

IN THE COURT OF APPEAL (CIVIL DIVISION)

Appeal No.: CA-2025-001268

ON APPEAL FROM THE HIGH COURT OF JUSTICE

Claim No.: G90CF037

KING’S BENCH DIVISION (MANCHESTER DISTRICT REGISTRY)

His Honour Judge Pearce (sitting as a Judge of the High Court)

BETWEEN:

DANIEL MAKIN

(by his mother and litigation friend Ms VICTORIA BARBER)

Appellant/ Claimant

-and-

~~THE RESTAURANT MUSE LIMITED~~ (Discontinued)

PROTEC SECURITY GROUP LIMITED

Second Defendant

QBE INSURANCE (EUROPE) LIMITED

Respondent/ Third Defendant

**APPELLANT/ CLAIMANT’S REPLACEMENT SKELETON ARGUMENT: 2
SEPTEMBER 2026**

References to the Judgment below take the form [Jx] with ‘x’ being the paragraph number.

References to the Core and Supplemental bundles take the form [Cx] and [Sx]

A. Introduction

1. On 6 August 2017, the Appellant/ Claimant (“Mr Makin”) was assaulted by a door supervisor outside the Muse Bar and Restaurant in Oldham. As a result, two days later he suffered a stroke that has left him with profound neurological disability. On 11 July 2023, His Honour Judge Sephton KC determined that the company which employed the [S/149] door supervisor, Protec Security Group Limited (“Protec”), the Second Defendant, was vicariously liable for the assault and Mr Makin’s injuries, including the stroke.

2. Mr Makin will not recover damages from Protec because it went into liquidation the day before the liability trial. Therefore, having obtained judgment against Protec, Mr Makin joined the Respondent (“QBE”), Protec’s liability insurer for the relevant period, as a (third) defendant to the claim pursuant to the Third Parties (Rights against Insurers) Act 2010 (“the 2010 Act”). It is common ground that Mr Makin has the right in principle to bring such a claim and that, subject to any coverage defences that QBE may have, the relevant policy (a “Security & Fire Protection” policy no. S42426004, “the Policy”) [C/174] responds to it in principle.
3. In a judgment dated 11 April 2025 (“the Judgment”), His Honour Judge Pearce (“the Judge”) [C/87] dismissed Mr Makin’s claim against QBE. He held that QBE was entitled to decline cover because Protec had breached the Policy in the following three respects:
 - (i) First, Protec failed, in breach of Claims Condition 3.5, to notify QBE of the assault promptly after it occurred.
 - (ii) Second, Protec failed, in breach of Claims Condition 2, to forward the letter of claim that Mr Makin had sent to the proprietor of the restaurant, The Restaurant Muse Limited (formerly the First Defendant), which then forwarded it to Protec.
 - (iii) Third, Protec failed, also in breach of Claims Condition 2, to forward the letter of claim that Mr Makin had sent to Protec itself.
4. To reach this conclusion, the Judge had to reject Mr Makin’s argument that the Claims Conditions were not conditions precedent to liability, but rather were clauses that, if breached, triggered a contractual discretion which, by reason of a ‘*Braganza*’ implied term, QBE had to exercise on rational grounds. The Judge preferred QBE’s argument that the obligations in question were straightforward conditions precedent to liability. However, the Judge went on to make a finding of fact that, if he was wrong about the proper construction of the clause, QBE did not exercise its discretion on rational grounds.¹
5. In this appeal, Mr Makin submits that the Judge erred in the following three respects:

¹ See [J94]-[J116].

- (i) Ground 1: he wrongly interpreted Claims Condition 3.5 and therefore wrongly held that Protec breached this condition (see section C below).
 - (ii) Ground 2: he wrongly interpreted Claims Condition 2 and therefore wrongly held that Protec breached this condition (see section D below).
 - (iii) Ground 3: he wrongly treated the Claims Conditions as conditions precedent to liability and therefore wrongly concluded that Protec’s breaches gave QBE an absolute right to decline its claim (see section E below).
6. The Judge refused permission to appeal on Grounds 1 and 2 but granted permission on [C/145] Ground 3. By Order dated 23 September 2025, Stuart-Smith LJ granted permission on [C/150] Grounds 1 and 2. To succeed, Mr Makin needs to win on either (i) Grounds 1 and 2 or (ii) Ground 3.
7. QBE has filed a Respondent’s Notice, permission for which was granted by Stuart-Smith [C/31] LJ on 23 September 2025. On 10 October 2025, QBE filed an application to amend its Respondent’s Notice, to which Mr Makin has consented. The issues raised by the Respondent’s Notice (as amended) are:
- (i) Was the Judge wrong to hold that QBE was bound by the judgment of His Honour Judge Sephton KC for the purpose of the 2010 Act? (This issue only arises if Mr Makin succeeds in his appeal.)
 - (ii) Was the Judge wrong to hold, in the context of Claims Condition 3.5, that: “*judged at the time of the incident or its immediate aftermath, no reasonable insured could be expected to have formed the view that it involved circumstances that “may give rise to a claim” under the policy*”? [J56] (This issue only arises if Mr Makin succeeds on Ground 1.)

