Neutral Citation Number: [2017] EWCA Civ 366

Case No: B3/2015/0518

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LIVERPOOL
His Honour Judge Parker
A19YJ567

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2017

Before :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE LLOYD JONES
and
SIR ROSS CRANSTON

- -

Between :

Bianca Cameron	**Claimant/ Appellant**
- and -	
Naveed Hussain	**First Defendant**
Liverpool Victoria Insurance Co Ltd	**Second Defendant/ Respondent**

- -
- -

Benjamin Williams Esq, QC (instructed by **Armstrong Solicitors Limited**) for the **Appellant**
Stephen Worthington Esq, QC (instructed by **Keoghs LLP**) for the **Respondent**

Hearing dates : 8 December 2016
Further submissions received on 12 December 2016

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Approved Judgment

Lady Justice Gloster:

Introduction

1. The issues in this case may be summarised as follows:

   i) whether it is possible to obtain a judgment in respect of a claim for damages against a defendant identified only by description ("an unnamed defendant"), in the context of a motor claim against an unidentified hit-and-run driver, where the vehicle was identified and an insurance policy had been effected in respect of such vehicle in the name of either a non-existent person or someone who was not traceable;

   ii) whether an insurer would be liable to satisfy any unsatisfied judgment against such an unnamed defendant under section 151 of the Road Traffic Act 1988 ("the 1988 Act");

   iii) whether the judges below were right to refuse to allow the claimant permission to amend her claim form and particulars of claim so as to substitute, for the named first defendant, a defendant identified only by the following description:

   > 'The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on 26th May 2013.'

Factual and procedural background

2. On 26 May 2013 there was a collision between the claimant in the action, Miss Bianca Cameron ("the appellant"), driving her Ford Fiesta, registration number KG03 ZJZ, and another motorist, driving a Nissan Micra, registration number Y598 SPS, on Torres Road in Leeds. That driver went on to hit another vehicle, but did not stop. However, the vehicle registration number of the Nissan was taken down by a passing taxi driver. As a result of the accident, the appellant suffered modest personal injuries as did the passengers in her car. In addition, her own car was written off and she incurred charges for the hire of a replacement car. The total value of the appellant's claim (which excludes any claim by her passengers) is estimated at between £10,000 and £15,000.

3. The Nissan was ascertained by the police to be registered to a Mr Naveed Hussain as registered keeper, who is currently the first defendant in the action ("the first defendant"). The first defendant did not co-operate with police enquiries into the accident, and on 19 November 2013 he was convicted of the offence of failing to give information about the identity of a driver by the Calderdale Justices.

4. The Nissan was also discovered to be the subject of a policy of motor insurance ("the policy") written by Liverpool Victoria Insurance Co Limited, the second defendant and respondent to the appeal ("the respondent"). The respondent filed evidence in the lower court stating that its insured was a Mr Nissar Bahadur of Hinkley, Leicestershire – a person whom it now believes to be fictitious, such that the policy

was obtained by fraud. The first defendant (i.e. the registered keeper) was not himself insured to drive the Nissan.

5. In January 2014 the appellant issued proceedings claiming damages against the first defendant, because at that time she believed him to be the other driver involved in the collision. In March 2014, the appellant amended the proceedings to add the respondent as second defendant and to seek a declaration against it pursuant to section 151 of the Act to the effect that it was obliged to satisfy any unsatisfied judgment against the first defendant.

6. In May 2014 the respondent filed a defence denying its liability to satisfy any judgment against the first defendant. This was on the grounds: (a) that the first defendant was not covered to drive the Nissan under the terms of the policy; and (b) that the claimant was unable to prove the identity of the driver at the time of the accident.

7. On 4 June 2014 the respondent issued an application for summary judgment on the basis of the arguments in its defence.

8. On 19 June 2014 the appellant made a cross-application for permission to amend her claim form and the particulars of claim so as to substitute, for the first defendant, a defendant identified only by the description set out in paragraph 1(iii) above.

9. On 16 July 2014 District Judge Wright dismissed the appellant's application to substitute the name of the first defendant for the description set out above and granted summary judgment against the appellant on the respondent's application.

10. On 13 January 2015 HHJ Parker ("the judge") dismissed an appeal by the appellant against that decision. By the time of that hearing it was common ground that the first defendant was not the driver of the vehicle on the relevant date.

11. On 22 October 2015 Tomlinson LJ granted permission to appeal to this court against the judge's decision.

The judgment appealed against

12. The judge set out the parties' submissions and the authorities at [5]-[22]. His reasoning was contained in [23]-[24]. He concluded that it would be unjust to the respondent to allow the appellant to obtain a judgment enforceable against it, when it could not hope itself to trace any unknown defendant so as to attempt recoupment. He also held that there was no injustice to the claimant, because she could still submit a claim to the Motor Insurers' Bureau ['MIB'].

13. The judge took the view that:

> "23. Applying *Bloomsbury Publishing Group v News Group Newspapers* [[2003] EWHC 1206 (Ch), [2003] 1 WLR 1633] and Civil Procedure Rules 7APD4.1(3) and CPR16 PD 2.6(a), in a claim for damages arising out of a road traffic accident, the claimant should provide the full name of the defendant. If the defendant is not known the claimant is unable to provide the full name of the defendant because the defendant is untraced,

> then in my judgment the claimant should not bring a claim for damages but rather should seek compensation through the MIB Untraced Drivers' Agreement. In my judgment, in a case of this nature it is neither necessary nor consistent with the overriding objective of enabling the court to deal with cases justly and at proportionate cost for the court to permit claims against defendants identified by description rather than name nor for that matter to permit an amendment to provide for identification of the defendant by description, simply to enable a claimant to obtain a judgment which an insurer is then required to satisfy under the Road Traffic Act 1988. The claimant has a perfectly good remedy under the Untraced Drivers' Agreement and any solicitor or other representative instructed by the claimant is able to recover costs which are prescribed by the scheme.
>
> 24. In my judgment, to allow claimants to pursue claims against defendants identified only by description and not by name merely serves to increase litigation and costs thereof and is likely to prejudice insurance companies unfairly by imposing all of the burdens of Section 151 of the Road Traffic Act 1988 whilst depriving them of an ability to pursue indemnity against the tortfeasor. To dismiss this appeal will in my judgment create no injustice for the claimant who can continue with a claim to the MIB Untraced Drivers' Scheme. To allow the appeal would work considerable potential injustice for the [respondent] who will be left with all the burden of Section 151 of the Road Traffic Act 1988 and a prospect of indemnity from the tortfeasor that is no more than fanciful."

14. The judge, therefore, refused to allow the appellant permission to amend the claim form so as to substitute, for the first defendant, a defendant identified only by the description set out in paragraph 1(iii) above.

Grounds of appeal

15. The appellant relied upon three stated grounds of appeal:

    i) Ground 1: English civil procedure permitted proceedings to be issued and orders (including judgments) to be made against unnamed parties where it is necessary and efficacious to obtain justice.

    ii) Ground 2: It was both necessary and efficacious to allow the appellant to proceed against an unnamed defendant in the particular circumstances of this case.

    iii) Ground 3: Permitting the appellant to proceed was consistent with the policy of section 151 of the 1988 Act.

The relevant statutory provisions

16. Section 151 forms part of Part VI of the 1988 Act, which legislates for, and is headed, 'Third Party Liabilities'. The basic structure of Part VI is as follows:

    i) Section 143 requires motorists to be insured against third party liabilities; so far as material it provides:

    > "**143 Users of motor vehicles to be insured or secured against third-party risks.**
    >
    > (1) Subject to the provisions of this Part of this Act—
    >
    > (a) a person must not 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 a security in respect of third party risks as complies with the requirements of this Part of this Act, and
    >
    > (b) **a person must not cause or permit any other person 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 other person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act.**[1]
    >
    > (2) If a person acts in contravention of subsection (1) above he is guilty of an offence.
    >
    > …"

    ii) Section 145 specifies the risks which the compulsory insurance must cover; so far as material it provides:

    > "**145 Requirements in respect of policies of insurance.**
    >
    > (1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.
    >
    > (2) The policy must be issued by an authorised insurer.
    >
    > (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,**
    >
    > **……**

[1] Bolding of text in this judgment (other than headings) is my emphasis.

(c) must also insure him or them in respect of any liability which may be incurred by him or them under the provisions of this Part of this Act relating to payment for emergency treatment.

(4) The policy shall not, by virtue of subsection (3)(a) above, be required—

…….

(c) to cover liability in respect of damage to the vehicle, or

(d) to cover liability in respect of damage to goods carried for hire or reward in or on the vehicle or in or on any trailer (whether or not coupled) drawn by the vehicle, or

(e) to cover any liability of a person in respect of damage to property in his custody or under his control, or

(f) to cover any contractual liability."

iii) Section 147 provides for the delivery and surrender of certificates of motor insurance.

iv) Section 148 voids (for the purpose of meeting third party liabilities, although not as against insureds) certain policy exceptions; thus section 148(1)-(2) nullifies certain policy restrictions relating to the features or circumstances of the driver, the vehicle or the loss event; section 148(5)-(6) nullifies any defence to liability arising because of contractual default subsequent to the loss event; so far as material section 148 provides as follows:

"**148 Avoidance of certain exceptions to policies or securities.**

(1) Where a certificate of insurance or certificate of security has been delivered under section 147 of this Act to the person by whom a policy has been effected or to whom a security has been given, so much of the policy or security as purports to restrict—

(a) the insurance of the persons insured by the policy, or

(b) the operation of the security,

(as the case may be) by reference to any of the matters mentioned in subsection (2) below shall, as respects such liabilities as are required to be covered by a policy under section 145 of this Act, be of no effect.

(2) Those matters are—

(a) the age or physical or mental condition of persons driving the vehicle,

(b) the condition of the vehicle,

(c) the number of persons that the vehicle carries,

(d) the weight or physical characteristics of the goods that the vehicle carries,

(e) the time at which or the areas within which the vehicle is used,

(f) the horsepower or cylinder capacity or value of the vehicle,

(g) the carrying on the vehicle of any particular apparatus, or

(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Vehicle Excise and Registration Act 1994.

(3) Nothing in subsection (1) above requires an insurer or the giver of a security to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability.

(4) Any sum paid by an insurer or the giver of a security in or towards the discharge of any liability of any person which is covered by the policy or security by virtue only of subsection (1) above is recoverable by the insurer or giver of the security from that person.

