



Neutral Citation Number: [2021] EWHC 2437 (QB)

Claim No QB-2020-004244

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Date: 31<sup>st</sup> August 2021

Before :

**His Honour Judge Graham Wood QC, sitting as a Judge of the High Court**

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Between :

**(1) PETER FLOWERS**

**Claimants**

**(2) EMMA FLOWERS**

**(3) SOPHIA DAVIES (a child by her mother and  
litigation friend Emma Davies)**

**(4) HARRISON DAVIES (a child by his mother  
and litigation friend Emma Davies)**

**(5) ASHLEY DAVIES**

**(6) AMELIE DAVIES (a child by her father and  
litigation friend Ashley Davies)**

**(7) MATTHEW FLOWERS**

- and -

**(1) CENTRO MEDICO SALUS BALEARES  
SL (t/a Hospital Clinica Benidorm)**

**Defendants**

**(2) BERKLEY ESPAÑA SUCURSAL EN  
ESPAÑA**

**Ms Katherine Deal QC** (instructed by Irwin Mitchell Solicitors) for the Claimants

**Ms Sandra Healy** (instructed by Browne Jacobsen Solicitors) for the Defendants

Hearing dates: August 24<sup>th</sup> and 25<sup>th</sup> 2021

.....

**Approved Judgment**

## **His Honour Judge Wood QC**

### **Introduction and Background**

1. In early February 2020, Mrs Yvonne Flowers, then 67 years of age, was admitted on an emergency basis to a private hospital facility in Benidorm, Spain, with significant back discomfort and pain arising from spinal disc herniation. Nine days later she died in the same hospital from multiple organ failure having contracted sepsis. The present claim arises out of that death, and is brought by her husband, as First Claimant, and various children, grandchildren and a stepson as Second to Seventh Claimants as close family members. The claim alleges that the First Defendant, Centro Medico Salus Baleares SL (Centro Medico or D1) which traded as the Hospital Clinica Benidorm, was at fault for the death of the late Mrs Flowers and damages are sought in accordance with Spanish law in the English courts. The Second Defendant (Berkley España or D2) is the public liability insurer of Centro Medico in relation to whom a direct right of action is claimed.<sup>1</sup>

2. Because the claim was issued before the end of December 2020, and therefore within the implementation period of legislation put in place to secure the departure of the United Kingdom from the EU and the many regulations applicable to membership, the Claimants have sought to avail themselves (as they are entitled to) of certain EU rights enshrined in the appropriate regulations, particularly the regulation referable to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels Regulation No 1215/2012, known as Brussels 1 recast or the jurisdiction/judgments regulation<sup>2</sup>, which provides certain gateways of accessibility to the jurisdiction of choice for citizens of member states, notwithstanding that the accident or event or cause of action occurred or arose on “foreign” soil.

3. Both Defendants have challenged the jurisdiction of the English court to hear this claim and the entitlement of the Claimants to use those gateways pursuant to CPR 11, and it is this challenge with which the court is concerned.

4. The brief summary above provides a simple overview of the substance of this case. However, this matter is anything but simple, with the challenge being multifaceted, and numerous issues arising, at least one of which is seemingly without judicial precedent, and all of which require resolution by the court.

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<sup>1</sup> The interests of both defendants coincide, and they are represented by the same counsel. I shall refer to the Defendants for the most part collectively, although where any issue concerns either, individually as D1 or D2,

<sup>2</sup> I will refer to this as the “Brussels Regulation Recast” throughout.

5. I propose to set out the balance of this judgment, for ease of reference, in the following sections: In the first section, I will deal with preliminary matters, including the threshold which must be crossed on a jurisdiction application, the European legislation which provides the gateways, a summary of the issues and the respective positions of the parties. In the second section I will address the issue of domicile. In the third section, I will address the consumer contract gateway, in the fourth section the insurance gateway, in the fifth section the parasitic claim and in the final section I will provide a summary of my overall determination. Clearly within each section, as will become apparent, there are various sub-questions which need to be resolved in accordance with the issues as they have been identified.

## SECTION 1

### PRELIMINARY MATTERS

#### *EVIDENTIAL THRESHOLD FOR A JURISDICTIONAL CHALLENGE*

6. There is no disagreement between counsel as to how the issues are to be approached, but it seems to me useful and informative to summarise the legal position which has been made clear in recent authorities in respect of the burden and threshold of proof on a jurisdictional challenge. In relation to the burden of proof this will always be on the party seeking to establish the jurisdictional basis, ie the Claimants. In respect of the standard, this is now universally applied following principles derived from those authorities.

7. In **Brownlie v Four Seasons Holdings International [2017] UKSC 80** the Supreme Court provided guidance in these terms, after reflecting on earlier case law in which the good arguable case test had evolved, based upon an assessment as to which party had “the much better argument on the available material” and to clarify confusion over the standard of proof:<sup>3</sup>

“The reference to “a much better argument on the material available” is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovic*. What is meant is (i) that the Claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word “much”, which suggests a superior standard of conviction that is both uncertain and unwarranted in this context.”

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<sup>3</sup> Lord Sumption at paragraph 7

8. In **Alta Trading Limited v Bosworth [2020] EWHC 2757(Comm)**<sup>4</sup> Sir Michael Burton interpreted the test, giving a practical example of its application at paragraph 13:

“13. My interpretation of the state of the law and the three limb test is straightforwardly as follows:

(i) In limb (i) the Court must decide if it can who has the better of the case. If it decides that the Claimant has the better of the case, he will have a good arguable case or a plausible evidential basis. If the defendant has the better of the case then the Claimant fails.

(ii) Limbs (ii) and (iii). The judge may have to struggle because at the jurisdiction stage the evidence may be wholly uncertain and insufficient and, in particular, because there has been no testing of that evidence by cross-examination or otherwise, and usually no adequate disclosure of documents by either side. He or she may not be able to reach even a provisional conclusion as to which party has the better case, and even if the judge tried to do so he or she may well turn out to be wrong. In such a circumstance where the judge cannot decide, after conscientiously doing his or her best, who has the better of the case, then it is sufficient if the Claimant has a plausible evidential basis and that will suffice for a good arguable case.”

9. It seems to me that this is a very helpful interpretation, because it allows for those situations where it is not possible to determine who has the “better case” on limited disclosure, and is particularly apposite here, where it might be said that the material is somewhat limited.

10. The test was endorsed in **ING Bank NV v Banco Santander [2020] EWHC 3561 (Comm)** SA by Cockerill J, with a useful additional gloss:

“64. In summary:

i) The onus is on ING to establish that they have a "good arguable case" that the English court has jurisdiction.

ii) The burden is on them to show that it has the "better argument on the material available" (making due allowance for the limitations of the material available at an early stage of the case).

iii) The standard is, for the purposes of the evidential analysis, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either).

iv) The test is context specific and flexible and, if there is an issue of fact, the **court must use judicial common sense and pragmatism**,<sup>5</sup> not least because the exercise is to be conducted with due despatch.”

### ***THE JURISDICTIONAL GATEWAYS UNDER EUROPEAN LAW***

11. I set out at this stage the relevant sections of the Brussels Regulation Recast, including not only the text of the Articles on which reliance is placed, but also the preambles which assist with the purposive interpretation of those Articles.

12. In the preamble there are statements of general principle as follows:

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<sup>4</sup> Upheld on appeal by the CA [2021] EWCA Civ 687

<sup>5</sup> My emphasis

“(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.....”

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.”

13. Thus paragraph 15 provides some key principles which have informed the argument in the current case, namely the high predictability of the EU regime, the starting point or default position of a defendant’s domicile determining jurisdiction, and the autonomous determination of domicile according to the jurisdiction of each member state to avoid a jurisdictional conflict. Paragraph 16 provides the first alternative ground, which whilst not applicable here, assists with a progressive understanding of the exceptions:

“(16) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen.....”

14. The purpose of the employment, insurance and consumer contract exception is explained in preamble paragraph 18:

“(18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.”

15. Turning to the Articles themselves, Chapter II contains the jurisdiction provisions, and section 3 deals with “*matters relating to insurance*”, a particular term, which, as will be seen, has proved controversial in both national and EU jurisprudence.

“Article 10

In matters relating to insurance, jurisdiction shall be determined by this Section,.....”

Article 11

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the Claimant is domiciled; or

(c) .....

16. Article 11 must be read in conjunction with Article 13 which provides a jurisdictional route in relation to claims against both the insurer and the insured in a liability context.

