QUEEN'S BENCH DIVISION

2–4; 12 March 2020

KOMIVES AND ANOTHER
v
HICK LANE BEDDING LTD AND ANOTHER

[2020] EWHC 3288 (QB)

Before Master DAVISON

Insurance (employers' liability) — Avoidance of policy for non-disclosure and misrepresentation — Whether there was a right to avoid — Effect of Insurance Conduct of Business Sourcebook (ICOBS) — Whether avoidance unreasonable — Third Parties (Rights Against Insurers) Act 1930 — Employers' Liability (Compulsory Insurance) Act 1969.

The claimants, Mr Komives and Mr Varhelyi, were Hungarian men employed by the first defendant, Hick Lane Bedding, from 2009 to 2013. They were employed in conditions amounting to modern slavery: they were paid negligible amounts of money, they were made to work excessively long hours and their accommodation was squalid and overcrowded.

The claimants suffered psychiatric injuries, and Mr Varhelyi suffered very serious physical injury in May 2012 resulting ultimately in a below-knee amputation. Hick Lane Bedding went into administration on 9 June 2015 and was insolvent.

During the period 12 July 2011 to 11 July 2012 Hick Lane Bedding had employers' liability insurance with AmTrust Ltd. The claimants brought proceedings against AmTrust under the Third Parties (Rights Against Insurers) Act 1930. However, by letter dated 22 March 2018, AmTrust avoided the policy ab initio on grounds of material non-disclosure and misrepresentation. AmTrust relied upon: material non-disclosure, in relation to the use of trafficked labour; material misrepresentation in regard to Hick Lane Bedding's health and safety regime; and material misrepresentation in regard to wage costs, which gave a misleading picture of the number of workers engaged and disguised the fact that the national minimum wage was not being paid to all workers.

The court ordered the trial of four preliminary issues: whether AmTrust was entitled to avoid the policy of insurance on grounds of material non-disclosure and/or misrepresentation; whether the policy had been validly avoided; whether Mr Komives and/or Mr Varhelyi had a valid claim against AmTrust under the Third Parties (Rights Against Insurers) Act 1930; and whether there was a right of indemnity under the policy.

———*Held*, by QBD (Master DAVISON), that AmTrust was contractually entitled to avoid the policy and that it did not act unreasonably in doing so.

(1) AmTrust had the right to avoid the policy ab initio and had done so.

(a) In order to avoid a contract of insurance, the insurers had to show that the facts misrepresented or not disclosed would have influenced the mind of a reasonably prudent underwriter in exercising his underwriting judgment as to whether to write the risk and that the underwriter who agreed the risks was induced to agree it by the facts misrepresented or not disclosed (*see* para 19);

———*Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427; [1995] 1 AC 501, *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] Lloyd's Rep IR 131; [2003] 1 WLR 577, applied.

(b) The expert evidence was that the matters withheld or misstated were highly material. Any one of them would have justified avoidance at common law (*see* paras 16 and 41).

(c) There was no authority for the proposition that an insurer could not avoid a policy where the assured had been guilty of criminal conduct which was material to the risk insured in circumstances where the claimants were not in any way associated with the illegality (*see* para 43);

———*Hardy v Motor Insurers' Bureau* [1964] 1 Lloyd's Rep 397; [1964] 2 QB 745, *Dunbar v A & B Painters Ltd* [1985] 2 Lloyd's Rep 616, *Total Graphics Ltd v AGF Insurance Ltd* [1997] 1 Lloyd's Rep 599, *Hounga v Allen* [2014] 1 WLR 2889, considered.

(2) The Insurance Conduct of Business Sourcebook (ICOBS), under which an insurer was required not unreasonably to reject a claim, did not affect the outcome.

(a) ICOBS had not introduced a broad test of reasonableness having regard to all the circumstances of the case which included the nature of the party seeking to enforce the policy. While there was a protection gap in the statutory scheme for employers' liability, ICOBS did not constitute legislative intervention (*see* paras 46, 47 and 51);

———*Parker v National Farmers Union Mutual Insurance Society* [2013] Lloyd's Rep

IR 253, *Bate v Aviva Insurance UK Ltd* [2013] Lloyd's Rep IR 492, applied.

(b) AmTrust had not acted unreasonably. There was little to criticise in AmTrust's enquiries into and acceptance of the risk. They were misled. There was nothing to put them on notice of the true position, which further enquiries would not have revealed. There was similarly little to criticise in the letter avoiding the policy (*see* para 49).