(5) A condition in a policy or security issued or given for the purposes of this Part of this Act providing—

(a) that no liability shall arise under the policy or security, or

(b) that any liability so arising shall cease,

in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such liabilities as are required to be covered by a policy under section 145 of this Act.

(6) Nothing in subsection (5) above shall be taken to render void any provision in a policy or security requiring the person insured or secured to pay to the insurer or the giver of the security any sums which the latter may have become liable to

pay under the policy or security and which have been applied to the satisfaction of the claims of third parties.

(7) Notwithstanding anything in any enactment, a person issuing a policy of insurance under section 145 of this Act shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

v) Section 151 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; so far as material it provides:

"(1) This section applies where, after a certificate of insurance or certificate of security has been delivered under section 147 of this Act to the person by whom a policy has been effected …… a judgment to which this subsection applies is obtained.

(2) **Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either—**

(a) it is a liability covered by the terms of the policy or security to which the certificate relates, and the judgment is obtained against any person who is insured by the policy ……, or

(b) it is a liability …… which would be so covered if the policy insured all persons……, and the judgment is obtained against any person other than one who is insured by the policy……

(3) In deciding for the purposes of subsection (2) above whether a liability is or would be covered by the terms of a policy …… so much of the policy …… as purports to restrict …… the insurance of the persons insured by the policy …… by reference to the holding by the driver of the vehicle of a licence authorising him to drive it shall be treated as of no effect.

……

(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy …… he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment—

(a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability, together with any sum which, by virtue of any enactment relating to interest on judgments, is payable in respect of interest on that sum,

(b) as regards liability in respect of damage to property, any sum required to be paid under subsection (6) below, and

(c) any amount payable in respect of costs.

……

(7) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is insured by a policy…… , he is entitled to recover from that person—

(a) that amount, in a case where he became liable to pay it by virtue only of subsection (3) above, or

(b)in a case where that amount exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy or security in respect of that liability, the excess.

(8) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy …… he is entitled to recover the amount from that person or from any person who—

(a) is insured by the policy …… by the terms of which the liability would be covered if the policy insured all persons …… , and

(b) caused or permitted the use of the vehicle which gave rise to the liability."

vi) Section 152 contains the exceptions to section 151: so far as material it provides:

"(1) No sum is payable by an insurer under section 151 of this Act—

(a) in respect of any judgment unless, before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings, or between the parties

(b) in respect of any judgment so long as execution on the judgment is stayed pending an appeal, or

(c) in connection with any liability if, before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability, the policy or security was cancelled by mutual consent or by virtue of any provision contained in it.

(2) **Subject to subsection (3) below, no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration—**

(a) **that, apart from any provision contained in the policy or security, he is entitled to avoid the policy under** either of the relevant insurance enactments, or the security **on the ground that it was obtained—**

(i) **by the non-disclosure of a material fact, or**

(ii) by a representation of fact which was false in some material particular, or

(b) if he has avoided the policy under either of the relevant insurance enactments, or the security on that ground, that he was entitled so to do apart from any provision contained in the policy or security

and, for the purposes of this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions."

The relevant rules of the CPR

17. CPR r. 7A PD 4.1(3) provides so far as material:

"The claim form and every other statement of case, must be headed with the title of the proceedings. The title should state: ……

(3) the full name of each party"

18. CPR r. 16 PD 2.6(a) provides so far as material:

"The claim from must be headed with the title of the proceedings, including the full name of each party. The full name means, in each case where it is known:

(a) in the case of an individual, his full unabbreviated name and title by which he is known."

19. CPR r. 19 contains the relevant rule for adding or substituting parties. In so far as material it provides as follows:

> **"19.2— Changes of parties—general**
>
> 19.2 (1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).
>
> (2) The court may order a person to be added as a new party if—
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.
>
> (3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.
>
> (4) The court may order a new party to be substituted for an existing one if—
>
> (a) the existing party's interest or liability has passed to the new party; and
>
> (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings.
>
> **19.4—Procedure for adding and substituting parties**
>
> 19.4 (1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.
>
> (2) An application for permission under paragraph (1) may be made by—
>
> (a) an existing party; or
>
> (b) a person who wishes to become a party.
>
> (3) An application for an order under rule 19.2(4) (substitution of a new party where existing party's interest or liability has passed)—
>
> (a) may be made without notice; and

(b) must be supported by evidence.

(4) ……

(4A) ……

(5) An order for the removal, addition or substitution of a party must be served on—

(a) all parties to the proceedings; and

(b) any other person affected by the order.

(6) When the court makes an order for the removal, addition or substitution of a party, it may give consequential directions about—

(a) filing and serving the claim form on any new defendant;

(b) serving relevant documents on the new party; and

(c) the management of the proceedings."

20. The relevant practice direction is 19APD. It adds little but I set it out the material parts for the sake of completeness:

> **"Changes of parties**
>
> **General**
>
> **19APD.1**1.1Parties may be removed, added or substituted in existing proceedings either on the court's own initiative or on the application of either an existing party or a person who wishes to become a party.
>
> 1.2 The application may be dealt with without a hearing where all the existing parties and the proposed new party are in agreement.
>
> 1.3 The application to add or substitute a new party should be supported by evidence setting out the proposed new party's interest in or connection with the claim.
>
> 1.4 The application notice should be filed in accordance with rule 23.3 and, unless the application is made under rule 19.2(4)1, be served in accordance with rule 23.4.
>
> 1.5 An order giving permission to amend will, unless the court orders otherwise, be drawn up. It will be served by the court unless the parties wish to serve it or the court orders them to do so.

……

Addition or substitution of defendant

19APD.3

3.1 The Civil Procedure Rules apply to a new defendant who has been added or substituted as they apply to any other defendant (see in particular the provisions of Parts 9, 10, 11 and 15).

3.2 Where the court has made an order adding or substituting a defendant whether on its own initiative or on an application, the court may direct:

(1) the claimant to file with the court within 14 days (or as ordered) an amended claim form and particulars of claim for the court file,

(2) a copy of the order to be served on all parties to the proceedings and any other person affected by it,

(3) the amended claim form and particulars of claim, forms for admitting, defending and acknowledging the claim and copies of the statements of case and any other documents referred to in any statement of case to be served on the new defendant,

(4) unless the court orders otherwise, the amended claim form and particulars of claim to be served on any other defendants.

3.3 A new defendant does not become a party to the proceedings until the amended claim form has been served on him."

21. A number of provisions expressly contemplate proceedings and/or orders against unnamed parties. These include, for example: CPR r. 8.2A, where money is to be distributed; CPR r. 19.7, relating to representative actions; and CPR r. 55.3(4), relating to claims for possession against trespassers. However, it was common ground that none of these provisions were of any direct relevance to this case. This case concerns the general position, in respect of which there have been a limited number of previous cases.

Submissions of the parties

The appellant's submissions

22. Mr Benjamin Williams QC appeared on behalf of the appellant. His submissions in support of the appeal are summarised below. I have set out his arguments in relation to ground 3 before ground 2, as logically those in relation to ground 3 come first.

Ground 1: judgments can be made against unnamed parties

23. The appellant's case was that English civil procedure permitted proceedings to be issued and orders (including judgments) to be made against unnamed parties where it was necessary and efficacious to obtain justice.

24. Mr Williams relied upon *Bloomsbury Publishing Group v News Group Newspapers* [2003] EWHC 1206 (Ch), [2003] 1 WLR 1633 as establishing this as a general principle. Whilst he accepted that the cases involving unnamed defendants were usually concerned with injunctions, he pointed out that judgments for damages against unknown persons have been subsequently made without any apparent questioning of the court's power to do so and despite obvious difficulties of enforcement. In this context he relied upon inter alia: *Stone v WXY* [2012] EWHC 3184 (QB), [14], where a claim for both an injunction and damages against unknown press photographers was made; *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB), where an injunction and damages were granted against "Persons Unknown responsible for the operation and publication of the website [SFUK.com]"; and *Smith v Unknown Defendant Pseudonym 'Likeicare'* [2016] EWHC 1775 (QB) another summary determination of a claim for an injunction and damages in respect of defamation.

25. Accordingly, Mr Williams submitted, the possibility of judgments against unnamed defendants was not, confined to non-financial relief. That approach was also supported by Canadian cases, where it was well-established that damages claims could be issued against unnamed defendants.

Ground 3: the policy behind section 151

26. Mr Williams submitted that the intention of Parliament inherent in section 151 and the associated provisions was that, where an insurance policy covers a vehicle, the insurer should compensate persons injured by the use of that vehicle

Ground 2: necessary and efficacious to justice to permit the claim by the appellant

27. Mr Williams submitted that in the present case it would be necessary and do justice to enable the appellant to obtain judgment against an unnamed party. In summary his submissions were as follows:

    i) It was necessary because the driver had deliberately and unlawfully concealed his identity from the appellant by failing to stop after an accident or to report it to the police. There was no reason why judgment should not be entered against that driver, who, as the respondent accepted, could have no defence to liability.

    ii) It was efficacious because it would thereby provide the appellant with a remedy under section 151 against the respondent (who did not deny that in the event the judgment was obtained, it would be liable to satisfy it). It would be unjust for an injured victim to be denied a remedy under section 151 because he or she could not identify the driver by name, but only by description.

    iii) To afford the appellant a remedy under section 151 would fulfil the policy of the legislation. It would not be unjust to insurers, who were familiar with the

relevant scheme and who would be liable in analogous situations (see paragraph 25 iv) above).

iv) Such result would avoid arbitrary outcomes. It would be perverse if the appellant could rely on section 151 if the driver's name was known (or alternatively an alias was known, so as to facilitate alternative service), even if the driver thereafter disappeared.

28. In answer to the respondent's contention that victims in the current scenario could instead rely on the MIB Untraced Drivers' Agreement ("the UTDA"), which both parties accepted applied to this case, and was available to the appellant, Mr Williams submitted:

i) The UTDA was irrelevant to the rules of civil procedure and the construction of section 151.

ii) The appellant's submissions would not render the UTDA redundant. It would remain important in cases where there was no policy of insurance or the vehicle driven by the tortfeasor could not be identified, such that the correct insurer (if any) could not be identified.

iii) The UTDA was a more limited remedy than section 151, for example:

a) only limited legal costs were recoverable;

b) the collision had to be reported to the police within 14 days of occurrence (if the claim was for personal injury) or 5 days (if it was for property damage);

c) the MIB would not meet subrogated (or similar) claims; and

d) the MIB itself carried out the investigation of the claim, and (subject to arbitral review) decided the amount of compensation.

