Mind Your Language!

Interpreting EU Law Post-Brexit Against Other Language Versions - *Covea Insurance Plc v Greenaway and Rocks* [2021]

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In this case note, Sarah Crowther QC, Dan Clarke and Joshua Cainer consider the recent appeal in *Covea Insurance Plc v Greenaway and Rocks* [2021] 3 WLUK 379. This was an appeal from a case management decision in which a motor insurer sought permission to obtain factual expert evidence as to the meaning of the word 'stolen' in other language versions of the Sixth Motor Insurance Directive (Directive 2009/103/EC).

They consider that the Court was wrong, as a matter of legal principle, to entertain the introduction to the proceedings of factual evidence as to the interpretation of EU law in other Member States (four experts on each side). Such an approach was not justified under EU law interpretative principles even as they stood prior to the UK leaving the EU. It also appears to be prohibited under the European Union Withdrawal Act 2018 ('EUWA 2018').

Background

The claimants had been seriously injured in a road traffic accident in 2018. They had been

passengers in a vehicle driven by their friend, the first defendant. All were 16 years old and too young to drive. The car belonged to another passenger's father. The claimants brought an action against the first defendant (the driver), the second defendant (the driver's insurer) and the third defendant (the MIB) and sought for the insurer to indemnify the first defendant under section 151(5) of the Road Traffic Act 1988.

The insurer's case was that the car had been taken without permission and that all the occupants knew that. It sought to rely on section 151(4) to escape the obligation to provide indemnity on the basis that the

claimants knew or had reason to believe that the car had been unlawfully taken or stolen. The claimants argued that section 151(4) was not compliant with Article 13 of the Motor Insurance Directive. This required that the claimants knew the vehicle had been stolen.

The issue in the case was therefore whether, on a proper interpretation, the use of the word 'stolen' in the Motor Insurance Directive meant that a vehicle had to have been 'stolen' in the same sense that the term is used in the Road Traffic Act 1988 or whether it was sufficient that a vehicle had, in terminology used in the Theft Act 1968, been 'taken without the owner's consent'.

Effect of EUWA 2018

The effect of the EUWA 2018 is to convert the body of EU law as it applied to and within the UK before 31 December 2020 into domestic law. There are five principal categories of 'retained EU law'. These include direct EU legislation (section 3(1)), saved directly effective rights (section 4), EU-derived domestic legislation (section 2), retained case law (section 6(7)) and retained general principles of EU law (section 6(7)).

To the extent that the Road Traffic Act 1988 is an enactment partly made for the purpose of implementing, or otherwise relating to, the UK's previously existing EU obligations under the Motor Insurance Directive, it falls within the definition of EU-derived domestic legislation (section 1B(7)).

It is worth noting, however, that non-directly effective EU legislation, such as directives, are *not* retained EU law – directives are expressly excluded from the category of direct EU legislation (section 3(2)(a)) and are only retained insofar as any directly effective rights have been recognised by the CJEU or any UK court or tribunal prior to IP completion day (section 4(2)(b)). The Motor Insurance Directives themselves, therefore, form no part of the law of England and Wales.

Prior to 31 December 2020, the obligation on the courts of England and Wales would have been to interpret the Road Traffic Act 1988 consistently with the purpose and effect of the Motor Insurance Directive, with the assistance of potential reference to the CJEU in the event that the meaning of the Directive was unclear, in order to ensure uniformity of interpretation across all EU member states.

Whilst legal continuity may have been a main objective of the EUWA 2018, it is clear that there are significant differences of approach which will inevitably lead to divergence between the English 'snapshot' of EU law as at 31 December 2020 and the 'real thing' over time. In particular, section 5(1) of the EUWA 2018 prohibits the future supremacy of any EU law post-dating 31 December 2020; section 6(1) renders any post-31 December 2020 CJEU decisions non-binding and removes the power to refer questions of law to the CJEU; and there are references throughout the 2018 Act to retained EU law being relied upon only insofar as it remains unmodified on or after 31 December 2020 by domestic law.