B. The Claims Conditions

8. The section of the Policy headed “*Claims Conditions*” begins as follows:

“The following Conditions 1-10 must be complied with after an incident that may [C/300] give rise to a claim under your policy. Breach of these conditions will entitle us to refuse to deal with the relevant claim.”

This clause is referred to as the “Claims Conditions Clause”.

9. Claims Condition 2 (“*Writ, summons, etc*”) provides, so far as relevant, as follows:

“You must not respond to any letter... sent to you in connection with any accident, incident or occurrence that may relate to any claim under your policy or which may give rise to a claim under any Section of your policy. You must immediately send them to Sutton Specialist Risks Ltd unanswered by return of post, or to us or legal representatives as may otherwise be advised by us.”

(Sutton Specialist Risks Limited (“SSR”) was QBE’s agent for receiving notice of potential claims or other notifiable circumstances.)

10. Claims Condition 3 (“*Notification of claims*”) provides, so far as relevant, as follows:

“You or any other party insured by your policy must inform Sutton Specialist Risks Ltd:

...

3.5 within as soon as practical [sic] but in any event within thirty (30) days in the case of any other damage, bodily injury, incident, accident or occurrence, that may give rise to a claim under any [sic] your policy but not separate [sic] specified above.”

C. Ground 1 – Claims Condition 3.5

11. As set out above, Claims Condition 3.5 required Protec “*within as soon as practical but in any event within thirty (30) days*” to notify SSR of an incident “*that may give rise to a claim*” under the policy.
12. At [J56] the Judge accepted Mr Makin’s argument that the incident *itself* was not notifiable:

“I accept the Claimant’s argument that, judged at the time of the incident or its immediate aftermath, no reasonable insured could be expected to have formed the view that it involved circumstances that “may give rise to a claim” under the

policy, given that the Claimant was able to get up and walk away after being restrained.”²

13. The Judge wrongly went on, however, to hold that the clause was nevertheless engaged because Protec’s director, Mr Lucas, acquired knowledge before the 30-day cut-off that would lead a reasonable insured to think that a claim may arise (such knowledge being the fact that the door supervisors in question were being interviewed by the police): see at [J55]-[J58].
14. The error the Judge made here was, in effect, to read Claims Condition 3.5 as if it read as follows (i.e. with the addition of the words underlined):

*“**You** or any other party insured by **your** policy must inform Sutton Specialist Risks Ltd within as soon as practical but in any event within thirty (30) days in the case of any other damage, bodily injury, incident, accident or occurrence, of when you become aware of facts that would lead a reasonable person to think that it may give rise to a claim under any your policy but not separate specified above.”*

15. In *Zurich Insurance plc v Maccaferri Ltd* [2016] EWCA Civ 1302, [2018] 1 All ER (Comm) 112 the insured, a supplier of Spenax guns, was informed that an incident had occurred involving a Spenax gun and that it should be recalled and kept for investigation. Several months later, it learned that the incident involved an injury, but there was no indication that the gun was faulty or that a claim was being intimated. It only notified insurers the following year after being joined as a Part 20 defendant to the proceedings that the employee had brought against the employer.
16. The policy in that case required notification “*as soon as possible after the occurrence of any event likely to give rise to a claim*”. Insurers argued that this meant that notice had to be given as soon as the insured became aware (or should have become aware) of an event that was likely to give rise to a claim. Christopher Clarke LJ, with whom Black LJ agreed, rejected this argument, saying at [33] that the clause did not impose on the insured an obligation to carry out something of a “*rolling assessment as to whether a past event is*

² As indicated above, QBE challenges this conclusion by its Respondent’s Notice. See further paragraph 23 below.

likely to give rise to a claim (and possibly as to whether an event has happened at all) as circumstances develop.” At [34] he concluded:

“The question therefore is whether, when the event occurred (an occasion not limited to the exact moment) it was likely to give rise to a claim. That will depend on whether in the light of the actual knowledge that the insured then possessed a reasonable person in his position would have thought that it at least 50% likely that a claim would be made.”