The respondent's submissions

29. Mr Stephen Worthington QC appeared on behalf of the respondent. His submissions may be summarised as follows.

Ground 1: judgments can be made against unnamed parties

30. Mr Worthington submitted that there should be a narrower formulation of the principle than that proposed on the appellant's behalf: the principle as formulated by Mr Worthington was that proceedings could only be issued against unnamed parties in exceptional circumstances, where an injunction was sought and where there was no other remedy available. He submitted that:

i) The word "should" in CPR 7PD 4.1 indicated that the normal rule was that a defendant must be named. Something exceptional was required to displace this.

ii) The fact that this was the primary position was exemplified by the fact that there were specific rules which made special provision for circumstances in which defendants did not require to be named, for example:

a) CPR 8.2A which applied where money was to be distributed;

b) CPR 19.7 where all the parties to a representative action did not have to be individually named; and

c) CPR 55.3 (4), probably the most well-known example, where the CPR specifically provided that a claim for possession against trespassers might name them as "persons unknown".

iii) *Bloomsbury Publishing Group* had emphasised that the applicants there would otherwise have no remedy.

iv) All the domestic cases where orders had been made against unnamed parties involved the making of an injunction. That was important: an injunction was prospective and could be targeted at a group of people. If a person breached the injunction, they could be identified and brought before the court for contempt. It was, therefore, only when the infringer becomes identified that the injunction became effective.

v) As to the award of damages: *Brett Wilson* was wrongly decided. The court should not have determined an obligation to pay money for a past event in circumstances where it was not known who was the paying party and against whom the money judgment was be valid. That said, *Brett Wilson* was a truly exceptional case in that the court was satisfied that the defendants, although unidentifiable, had knowledge of the proceedings. In that situation, the defendant could not be allowed to evade the court process.

31. Mr Worthington suggested three reasons why the present case failed to satisfy that test:

i) there was no claim for injunctive relief;

ii) the appellant would not be without a remedy; and

iii) the respondent might be prejudiced by a judgment against an unnamed defendant.

Ground 3: the policy behind section 151

32. Mr Worthington argued that it was an important safeguard on the scope of liability under section 151 that there should be a requirement that the driver be identified by name. In effect, section 151 was intended to be confined to situations where the driver could be named. By contrast, cases involving unnamed drivers were (now) covered by the UTDA.

33. Part of the reason was that insurers would face a number of problems in relation to section 151 claims if the driver could be sued by description alone, since the insurer

would then have no way of knowing who they were and would have no opportunity to question them:

i) An insurer would have no realistic way to obtain the driver's version of events, which is relevant to the decision whether to defend the claim.

ii) It gave rise to serious concerns regarding fraud: the insurer would have no way to establish the reality of the accident.

iii) The insurer's right of recourse under section 151(8) was dependent, in practice, on a driver being identified by name. The right of recourse was particularly important in small claims, because the mere fact that a person was uninsured did not mean they could not afford to reimburse the insurer.

34. More generally, under the English regime it was the person driving who had to be insured. That contrasted with many European countries under which the vehicle itself had to be insured (cf. *Sahin v Havard and Anor* [2016] EWCA Civ 1202 at [25]). It was therefore appropriate to place an emphasis on the identity of the driver.

Ground 2: necessary and efficacious to justice to permit the claim by the appellant

35. Mr Worthington submitted that the UTDA was a perfectly adequate alternative remedy available to the appellant:

i) Section 151 and the UTDA were a unified scheme to provide compensation to victims of road traffic accidents and had to be looked at in conjunction. The provisions of section 145 of the 1988 Act (from which section 151 sprang) could not be construed in isolation from the MIB arrangements. The UTDA was part of the relevant legal framework and could not be ignored: see *Sahin* at [24].

ii) It was common ground that the appellant could have brought (and could still attempt to) bring a claim under that scheme, because the driver of the vehicle was unidentified.

iii) To permit the appellant to circumvent the UTDA by bringing a claim under section 151 would disturb the dovetailing of section 151 with the UTDA.

iv) The principal reason why the UTDA was said to be inadequate was that it imposed a cap on recoverable costs. That should not render the scheme unjust, and in any event there were good reason for it, namely that, since the MIB investigated the claim, costs were reduced.

v) There was no basis on which to criticise the fact that the MIB carried out its own investigations, which were in any event subject to review by an independent arbitrator.

vi) In *Carswell v Secretary of State for Transport* [2010] EWHC 3230 (QB), Hickinbottom J rejected these criticisms (and a "*Francovich*" claim premised on the inadequacy of the UTDA).

vii) Even if there were some differences between the remedy under section 151 and the UTDA, that was no basis for undermining the general rule in relation to the identification of parties to litigation: see *Sahin* at [27]. That case demonstrated that the differences between the terms of the 1988 Act and the UTDA were permitted by the relevant Consolidated European Motor Insurance Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 (relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability). Such differences as there were did not influence the true construction of the 1988 Act.

36. Further, Mr Worthington submitted that it would do injustice to the respondent if the appellant were permitted to pursue a remedy under section 151:

i) On the present state of civil procedure, a claimant could not obtain judgment for damages against an unnamed defendant; to do so would be a novel expansion of the *Bloomsbury Publishing Group* line of cases. But section 151 is an obligation imposed by statute which an insurer would not willingly accept. It should therefore not be widened.

ii) As set out above insurers would face a number of practical problems in relation to claims against unnamed defendants.

37. Finally, Mr Worthington presented a "floodgates" argument: if the appellant were correct that one could bring a claim against an unnamed defendant whenever it was just to do so, the implications would extend far beyond section 151. There would be no reason why the appellant's logic should not apply whenever there was an insurer behind an unknown wrongdoer.

Discussion and determination

Relevant factual matters

38. It is appropriate to identify certain agreed or assumed facts relevant to this case.

i) There was no dispute that, if the appellant's action were allowed to proceed against an unnamed driver defendant, described as proposed, then:

a) the appellant, as claimant, would be entitled to a judgment against the unnamed defendant on the grounds of his negligence; and

b) the respondent would be liable, by virtue of the provisions of section 151(5) of the 1988 Act and the policy, to satisfy that judgment.

ii) In other words there was no dispute that, if the appellant obtained a judgment for damages against the unnamed defendant by the relevant description, such a judgment would relate to a liability with respect to a matter that was required to be covered by a policy of insurance under section 145 and that such a liability would have been covered by the terms of the policy if the policy had indeed insured "all persons"; see section 151 (2) (b).

iii) There was no dispute between the parties that, although the respondent, as insurer, would have been entitled under section 152(2(a) to have avoided the policy on the grounds of the fraudulent misrepresentation as to the existence of the purported insured, and to have obtained a relevant declaration to that effect, the respondent had not done so within the relevant time limit and was, accordingly, bound by the terms of the policy.

iv) It was accepted or assumed on both sides that the registered keeper, i.e. the first defendant, had not been the driver of the vehicle on the occasion in question.

v) It was not suggested that the appellant, as claimant, should have sued the first defendant as owner of the vehicle on the grounds that he was in breach of his statutory duty under section 143 of the 1988 Act in permitting the driver to drive the vehicle whilst uninsured; see *Monk v Warby* [1935] 1KB 75. Whilst it is arguable that the pursuit of such an action might have resulted in the first defendant identifying the actual driver (on pain of punishment for contempt), it is clear that the respondent would not have been liable under section 151 to have satisfied any such judgment against the first defendant; see *Sahin v Havard* [2016] EWCA Civ 1202.

vi) This court was not shown the policy and no argument was directed in relation to its terms.

vii) Apparently, as a matter of practice insurers almost never bring proceedings in small value cases pursuant to section 152(2) for a declaration they are entitled to avoid a policy on the ground that it was obtained by non-disclosure or false representation of a material fact. They do do so on occasions in high value cases.

The relevant issue - application of the rules, not statutory construction

39. I emphasise that it was not suggested by Mr Worthington, or by Mr Williams, that the resolution of the issue in this case depended on the construction of section 151 or any other provision of the 1988 Act. It was accepted by Mr Worthington that, if indeed a judgment were obtained against the unnamed defendant under the intended description, such a judgment would fall within the definition in section 151(2) of a judgment "obtained against any person other than one who is insured by the policy" and would be a judgment to which subsection (1) of section 151 applied and which, accordingly, the respondent would be liable to satisfy. Rather, the thrust of Mr Worthington's argument, as summarised above, was that the court could not, as a matter of principle, and/or should not, as a matter of discretion, exercise its power under the relevant procedural rules to permit the proposed amendment to the claim form to substitute the unnamed defendant identified by the proposed description. For that reason it is not relevant to consider the Consolidated European Motor Insurance Directive 2009/103/EC or the impact, if any, which it has on the construction of the 1988 Act.

My conclusion

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. My reasons are set out below.

Statutory policy of Part VI of the 1988 Act

41. I start my analysis from the basic proposition that the policy of the regime imposed by Part VI of the 1988 Act makes clear that, where a policy of insurance is in place in respect of a vehicle, the insurer must, where it has received statutory notice (under section 152 of the 1988 Act) of the issue of third party proceedings, generally meet liabilities to a third party victim irrespective of whether the policy covers the driver/tortfeasor, and irrespective of the identity of the tortfeasor. That is so unless the insurer can show that it was either off-cover (because the policy has been cancelled) or that it should never have been on-cover (because the policy was procured by non-disclosure or misrepresentation) and, in both the latter cases, that it has also taken rapid and formal steps to demonstrate those matters.

42. That policy is wholly consistent with common sense. If an insurer agrees to effect an insurance policy in respect of a specific vehicle and receives a premium in respect of accepting that risk, then *prima facie,* at least, and subject to any right to avoid the policy, the insurer, having received the economic benefit, should bear the economic risk as to the following matters: the existence or non-existence of the insured or named drivers; the fact that such persons may allow uninsured persons to drive the vehicle; and the fact that, because the vehicle is on the road, it may be driven unlawfully by persons without the consent of the insured. After all, the insurer, and only the insurer, is in a position to evaluate that risk; it, and it alone, makes the business decision as to whether to accept the risk, and to allow the particular vehicle to be driven with the benefit of an insurance policy in the name, or purportedly in the name, of a particular insured. The insurer enters the market knowing of the risk that, under the provisions of section 151, it may well be held liable to satisfy judgments against third-party tortfeasors, who have driven the insured vehicle negligently, notwithstanding that the latter may not be insured under the terms of the policy.