Further, section 6(3) provides that any question as to the validity, meaning or effect of any retained EU law is to be decided in accordance with any retained case law and retained general principles of EU law – a kind of domesticised *Marleasing* obligation – but also having regard to the limits of the competences of the EU. Under section 6(4)-(5) and regulation 4(2) of the Retained EU Case Law Regulations, the Supreme Court and Court of Appeal are also empowered to depart from retained case law (but not the High Court of England and Wales). The explanatory notes to the EUWA 2018 (at paragraph 111) also clarify that the domestic court's interpretative obligations under section 6(3) include taking a purposive approach to the meaning of retained EU law where it is unclear. This makes clear, if there was any doubt, that interpreting the meaning of retained EU law in accordance with retained general principles of EU law includes those principles relating to legislative interpretation.

The retention and interpretation mechanisms in the EUWA 2018 are designed deliberately not to vest in the courts of England and Wales the role that is carried out within the EU by the CJEU, namely, to give opinions on the meaning, validity and effect of EU law for the EU *itself*, but instead to perform a domestic function.

Their roles are completely different because the CJEU is concerned with identifying and ensuring a consistent application of EU law across all of the member states. Having severed ties from the interpretative community of EU member states as regards EU law, the courts of England and Wales have no such role. Indeed, the law which is being interpreted is now solely English law, albeit that it derives from EU law. The idea that the purpose of the EUWA 2018 was to ensure that the courts of England and Wales construed retained EU law with an EU interpretative philosophy of uniformity across the Union would be an odd way of 'taking back control'. The issue in the *Greenaway* case, remains, therefore, one of English law, albeit subject to a hybrid methodology of interpretation by reference to both retained EU law and domestic law more generally.

Interpretative methodology

The question arises what does this hybrid methodology of statutory interpretation, which the High Court must apply to the meaning of 'stolen' in the Road Traffic Act 1988, really involve? A full transcript of Martin Spencer J's judgment is awaited. In the meantime, it is hard to discern how this central question has been grappled with. In particular, how should foreign language versions of EU law be treated?

As we have mentioned above, section 6(3) means that a domesticised, purposive *Marleasing* interpretative obligation lives on in respect of domestic legislation which is EU-derived. In other words, whether or not the CJEU has actually had opportunity to consider the specific point, the legislation will still have to be read in accordance with the relevant directive, here the Motor Insurance Directive.

The fact that instruments of EU law are drafted in several languages and that all different language versions are equally authentic was considered by the CJEU in *CILFIT Srl v Ministro della Sanita (Case C-283/81)* [1982] ECR 3415 [1983] 1 CMLR 472. The Court held that 'an interpretation of a provision of Community law thus involves a comparison of the different language versions' (paragraph [18]). It added that, even where different language versions are 'entirely in accord with one another', the legal concepts do not necessarily have the same meaning in Community law as they do in the law of the various Member States (paragraph [19]).

The proper meaning of the reasoning in *CILFIT* with regard to when a reference to the CJEU was needed was considered by the UK Supreme Court in *R (ZO (Somalia)) v SSHD* [2010] UKSC 36, [2010] 1 WLR 1948. At paragraph [51] the Court explained that there is no need for a national court to conduct an analysis of how the question of EU law might be approached in all of those other courts. Lord Kerr stated: 'what is required is for the national court to conduct a careful examination of the reasoning underlying any contrary argument ranged against the view that it has formed'. Only if such argument could be accepted, should a reference to the CJEU be made.

So, what approach should be taken now in a case where the courts of England and Wales cannot exclude a contrary approach to the interpretation it prefers, but the power to refer no longer exists? Does it follow that in fact the courts of England and Wales now have to take on the task of analysing how the question might be approached in the courts of each of the member states of the EU?

We are of the view that this was never what was required. The interpretations adopted in member states are downstream of the source. They do not inform either the English courts or the CJEU as to the correct interpretation of EU

legislation. Further, all the indications in the EUWA 2018 are nothing has changed and that this is not what Parliament has intended for the domestic courts to do.

