3 HARE COURT

Travel & Aviation Bulletin

Spring 2023

Table of Contents

3 Hare Court

We continue to have a strong reputation in personal injury and travel litigation, as well as in civil fraud, commercial litigation, employment, insolvency, international work including arbitration, financial services, professional negligence, property and construction litigation and all manner of public, administrative, and constitutional law practice, incorporating civil liberties and human rights.

Members are ranked as leading specialists in the Legal 500, Chambers & Partners and Who's Who Legal in personal injury, travel, insolvency, civil fraud, administrative and commercial law, amongst others, and we are a top tier set for travel.

We provide specialist advice and representation at all stages of the litigation process, including pre-action, drafting pleadings, skeleton arguments and schedules, undertaking ADR, and providing advocacy at interlocutory hearings, trials and inquests – from fast-track cases to the most substantial and complex claims, from major commercial disputes to catastrophic and fatal accidents.

Claims in which we are involved frequently have a cross-border element; whether arising from an overseas accident or contractual dispute or involving foreign parties. We are uniquely placed to assist with such matters, where there are implications for the duty and standard of care, where jurisdiction and the choice of law are in issue and where direct actions are brought against overseas defendants or insurers. Chambers has established links to the travel industry and we are an ABTA partner. Members of Chambers are admitted as barristers in overseas jurisdictions and are fluent in many languages including Dutch, French, German, Hindi, Italian, Punjabi, Spanish, Swahili and Urdu.

For further information please view our website or contact us at Marketing@3harecourt.com or 020 7415 7800 for further information.

@3HareCourt

Foreword

Well, 6 months since the last bulletin isn't bad, is it. Comparatively. But what a bumper selection we have for you now, well worth the wait.

In this spring edition:

- **Christopher Loxton** gives an overview of some of the aviation decisions in the last year.
- **Asela Wijeyaratne** and **Rory Turnbull** consider the implications for expert evidence of the recent decision in Fawcett v TUI.
- **Claire Errington** considers the CJEU decision in Liberty Seguros and what that might mean for English claims.
- **Richard Campbell** and **Nicholas Leah** bring us up to speed on the latest round of covid wrangling in the CJEU in FTI Touristik.
- **Pierre Janusz** looks at some of the jurisdictional issues raised in Charlton v Deffert, and considers how to get around them.
- **Samuel McNeil** covers Arthern v Ryanair and wonders if 'accident' means what it did.
- **Anna Lancy** and **Nicholas Leah** consider the foreign limitation issues which arose in Bravo v Amerisur.
- And **Katherine Deal KC** revisits the issue of penalty interest.

We hope you enjoy this bulletin. We are already looking forward to the next one when we can update you on the appeal in Griffiths v TUI, in which Howard Stevens KC and Daniel Saxby are instructed for TUI, share insights from the upcoming ABTA conference where Dan Saxby and Asela Wijeyaratne are speaking, and much more besides.

In the event that you feel you cannot wait for the next edition, we regularly provide training online and in person on cross-border issues. If this would be of interest to you, please do get in touch with us.

Katherine Deal KC
Editor, Head of Personal Injury and Travel Law Group

Contributors to this Issue

Katherine Deal KC

Katherine is renowned for her expertise in cross-border accidents and aviation law. She has acted in many of the leading cases on juris-diction (at all levels up to and including the Supreme Court and Court of Justice of the European Union), and is widely regarded as a specialist on jurisdiction and issues of choice of law. Most of her claims involve injuries of maximum severity or death. She also undertakes work concerning package travel, and acted in the leading case of X v Kuoni Travel concerning the statutory defences, as well as in the claim arising out of the Tunisia terrorist attack, amongst many others. She is a firm believer in the advantages of alternative dispute resolution and has settled claims running into many millions of pounds over the last year alone. She was named "Personal Injury Silk of the Year" at The Legal 500 UK Bar Awards 2022.

Pierre Janusz

Pierre's practice areas cover all aspects of general common law and commercial litigation, with a strong emphasis on real property, landlord and tenant matters and associated professional negligence claims, but he is also recognised as a leading junior in personal injury claims, where he regularly deals with catastrophic injury and high value fatal accident cases as well as clinical negligence matters.

Richard Campbell

Richard accepts instructions on a wide range of civil and commercial matters. He regularly appears in court for both trials and interlocutory applications as well as undertaking a range of pleading and advisory work. Richard undertakes a wide-variety of personal injury work, including employers, occupiers and public liability cases and advises on matters of liability and quantum. He also regularly instructed to advise and appear in matters pertaining to travel claims.

Asela Wijeyaratne

Asela has extensive experience in claims arising out of overseas accidents and illness and is ranked in Chambers & Partners and Legal 500 as a leading junior in the field of Travel Litigation. He is regularly instructed in respect of claims under the Package Travel Regulations, including advising as to the applicability of the Regulations (1992 and 2018), dynamic packaging, incidents which occur in the course of excursions and evidence as to standards of care abroad.

Christopher Loxton

Christopher undertakes court, drafting and advisory work in a wide variety of matters relating to aviation and travel law, including: Insurance disputes. Hull damage claims, carriage by air disputes involving EU regulations, Warsaw and Montreal Conventions, and associated passenger, cargo, baggage, delay and denied boarding claims. Personal injury, fatality, and discrimination claims. Regulatory and compliance issues. Package Holiday (including holiday sickness) claims, Regulation (EU) 1177/2010 claims. International carriage by road and sea claims, including under Athens Convention and the Convention on the Contract for the International Carriage of Goods by Road (CMR).

Samuel McNeil

Samuel has experience in claims with a cross-border element, including claims that were issued before, during and after the Brexit transition period. During pupillage he assisted other members of chambers in the Supreme Court case X v Kuoni Travel Ltd [2019] UKSC 37. He has also appeared in numerous cases involving serious allegations of fundamental dishonesty. Samuel frequently appears in claims under EC Regulation 261/2004.

Claire Errington

Claire practice focuses on commercial, public, sport, travel and personal injury law, with both domestic and international elements. She regularly appears in trials, preliminary hearings and interim applications in the County Court, as well as undertaking a variety of paperwork across chambers' practice areas.

Anna Lancy

Anna has a civil practice comprising commercial law, civil fraud, international arbitration, insolvency, banking and financial services, public law and appeals to the Privy Council. Anna frequently appears in trials, interim applications and preliminary hearings, in addition to managing a busy paperwork practice. Her practice has both a domestic and an international dimension.

Rory Turnbull - Pupil

Rory commenced pupillage in October 2022 and is gaining experience in all of Chambers' core practice areas.

Nicholas Leah - Pupil

Nicholas commenced pupillage in October 2022 and is gaining experience in all of 3 Hare Court's core practice areas.

Aviation case law update

Celestial Aviation Services Ltd v Unicredit Bank AG (London Branch) [2023] EWHC 663 (Comm) 23 March 2023 (Christopher Hancock KC)

The Court heard Part 8 claims from two separate proceedings involving the same defendant German bank ("Unicredit"[1]) and concerning the impact of international sanctions on the bank's payment obligations arising under letters of credit (LOC) which its London branch had confirmed. The LOC related to leases of aircraft to Russian companies and were issued between 2017 and 2021. They confirmed other LOC issued by a Russian bank in the same period and were payable in USD.

The claimant in the first proceedings (C1), a company incorporated in the Republic of Ireland and a wholly owned subsidiary of a Dutch aircraft leasing company, had entered into the leases between 2005 and 2014. The claimants in the second proceedings (C2) were Irish-incorporated entities operating as aircraft lessors who had entered into leases in 2008 and 2014.

In February 2022, the Russian Federation invaded Ukraine and the UK imposed sanctions on it pursuant to the Russia (Sanctions) (EU Exit) Regulations 2019 as amended by the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2022 ("the Regulations"). The US and the EU also implemented sanctions.

Events of default arose under the aircraft leases following the imposition of the sanctions such that the aircraft leases were terminated. The claimants then made valid demands in March 2022 under the LOC. Whilst UniCredit accepted that it was liable under the LOC, it refused to pay, arguing that it was prohibited from doing so

[1] A wholly owned subsidiary of the Italian bank, UniCredit, and better known by its brand name "HypoVereinsbank".

because of the operation of the sanctions.

In October 2022, UniCredit was granted a licence to make payments to the claimants by the Office of Financial Sanctions Implementation and the Export Control Joint Unit. As a result, the parties reached agreement in relation to the principal amounts owed with payments being made in currencies other than USD. However, costs and interest had to be determined which required resolution by the Court of:

(1) Whether the UK Regulations prohibited payment under the LOC before the grant of the licence.

(2) If they did not, whether the bank nevertheless had a reasonable belief that the Regulations did for the purposes of section 44 of the Sanctions and Anti Money-Laundering Act 2018 (entitled "Protection for acts done for purposes of compliance).

(3) Whether UniCredit's failure to fulfil its obligation to pay in US dollars (USD) under the LOC was effectively suspended or otherwise excused.

In granting judgment for the claimants, Christopher Hancock KC (sitting as a judge of the High Court) held that the Regulations did not prohibited payment under the LOC before the grant of the licence. The overall purpose of the Regulations was to encourage Russia to cease its invasion of Ukraine, and the key purpose of the trade sanctions therein was to stop the supply of restricted goods, including aircraft, to Russia. The purpose of regulation 28 of the Regulations was to sever the supply of financing which could enable the supply of restricted goods.

The aircraft under the leases had been provided lawfully to Russian companies long before March 2022, and the provision by UniCredit of financial services to the Russian lessees by way of the LOC had also occurred lawfully long before then. Therefore, performance by the bank of its payment obligations under the LOC would not facilitate the supply of aircraft to Russia or to Russian persons.

Although an entirely collateral result was to discharge the independent obligations of the lessees and the Russian bank towards the claimants, the Russian bank remained liable to UniCredit and the lessees remained liable to the Russian bank. The fulfilment of an independent obligation owed by UniCredit to the claimants could not be intended to benefit the Russian bank who happened to be involved in other elements of the overall transaction.

The Judge reached no conclusion on the reasonableness of UniCredit's belief under section 44 of the Sanctions and Anti Money-Laundering Act 2018 as the parties agreed that it would only arise as part of a judgment on consequential matters.

In relation to whether UniCredit's failure to pay in USD under the LOC was suspended or otherwise excused, the Judge concluded that where a contract required payment in USD, the payee was entitled to demand such payment in the dominated cash. UniCredit was therefore obliged to make payment in USD unless this was impossible, for example because of a prohibition under the US sanctions regime. On the evidence presented, UniCredit had not established that the US sanctions regime prohibited performance of its payment obligations to C2 in USD.

