Neutral Citation Number: [2020] EWHC 1288 (Admin)

Case No: CO/182/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice Centre
2 Park Street Cardiff CF10 1ET

Date: 29 May 2020

Before:

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court

Between:

THE QUEEN (on the application of ASTRID LINSE)	**Claimant**
- and -	
THE CHIEF CONSTABLE OF NORTH WALES POLICE	**Defendant**

The claimant represented herself assisted by Celine Belli
Mr James Coutts (instructed by **Legal Services, North Wales Police**) for the **defendant**

Hearing dates: 18 May 2020

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and for publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 on the 29 May 2020.

Approved Judgment

HH JUDGE JARMAN QC:

1. The essential issue in this judicial review claim is whether a certificate of motor insurance which may be avoided for non-disclosure is nevertheless a "valid" certificate of insurance within the meaning of the Road Traffic Act 1988 (Retention and Disposal of Seized Motor Vehicles) Regulations 2005 (the Regulations). PC Birkby, of the North Wales Police's Road Policing Unit (RPU), decided that it is not, and consequently did not permit the claimant, Mrs Linse, to remove her vehicle, a Mercedes Benz Unimog U1300L (the vehicle), from custody. Mrs Linse issued this claim on 20 January 2020 challenging that decision. In the accompanying detailed statement of grounds, she said that the vehicle is a mobile home and was the only accommodation of herself and her husband. She also said that she produced a valid certificate of insurance issued by NFU Mutual dated 19 December 2019 and the vehicle should have been released to her.

2. Upon considering the application for permission on the papers, on 6 March 2020 I ordered that the application be adjourned to be listed in court as a rolled up hearing and that if permission be granted, the court would proceed immediately to determine the substantive claim. In the same order, and without expressing a view at that stage on the merits of the claim, the parties were encouraged to discuss whether there was a pragmatic solution. Because of the Covid-19 pandemic, it was necessary in the interest of justice to conduct the hearing remotely. Mrs Linse represented herself, with the assistance of a friend, Celine Belli. The defendant was represented by counsel, James Coutts. It became apparent that notwithstanding my order of 6 March 2020, the defendant has since disposed of the vehicle at auction. I shall have more to say about that later in this judgment.

3. I indicated to the parties at the outset of the hearing, that I proposed to hear their submissions on permission and on the substantive issue together, and then to hand down a written judgment dealing with both matters. I understood the parties to be content with that course.

4. The background can be summarised briefly. Mr and Mrs Linse are German nationals. On 28 October 2019 Mr and Mrs Linse were in the vehicle with Mr Linse in the driving seat. They were parked on an industrial estate in Conwy, looking for a petrol station. Another officer in the RPU, PC Morris, driving in uniform in a marked police car, had seen the vehicle being driven on the A55 shortly beforehand. He had been told by a colleague that the vehicle was uninsured and so he followed it. After parking, Mrs Linse got out of the vehicle and asked PC Morris for directions to a petrol station. He asked if she was the owner of the vehicle and she confirmed she was. She gave her name and produced what appeared to be a German registration document in respect of the vehicle. PC Morris asked if she had any documents to show that the vehicle was insured, but Mrs Linse was unable to produce such documentation.

5. There are several provisions in the Road Traffic Act 1988 (the 1988 Act) which applied to this situation, and so far as material these are set out or summarised below.

6. Users of motor vehicles are required to be insured pursuant to section 143 of the 1988 Act, subsections (1) and (2) whereof provide:

> "(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 other person such a policy of insurance as complies with the requirement 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 as complies with the requirements of this Act.
>
> (2) If a person acts in contravention of subsection (1) above he is guilty of an offence."

7. Under section 165 of the 1988 Act a person driving a vehicle on a road must on being required by a constable produce certain documents set out in subsection (2) which includes at (a):

> "the relevant certificate of insurance (within the meaning of Part VI of this Act), or such other evidence that the vehicle is not or was not being driven in contravention of section 143 of the Act as may be prescribed by regulations made by the Secretary of State."

8. Section 165A then gives power to a constable in uniform to seize vehicles being driven without licence or insurance if any of the conditions therein set out is satisfied, the second of which is set out in subsection (3) as follows:

> "(a) a constable in uniform requires, under section 165, a person to produce evidence that a motor vehicle is not or was not being driven in contravention of section 143,
>
> (b) the person fails to produce such evidence, and
>
> (c) the constable has reasonable grounds for believing that the vehicle is or was being so driven."

