IN THE COUNTY COURT AT NOTTINGHAM
SITTING AT THE COUNTY COURT AT DERBY

Claim No. B11YP672

B E T W E E N :

CRAIG PHILIP KEELING

Claimant

and

AARON KEELING

1st Defendant

and

TRADEWISE INSURANCE COMPANY LIMITED

2nd Defendant

Claim No. B05YP963

B E T W E E N :

CARLO AMENDOLA

Claimant

and

AARON KEELING

1st Defendant

and

TRADEWISE INSURANCE COMPANY LIMITED

2nd Defendant

Before :HHJ COE QC

- -

Hearing dates: 6th June 2018

- -

JUDGMENT

HHJ Coe QC :

The claimants' current applications

1. There are 2 applications before the court. They are both applications made pursuant to CPR 19.5 to add defendants after the end of the limitation period. Craig Keeling applies to join Robert Boddy as a defendant and Carlo Amendola applies to join both Mr Boddy and his insurers, Southern Rock Insurance company Limited ("Southern Rock"), as defendants.

Background

2. Craig Keeling and Carlo Amendola, the claimants in these actions, sustained injuries in an accident on 20 October 2012. They were both passengers in a vehicle driven by the first defendant Aaron Keeling. Aaron Keeling and the driver of a second vehicle, Mr Boddy were involved in driving at excessive speed when Aaron Keeling lost control of his vehicle which left the carriageway. Craig Keeling's claim has a pleaded value in excess of £300,000 and Carlo Amendola's claim has a pleaded value between £50,000 and £100,000.

3. Robert Boddy and Aaron Keeling both pleaded guilty to dangerous driving and were sentenced to 12 months' imprisonment by His Honour Judge Stokes QC on 25

November 2013.

4. Both claimants issued separate claims against Aaron Keeling. Aaron Keeling's insurers, Tradewise Insurance Company Ltd (" Tradewise") avoided the policy because Aaron Keeling had said he was a full-time motor trader when in fact he was employed as a white line painter. On 19 November 2015 Tradewise made an admission of negligence on the part of their driver.

5. The proceedings were issued on 12 October 2015. Since Tradewise were seeking to void the insurance policy the papers were served on Aaron Keeling direct and Tradewise was added a second defendant on 7 March 2016. By their defence Tradewise dispute liability and aver that Aaron Keeling and Robert Boddy were racing and encouraging each other to race, that the accident was caused or contributed by the actions of Robert Boddy and that this was an unlawful joint enterprise so that Robert Boddy should be held partially liable. Further, they argue that the claimants were willing parties in the driving. They also rely on contributory negligence.

6. By way of some further background, at a CMC in June 2016 Tradewise via Clause 14 of the Uninsured Drivers Agreement 1999 requested Craig Keeling to join in Mr Boddy in order to share liability or pass on the whole of the liability. That application to join in Robert Boddy was granted (in those proceedings) in December 2016 and judgement was entered against him on April 2017. Southern Rock applied to set aside that order which was granted on December 2017 since there had been no service on Mr Boddy. Southern Rock were discharged from the proceedings. The claimant therefore re-served the application on 17 January 2018. Whilst there was an argument about the section 152 notice in respect of the earlier proceedings following the re-serve in January 2018 notice has now been given. These applications were listed to be heard together. As was made clear the applications are made by the claimants Craig Keeling and Carlo Amendola, but the driving force behind the applications is Tradewise. The claimants' interest is in obtaining judgement against a defendant and an insurer who has a liability to pay.

7. I note that on 3 March 2016 the court ordered that Tradewise was entitled to avoid Craig Keeling's insurance. Tradewise made no formal request for Mr Amendola to join in the other parties until January 2018, hence the application in April.

The applications

8. Mr Craig Keeling's application is supported by the statement of Ardip Kahlon. His application is limited to joinder of Robert Boddy. On his behalf, Mr Arney outlined the nature of the application pursuant CPR 19.5 indicating that the court needs to be satisfied that the joinder is necessary or in personal injury proceedings that section 11 of the Limitation Act 1980 should not apply or should be dealt with at trial. He pointed out the availability of contribution proceedings in any event.