Mather v easyJet Airline Co Ltd, S.L.T. 209 (2023), 10 February 2023, Court of Session (Inner House, First Division)

(The Lord President (Lord Carloway), Lord Pentland, Lady Wise)

The Inner House of the Court of Session dismissed an appeal against the lower court's determination that an airline was liable for uncapped damages to a disabled passenger who was injured when he fell from a wheelchair being pushed by an employee of a ground handling company contracted by Hamburg Airport to assist the claimant disembark a flight from Edinburgh.

The Court held:

- The employee of the company had been acting as easyJet's agent for the purposes of the 1999 Convention for the Unification of Certain Rules for International Carriage by Air ("the Montreal Convention"). The Court adopted a test applied by a line of US authority that held that a person was an agent of an if they were acting "in furtherance of the contract of carriage". If the person in question did or omitted to do something which was in furtherance of the contract of carriage, such as assisting the disembarkation of passengers, then he was deemed, for the purposes of the Convention, to be an agent of the airline, whether or not he was an agent in accordance with domestic law. Given that it was necessary for the claimant to be provided with assistance to disembark the aircraft, the employee in question had been acting as easyJet's agent, even though there was no contract between the airline and his company; the company instead being contracted by Hamburg Airport to provide passengers with restricted mobility ("PRM") with assistance.

- The airline's case against the ground handling company who provided the employee was made out under German law which applied, namely s.831 of the German Civil Code, because the company had not taken reasonable care to train the employee in the hazards on the refurbished air bridge. An express finding to that effect ought to have been made by the Lord Ordinary.

- Although the airline's case against the ground handling company was brought under s.831 of the German Civil Code, the airline also needed to have brought its claim for contribution within time. Regulation (EC) 864/2007 ("Rome II") set out which law applied to the airline's contribution claim. Article 4(1) of Rome II provided that the law should be that of the country in which the damage occurred. German law would apply unless art.4(3) were engaged because the delict (tort) was "manifestly more closely connected with" England. The delict involving the pursuer had no connection with England, other than easyJet having its registered office at Luton Airport. Accordingly, German law, specifically section 199 of the German Civil Code, applied which provided for a two-year time period to bring contribution proceedings. As easyJet had brought proceedings nearly a year after the two-year time limit, the contribution claim was time-barred.

ILFC Aircraft 32A-1808 Ltd v Fly Bosnia D.O.O. [2023] EWHC 69 (Comm), 18 January 2023 (Christopher Hancock KC)

The Court granted a judgment on an admission pursuant to CPR 14.3 and, alternatively summary judgment of the claim pursuant to CPR 24, on claim for rent arrears involving the lease of an aircraft.

The parties had entered into an aircraft lease agreement dated 12 July 2018 by which the claimant leased to the defendant an Airbus A319-100 aircraft (" the Aircraft ") for a term of 72 months.

The defendant had admitted that an "event of default" had occurred as it had failed to make a payment of Base Rent, Maintenance Rent or any other payment due under the Lease after payment has become due.

The defendant has also failed to return the Aircraft in the required condition as it had failed an engine borescope inspection.

On the basis of the admissions, the Court held that the claimant was entitled to judgment on admissions in the sum of US$1,315,148.62 plus interest.

However, as the defendant had recently filed for insolvency in Bosnia, the liquidator in Bosnia was given liberty to apply in the event that the view was taken that the hearing, and judgment, should not have taken place. Such application was to be made within 28 days of any winding up order in Bosnia.

Peregrine Aviation Bravo v Laudamotion GmbH [2023] EWHC 48 (Comm), 17 January 2023 (Henshaw J)

The central issue in the case was whether the Austrian airline Laudamotion, a subsidiary of Ryanair, was obliged to accept delivery of four Airbus A320 aircraft leased or managed by A dispute arose during the first phase of the Covid pandemic, leading to the AerCap parties terminating or purporting to terminate four leases, and in due course the present claims.

In July 2019, the First Claimant ("Peregrine") and the second claimant ("AIL"), members of the AerCap group, the world's largest aircraft leasing company, entered into four 60-month aircraft leases ("the 2019 leases", relating to "the 2019 Aircraft") with the First Defendant ("Laudamotion"), a subsidiary of the Second Defendant ("Ryanair") for the provision of four Airbus A320 aircraft. Ryanair guaranteed Laudamotion's obligations under the lease for the first of these aircraft, MSN 3361. The final dates for delivery of the four aircraft were the end of May 2020 for one aircraft (MSN 3361) and the end of June 2020 for the other three.

There were also a number of pre-existing aircraft leases entered into in 2018 ("the 2018 leases", relating to "the 2018 Aircraft") between Laudamotion and either the Third Claimant ("AICDAC") or Wilmington Trust SP Services (Dublin) Ltd ("Wilmington"). Wilmington being a trust services provider that acts as lessor/trustee in respect of certain aircraft owned by companies in the AerCap group. Ryanair also guaranteed Laudamotion's obligations under the 2018 leases.

After the outset of the Covid pandemic, discussions took place between the parties which, the claimants contended, led to Laudamotion wrongfully refusing to take delivery of MSN 3361 in early May 2020. That led, on the claimants' case, to cross-defaults under the other three 2019 leases as well as the 2018 leases, which meant they were entitled to be indemnified in respect of the rental stream they lost and the other expenses they incurred. The net lost rental stream being the rent that would have been received from Laudamotion, *less* what was received from Flynas (the previous lessor) after the relevant Final Delivery Dates for the four aircraft, *less* what has been received from SmartLynx (to whom the Claimants leased the aircraft after terminating the Laudamotion

leases), *less* what was to be received from SmartLynx over the remainder of what would have been the term of the leases to Laudamotion.

The Judge set out the issues as follows:

1) whether Peregrine and AIL were entitled to terminate the 2019 leases pursuant to Article 24.2(n) of the leases (for threats to suspend payment of debts), and (if so) to bring claims against Laudamotion and Ryanair on that basis;
2) whether Laudamotion was obliged to take delivery of MSN 3361 on 7 May 2020 and wrongfully failed to do so (thereby entitling the Claimants to terminate the leases);
3) (if relevant) whether the claimants would, but for the termination, have delivered the other three 2019 aircraft by their respective Final Delivery Dates;
4) (if relevant) how much the claimants are entitled to recover from Laudamotion; and
5) (if relevant) whether Ryanair is liable as guarantor in respect of the claimants' claims under all four of the 2019 leases or only the lease relating to MSN 3361.

The Judge agreed with defendants' contentions that:

(1) The claimants had not consulted with Laudamotion prior to the claimants determining that MSN 3361 would be delivered on 7 May 2020, nor had they provided Laudamotion with "reasonable notice" of the date on which the MSN 3361 would be delivered. This was despite Laudamotion appearing to disengage from the delivery process, ceasing to cooperate in the delivery process for the Aircraft, and having informed the claimants that it did not intend to take delivery of the Aircraft.
(2) The contract could only be workable if Laudamotion was given sufficient time to conduct the necessary checks ahead of delivery as otherwise it would be left in an invidious situation of either (i) accepting an aircraft without proper checks, or (ii) refusing to accept it with the result that the lease would be terminated when the airline would otherwise have accepted delivery.

(3) The MSN 3361 had not meet the Delivery Condition Requirements when it had been tendered, including by failing to provide an Export Certificate of Airworthiness for the Aircraft. The appropriate test for airworthiness was whether the aircraft and its records had been maintained in accordance with applicable regulatory requirements and that there were no remained no outstanding maintenance or repairs required pursuant to those regulations.

The Judge rejected the claimants' contention that the Export Certificate of Airworthiness would have been provided at delivery if Laudamotion had been cooperative, having found that Laudamotion was under no duty to be cooperative.

The Judge concluded that Laudamotion did not wrongfully fail to take delivery of MSN 3361, that no Events of Default occurred, and that the claimants were not entitled to terminate the leases of any of the aircraft. As a result, the claimants' claims were dismissed.

Whilst the Judge found against the claimants, he did go on to consider what amounts would have been recoverable against Laudamotion had the leases been validly terminated.

Of particular note was the focus on the duty to mitigate and the application of the leases' provisions concerning adjustments on redelivery and a cost sharing regime for airworthiness directives above a certain threshold (which, if

invoked, would have again reduced the claimants' damages claim).

Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2022] EWHC 3287 (Comm), 20 December 2022 (Cockerill J)

Dassault and Mitsui Bussan Aerospace Co Ltd ("MBA") and entered into a contract governed by English law (the "Sale Contract"), whereby Dassault agreed to manufacture and deliver to MBA two aircraft and certain related supplies and services for supply to the Japanese Coast Guard.

Article 15 of the Sale Contract, titled "Assignment-Transfer", provided as follows:

"*Except for the Warranties defined in Exhibit 4 that shall be transferable to Customer, this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party.*"

Without Dassault consent, MBA subsequently entered into an insurance contract governed by Japanese law, with the Defendant insurer ("MSI") to cover the risk of MBA being held liable to the Japanese coast guard for late delivery under the sales contract.

Article 35(1) of the insurance policy reproduced article 25 of the Japanese Insurance Act. Article 25 provided that if an insurer made an insurance proceeds payment, it would, by operation of law, be subrogated to the rights held by the insured against the other person. Under Japanese law, the mechanism of subrogation was the transfer of rights: the insurer acquired the right to sue in its own name, including the right to initiate proceedings.

The aircraft and supplies were delayed and the Japanese Coast Guard claimed from MBA liquidated damages for late delivery. MBA claimed that sum from MSI, which it paid.

MSI then submitted a request for arbitration under the arbitration clause in the Sales Contract between Dassault and MBA. Dassault unsuccessfully challenged the tribunal's jurisdiction on the basis that any transfer of rights from MBA to MSI was precluded by art.15 of the sales contract, the defendant had not acquired any rights under that contract and, as a result, it was not a party to, or entitled to enforce, the arbitration agreement. Dassault thereafter applied under section 67 of the Arbitration Act 1996 to set aside a partial award.

Having heard Dassault's application, Cockerill J concluded that the arbitral tribunal had no jurisdiction to decide any dispute between Dassault and MSI and therefore its award fell to be varied accordingly.

Cockerill J held that the wording of article 15 of the Sales Contract was very broad, with the inclusion of the word "attempt" intended to be a blanket ban on transfer which was apt to cover transfer to an insurer. Further, it had clear wording covering consequences, namely voidness, and limited exceptions.

