OUTER HOUSE, COURT OF SESSION

[2023] CSOH 62

A294/21

OPINION OF LORD MENZIES

In the cause

AVIVA INSURANCE LIMITED

Pursuers

against

ALISTAIR McCOIST AND ANOTHER

Defenders

Pursuers: Ellis, KC; DAC Beachcroft Scotland LLP
First Defender: Cowan; Allan McDougall Solicitors (for PRG Partnership)
Second Defender: No Appearance

5 September 2023

Introduction

[1] In about January 2016 the first defender, Mr McCoist, purchased an Audi A1 car, registration number SC62 NKR for his son Argyll McCoist, who is the second defender. Although Mr McCoist owned the car and remained the registered keeper of it, he only drove it very occasionally. The car was bought for Argyll's use.

[2] By 2016, Mr McCoist was divorced from his ex-wife Alison, who was Argyll's mother. Mr McCoist had remarried and lived with his second wife Mrs Vivien McCoist at

an address in Bridge of Weir. Argyll lived with his mother Alison at an address in Bishopton. The Audi car was kept by Argyll at the Bishopton address.

[3] At first, the car was insured under a policy incepted with More Than Insurance on 28 January 2016, which had a planned expiry date of 26 January 2017. The policy was cancelled by letter from More Than dated on or about 24 February 2016 sent to the second defender following the box fitted to the car having recorded him driving at excessive speed. The policy was cancelled with effect from 23.59 on 2 March 2016. The vehicle was not insured for Argyll to drive thereafter.

[4] The reason for the cancellation of the policy was that the insurers discovered that on 22 February 2016 at 2.44am the car was being driven at 65mph in a 30mph limit.

[5] Argyll continued to drive the car without insurance after 3 March 2016. The defenders tried but failed to insure Argyll to drive the car with the pursuers on 8 July 2016. With effect from 13 August 2016 Mr McCoist entered into a contract of insurance with the pursuers, which related to several vehicles owned by Mr McCoist including the Audi. Argyll remained uninsured to drive the Audi.

[6] It is Mr McCoist's position that he told Argyll at the beginning of July 2016 that under no circumstances was he to drive the Audi, and that he told Argyll more than once thereafter that he was forbidden to drive the Audi.

[7] The Audi required some work to its steering, so it was taken to SABCO garage in Bishopton. The repairs were carried out, and thereafter the car remained parked in an area beside the garage. On about 21 November 2016 Argyll removed the Audi from this area and drove it back to his mother's house. He continued to drive it, although not insured to do so.

[8] At about 9.45pm on 3 December 2016 the Audi collided with a pedestrian, Stephan Murdoch, in Greenock Road, Bishopton. At the time Mr Murdoch was crossing the road on a pedestrian crossing which was showing a green man. He suffered serious injury. The Audi was being driven by Argyll at the time. Argyll failed to stop after the accident, but the car was traced by the police. Argyll subsequently pleaded guilty at Paisley Sheriff Court on 9 August 2018 to causing severe injury to Stephan Murdoch by dangerous driving, and to driving without insurance.

[9] Argyll tried to purchase one day insurance cover for the Audi at about 10.36pm on 3 December 2016, after the accident had occurred. The policy was void for non-disclosure. In any event it did not cover the time of the accident.

[10] Mr Murdoch raised an action for damages against Argyll. The pursuers entered the action as a minuter defender because of their interest as an insurer of the Audi. On 12 February 2020 Mr Murdoch obtained decree against the second defender for a principal sum of £200,000 of damages, together with interest and expenses. Following decree, the pursuers paid Mr Murdoch the principal sum together with £44,000 to settle interest and expenses.

[11] The pursuers were not obliged to pay damages to Mr Murdoch under the terms of their policy with Mr McCoist. They were obliged to do so because of the provisions of sections 145 and 151(2) of the Road Traffic Act 1988.

[12] In the present action the pursuers seek recovery from Mr McCoist and Argyll McCoist jointly and severally in terms of section 151(8) of the Road Traffic Act 1988 of the amount paid, namely £244,000.

[13] Until 2 May 2023 Argyll McCoist was legally represented, and defences were lodged and adjusted on his behalf. On 2 May 2023 a minute was lodged on his behalf stating to the court that "the second defender consents to his defences being repelled and decree being granted against him in terms of the conclusions of the summons." By letter dated 25 May 2023 his solicitors intimated to the court that they had withdrawn from acting. At the outset of the proof senior counsel for the pursuers intimated that he would move at the end of the proof for decree jointly and severally against both defenders, and indeed he did so.

The issue

[14] By joint minute between the pursuers and the first defender lodged at the Bar on 30 May 2023 it was agreed that:

> "The only remaining question which the court has to determine at proof is whether (as averred by the pursuers and denied by the first defender) the first defender 'caused or permitted the use of the vehicle which gave rise to the liability' in terms of section 151(8)(b) of the Road Traffic Act 1988".

The relevant statutory provisions

[15] Section 143(1) of the Road Traffic Act 1988 provides as follows:

> "(1) Subject to the provisions of this Part of this Act—
>
> (a) a person must not use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act, and
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> (b) a person must not cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that other person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act."

Section 145 of the 1998 Act provides that the compulsory insurance must provide cover *inter alia* for bodily injury to any person caused by or arising out of the use of the vehicle on a road.