9. Subsection (5) provides that where that subsection applies the constable may seize the vehicle in accordance with subsections (6) and (7) and remove it. Subsection (7) is not material but subsection (6) requires the constable before seizing the vehicle to warn the person by whom it appears that the vehicle is or was being driven in contravention of section 143 that he will seize it if the person does not provide him immediately with evidence that the vehicle is not or was not being driven in contravention of that section.

10. PC Morris, when such evidence was not provided upon request, then took the keys of the vehicle and issued Mrs Linse with a seizure notice under section 165 of the 1988 Act. The notice set out the steps that the owner would have to take to get the vehicle back, namely to produce a valid certificate of insurance and driving licence at a nominated police station, and attend the recovery firm and pay all the costs of removal

and storage. There was a warning in bold that these steps must be taken within 7 days or the vehicle could be sold or scrapped.

11. On the 29 October 2019 the defendant issued a seizure notice to Mr Linse addressed to Ms Belli's address in Caernarfon which had been given by Mrs Linse. It contained details of where the vehicle was kept, removal charges and storage charges and the police stations where a valid certificate of insurance could be produced, including Caernarfon, Llandudno and Colwyn Bay. It contained similar details as to how the vehicle may be recovered as in the notice issued by PC Morris. Mr and Mrs Linse say they did not receive the notice dated 29 October 2019.

12. Nevertheless, Mrs Linse says she attended Caernarfon Police Station on 30 October 2019 with the necessary documents which were copied to be passed on to PC Morris. She says she made several phone calls in the following days chasing the matter and attended Llandudno and Colwyn Bay Police Stations, before meeting with PC Morris at Caernarfon on 16 November 2019. The certificate of insurance she had provided was issued by a German insurer. PC Morris made inquiries with this insurer, as a result of which he informed Mrs Linse that he could not accept this as a valid certificate of insurance under the 1988 Act.

13. Accordingly, Mrs Linse applied to add the vehicle to an existing insurance policy with NFU Mutual in respect of a car owned by Mr Linse. The vehicle was added with effect from 19 December 2019 and a new schedule added to show the alteration and a new certificate issued, also dated 19 December 2019. Mrs Linse forwarded a copy to the RPU. A sergeant in the RPU, PS Collins, emailed Ms Belli and PC Morris on 22 December 2019 to say she had confirmed that the NFU Mutual insurance was valid, and that if Mrs Linse took that insurance document to a police station, the document would be stamped and she could go and collect the vehicle. Mrs Linse says that she had the money to pay the recovery and storage charges in respect of the vehicle and that was not in dispute before me.

14. Despite that email however, PC Morris liaised with PC Birkby who made enquiries of NFU Mutual. The latter officer says he became aware that Mrs Linse had driving convictions on a UK licence created for the purpose of recording the endorsements, and from conversations he had with an employee of NFU Mutual (he does not give the name or position of such a person) it was clear that Mrs Linse had not revealed a number of facts to NFU Mutual. These included the convictions, that the vehicle was not registered, that the purpose of obtaining the insurance was to secure the release of the vehicle after it had been seized, that the vehicle was her home, and that she and her husband were being prosecuted for driving without insurance.

15. In his witness statement dated 30 March 2020 filed in these proceedings, after setting out the above matters, PC Birkby then continues in paragraph 15:

> "The fact that the claimant had failed to inform NFU of the above matters when taking out the policy of insurance would have invalidated the insurance policy. Due to this, I was not satisfied that the NFU insurance document was valid insurance for the purposes of the Road Traffic Act 1988."

16. Mrs Linse disputes that the driving convictions are hers and says that it was her son who committed these offences without her knowledge. Nevertheless, by letter dated 12 March 2020 from NFU Mutual to Mrs Linse, the insurers referred to questions asked of Mrs Linse when she applied to insure the vehicle with them, including whether any drivers had in the last five years had any motoring convictions including any prosecutions pending, to which she answered "No." The letter, which was signed by one of NFU's policy validation team, continued that it was considered that that misrepresentation was reckless. The letter went on:

> "In the circumstances, we are entitled to avoid the Policies from inception on the 11 November 2019 for your Private Car Insurance Policy and to treat it as if it never came into existence. Please accept this letter as formal notification of this avoidance. As a result of avoiding the policy, we have no liability in respect of any claim made by you or any other party since 11 November 2019 as it is treated as not existing after this date."