The Judge considered that the word "by" invited attention as to why the assignment/transfer had happened, in the sense of whether a party had chosen it to happen. MBA could have chosen not to insure or chosen a policy governed by another system of law, excluding the operation of article 25 of the Japanese Insurance Act, or chosen not to make a claim. Any of those decisions would

have stopped the transfer. It was therefore in MBA's power to comply with the provision. It had chosen to take a step which on a certain contingency would put it in breach of the provision. The triggering of article 25 of the Japanese Insurance Act was a consequence of MBA's voluntary act, rather than an involuntary operation by law which may not have fallen foul of article 15.

R. (on the application of Doncaster MBC) v Doncaster Sheffield Airport Ltd [2022] EWHC 3060 (Admin), 1 December 2022 (Fordham J)

Following a strategic review, the defendant operator announced that aviation services at Doncaster Airport would be wound down from 31 October 2022 on the basis that it was no longer financially viable to operate the airport.

The claimant local authority sought permission to apply for judicial review of the defendant operator's decision to close Doncaster Airport on the grounds including that the defendant had failed to take into account (a) third-party prospective purchasers for the airport; (b) the offer of a £7 million bridging grant to allow time to find a third-party purchaser; (c) the economic impacts of the closure.

The operator submitted that the dispute was not amendable to judicial review as the decision to close the Airport because the operator was a private company which was at all times acting as a private entity and was therefore not discharging a public function.

In refusing the application for judicial review, the Court held:

- The claimant had a realistic prospect of success in arguing that the operator was discharging a "public function" amenable to judicial review. Case law supported the proposition that (1) the airport was land used in a relevant sense for "a public purpose"; (2) the operator was permitted to use the land as an airport "in the public interest"; and (3) the operator's function was carried out "in the national interest". Furthermore, the operator was subject to a statutory licencing scheme, and the airport provided services for the police, coastguard, and military, as well as an emergency "long landing strip".

- As a local authority, the claimant had a sufficient interest to bring a claim for judicial review. The airport was within its administrative area and was a key infrastructure asset interwoven into its public and legally significant plans. The local authority was heavily represented on the operator's own consultative committee and had been recognised as a "key stakeholder" to the airport by the operator.

- Whilst the claimant had placed itself on the "outer limits" of promptness by waiting five-and-a-half weeks before issuing the claim, it had been actively involved in the engagement leading to the decision and was proactive in the steps taken to attempt to rescue aviation activities at the airport. There had therefore not been any undue delay.

- The substantive grounds of review had no realistic prospect of success:

(a) The defendant had not closed its mind during the strategic review.
(b) A consultation with stakeholders had been set up voluntarily and had been conducted fairly.
(c) The operator had conscientiously considered a report commissioned to assess the current economic value of the airport and the "likely

impact that closure would have upon the local and regional economy". The airport was simply not commercially viable going forward.

(d) Engagement and discussions with third-party prospective purchasers had not delivered any "tangible results" or identified potential acquirers of the airport's operations.

(e) It was not *Wednesbury* unreasonable for the defendant to have rejected the offer of a capital grant of £7 million to allow a 13-month period for a proposal to purchase the airport to be achieved.

(f) There was no realistic prospect of showing that no "decision" had been taken by the operator or that the operator's decision involved an unlawful delegation or unlawful fetter.

Dore and Pistidda v easyJet Airline Company Ltd [2022] EWCA Civ 1553, 23 November 2022 (Males LJ; Birss LJ; Snowden LJ)

The two appellant passengers appealed against a County Court decision that they were not entitled to compensation for a delayed flight under Regulation (EC) 261/2004 (as amended and retained in UK law) because they had not complied with the respondent airline's terms and conditions of carriage before commencing their court action.

Clause 19.6 of easyJet's terms and conditions of carriage stated:

"*Passengers must submit claims directly to easyJet and allow Us 28 days … to respond directly to them before engaging third parties to claim on their behalf. Claims may be submitted using the online form*".

The word "form" contained a link to an online portal.

The claimants had engaged a claims handling company (Flightright) to seek compensation on their behalf. That company had submitted a claim but some of the information which it submitted was incorrect, and the airline's online portal generated an automatic email response which stated that the airline had been unable to find the booking with the information submitted and asked the passengers to resubmit their claim. There was no facility whereby a customer could re-access the online portal, identify what information had been entered previously, and correct any information already entered.

Neither the claimants nor Flightright resubmitted a claim on the online portal and instead a claim was issued in the County Court by solicitors for the claimants (Lovetts).

The Airline did not dispute that it might be liable under the Regulation, but took the point that the appellants had not complied with clause 19.6 by making a claim directly to the airline, and therefore the appellants were precluded from receiving compensation.

In allowing the appeal, the Court (Birss LJ giving the main judgment) referred to article 15 of the Regulation which prohibits airlines' contractual clauses from limiting or waived theirs obligations to passengers. An infringement of article 15 renders the relevant contractual clause(s) ineffective and unlawful.

The Court held that article 15 was concerned with matters of substance, although there was no clear line between procedure and substance. If a prescribed procedure was to fall foul of the Regulation, it would have to put a material obstacle in the passenger's path (*Bott & Co*

Solicitors Ltd v Ryanair DAC [2019] EWCA Civ 143 followed).

Whilst the Court acknowledges airlines' rights to require passengers to use an online dispute resolution portal in the first instance, a system which produced automated email responses which did not allow a user to see what data had been entered, so as to facilitate the correction of errors, risked amounting to a material obstacle in the way of passengers making claims, contrary to article 15 of the Regulation.

The Court rejected easyJet's argument that because the passengers had employed a claims handler, they had not submitted their claim "directly" as required by clause 19.6. Passengers were entitled to have someone else access the online portal on their behalf. If the true construction of the word "directly" did not permit this, then it would be a material obstacle for passengers and constitute an infringement of article 15 of the Regulation.

The Court concluded that the appellants had satisfied the requirements of clause 19.6 because 13 days after receiving the automatic email response, they had provided copies of their boarding cards, giving full and accurate details of their flights. The airline's response showed that it had correctly identified the passengers and their flights. In any event, the word "may" in the conditions of carriage made it clear that using the online portal was not mandatory.

Males LJ gave a separate judgment in which he held that there was a strong public interest in airlines having online systems for handling flight delay claims to enable passengers to claim compensation without difficulty, and to receive prompt payment without incurring legal fees or needing to pay claims companies. However, he opined that if an online system was to achieve those objectives without putting material obstacles in the passengers' way, the following requirements would need to be satisfied:

(1) the airline's terms and conditions had to make clear that use of the online system was compulsory before court proceedings could be commenced;
(2) the passenger should have the ability to save their claim and should be strongly advised to do so;
(3) if a claim could only be processed if some or all of the claim details were correctly entered on the online form, that had to be explained to the passenger; and
(4) if a claim was rejected on the ground that the claim details had not been correctly entered, the automated response sent by the airline had to make that clear

Christopher Loxton

christopherloxton@3harecourt.com

Leave it to the trial judge: recent guidance on applications to exclude expert evidence

Introduction

The High Court has recently given guidance on the principles it will consider when hearing applications to exclude expert evidence. Sitting as a Deputy Judge of the High Court in the case of *Fawcett v TUI UK Ltd* [2023] EWHC 400 (KB), Dexter Dias KC dismissed an application on the basis that the objections to an expert report went to weight rather than admissibility, and were best tested at trial rather than excluded altogether.

The Facts

This was a claim arising out of the death of Mr. Fawcett, who died when taking part in a snorkeling excursion in the Dominican Republic as part of a package holiday organised by the defendant.

Although the claim was governed by the law of England and Wales, it was agreed that local standards in the Dominican Republic were relevant to determining the duty of care owed by the excursion provider.

The claimants and the defendant were granted permission to rely on expert evidence in relation to the relevant local standards. They served their respective reports accordingly.

The Application

The claimants brought an application to exclude the expert report served by the defendant. There were three main grounds of objection:

(1) Lack of expertise in the local standards of the Dominican Republic
(2) Expressing opinions outside his expertise
(3) Failing to maintain impartiality

Judgment

The Court considered the grounds individually and cumulatively, and held that the application be dismissed.

(1) Lack of expertise in the local standards of the Dominican Republic

Regarding the first ground, the Court divided its reasoning into five sub questions.

The first question was whether the issue of an expert's lacking expertise could be assessed at an interim hearing at all. The judge held that it is a question of fact, but can be assessed at an interim hearing.

The second question the judge asked was, 'who must prove what?' Since it was the defendant that had instructed this particular expert, it was for the defendant to prove that that expert had the requisite expertise to act as an independent adviser to the Court.

The third sub question was, 'what is the route to establishing expertise?' Here, the Court noted that a specific qualification is not always essential: for example, a police officer can be considered an expert in identifications because he is used to looking at CCTV, not necessarily because he has a specific qualification in such matters.

The fourth sub question was, 'what is the standard of sufficient expertise?' Citing Christopher Clarke LJ at paragraph 43 of the judgment in *Rogers v Hoyle* [2014] EWCA Civ 257, the judge said that *'the bar to be surmounted in order to count as an expert is not particularly high, the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility*.' That said, it is not simply the case that anyone who presents themselves as an expert can be held as such: the bar (though not particularly high) must still be surmounted and it is up to the trial judge to consider how much weight is placed on the evidence in light of the expert's expertise.

The fifth sub question was, 'what is the basis of this particular expert's relevant expertise?' On the evidence, the defendant's expert claimed that his expertise was evident from his own experience. While he did not have any qualifications from the Dominican Republic, he did have experience engaging the relevant standards in the Dominican Republic (seen in his answers to Part 35 questions). Applying *Rogers*, recognising the not particularly high bar, the judge held that the defendant's expert had the relevant expertise.
In any event, the judge said that the depth and quality of the evidence can be tested at trial.

(2) Expressing opinions outside his expertise

The claimants contended that the defendant's expert report included some overreaching opinions outside of the expert's expertise. The judge held that this sort of objection is a matter for the trial judge. It would be inappropriate, at an interim stage, to excise certain passages and render them inadmissible; rather, the trial judge is entitled to place less weight on certain passages as he or she thinks fit.

In reaching this conclusion, the judge followed paragraphs 52 and 53 of the judgment in *Rogers:*

'52 It is not, however, the function of an expert to express opinions on disputed issues of fact which do not require any expert knowledge to evaluate. However, as the judge observed, it is common to find in many expert's reports opinions of that character, which are not helpful and to which the court would not have regard. As to those he thought it preferable: "…to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special

knowledge, the greater (other things being equal) the weight to be accorded to those opinions"

53 Insofar as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category.'

(3) Failing to maintain impartiality

The judge recognised the seriousness of this allegation: claiming that the defendant's expert failed to maintain impartiality was tantamount to an allegation of bias. He also noted that an expert expressing an opinion happens not infrequently and, in any event, is not enough *per se* to make an allegation of bias.