The following cases were referred to in the judgment:

Assicurazioni Generali SpA v Arab Insurance Group (BSC) (CA) [2002] EWCA Civ 1642; [2003] Lloyd's Rep IR 131; [2003] 1 WLR 577;

Bate v Aviva Insurance UK Ltd (QBD (Comm Ct)) [2013] EWHC 1687 (Comm); [2013] Lloyd's Rep IR 492;

Dunbar v A & B Painters Ltd (QBD) [1985] 2 Lloyd's Rep 616;

Hardy v Motor Insurers' Bureau (CA) [1964] 1 Lloyd's Rep 397; [1964] 2 QB 745;

Hounga v Allen (SC) [2014] UKSC 47; [2014] 1 WLR 2889;

Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (HL) [1994] 2 Lloyd's Rep 427; [1995] 1 AC 501;

Parker v National Farmers Union Mutual Insurance Society (QBD (Comm Ct)) [2012] EWHC 2156 (Comm); [2013] Lloyd's Rep IR 253;

Total Graphics Ltd v AGF Insurance Ltd (QBD (Comm Ct)) [1997] 1 Lloyd's Rep 599.

Jeffrey Jupp and James Robottom, instructed by the Anti-Trafficking and Exploitation Unit, for the claimants; the first defendant did not appear and was not represented; Geoffrey Brown, instructed by Kennedys Law LLP, for the second defendant.

Thursday, 12 March 2020

JUDGMENT

Master DAVISON:

Introduction

1. This is the polished version of a judgment which I gave orally on 12 March 2020.

2. These claims are part of a group of eight similar claims, all concerning the trafficking to the UK of Hungarian men, who were then put to work in manufacturing businesses in the north of England in circumstances amounting to modern slavery. Offers of employment and accommodation were made by a man named Janos Orsos, better known as "Kacsa" (pronounced "Kotcha"). Though these offers were painted in attractive terms, the reality was very different. The claimants were paid negligible amounts of money, they were made to work excessively long hours and their accommodation was squalid and overcrowded. The employer in the two cases before me was Hick Lane Bedding, the first defendant, also known as Kozesleep Beds. This was, or had been, a legitimate business. It supplied a number of well-known high street retailers and had a substantial workforce. Its managing director was Mr Mohammed Rafiq. Mr Rafiq unfortunately succumbed to using cheap trafficked labour, which included these claimants, Mr Komives and Mr Varhelyi. Mr Rafiq, Janos Orsos and another man named Ferenc Illes were subsequently convicted of conspiracy to traffic individuals into the UK with intent to exploit them. All were sentenced to terms of imprisonment.

3. Mr Komives worked for the first defendant from the summer of 2009 to October 2013. Mr Varhelyi worked there from January 2009 to June 2013. Both suffered psychiatric injuries. Mr Varhelyi also suffered very serious physical injury in an accident which occurred on or around 23 May 2012. The forks on a forklift truck he was using failed, causing a large and heavy industrial bin to fall onto his left leg, resulting ultimately in a below-knee amputation.

4. The first defendant went into administration on 9 June 2015 and is insolvent.

5. During the period 12 July 2011 to 11 July 2012, the first defendant had employers' liability insurance with AmTrust Europe Ltd ("AmTrust"), the second defendant. These claimants' claims are advanced pursuant to the provisions of the Third Parties (Rights Against Insurers) Act 1930. However, by letter dated the 22 March 2018, the second defendant avoided the policy ab initio on grounds of material non-disclosure and misrepresentation.

6. By a case management order dated the 10 December 2018, I ordered the trial of the following preliminary issues:

"(1) whether AmTrust was, and/or is entitled to avoid the policy of insurance issued by it in favour of the first defendant on grounds of material non-disclosure and/or misrepresentation as pleaded in the defences of AmTrust;

(2) if so, whether the policy had been validly avoided by reason of the above;

(3) whether Mr Komives and/or Mr Varhelyi have a valid claim against trust under the Third Parties (Rights Against Insurers) Act 1930;

(4) if so, whether there is a right of indemnity under the policy in connection with the claimants' claims for breach of contract quantum meruit, conspiracy by unlawful means, intimidation and/or harassment, and/or in respect of any such claim not arising from bodily injury occurring during the period of insurance and or in respect of the claimants' claims for aggravated damages."

