

IN THE COURT OF APPEAL (CIVIL DIVISION)

Appeal No: CA2025001268-Y

and Appeal No: CA2025001268-A

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, VICTORIA BARBER)

Appellant/Claimant

and

~~THE RESTAURANT MUSE LIMITED~~ (discontinued)

PROTEC SECURITY GROUP LIMITED

Second Defendant

QBE INSURANCE (EUROPE) LIMITED

Respondent/Third Defendant

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT: 4 SEPTEMBER 2026

([J...] refers to paragraphs of HHJ's Pearce's judgment)

[C/...] and [S/...] are references to the pages of the Core and Supplementary Bundles

Note: This skeleton argument is prepared on a consolidated basis so as to respond to the Appellant's grounds of appeal and the skeleton argument served in support of his request for permission to appeal¹ and in support of the Respondent's appeal as set out in its Respondent's Notice². The section of this updated skeleton argument dealing with the Respondent's appeal is in the same terms as its skeleton argument seeking permission to appeal, save for the final two paragraphs, which refer to the 16th edition of MacGillivray on Insurance Law (which was

¹ In respect of Grounds 1 and 2, which was granted by order of Lord Justice Stuart-Smith dated 23 September 2025 [C/152]. Permission in respect of Ground 3 had been previously granted by HHJ Pearce [C/150].

² Permission to appeal being granted by separate order of Lord Justice Stuart-Smith dated 23 September 2025 [C/154].

published after the date of the Respondent's previous skeleton argument) and the outcome sought by the Respondent by its appeal.

Respondent's response to the Appellant's appeal

Background to the Appellant's appeal

1. Under Section B of its Policy, the Respondent agreed to indemnify its insured, Protec Security Group Limited ("Protec") "up to the limit of indemnity against liability incurred by you during the period of insurance arising out of and in the course of business within the territorial limits" [C/199].
2. Clause 8 of the definitions section of Section B provided that, amongst other things, "liability" included a legal liability to pay damages as a result of accidental bodily injury to any person other than an employee and accidental bodily injury caused by deliberate acts of Protec's employees or sub-contractors [C/197]. Given the nature of the incident, it is also material that the indemnity also expressly covered liability to pay damages arising as a result of bodily injury in respect of assault by Protec's employees.
3. The relevant Claims Conditions for the Policy begin with a preamble in the following terms:

"The following Conditions 1-10 must be complied with after an incident that may give rise to a claim under your policy. Breach of these conditions will entitle us [the Respondent] to refuse to deal with the relevant claim." [C/301]
4. Claims Condition 2 states:

"You [Protec] must not respond to any letter ... or other document 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 Specialists Risks Ltd unanswered by return of post or to us or legal representatives as may otherwise be advised by us." [C/301]
5. Claims Condition 3 states:

“You [Protec] ... must inform Sutton Specialist Specialist Risks Ltd ...

3.5 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 that may give rise to a claim under any your policy ... ”. [C302-303]

6. The Learned Judge found that, at the time of the incident on 6 August 2017, the sole director of Protec, Mr Lucas was on leave in Barbados [J15(i) and (x)] [C/97-98] and there was no evidence he knew of the incident at the time it occurred [J56][C/118]. Either whilst he was still on holiday or on his return from leave, he became aware that police wished to interview the door staff about the incident and that this was well within the period of 30 days from the incident [J56, J58][C/118, 120]. The email sent by Mr Lucas to the First Defendant dated 9 January 2020 states that it was on his return from leave that he was contacted by the police [S/138].
7. Protec also received a letter of claim dated 29 October 2019 [S/174] sent by the Appellant’s solicitors to the First Defendant but which, given it was referable to the conduct of the door staff, was forwarded onto the Second Defendant with a request that this be passed onto their insurers (ie. the Respondent) [S/217]. Protec also directly received a letter of claim dated 5 June 2020 from the Appellant’s solicitors [S/127]. Neither of these letters was in fact sent to the Respondent [J64-65][C/121], such that the first that the Respondent was aware of the incident was when it was contacted directly by the Appellant’s solicitors by email dated 8 July 2020 [J17][C/100].
8. The Appellant has never argued that, by their nature, claims conditions 3.5 and 2 are not capable of being treated as conditions precedent. The appeal therefore seeks to repeat the arguments which were not accepted by HHJ Pearce as to the meaning of the two claims conditions (Grounds 1 and 2) and/or as to whether in fact a failure to comply with the conditions only afforded the Respondent a discretion not to provide an indemnity (Ground 3).
9. The Respondent will deal with each of the Grounds of Appeal in turn. In summary, it is contended that HHJ Pearce was fully entitled to reach the decision that he did.