First, section 3(4) of the EUWA 2018 is instructive: it contains an explicit requirement in respect of the retained category of direct EU legislation that only the English language version is 'snapshotted' into domestic law. It then adds that this provision 'does not affect the use of the other language versions [of direct EU legislation] for the purposes of interpreting it'. The question is whether this provision is neutral, permissive of reference to foreign language versions, or mandatory. Section 3(4) is neutral on this question, the answer to which must be found in the status of retained general principles of EU law, which include principles of legislative interpretation. That said, as a starting point, the explanatory notes (paragraphs 63 and 90) suggest that this reference is permissive.

Secondly, section 6(7) expressly defines retained general principles of EU law 'as those principles are modified by or under this Act or by other domestic law from time to time'. As already set out above, the UK's departure from the EU includes departure from the EU's interpretative community, such that the courts of England and Wales were necessarily intended to have a different interpretative role from the CJEU post-31 December 2020. In that light, Martin Spencer J was wrong to consider that the courts of England and Wales were being asked to put themselves in the position of the CJEU when their roles are now different. Accordingly, any general principle of interpretation requiring reference to foreign language versions of retained EU law will have been modified by necessary implication of the EUWA 2018 and the European Union (Withdrawal Agreement) Act 2020 to render any such requirement non-mandatory at the very least.

Thirdly, and in any case, section 3(4) does not apply to directives, because they are not direct EU legislation. Nor do the interpretative obligations directly apply under section 6(3), because directives are not retained EU law except to the extent that individual provisions have previously been held to have given rise to directly effective rights. The relevance of a directive to the interpretation of EU-derived domestic legislation in a case such as this is its existence as part of the legislative history. In that sense, the wording of a directive or any other non-retained EU law has no special status and is to be treated in the same way as legislative history is treated generally under English law principles of statutory interpretation. It would be highly unusual for legislative history to require expert evidence, under ordinary English law principles. In any event, the short note of the decision suggests that the expert evidence was not being sought in respect of the legislative history of the Motor Insurance Directive, but rather its subsequent interpretation by other courts.

Fourthly, paragraph 3 of Schedule 5 to the EUWA 2018 states that where it is necessary for the purpose of interpreting retained EU law in legal proceedings, to decide a question as to the meaning or effect in EU law of any EU instrument, the question is to be treated for that purpose as a question of law. This provision appears to apply broadly to EU law, including as it currently exists and not simply to matters of retained EU law, which makes sense given that the courts are permitted to have regard to ongoing developments in EU law post-31 December 2020 (section 6(2) of the EUWA 2018).

This provision therefore does apply to determining the meaning of the Motor Insurance Directives, even though they are not retained EU law. It also explicitly rules out the possibility of treating the EU instrument or EU law as 'foreign law' as traditionally viewed by the English common law – namely as a question of fact. In our view, this means that it is impermissible for the courts of England and Wales to receive evidence about the meaning or effect of the Directive in the national laws of any of the Member States or indeed as a matter of EU law itself. It is also material in this

regard that no provisions of the EUWA 2018 encompass the possibility of receiving foreign law expert evidence as to how that language is interpreted by the domestic courts of other Member States.

Put shortly, the court is responsible for determining the meaning and effect of the Motor Insurance Directive, or indeed any EU law, retained or otherwise. It cannot refer to the CJEU and it certainly cannot defer to the approaches prevailing in other Member States unless these have already been analysed in existing CJEU authority. It is not permitted to treat the question as one of fact. Any question of interpretation is a question of law it is required to decide for itself. To rely on expert evidence as to interpretation by foreign courts as part of their domestic law would be to usurp the judicial function which holds a monopoly over deciding questions of law.

Conclusion

We look forward to a full judgment transcript becoming available. We also await the trial with interest to see what use the court makes of the numerous expert witnesses whose evidence will now be obtained in accordance with the case management direction.

Issues of this nature will be common in the future. And not just in cases involving the provisions in issue here. In many areas (for example, financial services, environmental, consumer, and employment law) EU law, EU retained law and English will continue to co-exist cheek by jowl, raising questions of interpretation. It is important for the courts to establish a consistent approach as to how the interpretative obligations are to be undertaken and what evidence parties will be permitted to adduce in support of their cases.

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