[16] Section 151 of the 1998 Act provides *inter alia* as follows:

> " **151. — Duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks.**
>
> (1) This section applies where, after a policy or security is issued or given for the purposes of this Part of this Act, a judgment to which this subsection applies is obtained.
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> (2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either—
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> (a) it is a liability covered by the terms of the policy or security …, and the judgment is obtained against any person who is insured by the policy or whose liability is covered by the security, as the case may be, or
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> (b) it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and the judgment is obtained against any person other than one who is insured by the policy or, as the case may be, whose liability is covered by the security.
>
> …
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> (8) Where an insurer becomes liable under this section to pay an amount in respect of a liability of a person who is not insured by a policy or whose liability is not covered by a security, he is entitled to recover the amount from that person or from any person who—
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> (a) is insured by the policy, or whose liability is covered by the security, by the terms of the which the liability would be covered if the policy insured all persons or, as the case may be, the security covered the liability of all persons, and
>
> (b) caused or permitted the use of the vehicle which gave rise to the liability."

Summary of the evidence

[17] John Laird was a sole trader who owned and ran the SABCO garage at 140 Greenock Road. He remembered the Audi car being brought in for repairs in 2016, although he was not sure about the date. He could not be sure who brought it in or who took it away, but it was probably Alison McCoist who instructed the repairs. He remembered being told that there was some kind of dispute between Argyll and Mr McCoist, although he did not know what Argyll had done; he was asked if the car could stay at the garage while Alison McCoist sorted something out. The car was repaired, and then sat outside the garage until it was picked up some months later. Alison McCoist paid for the repairs. Mr Laird knew that Argyll stayed with his mother Alison at that time.

[18] Mr Laird heard that Argyll was involved in an accident, and shortly thereafter he received a visit from the police who wanted to confirm that the Audi involved in the accident was the same car that had been at the garage for several months. He confirmed that the Audi had been removed from the garage before 23 November 2016. He held the car on Alison McCoist's instructions - he had no dealings with Mr McCoist, who had never given him any instructions regarding the car. It was not possible that one of his employees had spoken to Mr McCoist about the car - if anyone booked a car in for repair, he would deal with this himself.

[19] Argyll McCoist was born on 2 June 1998 and lived with his mother at an address in Bishopton. He lived there throughout 2016. His father was the first defender Mr McCoist and his mother was Alison McCoist. His father gave him the Audi car at about the end of January 2016; he described it as a gift, although he believed that his father owned the car

and remained the registered keeper of it. The car was for his sole use - he did not remember his father ever driving the car, and his mother did not drive it.

[20] To begin with, in January 2016, Argyll was insured to drive the car with More Than; his father paid the insurance premium. He accepted that this policy was cancelled with effect from 23.59 hours on 2 March 2016, as explained in a letter dated 24 February 2016 from More Than addressed to him, but he did not remember receiving this letter - he had never seen it before being shown it in court. He did not receive a refund of £723.25, although his address was shown correctly on the insurance form (number 7/5 of process). He continued to drive the car, as he did not know he was not insured. In about the middle of March he was stopped by the police at Erskine, and was told he was not insured to drive the car. His father then found the emails cancelling the insurance policy, and told Argyll that he was not to drive the car until he could afford to buy insurance. This was as a punishment. In July 2016 attempts were made to insure him to drive the car, without success. His father told him more than once not to drive the car; he said this first in March 2016, and repeated this. His dad took the keys from him and gave them to his mum, and about two weeks later the car had to go for repair at the SABCO garage. Argyll was sure the car was either collected by the guy who owned the garage or was driven to the garage by his dad.

[21] The car was in the garage from about March to November 2016. Argyll did not remember being stopped by the police in June or July 2016 - he was sure the car was in the garage from March until November. He did not know where the car keys were.

[22] On about 21 November 2016 Argyll went down to the garage, collected the car keys from the garage, and drove the car home. (Photographs which he took (7/3 of process) show the car parked at the garage on 16 October 2016 and parked outside his mother's house on

23 November 2016.) He did not obtain his father's permission before driving the car, and he knew he was not insured to drive it. He had the car keys in his possession after he drove it home from the garage, and his mother knew this. He told her that he had his dad's insurance.

[23] At the time of the accident on 3 December 2016 Argyll was driving the car. He did not stop after the accident, but drove the car back to his mother's house and immediately tried to arrange insurance for it so that it would appear that the car was insured at the time of the accident. He accepted that this was an attempt to deceive.

[24] He was interviewed by the police on 5 December 2016, but he did not remember what he said in answer to their questions. In particular, he did not remember them asking him in terms of section 172 of the Road Traffic Act 1988 to provide the name and address of the Audi at the time of the accident, nor answering "I can't assist you with that". If he said that, he would have been lying to the police. He accepted that he did lie to the police.

[25] Mr Alistair Murdoch McCoist was aged 60 and worked as a sports commentator. He bought the Audi car for his son Argyll's use, but he owned it and was the registered keeper of it. In January 2016 he gave the keys to Argyll and arranged insurance for the car with More Than. He himself only used the car very occasionally, as he owned a number of other cars.

[26] He did not see the email from More Than cancelling the insurance police with effect from 2 March 2016. He received many hundreds of emails, and although he checks his emails regularly, he did not notice this. Nor did he notice the refund of £723.25 to his credit card. The first time that he realised that insurance cover for the Audi had been withdrawn was in July when Argyll was found to have been speeding. Argyll continued to use the car

from March until July when he was not insured, but Mr McCoist was not aware that he was not insured. In July 2016 he asked Andrew McCormick, his accountant who looked after his business affairs, to see if insurance could be arranged for Argyll to drive the Audi, but without success. He emailed his former wife Alison advising her of this, and he told Argyll that he must not drive the car. He told him verbally on several occasions that he was not insured and the prospect of him getting insurance was pretty minimal. When asked why he told this to Argyll on more than one occasion he explained that Argyll was aged 18, and when he (Mr McCoist) was that age his father had to tell him things more than once or twice. He told Argyll that he was legally not allowed to drive and that he was not to drive the car.