Article 13

- 1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
- 2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
- 3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

17. Article 15 provides the circumstances in which Articles 9 to 13 may be departed from:

Article 15

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after<sup>6</sup> the dispute has arisen;
- (2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;
- (3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State; L 351/8 Official Journal of the European Union 20.12.2012 EN
- (4) .....
- (5) .....

18. Article 15 should also be considered in conjunction with Article 25 which deals with the prorogation of jurisdiction. The relevant provisions of that Article are:

Article 25

- 1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.....
- 2.....
- 3. ....

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<sup>6</sup> My emphasis

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15,<sup>7</sup> 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24

19. **Section 4** deals with jurisdiction over consumer contracts and it is Articles 17 and 18 which are in part relevant to the jurisdictional arguments in this case.

#### Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a).....;

(b).....; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

#### Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2.....

3.....

### ***ISSUES TO DETERMINE***

20. In the course of submissions with counsel, (Ms Katherine Deal QC appearing on behalf of the Claimants, and Ms Sandra Healy for the Defendants), I queried whether or not there was an agreed list of issues, or questions for me to determine. In her skeleton argument Ms Healy had indicated that there was<sup>8</sup>. Ms Deal QC indicated that the issues were evolving and may be clearer at the conclusion of submissions. Whilst the suggestion was made that I would provide my own brief summary for consideration by counsel when I had had an opportunity to read more into the case, it seemed to me on reflection that the letter of 26<sup>th</sup> March 2021<sup>9</sup> with some slight modification provides a reasonable assessment of that which is in dispute, and a further reference to counsel was unnecessary. As will become apparent in the course of this judgment I will address the issues in a slightly different format and order to provide a logical sequence to that which has to be determined.

<sup>7</sup> Again, my emphasis, for reasons which will become apparent later in this judgement.

<sup>8</sup> Paragraph 18 referring to the letter of her instructing solicitor dated 26<sup>th</sup> March 2021 to the court

<sup>9</sup> Page A132 in the hearing bundles

21. In relation to the consumer contracts section of the Brussels Regulation Recast the issues are defined as:

- (i) Was there a contract between the late Mrs Flowers and Centro Medico?
- (ii) If there was, was it a consumer contract within the meaning of section 4?
- (iii) Does the Claimant's claim against Centro Medico fall outside the scope of the consumer contracts section because it has not been brought by the "consumer" within the meaning of the section?
- (iv) Was the deceased (or for that matter the first Claimant) at any time domiciled in England?

22. In relation to the insurance section (section 3) the issues are defined as:<sup>10</sup>

- (i) Whether Article 13 (2) of the Brussels Regulation Recast is inapplicable because under Spanish law (as the law governing the issue whether a direct action against Berkley España is permitted) the Claimants would not be permitted to pursue a direct action against them before the English courts on the basis of the terms in the Berkley España insurance policy on the geographical delimitation of the risks covered;
- (ii) If Article 13 (2) does not confer jurisdiction on the English courts over the Berkley España claim, whether it follows that Article 13 (3) does not apply to the claim against Centro Medico;
- (iii) If it does confer jurisdiction, whether the Claimants are precluded against Centro Medico because it is not a matter relating to insurance within the meaning of Article 10 of the Brussels Recast Regulation.

### ***THE RESPECTIVE POSITIONS OF THE PARTIES IN OUTLINE***

23. The Claimants' case can be summarised as follows. An entitlement to use the jurisdictional gateways arises because both Mr and Mrs Flowers, despite having lived as expats in Jalon in Spain for over 17 years, nevertheless also had a settled home in the United Kingdom, in Southampton England, and had effectively had never lost their English residence and domicile, because of their close ties, frequency of visits etc.<sup>11</sup> Although she had the benefit of the ASSSA health insurance to cover her for emergency admissions and significant treatment in Spain, there was no such cover after the initial admission, and therefore use of the private hospital facilities over several days thereafter was based upon a contract between her (through the agency of her husband) and the hospital agreed verbally. She was a consumer, and would have been entitled to utilise the jurisdictional gateway for any damage and loss under Article 17 to bring proceedings against Centro Medico in the country of her domicile (UK) had she lived. Her right of action passes to her husband (First Claimant) and heirs

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<sup>10</sup> It is clear that although the list of issues in the solicitor's letter (and in counsel's skeleton argument) was more expansive, the claimants have not sought to rely upon article 13 (1) to enable Berkeley España to be joined into the proceedings via that route.

<sup>11</sup> Examined in more detail in next section.



(Second to Seventh to Claimants) who have the same entitlement to use the jurisdictional gateway as consumers under her contract or who are subrogated to her claim.

24. The insurance claim under Article 11.1(b) and Article 13 (2) against Berkley España arises as they are injured parties with appropriate domicile in the UK, and where a direct right of action lies against the insurer. By virtue of Article 15 the insurer is not entitled to rely upon the territorial scope clause because it is a jurisdiction clause which cannot be held against the Claimants as injured parties. If it were necessary to bring in Centro Medico (if there is not a consumer contract gateway) into a direct action claim against the insurer (“a parasitic” claim, with the insurer as the anchor) pursuant to Article 13(3) this would be permissible under English law as it currently stands because it involves a “*matter relating to insurance*”, although it is accepted that this very issue is presently the subject of a CJEU reference.

25. Both Defendants hotly dispute the domicile of Mr and Mrs Flowers on the basis of the evidence provided.<sup>12</sup> Even if domicile were to be established for both of them, in respect of the consumer contract claim and the jurisdictional gateway under Articles 17 and 18 there was no contract, let alone a consumer contract either on a plausible evidential basis, or as a matter of legal interpretation of the relationship. In any event the Claimants would not be entitled to step into the shoes of the consumer (if the late Mrs Flowers had been so established) on the basis of the European jurisprudence, and the wording of the Brussels Regulation Recast.

26. In respect of the insurance jurisdictional gateway, regardless of the domicile difficulties already identified, the condition of the availability of direct action in Spain cannot be satisfied because of the territorial scope clause, which would exclude indemnity in relation to actions not commenced in Spain and which is not a jurisdictional exclusion clause which falls foul of the exception under Article 15. Insofar as the Claimants may wish to invoke the gateway under Article 13 (3), and thus pursue a claim against Centro Medico otherwise not permitted under Articles 17 and 18, this course is not open to them because the claim is not concerned with matters relating to insurance. On this latter point it is similarly accepted that there is a pending CJEU reference.

27. Clearly these summaries are but outlines of the respective positions which have been expanded by detailed argument from both counsel carefully analysing the national and European case law, and considering the text of the European legislation. I will address the substance of the respective arguments when dealing with each of the separate issues.

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<sup>12</sup> it is not disputed that the 2nd to 7th Claimants are domiciled in the United Kingdom.

## SECTION 2

### DOMICILE

#### *Applicable legal principles*

28. This question arises, of course, only in relation to the deceased and the First Claimant. Domicile for the other claimants is not disputed.

29. In the general provisions chapter<sup>13</sup> of the Brussels Regulation Recast, (Article 62) it is stipulated that:

“Article 62

1. In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law.”

30. Thus it is the law of England and Wales which is to be applied, and this can be found in the Civil Jurisdiction and Judgments Order 2001. (The “CJJ Order 2001”)

#### **“Domicile of individuals (section 41)**

“9.—(1) Subject to Article 59 (which contains provisions for determining whether a party is domiciled in a Regulation State), the following provisions of this paragraph determine, for the purposes of the Regulation, whether an individual is domiciled in the United Kingdom or in a particular part of, or place in, the United Kingdom or in a state other than a Regulation State.

(2) An individual is domiciled in the United Kingdom if and only if—

(a) he is resident in the United Kingdom; and<sup>14</sup>

(b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.”

31. It is agreed that this provides a two-stage test, with conjunctive requirements. In other words, residence alone is not sufficient, and there is a further requirement to prove a substantial connection. However, in this respect sub-paragraph 6 can be relevant:

“(6) In the case of an individual who—

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<sup>13</sup> Chapter V

<sup>14</sup> My emphasis

(a) is resident in the United Kingdom, or in a particular part of the United Kingdom; and

(b) has been so resident for the last three months or more,

the requirements of sub-paragraph (2)(b) or, as the case may be, sub-paragraph (3)(b) shall be presumed to be fulfilled unless the contrary is proved.”

32. In other words there is a reversal of burden once three months’ residence is established. This is a matter which commonly arises in the context of foreign nationals, “healthcare tourism”, and those who are “domicile hopping” for tax purposes.