9. Mr Amendola's application notice is dated 3 April 2018 and he applies to join Mr Boddy as a third defendant and Southern Rock as a fourth defendant also pursuant to CPR 19.5. The application reads "which step the claimant has been compelled to take by the second defendant under Clause 14.1 of the Uninsured Drivers' Agreement 1999". The application is supported by the statement from Mr Webley, an associate solicitor. Mr Webley sets out that "unless compelled to do so under Clause 14.1 the claimant did not intend to join the proposed third defendant or fourth defendant".

10. As identified, following the voiding of Aaron Keeling's policy, Tradewise stand in the shoes of the MIB by reason of their claim to have Article 75 status as insurer for the first defendant, Aaron Keeling.

11. Southern Rock's position as notified to Mr Amendola's solicitors was that they also hold Article 75 status by reason of Mr Boddy using a vehicle outside the permitted use under the policy. Hence the application to join in both Mr Boddy and Southern Rock.

12. I was told at the hearing that Tradewise have given a full indemnity as to costs in respect of both claimants' applications. As Mr Kahlon sets out that requirement is

especially relevant because the claimant would not otherwise be seeking to join Mr Boddy. It is apparent that Tradewise's motivation is to attempt to obtain some contribution or pass on responsibility to Southern Rock. Mr Boddy, like Aaron Keeling is properly described as a man of straw.

The Law

13. CPR 19.5 provides: -

(1) This rule applies to a change of parties after the end of a period of limitation under—

(a)the Limitation Act 1980;
(b)the Foreign Limitation Periods Act 1984; or
(c)any other enactment which allows such a change, or under which such a change is allowed.

(2) The court may add or substitute a party only if—

(a)the relevant limitation period(GL) was current when the proceedings were started; and
(b)the addition or substitution is necessary.

(3) The addition or substitution of a party is necessary only if the court is satisfied that—

(a)the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
(b)the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
(c)the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party.

(4) In addition, in a claim for personal injuries the court may add or substitute a party where it directs that—

(a)(i) section 11 (special time limit for claims for personal injuries); or

(ii)section 12 (special time limit for claims under fatal accidents legislation), of the Limitation Act 1980 shall not apply to the claim by or against the new party; or

(b)the issue of whether those sections apply shall be determined at trial.

The Arguments

14. The claimants essentially contend that there is no prejudice to Mr Boddy or Southern Rock if these applications are granted.

15. By reference to the exhibits to Mr Webley's statement and by reference to the defence and sentencing remarks it was pointed out on behalf of the claimants that during the criminal proceedings it was conceded by Mr Boddy that there was an element of competitive driving in that he did not slow down whilst being overtaken, although any prior arrangement is denied. Therefore, it is submitted that the threshold test of necessity is met and that without all parties being present before the court any apportionment would be an impossible task. It is suggested that whilst contribution proceedings are open to Tradewise such would amount to a duplication of proceedings. On the face of it, it is submitted that the claimants are in a strong position. In respect of the discretion which I have it was submitted that there was no evidential prejudice to Mr Boddy or his insurers and that I should bear in mind the overriding objective as to justice and proportionality of costs.

16. On behalf of Tradewise, Mr Featherby QC urged me firstly to consider the overall merits here. There were two cars and two uninsured drivers travelling at excessive speed probably in the region of 90 miles an hour and failing to allow overtaking. He submitted that to have one insurer picking up “the whole tab” is manifestly unfair and unjust. He submitted that there should be proper justice achieved between two tortfeasors.

17. By reference to the sentencing remarks and mitigation he set out that there is a triable issue both as to joint enterprise (for which there does not need to be any formal agreement, of course,) and the issue of racing. In respect of limitation and delay he said that nothing in terms of evidence is less cogent now than it would have been two years ago. The evidence has been obtained and investigated. There is no evidence that either of the two drivers have any diminished recollection. One of the passengers does not remember. There are witnesses to the driving. He submits that there can and should be a fair trial. Further and in any event if the applications are dismissed and contribution proceedings are the only way forward then such proceedings would likely be ordered to be tried at the same time and limitation would not arise since it has not yet started running for those proceedings. That reality should inform the exercise of my discretion in this application. He submitted that limitation ought to be left to the trial judge.