[27] Mr McCoist removed the keys from Argyll. The car needed to be repaired, but he could not remember how it got to the garage. He thought that he dropped it off himself but he could not be 100% certain; he was fairly confident that Alison did not take it to the garage.

[28] Mr McCoist accepted that it was possible that he knew that the Audi was not insured for about two weeks before it was taken to the garage; during that period he took no steps to remove the car. Argyll had a set of keys for the car, and Mr McCoist took them off him and left them with his mother. He did this because the keys would be needed to take the car to the garage. He was 100% sure that he told his former wife Alison that Argyll should not drive the car and that he was not insured to do so. When Argyll removed the car from the garage in late November 2016 he obtained the keys from the garage and drove off in the car. When he arrived back home from the garage Mr McCoist understood that Argyll lied to his mother and told her that he had insurance. Mr McCoist accepted that the garage would

think that Argyll was insured to drive the car. He did not tell the garage that Argyll should not take the car away - because this was unnecessary. He told Argyll in no uncertain terms repeatedly (perhaps once or twice) that he was not allowed to drive the car. His view was that he had absolutely removed the car from Argyll's use. There were two sets of keys to the car; he kept one of these himself, and the other was at the garage.

[29] On 4 December 2016 the police spoke to Mr McCoist. They asked him who was driving the Audi at the time of the accident. The handwritten note (number 6/63 of process) recording his answer as "I imagine it would be my son, I can't say for definite but I imagine it would be my son Argyll" was put to him and although he could not remember saying this, he accepted that he did if the police state that he did. He did not tell the police that the car was in the garage. He did have a set of keys to the car himself, and he did have access to it, but not immediate access. He accepted that he left the car at the garage and did not give the garage any instructions not to let Argyll take the car, but he told Argyll not to drive it. Argyll asked several times about getting insurance for the car, but Mr McCoist's reaction was the same - he must not drive the car.

[30] PC Brian McNab was aged 43 with 21 years police service. He attended at the scene of the accident in Greenock Road, Bishopton on 3 December 2016, and was the reporting officer in the subsequent investigation. He had refreshed his memory before giving evidence by looking at his notes and records. He noted some, but not all, of the conversations he had with witnesses. Number 6/61 of process was the witness statement which he dictated on 5 June 2017 in advance of the trial of Argyll McCoist, and accurately reflected his recollection. On 4 December 2016 he attended at Mr McCoist's house. Mr McCoist confirmed that he was the registered keeper of the Audi vehicle, but after

purchasing it had had immediately given it to his son Argyll and then had no other involvement in the vehicle. He confirmed that he had no access to the vehicle, and it was kept at Argyll's home address; he had not seen the vehicle for several weeks. PC McNab required him to provide the name and address or identity of the driver of the car at about 21.50 on 23 December 2016, in terms of section 172 of the Road Traffic Act 1988, and his response (which PC McNab noted in his electronic notebook and obtained Mr McCoist's signature to, at 6/63 of process) was: "I imagine it would be my son, I can't say for definite, but I imagine it would be my son Argyll".

[31] PC McNab then went to the house where Mrs Alison McCoist and Argyll McCoist lived. He did not take any notes of his conversation with Alison McCoist, and did not recollect her saying anything about the car being in the garage - he would have remembered this if she said it. He then spoke to Argyll McCoist, and required him under section 172 of the Road Traffic Act 1988 to provide the name and address or identity of the driver of the Audi at about 21.50 on 3 December 2016, and Argyll replied: "I can't assist you with that". PC McNab was 100% confident that the contents of his witness statement were accurate - he would take care that it was accurate.

[32] In cross-examination PC McNab confirmed that by 2016 all police officers in his department had electronic notebooks, and none used "old style" police notebooks; he noted any replies to formal requirements, such as section 172 requirements, but not necessarily all the rest of what was said. He spent perhaps half an hour in Mr McCoist's house. What appears in the first paragraph of page 4 of his witness statement (number 6/63 of process) was not a verbatim record, and other things may have been said. He agreed that it would be surprising if he could recall word for word what Mr McCoist said, and that it was possible

that Mr McCoist may have said he had no immediate access to the vehicle as it was not at his home.

[33] In re-examination PC McNab said that what was written down in his witness statement was what he intended as the content of his evidence, and he certainly stood by its accuracy. He did not remember Mr McCoist saying that he had no immediate access to the vehicle, but this was possible.

[34] At this point senior counsel for the pursuers moved to recall Mr McCoist, questioning to be restricted to the issue of whether he said "immediate" access to the vehicle. No objection was taken to this, and I granted the motion. Mr McCoist having been recalled, he was asked if he accepted that he said to the police that he had no immediate access to the vehicle, and his answer was "absolutely not". He did not say this, and he observed that it was surprising if PC McNab could remember it now, but not when he prepared his witness statement in June 2017. He stood by his earlier evidence, which he believed to be the truth.