33. The claim form was issued in December 2020, and this is the relevant date for the purpose of determining whether either Mr or Mrs Flowers was domiciled in England. (**Canada Trust v Stolzenberg No 2 [1998] 1 WLR 547.**)

34. There is an abundance of authority in relation to the meaning of the term “residence”. Perhaps the most helpful and comprehensive exposition of principles is set out in the case of **Bestolov v Povarenkin [2017] EWHC 1968**, in which Simon Bryan QC (as he then was) sitting as a Deputy High Court judge was dealing with a question of *forum non conveniens* in a partnership dispute between two Russian citizens. The judge noted and sympathised with the observations of Langley J in **In Cherney v Deripaska [2007] EWHC 965 (Comm)**, that there was a risk of over analysis, and that the word “residence” should be given its ordinary and natural meaning, before going on to state at paragraph 44:

“44. From the above cases, I would identify the following propositions:-

- (1) It is possible for a defendant to reside in more than one jurisdiction at the same time.
- (2) It is possible for England to be a jurisdiction in which a defendant resides even if it is not his principal place of residence (ie even if he spends most of the year in another jurisdiction).
- (3) A person will be resident in England if England is for him a settled or usual place of abode. A settled or usual place of abode connotes some degree of permanence or continuity.
- (4) Residence is not to be judged according to a “numbers game” and it is appropriate to address the quality and nature of a defendant’s visits to the jurisdiction.
- (5) Whether a defendant's use of a property characterises it as his or her “residence”, that is to say the defendant can fairly be described as residing there, is a question of fact and degree.
- (6) In deciding whether a defendant is resident here, regard should be had to any settled pattern of the defendant’s life in terms of his presence in England and the reasons for the same.
- (7) If a defendant visits a property in England on a regular basis for not inconsiderable periods of time, where his wife and children live, in order to see his wife and children (including where the centre of the defendant's relationship with his children is 20 England), such property has the potential to be regarded as the family home or his home when in England, which itself is evidence which may go towards supporting the conclusion that England is for him a settled or usual place of abode, and that he is resident in England, albeit that ultimately it is a question of fact and degree whether he is resident here

or not, having regard to **all** the facts of the case including any discernible settled pattern of the defendant's life or as it has also been put according to the way in which a man's life is usually ordered.”

35. For these principles the deputy judge drew on the earlier decisions of the Court of Appeal in **Varsani v Relfo Ltd [2010] EWCA Civ 560**<sup>15</sup> and the now historic case of **Levene v IRC [1928] AC 217**.

36. These latter cases, submitted Ms Deal QC, provide support for the contention that the court should be looking not only at a usual place of residence, such as an individual dwelling house, or address, but also the mode and way of life, and the nature and quality of the residence. In respect of **Varsani** she referred to paragraph 29 of the appeal court judgment:

“29. I do not accept Mr Jacob's submission that, in determining whether a residence is a “usual” residence within CPR 6.9, the test to be applied is essentially one of merely comparing the duration of periods of occupation, taking little account of the nature or “quality” of use of the premises, and ignoring altogether that the premises are occupied permanently by the defendant's family and that the premises can fairly be described as the family home. Mr Jacob's suggested approach is too narrow and artificial. I agree with Mr Peter Shaw, counsel for Relfo, that the critical test is the defendant's pattern of life. In *Levene v Commissioners of Inland Revenue [1928] AC 217 the House of Lords* considered whether the taxpayer was “ordinarily resident” for the purposes of income tax. Viscount Cave LC said at page 225:

“The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days in which he spends here and those which he spends elsewhere, and that it is only if any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance”.”

37. Miss Healy referred to the recent decision of Knowles J in **Kim v Lee [2020] EWHC 2162 QB**, a libel action brought in this country by two Korean nationals over a journalistic publications in relation to Premier league football, and where he endorsed the test in **Bestolov** and which had been relied upon by Ms Deal QC; she pointed out that at paragraph 45 the judge emphasised the need, when considering “*ordinarily resident*” to refer to a man's abode for settled purposes, a position which was reinforced in the even more recent case of **Lakatamia Shipping v Hsin Chi Sui & Others [2021] EW HC 1866** in which Bacon J indicated, at paragraph 36, that it was necessary to ask the question, in relation to a debtor's place of residence, whether it was a *settled or usual place of abode or home*. Whilst not trumping the principle that consideration should be given to the way that a “*man's life is usually ordered*” it was certainly a matter which required pre-eminence.

### Evidence on residence/domicile

38. The principal evidence on behalf of the Claimants is comprised in the witness statements of Mr Peter Flowers dated 20<sup>th</sup> May 2021 and 19<sup>th</sup> of July 2021, together with a number of supportive documents, for the most part utilities bills, GP and health care communications, including GP

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<sup>15</sup> Etherton LJ (as he then was)

registration confirmation, bank/building societies statements/telephone and media bills, and some limited material relating to HM Land Registry details on the property 7 Lyon Street in Southampton. There is also some Spanish documentation in respect of the residence in Jalon but this too is limited. There are no statements from any of the other Claimants in relation to the visits/stays of their parents/grandparents in the United Kingdom, nor has any other documentation been supplied in relation to the ownership of other properties in Southampton. It is a matter of criticism from the Defendants that there is no corroborative evidence in this respect.

39. The Claimants also place some reliance upon the evidence of the Spanish legal expert, Ms Anna Romero Porro, provided principally in response to the Defendants legal expert.

40. The evidence relied upon by the Defendants is comprised in the statements of their English solicitor, Mr Francis Mackie of Browne Jacobson, the first on 19<sup>th</sup> February of this year in support of the application, with a second statement on 2<sup>nd</sup> July. Clearly he does not give first-hand evidence in respect of residence issues but produces some documentation and records from the extensive enquiries which he and his colleagues have carried out both in Spain and the United Kingdom most notably in relation to the occupation of the UK properties. Reliance is also placed upon the evidence of the Spanish legal expert, Mr Ybarra.

41. In outline, Mr Peter Flowers explains the background to his relationship with his late wife and the family dynamics, following the death of his first wife, the mother of his daughter Jenna, who continues to live in Spain, and Matthew, the Seventh Claimant. Their relationship began in 1987, and the two families became one. There were no natural children of the relationship, but they were all brought up together in Southampton in a large family home. This was sold in the 1990s, as the family downsized, and in 1999 the property at 7 Lyon Street was purchased. This was a much smaller terraced property with three bedrooms. It was about this time that Mr Flowers chose to take early retirement from Volkswagen and he and his wife began to look at properties in Spain to find a “second home”. They purchased the Jalon property on the basis that it was close to and accessible through Alicante airport which had a direct flight to Southampton, which was also close to the Lyon Street property, the UK home. The journey could be easily completed within a day leaving time to spare. They spent a number of years refurbishing the property in Jalon, but after about 12 months of living there, had applied for foreigner ID cards which would allow them to stay in Spain for more than six months at a time, although this was not something which they intended to do, and they continued to return to the United Kingdom on numerous occasions “still spending as much time as they wanted” in the UK. In terms of healthcare provision, they both commenced medical insurance in October 2002 on the basis that free medical care was not available until they were of pensionable age. Their insurance policy was with ASSSA.

42. Prior to purchasing the Jalon property they had opened a Spanish bank account, but only to facilitate the purchase as it was a legal requirement, and this was only ever used for limited local expenses, with Mr Flowers’ state pension being paid into it to avoid fees. He also had a small

occupational pension, but throughout the period of residence in Spain the primary income was derived from investment properties in the United Kingdom (in Southampton) with five houses which were tenanted, and maintained by them without an agent. His late wife would do the books, and when in the United Kingdom he would deal with the maintenance side. Most of the properties were sold by 2015 as he was getting older. He and his wife enjoyed being expats in Spain, although he did not embrace the culture by learning the language as his wife had done. They both acquired Spanish driving licences in 2006 to facilitate longer periods of staying there (two separate national licences were not allowed as a matter of law) and in 2008 they updated their wills to include a Spanish will. Mr Flowers understood himself to be domiciled in the United Kingdom for the purposes of tax and until 2018 was responsible for complying with the self-assessment requirements.

