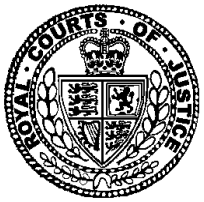

Neutral Citation Number: [2017] EWHC 2848 (Comm)

Case No: CL-2016-000639

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT

IN AN ARBITRATION CLAIM
(In Public)

The Rolls Building
7 Rolls Buildings
London EC4A 1NL

Date: 27/10/2017

Before:

THE HONOURABLE MR. JUSTICE BRYAN

- -

Between:

CHARLI LEWINGTON	**Claimant (Appellant)**
- and –	
THE MOTOR INSURANCE BUREAU	**Respondent**

- -
- -

Mr. Andrew Ritche QC (instructed by Slater & Gordon) appeared for the Claimant
Mr. Stephen Worthington (instructed by Weightmans) appeared for the Respondent

Hearing date: 27 October 2017

- -

APPROVED JUDGMENT

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1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR. JUSTICE BRYAN:

A. Introduction

1. The parties appear before me today on the hearing of an appeal on questions of law under section 69(2)(b) of the Arbitration Act 1996 from the award of Richard Methuen QC, dated 26th September 2016, pursuant to the permission to granted by Mr. Justice Knowles CBE of 6th March 2017.

B. Questions of Law that Arise

2. The questions of law that arise concern the proper interpretation of section 185(1)(c) of the Road Traffic Act 1988, which it is common ground is to be interpreted in accordance with the principles identified in the *Marleasing* case (case C-106/89) and, therefore, the wording and purpose of the relevant EC Directive. Since 1972 EC Directives have required Member States to impose compulsory insurance upon motor vehicles on land. The original EC Directive was 72/166/EC. With later Directives it was consolidated into EC Directive 2009/103/ EC, which is the relevant Directive in the present case (the "Directive").

3. There is a difference between the Road Traffic Act 1988, section 185(1)(c) and Article 1.1 of the Directive 2in relation to which "motor vehicles" are required to be insured for use on roads. The former provides that "motor vehicle" means "a mechanically propelled vehicle **intended or adapted for use on roads**" (my emphasis) whilst the latter provides that "vehicle" means any "motor vehicle **intended for travel on land and propelled by mechanical power**" (my emphasis).

4. It is the Appellant's case that the Road Traffic Act has to be interpreted by the Arbitrator in accordance with the purpose of the Directive which was to provide protection for members of the public from the negligence of others who were driving vehicles with engines on public roads, but that the Arbitrator failed so to do as a result of erring in law as to the correct test under section 185(1)(c) interpreted in accordance with *Marleasing* principles.

C. The Circumstances of the Accident

5. The appellant in this case is Charli Lewington. On 23rd February 2012 Ms. Lewington suffered serious injuries caused by the negligence of a criminal who stole a Bell B30D articulated dumper truck, drove it on a public road and caused a crash that resulted in Ms. Lewington's injuries which included a fractured neck, spinal injuries and a severed artery in her left arm, after which the criminal ran off and has never been traced.

6. More specifically, and I take this from the Defendant's Skeleton Argument, at about 10.45pm on 23rd February 2012 the Appellant was driving her Ford Fiesta car on the A120 near Felsted in Essex. The A120 is a dual carriageway

with a speed limit of 70 miles per hour. It was dark and the road was unlit. Unknown to the Appellant there were two large earth movers or dumper trucks on the road in front of her which had been stolen from a quarry. They were unlit at the rear. With a published maximum speed of 33 miles per hour, they were travelling relatively slowly. The Appellant was following her uncle's vehicle which suddenly swerved to avoid the rear most earth mover. She swerved too, but lost control and went off the road as a result of which she was injured. The drivers of the earth movers made off and were never traced. So the Appellant applied to the Defendant, the Motor Insurers Bureau (the "MIB"), for compensation under the Untraced Drivers' Agreement 2003.

7. There are pictures of a Bell B30D dumper truck in the bundle before me and, as the Arbitrator referred to in his Award, it was described by the police who attended the accident as being like a large yellow Tonka toy, which seems to be an apt description. It is a very sizable dumper truck and at 2.99 metres wide, it is wider than the 2.5 metres width restriction in the Construction and Use Regulations 1986 governing the use of vehicles on the road, although there are provisions in the Road Vehicles (Authorisation of Special Types) Order 2003 which may allow registration and taxing of particular special types of vehicle including engineering plant if they fall within its terms. There is something of a dispute between the parties as to whether in fact this particular Bell B30D could or could not fall within that Order as to registration and taxing.

D. Background to the Road Traffic Act and the Motor Insurers Bureau

8. The Road Traffic Act 1988 (the "RTA") protects the public by imposing an obligation to insure drivers of motor vehicles used on public roads and other public places. The MIB, the Respondent to the present appeal was created in 1946 to protect the public against criminals who failed to comply which the obligation to insure under the RTA. The MIB is required to compensate innocent victims of negligent criminals who drive without insurance under the Uninsured Drivers Agreement 1999 or who crash and drive away without stopping under the Untraced Drivers' Agreement 2003 (the "UDA"). The UDA applied to this road traffic accident and provided the claimant with the right to apply directly to the MIB for compensation.