[35] The pursuers then closed their proof on the evidence, all the documentary materials and the joint minute. Counsel for the first defender then recalled PC McNab, who accepted that his earlier evidence that Mr McCoist had said that after giving the car to Argyll he (Mr McCoist) had no other involvement with the vehicle did not appear anywhere in his witness statement. He agreed that at the time of preparing his witness statement this remark was not part of his recollection. He could not specifically recall Mr McCoist saying this, and he could not say definitely if this was said or not.

[36] In cross-examination, PC McNab agreed that the witness statement was prepared for Argyll's criminal trial, and only matters relevant to that trial were included in it. Any

remark made by Mr McCoist that he had no other involvement in the vehicle was not relevant for the purposes of Argyll's trial. He certainly did not recollect it when he prepared the witness statement, and he could not say whether or not it was said.

[37] Mrs Vivien McCoist was aged 48; she married Mr McCoist some nine years ago and they were living together in the same house in 2016. She remembered that the Audi was purchased in early 2016 with the intention it would be used principally by Argyll. This is what happened to begin with, but then his insurance was cancelled. She became aware of this in the summer of 2016. After this, she remembered hearing Mr McCoist having a telephone conversation with Argyll, in which he told Argyll that he was not allowed to drive the car any longer. There was one other occasion in their home (she could not remember the date or circumstances - perhaps Argyll had come over for dinner) when her husband told Argyll not to drive the car because he did not have any insurance.

[38] The car was mainly parked at Argyll's house, except when he came to visit them. At some time after Argyll was told that he was not allowed to drive the car any longer, a problem with the car had to be fixed and it was taken to the garage. When it was not at the garage it was kept at the house where Argyll lived with his mother, probably because there was more space for it there. There were two sets of keys - she and her husband had one set of keys in their house, and the other set was at Argyll's mother's house.

[39] The basis of her belief that Argyll was told not to drive the car because he was not insured was two conversations she heard. The first was over the telephone, when Mr McCoist phoned Argyll and told him that he could not drive the car. She could of course only hear one side of the conversation, but she could remember Mr McCoist saying that Argyll could not drive the car because he was not insured. The second occasion was when

Argyll was visiting them in their house, and he just wanted to use the car. She believed that Argyll asked his dad to insure the car - was there any possibility to get insurance for it. Mr McCoist said that in no circumstances could he drive the car as he was not insured. Apart from those two conversations, Mr McCoist did not have any involvement with the car. It was not possible that she was mistaken in her recollection of what was said in these two conversations. She accepted that she had discussed the case with her husband and she knew that this was part of her husband's case, but she denied that she had simply come to support him - the conversations 100% took place.

[40] James East was aged 55 and a company director living at Bridge of Weir. He was a close friend of Mr McCoist; he had known him for 20 years and they did business together. He also knew Argyll very well and had a close relationship with him. He knew that Mr McCoist purchased the Audi for his son in early 2016, and after it was purchased Argyll drove it. He saw Mr McCoist and Argyll all the time, and he became aware that Argyll was not able to drive the car. First of all he understood that Argyll had clipped a roundabout and damaged the car. About two or three months later Argyll was caught speeding in the car. Mr McCoist was concerned about Argyll's driving, and his having been involved in these two incidents when only aged 18. As soon as Mr McCoist knew there was a problem with Argyll not being insured to drive the car, straightaway he took the car off him. He was then present on more than six occasions when Argyll asked his father if he could drive the car again and could he get insurance; Mr McCoist would not let him, observing that he had had his chance and he was not to think of driving the car.

[41] He would go hillwalking and fishing with Argyll and the matter arose probably a lot more than six times. A lad of that age was understandably missing the car. Mr East did not

think Argyll fully understood the significance of what had happened. He was missing his friends, he was missing the car and he was on a real downer. He was isolated where he lived. Mr McCoist's response was the same - "Look son, I'm sorry - I can't even think about it, and I can't get insurance."

[42] In cross-examination Mr East agreed that he had a very close relationship with Mr McCoist, both business and social, and they were often in each other's company. He was insured to drive Mr McCoist's car, as was Mr McCoist insured to drive his. He had not discussed his evidence or what would help Mr McCoist - he knew what he knew. It was put to him that his evidence was an attempt to keep an old friend out of a scrape, but he replied "Absolutely not". He was aware that Mr McCoist took the car off Argyll after the speeding incident. He knew this because Mr McCoist told him, although he did not know what he did to take the car off Argyll. When the car was not at the garage, it was kept at Alison's house for Argyll's use. This was because there was a big parking area there - far bigger than at Mr McCoist's home, which already had a Shogun and two other cars, so there was not much space. He accepted that Argyll was always keen for the use of the car and chivvied his dad to insure it, but his father was having none of it. He heard Mr McCoist telling Argyll that he was not allowed to drive the car as he was not insured for it on many occasions, although he could not remember exactly where these were. He did not think Argyll realised how important the speeding incident was for getting insurance for him - there was no way he could get it.

[43] Counsel for the first defender closed his proof. As I have indicated, in addition to the parole evidence summarised above, there was a notice to admit procedure and a joint minute, each of which I have taken into account.

Submissions for the parties

[44] Both counsel helpfully provided the court with written submissions, which I do not propose to rehearse in detail. The following is intended to be a relatively brief summary of the written and oral submissions for the parties.

Submissions for the pursuers

[45] Senior counsel for the pursuers adopted his written submissions and moved the court to sustain the first plea-in-law for the pursuers, repel the first defender's pleas-in-law, and to grant decree jointly and severally against the first and second defenders for £244,000 with interest at the judicial rate from the date of citation. He sought the expenses of the action against the first defender and expenses against the second defender up to the date of the second defender's minute withdrawing defences, namely 2 May 2023.