43. In 2009 they both obtained certificates of registration (certificates of domicile) because the foreigner ID cards could no longer be used, but at no time, contrary to the assertion by Mr Ybarra, did they acquire permanent residence permits, as they have never had any intention of staying in Spain permanently. His late wife purchased a car in 2015 which was used in Spain. Their original plan had been to spend the winter months in Spain, when it was warmer than England, but as the years went by, and their family expanded in the United Kingdom, including the arrival of grandchildren, they resolved to return sooner rather than later. Spanish summers had become too hot for them, and prior to the death of Mrs Flowers, enquiries had been made with local estate agents in preparation for selling the property in Jalon and returning to England.

44. Throughout the period of living in Spain, they still regarded the Jalon farmhouse as a holiday home and many fun family holidays would be spent there with children and grandchildren. In relation to the English property at Lyon Street, this was not considered to be a commercial venture, although it was occasionally rented out until 2010, and subsequently in 2014. However, there came a time when Ashley (Fifth Claimant) needed to use the property following a messy divorce and more recently he was living there with his daughter Amelie. On their return to England Mr and Mrs Flowers would stay with Emma (Second Claimant) in a separate property, and in 2015 invested in a loft conversion to make this more comfortable and to facilitate more regularly staying over. Emma's address was used for correspondence, because it was more likely that she could notify them if they were in Spain when anything urgent arrived.

45. The only specific detail provided by Mr Flowers in relation to the 2019 visits to the United Kingdom which is unsupported by any travel documentation, is that they spent approximately 16 weeks in Southampton, which was said to be "on the lower end of average". Generally they would try to be in England at the time of the school holidays to spend more time with his grandchildren and to make contact with other members of the family and friends. In particular his wife had regular appointments with hairdressers, beauty parlours dentists and chiropractors which she trusted in the United Kingdom. In his second statement he explained that the difficulty in obtaining evidence in respect of these flights which was related to the fact that he could not access the relevant email account used by his late wife because he did not know her password.

46. Mr Flowers accepted that during the course of an interview with a journalist at the time of Brexit he had said that he and his wife had come out to live in the sun, but he did not accept that he had referred to himself as an expatriate.

47. In respect of the time spent in Spain since the passing of his wife, this had been more or less continuous because of the difficulties of travel as a consequence of the pandemic.

48. Ms Romero, the Spanish legal expert, addressed the question of the status of the Spanish certificate of domicile, which she advised involved a matter of administrative registration and did not establish domicile as such for civil purposes in Spain, nor did it imply that any person holding such a certificate was permanently or habitually resident in Spain. It was a Spanish legal requirement that any person living in Spain held a certificate of domicile in an appropriate municipal registry.

49. Mr Mackie, solicitor for the Defendants, investigated evidence relating to land registry entries and electoral roll registries for the property 7 Lyon Street which demonstrated that over the period from 2002 there had been a number of individuals who had been registered as eligible to vote, and apart from Mr Ashley Davies none had been family members. This was consistent with the use of the property for rental purposes and he did not encounter any evidence that Mr and Mrs Flowers had been present at the property in the relevant period.

50. Mr Ybarra engaged extensively with the question of domicile in his two statements, including expressing an opinion which is in my judgment outside the role of an expert witness, as to how the evidence of residence should be interpreted in an English court. However he explained the different forms of documentation which might be relevant to the question comprised in the Spanish certificate of domicile (which it is known Mr and Mrs Flowers held). In his opinion this implied permanent and habitual residence which would have excluded any British domicile, and the Spanish permanent residence permit was an entitlement for EU nationals who had resided continuously for a period of five years. He accepted that he had been unable to establish whether Mr and Mrs Flowers held such a permit.<sup>16</sup> He also dealt with the relevance of the NIE number, which is an identification number suggestive that a foreign national was involved in the process of obtaining a residence permit, it being noted that Mrs Flowers held such a number, and the Spanish vehicle and driving licence which would normally be obtained by proof of permanent residence.

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<sup>16</sup> This is denied by Mr Flowers

### Arguments on domicile

#### *Claimants*

51. On behalf of the Claimants, Ms Deal QC reminded the court that an individual could reside in more than one jurisdiction at the same time, relying on the principles summarised by the deputy High Court judge in **Bestolov**, and the approach to the domicile question required a conjunctive consideration of both residence and substantial connection, with many of the significant authorities emphasising an holistic assessment which required the court to consider the pattern of life of the individual and the way in which it was ordered.

52. This is a case, she says, where the evidence clearly demonstrates that Mr and Mrs Flowers split their life between Spain and England, being British nationals who retained their own passports, took part in English life including voting in important decisions, having property in England, and with very substantial family connections in this country, notwithstanding the fact that the majority of each year may have been spent in the Spanish farmhouse.

53. Whilst retaining a property for permanent use in England would assist in resolving the question in favour of an English domicile, it was not a requirement to have an address which had remained constant, and it was the nature and quality of the residence which mattered. It was important that the court did not indulge in a numbers game weighing up the time spent in one country compared to another.

54. Ms Deal submitted that there was no doubt on the evidence, although the threshold of proof which had to be crossed for a jurisdiction dispute was not necessarily stated in these terms, that Mr and Mrs Flowers had an established pattern of life which involved regular and sustained stays in England with their family, particularly Emma, to provide childcare in the school holidays, to deal with properties which they owned and which required maintenance until they were recently disposed of, and to preserve the close family ties which existed. Unlike the individuals who are described in the leading authorities they were not seeking to establish a connection with a “foreign” country as such, but England, and in particular Southampton was the home, and very much the centre of their lives. This court could have regard to the plans which were emerging prior to the death of Mrs Flowers of a gradual return to this country after the experience of living as expats in the sunny Spanish climate which was demonstrative of a need to “fertilise the roots” of their family connections.

55. In these circumstances, the substantial connection which was not a prerequisite that was in any way diminished by the need to identify residence in the country in which domicile is claimed, was clear. In the present case, the way in which Mr and Mrs Flowers ordered their lives carried very considerable weight.



*Defendants*

56. On behalf of the Defendants, Ms Healy submitted that the material relied on by the Claimants in relation to domicile did not pass the threshold of a plausible evidential basis. As indicated above, she referred the court to several authorities which confirmed that the need for a settled place of abode to establish residence could not be brushed over by general assertions about the way in which lives were ordered and which seemingly provided a connection with the country in which domicile was sought. What was required were objectively proven facts. She reminded the court of the third of the requirements at paragraph 44 in **Bestolov**, namely that the residence claimed had a sufficient degree of permanence.

57. Particular regard should be had to the very compelling picture painted in the evidence of Mr Ybarra, contrasted to the broad brush and vague material lacking in specific detail provided by Mr Flowers, which did not pass the “scratch test” required. Several features arose which were relevant. The address given for various utilities was that of the daughter, Ms Emma Davies, whereas the property at 7 Lyon Street (and that which appeared as the relevant address for the purpose of issue of proceedings) was supposed to be the main “residence”. It was clear that they never stayed at this property and the information in relation to the occasional renting only emerged after Mr Mackie’s statement which dealt with the investigations carried out, and even now no rental documentation has been provided. In relation to the visits to England, not only in 2019 which are specified as sixteen weeks, but also in respect of other occasions, there is a dearth of material to support this, despite it being asked for. At best, it is Mr Flowers’ assertion that this is representative of periods spent in other years. Insofar as reliance was placed upon the Lyon Street address as being their home, it was surprising that there had been significant expenditure on acquiring another bedroom in the loft of Emma’s property. There was no reason why some evidence could not have been provided about flights to the United Kingdom, even if the email address could no longer be accessed, such as digital boarding passes or e-tickets. Bearing in mind the availability of data digitally recorded it was also surprising that mobile phone bills had only been provided from December 2019 onwards which did not lend any support for the residence requirement or a substantial connection over a period of time with England. Ms Healy was critical of the fact that there was no corroborative evidence in the form of witness statements, family photographs etc.

58. If the court accepted that domicile could be established on such a paucity of evidence, there would be a real and genuine floodgates concern; this case, it was submitted, was right at the boundaries and stretching the definition of domicile, with an unreasonable emphasis on family ties and the ordering of life, with little or no evidence of any real residence, let alone an established pattern.