If an expert's opinion does constitute an overreach, the trial judge can ignore them. Similarly, it is a matter for the trial judge to determine whether the expert was acting as an 'partial advocate' or reached the wrong conclusion, taking account of all the evidence. Certain allegations may be well founded, and will form a proper basis of cross-examination at trial.

Comment

This case shows the difficulty applicants may have in excluding expert evidence altogether on the basis that another party's expert fails to surmount the not particularly high bar of counting as an expert for the purposes of Part 35, especially if that expert has a lot of experience. Indeed, it is a useful reminder of the Court's general reluctance to "get out its red pen" and exclude any or all of an expert report.

While one party may well have legitimate concerns about another party's expert report, it is the role of the trial judge to consider how much weight to put on particular evidence, reviewing it in light of that expert's own experience and expertise. Evidence will be tested at trial - that is the purpose of cross-examination – and the Court will generally wish to leave it to the trial judge to assess it.

In *Fawcett v TUI UK Ltd* [2023] EWHC 400 (KB) Andrew Young represented the Claimants and Asela Wijeyaratne represented the Defendant. The expert shall remain nameless.

Asela Wijeyaratne
With assistance from Rory Turnbull


aw@3harecourt.com
roryturnbull@3harecourt.com

Liberty Seguros

Background to Case

Liberty Seguros S.A. ("Liberty Seguros") brought an action for declaratory relief against a motor vehicle insurance policy holder ("DR"), following an accident on 24 March 2016 whereby 12 Portuguese nationals were killed. Liberty Seguros alleged the insurance contract was a nullity on the basis that the policyholder had been dishonest on the form in which he requested the transferral of his existing insurance policy onto another vehicle.

Following the accident, it became apparent that DR had failed to state that he was not the usual driver of the vehicle (the driver on that day being DR's nephew ("FN") who held a non-professional driver's license). DR was not the owner of the vehicle; FN was transporting paying passengers between Switzerland and Portugal which he was not legally authorised to do; the van had a trailer weighing 1,300kg which he had not insured, and was a weight well beyond that which a non-professional driver's license permitted; and finally that there were 12 passengers, the legal allowance for non-professional driver's licenses being 9, while the insurance contract authorised only 5. Liberty Seguros contended that, had such facts not been deliberately withheld from them, they would not have concluded the contract.

The Fundo de Garantia Automóvel ("FGA") was added to the proceedings as a principal party with equal interest to the Defendant (now Respondent), and filed a counterclaim that in any event the voidability or nullity of the contract could not be relied upon as against the injured third parties and the FGA.

The District Court of Guarda in Portugal determined, under national law, the relative and absolute nullity of the contract. However, the court also found that the enforceability of these findings against third parties and the FGA was contrary to Union law, and upheld the FGA's counterclaim. Liberty Seguros appealed this decision to the Court of Appeal of Coimbra, who stayed proceedings and referred the issue to the CJEU for preliminary ruling.

Referral to CJEU

The question the CJEU sought to answer was whether the first subparagraph of Article 3 and Article 13(1) of Directive 2009/103 – also known as the codified Motor Insurance Directive consolidating all that came before ("the MID") – must be interpreted as to preclude national legislation that has the effect of nullifying a motor vehicle insurance contract resulting from the exercise, by the policyholder, of a commercial international transport activity in the absence of authorisation, and omissions or false statements made by the policyholder to the insurance company at the time of creation of this contract, even though the third-party victims are passengers who could not ignore this lack of authorisation.

On considering this referral, the CJEU reflected on the progression and reinforcement of compulsory motor vehicle insurance within the Union in recent years (for example, noting their judgment in *Núñez Torreiro v AIG Europe Ltd* (C-334/16), in which it was established that national law provisions excluding compulsory insurance for injuries and damage on the basis of terrain were precluded by Union law).

The CJEU also referred to Recitals 2 and 20 of the MID, emphasising the European Community's fundamental objective of 'strengthening and consolidating the internal market in motor insurance'. The Court summarised both of these Recitals as, in essence, promoting the free movement of vehicles usually stationed within the Union territory, in addition to ensuring that victims of accidents caused by these same vehicles would benefit from comparable treatment, irrespective of the location within the Union where the accident occurred.

Furthermore, the CJEU clarified that Article 13(1) of the MID only provides one scenario in which insurance companies can oppose compensation to third parties who are victims of a traffic accident; namely, where the insurer can prove that such third parties who voluntarily sat in the (later damaged) vehicle knew at the outset that it was stolen. In terms of insurers enforcing contract nullity against third parties on the basis that the policyholder conducted international commercial transport activity in the absence of authorisation to do so, combined with omissions or false statements made by said policyholder to the insurance company at the time of conclusion of the contract, the CJEU pointed out that the Union regulations do not specifically seek to standardise an approach and as such, Member States may themselves determine the conditions of validity of insurance contracts.

That being said, Member States are not free of their obligations to guarantee compulsory car insurance to victims of damage following a motor accident, and they must exercise these obligations in accordance with Union law. If national law denied such third parties' compensation on this aforementioned basis, the MID would ultimately be deprived of its useful effect, even in situations where passengers could not ignore the lack of authorisation to conduct the international transport activity. Further motive to apply this reasoning comes from the fact that the Union legislator had not included in the aforementioned Article 13(1) other potential scenarios of illegality which would thereby exclude compensation for third parties. The CJEU further made clear that it would not be influenced by the potential compensation that FGA might provide these victims if Liberty Seguro was not found liable.

As such, the CJEU's response could only go one way; the first subparagraph of Article 3 and Article 13(1) of the MID would preclude national law in this scenario.

Reference to Greenaway

It is interesting to consider this outcome in light of the High Court's approach in *Greenaway v Parrish and Ors* [2021] EWHC 1506 (QB). Following Brexit and specifically the implementation of section 6 of the European Union Withdrawal Act (EUWA) 2018, the UK no longer has the ability to make references to the CJEU, and the domestic courts may increasingly find themselves in the position of trying to do that which was the CJEU's job of interpreting potentially conflicting EU law themselves. That is, if they decide to take on a similar role to the CJEU; on some readings of the EUWA, domestic courts should no longer be looking outwardly on how to interpret these questions at all, but be guided purely by domestic law in these scenarios.

In this particular instance, however, the High Court opted to allow the use of expert evidence to clarify the meaning of the word 'stolen' in other Member States' languages, in order to determine how the meaning of this word in the MID may or may not differ to that in section 151(4) Road Traffic Act 1988. Provided that it is necessary and proportionate to do so, allowing such evidence may be the way forward in UK courts for the time being. However, given the ongoing debate over whether this lingual interpretation is a question of law or fact, and thereby whether such evidence can and should be adduced, it is likely that we haven't heard the last of these procedural discussions just yet.

Nonetheless, if the High Court decides to mirror the Union's recent approach in Liberty Seguros, it is likely to adopt an interpretation of 'stolen' which is in line with the reinforcement of compulsory motor vehicle insurance. Namely, that which would enable compensation for the claimant. However, given the relative lack of clarity in the post-Brexit legal landscape, what approach they will take in *Greenaway* ultimately remains to be seen.

Claire Errington

claireerrington@3harecourt.com

FTI Touristik GmbH (Case C-396/21)

In a judgment handed down on 12 January 2023, the Court of Justice of the European Union provided much needed guidance on an important question that had been thrown into sharp relief by the Covid-19 pandemic: if a package holiday is interrupted, when would travellers be entitled to a price reduction from travel organisers, and at what rate? This article explores the Court of Justice's decision and provides commentary on what it means for travel organisers and its application to a post-Brexit UK.

Background

On 30 December 2019, two travellers from Germany purchased a package holiday to Gran Canaria from FTI Touristik GmbH ("FTI Touristik"), a German travel organiser. The package consisted of a return flight between Germany and Gran Canaria and a stay on the island for two weeks. Their holiday began on 13 March 2020, two days after the World Health Organisation declared the outbreak of the Covid-19 disease to be a pandemic. Within two days of their holiday, the Spanish authorities ordered a national lockdown after Prime Minister Pedro Sánchez declared a state of emergency. The beaches were closed, access to the swimming pools was prohibited, the hotel entertainment programme was shut down and an island curfew was put in place, meaning that the Claimants were only permitted to leave their hotel room to get food. On 18 March 2020, the Claimants were told they should prepare themselves to leave the island and, two days later, they had to return to Germany.

The Claimants brought a claim before the Amtsgericht München (Local Court, Munich, Germany) seeking a 70% reduction in the price of their package holiday, that is to say €1,018.50. They argued that they were entitled to a price reduction under the German equivalent of Regulations 15 and 16 of the Package Travel and Linked Travel Arrangement Regulations 2018 (the "PTR"). FTI Touristik argued that it could not be liable for two reasons:

1. The lockdown restrictions imposed in Spain were "normal circumstances" affecting all of Europe, including Germany, the Claimants' home country.

2. The restrictions formed part of a "general life risk" (a bespoke concept under German law).

In a judgment handed down on 26 November 2020, the Local Court in Munich dismissed the Claimants' action, taking the view that measures taken to fight Covid-19 were there to protect the health of the Claimants and could not lead to a "defect" in their package within the meaning of paragraph 651i of the German Civil Code, Bürgerliches Gesetzbuch (the "BGB"). Paragraph 651m of the BGB is worded as follows: "The travel price shall be reduced for the duration of the travel defect. In the case of a price reduction, the travel price is to be reduced in the proportion which the value of the package tour free of defects would, at the time when the contract was entered into, have had to the actual value. Where necessary, the price reduction is to be established by estimation".

The Claimants appealed to the Landgericht München I (Regional Court, Munich I, Germany), which decided that the travel organiser may be held liable for a lack of conformity of the travel services even in light of protective restrictions, taking into account the strict liability provided by Article 651i of the BGB. The Regional Court expressed doubts about whether restrictions could be regarded as part of the "general life risk" that excludes the liability of a travel organiser. Nevertheless, it placed some weight on the point that the protective restrictions could be considered "normal circumstances" imposed throughout Europe and not extraordinary circumstances specific to the travel destination. The Regional Court considered how the authors of Directive 2015/2302 (the "package travel directive") had included, among the "unavoidable and extraordinary circumstances" under Article 12(2), the "outbreak of a serious disease at the travel destination". It was not clear, however, whether the authors of the package travel directive contemplated a pandemic situation.