18. On the issue of necessity, he repeated that Mr Boddy and Southern Rock will be in the case anyway pursuant to some Part 20 proceedings. He says that the claimants are not entitled to judgment. There has been no admission of liability and there are many cases of negligent driving where there is a failure to recover. Further, there is the issue of joint enterprise here. In respect of Clause 14, it was his submission that there are issues in relation to whether or not there has been compliance. He referred to "a sorry saga". There have been misdirected letters and so on and so it may be that the claimants will lose on this point. In reliance on Clause 14 therefore he says that there is still an issue as to whether or not Tradewise would be liable in any event. Essentially, he submitted that rather than contemplating Part 20 proceedings the court should “cut through” the current procedural position and reconstitute the proceedings, order a case management conference and timetable the matter through to trial.

19. Mr Featherby QC acknowledged that Tradewise have a choice either to require the claimants to make these applications (pursuant to Clause 14) or to launch contribution proceedings subject to Part 20. However, he submitted that Clause 14 is the more reliable because of the problems with contribution proceedings: where there is no direct cause of action between Tradewise and Mr Boddy; where there is no right of

subrogation because the policy was voided ab initio (which is supported by the declaration made by the court); that there is no authority from Aaron Keeling to act; and that Aaron Keeling is already represented. On this point he also said that Southern Rock's stance on limitation is completely undermined by the possibility of the 1978 Act proceedings because the two-year period has not even begun to run.

20. On behalf Mr Boddy, Mr Morton submitted that the claimant cannot satisfy the test of necessity. Both claimants can perfectly well proceed to obtain a judgement against Aaron Keeling and Mr Boddy's joinder is not necessary. There is no necessity where there is no dispute that Aaron Keeling was negligent and no dispute that his driving was causative. Therefore, whether or not Mr Boddy was negligent is irrelevant. Hence the claimants can only rely upon the provision, "except as provided by s.33 Limitation Act 1980". The section gives the court a broad discretion and Mr Morton submits it would be a Draconian step to deal with the issue now because it would deprive Mr Boddy of the opportunity to advance cogent arguments as to why he should not be joined outside limitation. Rather, the court should assess the strength or otherwise of the party's position under s.33 before the court deciding if the matter should be left to the trial judge.

21. Mr Morton submits that Tradewise have delayed and that delay is to be deemed to be the claimants' delay. They knew of Aaron Keeling's misrepresentations about being a full-time motor trader as soon as they saw the police interviews. They knew about the alleged racing following the police statements and the sentencing. Nonetheless, in the case of Mr Keeling the application was made a year after limitation expired on 20 October 2015 and in the case of Mr Amendola it was made 2 1/2 years after limitation expired so that is now almost 5 years and eight months since the index accident. Mr Morton makes the point that the delay is wholly unexplained. Further, the balance of prejudice exercise is between the claimants and Mr Boddy and not Tradewise and Mr Boddy since this is the claimants' application.

22. The only possible prejudice to the claimants would be a successful argument that they

have not taken all reasonable steps to obtain judgement against every person who may be liable pursuant to the Uninsured Drivers Agreement 1999 which may enable Tradewise to avoid liability. By the fact of making these applications, it is submitted that they have taken those steps and so are subject to no prejudice. Mr Boddy on the other hand faces the prospect of a claim by insurers against his limited assets, the consequences which would be disastrous for him.

23. On behalf of Mr Boddy it is also submitted that the cogency of the evidence is likely to have been affected. There are real issues of fact between the witnesses. Mr Amendola has no memory of events after leaving work. Aaron Keeling denies racing. Craig Keeling says he was not aware of any joking or banter relating to driving, speed or car performance or any suggestion of any race. The claimants' accounts are not consistent with the pleadings submitted by Tradewise. There are a large number of witnesses whose evidence will need to be explored.

24. It is submitted that the s.33 application would be a weak one and that the claim can be dealt with between the existing parties more expeditiously and proportionately and in accordance with the overriding objective.