### Discussion on domicile

59. It is quite correct that this court is being asked to determine domicile in unusual circumstances, where the individuals<sup>17</sup> seeking to establish that they have an English domicile are British nationals, with British passports and have spent the vast majority of their adult lives in this country having been born here. It is axiomatic that domicile can change in line with the residence of such individuals, and even those who have chosen to live in a different country to their country of origin can, in effect, surrender one domicile in favour of another. It is also axiomatic that individuals can have more than one place of residence even for a substantial period of time, and the fact that a short period is spent in one country relative to the majority of time spent in another does not by itself displace the possibility of such joint residence or domicile. This court has not been referred to any recent case in which a senior court has been asked to rule that the national of one country who has chosen to live for the majority of the year in another country has in fact displaced the domicile of their birth or national identity, and the parties accept that the leading cases which have given rise to the principles to be applied in determining the question are all concerned with foreign nationals who have sought to establish a domicile or the absence of a domicile in the United Kingdom.

60. Further, I bear in mind that on this jurisdictional challenge I apply the same considerations to each question which has to be resolved on the applicable standard of proof as to plausible evidence and in particular whether the Claimants, on whom the burden lies, have the better of the arguments on the question as to whether or not Mr and Mrs Flowers have/had an English domicile entitling them to utilise the relevant EU gateways. There is little doubt that the Claimants could have presented a more substantial raft of evidence on the issue of domicile and that there are a number of shortcomings in the material provided which raise as many questions as they answer. Certainly there is merit in the submission of the Defendants that evidence relating to flights, length of visits in previous years, the use of the English properties including the extent of rental of Lyon Street, and other associations with their “English life” and in particular the family in Southampton could have been provided, including photographs and corroborative statements.

61. Equally, there is no doubt that nationals of one country can choose to sever ties with their country of origin and become expats in the true sense, assimilating in every respect to the country in which they choose to live. However, on any interpretation this is not a case where ties have been severed with the UK, because even on the lowest point of the Claimants’ case it is established that significant family connections remained. All but one of their children/stepchildren and their families live in the UK in and around Southampton and whilst this is challenged by the Defendants, there is evidence that at the very least there were regular trips by Mr and Mrs Flowers to see family members. The Defendants’ case is that to the extent that there were such trips these were no more than reverse holidays, so to speak, as one might expect whenever individuals lived abroad, and are incapable of amounting to the adoption of a second alternative abode for settled purposes. Whilst I understand that there is peril, and potential misdirection in overinflating “*the ordering of life*” and

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<sup>17</sup> By this, of course, I am referring to the First Claimant Mr Flowers, on his own behalf, and on behalf of his late wife

thus the second limb of the paragraph 9(2) test in the CJJ Order 2001 to the exclusion of establishing a meaningful residence, with respect I do not agree with the Defendants.

62. In my judgment, whilst there is irrefutable evidence of expatriate residence over a significant period of time in Spain in the Jalon farmhouse, which Mr and Mrs Flowers clearly enjoyed, there is a sufficiently plausible evidential basis for concluding that they retained a family base in their country of nationality, and in the locality where children and grandchildren were living, even if there was a degree of fluidity in where they chose to stay, and an absence of any compelling evidence that 7 Lyon Street had provided such a base other than fleetingly. Although the evidence of Mr Flowers in relation to the time spent in the United Kingdom in 2019 (sixteen weeks) is potentially open to challenge, and the assertion that this was the average length of stay (or less than average) is unsupported by any other material, there is no reason why in a jurisdictional challenge hearing at the interlocutory stage where the evidence is bound to be limited, and making reasonable assessment difficult (cf **Brownlie** supra), this court cannot take such evidence at face value, in other words to consider the Claimants' case at its highest, assuming that it does not lack plausibility. It seems to me that in the light of the reasons which have been demonstrated for visiting the United Kingdom and the suggested pattern and lifestyle of Mrs Flowers, lengthy stays rather than fleeting visits were far more likely. It is difficult to imagine that a couple who were family orientated, notwithstanding their decision to live abroad, would not have wished to spend as much time as possible with their children and grandchildren.

63. I accept that this is insufficient for the purposes of establishing domicile, because there are two limbs to the test. However, in relation to the aspect of residence, in my judgment there is force in the submission of Ms Deal QC that the loft conversion in Emma's house was suggestive of more than just a temporary basis for accommodation, but indicated a greater degree of permanence for residence when staying in England, and that the concept of a settled abode is not defeated by the absence of any evidence connecting them with the property which they owned at 7 Lyon St. Further, when this is considered in conjunction with the pattern of life which is demonstrated on the evidence of ongoing familial association with their country of nationality, and with emotional and physical ties and connections, I am satisfied that the Claimants have the better argument on the available material that they had a domicile in this country notwithstanding the fact that the majority of the time they resided as expats in Spain.

64. I should also make it clear that I agree with Ms Deal QC that the evidence of Mr Ybarra is of limited value. It is not in dispute that there were obvious and substantial connections with Spain and that the Flowers had utilised opportunities to obtain the appropriate documentation to make life as comfortable as possible administratively and for lengthy residence, but this does not preclude the prospect of a second residence in England. Further, insofar as Mr Ybarra seeks to comment on the likely outcome of any determination by an English court on the question of domicile, he is seeking to enter the arena and acting outside the area of expertise for which he has been instructed.

65. Whilst it is plain that the need for a settled abode and a degree of permanence to the residence in the United Kingdom, albeit for a relatively short period of any given year, should not be diminished, and must be the subject of careful analysis, the stringency of the tests which have been formulated and referred to in the jurisprudence on the domicile issue provide a better fit where the court is being asked to accept the domicile of an individual in a country which does not represent his nationality, and where there may be fiscal, healthcare or immigration advantages in establishing such a domicile. As I have indicated, the court has not been referred to any recent English case where an English national has been required to re-establish his domicile after a period of living abroad, and whilst it may well be, as Ms Healy says, the case that these are usually uncontroversial and do not give rise to any issue (one way or the other) in my judgment some greater weight must be given in such circumstances, when considering the question of substantial connection, in the case of individuals seeking to assert or rely on the domicile not only in the country of their origin and nationality, but also where all their ties and connections exist without question.

66. Accordingly, I am prepared to accept that the Claimants have provided plausible evidence that they were domiciled in England at the time that the claim was issued on 21<sup>st</sup> December 2020, and that Mrs Flowers was domiciled here at the time of her death.

### SECTION 3

#### **CONSUMER CONTRACT GATEWAY**

67. I remind myself of the issues other than domicile which fall to be considered under this section.

- (i) Was there a contract between the late Mrs Flowers and Centro Medico?
- (ii) If there was, was it a consumer contract within the meaning of section 4?
- (iii) Does the Claimant's claim against Centro Medico fall outside the scope of the consumer contracts section because it has not been brought by the "consumer" within the meaning of the section?

The first is a question of fact determined on the evidence to the requisite standard, the second is mixed fact and law, and the third is a matter of law.

#### Applicable legal principles

68. There is clear authority within the European jurisprudence which has considered the application of the consumer contract gateway that any narrow interpretation should be avoided at the stage of jurisdiction consideration. Ms Deal QC referred the court to the helpful assessment of Adrian Briggs in his eminent text **Private International Law in the English courts**:

“... Despite the requirement to give a restrictive interpretation to provisions which are exceptions to the domiciliary rule of general jurisdiction, there is no reason to suppose that it excludes claims which deny the existence or validity of a disputed contract..... The natural interpretation of the policy which justified this provision is that disputes concerning a contract and its enforceability which may or may not be disputed, should gain the benefit of this provision. Any narrower interpretation would damage the proper interests of the weaker party.”

In other words, the fact that the Defendants deny the existence of a contract should not, by itself, carry any significant weight.

69. In the case of **Benincasa v Dentalkit [1997] ETMR 447** the European Court dealt with the approach required in the context of a potential and significant dispute about contractual terms and the availability of a jurisdiction clause, including the extent to which enquiry should be made at this stage of jurisdiction determination:

“26. Next, as the Court has consistently held, the objectives of the Convention include unification of the rules on jurisdiction of the Contracting States’ courts, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued ( *Case 38/81 Effer v. Kantner [1982] E.C.R. 825* , paragraph 6, and *Case C-25/92 Mulox IBC [1993] E.C.R. I-4075* , paragraph 11).

27. It is also consonant with that aim of legal certainty that the court seised should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention, without having to consider the substance of the case.”<sup>18</sup>

70. It is not the governing law of the state in which jurisdiction is claimed that falls to be considered and an independent autonomous interpretation of the concept of a contract is required in the context of the objectives of the Brussels Regulation Recast, and the protection which it affords. This was emphasised in the case of **Brogstetter v Fabrication de Montres Normandes EURL [C-548/12]** in which the ECJ (as it then was) held that a tortious civil liability claim under national law, could still be considered as “*concerning matters relating to a contract*” and thus relevant to the application of the consumer contract gateway, where the conduct complained of might be considered a breach of the terms of a contract:

“21 In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature (see, to that effect, *Case C-167/00 Henkel [2002] ECR I-8111*, paragraph 37).”