9. The UDA sets out a procedure under which the MIB was required to investigate the application and determine whether it was required to pay compensation and how much. The MIB refused the Claimant's application on the ground that the unidentified driver was not required by law to insure the Bell to drive on a public a road. Under their interpretation of section 185 of the RTA the Bell was excluded from the insurance obligation because its main use was for transporting heavy loads off road (for instance at gravel quarries) and not for driving on public roads, so it was not a "motor vehicle". The Claimant appealed to the Arbitrator.

10. In his preliminary decision the Arbitrator found that the accident was caused by the negligence of the unidentified driver of the dumper truck which Ms. Lewington swerved to avoid. The MIB did not challenge that finding at the oral arbitration hearing.

E. The Issues before the Arbitrator

11. It was common ground before the Arbitrator at the oral hearing, as the Arbitrator noted in his Award at paragraphs 13 to 18, that in order to be entitled to an award under the agreement Ms. Lewington had to prove two things:-

(1) That the dumper truck was a motor vehicle, and

(2) That the dumper truck required motor insurance.

The Arbitrator found against the Appellant on both points, upholding the MIB's interpretation of section 185(1)(c) of the RTA.

F. Facts Found by the Arbitrator

12. In his Award the Arbitrator first addressed the Bell B30D dumper truck and its characteristics and made factual findings in that regard that it will be necessary for me to return to after considering the applicable legal principles of interpretation and the Arbitrator's findings in that regard.

13. The Arbitrator found that the dumper truck had the following characteristics:-

(1) It had a driver's cab, a windscreen, windscreen wipers, a steering wheel, a speedometer, wing mirrors, an engine, a gear box, six wheels and rubber tyres (paragraphs 32 and 33 of the Award).

(2) It had front lights (see paragraph 36 of the Award) and a flashing roof light (paragraph 43(iii) of the Award).

(3) It had no rear lights (paragraph 40 of the Award).

(4) It was big and could move fast with a top speed of 33 miles per hour (paragraph 43(i) of the Award).

(5) It could be driven on roads and be very dangerous to other road users.

(6) It was wider at 2.99 meters than the 2.5 width restriction in the Construction and Use Regulations 1986 (paragraph 43(ii) of the Award).

(7) The Road Vehicles (Authorisation of Special Types) Order 2003 allowed registration and taxing of special types of vehicles including "engineering plant" and dealt with specifically with permitting them, to go by road to and from repair garages and work sites (paragraph 42(v) of the Award).

(8) At paragraph 81 of his Award the Arbitrator also found that, *"It may have been possible to render the use of the Bell lawful"*, by registering it under the 2003 Order.

(9) Some wider similar Bell articulated dump trucks (the B50D, which is 3.7 meters wide, i.e. even wider), have been registered for road use by Bell UK as a special type of vehicle (paragraph 43(vi) of the Award.

(10) Some Bell B50D's were used at China Clay quarries in Cornwall and registered for road use to enable them to take clay from a quarry via a public road to another site (paragraphs 43(iv) and 86 of the Award).

(11) Plant hire businesses offered articulated dumper trucks for hire, DVLA registered and insured for £1,100 per week (that was based on the expert evidence that the Arbitrator heard, and he made a finding in that regard at paragraph 43(vii) of his Award).

(12) A firm, Richard Marshall, hired out Bell articulated B30D dump trucks with *"low ground pressure tyres [which] are very advantageous on all roads and dig and tip areas",* and *"All machines come with up to date service records, certificates of newness, daily tick sheets and insurance documentation)"* (paragraph 46 of the Award).

(13) The arbitrator also found, and noted, at paragraph 45 of his Award that a Bell B30D was photographed on Seaford Beach in East Sussex, which is a public place.

G. The RTA and the UDA

14. Sections 143, 145 and 185 of the RTA require drivers to insure "motor vehicles" for use on public roads. As already foreshadowed, the correct interpretation of the definition of "motor vehicle" in section 185(1)(c) applying *Marleasing* principles in the context of the Directive is a central issue on this appeal. The MIB is required under the UDA clauses 41(a) and (c) to compensate any applicant if the vehicle which injured the applicant was required to be insured under sections 143, 145 and 185 of the Road Traffic Act 1988 and the driver was untraced and hence a criminal for failing to stop.

H. The Rulings Appealed and the Alleged Errors of Law

15. The Arbitrator held that the dumper truck was not a motor vehicle within section 185(1)(c) of the RTA. The Appellant submits that he erred in law and failed to apply the correct principles of interpretation to Article 185(1)(c) and had he done so the dumper truck would have been found to be a motor vehicle within section 185(1)(c).