[46] The crux of the case was whether or not Mr McCoist permitted Argyll to use the Audi car on the road. The crucial words in the Road Traffic Act 1988 were "A person must not cause or permit any other person to use a motor vehicle on a road …" in section 143(1)(b), and "caused or permitted the use of the vehicle" in section 151(8)(b). Some guidance was to be found on the meaning of these words in *MacGillivray on Insurance Law*, 15th edition at paragraph 29-004. The pursuers were not suggesting that Mr McCoist caused Argyll to use the car; the important question is did he permit this?

[47] Permission can be, and often will be, inferred from circumstances; it does not require permission in words. Senior counsel referred to *Dickson* v *Valentine* 1988 JC 87 at page 90; *Houston* v *Buchanan* 1940 SC(HL) 17 at pages 36/37 and 39/40; *Newbury* v *Davis* [1974]

RTR 367; *MacDonald* v *Howdle* 1995 SLT 779; *DPP* v *Fisher* [1992] RTR 93 and *Lloyd-Wolper* v *Moore* [2004] 1 WLR 2350, particularly at 2359. However, many of these cases dealt with conditional permission, in which it was held that if a permission was truly conditional then the use had not been permitted. In the present case there was no evidence of a permission subject to a condition - either there was a prohibition or there was permission. Argyll took possession and use of the car before any prohibition, and there was no real evidence of conditional permission.

[48] On the evidence, Mr McCoist gave use and control of the car to Argyll early in 2016, and without any condition attached to this permission. After the cover with More Than was cancelled, Argyll continued to drive the car whilst uninsured, and Mr McCoist permitted his use of it. The car was kept at the house where Argyll lived with his mother, when it was not at the garage. The evidence of Mr McCoist taking the keys from Argyll and giving them to Alison McCoist came only from Mr McCoist (and, *quantum valeat*, Argyll).

[49] Although Mr McCoist's evidence that he told Argyll that he could not use the car was supported by Vivien McCoist and James East (and Argyll) there was no documentary evidence to support this. Mr McCoist was neither credible nor reliable, for the following reasons:

(i) What Mr McCoist said to the police in December 2016 shortly after the accident was inconsistent with his present story, which is that the car should have been in the garage where he put it.

(ii) The present story only emerged in Mr McCoist's answers to a minute of amendment lodged at the end of March 2023.

(iii) Mr McCoist's evidence that he only became aware of the cancellation of the More than policy in July 2016 is not credible. He claims not to have seen the email/letter cancelling the policy, nor the refund of £723.25; this is not believable.

(iv) His evidence regarding telling Argyll not to drive the car was malleable, going from many occasions to perhaps two or three, and then being explained by responding to requests for insurance.

(v) He retreated from his original evidence about removing the car from Argyll's house and taking it to the garage, and he accepted that this was ill-founded.

(vi) His account of taking the keys off Argyll and giving them to Alison was unsupported by any reliable evidence. It seems unlikely that Alison would have permitted Argyll to drive the car if she thought it was not permitted.

[50] The court should reject the evidence that Argyll's use of the car was restricted after July 2016; Mrs Vivien McCoist and Mr East were both very close to Mr McCoist, and they had a clear motive to assist him. The only safe conclusion is that Mr McCoist permitted Argyll's use of the car up to and including the date of the accident.

[51] Argyll's evidence was at odds with that of his father and the other evidence (eg that his father prohibited his use of the car in March, rather than July). He was dishonest to the police and to his mother, and his evidence should be discounted. PC McNab's evidence was self-contradictory and confused.

[52] Alternatively the court might accept the account from Mr McCoist only to the extent it is supported by Vivien McCoist and Mr East. There is some support from them for Argyll speaking to his father to try to get insurance so that he could drive the car and being told

that he could not drive the car because it could not be insured. In those circumstances where the car has been left at Argyll's house with keys available to Argyll to use, but no steps have been taken physically to remove the car from him, it was submitted that the use of the car by Argyll had been permitted by the making of the car and keys available to him. Giving an 18 year old, who is desperate to drive a car (on Mr East's evidence) the means to do so, even with a word not to use it, is to create a situation where use is quite likely and might be expected in many cases. The likelihood in this case is increased by Argyll's previous behaviour. The car and keys were kept at his house for the purpose of having the car available for his use. This was confirmed by Vivien McCoist. No other purpose was suggested. It is submitted that in those circumstances the use of the car has been permitted notwithstanding that there are also imprecations that he should not use the car. The permitting done by the making available outweighs the words which indicate the contrary. As a matter of fact Argyll was permitted to use the car.

[53] Even if the court was inclined to accept more of the account by Mr McCoist, the highest it amounts to is that Mr McCoist told Argyll he was not allowed to use the car. But it is submitted that he continued to permit the use of the car by leaving the car at Argyll's house with a set of keys left with his mother who did in November permit the use of the car by Argyll. She gave the keys to the garage. She knew Argyll had collected the car and the keys and did not stop him. Although the keys had, on Mr McCoist's account been left with her, he did not tell her not to give the keys to Argyll. It might be thought that she would not have done so if she had been given clear instructions to that effect. He left the keys with her on the assumption that she knew about the situation with no specific directions. At best for Mr McCoist he gave the control of whether or not Argyll would drive the car to

Alison McCoist. She was duped into allowing Argyll to drive the car because of a misrepresentation by him. On the basis of *Lloyd-Wolper* v *Moore* (at paragraph 28) a permission obtained by misrepresentation is still a permission in terms of section 151(8). If, as the owner, Mr McCoist delegated the power to allow Argyll to drive to another who did permit the driving, so did he permit it. This is particularly so in circumstances where he knew that Argyll had previously used the car uninsured. The only known purpose of the car being at Argyll's house was for him to use it. The car Mr McCoist had provided for Argyll to use was being used by Argyll at the time of the accident.