7. I heard factual evidence on these issues from Mr James Carroll, an underwriter with the second defendant. I also heard evidence from experts in insurance broking and underwriting: Mr Miles Emblin for the second defendant and Mr Roger Flaxman for the claimants. Mr Carroll was not in post at the time that the policy was written. The underwriter at this time was Mr Keith Rutter, who left in 2012. The proposal came to AmTrust from a placing broker, Miles Smith. The placing broker's information about the risk was derived from a retail broker, Bush and Associates. The contact there was Mr David Heap. The initial email enquiry was made on 16 June 2011. Mr Heap provided Miles Smith with a schedule setting out the claims experienced over the years from 2004 to 2010, and a document entitled "Liability Enquiry – Kozesleep Beds Ltd", which described the business, gave wage roll details and annual turnover, and health and safety information. In its final form, the health and safety information was as follows:

"The company employ an experienced full time health and safety manager. The company have a full health and safety policy, incorporating method statements and risk assessments for all types of work. Employees receive full training on operations they are engaged [sic] and use of equipment which they sign to confirm that they have received and understood the training. The H & S manager carries out daily on-the-spot checks that employees are following instructions and working correctly. Inevitably accidents do occur but the new regime has helped reduce claims to none during the last 12 months."

8. Another insurer, Chartis, was potentially interested, and carried out a survey. Mr Heap reported favourably on this survey in an email dated 6 July 2011 to Miles Smith. He had the following things to say about health and safety:

"The health and safety manager is very experienced and was previously employed by Silent Night before they went into liquidation and was responsible there for over 500 employees. He has written full risk assessments for all machines, processes and manual handling. These are fully and clearly documented and were made available for close inspection by the chartered surveyor. A specimen copy of the employee handbook and general safety instructions were also inspected. He was quizzed about Indian/Asian employees, who make up most of the manual manufacturing workforce, and how working practice/risk assessments/training is/are communicated and understood by them. Where a worker does not speak English, they are asked to take the documents home and ask someone to translate it, bring it back and ask them to confirm they have had it read to them and they understand it before signing a document which is then filed. The accident book was also inspected and this revealed minor incidents had occurred, and backed up the claims experience, provided that there have been no incidents involving a claim in the last 2/2.5 years. The surveyor commented most involved storage problems and light objects falling on workers. However, he said this could be put right with a little more advice/work with the Agent's Manager and it was accepted it was already well organised, but the number of units being made per day was stretching the storage. The only concerns of the chartered surveyor were the communication and understanding of documented procedures by employees that do not speak English and improving storage. Otherwise, he was reporting back favourably for a competitive quote. However, I do not think their quote will be much less than £55,000, but will have a profit share built in providing return of premium for low claims ratio."

9. Later the same day Miles Smith provided a quotation from the second defendant. There followed some negotiations about the premium. In the end, a premium of £31,500 was agreed, and cover was effected from 12 July 2011. AmTrust signed the placing slip on 13 July 2011. The placing slip contained the wage roll information. Somewhat unusually, there are no or no surviving emails or letters between Miles Smith and AmTrust. It seems likely that there would have been written communications of some kind which have subsequently been lost. However and in any event, I have no reason to doubt Mr Carroll's evidence that Mr Rutter, the underwriter, would have assessed the risk on the information provided, and that there would, at some stage, have been a face-to-face meeting at Lloyd's where AmTrust had a box, or at AmTrust's office.

10. Letters of claim on behalf of the claimants were sent on 30 August 2017 and 18 January 2018. Claim forms were issued on 31 October 2017 (Varhelyi) and 11 December 2017 (Komives). Particulars of claim followed in February and in April 2018. The letters of claim and the particulars of claim recited the treatment and the injuries that I have already briefly described. It is relevant to note that each of them alleged that the trafficked workers were treated as a sort of sub-class of employee,

working 70 hours per week without rest breaks, given no induction or training and provided with no information about health and safety. Payment in respect of their services was made to Kotcha. There could scarcely have been a starker contrast between the rosy description of health and safety contained in the liability inquiry document and the actuality, which was simply a disgrace, and which provokes profound sympathy for the claimants and strong disapproval of the conduct of those who treated them in this way.

11. By their letter dated 22 March 2018, AmTrust avoided the policy. The letter was written by Mr Stuart Marshall, a solicitor and senior claims adjuster. It was a lengthy and detailed letter. It recited the lamentable facts which had emerged and continued as follows:

> "There was gross and serious non-disclosure to AmTrust and anything but a fair presentation of the risk when the insurance was taken out in that the matters set out above were wholly undisclosed. Indeed, in the presentation documentation submitted to insurers by the company's brokers, the insureds were presented as being engaged in an entirely legitimate and responsible business, as can be seen from the terms of the liability enquiry document. That presentation was grossly and fundamentally misleading by reason of the matters set out above.
>
> It was also made out to AmTrust on presentation of the risk that the insured had a health and safety regime which exercised appropriate and commendable control over the health and safety of its workforce, as can also be seen from the above document. That was also seriously misleading in light of the matters referred to above.
>
> Further, the estimated wage costs given in the document were misleading insofar as they took no account of the off-the-books payments being made to the trafficked workers, and they accordingly gave a misleading impression in regard to the number of workers engaged in working for the insured.
>
> In light of the above, AmTrust are satisfied that the insurance was obtained by material non-disclosure and/or misrepresentation, and that they were thereby induced to issue insurance which they would never have been prepared to issue had the true facts been known, such that they are entitled to avoid the policy, and by this letter they exercise their right do so.
>
> This means that the company has no valid insurance cover with AmTrust and, accordingly, no right to indemnity from them in regard to any of the above or any other claim.
>
> Arrangements will be made to effect a refund of premium."