17. The only difference between the clause in *Maccaferri* and Claims Condition 3.5 is that the former had a higher notification threshold (“*likely to give rise*” rather than “*may give rise*”). Although the Judge seems to have thought that this made all the difference (see at [J57(i)]), it has no bearing on the issue at hand, which is whether it is permissible when determining whether the incident was one that may give rise to a claim to take into account knowledge which the insured acquired *after* the incident. The Judge was therefore wrong to distinguish *Maccaferri*.
18. The Judge was also wrong to think that the decision of Teare J in *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm), [2009] 2 All ER (Comm) 873 supported QBE’s position. In *Aspen*, the issue was when the insured should have notified insurers of a fire that occurred in a tunnel in which it was working. The relevant notification clause was as follows:

“The Assured shall give to [insurers’ agent] immediate written notice with full particulars of... any occurrence which may give rise to indemnity under this insurance.”

19. Teare J held that the insured, which did not notify insurers until it received a letter before action some three years after the fire, failed to comply with this clause. At [48] he held that the fire was:

“an occurrence which gave rise to a real risk that the [insured] might claim an indemnity under its policy of insurance in respect of claims made against it in connection with the fire. Such a risk was one which would have been recognised by a reasonable man having the knowledge that [the insured] possessed.”

20. *Aspen* is therefore an entirely different case, because there it was held that the incident in question was *itself* notifiable, whereas in the present case the Judge held that it was not, because there was nothing about the assault and its immediate aftermath that would lead a reasonable person to think that it might give rise to a claim.
21. Finally, it is nothing to the point that by the time Protec's director, Mr Lucas, first learned about the incident, it had become reasonably apparent that it may give rise to a claim. As *Maccaferri* explains, the question is whether the incident itself had the necessary characteristic (i.e. that it was an incident that may rise to a claim) *at the time it occurred*, not whether it had gained that characteristic by the time the insured first acquired knowledge of the incident. (This assumes, of course, that it is only Mr Lucas' knowledge that counts. In fact, there is no reason why the knowledge of the door supervisors should be disregarded for this purpose. If the incident itself would have led a reasonable person to think that a claim may arise, then the door supervisors' knowledge would have been attributable to Protec for this purpose as they were responsible for its actions at the time.)
22. For all these reasons, the Judge was wrong to hold that Protec breached Claims Condition 3.5. The correct analysis is that the condition was not engaged because, as the Judge (correctly) found, the incident itself was not one "*that may give rise to a claim*".

Respondent's Notice – Ground 1

23. As noted above, QBE contends by way of its Respondent's Notice that the Judge was wrong to hold that no reasonable person would have thought that the incident *itself* was one that may give rise to a claim. It argues:
- (i) First, the fact that Mr Makin got up and walked away from the incident does not militate against the possibility of a claim, because the tort of battery is actionable per se.
 - (ii) Second, the fact that Protec completed incident reports means that it considered that there may be claim, since otherwise there would be no reason to complete the documentation.
24. The Court should reject these arguments:

- (i) The Judge’s conclusion is by its nature an evaluation of primary facts. It is well established that, absent some error of principle, an appellate should not interfere with such an evaluation: see *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577 per Clarke LJ at [16]; *Various Eateries Trading Ltd v Allianz Insurance plc* [2024] EWCA Civ 10; [2024] Bus LR 810 per Males LJ at [57]-[59].
- (ii) The Judge would of course have appreciated that the tort of battery is actionable per se. But the theoretical possibility of a claim does not, without more, meet the notification threshold, which requires “a real as opposed to a fanciful risk” of a claim being made (per Teare J in *Aspen* (supra) at [9]). It was plainly open to the Judge to think that, at the time of the incident, there was no realistic possibility of Mr Makin suing Protec.
- (iii) There is no evidence that Protec filled in incident forms specifically because it anticipated a claim. The mere fact that there was a physical altercation with a customer justifies preparing a report. Furthermore, the Judge did consider the presence of “incident reports” when making his decision, as noted at [J42].
- (iv) In summary, there is no reason for this Court to interfere with the Judge’s conclusion on this issue.