Ground 1 – Claims Condition 3.5

10. The Appellant submits that the claims condition 3.5 was never engaged because the assessment as to whether notification is required under this condition of the policy is restricted to the time of the incident or its immediate aftermath only. The Learned Judge rejected that submission and considered that the case of *Aspen Insurance UK Limited and others v Pectel* [2009] 2 All ER (Comm) 873 was more applicable to the interpretation of the wording of claims condition 3.5 than the decision in *Zurich Insurance plc v Maccaferri Ltd* [2018] 1 All ER (Comm) 112 [J57-58]. He was right to do so.
11. Whilst the correctness of the decision in the Court of Appeal in *Maccaferri* is not challenged, as an authority it is limited to determining the correct interpretation of specific and materially different policy wording which is not applicable to the present case.
12. In *Maccaferri*, the applicable claims condition stated that, “The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof. ...”
13. In his judgment at [16], Christopher Clarke LJ noted that it was agreed that an “event likely to give rise to a claim” meant an event with at least a 50% chance that a claim against the claimant would eventuate. He also determined at [33] that clauses need to be clear if they are to have effect and that “is particularly so in circumstances where the context in which the clause was agreed was that *Layher* and *Jacobs* had been decided as they had. Although the wording in the present case is not identical to the wording in those cases, the two cases indicate that *prima facie* whether there is an obligation to notify an occurrence as one likely to give rise to a claim is to be determined by reference to the position immediately after it occurs.”
14. The references are to *Layher Ltd v Lowe* (1996) ConLR 42 and *Jacobs v Coster* [2000] Lloyd’s Rep IR 506 in which Christopher Clarke LJ noted at paragraphs [21-25] of his judgment that both cases proceeded on the basis that the wording, “likely to give rise to a claim”, was to be judged on the basis of the state of affairs as it existed immediately

after the incident. In the circumstances, Christopher Clarke LJ confirmed that the authors of the *Maccaferri* policy, in adopting the same type of wording, should be deemed to know that this was how the court would interpret such a clause.

15. The Court of Appeal's decision in *Maccaferri* does not purport to establish a principle that its interpretation of the particular policy before it should have general application to all other notification claims conditions. On the contrary, Christopher Clarke LJ expressly recognised at [33] that there can be clauses in other policies as to whether a past event is "likely to give rise to a claim" but which permit a rolling assessment as circumstances develop. However, he determined that this was not in the form of words used by the *Maccaferri* policy.
16. Insofar as the Appellant's argues that *Maccaferri* therefore establishes a principle that limits consideration of the obligation to notify to circumstances at or immediately following an incident is wrong as a matter of law.
17. The wording used in claims condition 3.5 is materially different to *Maccaferri* and, as HHJ Pearce correctly recognised, is in fact very similar to that considered in *Aspen* ("The Assured shall give ... immediate written notice with full particulars ... of any occurrence which may give rise to indemnity under this insurance ..."). In *Aspen*, it was clear that Teare J did not consider that this form of notification clause was limited to a restricted time period fixed at the time of the incident (notwithstanding the use of the words "immediate written notice") and that the knowledge of the insured acquired after an incident can and should be taken into account in determining whether there has been compliance with the claims condition.
18. Contrary to the Appellant's case, in *Aspen*, it is apparent that Teare J did not consider that the fire in itself was necessarily notifiable. It is clear that, for example, the Judge also took into account as part of the evidence that the insured were subsequently aware that its employees were to be interviewed [47] and that, although there was a conversation which indicated that the insured was not to be blamed [49], a subsequent request for testing of the insured's equipment [50] indicated that there was a real possibility of a claim being made. The Judge therefore found that by early April 2004 (the fire having been on 29 March 2024) notification was required to be given. It is notable that the Judge also found, in case that he was wrong in that assessment, that notice should have been

provided in November 2004 and January 2007 [52 and 53]. This is therefore indicative that a clause requiring notice of an incident “which may give rise” to a claim or indemnity therefore can take into account evidence beyond the state of affairs immediately following its occurrence.