12. The claimants have challenged AmTrust's right to avoid the policy in that way. The grounds of the challenge were complex, but in their essentials came down to the propositions that first, in some respects the second defendant could not satisfy the common law requirements of a valid avoidance and, secondly, in any event, the common law was now subject to a regulatory overlay, introducing a reasonableness requirement which, on the facts of these cases, was not made out.

The evidence

13. Before coming to these points I will give a brief summary of the evidence, including the expert evidence, little of which was in dispute. I will also give an overview of the relevant legal principles.

14. I have already referred to those aspects of Mr Carroll's evidence dealing with the inception of the policy. He readily agreed that trafficking had become more prevalent in recent years and that insurers had a role to play in discouraging it. However, he maintained that here there had been nothing to put the underwriter, Mr Rutter, on notice. He agreed that the second defendant had not undertaken its own enquiries. But he pointed out that Chartis had visited and given the first defendant "a clean bill of health" and that there was information from the broker which Mr Rutter would have relied upon. Mr Carroll surmised that Mr Rutter "felt he had sufficient information that it was a well enough run operation to provide cover". As to avoidance, he accepted that insurers took this step rarely and that, even where the legal right to avoid had arisen, an insurer would sometimes pay the claim, recover from the insured, if solvent, or "take the hit" if not. It was implicit in his answers that the circumstances of these two cases were so extreme that the insurers were not willing to do that on this occasion and had chosen to stand on their legal rights.

15. Mr Emblin gave evidence remotely by video link, and I record my gratitude to him for doing so when he was frail and unwell. In the normal way, he and Mr Flaxman had provided written reports and a joint statement. They helpfully summarised the grounds for avoidance under three heads:

> (1) material non-disclosure, in relation to the use of, and Mr Rafiq's involvement in trafficked labour, (the criminality ground);
>
> (2) material misrepresentation in regard to the first defendant's health and safety regime, (the health and safety ground);
>
> (3) material misrepresentation in regard to wage costs, which gave a misleading picture of the number of workers engaged and disguised the fact that the national minimum wage was not being paid to all workers, (the wage roll ground).

16. By the time Mr Emblin and Mr Flaxman had concluded their oral evidence, I could detect no real difference between them as to the significance of the above. Subject to the court's factual findings, they agreed that these matters were highly material and that had the true state of affairs been known, no insurer would have "touched it". Mr Flaxman, the claimant's expert, accepted that in the true prevailing circumstances the first defendant was uninsurable and that, placed in the scale of non-disclosures or misrepresentations, "it couldn't get much worse". They differed in two respects. Mr Flaxman's view was that the second defendant had made scant enquiries, (though that was not in itself abnormal – "lots of presentations these days are pretty scant and underwriters have different appetites for detail"). He felt that some of the assertions as to health and safety practices were obvious moonshine and should have prompted further investigations. He also took the view that, as a matter of market practice, the insurer should have paid the claims. In paras 7 and 8 of the joint statement he said:

> "In matters of employer liability insurance, the prudent underwriter will take into consideration the moral hazard risk associated with the insured's business, conscious of the Regulations that are there to protect the particular interests of the injured employee as distinct from the sole interest of the insurer. In my opinion, market practice would expect an underwriter finding themselves in this position to pay the claim for the benefit of the injured employees and seek such recovery from the insured as may be available."

17. The reference there to 'moral hazard' was a refrain of the point he had made at para 4.12 of his report. In that paragraph he said this:

> "It is recognised by insurance practitioners generally that there exists in some businesses a high risk of commercial and business practices that are, or border on, illegal practices. A prudent underwriter will be alert to them at the time of assessing a risk for acceptance. In summary, it is by no means unlikely that a company with a need for inexpensive labour and access to immigrant labour will take advantage of the connections it has, which may include criminal activity. This would be unlikely to be disclosed to anyone; including an insurer."

18. Notwithstanding the phrasing of those paragraphs, Mr Flaxman accepted that this was the only case of trafficking he had come across and that he could give no example of an insurer forbearing to avoid in such a case. He accepted that it depended on the attitude of the insurer and the facts of the individual case. At one point, he said that to pay the claim and to recover, if feasible, from the insured was the "thing to do".