71. The court went on to formulate a test considered to be of useful application in determining whether the claim is a matter relating to the contract at paragraph 26ff:

“26 It is therefore for the referring court to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.

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<sup>18</sup> My emphasis

27 If that is the case, those claims concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001. Otherwise, they must be considered as falling under 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001."

72. In the English case of **Committeri v Club Med & Generali Assurances [2018] EWCA Civ 1889**, the Court of Appeal, upholding the careful analysis of Dingemans J (as he then was) at first instance and applying autonomous EU law agreed that a broad interpretation was required in relation to a civil liability claim (in that instance the issue was whether or not the claim for damages arising out of a climbing accident in France was contractual, or non-contractual, which would determine which EC regulation would apply, that is either Rome I, or Rome II, because of a potential strict liability) and held that for the purposes of deciding whether the claim concerned "*matters relating to a contract*" it was necessary to decide whether the contract was peripheral, or the basis of the obligations between the parties. Coulson LJ at 52ff said:

"52. Secondly, applying *Brogstetter*, *Ergo*, and *Amazon*, the contract between BNP and the respondent was not simply part of the background to the claim (as it was found to be in *Bosworth*); it is the basis for the obligations of which the respondent is said to be in breach. Although it is unwise to be over-definitive as to the precise test to be derived from the European authorities, I derive the following from these three cases:

(a) The mere fact that a contracting party brings a civil liability claim against the other party does not by itself mean that the claim concerns "matters relating to a contract" but it will be sufficient if the conduct complained of may be considered a breach of contract (*Brogstetter* [24]) or if the purpose of the claim is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract (*Brogstetter* [26]).

(b) Only an obligation freely consented to by one person towards another and on which the Claimant's action is based is a 'matter relating to contract' (*Ergo* [44]).

(c) The classification of an obligation for the purposes of Rome I or Rome II depends on the (contractual or non-contractual) source of that obligation (*Amazon*, AG's opinion [48]). A contractual obligation implies at the very least an actual and existing commitment (*Amazon* [50]).

53. On an application of all or any of those principles, it is clear that the pleaded strict liability claim can only be characterised as a contractual claim. It is a claim for damages for breach of the obligations set out in the contract, freely entered into by both sides. That contract is the source of the relevant obligations and imposed the necessary commitments. To put it another way, to use Judge Waksman's words in *AXA* (paragraph 43 above), the contract was not "a stepping stone to the ultimate liability of [the respondent but] the basis for the obligation actually relied upon...".

73. The requirement to provide an autonomous interpretation applies not only to the existence of the contract, but also whether it is a "consumer" contract, a point made with some force by Ms Deal QC, because of the heavy reliance by the Defendants' expert Mr Ybarra on the Spanish law for consumer protection and the question of its applicability to the relationship between Mrs Flowers and the hospital. Reference should be made to the case of **Shearson Lehman Hutton Inc v Treuhandgesellschaft [1993] ECR I-139** and the decision of the ECJ:

"13 For the purpose of answering that question, it is necessary to bear in mind the principle, established by case-law .....according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This rule must apply, in particular, to the concept of "consumer" within the meaning of Article 13 et seq. of the Convention, in so far as that concept is the principal factor in the determination of rules governing jurisdiction."

74. Whilst the Defendants' Spanish legal expert provides a detailed exposition as to why the arrangement between the late Mrs Flowers in the hospital should not be considered a consumer contract under Spanish law, there is no significant challenge that if the claim brought by the Claimants can properly be regarded as concerning "*a matter relating to contract*" in accordance with autonomous conventional law then it is a consumer contract by reason of the other requirements set out in Article 17. The more complex question, as will be seen, is whether or not the claim can be brought by persons other than the consumer. There are no clear principles which can be stated, but both counsel address several authorities to support their respective positions, and I shall deal with these when considering the arguments below.

### Relevant evidence

75. Again, the primary material relied upon by the Claimants is derived from the statement of Mr Flowers, and in particular the latter part. In summary, he describes how he and his wife had chosen to go to the hospital in Benidorm, the emergency admission for which was provided for under the terms of the ASSSA insurance policy, because she had a medical appointment there the next day in any event in relation to a bunion. On admission on 2<sup>nd</sup> February, she was required to provide the details of her medical health insurance policy with ASSSA. She had been in significant pain in relation to her back, and an MRI scan revealed a herniated disc which required an operation. That is an operation which could not be performed immediately, but his wife was in such pain that she did not wish to go back to the house in Jalon, and a request was made for her to stay at the hospital for up to a week, where she could be made more comfortable. Unfortunately the health insurance was limited to the emergency admission, and there was no basis for any cover (except in relation to the later operation) for the intervening period. Mr Flowers asserts that the hospital verbally agreed to this, and whilst no documentation was completed, he was told by an administrator that this could be covered by the "special" price of €1000 on 3<sup>rd</sup> February. He produces a voucher which confirms that the hospital were expecting to be paid by the insurance policy only for the first two days of emergency admission. Further, communication with the insurance company has confirmed that they were only expecting to pay for this, and not the extended stay. As matters transpired, Mr Flowers was never billed for the additional days of care and treatment, but it was during this period that his late wife incurred the relevant infection and of course it was this which led to her death. However, had she lived, he would have expected to have to pay for the additional hospitalisation, and patients were not allowed to leave hospital without bills being settled.

76. The Defendants rely upon the evidence of Mr Ybarra, who has analysed the available documentation from the hospital and the health insurer, and who has explained the arrangements which would normally exist in relation to health insurance emergency admission. His principle contention is that the question as to whether a contract existed between Central Medico and Mrs Flowers or her husband would be determined according to Spanish law, ultimately, and the nature of the relationship following the admission of Mrs Flowers was one which would have required the insurer to pay the hospital, whilst Mrs Flowers had a contractual relationship with the insurer. This relationship was confirmed by a number of Spanish Supreme Court authorities and it was a non-

contractual relationship, which was important because of the operation of the statute of limitations which would have applied if the opposite was the case. Mr Ybarra also referred to the documentation in the case noting that following her death an invoice was directed to her by the hospital for the treatment in the ICU, because this had not been paid by the insurance company. He suggested that this was not evidence of a contract, but was clearly a mistake, and thus null and void under Spanish law. In any event, it would not have been possible to enter into a contract with a person who was deceased, if that was the implication relied upon by the Claimants.

77. In so far as it was being suggested that there was a vague contractual relationship, this could not be a consumer contract, suggested Mr Ybarra, applying the definition of a consumer under the European legislation as a person who is “*acting for purposes which are outside his trade, business, craft or profession*” and this would have been entirely in keeping with Spanish law, which has made it clear that consumer regulations do not apply in medical malpractice cases.

78. On behalf of the Claimants, Ms Romero provides a contrary viewpoint, stating that if the insurance would not cover after the first two or three days of emergency admission, the deceased would be regarded under Spanish law as entering into a “hospitalisation contract” which whilst complex would cover the provision of services which were both extra medical, including care, board, accommodation, and medical, that is the acts or treatment provided by doctors. She argued that this was a position recognised by the Spanish Supreme Court. Further, it was arguable that whilst medical acts did not necessarily fall under consumer legislation, nevertheless this could still be the case if damage was caused as a result of the defective functioning of the health service given.

### The respective arguments

#### *Claimants*

79. In relation to the first question as to whether there was a contract with the hospital, Ms Deal QC invited the court to ignore, for the most part, the evidence of Mr Ybarra which was too Spanish centric and failed to deal with the autonomous interpretation required under EU law, or through the “EU prism”. The complexities of the relationship between Mrs Flowers, the hospital and the insurer were unimportant, and the court should not be drawn into an analysis of potential arrangements. The essential facts were that the deceased went into a private hospital for which only the first two nights were covered by her private health insurance. There was a clear understanding, absent a formal agreement, that someone would have to pay for the following seven days, and this provides a compelling basis for saying that there was a legal obligation freely consented to. This was the test specifically approved by the Court of Appeal, having been formulated by Dingemans J at first instance, in **Committeri** *supra*.