43. As Mr Williams submitted, the policy of imposing third party liabilities on the insurer of a vehicle irrespective of its obligations to its insured has stood since the Road Traffic Act 1934. The mischief to which that legislation was directed was stated by Goddard LJ in *Zurich Insurance Co Ltd v Morrison* [1942] 2 KB 53 (CA), 61:

> "Part II of the Road Traffic Act 1934 was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established…. That… would naturally have led the public… to believe that if thereafter they were, through no fault of their own, injured or killed by a motor car they or their dependants

> would be certain of recovering damages, even though the wrong-doer was an impecunious person. How wrong they were quickly appeared. Insurance was left in the hands of companies and underwriters who had imposed what terms and conditions they chose. Nor was there any standard form of policy, and any company… could hedge round the policies with so many warranties and conditions that no one advising an injured person could say with certainty whether… there was a prospect of recovering against the insurers … It is not surprising therefore… that… Parliament interfered, and… they took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford. Generally speaking, [the legislation] was designed to prevent conditions in policies from defeating the rights of third parties, but insurers were still allowed to repudiate policies obtained by misrepresentation or non-disclosure of material facts."

Likewise, in In *Hardy v MIB* [1964] 2 QB 745 (CA), 769-770, Diplock LJ stated (in relation to the equivalent provisions of the Road Traffic Act 1960):

> "The whole purpose of this Part of the Act is for the protection of the persons who sustain injury caused by the wrongful acts of other persons who use vehicles on a road, and it was no part of the policy of the Act that the assured's rights to enforce his own contract against the insurers should constitute the sole measure of the third parties' rights against the insurers… ."

44. Thus the effect of the statutory regime is clear. Like its predecessors, the 1988 Act gives insurers rights of recourse against the insured or other culpable third party where they must pay out without contractual obligation to do so. For example, section 151(8) provides that an insurer may recover its outlay from an uninsured user of the vehicle, or from the insured if he permitted the user. Nevertheless, in accordance with the policy explained by Goddard LJ in the *Zurich* case, whether this right of recourse proves to be useful is a risk which falls on the insurer. In many cases, the right will be nugatory, because the actual tortfeasor will be a man of straw (e.g. cases where the driver was a thief). In particular, insurers may well routinely have to meet judgments obtained against defendant drivers who, although their identity is known at the date the proceedings were instituted by the victim, can no longer be traced by the time judgment is obtained. An example given by Mr Williams was the case of a visiting foreign worker who, although originally identified, some time after the relevant accident returned home to a foreign country and could no longer be found. In such circumstances, no defence is afforded to the insurer; Indeed, if proceedings are yet to be issued, the usual procedure is that the claimant obtains an order for alternative service on such a defendant by serving the insurer itself; see for example the practice suggested in *Murfin v Ashbridge* [1941] 1 All ER 231 (CA), 235 and in *Gurtner v Circuit* [1968] 2 QB 587 at 596G 597D in relation to substituted service on an insurer in relation to a named and identified, but untraceable, defendant. It was common ground between Mr Williams and Mr Worthington that this was the normal practice in relation to an order for service by alternative means:

Blackstone's Civil Practice 2017, §15.19; *Zuckerman on Civil Procedure* (3rd ed), §5.122.

45. Accordingly, as Mr Williams submitted, insurers will commonly have to meet judgments under section 151 where they have no hope of enforcing against the culpable party, or even of finding the culpable party. Insurers will defend and control the defence of such proceedings whether the culpable party has been served with them, or knows anything about them. Indeed the insurers may well have been served with the proceedings in lieu of the culpable party.

46. In such circumstances I am not impressed by Mr Worthington's arguments that to permit a judgment to be entered against an unknown defendant driver in circumstances such as the present, where the vehicle, the insurer and the purported name of the insured can all be identified, will open the floodgates to a raft of fraudulent claims against insurers. It is for insurers to stipulate the conditions which they require to be satisfied by a proposed insured to establish identity before insurers issue a policy. If they do not, as a matter of practice, whether because of administrative difficulties or otherwise, seek declarations that they are entitled to avoid policies in the event of fraudulent non-disclosure or misrepresentation, that is a matter of their own commercial choice. Moreover, Mr Worthington was not able to articulate, other than in the most vague and general terms, the type of problems which he said might arise.

47. Thus, it appears to me to be entirely consistent with the policy of the 1988 Act that an identified insurer's liability under section 151 in relation to a policy of insurance, written in respect of a specific vehicle and a specific named insured, should not depend on whether, as at the date of issue of the proceedings, or thereafter, the claimant can identify the tortfeasor driver by name.

The exercise of the court's powers under the relevant rules of the CPR

48. It was correctly assumed by both parties that, only if judgment for damages could indeed be obtained against an unnamed defendant satisfying the relevant description, could it be a proper exercise of the court' s powers or discretion to permit an amendment of the claim form and particulars of claim to substitute the unnamed defendant. The argument therefore appropriately focused on the issue as to whether a judgment for damages could be obtained against an unidentified party. However, Mr Worthington also argued that the existence of the appellant's alternative remedy under the UTDA meant that the case could not be regarded as an exceptional one justifying the exercise of the court's discretionary power to permit proceedings to continue against an unnamed defendant.

49. I reject Mr Worthington's submission that, whether as a matter of the construction of the relevant rules or as to the circumstances in which any power conferred thereunder should be exercised, a party is unable to bring proceedings against an unnamed party, identified by a specific description, for damages, or is unable to do so in the absence of a claim for an injunction to restrain such a defendant's conduct in the future. In my judgment, in appropriate circumstances such as the present, a claimant can do so.

50. In my judgment, the analysis of Sir Andrew Morritt V-C in *Bloomsbury Publishing Group v News Group Newspapers* [2003] 1 WLR 1633 is compelling and I

respectfully adopt it. In that case, an injunction was granted against unknown persons who had obtained a copy of an unpublished *Harry Potter* novel. Sir Andrew Morritt V-C found that the cases decided prior to the introduction of the CPR were no longer applicable. He held that under the CPR, there was no procedural bar to issuing proceedings, and obtaining orders, against persons unknown. There was no attempt to prescribe the circumstances in which parties would be permitted to do so. At [18]-[22] he stated:

"18. Thus there are two questions:

a) am I entitled to make the order sought? and if so

b) should I do so?

The answer to the first question depends on whether and if so to what extent I am bound by the ratio decidendi of either *Friern* or *Wykeham Terrace.* I will consider them in turn.

19. *Friern* was decided on two grounds, first that the prescribed form of writ required the defendant to be named, second that the description used was too vague. Both points were decided against the background of the regime prescribed by the Rules of the Supreme Court. **The regime introduced by the Civil Procedure Rules is quite different. There is no requirement that a defendant must be named, merely a direction that he "should" be. The failure to give the name of the defendant cannot now invalidate the proceedings both because they are started by the issue of the claim form at the request of the claimant and because, unless the court thinks otherwise, Rule 3.10 so provides. The over-riding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance. The proper application of Rule 3.10 is incompatible with a conclusion that the joinder of a defendant by description rather than by name is for that reason alone impermissible.** For these reasons I conclude that the decision of the Court of Appeal in *Friern* is not applicable to proceedings brought under the Civil Procedure Rules.

20. The decision of Stamp J in *Wykeham Terrace* is not binding on me in any event, though I would follow it unless it was distinguishable or I was satisfied that it was wrongly decided. I consider that it is distinguishable as being, like *Friern*, inapplicable to cases under the Civil Procedure Rules. But it is also distinguishable on other grounds. First the objection in that case was that there was no defendant. In this case there is; the question is whether he or she has been properly described. Second, the objection in that case that the order sought would not bind any one to do or abstain from doing anything. That is not so in this case. A person falling within the description of the defendant could be liable for contempt of court if he acted inconsistently with it. Any other person who knowing of the

> order assists in its breach or nullifies the purpose of a trial may also be liable for contempt. *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 AER 1175 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191.
>
> 21. These conclusions are consistent with the decisions of the Court of Appeal in *Biguzzi v Rank Leisure* [1999] 1 WLR 1926 and *Stewart v Engel* [2000] 1 WLR 2268. Accordingly I conclude that the claimants are entitled to join as defendants and I am entitled, if I see fit, to make the order sought against persons described as quoted in paragraph 4. Mr Carr, as advocate to the court, for whose assistance I am most grateful, suggested that there might be a distinction to be drawn between cases such as *Jackson* and *Levy,* in which the description clearly referred to an identified person, *Golden Eagle* in which the defendants were identified in part by service of the statement of claim and *Tony Blain* in which the defendant was also identified in part by service of the order and this case where the description may cover no one or, by contrast, more than one person. I accept that those distinctions may be drawn but I do not consider that they should lead to a different result. The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me to matter that the description may apply to no one or to more than one person nor that there is no further element of subsequent identification whether by service or otherwise.
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> 22. I can see no injustice to anyone if I make an order in the form sought but considerable potential for injustice to the claimants if I do not. For these reasons I will make the order."

51. *In Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB), Warby J granted an injunction and damages against "Persons Unknown responsible for the operation and publication of the website [SFUK.com]". That was in the context of a claim for defamation, under the summary disposal provisions in section 9 of the Defamation Act 1996. The court was also satisfied that the defendants, though unidentifiable, had knowledge of the proceedings: see [6]-[9], [16], [31] and [35]. No specific reference was made to the (apparent) novelty of the award of damages, in addition to an injunction.

52. *Smith v Unknown Defendant Pseudonym 'Likeicare'* [2016] EWHC 1775 (QB) was another summary determination of a claim for an injunction and damages in respect of defamation. Again there was no discrete consideration of the jurisdiction to award damages against unnamed defendants: see [11] and [18]-[22].

53. I agree with Sir Andrew Morritt V-C that there is no reason in principle why, in appropriate cases, it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description. The fact that the CPR may make express provision for situations in which this can take place does not preclude orders being made against unnamed defendants

in other circumstances. Likewise, I see no reason in principle, or as a matter of construction of the rules, why the ability to do so should be limited to a claim for an injunction or in relation to future relief. Although there was no express discussion of the issue as to whether it was appropriate to bring a claim for damages against an unnamed person in the defamation cases, the logic of Sir Andrew Morritt's analysis, in my judgment, equally applies to a claim for damages. The Canadian authorities demonstrate that it is well-established that damages claims may be issued against unnamed defendants. For example, in *Manson v John Doe* [2013] ONSC 628 damages of $200,000 were awarded against an anonymous person waging a campaign of defamation via websites. In such a case there is every reason for such an order to be made.