16. After considering the applicable legal principles and drawing attention to the difference in language between section 185(1)(c) and article 1 of the Directive, the Arbitrator ruled at paragraph 75 of his Award*: "I can see no way in which I can interpret section 185 so as to make it compatible with Article 1.*" It is said that the Arbitrator fell seriously into error in so ruling. The Appellant submits that he could, and should, have interpreted the Act in a way compatible with the Directive applying the *Marleasing* principles.

17. At paragraphs 77 and 79 of his Award the Arbitrator then went on to rule, as a matter of law, that on the facts as he found them a reasonable man would not consider that the Bell was "intended or adapted for use on roads." He described the test as *"a subsidiary, but still general use (as opposed to an isolated or irregular use)."* He ruled that, *"A reasonable person would not*

have contemplated the use of the earth mover on a road unless that use had been unlawful".

18. The Appellant submits that he applied the wrong test in law and applied it in the wrong way. The Appellant submits that the correct test is whether a reasonable man would say that *"one of the uses was on roads"* and the answer should have been *"yes", a*pplying the case law and in particular the leading case of *Burns v Currell* [1963] 2 All ER 297 and Lord Parker CJ's classic interpretation of the words now in section 185, *a fortiori* (submits the Appellant) once one overlays the statutory purpose of section 185 of the RTA and applies *Marleasing* principles in the context of the Directive.

19. The Appellant also criticises the Arbitrator for his finding that a reasonable person would not have contemplated the use of the earth mover on a road unless that use had been **lawful**. This is submitted to be a fatal error of law, itself undermining the conclusion that the Arbitrator reached. The Appellant submits that the case law shows that an item may be a motor vehicle even if it is expressly stated by its manufacturer not to be for road use and cannot be lawfully used on the roads.

20. The Appellant identifies that if the main use of the motorised vehicle on roads the test is easy to apply. If the main use of the motorised vehicles is off road, then the correct test, it is submitted, is whether a reasonable person would *foresee a use on roads*. Applying this test properly, even ignoring the Directive, should, it is submitted, have led to a finding that the Bell dumper truck had *a use on roads* and had to be insured for that use. The Appellant submits that the position is *a fortiori* once one has regard to *Marleasing* principles and the Directive.

21. The Appellant submits that the purpose of both section 143 and section 185 of the RTA and the Directive is to protect the public by requiring road traffic insurance for motorised vehicles on roads so that compensation is provided for injuries cause by the negligence of drivers. No issue arises in this case about off-road accidents.

22. Applying this purpose is all the more important, it is said, where a driver was a criminal and thief, and was breaking the law by driving a stolen or dangerous or uninsured vehicle with an engine on a public highway.

I. The Applicable Principles and Associated Case Law

23. The English case law relating to the interpretation of the words "intended or adapted for use on roads" in section 185 was developed in particular from 1941 onwards in criminal prosecutions for driving without insurance or without road tax which were on occasions appealed up to the Divisional Court. In this regard Mr. Andrew Ritchie QC, who appears on behalf of the Appellant, set out in Schedule 2 to the Appellant's Skeleton Argument a table containing a number of cases in that regard. In 1963 this body of case law gave rise to Lord Parker's classic interpretation of the words which are now in section 185, in the case that of *Burns v Currell*, to which I have already referred, at page 300E where he said this:

> "**I prefer to make the test whether a reasonable person looking at the vehicle would say that <u>one of its users</u> would be a road user.** In deciding that issue, the reasonable man would not, as I conceive, have to envisage what some man losing his senses would do with a vehicle, nor an isolated user or a user in an emergency. **The real question is: Is some general use on the roads contemplated as <u>one of the users</u>**?"
>
> (my emphasis)

24. The key words here are "one of it uses" and the real question being "is some general use on the roads contemplated as one of the uses"? This interpretation has long been followed in a Divisional Court. For instance, Lord Justice Glidewell in *Chief Constable of Avon v F* 1987 RTR 378 said this:

> "I emphasise that the test is what would be the view of a reasonable man as to the general user of this particular vehicle; not what was the particular user to which this particular defendant put it, either at the time in question or, indeed generally. In other words if a reasonable man were to say, "**Yes, this vehicle might well be used in on the road",** then applying the test, the vehicle is intended or adapted to such use. If that is the case, it is nothing to the point if the individual defendant says, "I normally use it for scrambling, and I am only pushing it along the road on this occasion because I have no other means of getting home."
>
> (my emphasis)

25. Those passages were cited with approval in the case of *Chief Constable of North Yorkshire Police v Saddington* [2001] RTR 227 where Pill LJ added at paragraph 19:

> "The test is whether a reasonable person would say that the **<u>one of its uses</u>** would be use on the roads. That person must consider whether some general use on the roads must be contemplated and not merely isolated use by a man losing his senses."
>
> (my emphasis)

26. In *Winter v DPP* [2002] RTR 14 the judge had to consider whether a bicycle powered by an electric motor but fitted with peddles was to be treated as a "motorcycle" for insurance purposes. At paragraph 8 he stated:

> "Mr. Bryant-Heron invites me to have regard to the policy behind section 143 of the Road Traffic Act 1988, namely to safeguard road users and pedestrians from uninsured injury from a mechanically powered vehicle, by providing for compulsory insurance. In my judgment Mr. Bryant-Heron is

> correct in his submission that a purposive construction should be adopted to Regulation 4(b) to give effect to the intention of Parliament which must be to require the pedals on an electrically assisted pedal cycle to be capable of propelling the vehicle in a safe manner in its normal day to day use. On this construction it is not necessary to read any additional words into Regulation 4(b)".