In light of the uncertainty, the Regional Court made a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of European Union ("TFEU"). It asked the Court of Justice to interpret the package travel directive, in particular Article 14(1). That article, titled "price reduction and compensation for damages", provides that:

1. Member States shall ensure that the traveller is entitled to an appropriate price reduction for any period during which there was lack of conformity, unless the organiser proves that the lack of conformity is attributable to the traveller.

2. The traveller shall be entitled to receive appropriate compensation from the organiser for any damage which the traveller sustains as a result of any lack of conformity. Compensation shall be made without undue delay.
3. The traveller shall not be entitled to compensation for damages if the organiser proves that the lack of conformity is:

   (a) attributable to the traveller;

   (b) attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or

   (c) due to unavoidable and extraordinary circumstances.

The exact question referred to the Court of Justice was as follows:

"Do restrictions imposed due to an infectious disease that is prevalent at the travel destination constitute a lack of conformity within the meaning of Article 14(1) of [Directive 2015/2302] even if, because of the worldwide spread of the infectious disease, such restrictions were imposed both in the traveller's place of residence and in other countries?"

The Court of Justice's decision

By its question, the Regional Court wanted to know whether Article 14(1) of the package travel directive must be interpreted as meaning that a traveller is entitled to a price reduction of their package holiday where a lack of conformity of the travel services included in the package is due to restrictions that have been imposed at the travel destination to fight the spread of a disease and such restrictions have also been imposed not only in the traveller's place of residence but also in other countries around the world.

Giving a clear answer in the affirmative, the Court of Justice held that a traveller is entitled to a price reduction of their package holiday in those circumstances. FTI Touristik's arguments in defence did not persuade the Court of Justice, which made four principal observations.

First, the Court of Justice held, at [24], that the literal interpretation of Article 14(1) of the package travel directive is that the failure to perform – or improper performance of – the travel services entitles a traveller to a price reduction in all circumstances, except where the failure to perform or improper performance is attributable to the traveller. The fact that lack of conformity is attributable to the travel organiser, people other than the traveller or "unavoidable and extraordinary circumstances" does not vitiate the traveller's right to a price reduction. In other words, a traveller must demonstrate a difference between the travel services included in the package and those actually provided.

Second, the Court of Justice further observed, at [25], that Article 14(1) of the package travel directive is part of "the harmonised system of contractual liability for package travel organisers" which is characterised by strict liability on the part of the organiser concerned with limited exceptions to escape liability.

Third, the Court of Justice made clear, at [29], that the literal interpretation of Article 14(1) is consistent with the overall objective of the package travel directive to provide a "high level of consumer protection" to travellers. In particular, a travel organiser's obligations arising from a package travel contract [2]cannot be interpreted restrictively. Consequently, as the Court of Justice had itself held in a judgment dated 18 March 2021 (*Kuoni Travel*, Case C-578/19), a travel organiser's obligations include not only those stipulated in the package travel contract but also those linked with it as a result of the purpose of the contract. In other words, a performance of a package contract has to be judged in the context of its purpose, which, in the Claimants' case, was a relaxing and enjoyable holiday.

Fourth, the Court of Justice stated, at [30], that the legislative history of the package travel

[2] See X v Kuoni Travel Ltd [2021] UKSC 34

directive supported the literal interpretation of Article 14(1). It drew on Advocate General Laila Medina's Opinion that, in the course of the legislative process, the exceptions to the right to receive a price reduction were distinguished from those of the right to receive compensation. If a lack of conformity was due to "unavoidable and extraordinary circumstances", then it would provide a travel organiser with an exception from having to pay compensation but not from having to give a price reduction.

Calculating a claim for a price reduction

What then is the method for calculating an appropriate price reduction? The Court of Justice identified three factors that the Regional Court in Germany – and by extension other national courts – will have to take into account to arrive at an appropriate price reduction. The three factors were:

1. The price reduction should be assessed in relation to the travel services included in the package travel contract which have not been performed or which have been improperly performed. A travel organiser should only offer a price reduction for services which it actually undertook to provide. It will be for the Regional Court to assess whether the closure of swimming pools, the lack of an entertainment programme and the inability to access the beaches of Gran Canaria or visit the island following the imposition of protective restrictions constituted failure to perform or improperly perform FTI Touristik's package contract with the Claimants.

2. The price reduction must be appropriate for the entire period in which there was a lack of conformity. This assessment must, like the initial finding of a lack of conformity, be objective in light of the travel organiser's obligations under the package travel contract. It must be based on an estimate of the value of the travel services included in the package travel contract which were not performed or improperly performed, taking into account the duration of the lack of conformity and the value of the holiday.

3. A traveller is required to inform the travel organiser without "undue delay" where they perceive any lack of conformity during the performance of travel services included in the travel package contract. Failure to do so can be taken into account when assessing the price reduction where such notice could have reduced the duration of the lack of conformity.

What it means for travel organisers

A decision like *FTI Touristik GmbH* is long overdue in relation to the package travel directive. The Court of Justice has finally provided some clarity on considerations to be applied when assessing price reductions for package holidays. Although the Court of Justice's overall conclusion that travellers are entitled to price reductions where their holidays were impacted by Covid-19 will not be met enthusiastically by travel organisers, it provides guidance to national courts about how to treat a growing area of litigation.

It is unlikely that travel organisers will have expected to escape liability altogether in relation to disruption caused by Covid-19. Thus, any guidance on how price reduction claims are likely to be calculated is helpful. That said, however, the guidance does not provide complete certainty about either how the claims will be calculated or what the exact calculation will be. Travel organisers will be disappointed to learn that price reductions are not a purely forensic

calculation, reducible to a set formula. As the Court of Justice set out, at [38], national courts are able to factor in not only the obligations explicitly contained within the package travel contract but also those "linked to it as a result of the purpose of that contract". In the context of holidays disrupted by Covid-19, that could mean the travellers' inability to travel outside of the hotel or onto the beach. Whilst it is not certain what these "linked" obligations encompass, it will likely boil down to how the package holiday was marketed. For example, whether an "on the beach" description was included in the marketing might be relevant.

In better news for travel organisers, the Court of Justice made clear that both a finding of a lack of conformity and an assessment of whether a price reduction is appropriate are to be carried out objectively. This objective test means that the subjective wishes of a traveller to, for instance, be welcomed by their favourite concierge who turns out not to be working that week, will be dismissed. National courts will therefore assess any perceived lack of conformity in line with the travel organiser's obligations set out under the package travel contract.

Application to the UK

Whether UK courts will follow the Court of Justice's guidance, as with so much else, remains to be seen. Following Brexit, the UK courts are under no obligation to follow judgments of the Court of Justice.

The decision in *FTI Touristik GmbH* should prove influential. It carries sound reasoning and relates to circumstances that are widely applicable to claims likely to be brought in the UK under the PTR in the coming years. One would expect UK courts to follow a similar logic to the Court of Justice in calculating price reduction claims.
There are some key differences in wording and substance between the PTR and the package travel directive though. Under Regulation 15 of the PTR, there are multiple routes (or "gateways") for claimants to trigger the right to a price reduction under Regulation 16. The Court of Justice only dealt with one of those gateways about lack of conformity.

Two of the gateways in Regulation 15 state that a right to price reduction only follows "where appropriate", in particular circumstances where "a significant proportion of the travel services as agreed in the package travel contract" (paragraph 8) cannot be provided or where a lack of conformity "substantially affects the performance of the package" (paragraph 11a). The subtle difference in the wording between the PTR and the package travel directive makes it challenging to predict – if UK courts are inclined to follow European jurisprudence – what the outcome of price reduction claims about Covid-19 disruption might be. Those words, "where appropriate", are likely to give rise to future litigation. Perhaps then we will have certainty (although hopefully not too soon)!

Richard Campbell
With assistance from Nicholas Leah

richardcampbell@3harecourt.com
nicholasleah@3harecourt.com

Service without a smile

The essential nature of the claim in the case of *Charlton* v. *Deffert* [2022] EWHC 2378 KB is identical to that of many claims which persons domiciled in England and Wales will continue to wish to try to pursue in the English courts in the post-Brexit era, namely a personal injury claim arising out of a road traffic accident abroad where the proposed defendant is not *prima facie* susceptible to the jurisdiction of the English courts. Following the expiry of the transitional period, the ability of an injured person domiciled in England and Wales to sue an EU or Lugano Convention domiciled insurer of a driver as of right under the *Odenbreit* principle disappeared and such a claimant is in principle now obliged to seek the court's permission to serve a claim form out of the jurisdiction (as has always been the case when bringing a claim not falling within the Judgments Regulation or the Lugano Convention).

As demonstrated by *Charlton* v. *Deffert*, that preliminary procedural step will not be necessary if, with the laudable if not wholly selfless intention of saving costs, a defendant agrees to accept service within the jurisdiction. This has been a common practice, particularly where service is likely to be a protracted event, albeit usually with the express caveat understood on both sides that acceptance of service is without prejudice to jurisdiction, leaving the defendant free to challenge under CPR Part 11 if it sees fit. Master McCloud's recent procedural decision in that case provides a warning to English solicitors acting for foreign defendants that they might weaken their clients' position by trying to be helpful in this manner. The case also gives a reasonably strong indication, at least at the level of first instance decisions, that claimants who have suffered accidents anywhere abroad may not be in a very much less advantageous situation with regard to jurisdiction than they were under the pre-Brexit *Odenbreit* regime relating to accidents in EU and Lugano Convention states.

The case concerned an English domiciled claimant who had suffered injuries in a road traffic accident France who wished to sue a French domiciled driver. He was not required to obtain the court's permission to serve the claim form on the French driver in France because the French driver (or more likely his insurer) agreed via

English solicitors that service could be effected on those English solicitors. This was doubtless done in recognition of the fact that the process of obtaining the court's permission and then having the documents translated and served in France would be costly and that the defendant would be liable for such costs if the claim succeeded. It appears to be the case (although it is not entirely clear from the judgment) that the agreement to accept service was expressed to be without submission to the jurisdiction, as one would expect. Had the clamant been required to obtain the court's permission to serve out he would have been obliged to establish one of the "gateways" under paragraph 3.1 of PD6B (there being no dispute but that he would have been able to do so as he had sustained "damage" within the jurisdiction) but crucially he would also have had to satisfy the court that England was the proper place in which to bring the claim (CPR r.6.37(3)), i.e. that it was the *forum conveniens*. This would have put on him the burden of satisfying the court that England was clearly the appropriate forum for the trial of the action or put as it was by Lord Lloyd-Jones in *FS Cairo v. Brownlie,* that the claim had its closest connection with this jurisdiction.