54. As Sir Andrew Morritt V-C pointed out, the question is not simply whether a claimant *can* issue proceedings against a person unknown, notwithstanding the direction in the rules that a defendant "should" be named, or whether the court *can* permit a party to amend the claim form to substitute an unnamed defendant for a named defendant. The question also arises whether, in any particular case, the court *should* in the exercise of its discretion permit a claimant to amend in order to substitute an unnamed defendant, or permit such an action to proceed, so as to lead to a judgment against him. Once it is accepted that proceedings can be brought against unnamed defendants, then whether in any particular case that should occur, or whether relief should be granted against such defendants, must, it seems to me, depend on whether the overriding objective (that is to say of deciding cases justly and at proportionate cost – see CPR r1.1) would be furthered by such a course.

55. In that context also, I do not accept Mr Worthington's submission that it is only in "exceptional" circumstances that a claimant would be permitted to join an unnamed defendant, identified only by description, or that a judgment for damages would be granted against such a defendant. Nor do I accept his suggested constraint that, if a claimant has an alternative remedy (i.e. in the present case the appellant's remedy under the UTDA) that *necessarily* precludes any exercise of the court's relevant discretion in a claimant's favour - whether to permit a claimant to substitute an unnamed defendant or to award damages against such a defendant.

56. For these reasons I also reject Mr Worthington's submission that the judge's approach, as set out in paragraphs 23 and 24 of his judgment (as quoted above), was correct as a matter of law and that accordingly the exercise of the district judge's discretion should be upheld. I see no reason why the fact that the appellant has an alternative remedy for compensation under the UTDA against the Motor Insurers Bureau should be regarded as a legitimate reason for preventing her from enforcing her undoubted *substantive* rights to:

    i) a judgment for damages for negligence against the unnamed driver of the Nissan; and

    ii) in the event that such a judgment is unsatisfied, payment by the respondent as insurer of the Nissan of the amounts payable under the judgment pursuant to the provisions of section 151.

Put another way, in circumstances where the appellant has an undoubted right conferred by statute to payment by the insurer of a vehicle in the event that she

obtains a judgment against its negligent driver, it cannot be just to deprive her of the remedy to give effect to that substantive right, simply by the court's refusal to exercise a procedural power on grounds of the existence of an alternative remedy against the MIB - a remedy which she is not obliged to pursue and the exercise of which is not a precondition to her entitlement under section 151.

57. I also reject Mr Worthington's submission and the judge's conclusion that it would cause no injustice so far as the appellant is concerned if she were restricted to her claim to compensation under the UTDA and prevented from enforcing her rights under section 151. Apart from the point, which I have already mentioned (namely, that it is unjust for her to be deprived of a remedy to enforce her substantive right under section 151), it is clear that, for the reasons given by Mr Williams, including in particular the restriction on costs recovery, the inability to recover subrogated claims and the absence of a transparent court adjudication of her claims, a claimant in the position of the appellant might well regard a claim for compensation under the UTDA as an inferior remedy to a court action for damages and under section 151.

58. I likewise reject Mr Worthington's submission and the judge's conclusion that to permit an action to proceed against an unnamed defendant by reference to a specific description would cause injustice to the respondent as insurer, on the grounds that it will be unable to ascertain from the driver, or indeed its own purported insured, how the accident happened or whether there is any defence to the claim. For the reasons which I have already stated in paragraph 42 above, the respondent's inability to ascertain the facts from the driver of a vehicle is a problem which it may often face in section 151(2)(b) situations. So far as being unable to ascertain the relevant facts from its own insured is concerned, the respondent must bear the responsibility of not having carried out appropriate checks as to the identity, or existence, of the insured prior to inception of the policy.

Authorities relied upon by the respondent

59. There is nothing in the cases relied upon by Mr Worthington which requires this court, or persuades me, to conclude to the contrary. *Carswell v Secretary of State for Transport supra* was a case where Hickinbottom J had to consider whether, in the context of a "*Francovich*" damages claim against the Secretary of State for Transport, the claimant could establish that the establishment of the UTDA failed to comply with the UK's obligations on the implementation of the Second Motor Insurance Directive on the grounds that the scheme was inherently bad or that it necessarily offended the principle of equivalence. His comments in relation to a comparison between the scheme and the court action for damages were all made in that context.

60. Nor is the case of *Sahin supra* relied upon by Mr Worthington of any assistance. In that case this court (Longmore, Kitchin and Floyd LJJ) had to consider whether a liability in respect of a *Monk v Warbey* claim by a Mr Sahin against a Ms Havard, the hirer of the vehicle, who, in breach of the terms of the insurance and of section 143 of the 1988 Act, had permitted an uninsured, unidentified driver to drive the vehicle which caused the accident, was a liability within the ambit of section 151(2). The court held *inter alia* that, because such a liability was not required to be covered under section 145, it was not within the ambit of section 151(2), and accordingly the insurer was not liable. The fact that, in that context, the court considered that there was "no scope for construing section 145, in isolation from MIB arrangements" is irrelevant

for present purposes. For similar reasons, so is the statement upon which Mr Worthington sought to rely in paragraph 27, to the effect that the argument that the relevant liability was covered by section 145 was "quite unnecessary when the MIB Untraced Drivers Agreement covers the situation satisfactorily".

61. After the hearing of the appeal, Mr Worthington referred the court to a decision of this court (Stephenson and Roskill LJJ) in *Clarke v Vedel* [1979] RTR 26. In that case a motorcyclist, who was riding a motorcycle which had been stolen and had been insured with the Sun Alliance & London Insurer Group collided with two people and provided a false name and address. The plaintiffs used the false name as the defendant in proceedings and substituted service was initially ordered on the MIB with a view to the plaintiffs obtaining satisfaction of their judgment under the terms of the MIB Agreement 1972 (Uninsured Drivers). On application by the MIB, the order was set aside and the plaintiff unsuccessfully appealed against that ruling. This court decided that the false name meant that the driver was unidentified so that there could be no substituted service on the MIB and that accordingly the plaintiffs could only recover by means of a claim for compensation under the MIB Agreement 1972 (Untraced Drivers), which did not involve court proceedings. The issue was important as between the MIB and the Sun Alliance because, if the plaintiffs obtained a court judgment under the Uninsured Drivers Agreement, then, under the then current arrangements between MIB and insurers, the Sun Alliance, as the former insurer of the motorcycle, would have had to cover the liability. On the other hand, if the claim was only made under the Untraced Drivers Agreement, the MIB would have had to cover the liability. In addition, as Stephenson LJ appeared to accept at page 30, and as I consider to be the position in the present case, the plaintiffs were also potentially disadvantaged by having to bring a claim for compensation under the Untraced Drivers Agreement, as opposed to a court action for damages. But the court held that in the circumstances it was not appropriate to make any order for substituted service in relation to a fictitious, or partly fictitious defendant. Stephenson LJ said at 37 to 38:

> "For my part, I do find some difficulty in reconciling the general rule that substituted service should only be ordered where there is a probability that it will bring the document served to the notice of the defendant with, at any rate, some of the observations in *Gurtner v Circuit* [1968] 2 QB 587; and I conclude that this court recognises that there may be cases where a defendant, who cannot be traced and, therefore, is unlikely to be reached by any form of substituted service, can nevertheless be ordered to be served at the address of insurers or the Bureau in a road accident case. The existence of insurers and of the Bureau and of these various agreements does create a special position which enables a plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases. But I am not satisfied that that exception is as wide as the proposition laid down in the Supreme Court Practice 1976, and I am not satisfied that it applies to this case.
>
> The distinguishing feature of this case is that it makes a difference, not only to the plaintiff, but also to the Bureau

whether the rule is applied or whether the case is treated as exceptional. The Bureau is, as it seems to me, entitled to say: 'this is the case not only of an uninsured driver, but of an untraced driver. It is properly dealt with under the Untraced Drivers Agreement . We prefer it to be dealt with in that way. It is true that that may mean that we have to pay whereas if we allowed it to be dealt with under the other agreement the Sun would be responsible for paying any compensation or damages awarded to the plaintiffs, but we are entitled to have it our way. It has certain advantages to us and as we are not prepared to get rid of this problem of service by entering a conditional appearance but stand on our rights, it would be quite wrong to make an order which has no chance of bringing the existence of the writ to the notice of the rider of the motor cycle, the untraced driver, simply in order to enable the plaintiffs to get a judgment against him in an action which we would have to fight, with all the trouble and expense that that involves'.

As Mr Crowther has pointed out, the continued existence of the right of action depends upon substituted service being ordered and it is a circular argument to say that substituted service ought to be ordered to allow the plaintiff to continue to sue the untraced driver and the Motor Insurers' Bureau if the true view is that this is a matter which should be dealt with under the Untraced Drivers Agreement and not a matter in which on ordinary principles substituted service should be ordered.

Mr Deby has argued persuasively that the object of bringing a writ to the notice of a defendant is to enable him to defend himself, if he wishes to, clear his good name, support his record as a good driver, and do all he can to avoid being made liable to pay damages, and that is why it is important that he should know that proceedings are being brought against him in which he may be made liable for damages. He says that in this case neither of those matters has any real validity at all because this driver clearly will not wish to appear and defend his driving record, perhaps at the cost of revealing that he was a party to the stealing of this motor cycle or knew that it was stolen, nor will he be any better off by coming and defending the claim than he would be by remaining untraced and leaving the matter to be settled by the Bureau and it may be by the Sun Alliance. That is an argument which very cogently supports the application of the exception to the facts of this case, but, as I have already indicated, it seems to me that it is not only the plaintiffs who have to be considered but the Bureau. I say nothing about the position of the Sun, although Mr Crowther is altruistically appearing both on their behalf and on behalf of the Bureau, because the Sun are not a party to this action and I am not satisfied that their position, except insofar as it affects the position of the Bureau, is one which we can take into account

> in considering whether an order made between the plaintiffs and the Bureau is proper and correct.
>
> On the whole, I have come to the conclusion that this is an Untraced Drivers Agreement case and the Bureau is entitled to assert so. **This is a case in which, on the face of it, substituted service under the rule is not permissible and the affidavit supporting the application for it is insufficient**. **This fictitious, or, at any rate, partly fictitious defendant cannot be sued, so Mr Crowther is right in saying that he cannot be sued, and, therefore, the Bureau cannot be made liable in an action but only under the provisions of the Untraced Drivers Agreement.** No agreements similar to the Agreements of 1972 were in existence at the date when *Gurtner v Circuit* [1968] 2 QB 587 was decided; I do not think that Lord Denning MR or Diplock LJ or Salmon LJ or Goddard LJ had anything like the facts of this case in mind; and whatever the cases in which the exception to the general rule should be applied, in my judgment this is not one of them."