27. As the Arbitrator rightly recognised at paragraph 66 of his Award, that is an illustration of a judge interpreting an Act in the light of the purpose for which it was enacted.

28. The tests set out above were followed in *DPP v King* [2008] EWHC 447 (Admin) and were again had regard to in the case of *Conolly v Lancaster* in the Manchester County Court in March 2011 where His Honour Judge Foster had to consider the question in the context of a conventional forklift truck. Having cited various parts of the authorities, he concluded as follows:

> "It seems to me beyond real argument that the test is the one adumbrated by Lord Chief Justice Parker and adopted by Lord Justice Glidewell in *Fleming*. I note that the wording of the section uses roads in the plural rather than road in the singular and is therefore looking at the general use of the vehicle. If one of those uses might be use on a public highway, then the test will be satisfied. However, the text is a mixed test, firstly posing the correct question and then on the facts of the particular case, applying it to the vehicle in question. The fact that a vehicle is capable of being driven on the road is clearly not sufficient although it is a preliminary necessity for consideration of the test."

29. Then in the next paragraph he said this:

> "I have come to the conclusion that a reasonable man would say that the intended user of this vehicle was moving goods within a working environment. The reasonable man would probably acknowledge the possibility of the vehicle being occasionally driven on a public highway, but he would not say it was intended or adapted for that purpose."

30. It is said on behalf of the Appellant that although the test may well have been correctly identified, the conclusion reached by HHJ Foster is wrong, applying the facts as found by him to the law. I have to say, for my own part, that I have some difficulty reconciling the conclusions reached by HHJ Foster, with the proper application of the facts to the legal test that he identified. It seems to me that if he had applied the legal test, which he had just identified, to the facts that had had found (i.e. that a reasonable man would probably acknowledge the possibility of the vehicle being occasionally driven on a

public highway) then the correct conclusion would have been that the forklift was a motor vehicle for the purpose of the Act, as this was a foreseeable subsidiary use. I also note that HHJ Foster does not refer to the Directive, and he would not appear to have applied *Marleasing* principles.

31. The Divisional Court has not referred to the relevant directive issued in 1972, or current Directive, in any case since that date, but it is clear that the existing common law test has a degree of flexibility. That can be seen particularly clearly in two decisions, namely *Chief Constable of North Yorkshire Police v Saddington* [2001] RTR 227 and *DPP v King* [2008] EWHC 447 (Admin). Those cases were concerned with something called a Go-Ped and a City Mantis. Both were vehicles which the manufacturer specified were not to be used on the roads and indeed could not lawfully be used on the roads, yet both were held to be motor vehicles because one of their foreseeable subsidiary uses was on roads.

32. The words in the second sentence of the passage from the judgment of Lord Parker in *Burns v Currell* that *"a reasonable man would not, as I conceive, have to envisage what some man losing his senses would do with a vehicle, nor an isolated user or an user in an emergency",* are effectively glosses upon the statutory words, which refer simply to a vehicle "intended or adapted for use on the roads." The additional words were described by the Divisional Court in *DPP v King* (at paragraph [17]) as a "narrow qualification", a description with which I agree.

33. In the context of a purposive approach to statutory interpretation, and the application of *Marleasing* principles, any such qualification is likely to be confined to unusual facts. I address below whether in fact such a qualification can survive a purposive approach and an application of *Marleasing* principles.

J. The Purpose of the Statute and *Marleasing* Principles

34. I have already noted that the case of *Winter v DPP* is an example of the purposive interpretation of a statute. I will now turn to the case of *Marleasing* ECC 106/89 which it is common ground sets out the applicable principles as the interpretation of statues in the context of Directives. At paragraph 8 in *Marleasing* it was said as follows:

> "The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 of the Treaty."

35. In his final Award, at paragraph 49 thereof, the Arbitrator rightly accepted that the *Marleasing* principle applied and that he must interpret section 185 of the RTA in the light of the wording and the purpose of the Directive.

36. There are, however, limits to the power of the Court when applying *Marleasing* principles, as the Defendant identified at paragraph 12 of its Skeleton Argument. In the case of *Vodafone 2 v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWCA Civ 446 the Chancellor giving his judgement, with whom Lord Justice Beatson and Lord Justice Anderson agreed, after referring to various cases, said that the principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction (Per Lord Oliver in *Pickstone* at 126B);
>
> (b) It does not require ambiguity in the legislative language (Per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32);
>
> (c) It is not an exercise in semantics or linguistics (See *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115);
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghaidan* at 31);
>
> (e) It permits the implication of words necessary to comply with Community law obligations (Per Lord Templeman in *Pickstone* at 120H-121A; Lord Oliver in *Litster* at 577A); and
>
> (f) The precise form of the words to be implied does not matter (Per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in *IDT Card Services* at 114)."