D. Ground 2 – Claims Condition 2

- 25. Under Ground 2, Mr Makin submits that the Judge interpreted Claims Condition 2 incorrectly. This led him wrongly to conclude that Protec was obliged “*immediately*” to send either (or both) of the letters of claim to SSR, when in fact no such obligation arose on the proper interpretation of the clause.
- 26. As the Court will have noted, the Judge also rejected Mr Makin’s alternative argument that Protec was not in breach even on QBE’s interpretation of the clause. Mr Makin no longer pursues this alternative argument. Ground 2 therefore stands or falls on Mr Makin’s interpretation of Claims Condition 2 being accepted.
- 27. The relevant facts are straightforward. On 29 December 2019, Mr Rob Norbury of The Restaurant Muse Limited (“Muse”) forwarded a scanned copy of Mr Makin’s letter of [S/214]

claim addressed to Muse to Protec's director, Mr Lucas. Protec did not send this letter or Mr Norbury's covering email to SSR. On 5 June 2020, Mr Makin's solicitors sent a letter [S/125] of claim to Protec itself, but again Protec did not send the letter to SSR. The first QBE learned of the claim was on 8 July 2020, when Mr Makin's solicitors emailed QBE [S/175] attaching the 5 June 2020 letter.

28. Claims Condition 2 states as follows.

"You must not respond to any letter... sent to you in connection with any accident, incident or occurrence that may relate to any claim under your policy or which may give rise to a claim under any Section of your policy. You must immediately send them to Sutton Specialist Risks Ltd unanswered by return of post, or to us or legal representatives as may otherwise be advised by us."

29. There are two ways to parse the clause:

(i) First:

"You must not respond to any letter... sent to you

(a) *in connection with any accident, incident or occurrence that may relate to any claim under your policy or*

(b) *which may give rise to a claim under any Section of your policy."*

(ii) Second:

"You must not respond to any letter... sent to you in connection with any accident, incident or occurrence

(a) *that may relate to any claim under your policy or*

(b) *which may give rise to a claim under any Section of your policy."*

30. At [J60], the Judge said:

"Whilst it is possible to see how, applying the usual rules of grammar, the Claimant comes to the first and second suggested constructions referred to at [38] above, it is common ground that neither of those meanings in fact makes sense for exactly

the reasons that the Claimant identifies – the first because it would suppose a circumstance in which a letter or similar document gave rise to a claim under the policy; the second because it would suppose that an accident etc. might relate to a claim under the policy.”

The “*first and second suggested constructions*” are those set out in paragraph 29 above.

31. Contrary to what the Judge said at [J60], it was not common ground that neither of these two constructions “*makes sense*”. What Mr Makin said³ was that the two readings were “*problematic*” (essentially for the reasons set out by the Judge in [J60]). But it does not follow that the two readings do not make sense as a matter of language: to the contrary, they do make linguistic sense.
32. At [J61], the Judge set out a third construction (which Mr Makin had himself put forward in his trial skeleton argument below as a rewritten formulation of what the draftsman might have intended to, but did not, write):

“You must not respond to any letter ... sent to you

(a) that may relate to any claim under your policy or

(b) in connection with any accident, incident or occurrence which may give rise to a claim under any Section of your policy.”

33. The Judge held that this was the correct construction, describing it at [J61] as a “*sensible construction*” [J61]. At [J63] he said: “*I have not been able to identify any other meaning of those words other than the Claimant’s third suggested reading*”.
34. It is respectfully submitted that the Judge erred in his approach because he failed to recognise (or to give adequate weight to) the fact that his chosen construction involved a reordering of the words in, and therefore a rewriting of, the clause. It was not therefore simply an alternative to the other two constructions, but required a form of “*rectification by construction*” in the sense considered by Brightman LJ in *East v Pantiles* (1982) 2 EGLR 111.

³ Trial skeleton argument, para. 27.

35. As recently explained by Sir Geoffrey Vos MR, with whom Males and Birss LJ agreed, in *Bellini (N/E) Ltd v Brit UT Limited* [2024] EWCA Civ 435, [2024] Bus LR 1611 at [28]:

“...it [is] only permissible to rewrite [an extension to cover clause] if something has indeed gone wrong with the language used. If not, then the clause would have to be given its natural meaning, if, as was effectively acknowledged also, it was not ambiguous on its face, even if it did provide only limited additional cover beyond the other cover provided [the main insuring clause].”