19. Although *Aspen* is referred to in Christopher Clarke LJ’s judgment in *Maccaferri*, it is notable that he does not indicate any suggestion that *Aspen* was wrongly decided. It is simply that different approaches have been taken to differently worded policies, particularly as it is clear that in *Maccaferri* a subjective assessment by the insured was required as to whether a claim was likely (*Denso Manufacturing UK Limited v Great Lakes Reinsurance (UK) plc* [2018] 4 WLR 93 at [41]). Further, on the reasoning adopted by Christopher Clarke LJ, the Respondent’s policy wording and the interpretation to be placed upon it should be in the context of the similar wording in *Aspen* having been decided as it had.
20. HHJ Pearce was therefore correct to find that the present policy was more akin to that in *Aspen*. Although Mr Elvin had been away at the time of the incident and therefore could not have known about the incident at the time it occurred, he was clearly aware on his return shortly afterwards that the police were interviewing the door staff and that this was sufficient to prompt a requirement under claims condition 3.5 to provide a notification to the Respondent. As he failed to do so, HHJ Pearce was right to find that Protec breached the condition [J58][C/119].
21. If the court finds, contrary to these submissions, that the requirement to notify was only applicable on the basis of the state of affairs at the time of the incident or immediately afterwards, the Learned Judge fell into error in determining that “no reasonable insured could have been expected to form the view that it involved circumstances that “may give rise to a claim” [J56][C/118].
22. The Learned Judge’s sole reason for reaching that determination was that “the Claimant was able to get up and walk away after being restrained.” [J56][C/118]. This, however, cannot be a complete or sufficient explanation as to whether the incident was one which gave rise to a real as opposed to a fanciful risk of a claim being made under the policy because:

- (a) the Appellant's case is that he was the victim of multiple assaults and batteries culminating in him being wrestled to the ground and strangled, with the crushing of his neck for over a minute (paragraph 7 of the Particulars of Claim)[S/6-7]. The Appellant's description and perception of such an incident is plainly one which may give rise to a claim in respect of a policy which specifically covers claims for an assault;
- (b) the Second Defendant completed incident forms which it forwarded to the police [J15 (x)][C/98] and the individual guards completed their own short notes providing their respective accounts of the events [J18][C100-101]. Such actions must have been taken on the basis that it was considered that there may be a claim; and
- (c) the fact that the Appellant was able to get up and walk away does not mean that the incident was not one which may give rise to a claim. The tort of battery does not require substantial injury to have been caused or inflicted.

23. Ground 1 of the Appeal should therefore be refused.

Ground 2 – Claims Condition 2

24. The court will be familiar with the lengthy recitations as to the correct principles of contractual interpretation summarised in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and *Arnold v Britton* [2015] AC 1619 to the effect that the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be and that the meaning of a clause has to be assessed, amongst other things, in light of the natural and ordinary meaning of the relevant words, the overall purpose of the clause and commercial common sense.
25. The requirement under Claims Condition 2 is that Protec 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” and must instead immediately forward any such letter to the insurer's representative.