Roskill LJ agreed, adding further reasons at pages 39-40:

> "In the circumstances it seems to me that it would be wrong, with all respect to Mr Deby, to allow the order originally made by the master for substituted service to stand. This order cannot possibly bring these proceedings to the notice of Mr Vedel, or whoever was the driver. What the court was primarily concerned with in *Gurtner v Circuit* [1968] 2 QB 587 was whether or not the Motor Insurers' Bureau should, in a case in which they were, interested, be allowed to be joined as defendants. There were earlier decisions which said that they should not be so allowed. This court took a different view; but it was not primarily concerned with any question of substituted service. It was common ground that the order made in that case for substituted service on the Royal Insurance Co Ltd was wrongly made; all that this court was concerned to say was that, although that order was wrongly made, on the facts of that particular case no useful purpose would be served by setting aside that order and marking an alternative order for substituted service upon the Motor Insurers' Bureau. But the main point that was argued was not directed to substituted service at all. As I read Mr Gibson's argument, as it appears at p 592, it was never contended on behalf of the Motor Insurers' Bureau that it was not an appropriate case for substituted service on the Motor Insurers' Bureau; it was a case where the identity of the driver was ascertained but he was uninsured. I think that the passage relied upon in the judgment of Diplock LJ was clearly directed to the facts of that particular case and is not to be treated as of general application.

> In the present case if we allowed the order for substituted service to stand, and reversed the judge, the effect would be to oblige the Motor Insurers' Bureau to pay under the Uninsured Drivers Agreement rather than under the Untraced Drivers Agreement . In my view, on the facts of this case, that would be a misuse of the procedure of substituted service.
>
> For those reasons, in addition to those which have been given by Stephenson LJ, I would dismiss the appeal."

62. But the decision in *Clarke v Vedel* predated not only the CPR but was also decided before the introduction of the 1988 Act. The reasoning of the court is clearly premised on the inability to sue a fictitious or unidentified defendant and the consequent inability to make an order for substituted service. In those circumstances it does not appear to me that this court is bound by the decision or should regard its views as persuasive. As the judgment of Sir Andrew Morritt V-C in *Bloomsbury* makes clear, since the introduction of the CPR, an unnamed defendant, identified only by a relevant description, may be sued and appropriate directions can be given for alternative service of the claim form on him or her. Indeed, in the present case Mr Worthington did not suggest that an order for alternative service could not be made, if an order were made for the substitution of the unnamed defendant.

Disposition

63. For the above reasons, I consider that the approach adopted by both the district judge and the judge himself were flawed. I would allow the appeal and grant the appellant permission to amend her claim form and particulars of claim so as to substitute, for the named first defendant, a unnamed defendant identified by the description set out in paragraph 1(iii) above.

Lord Justice Lloyd Jones:

64. I agree with the judgment of Gloster LJ and would allow the appeal for the reasons she gives.

65. The facts of this case are rather unusual. The appellant is unable to identify by name the driver of the vehicle which collided with her car ("T") but the vehicle he was driving has been identified. It proved to be subject to a policy of insurance and, as a result, the insurer, the second respondent, has been identified and notified. The registered owner has refused to provide information as to the driver of the vehicle and has been convicted of an offence of failing to provide information. The insurer has established that the policy was taken out fraudulently in a fictitious name.

66. It is common ground between the parties to this appeal that T is liable for the collision, that if the claim is allowed to proceed in the manner proposed against an unnamed defendant the appellant will be entitled to a judgment against T and that the insurer would be liable to satisfy any unsatisfied judgment against T by virtue of section 151, Road Traffic Act 1988. However, the insurer maintains that the inability of the appellant to name T is a bar to bringing proceedings against T.

67. On behalf of the appellant Mr. Williams QC does not contend that as a general rule it should be possible to bring a claim for damages against an unidentified tortfeasor. He accepts that if there were no prospect of such proceedings being efficacious it would be contrary to the overriding objective to permit them to proceed. However, he submits that it is now well established that where it is both necessary and efficacious to do justice the court will issue proceedings and make orders against defendants who are identified by a description rather than by name. He submits that in the present circumstances the appellant should be allowed to bring proceedings against T, as an unknown person who should be described in the proceedings as "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on 26 May 2013", in order to permit the appellant to claim against the insurer under section 151. This, he submits, is necessary to do justice because T has unlawfully concealed his identity from the appellant by failing to stop after the accident. It is efficacious, he submits, because the insurer will then be liable to satisfy any unsatisfied judgment against T pursuant to section 151.

68. On behalf of the insurer, Mr. Worthington QC objects on the grounds that

(1) The power to commence an action against an unknown and unnamed person should only be exercised in exceptional circumstances and where there is no other remedy available to the claimant.

(2) The case law in this jurisdiction has not gone so far as to permit a claim for damages to be brought against an unnamed defendant.

(3) The power should not be exercised in this case because this is not an exceptional case and the appellant has an alternative remedy under the Untraced Drivers Agreement.

(4) To permit the appellant to commence proceedings against an unnamed defendant would be unfairly prejudicial to the insurer and would have potentially wide ranging consequences for other factual situations.

69. I gratefully adopt the account of the statutory provisions, the MIB arrangements and the relevant rules of the CPR set out in the judgment of Gloster LJ

70. The insurer does not deny that the court has a power to permit proceedings to be brought against parties who are not identified by name. Mr. Worthington submits that the general rule is that parties should be named and that proceedings against an unnamed defendant should be permitted only in exceptional circumstances where there is no alternative remedy. He submits that "should" in CPR r. 7A PD 4.1(3) should be read as "shall" save in exceptional circumstances.

71. The appellant submits that the fact that the insurer would be liable under section 151 to satisfy any unsatisfied judgment against T is a compelling reason why the court should permit the claim to be brought against T notwithstanding the fact that the appellant is unable to name him. Moreover, the inability to name him, she submits, is due to T's deliberate and unlawful conduct in absconding after the collision.

72. The question whether the appellant should be permitted to bring proceedings in this way must be determined having regard to the nature of the proceedings viewed in the context of the provisions of Part VI of the 1988 Act and the MIB schemes by which the United Kingdom discharges its obligations under Directive 2009/103/EC of 16 September 2009 ("the EU Directive").

73. The appellant is able to point to a line of authority in this jurisdiction in which proceedings have been brought against unknown persons in order to obtain injunctive relief. In particular, in *Bloomsbury Publishing Group v. News Group Newspapers* [2003] 1 WLR 1633 Sir Andrew Morritt V-C granted an injunction against unknown persons who had obtained a copy of an unpublished Harry Potter novel. He held that there was no general rule that joinder of a defendant by description rather than by name is for that reason alone impermissible. More recently, proceedings claiming an injunction and damages have been permitted to be issued against unnamed persons in *Brett Wilson LLP v. Persons Unknown* [2015] EWHC 2628 (QB) and *Smith v. Unknown Defendant Pseudonym "Likeicare"* [2016] EWHC 1775 (QB).

74. Mr. Worthington submits that the claim for damages in *Brett Wilson* and in *Smith* should be considered as purely incidental to the main claim for injunctive relief which is prospective. He further submits that in none of the reported cases in this jurisdiction has the court made an order permitting proceedings against an unnamed defendant in circumstances where the only relief sought was damages for a past wrong. He submits that the critical feature of *Brett Wilson* and *Smith* is that they involve injunctions and if the court had not permitted the claim to be commenced against persons unknown the claimant would have had no remedy. There is, he submits, a justification for such a course in injunction cases in that effective relief can be obtained – the objective is the prevention of future tortious wrongs - but that where there is simply a claim for damages for past wrongs no effective relief can be obtained against an unnamed defendant. Mr. Worthington was unable to explain, however, why such a claim for damages should be permitted when claimed in conjunction with injunctive relief but not otherwise.

75. To my mind any distinction in this regard between claims for an injunction and claims for damages turns on the efficacy of the proceedings. It will usually be pointless to bring a claim simply for damages against a defendant who cannot be named, because the resulting judgment would not be capable of being enforced. It seems to me that it is this, rather than any objection founded on the nature of a claim for damages as opposed to a claim for injunctive relief, which explains why there is apparently no previously decided case in this jurisdiction in which a claim for damages alone has been permitted to be brought against an unnamed defendant. Moreover, there are good reasons why such a claim should not normally be permitted to be brought. This would not result in any effective vindication of the right of the claimant. It would also be a waste of court resources and inconsistent with the overriding objective of the CPR. Court resources are precious and cannot be squandered on pointless litigation.

76. Different considerations may apply, however, where a judgment for damages obtained against an unknown person may confer a real benefit on the claimant. This may be the explanation of *Brett Wilson* and *Smith* where proceedings were brought against unknown persons and the relief included both injunctive relief and an award of damages. The award of damages in those cases, even if not enforceable, was in those

particular circumstances an important statement vindicating the character and reputation of the claimants.

77. Accordingly, I agree with the conclusions of Gloster LJ that:

(1) There is no reason in principle why, in appropriate cases, it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description.

(2) There is no reason in principle or as a matter of construction of the rules why the ability to do so should be limited to a claim for an injunction or in relation to future relief.

(3) Whether in any particular case a claimant should be permitted to bring proceedings against a person identified only by description should depend on whether the overriding objective would be furthered by such a course.

78. The appellant in this case has a cause of action against a tortfeasor who has absconded. If he had been identifiable by name, a claim for damages could have been brought against him in his absence and a judgment obtained. It was common ground before us that the effect of section 151 is that insurers will routinely have to satisfy judgments against tortfeasors who, although their identities are known, can no longer be traced by the time proceedings are brought. It is said, however, that in the present case the appellant should be prevented from bringing a claim and obtaining a judgment for damages because the defendant cannot be identified by name.

79. I can see no distinction between the two situations in terms of prejudice to the tortfeasor. It is also significant that in the situation now under consideration the tortfeasor has unlawfully sought to place himself beyond the reach of legal proceedings. Furthermore, there is here a justification for permitting such a claim. The present case is unusual in that to permit the appellant to bring a claim for damages against an unknown person would be efficacious because the insurer would be liable to satisfy the claim by virtue of section 151. In these circumstances it seems to me, prima facie, that the appellant should be permitted to bring the claim.