36. In *Bellini*, the insured claimed that the policy provided cover against business interruption losses caused by the Covid-19 outbreak. The problem was that the relevant clause required that the interruption was caused not only by the disease, but also by physical damage. The insured argued that the physical damage requirement was nonsensical given the nature of the peril, and that the clause should therefore be rewritten to remove it. However, the Master of the Rolls disagreed, holding that nothing had gone wrong with the language of the clause and that it should be given its literal construction.
37. In the present case, the Judge cited *East v Pantiles* when recording Mr Makin’s submissions on the issue (see at [J38(iv)]) and thus was aware that rectification by construction requires that something has “*gone wrong with the language used*” (the formulation of the test in *Bellini*, cited above). However, where the Judge fell into error was to conflate (i) something having gone wrong with the language of the clause (a far higher threshold) with (ii) the clause having a commercially unlikely meaning. As noted above, this mistake may stem from his misapprehension that it was common ground that neither of the literal meanings of the clause “*makes sense*”. In fact, they do make sense; it is just that they do not make as much *commercial* sense as the meaning adopted by the Judge. It is well established, however, that the Court cannot rewrite a contract to give it more commercial sense.
38. It follows that the Judge should simply have chosen between the two constructions set out in paragraph 29 above. In this regard, the proper approach is to adopt the meaning

less favourable to the insurer (the *contra proferentem* rule),⁴ which is the meaning given by the reading at paragraph 29(i).

39. If the reading at paragraph 29(i) is adopted, it follows that Protec did not breach Claims Condition 2. This is because:

- (i) the letters of claim against Muse and Protec were not “*in connection with [an] incident... that may relate to [a] claim under your policy*” since Protec had not yet made a claim under the Policy; and
- (ii) a reasonable person would not think that the letters themselves (as opposed to the incident referred to in the letters) might “*give rise to a claim*” under the Policy.

40. For these reasons, the Court is respectfully invited to uphold Ground 2.

E. Ground 3 – the Claims Condition Clause

41. Ground 3 only arises if the appeal fails on Grounds 1 or 2. It raises the question of whether Protec’s alleged breaches of Claims Condition 2 and/or 3.5 meant that QBE was automatically released from liability under the Policy. The answer to this question turns on the proper interpretation of the Claims Condition Clause: “*Breach of these conditions will entitle us to refuse to deal with the relevant claim*”. Do these words mean that, if the insured breaches a claims condition, then insurers have an *absolute right* to decline cover (QBE’s construction)? Or do they mean that, if the insured breaches a claims condition, then insurers have a *discretion* to decline cover (Mr Makin’s construction)?

42. The Judge preferred QBE’s construction. Mr Makin respectfully submits that he was wrong to do so.

43. The relevant part of the Judgment is at [J84]-[J92]. Mr Makin respectfully endorses much of the Judge’s reasoning here:

- (i) The Judge was right to be cautious ([J85]-[J86]) about following the decision of Ritchie J in *Cuckow v AXA Insurance UK Plc* [2023] EWHC 701 (KB). The clause in that case had different wording (“*if you do not comply with this condition we*

⁴ See Colinvaux’s *Law of Insurance*, 13th ed., at 3-027f.

have the right to refuse to pay your claim”) and the judgment does not set out the full terms of the policy, which means one cannot judge the clause in its full context by construing the policy as a whole.⁵ It also appears that the insured in that case had not made the same ‘discretion’ argument that Mr Makin now makes.⁶

(ii) The Judge was correct at [J89] to regard as persuasive Mr Makin’s point that the words “*condition precedent*” were used on several occasions elsewhere in the Policy. The words were used:

- (a) in Section B, clause 22 (p.31 of the Policy) when setting out what the insured [C/204] must do to benefit from cover against liability under an adjudicator’s award;
- (b) at Section I, “Cover”, clause 2 (p.111 of the Policy) when qualifying the [C/284] Policy’s D&O cover;⁷ and
- (c) at Section J (p.117 of the Policy) when setting out the “*minimum standards*” [C/290] that the insured must operate to benefit from the fidelity guarantee.