26. The Appellant's contends that this clause is insufficient to impose any obligation upon Protec to forward onto the Respondent the two Letters of Claim prepared by the Appellant's solicitors headed "Letter of Claim – Catastrophic Injury" and even though Protec were expressly asked to pass on the first of the letters (which was addressed to the First Defendant) to its insurers [J16][C/98]. In the context of a liability insurance policy, that would be a truly extraordinary result and the Appellant's case to that effect was rightly rejected by HHJ Pearce.
27. There is no rewriting of the clause required in the interpretation favoured by the Learned Judge which was the straightforward interpretation that letters sent in connection with an incident that may relate to any claim under the policy and letters sent in connection with an incident which may give rise to a claim under the policy should be forwarded on to the insurers [J61][C/120]. The condition therefore obviously covers the forwarding of letters relating to incidents for which a claim under the policy had already been made or which might give rise to such a claim under the policy. The Judge's interpretation is consistent with the natural and ordinary meaning of the relevant words, the overall purpose of the clause and commercial common sense.
28. In contrast, the Learned Judge was entitled to find that the Appellant's alternative constructions did not make sense. On the interpretation most favoured by the Appellant, the claims condition would not oblige an insured to forward on a letter of claim if no claim had previously been notified in relation to an accident or unless the terms of the letter itself gave rise to a claim for an indemnity by the insured under the policy (which is difficult to conceive how this could ever arise as the insured would be the recipient of the letter).
29. The Learned Judge appropriately reflected the correct approach to the interpretation of the clause and ultimately determined that no other reading other than the one he determined at [J61] made sense. That was a judgment he was entitled to make and his approach at [J62 and 63] betrays no error. [C/120].
30. The appeal in respect of Ground 2 should therefore also be refused.

Ground 3 – the Claims Conditions Clause

31. The Learned Judge determined that the wording used in the Claims Condition Clause, namely “Breach of these conditions will entitle us [the Respondent] to refuse to deal with the relevant claim” was sufficient to create a condition precedent. The Learned Judge found that there was no ambiguity in the words used and that “it would do an injustice to the language” to conclude that breach of the conditions gave merely a discretion to insurers to decline to provide an indemnity [J92][C/132]. The Learned Judge was entitled to reach that decision, which was also the only correct interpretation given the clear wording of the clause.
32. The Appellant seeks to argue that, if the Respondent wanted the Claims Conditions to be conditions precedent, it should have used those particular words as it did elsewhere in the Policy.
33. HHJ Pearce was, however, correct in dismissing this submission, given his finding that there was no ambiguity in the wording in fact used and that the true meaning of the language was clear even without the specific label of “condition precedent” being used [J92][C/132].
34. As Teare J stated in *Aspen*, what is required is a conditional link between the assured’s obligation to comply with the notification clause and the underwriters’ obligation to pay the claim in question (at [67]). Further at [62], Teare J stated that, whilst the express words “condition precedent” can be used, “other words can have the same effect so long as the clause is apt to make that effect the clear intention of the parties”. In *Aspen*, the material clause was not expressed as a condition precedent, even though other clauses were given that label within the policy (as is the case with the Respondent’s policy). Teare J confirmed that this was not significant given that the words in fact used were “apt to establish the necessary conditional link” (at [68]).
35. That conditional link is plainly established by the Respondent’s policy wording that breach of the claims condition will entitle it to refuse to deal with the claim.

36. It is relevant that in *Cuckow v AXA Insurance UK Plc* [2023] EWHC 701 (KB) the relevant claims conditions using the similar wording, “If you do not comply with this condition we have the right to refuse to pay your claim” was held to be a condition precedent. This wording is obviously very similar to the Respondent’s policy and the Learned Judge was right to recognise the merit of a consistent interpretation [J85][C/129].
37. The Appellant seeks to argue that the phrase “will entitle us to refuse to deal with the relevant claim” does not give rise to an absolute entitlement. The Respondent submits that, on the contrary, the clear wording used does give rise to such a right because:
- (a) as determined by HHJ Pearce, the wording does not contain any implication of some contractual limit upon the insurer or that it is limited to a discretion [J92][C/132]. That analysis must be correct;
 - (b) MacGillivray on Insurance Law (16th edition) states at 19-043³ that, “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.” It is therefore not recognised in *MacGillivray* that claims conditions requiring notifications to insurers can also give rise to merely a discretionary power on the part of the insurer, as the Appellant seeks to argue; and
 - (c) it is long-established and settled law that if a claims condition is a condition precedent, there is no requirement for an insurer to prove that it was prejudiced before it is entitled to rely upon a breach of such a condition and refuse to deal with the claim. This issue has been definitively confirmed by *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance* [1985] 2 All ER 395 at 403j, which has been cited with approval by the Court of Appeal in *Pilkington v CGU Insurance* [2004] EWCA Civ 23 at [58] and the Privy Council in *Motor and General Insurance Co v Pavy* [1994] 1 WLR 462 at 469E-F. There is therefore no basis for inferring that an Insurer’s ability to act in refusing to provide an indemnity is merely discretionary and may only be undertaken on *Braganza* principles.
38. In the circumstances, the Appellant’s Ground 3 should also be dismissed.