The law

19. In order to avoid a contract of insurance, the insurers have to satisfy the two-stage test laid down by the House of Lords in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427; [1995] 1 AC 501:

> "(1) That the particular facts misrepresented or not disclosed would have influenced the mind of a reasonably prudent underwriter in exercising his underwriting judgement as to whether to write the risk or here to extend cover by agreeing the variation;
>
> (2) That the underwriter who agreed the risks (or in this case the variation) was induced to agree it by the facts misrepresented or not disclosed. To establish inducement, the insurers must satisfy the effective cause test as clarified by the majority of the Court of Appeal in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] Lloyd's Rep IR 131; [2003] 1 WLR 577 per Clarke LJ at para 59:
>
> > 'The misrepresentation must be an effective cause of a particular insurer or reinsurer entering into the contract, but need not of course be the sole cause. If insurer would have entered into the contract on the same terms in any event, the representation or non-disclosing will not, however material, be an effective cause of the making of the contract.'"

20. Turning specifically to employers' liability insurance, since the Employers' Liability (Compulsory Insurance) Act 1969, this has been compulsory. The Employers' Liability (Compulsory Insurance) Regulations 1998 (SI 1998 No 2573), made under the powers conferred by the 1969 Act, require the insurer to issue a certificate of the employers' liability insurance and display it in the workplace. Regulation 2 is in these terms:

> "(1) For the purposes of the 1969 Act, there is prohibited in any contract of insurance any condition which provides (in whatever terms) that no liability (either generally or in respect of a particular claim) shall arise under the policy, or that any such liability so arising shall cease if:
>
> …
>
> (b) the policy holder does not take reasonable care to protect his employees against the risk of bodily injury or disease in the course of their employment;
>
> (c) the policy holder fails to comply with the requirements of any enactment for the protection of employees against the risk of

bodily injury or disease in the course of their employment; or

(d) the policy holder does not keep specified records or fails to provide the insurer with or make available to him information from such records."

21. This statutory scheme is noticeably less comprehensive than the scheme which applies to motor insurance. *Colinvaux and Merkin's Insurance Law*, at para D-0456 makes these observations:

"The Employers' Liability (Compulsory Insurance) Act 1969 is far less generous to employees than is the Road Traffic Act 1988 to the victims of road accidents. The Road Traffic Act 1988 contains a comprehensive list of limitations which may not be imposed in a compulsory insurance policy; this prevents the insurer from relying on post loss breaches of condition by the assured and severely restricts the insurer's right to avoid the policy for breach of the assured's duty of fair presentation. The Employers Liability (Compulsory Insurance) Regulations 1998, despite the increased protection compared to that under the 1971 Regulations, are less extensive and, most importantly, do nothing to prevent the insurer's reliance on the assured's misrepresentation of, or failure to disclose, a material fact, and on the assured's breach of warranty."

22. Mr Jupp's skeleton argument, also referred to an article in the *Industrial Law Journal* by Professor Chris Parsons, in which the same point was made:

"If an insurer denies cover under an employers' liability insurance, the consequences for the injured employee can be severe because in the absence of an alternative remedy, the latter will go uncompensated if the employer himself is unable to pay. In the case of employers' liability insurance, the right of the insurer to avoid the insurance policy for misrepresentation or failure to disclose facts material to the risk – a central principle of insurance contract law – has never been restricted in any way. The [1998 Regulations] make no change this regard. In fact, employers' liability insurers do sometimes take the defence although it is not suggested that they do so lightly or frequently. However, it is submitted that the point is more likely to be taken when large sums are at stake, ie where the injuries in question are very severe or numerous. Indeed it was taken by the insurers in the case of the Glasgow Fire, discussed earlier, which helped to generate support for the 1969 Act. As has been observed, it is curious that the Act failed to address this problem."

23. That this constitutes a significant gap in the protection available to employees was recognised by Mr Michael Pratt QC, sitting as a Deputy Judge of the Queen's Bench Division in the case of *Dunbar v A & B Painters Ltd* [1985] 2 Lloyd's Rep 616. The Deputy Judge described the certificate of insurance displayed in the workplace as "nothing more than a snare and a delusion" if the insurance was vulnerable to be avoided for material non-disclosures of which the employees were ignorant and in which they were in no way complicit. The Court of Appeal endorsed these remarks. However, it is to be noted that Mr Pratt QC nevertheless felt himself constrained to apply the normal rules relating to contracts of insurance. It is also relevant that, with the exception of Insurance Conduct of Business Sourcebook (ICOBS), which I will come to, the statutory position remains very much as it was in 1985.