Having been served, the defendant made a prompt application challenging jurisdiction. In an earlier *ex tempore* judgment Master McCloud had already swiftly dismissed the submission that service was defective because no application for permission to serve out of the jurisdiction had been made, but went on in a reserved judgment to address the defendant's submission that service of the claim form should be set aside on the grounds that England was not the *forum conveniens*. The defendant's primary position was that the correct approach to his application was to proceed on the basis that it was for the claimant to satisfy the court that England was the appropriate forum, which would have been the case had the claimant applied for and obtained permission to serve out and, upon being served, the defendant had made an application to set aside service.

The Master did not accept this submission, considering that given the agreement to accept service within the jurisdiction, the fact that no application to serve out had ever been made and that service had been effected in accordance with the agreement this was a case of service as of right in relation to which there could be no requirement on the claimant to justify commencing the action by reference to CPR rr.6.36 and 6.37 and PD 6B. This was not the end of the matter, however, because both parties accepted that the court has an inherent jurisdiction to stay an action brought as of right on the ground of *forum non conveniens*. However in the case of an application for a stay the burden lies on the *defendant*, and although the essential question which the court is asking itself is the same one, in practice because of the reversal of the burden the test it is not simply a mirror image of the one applied when deciding whether to grant permission to serve out.

Recalling the injunction of Lord Lloyd-Jones in *Brownlie* to apply *forum conveniens* principles robustly so that the exercise of exorbitant jurisdiction by the English courts does not stray too far, the Master went on to weigh up the various factors in the case which pointed in each direction. The conclusion was that the defendant had not set out a *prima facie* case that there was a clearly or distinctly more appropriate forum than the English court, and accordingly the Master declined to stay the proceedings.

The cynical amongst us might wonder about the extent to which the outcome of the application was affected by the burden being on the defendant rather than on the claimant. English courts generally appear to be very ready to accept jurisdiction over foreign defendants, particularly in personal injury claims, and it is easy to see how the factors identified as favouring the

jurisdiction of the English court could lead a judge to decide that England was the clearly appropriate forum. These factors would apply in almost all similar claims where the injury sustained is significant and there are consequences and treatment in England. It is this which led to it being said above that claimants in such cases may not be much worse off with regard to bringing this type of claim before an English court than they were under the pre-Brexit regime.

The question for a defendant who believes that a claimant might have difficulty in persuading a court that England is the *forum conveniens* is, therefore, what can be done to avoid ending up in the situation of Mr Deffert? The first, and most obvious, answer is not to agree to accept service within the jurisdiction. In that situation the claimant will need to meet the requirement of CPR r.6.37(3) when applying for permission to serve out, and on any subsequent challenge the defendant may make if the claimant succeeds in obtaining permission, the burden will remain on the claimant. This course however runs the risk of the defendant having ultimately to bear the costs of the claimant's initial application and the increased costs of service out of the jurisdiction.

If trying to save costs is a significant consideration, a more satisfactory solution would be to make it clear that the terms on which service within the jurisdiction is being accepted are not as unqualified as Master McCloud considered them to be in *Charlton* v. *Deffert*. If, as I believe was the case, the agreement to accept service within the jurisdiction was on the basis that it was not a submission to the jurisdiction, it may well be the case that there was an error seeing the acceptance of service in so unqualified a way in any event. This is because of one of the cases cited, *Sphere Drake Insurance* v. *Gunes Sigorta A.S.* [1988] 1 Lloyd's Rep 139, a decision of the Court of Appeal, in which the court held that, although the qualification to the agreement for service in that case was not as clearly expressed as would have been desirable, nevertheless it was effective to mean that it was open to the defendant to challenge jurisdiction after the writ had been served in accordance with the agreement. In that case the English solicitors, after writing that they had instructions to accept service on behalf of a foreign defendant went on to say "we must emphasise that we reserve our clients' right to contest the jurisdiction of the English courts in the case and service will be accepted on that basis only". It is clear from what the Court of Appeal said that in those circumstances the writ was to be treated as if it had been served abroad, and on the defendant's subsequent challenge to the jurisdiction it would fall to the plaintiff to make out the case for service out.

However, unless and until another court says that Master McCloud's interpretation of what the agreement to accept service meant was an error (and it is understood that no appeal has been launched), the safer course for a defendant wishing to avoid a claimant incurring the costs of applying for permission to serve out and of serving abroad but retaining all his rights to challenge jurisdiction will be to make the position as clear as possible. A suggested form of words would be: "We have instructions on behalf of [X] to accept service of proceedings but we expressly state that this is solely on the basis that it shall be without prejudice to our client's right to challenge the jurisdiction of the English court or to ask the English court not to exercise any jurisdiction it may have and seek the setting aside of service exactly as if your client had applied for and obtained permission to serve out of the jurisdiction and the proceedings had then been served out of the jurisdiction, which for the avoidance of doubt means that the burden of establishing (i) one of the gateways under paragraph 3 of PD 6B and (ii) that England and Wales is the proper place in which to bring the claim will remain exclusively on your client in the

event of a challenge to the jurisdiction by our client or a request for the court not to exercise any jurisdiction it may have."

Finally, for a defendant who has no presence or assets in the United Kingdom a more extreme solution to the problem of the English courts exercising jurisdiction over a claim against him against his will could be to ignore the proceedings, either wholly or only after he has failed in a challenge to the jurisdiction. The availability of this solution depends on the regime for enforcement of foreign judgments in any state where he is present or has assets. If it is essentially the same as in England and Wales, then outside situations where statutes give the court jurisdiction in special cases, such as the Montreal Convention, a foreign judgment cannot be enforced if it was obtained on the basis of what the English courts regard as exorbitant jurisdiction, unless the defendant has clothed the court with jurisdiction by e.g. submitting to the jurisdiction or counterclaiming. Clearly this course should only be taken after the particular circumstances of the defendant in question are carefully investigated and the enforcement regime in any relevant state has been accurately established. It would be most unsatisfactory to find oneself at the wrong end of a judgment in a claim where a claimant had been enabled to have a free run on all questions of liability and quantum.

Pierre Janusz

pierrejanusz@3harecourt.com

Arthern v Ryanair [2023] EWHC 46 (KB)

In the United Kingdom, personal injury in the context of aviation is subject to unique framework of liability under the Convention for the Unification of Certain Rules for International Carriage by Air, better known as the "Montreal Convention".[3] The recent success of Christopher Loxton in the High Court has provided much-needed guidance as to the application of this framework.

The importance of the Montreal Convention comes from the fact that under Article 29 it provides an *exclusive* framework for liability. If an incident complained of falls under the Montreal Convention and the Montreal Convention does not provide a remedy, there is no remedy available at all.

The Montreal Convention's provisions deal with the liability of air carriers for death or bodily injury to passengers (Article 17(1)), loss or damage to baggage (Article 17(2)), damage caused by delay (Article 19), and loss or damage to cargo (Article 21). Article 17(1) states as follows:

'The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

Article 17 is therefore not fault-based: there is no need for the party relying upon it to show that the carrier was negligent. However, the word "accident" in Article 17 does a lot of heavy lifting.

[3] implemented into the jurisdiction of England and Wales by section 1 and schedule 1(b) of the Carriage by Air Act 1961 (as amended) and implemented in the EU by Council Regulation (EC) No. 2027/97 (amended by Parliament and Council Regulation (EC) No. 889/2002).

The leading case internationally on the interpretation of accident is *Air France v Saks* 470 US 392, a decision of the United States Court of Appeals for the Ninth Circuit which concerned the similar provision of Article 17 of the Warsaw Convention, the predecessor to the Montreal Convention, which contained a similar provision for accidents. The Court in *Saks* found at p405 that liability arises "only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries". It further decided that "...when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident...". While *Saks* adds some clarity to the meaning of accident, English judicial clarification on Article 17(1) is rare.

In the context above, the decision in *Arthern v Ryanair* [2023] EWHC 46 (KB) provides importance guidance on what constitutes an accident under Article 17.

The facts of the case were as follows. Passengers on a flight from Manchester to Hamburg had been required to walk across tarmac to board an aircraft that had recently been de-iced, rather than use a boarding bridge. According to the Claimant, he got up to use the aircraft's toilet during the flight and slipped near to the toilet door. He noticed after he fell that his clothes were wet, and that he had slipped on what he described as a large amount of fluid on the floor. He was not sure whether the liquid was water or a mixture of de-icer and water, which made a kind of slushy substance that "was similar to wallpaper paste". The Judge at first instance found that passengers had walked a mixture of water and de-icing fluid into the aircraft from the tarmac upon boarding. Crucially, as to whether the Claimant had suffered an accident for the purposes of Article 17(1), the judge at first instance held the following at paragraph 25:

"25. I am mindful of the fact that there is no direct evidence from the Defendant on the particular point of de-icing fluid being tracked into the cabin. Nonetheless it seems to me to be a matter of common sense, and such common knowledge as I am entitled to rely upon, that it is not in the scheme of things unusual or unexpected in cold weather for aeroplanes to have to be de-iced before travel, and so it is not unusual or unexpected for there to be de-icing fluid present on the tarmac and, from there, tracked into the cabin in exactly the same way that water can be tracked into the cabin. In my judgment the objective passenger would not view this as unusual or unexpected for the same reasons as I do not find it unusual or unexpected.…

"Knowing that this was an icy day, where the floor was wet, where the aeroplane was de-iced on the tarmac before the passengers walked across the tarmac to board the aeroplane, the reasonable passenger with ordinary experience of commercial air travel would not in my judgment find the presence of such fluid on the floor close to where people enter the aeroplane to be unusual or unexpected. The fact that the Claimant says there was quite a lot of it does not seem to me to make a difference, given that whilst Mr Arthern was not sure how many passengers there were on the flight, he certainly gave the impression that it was quite a number rather than just a handful."

Mrs Justice Farbey on appeal accepted this reasoning of the first instance judgment, and found the following at paragraph 43:

"Having considered the authorities, I have reached the view that the judge applied the correct legal principles to the facts that she found. Her factual findings are rooted in the evidence before her. She was alert to the issues in dispute and considered with care whether the appellant

had suffered an "accident" within the meaning of article 17(1). She made her own assessment of whether the requirements of an "accident" were met with which this court will be slow to interfere on appeal".