[54] Mr McCoist had not established that permission given by him directly or indirectly by giving his son use and control of the car was withdrawn. The car was normally kept with Argyll at his address. It was kept there after it was removed from the garage. It was not left there for any other reason than to be available for Argyll to use. The circumstances of removal from the garage show that the car was still available to Argyll for his use. There is good reason not to restrict the concept of "permitting" beyond the circumstances of a truly conditional permission. It is the policy of the statute to ensure that insurance is available for the benefit of those who suffer damage as a result of the use of motor vehicles on the roads.

[55] With regard to the criticisms made regarding the pursuers' pleadings at paragraphs 10 and 18 of the submissions for the first defender, all the evidence was led without objection and may be relied on. In any event, the pursuers' case pleaded on record is wide enough to permit reliance on all the evidence. The averments at article 7 of condescendence at pages 15/16 of the closed record and at article 9 of condescendence at pages 24/25 were sufficient to enable senior counsel to make his submissions.

Submissions for the first defender

[56] Counsel for Mr McCoist adopted his written submissions and sought decree of absolvitor with expenses. He pointed out that the onus of proof remained with the pursuers. He recognised that there were some inconsistencies between the evidence of Mr McCoist and Argyll, and that Mr McCoist may have been mistaken in his recollection of certain aspects - eg picking up the car and taking it to the garage. However, inconsistencies after the elapse of such a period of time are to be expected. On a number of important matters there was no contradictor to the first and second defenders - eg Mr McCoist taking the keys off Argyll, and telling him that he was not allowed to drive the car. These were consistent with Mr Laird's evidence and also the evidence of Vivien McCoist and Mr East. Although neither Mrs McCoist nor Mr East were independent, that is not a reason in itself to reject their evidence. With regard to Mr McCoist's reply to the section 172 requirement, it was logical for him to imagine that it was his son driving, because it was only he and his son who had driven the car, and there was no suggestion that the car had been stolen. Counsel for the first defender invited the court to make 13 findings of fact, listed at paragraph 9 of this written submissions, which I have taken into account but do not rehearse here.

[57] "Causing" and "permitting" are distinct and different concepts - see *Houston* v *Buchanan* at pages 39/40. Permission given subject to a condition which is unfulfilled is no permission at all - *Newbury* v *Davis* at 370 and 371; *Lloyd-Wolper* v *Moore* at paragraph 25.

[58] The pursuers rely upon Mr McCoist's failure to instruct the garage not to release the car to Argyll, but the statutory liability under section 151(8) is not based upon a failure to take reasonable care to prevent use without insurance. A failure to take steps to prevent the use of a vehicle could only constitute permission if it could be inferred from the failure that

the other person was allowed to use the vehicle. Such inference cannot be drawn in the present case.

[59] Mr McCoist's evidence was that, following his discovery that the policy with More Than had been cancelled, he told Argyll on more than one occasion not to drive the car. If the court finds that established, there can be no question of Mr McCoist having permitted Argyll to drive the car. Whether Mr McCoist told Argyll not to drive the car is determinative of the case. Mr McCoist's evidence on this point should be accepted.

[60] Moreover, Mr McCoist's withdrawing of permission for Argyll to drive the car after he learnt of the cancellation of the More Than insurance policy is supported by Mr McCoist telling Argyll that he was no longer going to insure the car for him, forwarding the emails with the details of specialist high risk brokers, and taking the keys off Argyll and giving them to his mother. Furthermore, the test of whether Mr McCoist knew or ought to have known that the car was being used or was likely to be used without insurance has not been met. Mr McCoist could not reasonably have anticipated that the car would be used. As far as he was aware, it was still in the garage; Argyll did not have the keys; and Argyll was aware that he was not insured to drive the car.

[61] With regard to the six reasons given in the written submission for the pursuers for doubting the credibility and reliability of Mr McCoist, counsel commented as follows:

(i) There was no inconsistency between Mr McCoist's statement to the police in December 2016 and his present evidence. PC McNab was clear that his written statement was not a complete account.

(ii) There was no sinister significance to the delay in putting forward the written case for Mr McCoist. The action was raised in late 2021 and the same

solicitors acted for both defenders initially, until March 2023 when the possibility of a conflict of interest was considered. Shortly after the first defender was represented by a different firm of solicitors his pleadings were changed to reflect his current defence.

(iii) The timing of the attempts to obtain fresh insurance cover supports Mr McCoist's evidence that he was unaware of the cancellation of the More Than policy until July 2016 - see the email correspondence in July 2016, numbers 7/2 and 7/2 of process.

(v) Counsel accepted that Mr McCoist's evidence about removing the car from Argyll's home and taking it to the garage for repair was probably an error by Mr McCoist.

(vi) No reason is given for not accepting Mr McCoist's evidence that he took the keys off Argyll and gave them to Alison.