³ In the same terms as paragraph 19-040 in the 15th edition, quoted by the Learned Judge

Respondent's Appeal

Background

39. By his judgment, HHJ Pearce determined that the Second Defendant (“Protec”) had breached Claims Conditions 2 and 3.5 of its public liability insurance policy issued by the Respondent (“QBE”) and that both of these conditions were conditions precedent to QBE’s obligation to provide an indemnity to Protec in respect of the claim of the Appellant (“Mr Makin”). HHJ Pearce therefore held that QBE was not liable to Mr Makin in his claim pursuant to the Third Parties (Rights against Insurers) Act 2010.
40. Although it was therefore immaterial given this determination, HHJ Pearce went onto consider the effect of the judgment of HHJ Sephton KC delivered on 11 July 2023 following a trial on the same day.
41. In those proceedings between Mr Makin and Protec before HHJ Sephton KC, Protec did not attend the trial and its defence was struck out. QBE was not a party to the claim. Having heard evidence called on behalf of Mr Makin, HHJ Sephton KC gave judgment against Protec on the preliminary issue of liability with damages to be assessed [J124][C/143][S/151]. In his judgment, HHJ Sephton KC found the doormen guilty of assault and that the assault had caused the Claimant to suffer a stroke. He also found that the defence of self-defence was not available (as Protec’s Defence had been struck out), although he would have rejected it in any event on the evidence and further that he did not need to deal with the “interesting and difficult” argument as to whether the responsible doorman was an independent contractor again because the Defence had been struck out [J125][C144][S/154].
42. HHJ Pearce determined that, if it had arisen for consideration, he would have found, following the decision of the Court of Session, Inner House in *Scotland Gas Networks plc v QBE UK Ltd* [2024] CSIH 36, that the judgment of HHJ Sephton KC was binding and determinative of the issues that there was breach of duty, vicarious liability and causation (including that the assault had caused the stroke) in the claim by Mr Makin against QBE pursuant to the 2010 Act [J127-129][C/144-146].

43. QBE oppose Mr Makin’s proposed appeal against the judgment of HHJ Pearce, as summarised in paragraph 1 above. In the event that it was to become material following the appeal, QBE seek permission to appeal the determination that the judgment of HHJ Sephton KC is binding upon it.

Respondent’s Grounds of Appeal

44. It is accepted that Protec is a “relevant person” for the purposes of the 2010 Act and that, by virtue of HHJ Sephton KC’s judgment, Mr Makin has established liability against Protec (which includes a finding that the assault caused his stroke). As against Protec, Mr Makin therefore has the benefit of judgment with damages to be assessed.
45. It is further accepted that the Court of Session, Inner House in *Scotland Gas Networks* determined that:
- (a) once liability has been established by one of the methods listed in s.1(4) of the 2010 Act, that liability may be enforced against the insurer without the need to establish it all over again to the satisfaction of the insurer or a judge hearing the claim against the insurer (paragraph 33 of the judgment); and
 - (b) it was not open to the insurer to require either the existence or amount of that liability to be proved or to raise points which could have been but were not presented by way of defence by the insured in the previous action (paragraph 35 of the judgment).
46. Section 1(4) of the 2010 Act provides that:
- “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 –
- ... (b) by a judgment or decree ...”⁴

Ground 1: the effect of section 1(4) of the 2010 is inapplicable to the present case

47. The short point is that HHJ Pearce recognised that HHJ Sephton KC’s judgment did not determine the amount of the liability of Protec [J124-J125][C143-144][S151-154].