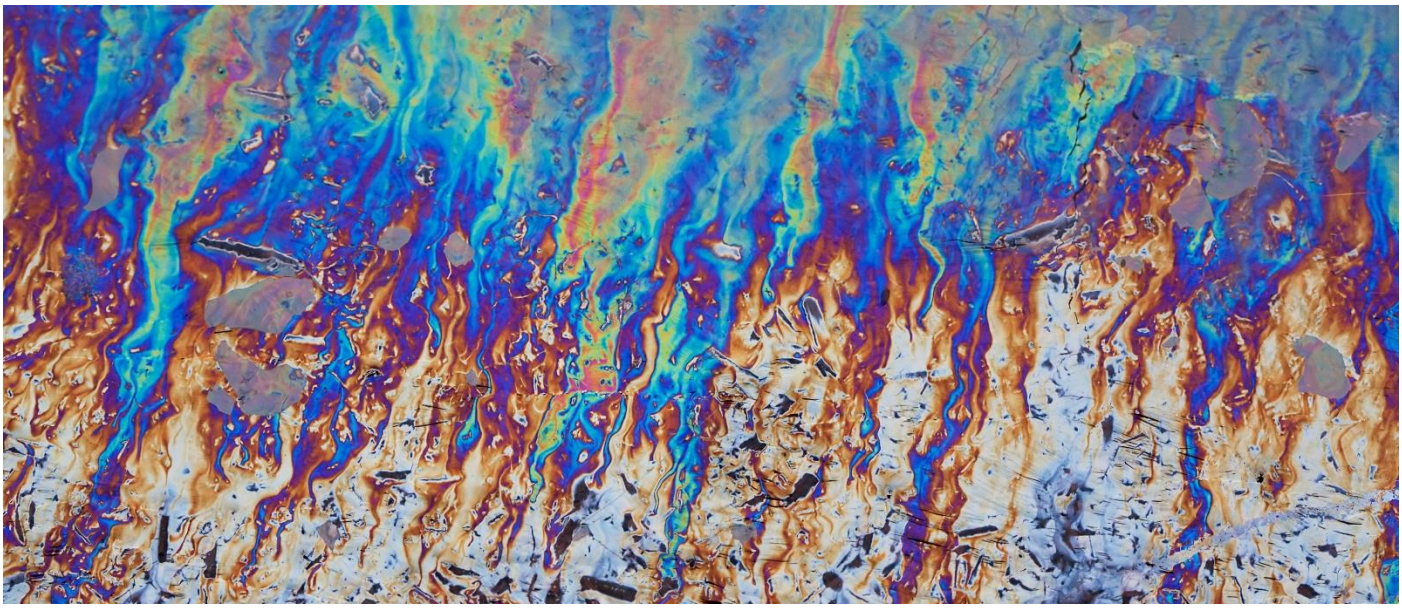
Significantly, Mrs Justice Farbey confirmed for the first time in an English case that the test under article 17(1) was not a subjective one, thereby clarifying comments made by Lord Scott *in In re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 AC 495 that suggested otherwise. She held that the test of whether an event or happening was 'unusual' or 'unexpected' was to be judged from the standpoint of an ordinary, reasonable passenger, applying the decision of the US Court of Appeals for the First Circuit in *Moore v British Airways* (29 April 2022). She held that the ordinary, reasonable passenger "*must be regarded as a person with experience of commercial air travel and with reasonable knowledge of established or common airline practice*" (para.28).

This case was an appeal, and thereby a review of the first instance decision rather than a rehearing. The High Court was not determining on evidence at first instance whether a slip caused by water and de-icing fluid walked into an aircraft in icy conditions amounted to an accident, nor was there any specific consideration of the facts and whether a minimum level of liquid on the floor would be necessary to pass the threshold.

However, the reasoning of the court of first instance received important validation as to the correctness of its reasoning. Given the potential inconsistency between this decision and that of Obi J (as she now is). in *Labbadia v Alitalia* [2019] EWHC 2103, the stage is set for a very interesting (re)analysis of what might be thought to be the simple concept of an 'accident' in the near future.

Samuel McNeil

samuelmcneil@3harecourt.com



Case comment on Bravo & Ors v Amerisur Resources Ltd (Re The Amerisur plc Putumayo Group Litigation)

Introduction

On 26 January 2023, judgment was handed down in Bravo & Ors v Amerisur Resources Ltd (Re The Amerisur plc Putumayo Group Litigation) [2023] EWHC 122 (KB). The High Court was required to determine two preliminary issues: first, the applicable statute of limitation under Colombian law governing whether the claims were time-barred; and, second, whether a parent company had no liability under Colombian law for the acts or omissions of a subsidiary. This article predominately focuses on the issue of limitation. In Steyn J's determination on the issue of limitation, she provided helpful guidance on the application of Article 15(h) of the Rome II Regulation.

Background to the litigation

The two preliminary issues identified above form part of broader proceedings brought by a group of campenisos (farmers) (the "Claimants") in Colombia's rural communities near the Ecuadorian border. Amerisur Resources Limited (formally called Amerisur Resources Plc) (the "Defendant"), a UK company owned by a large oil and gas company called GeoPark Limited, is engaged in the exploration, development and production of oil and natural gas in Colombia.

The original claim form issued on 30 December 2019 named 15 claimants. Permission was subsequently granted to join intended claimants, and a group litigation order ("GLO") was made by Steyn J on 29 June 2020. There are now 171 claimants who have served Schedules of Information as part of the litigation. Meanwhile, the Defendant is subject to a final order freezing its assets in England and Wales in the sum of £4,465,000.

The "GLO Issues" included issues in respect of the "release/escape of contaminants from oil drilling sites" and of the "11 June 2015 tanker spill incident". The Claimants allege that the Defendant was responsible for environmental pollution caused by such oil spills in the Putumayo region on 11 June 2015.

The spill occurred during an attack by the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia) on tanker trucks containing the Defendant's crude oil. Consequently, the oil spread into the streams and wetlands of the Putumayo region. This region forms part of the Amazon rainforest. There is strict liability under Colombian law for harm arising from dangerous activities. The Claimants argue that the attack was foreseeable and preventable and that the Defendant is liable notwithstanding the involvement of the armed group.

The Claimants' two causes of action are pleaded as (i) guardianship of a dangerous activity and (ii) negligence. Both parties accept that the oil spillage was the result of deliberate terrorist activity. It is also common ground that, pursuant to Articles 4 and 7 of Rome II (as part of retained EU law), Colombian law applies on the law applicable to non-contractual obligations. The Claimants therefore seek damages pursuant to Articles 2341 and 2356 of the Colombian Civil Code, and in reliance on Decree 321/1999.

Limitation issue

The first preliminary issue was whether the two-year limitation period (caducidad) provided by Article 47 of Law 472 of 1998, which applies to Colombian group actions, also applied to the claims. If so, the claims would have been time-barred after 11 June 2017. The Claimants contended that the applicable limitation period (prescripción) was the ten-year period prescribed by Article 2356 of the Civil Code.

The Claimants relied on three arguments. Firstly, they argued that Article 47 of Law 472 was a procedural provision within Article 1(3) of Rome II and therefore fell outside the scope of Rome II ("the Rome II argument"). Secondly, they argued that their action was not properly characterised as a group action under Law 472 ("the characterisation argument"). Thirdly, they argued that, even if the court found against them on the first two points, the application of the time limit in Article 47 of Law 472 would be inconsistent with English public policy so the court should refuse to apply it pursuant to Article 26 of Rome II ("the public policy argument").

The Rome II argument

On the question of whether the English proceedings are a Colombian group action or a Colombian ordinary action, the Claimants suggested, at [84], that was "like asking whether a cat is a Jack Russell or a Chihuahua". They argued this binary question is based on a false premise that it must be one or the other, when it is in fact neither: it is an English action. If Article 47 of Law 472 is excluded from Rome II, then the Claimants argued it logically follows that the claim was issued in time because the ten-year limitation period under Article 2356 of the Civil Code attaches to the cause of action rather than to any procedure. By contrast, the Defendant submitted, at [85], that Article 47 of Law 472 was a limitation provision forming part of the applicable Colombian law in accordance with Article 15(h) of Rome II and that the English action was more like a Colombian group action than an ordinary action.

On the Rome II argument, Steyn J held, at [107], that the provisions of Article 15 of Rome II should be construed widely. Article 15(h) has the effect that the applicable law (Colombian law) governs the manner in which an obligation may be extinguished, rules of prescription and rules of limitation (including rules relating to the

commencement, interruption and suspension of a period of prescription or limitation). Steyn J accepted the Defendant's submissions that Article 47 of Law 472 falls squarely within the concept of a rule of limitation within Article 15(h) of Rome II. However, she found that it is of no consequence whether the limitation period in Article 47 is regarded as a matter of procedure or substance; it is a Colombian rule of limitation. Article 2356 of the Civil Code is also a Colombian rule of prescription or limitation (a point not in dispute).

The characterisation argument

The key issue as to characterisation was whether, applying Colombian law, the Claimants' actions falls to be treated as group action to which Article 47 of Law 472 applies. Steyn J asked three separate questions to test if the requirements for a group action had been met.

The first question stated: is the common cause requirement met? On this requirement, Steyn J found, at [123], that it had been met. All the Claimants (and former claimants) were farmers from Putumayo who said they had suffered both economic and non-economic damage caused by environmental contamination and pollution. She preferred the view of the Defendant's Colombian law expert on this requirement, and it was clear the Claimants chose to bring the claims together and sought a GLO on the basis that the claims raised common or related issues of fact or law.

The second question stated: is the group size requirement met? As to that requirement, Steyn J found, at [131], that it was undoubtedly met. The number of Claimants far exceeded the requirement that should be at least 20 people in the group.

The third question stated: should this action be treated as a Colombian group action? On this question, Steyn J placed emphasis on the principles cited by the Claimants' Colombian law expert. She noted, at [133], important differences between this action and a Colombian group action, in particular the "the opt-out nature of the latter compared to the opt-in nature of this claim". The starting point is that the Claimants neither chose to bring a Colombian group action nor did they invoke Law 472. Instead, they sought to use the procedures available under the English Civil Procedural Rules to bring a group claim, identifying "GLO issues" and anticipating the lead claims.

It followed that, contrary to the view of the Defendant's Colombian law expert, this is not a case in which the court must respect the Claimants' choice to pursue group action. More than one procedural avenue would have been open to the Claimants in Colombia and they have not expressly (or implicitly) chosen a Colombian procedural route. It was therefore for the court to determine the procedure in recognition that the Claimants would not have been precluded from bringing either type of action on grounds of unsuitability. Steyn J applied the pro homine principle which provides that the court should focus on the application of the law most favourable to the individuals. She observed, at [136], that by treating the Claimants as if they had erroneously chosen a procedure that is fatal to their claims (i.e. choosing a time-barred action) rather than the one that is not, it would not be reasonable or consistent with the pro homine principle. As a consequence, Steyn J held that that the action does not fall to be treated as if it had been brought as a Colombian group action, and accordingly is not time-barred.

