QB-2018-005408

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2021] EWHC 178 (QB)

5 February 2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

MASTER DAVISON

- -

Between :

PAUL JAMIESON	**Claimant**
- and -	
(1) WURTTEMBURGISCHE VERSICHERUNG AG **(2) BANK OF AMERICA MERRILL LYNCH**	**Defendants**

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Mr Harry Steinberg QC (instructed by **Stewarts Law LLP**) for the **Claimant**
Ms Sarah Crowther QC (instructed by **DWF LLP**) for the **First Defendant**
Mr Richard Viney (instructed by **Clyde & Co LLP**) for the **Second Defendant**

Hearing date (via Microsoft Teams): 1 February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Introduction

1. What follow are my reasons for refusing to lift the stay of these proceedings which was imposed by a consent order of 28 September 2018. When I announced at the conclusion of the hearing that I would give judgment in writing, I said that my reasons would be brief. As to that, I have the excellent example of the judgments of the German courts referred to below, whose economy of language and expression I can only try to emulate. Consistently with that intention, I will avoid extensive citation of authority and I will recite only the key statutory provisions, which are contained in Regulation No 1215/2012 on jurisdiction and the recognition of judgments in civil and commercial matters (the "Recast Regulation").

2. On 17 September 2016 the claimant, then aged 44, was injured in a road traffic accident in Munich. He was working as a commodities broker for the second defendant. He was attending the Oktoberfest with clients, whom he was entertaining. He was walking from the beer hall to his hotel. He crossed a busy highway and was struck by a taxi, sustaining very severe injuries. The precise circumstances of the collision are in dispute. The taxi was insured by the first defendant, against whom the claimant has a direct right of action.

3. The claimant instructed Stewarts solicitors to represent him. They entered into pre-action correspondence with Van Ameyde UK Ltd, who were the first defendant's UK representatives. That correspondence began in April 2017 and in their first letter Stewarts asked Van Ameyde to confirm that they would not issue proceedings in another jurisdiction. They received only a holding response and their request for confirmation as to the first defendant's position in respect of other proceedings was not answered. The pre-action protocol correspondence continued throughout the remainder of that year and into 2018. On 8 March 2018 and more clearly on 30 April 2018, Van Ameyde disclosed to Stewarts that the first defendant had issued proceedings in Germany for a negative declaration, i.e. a declaration that they were not liable for the accident. Those proceedings had been issued on 18 July 2017. Stewarts then issued protectively in England on 10 May 2018.

4. For the first defendant to have issued in Germany (having been asked to confirm that they would not do that very thing and having studiously avoided answering a straight question about it) was somewhat lacking in transparency. It was also, I infer, intended to advantage the first defendant and disadvantage the claimant by removing from him the opportunity to litigate his claim in England, where he lives. That was (as the first defendant must be taken to have known) contrary to the structure and intention of the Recast Regulation which conferred on the claimant the option to pursue his claim either here or in Germany. The effect of the first defendant's action was to deprive the claimant of this option because it then became incumbent on the English court to stay the English proceedings in favour of the German ones; see Article 29(1) of the Recast Regulation below. That was not done and on 19 June 2018, the first defendant applied to challenge the jurisdiction of the English court. On 12 September 2018, the second defendant (having been served with the claim on 30 August 2018) followed suit. On 28 September 2018, the parties agreed a consent order in these terms:

> "The claimant's claim against the defendants be stayed until the resolution of the proceedings currently before the Munich Regional Court … involving the claimant and the first defendant, or any stay of those Munich proceedings in favour of these proceedings."

5. The claimant instructed German lawyers, Wach und Meckes, to represent him in the German proceedings and they filed a response challenging jurisdiction. On 8 May 2020 the Munich Regional Court ruled that the German proceedings should be suspended in favour of the proceedings in the English High Court. The reason was that it had not been until 13 June 2018 that the first defendant (the claimant in those proceedings) had supplied the court with the claimant's correct address for service. It was on that date that the Regional Court found that it was "deemed seised". That order was, however, set aside by the Munich Higher Regional Court on 14 December 2020. The Reasons supplied stated that the appeal was "justified". However, the Higher Regional Court went on to find that the claim for a negative declaration was inadmissible because it undermined the right of an injured party under