80. On the question as to whether this was a consumer contract, she submits that the Defendants, and in particular their expert, have again fallen into error by focusing on the medical relationship. It



was sufficient, applying autonomous EU law, that the arrangement was one which concerned matters relating to a contract, and that the patient was entering into the obligation for a purpose outside “her trade or profession”.

81. Whilst the evidence relied upon by the Claimants, in particular the discussion with the administrator over the payment of €1000 may be the subject of challenge in any final determination, at the jurisdiction stage the court was not required to apply any great scrutiny, and in this case there was a plausible evidential basis for a contractual arrangement which was compelling. One would not have expected a private hospital to allocate bed and board unless someone was going to pay for it, and it is irrelevant that the invoice may have been subsequently voided.

82. Ms Deal reserved the thrust of her submissions for the knottier question as to whether or not a consumer contract protection claim could be brought by the Claimants as the heirs of the deceased in whom it was clearly vested, as assignees or subrogates. She accepted that this was a question for which there was no clear answer in European or national jurisprudence, acknowledging that were the matter still open for a reference to the European Court, this would be an appropriate case to do so.

83. She invited the court to consider some basic propositions, in order to have an overview of the way in which the definition of the weaker party, and thus potential Claimant, through the exceptional gateways on jurisdictional questions, has been extended. In **Odenbreit v FBTO Schadeverzekeringen NV C-463/06** she asked the court to note that the injured party in an RTA was entitled to bring a direct action against an insurer. Whilst this case was concerned with the insurance gateway, not the consumer contracts gateway, the case demonstrated the general principle of permitting the weaker party to take advantage of a greater range of options which might be available to the policyholder, insurer or beneficiary on “*matters relating to insurance*”.

84. The development continued, says counsel, with the decision of the European court in **Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs AG (C-347/08)** (“**Vorarlberger**”), a case in which a social security institution in Austria was seeking to recover in Austria benefit payments made to the victim of a road traffic accident in Germany, by utilising the insurance gateway within the predecessor European regulation. It was held that such an institution could not be the weaker party and not therefore entitled to the protection of the exception, and recovery of any loss could only be made within the jurisdiction in which it was incurred. The social security institution was the statutory assignee of the rights of the injured party. However, Ms Deal QC referred to paragraph 44 of the judgment. Whilst the European court did not accept that a Social Security institution could be regarded as the weaker party, though still a statutory assignee of the rights of the injured party, nevertheless it appeared to endorse the position of the heirs of the injured party:

“44. In contrast, where the statutory assignee of the rights of the directly injured party may himself be considered to be a weaker party, such an assignee should be able to benefit from special rules on the jurisdiction

of courts laid down in those provisions. This is particularly the situation, as the Spanish Government states, of the heirs of the person injured in an accident.”

85. This suggests that the *forum actoris*, albeit in the context of the insurance gateway, has been extended to heirs, it is submitted, where they should be entitled to the specific protection afforded to an injured party who has died.

86. Ms Deal placed reliance on the opinion of the Advocate General (Bobek) in the case of **Landeskrankenanstalten-Betriebsgesellschaft - KABEG v Mutuelles du Mans assurances - MMA IARD SA (C-340/16) (“KABEG”)** where an employer sought to use the insurance gateway for a jurisdiction of choice in a claim to recover sick payments made to an injured employee during his period of absence following an accident. The employer was successful on the subrogated claim, and held to be the weaker party. At paragraph 28 of his opinion the AG provided a useful analysis of the concept of subrogation:

“AG28. As a preliminary terminological remark common to the entire argument, I wish to stress that in this Opinion, I use the term “subrogation” in a general, neutral way, as generically referring to all kinds of legal “substitution”.<sup>7</sup> It simply captures the situation of a person who steps into another person’s shoes to enforce rights or assume obligations.”

This, it is submitted, is no more than that which the Claimants have done in the present case.

87. The **Vorarlberger** rationale, submitted Ms Deal was reiterated in the case of **Hofsoe v LVM Landwirtschaftlicher Versicherungsverein Munster AG (C-106/17) (Hofsoe)**. Whilst it was held that a professional person who took a commercial assignment of an injured party’s rights could not be held to be the weaker party, the court made some helpful observations which endorsed the position of the heirs as the weaker parties who were clearly not professional persons:

37. Fourthly, it should also be recalled that the Court has held that the purpose of the reference in art.13(2) of Regulation 1215/2012 is to add injured parties to the list of Claimants contained in art.11(1)(b) of that Regulation, without restricting the category of persons having suffered damage to those suffering it directly (judgment of 20 July 2017, *Landeskrankenanstalten-Betriebsgesellschaft - KABEG v Mutuelles du Mans assurances - IARD SA (C-340/16) EU:C:2017:576; [2017] I.L.Pr. 31*, [33] and the case law cited).

38. Thus, the *forum actoris* must be extended respectively to the heirs of an insured party and to the employer who continued to pay the salary of an employee injured in a road accident while he is on sick leave after that accident (judgments of 17 September 2009, *Vorarlberger Gebietskrankenkasse (C-347/08) [2010] I.L.Pr. 2*, [44], and of 20 July 2017, *MMA IARD (C-340/16) [2017] I.L.Pr. 31*, [35]).

88. Whilst acknowledging that again this line of authorities which purported to extend the scope of those regarded as the weaker party arose within the context of the insurance gateway, she submitted that an analogy can be drawn for the purposes of the consumer contract gateway where the heirs count as the statutory assignees to an injured party’s right to obtain their own *forum actoris* although not actually injured themselves.

89. In her review of the authorities, the last case referred to by Ms Deal QC was **Schrems v Facebook Ireland C-498/16**, upon which the Defendants, through counsel, have placed heavy reliance. Mr Schrems was held to be entitled to use the consumer contract gateway in respect of his own personal claim against Facebook relating to the use of his account as a consumer, but not for those claims which had been assigned to him by other consumers. Ms Deal accepted that the case did not support her primary position of the establishment of a *forum actoris*, but submitted the principle was largely concerned with the difference between a consumer and an economic operator, and the court was exploring the meaning of a consumer providing an autonomous interpretation in accordance with European law. She submitted that paragraphs 96 and 97 of the opinion of AG Bobek carried some relevance:

“AG96. First, the Court has indeed already had the opportunity to examine whether the *forum actoris* of consumers is applicable to assignees of consumer claims that are not themselves parties to a contract. In the *Henkel* and *Shearson Lehman Hutton* judgments, the Court found that the special consumer jurisdiction was *not applicable* to legal persons acting as assignees of the rights of a consumer. However, the Court arrived at that conclusion not only because, as the applicant submits, those legal persons (a private company and a consumers’ association) were not “weaker parties”, but also, as clearly stated in both decisions, because those persons were not themselves parties to the contract.

AG97. Secondly, according to the applicant, the case law of the Court relies on an abstract need of consumer protection as the determining element for establishing the forum, irrespective of the assigned nature of claims. In this regard, both the Austrian Government and the applicant have referred to the Court’s judgment in *Vorarlberger Gebietskrankenkasse*, where it was stated that contrary to the social security institutions, “where the statutory assignee of the rights of the directly injured party may himself be considered to be a weaker party, such an assignee should be able to benefit from special rules on the jurisdiction of courts laid down in those provisions. This is particularly the situation ... of the heirs of the person injured in an accident”.

AG98. Inasmuch as reliance on that case can still be of relevance in the light of the Court’s recent judgment in *MMA IARD*<sup>27</sup> which has considerably nuanced the approach adopted in *Vorarlberger Gebietskrankenkasse*, the analogy with the present case is misplaced for two reasons. First, the special head of jurisdiction for matters related to insurance is differently conceived and, is, in itself, much broader. Secondly, and more importantly, in *Vorarlberger Gebietskrankenkasse*, the request was to keep the already extant special forum and to be allowed to pass it on to a third party. What the applicant is effectively asking for is the *creation* of a new special forum particular to the assignee or successor to the claims, in a situation where those claims have been assigned purely for litigation purposes.”

90. These observations, it is said, could not be taken to apply to the situation of an inherited claim from a consumer who had died, and were clearly directed to commercial assignments for litigation purposes. It is a question which the ECJ/CJEU has never previously grappled with, and it would be curious, submitted Ms Deal, if the legislative provisions should be interpreted to provide more benefit to those who were in a stronger financial position than to the consumer because she had died. The heirs will always be in a weaker position, and the situation could not be compared to that which would prevail if, for instance, the deceased had assigned her right to sue to a claims farm.