[62] With regard to the alternative argument contained in paragraph 25 of the written submissions for the pursuers, there is simply no evidence to support this. Mr McCoist was entitled to assume that the car would not be driven by his son. The pursuers suggest that Argyll's previous behaviour might cause Mr McCoist to consider that Argyll might drive the car - but what previous behaviour is relied on? Argyll was found to be speeding in March 2016, but it is unclear why a previous incident of speeding would increase the likelihood of Argyll ignoring his father's instructions and driving the car. Mr East gave evidence that Argyll was desperate to drive the car, but it is one thing for an 18 year old to plead with his parent to allow him to drive or to get insurance, and quite another thing to drive knowing that he was not insured. There was no evidence that Argyll had threatened

that he would drive the car if insurance was not found. These suggestions were not put to Mr McCoist in his evidence. It was never suggested to him that he ought to have realised that his son might ignore his instructions and drive the car.

[63] The same arguments apply to the second alternative in paragraph 26 of the pursuer's written submissions. The keys to the car were given by Mr McCoist to Alison McCoist. Passing the keys to another person carries no element of telling the person to whom they were given that it is up to them whether to give the keys to Argyll. Simply passing keys to Alison McCoist can never amount to permission to Argyll to drive. Mr McCoist was not authorising Alison McCoist to permit Argyll to drive in any circumstances. There is a fundamental contradiction in the pursuer's approach in this alternative argument. It proceeds on the basis that the court accepts Mr McCoist's evidence that he prohibited the use of the car by Argyll. How can the passing of the keys to Argyll's mother countermand that prohibition? It cannot, unless there was evidence that Mr McCoist told Alison "Here are the keys, it is up to you to decide whether to allow Argyll to drive." There was no evidence to that effect, but there was evidence that Alison was aware that Argyll did not have insurance - the email to that effect, number 7/2 of process, was forwarded to her. It might have been better if Mr McCoist had kept the keys himself, or had told Alison McCoist in no circumstances should she give the keys to Argyll - but the test is not whether all reasonable steps were taken to prevent Argyll from driving, it is whether Mr McCoist permitted Argyll to drive on 3 December 2016. He did not. The first defender should be assoilzied.

Reply for the pursuers

[64] In a brief reply, senior counsel for the pursuers observed that there was nothing in the written pleadings for the first defender about conditional permission. In *Houston* v *Buchanan* Lord Wright's observations at page 40 as to whether the vehicle might be or was likely to be used, or that the accused was guilty of a reckless disregard of the probabilities of the case, is not an assessment of probability in the sense of 51%/49%, but as in an assessment of remoteness of damages. If the evidence establishes that Mr McCoist handed over the keys to his ex-wife Alison without making any definite arrangement with her as to use, one possible use was that Argyll could have driven the car - see Lord Carmont's views quoted by Lord Wright in *Houston* v *Buchanan* at page 40.

Assessment of the evidence

[65] In general, and subject to the specific observations below, I formed the view that the witnesses were doing their best to assist the court, and were credible and reliable. It must be remembered that they were giving evidence about events in 2016, more than six years before the proof.

[66] No criticism was made of Mr Laird, and I found his evidence entirely credible and reliable. I also believed Mrs Vivien McCoist and Mr East; although they were not entirely independent of Mr McCoist, and were clearly supportive of him, that of itself does not justify writing off their evidence. Mr East may perhaps have exaggerated the number of occasions on which he was present when Mr McCoist told Argyll that he must not drive the car, but I accepted the rest of their evidence.

[67] Most importantly, I found Mr McCoist to be a credible and generally reliable witness, who was doing his best to assist the court. He gave his evidence in a clear and restrained manner, without exaggeration, and I was impressed by his demeanour as a witness. Initially he stated that he thought he dropped the car off at the garage himself, but he was not 100% certain about that, and he accepted that it might have been Alison McCoist who did so.

[68] I found his evidence that he did not see the email/letter from More Than telling him that Argyll's cover would end at 23.59 on 22 March 2016, and that he was unaware of the refund of £723.25 to his credit card on 15 March 2016 to be surprising. However, I believed him when he gave this evidence, and the email correspondence in July 2016 regarding the difficulty in finding alternative insurance does support his evidence that it was only in July 2016 when Argyll was stopped for speeding that he discovered that Argyll was no longer covered by the More Than insurance policy.

[69] I did not find his response to the section 172 requirement, as noted by PC McNab, to undermine his evidence. He accepted that the note was accurate; he was not driving the car at the time of the accident, and the only other person who drove it was Argyll. Even though he believed the car to be still in the garage, it was logical for him to state that he imagined the driver of the car would be his son Argyll, but he could not say for definite. I see no material inconsistency between Mr McCoist's evidence on this and the evidence of PC McNab.

[70] Mr McCoist accepted that he did not tell the garage that Argyll should not be allowed to take the car away, but he viewed that as unnecessary - Argyll knew that he was not insured to drive it, and that he must not do so.

[71] Senior counsel for the pursuers described Mr McCoist's evidence about telling Argyll that he must not drive the car as "malleable". I do not think that this is a fair description. He said that he told Argyll "repeatedly", "on several occasions", and "in no uncertain terms". Argyll asked him more than once if it was possible to arrange insurance, and he told him that it was not, and that he must not drive the car. After six years, I do not find it surprising that Mr McCoist was not able to say precisely how many times he told Argyll not to drive the car. I am satisfied that he did tell Argyll not to drive the car, he said this clearly and in no uncertain terms, and he told him this more than once.