24. Under powers conferred by the Financial Services and Markets Act 2000 (the FSMA), the FSA (now the FCA), was permitted to make binding rules to be followed by insurers. The relevant rules for present purposes were contained in ICOBS. Non-compliance with ICOBS would expose the insurer to a right of action in favour of private persons under section 138D of the FSMA. The specific provision of ICOBS engaged in the present cases is rule 8.1.1 of chapter 8, which is titled "Claims Handling". This states as follows:

"An insurer must:

(1) handle claims promptly and fairly;

(2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;

(3) not unreasonably reject a claim (including by terminating or avoiding a policy); and

(4) settle claims promptly once the settlement terms are agreed."

25. The legal effect of these provisions was considered by Teare J in *Parker v National Farmers Union Mutual Insurance Society* [2013] Lloyd's Rep IR 253. At para 197 he said this:

"The scheme of the Financial Services and Markets Act 2000 does not purport to make the standards of conduct set out in ICOBS implied terms of policies of insurance … However, those standards are legally binding upon the insurer and can be enforced by civil action. In those circumstances, whether or not they are implied terms of the policy, the insurer cannot claim to be entitled to exercise a right to reject a claim under a policy of insurance otherwise than in accordance with those standards."

The claimants' submissions

26. I turn then to the claimants' submissions. For the purposes of this judgment, I have condensed and slightly re-ordered them.

27. As to avoidance at common law, in brief summary Mr Jupp submitted that the insurers had closed their eyes to the criminality, that there was no evidence that the health and safety information had ever been passed on to the insurer, and that the wage roll information, even if truly stated, would have been too marginal to have satisfied the requirement of materiality. In relation to the criminality ground, he additionally argued that even if the insurers had not closed their eyes to the criminality, as regards "innocent third parties", they were not entitled to rely on it. The authority for this proposition was *Hardy v Motor Insurers' Bureau* [1964] 1 Lloyd's Rep 397; [1964] 2 QB 745. In that case, the Court of Appeal upheld a claim by a person injured by the negligent and criminal driving of a motorist (who had stolen the car) whilst observing that the motorist himself would not have been entitled to recover under the policy.

28. In any event, relying upon the expert evidence of Mr Flaxman, there was a market practice to pay the claims in circumstances such as these and the avoidance of the policy was contrary to that market practice.

29. Mr Jupp went on to submit that even if, applying ordinary common law principles, the second defendant was prima facie entitled to avoid the policy, that right was now subject to rule 8.1.1 of ICOBS. This required them to act "reasonably". (It is, in fact, phrased as a negative, namely a duty not unreasonably to reject the claim, including by avoiding the policy.) In the circumstances of this case, avoiding the policy transgressed that requirement of reasonableness for the following reasons.

30. The 1969 Act and the 1998 Regulations provided for compulsory employers' liability insurance, which was intended to ensure that employees injured at work receive compensation for workplace injuries. The 1930 Act was intended to ensure that an employer's insolvency did not defeat that entitlement. The 1998 Regulations contained particular anti-avoidance provisions directed to terms or conditions which purported to exclude liability for non-observance of proper health and safety standards after inception. In these circumstances, an insurer which sought to avoid a policy, would be running a coach and horses (a phrase that originates with Mr Pratt QC in the *Dunbar* case) through the statutory scheme. That was especially the case in relation to avoidance or misrepresentation or non-disclosure in respect of health and safety shortcomings. Under the 1998 Regulations, these could not have been made the subject of a condition post-inception. It was therefore unreasonable to avoid on the ground of the like failings pre-inception.

31. Put more shortly, there was a statutory scheme with a clear policy objective, and to permit avoidance, "created a lacuna" in the scheme and a "protection gap" for employees. To put that slightly differently, Mr Pratt QC in the *Dunbar* case had said that "seemingly, if there is to be a solution that will be a matter for the legislature rather than the courts initially". The combination of rule 8.1.1 of ICOBS and section 138D of FSMA were, Mr Jupp submitted, that legislative intervention and if they were not recognised as such, then the lacuna in the statutory scheme for the protection of employees was perpetuated.

32. This was Mr Jupp's "overarching point". Other grounds why he said that the insurers had acted unreasonably in avoiding the policy were as set out in the following paragraphs.

33. Although this was not a public law claim and the insurer was not an emanation of the state, insurers (as Mr Carroll had acknowledged) had a role to play in combating modern day slavery. Mr Carroll had accepted that this included being astute to make enquiries where appropriate. Mr Jupp submitted that that might reasonably also have included having regard to the trafficked status of the injured claimants in deciding whether or not to avoid the policy. He pointed out that the public policy interest in protecting victims of trafficking had been recognised by the Supreme Court in the case of *Hounga v Allen* [2014] 1 WLR 2889 as a legitimate reason to give effect to an employment contract that would otherwise have been defeated by illegality. For similar reasons, it should, he submitted, be recognised as a factor to which an insurer would have to have regard in deciding whether to avoid a policy.

