3 HARE COURT

Case Review: Johnson v Berentzen and Zurich Insurance PLC [2021] EWHC 1042 (QB)

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Introduction

On Monday 26th April 2021 the High Court of England and Wales handed down judgment in *Johnson v Berentzen and Zurich Insurance plc* [2021] EWHC 1042 (QB). The claimant, habitually resident in England, suffered life changing spinal injuries in the course of a road traffic accident whilst on holiday in Scotland on 15 June 2016. The case is of special significance for travel lawyers advising on accidents abroad for two reasons.

First, and more generally, the judgment confirms that in claims where the applicable law is determined by Regulation (EC) 864/2007 ('Rome II'), the question of when a limitation period is interrupted or expires is a matter to be determined in accordance with the applicable law of the *lex causae* and is not a question of procedure subject to the rules of the *lex fori*.

Second, the judgment offers some useful guidance on how a Court will apply its discretion under section 19A of the Prescription and Limitation (Scotland) Act 1973 ('the 1973 Act') to allow a claim to proceed which would otherwise be time-barred in Scots law.

Issues

The dispositive issues the court identified for consideration were threefold:

i) *"Pursuant to the Rome II Regulation, and if applicable… the Foreign Limitation Periods Act 1984, what are the relevant rules that govern the commencement of this action, in particular which stop time running for the purposes of limitation?"*

ii) *If the relevant rules identified in (i) are those of Scots law, was the claimant's*

action commenced outside the relevant limitation period?

iii) *If the claimant was out of time when he commenced proceedings, whether the discretion available to the court under s.19A Prescription and Limitation (Scotland) Act 1973 'the 1973 Act') should be used so as to allow the claimant's action to continue"*

The parties' positions

The defendants took the point on limitation asserting that the claim was statute barred since the claim had only been served on 7 August 2019. It had therefore not been served on the defendants before the expiry of the applicable three-year limitation period for a claim for non-fatal personal injury, required under Scots law to stop time running.

The claimant, by contrast, asserted that service of the claim was a procedural matter and not a substantive law issue and was therefore to be governed by the procedural rules of England and Wales as the *lex fori*. Accordingly, it was argued that the claimant had a further period of four months in which to serve the claim and since the defendants had been served within that further period the claim had not been brought out of time. Alternatively, the claimant sought an extension of time pursuant to the discretion provided by s.19A of the 1973 Act.

Issues 1 and 2

The Court noted there was considerable agreement between the parties. As to the relevant provisions of Rome II, the parties agreed:

(1) That pursuant to Article 4(1), the applicable law was that of Scotland;
(2) That the rules of procedure and evidence were those of the English and Welsh courts pursuant to Article 1(3); and
(3) That the limitation period fell to be determined in accordance with Scots law pursuant to Article 15(h).

The Scots law experts instructed by the parties agreed that the relevant limitation period to be applied was that contained in section 17 of the 1973 Act which imposes a three-year limitation period for non-fatal personal injury claims. It was also agreed that time ran from the day of the accident on 15 June 2016 and expired on the third anniversary of the accident.

The question whether limitation is a matter of procedure or substance was considered by Mrs Justice Tipples in *Pandya v Intersalonika General Insurance Co SA* [2020] EWHC 273 (QB). At paragraph [40] of her judgment, she held:

> *"There is no dispute between the parties that the law of limitation in this case is governed by Greek law. On the agreed expert evidence before me, it is clear that it is a rule of Greek law that, in order to interrupt or stop the period of limitation, the claim form must be both issued and served … Further, the experts agree that as a matter of Greek law, a claim that is served after the five-year period is time-barred. Therefore, service of the claim form is, as a matter of Greek law, an essential step which is necessary to interrupt the limitation period. Service of the claim cannot be severed, carved out or downgraded to a matter of mere procedure which falls to be dealt with under English Civil Procedural Rules. That, apart from anything else, would give rise to a different limitation period in England and Wales than in Greece. The clear intention of the Rome II Regulation is to promote the predictability of outcomes and, in that context, it seems to me that such an outcome is not what the Regulation intended to happen in these circumstances"*

In short, the points of crucial dispositive importance in *Pandya* were: (1) the policy goal of Rome II of promoting legal certainty and (2) reference to the expert evidence for the content of Greek law on limitation.

The claimant in *Pandya* had *issued* their claim before the expiry of the period, but had not *served* proceedings within the Greek limitation period (service being required to interrupt limitation under Greek law). It was claim was therefore time-barred and it was accordingly dismissed.

The claimant in *Johnson* accepted that if *Pandya* was correctly decided then that would mean that the claimant's case that the limitation dispute was a matter of procedure subject to the *lex fori* would automatically fail. This was because the law as to issue and service of a claim in Scots law was materially identical to that in Greek law. The claimant accepted the doctrine of *stare decisis* as formulated by Lord Neuberger in Willers v Joyce and Another (No. 2) [2016] UKSC 44:

> *"So far as the High Court is concerned, puisne judges are not technically bound by the decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance Judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary; see Patel v Secretary of State for the Home Department [2013] 1 WLR 63, para 59" [emphasis supplied]*

The claimant's submissions that *Pandya* had been wrongly decided were dismissed. Further, the Judge held that the claimant had additionally failed to provide a '*powerful reason*' to depart from *Pandya* and she would, therefore, follow it. Accordingly, the Judge held in answer to issues 1 and 2 that it is Scots law which governs limitation and that the claimant's action had commenced outside the relevant three-year limitation period.

Discretion to disapply limitation period in Scots law

The Judge subsequently turned her attention to the third issue requiring resolution, whether the discretion available to the court under s.19A of the 1973 Act should be used so as to allow the claimant's action to continue.

The judgment repays close reading for practitioners representing litigants injured in accidents in Scotland. Of relevance to such cases, the Judge outlined the following general principles:

(1) s.19A of the 1973 Act confers an unfettered discretionary power;
(2) Since each case is fact sensitive and the court is considering the exercise of a discretion, the case-law is therefore of limited assistance.
(3) The burden is on the claimant to persuade the court to exercise this discretion;
(4) The availability and strength of an alternative remedy against a claimant's solicitor is a strong and important factor for the court to consider, but is not determinative;
(5) The court must consider and weigh in the balance all the facts and circumstances specific to the case to determine whether the claimant has established that equity lies in favour of exercising the discretion.

Ultimately, the Judge exercised her discretion to disapply the relevant limitation period. Although the claimant potentially had an alternative remedy open to him against his solicitors on *paper*, the Judge held that this route was not *practically* open to him to pursue as a consequence of the physical and mental health disabilities he had sustained in the course of the accident and his deteriorating condition.

Conclusion

The judgment in *Johnson* confirms the position outlined in *Pandya* with the consequence that any confusion or complexity which reigned pre-*Pandya* as to whether a Court will apply the *lex causae* or *lex fori* to matters of limitation has now been cleared up. Following *Johnson*, matters of procedure which are governed by the substantive law of the *lex causae* will not fall to be decided in accordance with the *lex fori*. As was identified in *Pandya* this would compromise legal certainty, which was one of the policy goals intended to be achieved through Rome II.

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