⁵ See in this regard *Cox v Bankside Members Agency Ltd* [1995] CLC 180 at 203, cited at [J69], where Phillips J (as he then was) approved the following passage from an insurance law textbook: “*It is not always easy to decide whether clauses requiring notice of a claim are conditions precedent to the liability of the insurer under the policy, or merely terms of the policy for breach of which the insurer’s only remedy is to claim damages for the extra expense flowing from the insured’s failure to give notice within the proper time. Little more can be said than that it is a matter of construing the policy as a whole.*”

⁶ Mr Makin’s primary argument is that *Cuckow* is distinguishable. But, if necessary, he will argue in the alternative that Ritchie J was wrong to regard the relevant clause in that case as a condition precedent to liability.

⁷ “*It is a condition precedent to our liability that where cover is provided for this Section I you have complied with any subjectivities or condition precedents set out in our quotation, unless we agree in writing and endorsed to the schedule that any such subjectivity or condition precedent shall not be applicable to the insured.*”

- (iii) Similarly, the Judge was right to distinguish *Aspen v Pectel*, since in that case the relevant clause stated: “*The liability of Underwriters shall be conditional on ... the Assured ... observing the terms and conditions of this insurance*”.
 - (iv) The Judge was right at [J90] to say that the words “*will entitle us to refuse to deal*” connote a “*further process interposed between the non-compliance with the Claims Conditions and the refusal of indemnity*”. Unlike phrasing such as “*No claim... shall be payable unless the terms of this condition shall have been complied with*” (as in *Welch v Royal Exchange Assurance* [1939] 1 KB 294), the words here suggest that a conscious decision to decline cover will need to be taken by QBE.
 - (v) Finally, the Judge correctly observed at [J91] that Mr Makin's interpretation of the Claims Condition Clause strikes a commercially reasonable balance between (a) a condition precedent to liability, which can be overly burdensome on insureds, and (b) a term whose breach only results in a claim for damages, which may not serve much practical purpose for insurers.
44. Where it is respectfully submitted the Judge went wrong was at [J92], where he said that Mr Makin’s construction “*does an injustice to ... language*”, and later added:
- “*...to say that a particular set of circumstances “will entitle” a party to act in a certain way does not contain within it the implication that there is some contractual limit on the party to take that action.*”
45. Contrary to the Judge’s analysis here, the word “*will*” means (or at least is capable of meaning) that, if the insured breaches a Claims Condition, then QBE will have an entitlement to decline cover. But it does not necessarily follow that QBE’s entitlement is absolute. It does not do an injustice to language to say that, if QBE would have the entitlement to decline cover if the Condition is breached, then its ability to go on to exercise that entitlement is nevertheless fettered by the requirement to do so rationally or on reasonable grounds.
46. As Mr Makin submitted below (see [J70]-[J71]), if QBE wanted the Claims Conditions to be conditions precedent to liability, rather than conditions whose breach gave it a discretion to decline cover, then it could easily have said so in clear rather than ambiguous terms, as indeed it did elsewhere in the Policy. As Longmore LJ said in

Dornoch Ltd v Royal and Sun Alliance plc [2005] 1 CLC 466 at [19]: “It is a well-established and salutary principle that a party who relies on a clause exempting him from liability can only do so if the words of the clause are clear on a fair construction of the clause.” Here, the words in question are far from clear: see *Tektrol Ltd v International Insurance Co of Hanover Ltd* [2005] 2 CLC 339 at 344B, where Buxton LJ said (in connection with the *contra proferentem* rule):

“It is at least a relevant factor... to recall that the insurers indeed could have made things much clearer in their own favour if that was indeed their intention when they drew the policy.”

47. For all these reasons, the Court is respectfully invited to allow the appeal on Ground 3.

F. Respondent’s Notice – the 2010 Act

48. As noted above, Judge held that, by reason of section 1(4) of the 2010 Act, the judgment of His Honour Judge Sephton KC:

“would have been binding on the Third Defendant in the same manner in which it is binding on the Second Defendant, but for my findings on other issues”.⁸

On this basis, if Mr Makin’s appeal succeeds, then all that would remain is an assessment of damages.

49. By its Respondent’s Notice, QBE contends that the Judge’s approach is wrong. It says that, because it was not a party to the proceedings when His Honour Judge Sephton KC gave his judgment, it is not bound by that judgment. It argues that Mr Makin has not therefore “established ... [Protec’s] liability” for the purpose of section 1(3) of the 2010 Act, and that it (QBE) is therefore free to argue at trial that Protec did not incur a liability to Mr Makin.

50. Section 1 of the 2010 provides, so far as relevant, as follows:

“(1) This section applies if—

⁸ [J129(iv)].

(a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or

(b) a person who is subject to such a liability becomes a relevant person.