80. Mr. Worthington submits, however, that to permit the appellant to bring these proceedings against an unnamed defendant would potentially prejudice the insurer.

(1) First, he submits that the fact that, at present, an insurer can only be liable under section 151 if the driver is identified provides the insurer with a valuable safeguard in that it has an opportunity to interview the driver to obtain his version of events in relation to liability and to get some idea of the claim on quantum. I do not find this submission particularly persuasive. Assuming for present purposes that this may be of some value to an insurer in deciding whether or not to defend the claim, the possibility that the driver cannot be interviewed is in a sense part of the risk assumed by the insurer when entering into the contract of insurance. Moreover, an inability to interview the driver is likely to be encountered frequently in other situations, for example where an identified driver has subsequently absconded or refuses to co-operate.

(2) Secondly, he submits that the scope for fraud is considerable here. I readily acknowledge that many fraudulent claims are made in the field of motor insurance. However, Mr. Worthington did not explain precisely how the possibility of a claim against an unnamed defendant would significantly broaden an insurer's exposure to the risk of fraud. In this regard I note that the insurer would know the identity of the insured and the registered owner.

(3) Thirdly, it is said that if an unnamed driver can be sued, the insurer would be liable under section 151 without recourse against that driver under section 151(8). I accept that the insurer would not be able in such circumstances to recover its outlay from the culpable party. However, the risk of locating and then enforcing against that party is placed by the statutory scheme on the insurer. I also note that in such circumstances section 152 would still apply so it would be possible for the insurer to bring a claim for a declaration of non-liability under section 152(2).

81. Accordingly, I am unable to accept that to permit proceedings to be issued against an unnamed driver would result in any unfairness to the insurer. On the contrary, it seems to me that there is force in the submission of Mr. Williams that to deny the possibility of such a claim leads to arbitrary outcomes. If the tortfeasor stops at the scene of the accident or is subsequently arrested or traced, he can be identified and sued and the insurer will be liable. That would remain the case even if the tortfeasor subsequently vanishes. Similarly, if the tortfeasor can be identified by name but is never subsequently traced or apprehended the insurer can become liable under section 151. However, if a victim is unable to name the tortfeasor because he has been adept enough to avoid identification, the victim would lose the protection of section 151 unless the tortfeasor could be sued by description.

82. It is then submitted on behalf of the insurer that the availability of an alternative remedy, namely a claim under the MIB Untraced Drivers Agreement, should necessarily lead the court to decline to exercise its discretion so as to permit a victim to proceed against an unnamed driver. Mr. Worthington submits that the appellant will be able to obtain "a proper remedy" under the Untraced Drivers Agreement, a scheme which makes the MIB and not the insurer liable if the tortfeasor is untraced. There is, as he puts it, simply no need to permit an elaborate fiction in order to enable the appellant to obtain a remedy.

83. In the course of argument it was suggested that a claim under the Untraced Drivers Agreement may be less advantageous to a claimant than a judgment against an unnamed tortfeasor which the insurer would be liable to satisfy under section 151. It was submitted that, among other disadvantages, only very limited legal costs are payable under the Untraced Drivers Agreement, that for property damage claims a claim must be submitted to MIB within 9 months of the accident, that the accident must have been reported to the police within 14 days of the accident (in the case of personal injury) and within 5 days (in the case of property damage), that the MIB will not meet subrogated claims and that the MIB itself carries out the investigation of the claim and (subject to provision for arbitration) assesses the amount of compensation. It was submitted that these are disadvantages which may be highly detrimental to claimants.

84. I agree with Gloster LJ that a claimant in the position of the appellant might well reasonably regard a claim for compensation under the Untraced Drivers Agreement as

an inferior remedy to a court action for damages. More fundamentally, however, I consider that the existence of an alternative remedy should not in the circumstances under consideration necessarily require a court to exercise its discretion against permitting a claim to be pursued against the tortfeasor. We are concerned here with a private law cause of action vested in a claimant who should not be prevented from vindicating it in legal proceedings without good reason. As Gloster LJ points out, the appellant is under no obligation to pursue the alternative remedy and its exercise is not a pre-condition to her entitlement under section 151. In the circumstances it would not be just to deny her a remedy which would give effect to her substantive right.

85. Finally, Mr. Worthington submits that to permit a claim for damages against an unnamed defendant would cut across the scheme established by Part VI of the 1988 Act, the MIB Untraced Driver Agreement and the MIB Uninsured Driver Agreement by which the United Kingdom meets it obligations under the EU Directive. He submits that the system for the compensation of victims of road traffic accidents is a carefully constructed edifice and that tinkering with it by permitting claims such as the present will have serious consequences for the system. He submits that if such claims are allowed to proceed the procedure may thereafter be abused in a myriad of cases where the claimant is not bona fide, where liability is disputed and where the insurer would be prejudiced. It will, he says, be very difficult for the courts to limit the use of this procedure to cases where this is an appropriate course. The court is asked to make a fundamental change in the field of road traffic claims where it is not possible to see the full implications.

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. I would accept that permitting a claim for damages against an unnamed party might result in an increase in the number of judgments against tortfeasors which insurers would be liable to satisfy, as opposed to recourse to the MIB Untraced Drivers Agreement. However, I am not persuaded that that is a valid reason for preventing the victim from obtaining a judgment against the tortfeasor. Moreover, to permit a claimant in the position of the appellant to proceed with a damages claim against an unnamed driver would not make the Untraced Drivers Agreement redundant. It would remain essential, for example, in cases concerning unwitnessed hit and run incidents where a vehicle driven by a tortfeasor cannot be identified at all.

87. It was not suggested before us that to permit such a claim would be inconsistent with the requirements of the EU Directive.

88. The intention of Parliament in enacting section 151 was that a motor insurer should compensate any parties injured by a vehicle it insures, even if the insurer has no contractual liability to indemnify the driver of the insured vehicle under the policy. The insurer is given a remedy against the tortfeasor under section 151(8) but the risk as to whether that will be effective is clearly intended to be borne by the insurer. As Mr. Williams put it in argument, this policy and the liabilities which result from it, are simply the obligations which motor insurers must accept as the price for writing motor business in the United Kingdom. Permitting the appellant in the present case to

sue the unnamed tortfeasor is, in my view, entirely consistent with the policy of Part VI and section 151 in particular.

89. For these reasons I consider that the judge's approach was wrong as a matter of law and that, accordingly, the exercise of his discretion should not be upheld. I would allow the appeal.

Sir Ross Cranston:

Introduction

90. I have the misfortune to disagree with the conclusion reached by Gloster LJ. I agree with her that, notwithstanding that the Civil Procedure Rules generally require that parties should be named, in appropriate circumstances a party is able to bring proceedings against an unnamed party, suitably identified by description, not only for an injunction, or in relation to future relief but also, at least in some circumstances, for damages: [49], [53]. I also agree that the issue in any such case is whether the court should exercise its discretion under the CPR to permit a claimant to amend a claim in order to substitute an unnamed defendant, or permit such an action to proceed by dispensing with the procedural error of failing to name the defendant: [54].

91. Where I respectfully part company with Gloster LJ is that I do not agree that in this case HHJ Parker ("the judge") was wrong in refusing to countenance an amendment to substitute an unnamed person for the defendant. My conclusion follows, firstly, from my reading of the CPR and the case law interpreting them; secondly, from my interpretation of the Road Traffic Act 1988 ("the 1988 Act") against the background of the long existence of the Motor Insurance Bureau and its operation of the Untraced Drivers Agreement for hit and run accidents such as occurred in this case; and thirdly, from my concern about the consequences which might flow from allowing claims against unnamed drivers in this and similar cases.

92. The facts I gratefully adopt from Gloster LJ's judgment. In summary the claimant was involved in a hit and run accident, sued the first defendant as registered keeper of the vehicle (who was not insured to drive it) under an insurance policy written by the second defendant, the respondent to this appeal. That policy was later discovered to be taken out by a person believed to be fictitious, and by the time the case was on appeal before the judge it was also common ground that the first defendant (who was uncooperative and convicted for this) was not the driver. As I have indicated the judge upheld the refusal of District Judge Wright to grant the claimant permission to amend the claim to substitute, for the name of the first defendant, a description: "The person unknown driving vehicle registration number Y598 SPS who collided with [the claimant's vehicle] on 26 May 2013." A judgment against that unnamed person could have been enforced against the respondent under section 151 of the 1988 Act.

The relevant CPR rules and the exercise of discretion under them

93. The CPR are clear that, generally speaking, the claim form and any other statement of case should name the parties: CPR rr. 7A PD 4.1(3), 16 PD 2.6(a). That seems to be a consistent with the principle of open justice, as well as a means of enabling defendants to know about proceedings and to put their case in response. In situations

where insurance is in place it also operates as a curb on fraud in placing an insurer in a better position to investigate details of a claim.

94. There are a number of situations spelt out in the rules permitting unnamed parties. They are there for good reason. Thus the nature of representative actions is such that it may not be possible to ascertain one or more of the interested persons; the rules therefore allow for unnamed parties: see CPR r. 19.7. A person entitled to the possession of land seeking its recovery may not be able to name the trespassers in occupation or possession of it, since those trespassing have an interest in remaining unknown. Again the rules enable the claim to be brought against persons unnamed: CPR r.55.3(4).

95. These limited exceptions in the rules indicate to me that the underlying premise of the CPR is that parties should be named and that to move away from named parties outside the gateways they provide needs substantial justification.

96. I accept that the rules requiring that parties to actions be named must be read in the context of the rules as a whole. Crucial is the overriding objective in CPR r. 1.1, of enabling the court to deal with cases justly and at proportionate cost. The overriding objective must be given effect whenever the court exercises any power given by the rules: r. 1.2. Further, the general powers of managing cases conferred by the rules include the power to make orders to further the overriding objective: CPR r. 3.1(2)(m).

97. Thus the overriding objective bears on the exercise of specific powers in the rules, such as CPR r. 3.10, empowering the court to dispense with a procedural error and its effects, CPR r. 4(2), authorising a variation in a claim form if required by the circumstances of a particular case, and CPR 19, providing for changing parties to proceedings.