17. Mrs Linse made a complaint to NFU Mutual about that decision, but the complaint was not upheld.

18. In my judgment it is clear from PC Birkby's witness statement that central to his decision making process in refusing to accept the NFU Mutual certificate as a valid certificate of insurance for the vehicle, was his conclusion that the non-disclosure he refers to "invalidated" the insurance policy.

19. Regulation 5 of the Regulations provides as follows:

> "(1) Subject to the provision of these Regulations, if, before a relevant motor vehicle is disposed of by an authorised person, a person-
>
> (a) Satisfies the authorised person that he is the registered keeper or owner of the vehicle,
>
> (b) Pays to the authorised person such a charge in respect of its seizure and retention as is provided for in regulation 6; and
>
> (c) Produces at a police station specified in the seizure notice a valid certificate of insurance covering his use of that vehicle and a valid licence authorising him to drive the vehicle,
>
> the authorised person shall permit him to remove the vehicle from his custody."

20. Regulation 2 provides that in the Regulations "certificate of insurance" is to be construed in accordance with sections 147(1) and 161(2) of the 1988 Act. The latter, which is now omitted was not material, but the former subsection reads:

> "An insurer issuing a policy of insurance for the purposes of this Part of the Act must deliver to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed"

21. There is no further indication in the Regulations as to what is meant by "valid." No authority was cited to me by the parties. Mr Coutts appeared to submit initially that a certificate which is liable to be avoided on the grounds of non-disclosure is void. However, I cited to him Chitty on Contracts, 33rd edition, at paragraph 42-04, in relation to contracts of insurance where the editors say:

> "Non-disclosure or misrepresentation makes the contract voidable, not void, so that the aggrieved party has an election whether or not to avoid the contract."

22. Mr Coutts, as I understood him, did not then pursue his argument that such a contract is void. Moreover, he accepted that PC Birkby's statement that the non-disclosure in this case "invalidated" the insurance policy is not a correct statement of the law.

23. In my judgment that was a proper concession. In the specific instance of motor vehicle insurance, the editors of MacGillivray on Insurance Law 14th edition at paragraph 31-008 refer to provisions of the 1988 Act and say this:

> "When a policy is voidable, for instance on account of misrepresentation, it remains "in force" for the purposes of s.143 unless and until the insurer takes steps to avoid the policy as provided in s.152."

24. The authority cited for that proposition is *Durrant v McClaren* [1956] 2 Lloyd's Rep 170, where the Divisional Court on a case stated considered section 10(1) of the Road Traffic Act 1934 then in effect. That provided:

> "If after a certificate of insurance has been delivered… judgment in respect of any such liability as is required to be covered by a policy…is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of any judgment any sum payable thereunder in respect of the liability…"

25. Lord Goddard CJ at page 72, after citing the section said this:

> "Therefore, if a person is injured the effect of this section is that an insurer who has delivered a certificate of insurance, although he may have the right to avoid the policy, and for this purpose I do not see that it makes any difference whether the policy is void or voidable--if he can avoid the policy he is none the less liable

> to pay the injured person damages although he will have a remedy over against his assured."

26. Ormerod J at page 73 agreed. He referred to the procedure under section 10(2) of the 1934 Act whereby insurers might obtain a declaration prior to the event giving rise to potential liability that they could avoid the policy, and continued:

> "…until such proceedings are taken the insurance company remains liable to pay any damages incurred, providing a judgment is obtained, in spite of the fact that the proposed insured has made clearly false statements in his proposal. In these circumstances, it seems to me that this insurance was in force, at the time when the respondent was driving this car, and I agree that this appeal must be dismissed."

27. Donavon J also agreed, and at page 73 said this:

> "I also agree, I think that in spite of the lies told by the respondent in the proposal form, it is not possible to say that there was not a policy in force at the time of the accident within the meaning of s 35 of the Road Traffic Act, 1930. It was in force then though it might lose its force if the insurer adopted the procedure under s 10 of the 1934 Act."

28. These provisions are now contained in sections 151 and 152 of the 1988 Act. Subsection 151 (5) applies where a judgment is obtained relating to liability required to be covered by a policy of insurance, and states:

> "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 liability, together with any sum, by virtue of any enactment relating to interest on judgment, 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."