(2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the “third party”).

(3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.

(4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, “establish” means establish—

(a) by virtue of a declaration under section 2 or a declarator under section 3,

(b) by a judgment or decree,

(c) by an award in arbitral proceedings or by an arbitration, or

(d) by an enforceable agreement.”

51. In its skeleton argument, QBE advances two alternative grounds for why Protec’s liability has not been “*established*”.

(i) First, it says that, for the purpose of section 1(4), His Honour Judge Sephton KC’s judgment only establishes the “*existence*” of Protec’s liability, whereas the provision requires the establishment of both its “*existence*” and “*amount*”.

(ii) Second, it says that the Judge’s approach is contrary to the position at common law as explained by Christopher Clarke J (as he then was) in *Omega Proteins Limited v Aspen Insurance UK Limited* [2010] EWHC 2280 (Comm); [2011] 1 All ER (Comm) 313, and approved by the Court of Appeal in *AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660; [2014] 2 All E.R. (Comm) 55.

52. These grounds are addressed in turn.

Ground 1 of the Respondent's Notice

53. As set out above, QBE argues that it is not bound by His Honour Judge Sephton KC's judgment because that judgment only determined liability, not quantum, whereas section 1(4) provides that "*a liability is established only if its existence and amount are established*" (emphasis added).

54. The Court should reject this argument:

- (i) It requires, for no good reason, section 1(4) to be read as if it said "*a liability is established only if its existence and amount are established at the same time*".
- (ii) That would be an absurd reading. It would mean that claimants (i.e. third parties under the Act) could never enforce a judgment directly against an insolvent tortfeasor's insurer if that judgment was reached by way of a split trial. It cannot have been Parliament's intention to jettison split trials for the purpose of the 2010 Act, given the obvious benefits such a procedure brings.
- (iii) The fact that a third party cannot "*enforce*" its transferred rights under an insurance policy until it has established both (a) the insured's liability and (b) the amount of that liability does not mean that the third party cannot establish (a) and (b) sequentially.
- (iv) As things stand, Mr Makin has established the insured's (i.e. Protec's liability) but has not yet established the amount of that liability. If he succeeds in this appeal, then the next step will be for him to establish the amount of Protec's liability. Once he has done so, then he will be able to enforce the rights under Protec's policy that were transferred to him under section 1(1) of the Act.

55. For these reasons, the Court is invited to reject Ground 1 of the Respondent's Notice.

Ground 2 of the Respondent's Notice

56. As set out above, QBE's next argument is that a third party can only establish a relevant person's liability for the purpose of section 1(3) by way of a "*judgment*" under section

1(4)(b), if the insurer is otherwise bound by that judgment (either because it was a party to the proceedings at the time or because it agreed⁹ to be bound).

57. In reaching the conclusion he did, the Judge applied the reasoning of the Inner House, First Division, in *Scotland Gas Networks plc v QBE UK Ltd* [2024] CSIH 36: see at [J118]-[J120]. In that case, which addressed precisely the same issue, the Court (comprising The Lord President (Carloway) and Lords Pentland and Tyre) held that for the purpose of the 2010 Act, the insurer was bound by a default judgment that the third party had obtained against the insured.
58. In reaching that conclusion the Inner House referred to the *Omega Proteins / AstraZeneca* principle and noted Christopher Clarke LJ's comment in the latter case at [18] that it was "very inconvenient for insureds". At [33] the Court then said:

"In the circumstances addressed by the 2010 Act, ie claims against insolvent policyholders, that inconvenience has been removed. The effect of section 1(2)-(4) is that once the existence and amount of the policyholder's liability have been established by one of the methods listed in subsection (4), that liability may be enforced against the insurer without any need to establish it all over again to the satisfaction of the insurer or the judge or arbitrator hearing the claim against the insurer. The rights of the policyholder under the contract of insurance are transferred to the person to whom the liability was incurred."

59. QBE invites the Court to depart from the Inner House. It submits as follows:
- (i) If the 2010 Act had intended for the principle laid down by *Omega Proteins* and *AstraZeneca* not to apply to third parties enforcing rights transferred under section 1(1), it would have said so expressly.
 - (ii) Support for that conclusion can be found in paragraph 10 of the Explanatory Notes to the Act, which states, so far as relevant:

⁹ Such agreement could be given either prospectively by virtue of a term in the insurance policy, or retrospectively by means of a settlement agreement.