[72] I also found PC McNab keen to assist the court - almost too keen. He acceded to propositions made to him from which he subsequently had to retreat. However, he remained 100% confident that his witness statement was accurate, although he accepted that not everything that was said was noted down by him. I accepted that his witness statement was accurate. The word "immediate" in relation to Mr McCoist's access to the car does not appear in the witness statement, and PC McNab could not be sure if this was said or not. The first paragraph of page 4 of his witness statement was not a verbatim record, and other things may have been said. Subject to this caveat, I accepted his witness statement as accurately reflecting PC McNab's evidence.

[73] I did not find Argyll McCoist to be a credible or reliable witness, and I did not feel able to place any reliance on his evidence. I was not impressed by his demeanour when giving evidence, and he had a history of telling lies and engaging in deceitful behaviour. He removed the car from the garage and drove it despite his father's clear instructions not to do so, and in the knowledge that he was uninsured and breaking the law by doing so. He lied to his mother when he told her that he was insured. After the accident he did not stop to

assist Mr Murdoch, but drove off without reporting the accident to the police, and then attempted to obtain insurance cover to make it appear that he was insured at the time of the accident. He lied to the police in his response to their requirement in terms of section 172 of the Road Traffic Act 1988. His evidence as to when he was stopped for speeding was at odds with the evidence of Mr McCoist and the documentary evidence. He was not an impressive witness.

[74] On the basis of the evidence which I accepted, as set out above, I am satisfied that Mr McCoist did not realise until July 2016 that Argyll was driving the car without insurance, the insurance policy with More Than having been cancelled as from 3 March 2016. After he discovered this, Mr McCoist took the keys of the car from Argyll and gave them to Alison McCoist, forwarded the email correspondence about the difficulty of obtaining insurance cover to Argyll and to Alison McCoist, and told Argyll on several occasions, in no uncertain terms, that he was not allowed to drive the car and must not do so (despite Argyll repeatedly asking him to arrange insurance cover for him). The car was parked at the house where Argyll and Alison McCoist lived. Alison McCoist drove it to the SABCO garage, where the car underwent repairs and then was parked outside the garage. The keys were at the garage, and no instructions were given to the garage proprietor or staff that Argyll should not be allowed to drive the car away. Shortly before 23 November 2016 Argyll took the keys of the car from the garage and drove the car back to the house where he and his mother lived. He told his mother that he had insurance to drive the car, although he did not. He continued to drive the car, knowing that he was not insured to do so. Mr McCoist was not aware that the car had been removed from the garage until after the accident, when he was spoken to by the police. At the time of the accident Argyll was driving the car when

he knew he was not insured to drive it, and in the face of his father's repeated prohibition on him doing so.

Discussion and decision

[75] Counsel for the first defender submitted that whether Mr McCoist told Argyll not to drive the car is determinative of this case. This is perhaps a slight over-simplification, because it is possible to infer permission from a variety of circumstances, but for practical purposes it is an accurate statement in the circumstances of this case. Having found that Mr McCoist did indeed tell Argyll on several occasions from and after July 2016 that he must not drive the car, and in the absence of any evidence that he expressly withdrew this prohibition or that there were circumstances from which it can be inferred that it no longer had force, it would be surprising if the court held that Mr McCoist had permitted Argyll's use of the vehicle.

[76] There has been discussion in the authorities to which I was referred about what is meant by "permit" in section 143(1)(b) and "permitted" in section 151(8) of the Road Traffic Act 1988. It is clear from these authorities that, in the circumstances of those cases, permission can be inferred even where there has been no express permission - see Lord Wright's observations in *Houston* v *Buchanan* at pages 39 and 40, and Pill LJ's observations in *Lloyd-Wolper* v *Moore* at paragraphs 25-29. However, in none of the cases to which I was referred was the court dealing with a situation in which the owner of the vehicle had expressly told another party that he must not drive the vehicle.

[77] It is important to remember that the statutory liability under section 151(8) of the 1988 Act arises only if the insured caused or permitted the use of the vehicle which gave rise

to the liability. Liability does not arise if the insured simply failed to ensure that another person did not drive the vehicle, or even that the insured failed to take all reasonable steps to prevent another person driving the vehicle. In the present case, Mr McCoist knew that Argyll, who was aged 18 at the time and "desperate" to drive the car, was very keen for insurance cover to be arranged to enable him to do so. It would have been prudent if Mr McCoist had kept both sets of keys to the car securely in his own possession. It would also have been prudent for him to have told the owner or staff at the garage that in no circumstances should Argyll be allowed to take the keys and drive the car away, at least without Mr McCoist's express authority. If the test for liability had been that Mr McCoist failed to take all reasonable steps to see to it that Argyll did not drive the car, I consider that he would have failed that test. But that is not the test. I can find nothing in the evidence which comes up to the statutory test of permitting. Nothing which happened between July 2016 and December 2016 is enough to give rise to the inference that Mr McCoist had withdrawn or relaxed his repeated express prohibition on Argyll driving the car. Nothing suggests that Mr McCoist had changed his mind and permitted Argyll to drive the car.

[78] The pursuers have therefore failed to meet the statutory test for imposing liability on Mr McCoist in terms of section 151(8) of the 1988 Act. I shall therefore sustain the second and third pleas-in-law for the first defender, repel the pursuer's first plea-in-law insofar as directed against the first defender, and assoilzie the first defender from the conclusions of the summons.

[79] The second defender has withdrawn his defences to the action, and a minute (number 21 of process) has been lodged on his behalf consenting to decree being granted against him in terms of the conclusions of the summons. On the basis of all the evidence

before me it is appropriate that I should accede to this minute. I shall grant decree in favour of the pursuers against the second defender for payment of the sum of £244,000 with interest thereon at 8% from the date of citation until payment.