The public policy argument

On the public policy argument, Steyn J found, at [142], that, if Article 47 of Law 472 had applied, (which it did not) there could be no objection in principle that a two-year limitation is contrary to public policy.

Parent company issue

The second preliminary issue concerned whether a parent company had no liability under Colombian law for the acts or omissions of a subsidiary, as the Defendant alleged. The Claimants' pleaded case was that the Defendant's principal office was based in Colombia and the majority of its staff were based there, including most of the senior management. Further, the Claimants argued that the Defendant directly managed and controlled AE Colombia's (the Defendant's subsidiary) activities in relation to environmental issues and was a guardian or co-guardian of the dangerous activities.

Steyn J held, at [153], while paragraphs 56 to 61 of Defendant's Amended Defence correctly state Colombian law, she had no hesitation in preferring the evidence of the Claimants' Colombian law expert. On this finding, the principles of Colombian law did not preclude the possibility of liability on the part of the parent company for the activities of its subsidiary.

Conclusion

Steyn J's determination of the preliminary issues has not been subject to appeal. It therefore represents guidance on the application of Article 15(h) of Rome II. Steyn J's conclusion that Article 15 "should be construed widely" appears to stand in conflict with Floyd LJ's dicta, at [139], in Actavis UK Ltd & Ors v Eli Lilly and Co [2015] EWCA Civ 555: "I do not accept that Article 15 should be given a wider effect than its language suggests, treating the listed matters as no more than examples of a class of analogous matters regarded as procedural in private international law, but now to be brought within the designated law". Nevertheless, Steyn J couched her reasoning in careful language. She held, at [106], that a "broad approach to interpretation of Article 15", albeit not one which treats the listed matters as mere examples "within wide-ranging classes of faintly analogous matters", is compatible with the approach in Actavis. The case will now progress to a trial of the substantive issues.

Anna Lancy
With assistance from Nicholas Leah


annalancy@3harecourt.com
nicholasleah@3harecourt.com

NOTHING OF INTEREST?

Attentive readers will no doubt recall the writer's earlier attempt to delve into the thrilling world of interest in foreign claims a couple of bulletins ago. After the quite the wild ride through the substantive versus procedural battle up to 2020, the conclusion was that interest was increasingly becoming the battleground between victims and foreign insurers fed up being asked to pay damages (let alone costs) at odds with what they would pay in their home courts and now being hit with demands for interest rates producing awards sometimes in excess of the actual damages.

One can understand insurers' frustration. Interest rates are very 'personal' to their own system of law, in a way that heads of damage may not be. Almost every jurisdiction will compensate medical expenses, for example (whether there is an NHS or not). But interest rates grounded in economic conditions may be very different. And whilst forums such as England and Wales try to encourage settlement via the costs incentives of the Part 36 regime, for example, others such as Spain put the pressure on insurers via penalty interest provisions. Is the application of a penalty rate – expressly designed to further domestic interests in limiting litigation and encouraging early settlement against a background of the rigid Spanish Baremo tables, truly appropriate for a different forum? For insurers still suffering PTSD from the pre-Rome II years, the shift towards the awarding of swingeing rates of interest on claims they defend with good reason has seemed like a return to the bad old days.

Since the earlier article, the battle lines have shifted again. The main decisions over the last couple of years, two High Court, one County Court, have focussed on Spanish penalty rates, although there are other systems of law which take similar approaches.

Under Spanish law, courts are able to award interest on damages at a penalty rate, the aim being to encourage insurers to make sensible payments in settlement at an early stage. Article 20 of the Spanish 50/1980 Insurance Contract Act

states that the insurer is to pay compensation to the claimant within three months from the date of the accident, failing which interest will start to accrue. For the first two years after interest starts running, interest accrues at the current legal interest rate plus 50% (currently 4.5%). After two years interest starts to accrue at a rate of 20% per annum (unless the delay in payment is justified).

First off was an appeal from the County Court in *Troke & Anor v Amgen Seguros Generales Compania De Seguros Y Reaseguros SAU* [2020] EWHC 2976 (QB). Griffiths J concluded that the award of interest was a procedural matter rather than a substantive right or entitlement arising by virtue of Spanish law being the applicable law. Interest was therefore to be awarded pursuant to s.69 of the County Courts Act 1984. He upheld the decision of the recorder below that the English rate was appropriate. The Spanish rate could have been allowed under the court's discretion but the recorder had not been asked to consider that. In any case, the award of penalty interest was discretionary rather than mandatory.

Two further cases followed last year, in both of which the procedural nature of the award of interest was accepted by the court.

In *Woodward v Mapfre* (HHJ Walden-Smith, unreported, 14 October 2022) the claimant argued and the court rejected the submission that the right to penalty interest was one that 'went with territory' where Spanish law is the governing law. She placed reliance on the fact that it is not automatic, even in proceedings in Spain. There the good news ended for the insurer. In the exercise of her discretion under section 69 of the County Courts Act 1984, it was her judgment that as the defendant had not taken steps to resolve the case or make an interim payment the interest to be applied should be in accordance with the Spanish penalty interest.

Shortly afterwards Lambert J had cause to consider the same arguments in *Sedgwick v Mapfre* [2022] EWHC 2704 (KB). She formed the same view - penalty interest is not a substantive right, it is "a procedural sanction to give teeth to a procedural regime aimed at early disposal of cases". She continued, "The substantive right to an award of interest to compensate the victim for being kept out of his or her award and the loss of use of the money is therefore consistent with this objective. But the imposition of an award of penalty interest by definition is not intended to achieve restitutio in integrum for the claimant but to penalise the defendant for having failed to comply with the requirement of making a conservative payment within three months of the claim." Accordingly it was a matter for the law of the forum under s35A of the Senior Courts Act 1981. In exercising her discretion, she placed great weight on her determination that, if the claim had proceeded in Spain, the insurer would have paid penalty interest. Accordingly her conclusion was to "exercise [her] discretionary power under s. 35A Senior Courts Act 1981 to award interest on general and special damages in accordance with the penalty rate which would have been applied had this litigation been issued and pursued in Spain."

The insurer has sought permission to appeal, although there is as yet no word whether this has been allowed. It should be. This is an area ripe for proper appellate analysis. How should first instance imperatives of attempting to ensure the same outcome on interest as would (or might) have occurred in a foreign court be reconciled with previous Court of Appeal dicta that it is not the task of the English court assessing damages under a foreign law to try and reach the same decision the hypothetical foreign court would have reached (per Longmore LJ at para 15 of Wall v Mutuelle de Poitiers [2014] EWCA Civ 138)?

And, unless the line of emphasis on Part 36 offers in Sedgwick was a red herring, is there a conflict to the point of injustice between the procedural

sanctions a court may impose in an English claim under Part 36 and the sanctions to which the insurer is subject under Spanish law? Since one of the key factors of the penalty interest regime is an insurer making payments, how does that sit with the trial Judge being asked to determine interest before he or she is entitled to know of attempts at resolution?

Since a decision on permission to appeal should be forthcoming within the next few weeks, the remainder of this article will simply highlight the arguments that may otherwise be in play in different claims.

If the award of penalty interest is discretionary under s.35A, surely the outcome is somewhere *between* the English rate and 20%. It is not 'either/or'. By accepting that it is a matter of discretion, one surely steps away from the imposition of the penalty rate as the default rate. Discretion can, and surely should, factor in not merely what might have happened in Spain in the hypothetical alternative. If it is not mandatory (and it is not), the court's discretion ought not to be fettered by considering itself tied to rates imposed by a different regime.

In the writer's view, once one departs from the application of the penalty provisions as a matter of Spanish law, and the rate of 20% is in play as an exercise of the English court's discretion, there is no longer any reason to stick to the hard line approach some Spanish courts adopt, where the merits of the defence are broadly irrelevant. Surely, once the question of the rate is being approached under s.35A, all or any of the following could be of relevance:

- Any delay in notifying, issuing, or litigating the case. Spanish practices may well lead to faster litigation – limitation is generally shorter, prediction of damages is easier because of the baremo tables, the process is not as adversarial and generally quicker and less combative. If a claim takes longer to come on to trial because the Claimant has opted for the English forum, an insurer may be able to use this to its advantage.
- Whether liability was reasonably in dispute (contributory negligence probably less relevant since that only reduces rather than avoids);
- When the Defendant could realistically take a view on the Claimant's case. In some cases it may be quickly evident what sort of bracket of damages will apply (particularly if the Spanish baremo tariffs apply). A Claimant with paraplegia may sensibly be able to contend that he was always going to be awarded more than a policy limit. But in other, indeed in most, cases it may be some considerable time before a properly-advised Claimant actually puts his cards on the table, discloses some evidence, and permits the Defendant to see what it is facing. Whether or not this might amount to a valid reason (whether under article 20(8) or just as part of the discretion matrix) could depend on how late the information was provided, the validity and substance of any challenge, and numerous other factors a Spanish court might ignore.
- Possibly – the effect of any policy limit on the proper payment of a Claimant's claim. Spanish insurers will generally accept that penalty interest is awarded on top of any policy limit, rather than being subject to that cap. In some circumstances, it may be of relevance that a Claimant will only receive something closer to full restitution if the full penalty interest rate is awarded.
- Given the tension between the importance under the Spanish Insurance Code of the making of timely payments/offers, and the prevention of that information being shared with the trial Judge before judgment, there may be valid reason to contend that the decision on the rate is so tied up with

settlement offers that it can only sensibly be dealt with at the same time as costs, rather than in the judgment.

Anecdotally, at least, few cases are settling at the moment with Spanish insurers accepting liability for anything close to a full penalty interest calculation. Ultimately the timing and amount of settlement is up to the parties – an adult Claimant of full capacity is obviously entitled to take a settlement sum which does not allow for penalty interest in favour of finality. The writer anticipates that, for claims issued under the new QOCS regime, claimants' appetite for litigating the issue may be reduced if the costs of an unsuccessful pursuit of penalty interest can be set off. All eyes, for now, on the Court of Appeal. Interesting times indeed.

Katherine Deal KC

KatherineDealKC@3harecourt.com

3 HARE COURT

Temple
London EC4Y 7BJ

Telephone: +44 (0)20 7415 7800
Email: clerks@3harecourt.com
DX: 212: London – Chancery Lane
@3HareCourt

www.3harecourt.com