“The Act retains the general approach of the 1930 Acts that the rights transferred to the third party will be subject to the defences which the insurer could use against the insured.”

QBE submits that the insurer’s right to challenge the insured’s liability is one such “defence”.

- (iii) If the Judge’s approach were correct, then paragraph 18 of the Explanatory Notes would say more about section 1(4) than simply: *“Subsection (4) sets out how a liability can be established.”*
- (iv) Finally, it risks unfairness if insurers are unable to dispute the insured’s liability. In the present case, QBE should be entitled to “explore” whether the security guards were acting in self-defence, to “consider” whether the guards were independent contractors, and finally to obtain medical evidence to “consider” the cause of Mr Makin’s stroke.

60. These submissions should be rejected:

- (i) First, the whole purpose of the 2010 Act was to remove the need for multiple proceedings that applied under its predecessor, the Third Parties (Rights against Insurers) Act 1930. See paragraph 7 of the Explanatory Notes:

“Under the 1930 Acts, a third party cannot issue proceedings against an insurer without first establishing the existence and amount of the insured’s liability. This may involve expensive and time-consuming legal proceedings. The Act removes the need for multiple sets of proceedings by allowing the third party to issue proceedings directly against the insurer and resolves all issues (including the insured’s liability) within those proceedings. Under the Act the third party has the choice of using either the new method of single proceedings established by the Act, or the existing method of first establishing the liability of the insured before initiating proceedings against the insurer.” (Emphasis added)

QBE’s proposed approach would significantly undermine that purpose.

- (ii) Second, the underlined words in the passage quoted above support the view that the third party can establish the insured's liability without the insurer being a party to the proceedings or settlement agreement.
- (iii) Third, section 1(4) provides for alternative methods by which the third party can establish the insured's liability. The most likely route is (a) – namely a declaration under section 2 (specifically 2(2)(a)) as to the insured's liability in proceedings between the third party and the insurer. But where, as in the present case, the insured went into insolvency *after* proceedings had already been issued against it, then the Act enables the third party to pray in aid a judgment obtained against the insured.
- (iv) Fourth, if, as QBE contends, a third party in Mr Makin's position were only able to rely on such a judgment if the insurer were also a party, then section 1(4)(b) would be redundant, because a third party in that position would simply claim a declaration under section 2(2)(a) (i.e. "*a declaration as to the insured's liability to P*"). This cannot have been Parliament's intention.¹⁰
- (v) Fifth, paragraph 10 of the Explanatory Notes does not assist QBE. The *Omega Proteins / AstraZeneca* principle is not a "*defence which the insurer could use against the insured*". The principle is concerned with what the insured needs to prove for the purpose of obtaining an indemnity under the policy – i.e. the constituent elements of the insured's cause of action. By contrast, the sorts of "*defences*" referred are, for example, exclusion clauses and a failure to comply with conditions precedent.
- (vi) Sixth, the Judge's approach does not lead to unfairness to QBE or other insurers. The Inner House addressed this in *Scotland Gas Networks* at [39]:

"Nor does such an interpretation result in any obvious injustice in circumstances falling within the 2010 Act. Where an insolvent policyholder is sued for a loss arising out of an insured risk, the insurer will usually have

¹⁰ Indeed, on QBE's case, the only scenario in which sections 1(4)(b), (c) and (d) would apply is where the insurer happened also to be a party to the judgment, arbitration award or settlement agreement, presumably because there had been a need to resolve coverage issues.

the right (as we understand to have been the case here) to assume responsibility for the defence of the action against the policyholder. Where, unusually, the insurer does not become aware of the claim until after decree has been granted against the policyholder, the insurer may be able to put itself in a position to seek one of the remedies available to a defaulting party. In any event it will always remain open to the insurer to contend that the loss sustained did not arise out of an insured risk.”

In the present case, the reason why QBE did not conduct Protec’s defence is because it believed, rightly or wrongly, that it was not liable to indemnify Protec. If it is right about that, then there is no prejudice. But if it is wrong, then it cannot now complain and seek to have a second bite of the cherry.

61. For these reasons, the Court is respectfully invited to endorse the decision of the Inner House in *Scotland Gas Networks* and reject Ground 2 of the Respondent’s Notice.

G. Conclusion

62. For all these reasons, the Court is respectfully invited to allow the appeal on Grounds 1 and 2; alternatively, to allow the appeal on Ground 3; and to dismiss the Respondent’s cross-appeal.

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