98. It was against the background of the different philosophy underlying the CPR that in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd and others* [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633 Sir Andrew Morritt V-C distinguished *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25, decided under the previous Supreme Court Rules, where a strong Court of Appeal had held that defendants must be named. Sir Andrew Morritt V-C held that under the CPR there was no requirement that a defendant must be named, merely a direction that he or she should be; that the failure to give the name of the defendant could not invalidate proceedings already begun, in particular because unless the court thought otherwise rule 3.10 so provided; and that the overriding objective of the CPR and the obligations cast on the court to further it were inconsistent with an undue reliance on form over substance. "The proper application of rule 3.10 was incompatible with a conclusion that the joinder of a defendant by description rather than by name was for that reason alone impermissible": at [19].

99. Having decided that he was entitled to make the order sought – the continuation of an injunction preventing unknown persons, who had offered a copy of one of the Harry Potter books to certain newspapers, from disclosing its contents prior to the date of its official publication - Sir Andrew Morritt V-C then considered whether he should exercise the discretion to do so. He held that he should. First, he said, the description of persons to whom the injunction should apply was sufficiently certain as to identify

both those who were included and those who were not: [21]. Secondly, he could see no injustice to anyone should he make an order in the form sought "but considerable potential for injustice to the claimants if I do not": [22].

100. *Bloomsbury Publishing* has been followed in a number of cases. In *Kerner v WX* [2015] EWHC 128 (QB); [2015] EWHC (QB) the court granted an injunction restraining harassment of a woman and her son after they had been photographed in what was said to be an aggressive and intrusive manner by two photographers outside their home. They had refused to identify which newspapers employed them although one said that he was freelance. The judge said that it was legitimate to bring proceedings against the photographers as persons unknown, since it had been impossible despite inquiries to identify them. They were given the pseudonyms WX and YZ, and a description which specified them as persons who were responsible for the events of the morning of 22 January.

101. In *Brett Wilson LLP v Person(s) Unknown* [2015] EWHC 2628 (QB); [2016] 4 WLR 69 a solicitors firm was accused of misconduct in entries on a web-site owned by "Anonymous Speech", a proxy registrant service claiming to move its servers from one country to another on a regular basis and further claiming to ignore court orders originating from the EU or US. Unsuccessful in identifying the website's operator, the firm commenced proceedings against "persons unknown", claiming damages for libel and an injunction restraining the accusatory words.

102. In considering that the case was being advanced against unknown defendants, Warby J referred to the legitimacy of the *Bloomsbury Publishing* procedure having been recognised for over a decade, and concluded that its requirement was met in that the unknown persons in the case before him were clearly identified by naming them as "Persons Unknown responsible for the operation and publication of the website [SFHUK.com]": [8]. Warby J was satisfied that the defendants had had notice of the application and an adequate time to respond but had chosen not to engage with the court process. He then went on to hold that the firm should have its injunction and a judgment for damages to be assessed.

103. Green J applied *Bloomsbury Publishing* and *Brett Wilson* to hold that relief was available against unknown persons in another defamation case, *Smith v Unknown Defendant, Pseudonym 'Likeicare'* [2016] EWHC 1775 (QB) :[11]. He granted judgment in default and injunctive relief. In that case there can be no possible doubt as to the fact that service was effected since the administrators of the site not only responded to the pre-action documents but also published it on the internet site itself.

104. In my judgement, while there is no test of exceptionality as the respondent contended, there is no basis for the test for the exercise of discretion proffered by the appellant. That was that a court should consider whether it is necessary and efficacious to justice to permit proceedings by unnamed parties. In *Bloomsbury Publishing* Sir Andrew Morritt V-C was recognizing that, if the discretion to allow proceedings against persons unknown was not exercised, unlawful action might go un-remedied, in other words, the unknown persons could have misused the unlawfully obtained copies of the Harry Potter book prior to its official publication date. Similarly, in *Kerner* harassment might have continued without allowing proceedings against unnamed persons, and in *Brett Wilson* and *Smith* defamatory statements would have remained searchable on the internet.

105. In my view the threshold is high when a court exercises a discretion under the rules to allow proceedings against unnamed parties. That follows because of the policy reasons for naming parties; the rules themselves, which expressly require that parties to proceedings be named and which contain only a limited number of specified exceptions; and *Bloomsbury Publishing*, where the court held that the overriding objective required proceedings against unnamed parties if there was to be any remedy against wrongful action. Consequently, my conclusion is that the exercise of the discretion to permit proceedings against unnamed parties demands first, that there be no injustice to the unnamed persons involved, and secondly, that there will be a real potential for injustice to a claimant should such proceedings not be permitted.

Exercise of discretion in this case

106. In the present case the question is whether this test was met for the judge to have allowed the amendment to substitute an unnamed party as the defendant. Given the factual background, there would have been no injustice to the unnamed party in that he she is most likely to have been aware of the proceedings. However, I am not persuaded that without the substitution of the unnamed party there was a real potential for injustice to the claimant. That is because it was common ground between the parties that the claimant can obtain compensation under the MIB Untraced Drivers' Agreement.

107. The appellant's case was that there were two factors which meant that the judge should have exercised his discretion to allow the amendment. First, there was what was said to be the policy behind part 6 of the 1988 Act; and secondly, it was submitted that the MIB scheme offers a less adequate remedy for a claimant than that provided under section 151.

108. Gloster LJ has set out the statutory framework of Part 6 of the Road Traffic Act 1988 and referred to its historical background. In short a person using a motor vehicle must have insurance complying with the Act in respect of third party liabilities, and a person must not permit others to use the vehicle without the policy covering them: s.143(1). The statutory requirements for such policies of compulsory insurance are contained in section 145. As well as the risks it must cover, the section provides that the policy must be issued by an authorised insurer, defined as a

> "an insurer who is a member of the Motor Insurers Bureau (a company limited by guarantee and incorporated under the Companies Act 1929 on 14th June 1946)" :ss. 95(2), 145(2)(5).

109. Compulsory insurance is not comprehensive as to all injury and property damage which can occur. However, section 151 (2)(b) provides that insurers must meet judgments in respect of insured third party liabilities, even if the insurer is not contractually liable under the policy vis a vis the insured, and even if its insured is not the tortfeasor. In that event the insurer can recover against the uninsured negligent driver or the insured if he or she permitted use of the vehicle giving rise to the liability: S.151(8). In limited situations the insurer may also be able to avoid the policy: s.152(2).

110. The appellant contended that the policy behind these statutory provisions was that, when an insurance policy covers a vehicle, the insurer should compensate persons

injured by its use, whether or not the policy covers the risk and whoever is the negligent driver. Insurers know that they can be liable to pay out on judgments against negligent third parties not covered by the policy. It went with the grain of the legislation, as the appellant put it in oral argument, that when there is a policy of insurance in place for a vehicle, and a named insured, the insurer should be liable whether proceedings have begun or if later the claimant cannot name the uninsured negligent driver.

111. In my view the appellant's characterisation of the grain of the legislation hits a very large knot: the obligation on insurers under section 151 arises when there is a judgment. To obtain a judgment a claimant must satisfy the requirements of both procedural and substantive law. As a general rule procedural law requires, as we have seen, that defendants in legal proceedings be named.

112. Indeed, the grain of the legislation, in my judgment, is that a defendant must be named. First, the insurer's right of recourse under section 151(8) will often be dependent, in practice, on a driver being identified. Even where identified drivers disappear, the insurer may have had the opportunity to obtain more details of an accident, and may also be able to trace them. With unnamed defendants that is very unlikely. Secondly, under the 1988 Act and its predecessors, it is the driver who must be insured, not the vehicle. That suggests that identity is important within the legislative framework.

113. Thirdly, and most importantly, the legislation runs in parallel with the MIB scheme. That scheme has existed since 1946, almost as long as the earliest version of part 6 of the 1988 Act. Insurers must be members of MIB under the 1988 Act and under its articles of association must pay a levy so that the MIB can meet claims in accidents where there are uninsured and untraced drivers. It will not do for the appellant to describe the MIB arrangements simply as a contract with the Department of Transport: they have statutory backing and are part of an overall legislative scheme.

114. Given that history and the legislative design, it is unsurprising that the courts have long considered, albeit in contexts other than that arising in the present case, that the 1988 Act (and its predecessors) and the MIB arrangements must read together. *Bristol Alliance Ltd Partnership v Williams* [2012] EWCA Civ 1267; [2013] Q.B. 806 *and Sahin v Havard* [2016] EWCA Civ 1202 are recent examples of this approach.

115. As the appellant accepts, the MIB provides for recovery in her case. The appellant's contention is that the existence of the MIB untraced drivers scheme is no answer to the exercise of discretion in her favour since it provides a less adequate remedy that under section 151 of the 1988 Act. Only limited legal costs are recoverable under it; an accident has to be reported within a limited period; the MIB does not meet subrogated claims; and the MIB itself investigates a claim and decides on the amount of compensation.

116. The first factor seemed to loom large in the appellant's submissions, although at first blush it does not seem surprising that recoverable costs with the MIB are less when it takes on the task of investigating a claim. I note that there was no suggestion that the level of compensation the MIB awarded is less than what a court would order in similar circumstances. I also note that in *Re Carswell (Deceased)* [2010] EWHC 3230 (QB) Hickinbottom J found in the context of a challenge to the implementation of the

Motor Insurance directive 84/5/EEC that the MIB scheme in general adequately safeguarded the rights of those who are the victims of untraced drivers.

117. In my view the differences with the MIB scheme are no basis for the contention that the judge should have allowed the amendment. The judge held that to allow the claimant the section 151 avenue would increase litigation and costs and would likely prejudice insurers by depriving them of an ability to pursue any indemnity against the unnamed driver. He also held that there was no injustice for the claimant, who could continue with a claim under the MIB Untraced Drivers' Scheme. I agree with this reasoning. It is consistent with what I regard as the test for exercising discretion to permit unnamed parties under the CPR.

118. There is also the greater potential for fraud if proceedings can be taken against unnamed drivers without MIB investigation. As well there is the threat of undermining the balance between the statutory and MIB avenues for claimants to obtain redress following motor vehicle accidents. That balance and the existing arrangements may not be ideal – in other countries compulsory insurance is of the vehicle and is comprehensive in nature - but the arrangements in this jurisdiction are long standing and have Parliamentary approval. In this difficult field for policy makers it is not for the court to disturb these arrangements through sanctioning an exercise of discretion where there is no injustice to remedy.

Conclusion

119. For the reasons I have given I would dismiss the appeal.