25. Mr Morton pointed out that where Part 20 contribution proceedings are still possible it is likely that Aaron Keeling will grant the authority to Tradewise and limitation would not be an issue. In the circumstances Tradewise are choosing to pursue joinder despite limitation difficulties and that therefore the potential of Part 20 proceedings does not undermine the limitation stance of Southern Rock and Mr Boddy but in fact underpins it.

26. Miss Foster, on behalf of Southern Rock (who is only concerned in Carlo Amendola's claim), repeated submissions made in writing for the hearing in December 2017 and I was referred to the witness statement of James McCabe dated 9 November 2017. In argument Miss Foster largely adopted the submissions of Mr Morton setting out that necessity is not made out and that CPR 19.5(4) suggests two routes for the court, firstly

to disapply s.11 now or secondly to let limitation be dealt with at trial. It was submitted that the correct approach must be to ask whether there is a real prospect that the s.33 discretion might be exercised in the claimants' favour. It was submitted that the claimants' position is extremely weak. Miss Foster pointed out that there is no explanation for the delay and no evidence in support of any reason for the delay. There has been reference to correspondence and "to-ing and fro-ing" but no adequate basis is put forward for the exercise of the discretion. Further, the claimants have an unassailable case against the first defendant. Mr Boddy might very well be called as a witness to the issue of joint enterprise/volenti, but does not need to be a party.

27. She reiterated that any prejudice to Tradewise is irrelevant as this is not their application. In terms of delay generally the third and fourth defendants would suffer because they have had no opportunity to investigate issues and it is now more than five years since the accident. Finally, she says that whether or not contribution proceedings can be or subsequently are issued should not affect my decision because it is of no concern to the claimant, they are only of importance to Tradewise.

28. In reply Mr Morton referred to the s. 33 test of "all the circumstances of the case" and reminded me that it is important to look at the totality of the delay (some five and half years) although the weight to be attached to the pre-limitation delay as opposed to the post limitation delay is different. Tradewise refer to the availability of Part 20 proceedings, but have not pursued them. They could have done so. There is no explanation as to why they have not. In relation to the Clause 14 point, no evidence about the claimant's actions upon which Tradewise would rely have been put forward. Mr Featherby QC referred to an amended defence which he says raises this point, but it is, I was told, only in draft form and no permission has been obtained to serve an amended defence.

29. Miss Foster submitted that if Tradewise intended to bring Part 20 proceedings they would have done so by now. She said that the submissions in respect of prejudice do not relate to the claimants' applications and submitted that it is not for the court to

correct any injustice to Tradewise by this procedure.

30. Mr Arney on behalf of Mr Craig Keeling said that it is not accepted by the claimants that there is a Clause 14 argument which will in fact be pursued and even then, there is no evidence in support.

Analysis

31. The test for me to apply is as set out in CPR 19.5 and section 35 Limitation Act 1980. There are alternative routes to a successful application. Under section 35(5) (b) joinder must either be necessary or there is the freestanding provision to disapply the Limitation Act now or at trial. In other words, there are separate routes. Of course, it is only if Mr Boddy is to be joined that Southern Rock should be joined given the insurance position. I was referred to the notes in the White Book and the overriding objective.

32. The applications are brought by the claimants. Both claimants issued proceedings against Mr Aaron Keeling alone. Both claimants were aware of the circumstances of the accident. Neither claimant felt it was necessary to join in Mr Boddy. Both claimants make it clear that they have only made these applications because they have been compelled to do so by Tradewise. Otherwise they would not have done so. The reason for doing so is so that they can be seen to have taken all reasonable steps pursuant to Clause 14. It does not sit well therefore in the mouths of the claimants now to say it is necessary to join in Mr Boddy.

33. The claimants were passengers in the vehicle being driven by Aaron Keeling. The vehicle left the carriageway when Mr Keeling lost control. He has pleaded guilty to dangerous driving. There is no suggestion that Mr Boddy could be exclusively responsible. Mr Boddy may be called as a witness but he is not a necessary party to the proceedings under the tests in section CPR 19.5(3) since the claim clearly can properly be carried on against Aaron Keeling without his addition.