34. To the extent that the insurers found themselves saddled with a liability that was more than they had bargained for this was at least partly the product of their own failure to make fuller enquiries. They incepted the policy on scant information and, having done so, it was unreasonable to avoid it.

35. Mr Jupp pointed to the nature of the injuries and the nature of the accident to Mr Varhelyi, which were not unusual in the employment context.

36. He relied upon the market practice referred to by Mr Flaxman.

37. He said it was illogical to avoid in circumstances where the worse the employer's conduct was the more likely an injury would follow.

38. He criticised the letter of avoidance as failing to address relevant matters, in particular the special position of the claimants.

The second defendant's submissions

39. Mr Geoffrey Brown's submissions, which I have substantially accepted, appear sufficiently from the discussion and conclusions which follow.

Discussion

40. I accept that it is surprising and a little unsatisfactory that the second defendant did not field the witnesses responsible for accepting the risk and avoiding the policy. I accept also that there is a surprising lack of paperwork between the placing broker and the insurer. However, it is very likely that Mr Rutter, the underwriter, saw the liability enquiry and the email regarding the Chartis visit. If he did not see them, it is inconceivable that he was not informed of their contents. They contain precisely the information he was interested in and was required to consider. That being the case, and having regard to the unanimous views of the experts, that there can be no question that there were material non-disclosures and material misrepresentations which influenced the second defendant to accept the risks.

Avoidance at common law

41. To repeat Mr Flaxman's remark, it could not "get much worse". Any one of the non-disclosures would obviously have justified avoidance at common law. The contrary is not really arguable. I include the wage roll representations in that conclusion. It is correct that the true amounts would have increased the overall total by only a small amount. But that adjusted figure would still have been seriously misleading because it would have disguised the fact that a component of the workforce, ie those in the position of Mr Komives and Mr Varhelyi, were not being paid the national minimum wage.

42. I have not been able to discern anything in the liability enquiry document or the emails that could realistically be said to have put the second defendant on inquiry. Further, it is in the nature of the case that enquiries would not have been likely to have revealed the true position. That is also apparent from the fact that Mr Heap of Bush and Associates and the person who carried out the survey for Chartis were both, it seems, deceived. If the material which the second defendant had was relatively scanty, there was nothing unusual or untoward in that and, subject to Mr Jupp's arguments about ICOBS, the scantiness of the material has no bearing on the materiality of the non-disclosures, or on the right to avoid.

43. Neither *Hardy v MIB* nor *Total Graphics Ltd v AGF Insurance Ltd* [1997] 1 Lloyd's Rep 599 (the other case relied upon by the claimants) are authority for the proposition that an insurer cannot effectively avoid a contract of insurance where the insured has been guilty of criminal conduct which is material to the risk to be insured and which has not been disclosed. The second defendant has never said that these claimants should be denied recovery because of illegality on the part of the insured and Mr Rafiq. As in *Hardy* and *Total Graphics*, they were not in any way associated with that illegality. But it does not at all follow that AmTrust were precluded from relying on the illegality as a ground of avoidance.

44. Finally under this heading, it is obvious from the evidence of Mr Emblin and Mr Flaxman that there was no established market practice whereby it was incumbent on the insurer to pay the claim and recover, if feasible, from the insured. Their evidence, the extracts from *Colinvaux* and the article by Professor Parsons referred to at paras 21 and 22 above all recognised that there was no such practice. The case of *Dunbar* was a specific example of an insurer avoiding under circumstances similar to the present and that avoidance was upheld at first instance and on appeal.

ICOBS

45. Because there can be no doubt that AmTrust was entitled to avoid at common law, it follows that Mr Jupp's submissions about ICOBS are central to the preliminary issues. Broadly speaking, Mr Brown was content to approach the impact of ICOBS para 8.1.1 on the same basis as Mr Jupp, namely that it imposed a requirement on the insurer not unreasonably to reject a claim by avoiding the policy and that this requirement, if contravened, could preclude the insurer from relying on the avoidance. The overall effect would be to force the insurer to accept the claim.