37. In paragraph 38 of the judgment it was noted that Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:

> 'The only constraints on the broad and far-reaching nature of the interpretative obligation are that:

> (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (Per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in *EB Central Services* at 81) An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment."

38. In this regard the Defendant, at paragraph 12 of Mr. Stephen Worthington QC's Skeleton Argument, points out, consistent with what I have just quoted, the limits to the power of the Court when applying *Marleasing* principles. He quotes from the judgment of Aikens LJ in *Churchill Insurance v Wilkinson* 2012 EWCH Civ 116 at paragraphs 46 to 51, where Aikens LJ analysed the principles in a motor insurance context and quoted the observations that I have just referred to of Sir Andrew Morritt, the Chancellor in the *Vodafone* case. He said himself at paragraphs 37 to 38:

> "The obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular [the obligation]: (1) is not to be constrained by conventional rules of construction; (2) does not require ambiguity in the legislative language; (3) is not an exercise in semantics or linguistics; (4) permits departure from the strict and literal application of the words which the legislature has elected to use; (5) permits the implication of words necessary to comply with Community law obligations; 6) [accepts that] the precise form of the words to be implied does not matter; (7) [is only constrained] to the extent that the meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed."; must not lead to an interpretation being adopted which is inconsistent with the fundamental or cardinal feature of the [national] legislation since this would cross the boundary between interpretation and amendment; (9) cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate."

K. The Directive and its Purpose

39. There are a number of preambles to the Directive from which the purpose of the Directive is clear including the following:

> "(2) Insurance against civil liability in respect of the use of motor vehicles (motor insurance) is of special importance for European citizens, whether they are policyholders or victims of an accident…

…
(3) Each Member State must take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.

40. Paragraph 8, provides that the national law of each Member State should provide for the compulsory insurance of vehicles against civil liability, such insurance to be valid throughout Community territory. Paragraph 10 provides for the possibility of derogation in certain circumstances, for example, by bodies like the Ministry of Defence. Paragraph 11 provides for derogation for specific types of vehicles carrying special plates. Paragraph 12 provides for minimum amounts of insurance. Paragraph 14 provides for the setting up of bodies such as the MIB to guarantee that the victim will not remain without compensation where the vehicle that caused the accident is uninsured or unidentified, and that it is important to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact. Paragraph 15 provides in relation to exclusion clauses and what derogation arises in relation to stolen vehicles or where there has been violence used in the taking of the vehicle. Paragraph 16 provides for derogation in terms of excesses. Importantly, at paragraph 20 it is provided that, "motor vehicle accident victims should be guaranteed comparable treatment irrespective of where in the Community accidents occur". There is then at paragraph 23 a provision in relation to no derogation in relation to alcohol.

41. It is clear from the preambles to the Directive that there cannot be any blanket derogation based on geography, intent or type of vehicle. Therefore, subject only to the specified derogations, Member States cannot create their own derogations see the case of *Delaney v Sec of State* [2014] EWHC 1785 at paragraph [49] onwards and paragraphs [64] to [67].

42. Turning to the Articles of the Directive. Article 1 (as previously noted) provides:

"Article 1

Definitions

For the purposes of this Directive:

1. 'vehicle' means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled."

43. Article 3, headed "Compulsory insurance of vehicles", provides:

"Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of

the use of vehicles normally based in its territory is covered by insurance."

44. There are then special derogations set out in Article 5 for bodies like the Ministry of Defence. Then Article 9 sets outs the minimum amounts of insurance. Article 10 deals with bodies like the MIB and Articles 10(2) and 10(3) provide:

> "2. The victim may in any event apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.
>
> 3. Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured."

45. In Article 13 addresses exclusion clauses, and provides at Article 13(1):

> "Each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by:
>
> (a) persons who do not have express or implied authorisation to do so;
>
> (b) persons who do not hold a licence permitting them to drive the vehicle concerned;
>
> (c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned."

46. On that final point the Appellant says that the Arbitrator comes very close, in fact, to reaching a conclusion which would be contrary to that provision.

47. In a large number of cases where there has been an attempt by the insurance industry to derogate from the blanket obligation to insure motorised vehicles such an attempt, and associated interpretation of the Directive, has been rejected as contrary to EC law. There are a number of cases in this area which I have been referred to. For example, in the relation to the alcohol derogation being rejected two cases, *Ruiz Bernáldez* which is case number C129/94, in particular see paragraphs 18 and 19 and *Candolin and Others* [*2005*] *ECR I-5745*, in particular at paragraphs 17, 18, 21 and 22.

48. In relation to a person not sitting in a proper seat in a vehicle, any such derogation was rejected in the case of *Farrell* (Case 356/05) where it was said at paragraph 29:

> "Given that, first, the right to derogate from the obligation to protect accident victims is defined and circumscribed by Community law and, secondly, the realisation of the objectives referred to above requires a uniform approach to the insurance cover in respect of passengers at Community level, the Member States are not entitled to introduce additional restrictions to the level of compulsory insurance cover to be accorded to passengers."