34. Therefore, whilst I accept that there may be arguments about Mr Boddy's liability to the claimants, those arguments depend upon a finding of joint enterprise (to include an agreement, tacit or otherwise, to race and/or drive competitively) and awareness on the part of the claimants and a willingness to be involved in such activity. Even if successful, those arguments depend upon the liability of Aaron Keeling and would not exonerate him.

35. I do not accept that this application is an application which requires me or pursuant to which it would be appropriate for me to consider whether or not there is injustice to Tradewise, even if they are the only insurer “picking up the whole tab".

36. The claimants do not succeed therefore on the necessity route.

37. I agree that it would be a Draconian step to disapply limitation now and that if I were to accede to the applications, limitation would have to be considered at trial. It is therefore necessary for me in deciding whether or not to allow the applications to assess the prospects of the s.33 application being successful. If there is no realistic prospect of success then there is clearly no merit in allowing the applications.

38. Section 33 requires a consideration of all the circumstances of the case. It involves a balancing exercise in respect of the prejudice to both claimant and defendant. It also and importantly in this case requires the court to consider the length of and reasons for the delay. The delay here is, as I find, significant.

39. No reason for the delay is put forward by the claimants. There has been no attempt by the claimants in their application to explain the delay in the application. There is no explanation. There is no evidence. There is no statement.

40. Since the claimants say that they would not have made these applications unless required to, I have to conclude that they made conscious decisions within limitation not to pursue Mr Boddy.

41. In the circumstances, it does not seem to me that the court could properly exercise its discretion in the claimants' favour on the issue of delay alone.

42. I agree with the submissions of Mr Morton and Miss Foster that the balancing exercise in respect of prejudice has to be conducted between the claimants and Mr Boddy. Any prejudice to Tradewise is no part of the exercise. The height of the claimants' argument is that there is no prejudice to Mr Boddy. They essentially cannot point to any prejudice to the claimants except that they would not be able to pursue the possibility of a claim against Mr Boddy in addition to the stronger claim they already have against Mr Aaron Keeling. They made a conscious decision not to pursue that claim within limitation and have stated that they only make the applications now because they have been required to.

43. Further, the claimants, by these applications, have now taken steps pursuant to Clause 14. I accept that the Clause 14 point has not yet been formally raised, let alone adjudicated upon, but I am entitled to assess the likely prejudice to the claimants on this issue for the purpose of these applications. In so far as Tradewise say that they may still have a Clause 14 argument, there is currently no pleading to that effect and there is absolutely no evidence put forward to support it. At the present time therefore, and without binding any future tribunal, any prejudice to the claimants is unidentified and must be very limited. The claimants' case (and these are the claimants' applications) is that there could not be a successful Clause 14 argument and so they cannot rely on any potential prejudice arising from that issue.

44. On the other hand, there is real prejudice to Mr Boddy as I find. He has not been a party to these proceedings so far. He would have to, together with solicitors, start afresh. He is described as a "man of straw", but if limitation at trial were decided against him and if he were found liable he would face dire financial consequences. The cogency of the evidence would be adversely affected.

45. Any s.33 argument therefore lacks any sufficient prospect of success to allow the applications via this route.

Conclusion

46. In the circumstances I am not satisfied that the claimants have made out the grounds for an application and the applications are dismissed.

47. I gave an extemporary ruling to this effect immediately after the hearing and said that I would provide this judgement in writing. It will be formally handed down in Nottingham. The parties' attendance is excused. I have given some directions for a costs case management hearing on 2nd October with costs budgets and objections to be provided sequentially 28 days and 14 days before that. I have directed that any contribution proceedings should be brought by 27th July. I hope that the overall position will be clear by the time the matter comes before the District Judge in October and real progress can be made.

48. I have not dealt with the issue of costs following this hearing. The claimants are indemnified by Tradewise (otherwise they would not have brought the applications). Mr Boddy has an indemnity from Southern Rock. Miss Foster has indicated that although the application was brought by the claimants she would seek a costs order against Tradewise. I have invited the parties to see if they can reach some agreement about the cost issues and I will receive submissions in writing as to costs, if necessary, by 4pm on 19th July.