46. This is certainly in line with the approach taken by Teare J in the *Parker* case. Nevertheless, this part of ICOBS is concerned with claims handling and does not purport to change or modify existing legal principles, but, rather, to require the insurer to apply those principles fairly and reasonably. There is nothing in *Parker* or *Bate v Aviva Insurance UK Ltd* [2013] Lloyd's Rep IR 492 to suggest otherwise. Therefore, whilst I agree with Mr Jupp that rule 8.1.1 of ICOBS has introduced a regulatory overlay to insurers' decisions to reject or avoid, that overlay is fundamentally concerned with process. It is not apt to change the substantive law. Specifically, I do not agree with Mr Jupp's proposition that ICOBS as interpreted by Teare J in *Parker* has introduced "a broad test of reasonableness having regard to all the circumstances of the case which must include the nature of the party seeking to enforce the policy". I was taken to no textbook, commentary or academic writing which supported such a proposition and the effect, if Mr Jupp were correct, would be to re-write the test set out by the House of Lords in the *Pan Atlantic Insurance* case. The language of ICOBS and the evident legislative intention of FSMA do not support such a far-reaching and significant change.

47. I acknowledge that there is what Mr Jupp has reasonably labelled a "protection gap" in the statutory scheme for employers' liability. But that gap or lacuna has existed for many years and is well recognised by courts and commentators as a matter which would benefit from legislation. It is not realistic to submit that the combination of ICOBS and section 138D of the FSMA constitute that legislative intervention. And I would add that, if it were, it would rectify what is acknowledged to be a general defect in only a proportion of cases. The statutory lacuna works general unfairness to injured workers. From their perspective, their remedy should not depend on it being shown in any individual case that the insurer has acted unreasonably. From the perspective of a legislator, it would be a somewhat haphazard and arbitrary remedy, not at all in line with, or as effective as, the prevailing statutory scheme for motor insurance. This is another reason to reject Mr Jupp's analysis.

Unreasonable process?

48. Given my interpretation of the effect of ICOBS, it is appropriate to look first at the process by which the second defendant incepted and subsequently avoided the policy.

49. As noted in paras 41 and 42 above, it seems to me that there is little to criticise in the second defendant's enquiries into and acceptance of the risk. They were misled. There was nothing to put them on notice of the true position, which further enquiries would not have revealed. There is similarly little to criticise in the second defendant's letter avoiding the policy. Mr Jupp pointed out that it contained no reference to the statutory scheme or to the fact that avoidance had the specific effect of rejecting these particular claimants' claims. But the letter was (and could only be) addressed to the first defendant and, in that context, it is unsurprising that it was confined to the matters which entitled AmTrust to avoid.

General unreasonableness?

50. The inelegant sub-heading "general unreasonableness" is intended to address Mr Jupp's wider points in support of a finding that his "broad test of reasonableness" was not met. I have rejected the proposition that it was for AmTrust to satisfy a test so phrased. Nevertheless, out of respect for Mr Jupp's arguments and in case these cases should go further, I should record my observations and findings on these points.

51. If, contrary to my interpretation, rule 8.1.1 of ICOBS has introduced such a test, then the language strongly suggests that it would fall to be applied as between insurer and insured. That is the focus of the rule, which refers to "insurer" and "policyholder". It makes no reference to injured parties. There is an obvious contrast with rule 8.2, which does refer to "injured parties" and sets out a code for the handling of their claims. But rule 8.2 governs motor vehicle liability insurers and reflects the fact that in the field of motor insurance the law provides for injured parties to have a direct claim against the relevant motor insurer.

52. If Mr Jupp's "broad test of reasonableness" under rule 8.1 were to be applied as between insurer and injured parties that would, in practical terms, assimilate the position of employers' liability insurers to that of motor insurers. That is because from the perspective of an injured party it could never be reasonable to avoid the policy, save, perhaps, in the very rare case where the injured party had colluded in the non-disclosures or misrepresentations. Applied from this standpoint, the claims of an innocent third party would always trump all other considerations. Because they involve trafficking and modern slavery, the claims of Mr Komives and Mr Varhelyi would be particularly deserving. But any and all injured claimants, whether trafficked or not, could very justifiably label the avoidance of the insurance policy underwriting their claims as unreasonable and unfair if it left them without a remedy. I do not think that such an interpretation, which would, as Mr Brown observed, have the practical effect of imposing a 'blanket ban' on insurers exercising their legal rights in circumstances such as the present, can possibly have been the intention of rule 8.1.

53. As between insurer and insured, I do not think that AmTrust can be said to have acted unreasonably, even if the parameters of the test of reasonableness were to be drawn more widely than I think is permissible.

Conclusion

54. I have come to the reluctant conclusion that the second defendant was contractually entitled to avoid the policy and that it did not act unreasonably in doing so. I reach this conclusion with regret because the statutory scheme which has permitted that result is defective and unfair. The reasons were eloquently stated by the judge in the *Dunbar* case, and endorsed by the Court of Appeal and I will not repeat them.

55. I would, therefore, answer the questions framed in the preliminary issue as follows: question (1): yes; question (2): yes; question (3): no; question (4) does not arise.