(The Appellant would say equally to be accorded to members of the public).

49. Equally extension of the guilty knowledge derogation has been rejected in the *Delaney* case [2014] EWHC 1785 QB and the case of *White v White* [2001] UK HL 9.

50. In the case of *McCracken v Damian Smith, the MIB and Darren Bell* [2015] EWCA Civ 380 a contention of the MIB that a trials motor bike was not within the definition of a motor vehicle within section 185 of the RTA (and so would not have required to be in force a contract of insurance) was abandoned at the beginning of trial by the MIB (as noted by the trial judge, Keith J at paragraph 56 of his judgment). As the judge stated:

"That contention was abandoned at the beginning of the trial., and it is now accepted that the bike had to be insured if it was to be ridden on the road, even though (and this is where the irony comes in) it could not have been ridden lawfully on the road."

That case is another example of something being used on the road and requiring insurance even though it could not be ridden lawfully on the road.

51. Finally, in this area, in the *VNUK* case (C/162/13) any off road accident on private land derogation was rejected. In that case, the court said this at paragraphs 56 to 59:

> "56. In the light of all those factors, and in particular of the objective of protection pursued by the First to Third Directives, the view cannot be taken that European Union legislature wished to exclude from the protection granted by those directives injured parties to an accident caused by a vehicle in the course of its use, **if that use is consistent with a normal function of that vehicle**.
>
> 57. In that regard, it is also important to point out that, according to part A of the Annex to Directive 73/239, as amended by Directive 84/641, the class of direct insurance activity relating to 'Motor vehicle liability' concerns '[a]ll liability arising out of the use of motor vehicles operating on the land' (including the carrier's liability).

> 58. In the present case, it must be pointed out that first, as is apparent from information published by the Commission, the Republic of Slovenia did not, pursuant to Article 4(b) of the First Directive, exclude any type of vehicle from the scope of Article 3(1) of the First Directive. Secondly, according to the information provided by the referring court, the accident which gave rise to the dispute in the main proceedings was caused by a vehicle reversing, for the purpose of **taking up a position in a specific location**, **and therefore seems to have been caused by the use of a vehicle that was consistent with its normal function**, this, however, being a matter for the referring court to determine.
>
> 59. Accordingly, in the light of all of the forgoing considerations, the answer to the question referred is that Article 3(1) of the First Directive must be interpreted as meaning that the concept of 'use of vehicles' in that article **covers any use of a vehicle that is consistent with the normal function of that vehicle**. That concept may therefore cover the manoeuvring of a tractor in the courtyard of a farm in order to bring a trailer attached to that tractor into a barn, as in the case in the main proceedings, which is a matter for the referring court to determine."
>
> (emphasis added)

52. On the facts of that case a tractor was manoeuvring in the courtyard of a farm and someone was knocked off a ladder by the tractor. It is hardly surprising that this was considered to be a use that was consistent with a normal function of that vehicle. However, it is said on behalf of the MIB in the present case, that the use of the dumper truck was not consistent with the normal function of the vehicle, and that where the court is using those words in paragraph 56 (as quoted above) such words would not apply to the vehicle under consideration.

53. I consider that in the case of *VNUK*, where the court is talking about uses which are consistent with the normal function of that vehicle, what they are actually seeking to do is distinguish matters which relate to the normal use of a vehicle, such as moving from A to B or whatever, and the vehicle being used in a way where it is not being used as a vehicle as such. The example given by Mr. Ritchie QC for the Appellant, is that of a situation whereby someone has climbed on to a tractor with a view to picking some apples from an apple tree under which the tractor has previously been parked, and therefore effectively using the vehicle, not as a vehicle, but as a ladder, and in the course of doing so a bucket that the person is holding falls and injuries somebody. He says that this situation, where the use to which the vehicle is being put is not a use of a vehicle that is consistent with the normal function of that vehicle, is what the European court were concerned with. I agree.

L. Applying the Purpose

54. The MIB submits that an essential feature of the definition of motor vehicles in section 185 of the RTA is that it is confined to vehicles intended or adapted for use on roads. It is said that it is not possible to apply *Marleasing* principles to make that definition compatible with a definition of motor vehicle in the Directive because that definition contemplates use anywhere. In

order to make it compatible (says the MIB), it would be necessary to substitute the word "roads" with "land" and to do that would be to go against the grain of the legislation and to involve amendment rather than interpretation, neither of which is permissible. This was, of course, the Arbitrator's conclusion which is the subject of the first ground of appeal.

55. Addressing this ground of appeal, I fundamentally disagree with the proposition that it is not possible to apply *Marleasing* principles to make the definition in section 185 compatible with that of the Directive.