Articles 11(1)(b) and 13(2) to bring his claim in his country of domicile – which right was intended to ensure a regime more favourable to the "weaker party" in accordance with Recital 18 to the Recast Regulation. They found that Article 29 was subordinate to this principle and invited the first defendant to withdraw the claim. The first defendant came in for some sharp criticism. Its negative declaratory action was labelled a "torpedo action". And Article 29 was said to require limits to be imposed on it "where, as here, it only serves the abusive conduct of the economically stronger liability insurer to delay a proper settlement". In so finding, the Higher Regional Court was aligning itself with what I might call the "consumer" side of a debate that German courts have (I was told) not always ruled upon consistently. The first defendant regards this as a point upon which a decision of the Bundesgerichtshof, (Germany's highest civil court), and/or of the Court of Justice of the European Union, via a reference, is required. It is a point going to jurisdiction not seisin and it is one that, as Mr Steinberg QC for the claimant rightly observed, might take several years to resolve.

6. In an order dated 25 January 2021, the Regional Court has concurred with the legal opinion of the Higher Regional Court and has given the first defendant an opportunity to clarify whether it intends to withdraw. For the reasons expressed at the conclusion of this judgment, it is to be hoped that the first defendant will do so. But I have to resolve the present applications on the basis that they will not.

7. The issue of forum (i.e. where his claim is to be litigated) is of very real practical significance to the claimant. To characterise him as the "weaker party" in the dispute would be no more than the literal truth. He would be greatly disadvantaged by having to litigate in Germany. He suffered a range of serious physical injuries including a neurological injury which has impaired his cognitive and psychiatric functioning. For him to have to continue to instruct German lawyers and to come to Germany for a trial would be hugely more difficult for him than to litigate in England. There is also the problem of funding. He has exhausted or almost exhausted his legal expenses insurance. In this country, that shortfall is simply and easily addressed by the availability of conditional fee agreements. But there are no equivalent arrangements available in Germany. Given the claimant's situation, which invites sympathy, the reasoning of the Higher Regional Court is powerful and attractive.

The Recast Regulation

8. Articles 29 and 32 are the key provisions and are in these terms:

> "Article 29
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> 1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
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> 2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.
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> 3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.
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> Article 32
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> 1. For the purposes of this Section, a court shall be deemed to be seised:
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> (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;"

The applications

9. By application notice dated 30 October 2020 the claimant applied to lift the stay. The claimant's primary position is that the stay was lifted automatically by the order (albeit set aside) of the Regional Court dated 8 May 2020. But if that was wrong, the claimant invited me so to direct. In the event that I did, the claimant said that the defendants' jurisdictional challenges fell away.

10. By a separate application notice dated 5 January 2021, the first defendant sought to introduce the expert evidence of Professor Dannemann.

Discussion and analysis

11. The position that Mr Steinberg QC took was that the Regional Court's decision that the date of seisin was 13 June 2018 was still operative and in force. Given that this date fell after the date that the English proceedings had been commenced, it was therefore the English court that was first seised. Mr Steinberg QC submitted that the decision of the Higher Regional Court setting aside this ruling did not disturb its underlying reasoning and conclusion. This was because the basis for setting aside was that there was a prior reason to decline jurisdiction altogether, which was that the action was a "torpedo action". This prior reason rendered a decision on seisin redundant and the order setting aside the Regional Court's order was therefore a formality which did not revoke or quash its finding as to seisin.

12. There is some support for Mr Steinberg QC's position in the words at the end of the Higher Regional Court's judgment, where it said "even if the English action was brought later (and therefore *it is not necessary for this Court to clarify which Court was seised first*) the German action that was brought earlier must become inadmissible". These words suggest that the court left the question of seisin undecided because it was not necessary to address it. On the other hand, the order of the Regional Court was definitely set aside and Ms Crowther QC was correct to point out that if the Higher Regional Court had not intended by that to overturn the finding of second seisin there would have been no warrant or basis to consider the issue of jurisdiction at all. The reasoning that there was no jurisdiction only arose on the footing that it was the German court that was first seised.