⁴ In *Scotland Gas Networks*, the insurers sought to argue unsuccessfully that a decree in default was not a judgment. It is not argued in the present case that HHJ Sephton KC’s judgment was a judgment in default [J126].

48. HHJ Sephton KC only resolved, as against Protec, the issues of liability (including vicarious liability) and causation⁵ [J128][C/145] but the issue of quantum was not before him and he was neither invited to nor did he purport to undertake any assessment of damages [J121][C/142]. His judgment was therefore for damages to be assessed.
49. In the circumstances, for the purposes of s.1(4) of the Act, Mr Makin does not have a judgment against Protec which establishes liability because the amount of that liability has not been determined. The Learned Judge therefore fell into error in determining that *Scotland Gas Networks* was applicable to Mr Makin's case⁶ and should be followed [J127][C/144] and/or that there was any liability for the purposes of the 2010 Act which could be held to be binding upon QBE. Whilst it is accepted that s.1(4) of the 2010 Act sets out different routes for establishing the liability of the insured, none of them apply to Mr Makin. As in the present case, a judgment on the preliminary issues of liability and causation against an insured is not sufficient to establish "liability" which binds the insurer.

Ground 2: the applicable law should remain that as summarised in *Omega Proteins v Aspen*

50. The position under the Third Parties (Rights Against Insurers) Act 1930 provided that where an insured had become bankrupt or subject to a winding-up order, its rights under a contract of insurance would vest in the third party who had established liability against that insured.
51. As was recognised by the Inner House in *Scotland Gas Networks* and by making reference to the Explanatory Notes to the 2010 Act, the 2010 Act provided that a third party now had a choice as to whether to use the new method of single proceedings directly against the insurer or to utilise the existing method of establishing liability of the insolvent policyholder before initiating proceedings against the insurer (paragraph 9 of the judgment).

⁵ In the sense that injury was caused by the assault

⁶ The decree in default in *Scotland Gas Networks* had included provision that there should be a payment of £3million and therefore the amount of liability had also been established (paragraph 4 of the judgment).

52. The existing method therefore reflected the approach which was necessary under the 1930 Act for liability to be established before those rights would vest in the third party against the insurers. The relevant principles in respect of liability insurance for such claims was summarised by Christopher Clarke J (as he then was) in *Omega Proteins Limited v Aspen Insurance UK Limited* [2010] EWHC 2280 (Comm) and quoted by HHJ Pearce at [J123]⁷.
53. Christopher Clarke J's summary provides, amongst other things, that a judgment against an insured is not determinative of whether a loss is covered by the policy (assuming that the insurer was not a party to those proceedings and there was no agreement by the insurer to be bound) and that it is therefore open to an insurer to dispute that its insured was in fact liable or was liable on the basis specified in the judgment.
54. On its particular facts, the decision in *Scotland Gas Networks* that the insurer should be held to be bound by the judgment against its insured might be explicable on the basis that it would appear that the insurer had initially involved itself in the conduct of its insured's defence before deciding not to maintain this position (paragraph 29 of the judgment).
55. However, it is respectfully submitted that, insofar as *Scotland Gas Networks* determined that under the 2010 Act, insurers are not entitled to require either the existence or the amount of liability to be proved or even to raise points that could have been but were not presented by way of defence by its insured, the decision is incorrect and should not be followed in England and Wales. The position as outlined in *Omega Proteins* should continue to be regarded as correct under the 2010 Act.
56. This is for three reasons.
57. Firstly, as the Inner House recognised, the existing process of establishing liability (ie. by way of proceedings against the insolvent policyholder) was retained by the 2010 Act, alongside entirely new provisions enabling a direct claim against an insurer (paragraph 9 of the judgment). If the 2010 Act had intended to change the long-established law associated with the existing process and in particular as to the effect of such a judgment

⁷ This summary was approved by the Court of Appeal in *AstraZeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd and another* [2013] 1 CLC 478 at [23].

against an insured and the ability of Insurers to challenge it (as summarised in *Omega Proteins*), this would have been made expressly clear by the terms of the 2010 Act but it is not.