56. It is true that there may be other circumstances where it is possible to contemplate that there may be a difference (and potentially an inconsistency) in the context of an off-road scenario, but that is not this case, and is not a matter for determination today. Nor does any such difference impact upon the conclusions I have reached. It does not go against the grain at all nor is it contrary to the underlying thrust of the legislation applying the principles that I have identified, including those in *Vodafone* and *Churchill* to have regard to the purpose of the RTA when construing section 185 of the RTA and to have regards to the common purpose in the Directive.

57. In the first instance that simply involves applying the common law principles identified by Lord Parker in *Burns v Currell*. It is quite clear, as I have already identified, that the relevant test is, and has always been understood to be, that set out in *Burns v Currell* namely to look at whether "a reasonable person looking at the vehicle would say that one of its users would be a road user" – is "some general use on the roads contemplated as one of the users".

58. In this regard it is quite clear that the purpose of section 185 of the RTA is to provide protection against uninsured drivers in circumstances where one of the users of the item of equipment concerned is use on a road. That is the common law test as has been repeatedly applied in subsequent cases such as the ones that I have already identified. It is also equally clear from *Winter v DPP* any qualification in relation to that is narrowly construed, given that any carving out would derogate from the purpose of the statutory provision.

59. The Arbitrator erred in law in saying and finding, as he did, that it is not possible to reconcile the wording of section 185 with the Directive. It is perfectly possible to do so if one has regard to the common purpose of the Road Traffic Act 1988 and the Directive, namely to ensure that if vehicles are used on roads, there is insurance in place, and if there is not, there is redress through the relevant body, here the MIB, for anyone who suffers loss or injury in consequence. This has long been understood to be the purpose of the Road Traffic Act 1988, and it is clear from the preambles and Articles of the Directives that I have quoted, that that is also the purpose of the Directive.

60. I consider that the Arbitrator took his eye off the ball in this case by focusing upon an issue which was not before him which was the outstanding question of whether or not section 185 is compatible with the Article in an off-road scenario. Here we are concerned with an on-road scenario. It seems to me that he erred in law in finding that the two were irreconcilable. That is the first error of law that he committed.

61. I also consider that he erred in law in his application of the principle in *Burns v Currell* because (although he cited the judgment of Lord Parker in *Burns v Currell* and the subsequent cases that followed thereafter), he failed to focus upon the opening words of what was said by Parker LJ at page 300E, namely where he stated "I prefer to make the test where a reasonable person looking at the vehicle would say that one of its users would be a road user" and his conclusion that the real question is, "is some general use on the roads contemplated as one of the users." That is the established test at common law, and it can be applied in the same manner both at common law and applying *Marleasing* principles in the context of the Directive.

62. The words, "in deciding that question, the reasonable man would not, as I conceive, have to envisage what some man losing his senses would do with a vehicle; nor an isolated user or a user in an emergency", do not appear in section 185 and have long been regarded as a "narrow qualification" (see *DPP v King*). What is being interpreted are the words of the statute itself. When interpreting those words it will, in most cases, not be necessary to go beyond asking whether a reasonable person looking at the vehicle would say that one of its users would be road user. However, a question arises as to whether there can ever be a situation where there is an isolated user or user in an emergency which is to be carved out so that the vehicle would not be a motor vehicle within section 185 applying *Marleasing* principles in the context of the Directive.

63. I do not consider that it would be appropriate for me to determine that as a matter of law in the context of this application because it is not necessary for me to do so, and it is possible that there may be factual scenarios which may arise in the future where there may still be some scope for such a carve-out, for example in an emergency type scenario. However, my view is that the writing is on the wall, having regard to cases such as *Chief Constable of North Yorkshire v Saddington* and *DPP v King* from which it is clear that any qualification is to be narrowly construed, and the facts of those cases are good illustrations of that because those are cases where the manufacturer effectively forbade them to be used on the road, and it was not lawful for them to used on the road, yet they were found to be motor vehicles.

64. Applying a purposive approach to statutory interpretation, and applying *Marleasing* principles in the context of the Directive, there may well be another case, and it is not this case, where it is necessary to determine whether in fact that gloss, as I have put it, or qualification, can in fact survive the modern approach to purposive interpretation and the application of *Marleasing* principles in the context of the Directive, but that is for another day and another case.

65. In the present case the second error of law which was committed by the Arbitrator was that he failed to apply the test at common law set against the backdrop of the purpose of section 185 of the RTA.

66. The third error of law of the Arbitrator was that, although he identified the appropriateness of having regard to the purpose of the statute (see paragraph 66 of the Award), he failed to do so, and have regard to the purpose of the

provision in the context of both the Road Traffic Act and the Directive. The reason why he did not do so is reasonably clear, and is the result of his first error of law in regarding the statute and the Directive as incompatible. The Arbitrator unduly focussed upon the difference between "road" and "land" and a scenario which could arise in another case, but did not arise in the present case.

67. What he should have done was focus on the purpose of the statutory provision, which is a perfectly proper approach to interpretation, and if one applies a purposive approach to the interpretation of the statute, it would be consistent with that purpose to find that a scenario where someone steals a vehicle, where a reasonable person looking at the vehicle would say that one of its users would be road user, would be covered by the provisions of the RTA, including the MIB provisions that we are concerned with.