13. The effect of the orders of the Regional Court and the Higher Regional Court, whether approached as a matter of language or inference, is, in my view, ambiguous and unclear. In those circumstances, Article 29(2) provides a mechanism for ascertaining which court was first seised. This mechanism is for the High Court to make a request to the German court that it inform this court when it was seised. I am willing to do that if the parties, or any of them, so request. Indeed, I would be minded to do that of my own motion. What I am not willing to do is to decide that question myself. Although there are cases where an English court has done so, those cases were on very different facts and were not Article 29 cases. If I were to decide the question of seisin I would be bypassing the statutory mechanism in Article 29(2), which was introduced into the Recast Regulation in order to provide clarity and uniformity of approach. It seems to me that I am mandated to follow that mechanism. But even if I had a completely free hand I would hesitate before embarking on the resolution of an issue which is currently before a German court and which that court is better placed to decide. For me to rule upon it would, or would risk seeming to, be an interference and an infringement of the principle of comity. That is especially the case where the parties, by their consent order of 28 September 2018, have themselves referred the issues of first seisin and jurisdiction to the decision of the German court.

14. Mr Steinberg QC had a fallback position, which was that I should adopt the reasoning of the Regional Higher Court, find that the negative declaratory action was an abuse and give effect to that finding by lifting the stay and dismissing the defendants' challenges to jurisdiction. I have already said that I find the reasoning of that court powerful and attractive. But there are insuperable obstacles to the course that Mr Steinberg QC has proposed. I accept that the references to "abusive conduct" and (at the end of the judgment) to "the exception of the priority principle of Article 29 of the Recast Brussels Regulation on the grounds of abuse of rights" may amount to a finding by the Higher Regional Court that the first defendant was guilty of an abuse of EU law (defined by Lord Briggs in *Lungowe v Vedanta Resources Plc* [2019] UKSC 20 as the "collusive invocation of one EU principle so as improperly to subvert

another"). But, as with the issue of seisin, this is a matter which the German courts are considering. It would be contrary to the principle of comity, to which I have already referred, for the English High Court to assume jurisdiction on the basis of an abuse of EU law in a German action when the existence and consequences of that abuse are in the process of being worked out by the German courts. Further, the CJEU in *Turner v Grovit* Case C-159/02 [2005] 1 AC 101, has (in the context of an anti-suit injunction) expressly disapproved of such a course:

> "The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of *lis alibi pendens* and of related actions. Secondly, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one contracting state, a decision might nevertheless be given by a court of another contracting state. Similarly, the possibility cannot be excluded that the courts of two contracting states that allowed such measures might issue contradictory injunctions."

Those considerations would apply with equal force to Mr Steinberg QC's proposal, which would amount to the English High Court purporting to remove a claim from the jurisdiction of the German courts on the basis of abuse of EU law before those courts.

15. For these reasons I must refuse the claimant's application.

16. I do so with reluctance because I have sympathy with the claimant's dilemma. To adopt Mr Steinberg QC's terminology, his claim has become bogged down in a procedural quagmire in Germany which (if the German courts have indeed found that they were first seised) may not be resolved for years. It is no answer to that dilemma to say that he could simply abandon his opposition to the negative declaratory claim being heard in Germany because that is precisely the stance which the Recast Regulation was intended to enable him to take.

17. Looked at from the point of view of the first defendant, they would not be significantly disadvantaged by having to litigate in England. They could apply for liability to be tried as a preliminary issue, in which case that issue could be resolved here expeditiously. Wherever it is tried, it will be German law that applies. The stance presently taken by the first defendant seems unreasonable and unfair and has been achieved by conduct which I have already described as lacking in transparency.

Conclusion

18. The application to lift the stay is refused. The cross-applications by the defendants therefore do not arise for consideration.

19. The expert evidence from Professor Dannemann played no decisive part in the substantive application and was not reasonably required to resolve it. Though it makes no difference to the outcome, I refuse permission to rely upon it.

20. I invite counsel to agree an order reflecting the above.

Postscript

21. Following promulgation to the parties of a draft of this judgment, the claimant requested me to make a request under Art 29(2) to the Munich Regional Court to inform this court, without delay, of the date when it was seised or deemed seised of the claim. This I will now do.