58. Further, the Explanatory Notes to the Act relied upon by the Inner House continue at paragraph 10 to confirm that, “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. However, it introduces three exceptions which are designed to ensure a third party is not prevented from enforcing his or her rights⁸.” The defences referred to must include the insurer’s rights as reflected in *Omega Proteins* to challenge whether the insured was liable or as to the basis of its liability.
59. Further, paragraph 18 of the Explanatory Notes simply records that sub-section 1(4) “sets out how a liability can be established”. If the 2010 Act was intended to have the far reaching effect ascribed to it by *Scotland Gas Networks* in treating a judgment against an insured as including a definitive and binding determination on its insurer, this would have been bound to have been noted as being a fundamental change introduced by s.1(4) of the 2010 Act. On the contrary, the Explanatory Notes suggest a continuation of the existing process established under the 1930 Act, albeit with the specific exceptions noted in the 2010 Act.
60. It is submitted that section 1(4) therefore simply represents a codification of the procedure which preceded the 2010 Act and, as confirmed by Christopher Clarke J at [49.4] of *Omega Proteins*, such a judgment against an insured might settle the question of whether a loss is covered by the policy because it will be accepted by an insurer as showing a basis of liability falling within the terms of the policy. Section 1(4) therefore has purpose and effect on this basis. It is not necessary to interpret it as having further effect such that an insurer is automatically and irrevocably bound by that judgment in any subsequent proceedings, when such wording is neither expressly used nor necessary as a matter of implication.
61. Secondly, the decision in *Scotland Gas Networks* effectively disturbs the long-established principle that a judgment given in proceedings between A and B is not binding on C in

⁸ Those exceptions are specified by section 9 of the 2010 Act and do not arise in the present case.

subsequent proceedings between B and C (*Omega Proteins* at [58]) or as between A and C. The 2010 Act did not create an exception to this principle or in fact extend it so as to even preclude C from raising a matter which B might have but did not in fact raise against A, as the Inner House determined at paragraph 35 of its judgment.

62. Thirdly, the interpretation of the Inner House gives rise to potential manifest unfairness. It is of course recognised that a claim which has been fully contested and determined by a court is highly unlikely to be disturbed in subsequent proceedings. That, however, ought not to foreclose as a matter of principle an insurer's ability to try, if it considered it appropriate to do so (*Omega Proteins* at [67-69]).
63. In the present case, however, Protec's defence was struck out and it did not attend trial or call any witnesses. Given that it is now facing a claim for substantial damages and it was never a party to those proceedings, it is wrong that QBE should be precluded from, for example, exploring whether self-defence could in fact have been raised or considering whether the guards were independent contractors or even obtaining medical evidence to consider the causation of the stroke suffered by Mr Makin. The 2010 Act should not be interpreted so as to have this effect.
64. Further, as argued by paragraph 28-026 of *MacGillivray on Insurance Law* (16th edition), the interpretation of s.1(4) of the 2010 Act as conclusively resolving questions of the insured's actual liability for the purposes of a third party claim risks altering the principle that the third party should be in no better position than the insured vis-à-vis rights under the policy. For example, if s.1(4) of the 2010 Act did preclude an insurer from challenging whether its insured was legally liable under either a judgment, arbitral award or settlement, the third party would be in a better position than the insured, against whom the insurer would be permitted to raise these points had it remained solvent and was bringing its own claim against the insurer. This cannot have been the purpose of the 2010 Act and therefore respectfully the determination that s.1(4) should have such an effect is in error.

65. If the issue arises following the determination of the main appeal, the Respondent would therefore invite the Court to set aside HHJ Pearce's determination that the judgment of HHJ Sephton KC was determinative of the issues of breach of duty, vicarious liability and causation in the Appellant's claim against the Respondent pursuant to the 2010 Act.

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4 September 2026