68. Such a conclusion would have been fortified, if section 185 was construed applying *Marleasing* principles and regard had to the purpose of the Directive that I have already identified. It is very much in accordance with the purpose, both at common law, under the statute, and also applying *Marleasing* principles under the Directive, that there would be cover in a scenario such as the present.

69. The final respect in which I consider that the Arbitrator erred in law was in relation to what he said about lawfulness. He stated as follows:

> "77. Would the reasonable person have contemplated a subsidiary but still general use (as opposed to an isolated or irregular use) of the earth mover on a road.
>
> 78. In my view the answer to that question is no.
>
> 79. A reasonable person would not have contemplated the use of the earth mover on a road unless that use had been lawful"

70. It is clear that what the Arbitrator says at paragraph 79 of the Award colours what he says at paragraphs 77 and 78, and those paragraphs themselves have to be read subject to what I have said about his other error of law. I disagree with what the Arbitrator says at paragraph 79, and consider that he erred in law when he said that a reasonable person would not have contemplated the use of the earth mover on a road unless that use had been lawful.

71. It is quite clear from a number of cases that it is possible, and it can be contemplated by a reasonable person, that an item, be it an earth mover or whatever, can be used on a road in circumstances where its use on a road is unlawful. Cases such as *Chief Constable of North Yorkshire Police v Saddington* and *DPP v King* are illustrations in point.

72. I consider that when contemplating the use of an earth mover on roads, a reasonable person would contemplate what thieves and criminals might do and

might use the item to do, such as take it from a quarry and drive it, as part of a theft, on public roads. I consider that such a conclusion is entirely consonant with the purpose both of the statute and with the purpose of the Directive and that in reaching a contrary conclusion, which appears to have coloured the findings that he made, when the Arbitrator applied the facts to the law, that is an additional respect in which he has erred in law.

73. I accordingly find that the Arbitrator erred in law in the respects I have identified. That leaves the question as to whether to remit the matter in question for reconsideration by the Arbitrator based on the correct legal test that I have identified and applying the facts thereto. I am satisfied that it would be inappropriate for me to do so in circumstances where the Arbitrator has made comprehensive factual findings in the present case which if one now applies them to the correct legal test, which I have identified, leads to but one conclusion and that conclusion is that this dumper truck was indeed a motor vehicle within the meaning of section 185 of the RTA applying the common law authorities and *Marleasing* principles.

74. In this regard I refer back to the factual findings of the Arbitrator that I identified earlier on in my judgment. Of those matters, which are found as a matter of fact in the Award, particular regard is to be had to those in paragraph 81 where the Arbitrator found it may have been possible to render the use of the dumper truck on a road lawful; the fact that some wider Bell articulated dumper trucks have been registered for road use, that is paragraph 43(vi) of the Award; the fact that some Bell 50Ds have been used at China clay quarries in Cornwall and registered for road use to enable them to take clay from a quarry via a public road to another site, that is paragraph 43(vi) of the Award quoting Mr Pearson's evidence; the fact, based again on the expert evidence of Mr Pearson, that plant hire businesses offered articulated dumper trucks for hire, DVLA registered, and that is obviously for use on roads, and insured for £1,100 a week (paragraph 43 (vii) of the Award); the fact, quoted at paragraph 46 of his Award, that Richard Marshall hired out Bell articulated B30D dumper trucks with "low ground pressure tyres [which] are very advantageous on all roads and dig and tip areas", and "All machines come with up to date service records, certificates of newness, daily tick sheets and insurance documentation" (though the Arbitrator noted there was no evidence as to what insurance would be provided) and the fact that a Bell B30D dumper truck had been photographed on Seaford beach in East Sussex, a public place. In highlighting the above facts I confirm that I also considered the additional factual matters which Mr. Stephen Worthington QC identified to me during the course of his submissions,

75. If one overlays the actual factual findings of the Arbitrator, in particular those I have identified above, to the correct legal principles that I have identified, as set out in *Burns v Currell* applying a purposive approach to interpretation of the statute and applying *Marleasing* principles in the context of the Directive, then there is only one conclusion which can be reached and that is that this dumper truck was a motor vehicle within section 185 of the RTA.

76. It is accepted by the MIB that if, as I have found, the dumper truck is a motor vehicle within section 185, then since it being used on the road at the time of

the accident, that is a use which was required to be insured under section 145 of the RTA. On that basis the MIB does not seek uphold the Arbitrator on that issue.

77. Accordingly, for the reasons I have given, I find that the Arbitrator erred in law in the respects that I have identified and that applying the factual facts found by the Arbitrator the dumper truck was a motor vehicle within section 185 of the RTA, and therefore required to be insured.

78. In the above circumstances I set aside the Award in whole under section 69(7)(d) of the Arbitration Act 1996, and declare that the dumper truck was a motor vehicle within section 185 of the RTA, and therefore required to be insured, and in consequence the MIB was under a liability to the Appellant.