29. Subsection (6) makes provision for total amounts payable. Section 152(2) provides that no sum is payable under section 151 if before the event giving rise to liability the insurer had obtain a declaration that he is entitled to avoid the policy on the grounds of non-disclosure or misrepresentation. As far as I am aware no such declaration has been obtained in this case.

30. In my judgment, the reasoning of the Divisional Court in *Durrant* applies with equal force to the statutory regime currently in force. As the matters in paragraphs 22 to 28 above were not canvassed at the hearing, I gave the parties an opportunity to send to the court and to the other side written submissions within 7 days of receiving my draft judgment if that party disagreed with the applicability of these principles and provisions, giving reasons. No such submissions were made.

31. However, as indicated Mr Coutts accepted in the end that the policy in question was voidable and was not avoided until the NFU Mutual letter dated 12 May 2020. His submission was that the officers were entitled to take the view that that would be the likely position and were vindicated in their decision by that letter, which made it clear that the policy was treated as having never existed.

32. In my view however the policy remained in force until then. At the time the certificate was presented to the RPU it was a valid certificate. PCs Morris and Birkby, in taking into account that the insurer may have grounds to avoid the policy, took into account immaterial matters.

33. Mr Coutts also submitted that there is an alternative remedy available if the defendant were wrong to dispose of the vehicle, namely proceedings in the county court for conversion.

34. I do not consider that is an adequate remedy. A challenge to the lawfulness of a decision of a public body is appropriately dealt with by way of judicial review which must be brought promptly.

35. Mr Coutts also relies upon the disposal of the vehicle in submitting that there is now no remedy to protect the rights of Mrs Linse. The fact that the disposal was made after and in knowledge of the order dated 6 March 2020 is, to say the very least, highly surprising. Mrs Linse applied for urgent consideration on 20 January 2020, and one of the grounds was that the vehicle was up for auction. The same day I refused urgent consideration, in terms because the position had obtained since October 2019, and there was no documentary confirmation that the defendant had been informed of the proceedings at that stage or of imminent disposal of the vehicle.

36. Although there was no order, therefore, preventing such disposal, the order of 6 March 2020 made quite clear that the court was seized of the matter and that there was a hearing to be listed. Following the court's encouragement to the parties to discuss whether there was a pragmatic solution to the situation, Mrs Linse sent an email to the defendant's solicitor on 24 March 2020 inviting settlement discussion through email and phone communication, given the restrictions then in place as a result of the Covid-19 pandemic. Despite chasing emails, no substantive response was provided, and Mrs Linse found out on social media on or about 11 April 2020 that the vehicle had been disposed of and dismantled and parts were being advertised.

37. I asked Mr Coutts whether that conduct on the part of the defendant might be seen as potentially frustrating an order that the court may make in the proceedings, and he was hard pressed to provide a satisfactory answer. In my judgment it is not conduct which may be expected on behalf of a Chief Constable of Police, still less conduct which should defeat the claim.

38. In my judgment it is proper to grant permission and to quash the decision of PC Birkby that the NFU Mutual certificate of insurance was invalidated when presented in December 2019. It follows that Mrs Linse should have been permitted to recover the vehicle from custody, as PS Collins had indicated.

39. Now that the vehicle has been disposed of there is no point in remitting the matter to the defendant to reconsider. Damages can be recovered in judicial review proceedings where they could have been awarded in an ordinary claim, as the defendant accepts they could have been in this case. However, to require separate county court proceedings in relation to this matter will serve only to increase costs and add delay. Having regard to the overriding objective in my judgment damages should be assessed in the present claim. As Mrs Linse only discovered that the vehicle had been disposed of weeks before the hearing, the filed evidence does not engage with the issue of damages.

40. I shall direct that the claimant shall send to the court and to the defendant a further witness statement within 21 days of hand down of this judgment dealing with damages. The statement should exhibit a schedule of loss and all documents relied upon.

41. The defendant shall have 14 days after receipt of that evidence to file witness statements in response which shall also exhibit a counter schedule of damages and any documentation in response.

42. The matter will then be listed for a damages assessment and any consequential matters on the first available date after 13 July 2020 with a time estimate of one day. A decision will be taken nearer that time as to whether the hearing should be a face to face hearing in North Wales or dealt with remotely. Skeleton arguments, referring to any authorities relied upon shall be exchanged and sent to the court (electronically only) no later than 7 days before the hearing.