91. Her final submission on this point, was that there were two options which could be constructed to allow the use of the gateway, by means of the passing on of the right, and the progression of authorities referred to. The first was that the heirs have their own *forum actoris* as subrogated to the claim of the late Mrs Flowers having become statutory assignees and thus the weaker party. The second was that they inherited the *forum actoris* which the consumer could have

relied upon purely as heirs. The second option would not require an extension of the strict wording of the section 4 consumer contract gateway, and maintain the proper balance between the interests of the consumer and the other contracting party. Either way, it was not permissible that the consumer contract gateway died with the victim.

### *Defendants*

92. On behalf of the Defendants, Ms Healy of counsel predicates her submissions in relation to the consumer contract gateway on domicile having been established, and of course it is her primary argument that it is not. In relation to the existence of a contract, she accepts that the autonomous approach under European law is relevant but contends that the Spanish law is harmonious with this approach. She relies on the Spanish legal position as elucidated by her expert Mr Ybarra, that the relationship between the hospital and the patient was tripartite involving the payment of her costs by the insurer, and that Spanish Supreme Court authority affirmed that there could be no contract in such circumstances. She dismissed the suggestion of the Claimant's expert, Ms Romero, that this was a reimbursement policy, which would somehow affect the position.

93. The preponderance of the evidence, submitted Ms Healy, militated against there being a contract. The agreement relied upon by Mr Flowers in his evidence, which was also flatly denied by Mr Burgeuro from the hospital, was the subject of a number of inconsistencies, unsupported by any documentary evidence, and not the contract which is now set out in the Particulars of Claim which asserts that it was entered into upon admission to the hospital in Benidorm.

94. Even if the evidential threshold is crossed, this could not be properly characterised as a claim which was concerned with "*matters relating to contract*" on the basis of the guidance provided in the domestic and European jurisprudence, including **Brogsitter**, and the court should be looking at the subject matter of the claim to determine whether it was in substance a breach of contract; this included an interpretation of the terms of the contract as indispensable to deciding the dispute. There were no specific terms relied upon in this case other than to act with reasonable skill and care as hospital staff and this is in effect a tortious claim.

95. In respect of the other required element, namely that the claim has been brought by the "consumer" she deals with this aspect in conjunction with the substantial argument that there cannot be an inherited claim within the consumer contract section of the regulation, supplementing her skeleton argument with oral submissions.

96. Ms Healy submitted that contrary to the submissions of Ms Deal, the issue as to whether or not the Claimants could step into the shoes of the consumer was not uncharted territory, and the answer was to be found not only in the text of the regulations, but also the EU jurisprudence. She made six points.

97. First, she referred to the wording of Article 17 and the sharp distinction in the language compared to the insurance section where the scope was far broader. In particular she referred to an extract from Adrian Briggs at chapter 10.02

“Whereas section 3 of title II applies to all insurance matters, there is a more restrictive definition, or identification, of consumers or their contracts included in section 4. This is partly statutory and partly judicial.....”

98. Second she asked the court to note that the development of European case law relied upon by Ms Deal should be seen in its context, and in particular the chronology of the opinions expressed by AG Bobek said to be authoritative; AG Bobek was involved in both **Schrems**, which was the later case and **KABEG**. At the time that **Schrems** was decided the European court would clearly have had in mind the developments that were going on in broadening the scope of the weaker party in the insurance section and yet chose to confine the scope within the consumer contracts section to allow for clear predictability. She placed particular reliance upon paragraphs 43 to 45 of the judgment in **Schrems**:<sup>19</sup>

43. In that respect, it should be recalled, first of all, that the rules on jurisdiction laid down in s.4 of Ch.II of Regulation 44/2001 constitute a derogation both from the general rule of jurisdiction laid down in art.2(1) of that Regulation, which confers jurisdiction upon the courts of the Member State in which the defendant is domiciled, and from the rule of special jurisdiction for contracts, set out in art.5(1) of that Regulation, under which jurisdiction lies with the courts for the place of performance of the obligation in question. Thus, those rules must necessarily be interpreted strictly (see judgment of 28 January 2015, *Kolassa (C-375/13) [2015] I.L.Pr. 14*, [28] and the case law cited).

44. Next, the Court has already held that, since the special system established in art.15 et seq. of Regulation 44/2001 is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, the consumer is protected only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings. Consequently, an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts (see, to that effect, judgment of 19 January 1993, *Shearson Lehmann Hutton Inc v TVB Treithandgesellschaft fur Vermögensverwaltung und Beteiligungen mbH (C-89/91) EU:C:1993:15; [1993] I.L.Pr. 199*, [18], [23] and [24]). The same considerations must also apply to a consumer to whom the claims of other consumers have been assigned.

45. The rules on jurisdiction laid down, as regards consumer contracts, in art.16(1) of the Regulation apply, in accordance with the wording of that provision, only to an action brought by a consumer against the other party to the contract, which necessarily implies that a contract has been concluded by the consumer with the trader or professional concerned (judgment of 28 January 2015, *Kolassa (C-375/13) [2015] I.L.Pr. 14*, [32]).

99. She also drew on several aspects of the opinion of AG Bobek as had Ms Deal. In particular paragraphs 78-82 in which the importance of the particular consumer seeking to rely upon the jurisdictional gateway being the consumer who brought the contract and not someone who might have stepped into his shoes.

AG78. The applicant submits that the consumer bringing the claim does not necessarily need to be the same consumer who is party to the consumer contract. Both he and the German Government, argue that art.16(1) of Regulation 44/2001 refers to “a consumer” as the person who can bring the claim not to “the consumer”. According to the applicant, requiring identity between the contractual parties and the parties to the proceedings

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<sup>19</sup> My emphasis provided

would amount to a *contra legem* unwritten condition for the application of art.16(1) , not admissible under the Regulation.

AG79. This argument fails to convince. The wording of both art.15 and art.16 of Regulation 44/2001 clearly stresses the importance of the identity of the parties to the concrete contractual relationship in the determination of the applicability of those provisions.

AG80. First, drawing such significant conclusions from the simple use of an indefinite Article at the beginning of a sentence appears somewhat far-fetched. It starts to crumble when inspecting other language versions, such as those in Slavic languages, which do not use (in)definite Articles and where accordingly no such distinction is made. Above all, however, even in the languages that employ Articles and make this distinction, it would be quite logical that since the word “consumer” is mentioned for the first time in a sentence, the first reference is to “a” consumer (using the indefinite), whereas the second reference to the same consumer in that sentence is “the” consumer.

AG81. Secondly, the wording of art.16(1) of Regulation 44/2001 is clear: “a consumer may bring proceedings *against the other party to a contract*”.<sup>18</sup> In the same vein, art.16(2) of Regulation 44/2001 provides that “proceedings may be brought against a consumer *by the other party to the contract* only in the courts of the Member State in which the consumer is domiciled”.

100. Further, those parts of his opinion relied upon by Ms Deal<sup>20</sup> were in fact supportive of the defendant’s position particularly paragraph 98 where AG Bobek emphasised the broader nature of the special jurisdiction for matters relating to insurance.

101. She also drew the court’s attention to paragraph 32 and 33 of the judgment in **KABEG** to demonstrate that the purpose of adding injured persons is not mirrored in the consumer cases:

32. As the Advocate General observed, in [AG47] of his Opinion, the notion of the “weaker party” has a wider acceptance in matters relating to insurance than those relating to consumer contracts or individual employment contracts.

33. It should also be recalled that the Court has held that the purpose of the reference in art.11(2) of Regulation 44/2001 is to add injured parties to the list of plaintiffs contained in art.9(1)(b) of that Regulation, without restricting the category of persons having suffered damage to those suffering it directly.....

102. Miss Healy’s third point was that there was no basis for any analogy or cross-fertilisation between the consumer contract section and the insurance section. She referred in particular to the decision of the Supreme Court in **Aspen Underwriting Ltd v Credit Europe Bank NV [2020] UKSC 11** in which the defendant bank had sought to rely upon the insurance jurisdiction gateway as the “weaker” party in a dispute over a mistaken insurance payment by insurers in a shipping claim. Lord Hodge, giving the main judgment said at paragraph 35:

“35. First, it is to my mind important to note that the title to section 3 “Jurisdiction in matters relating to insurance” is broader than the words of Article 7(1) “matters relating to a contract” (emphasis added). Similarly, it is wider than the titles of section 4 “Jurisdiction over consumer contracts” and section 5 “Jurisdiction over individual contracts of employment”. The difference in wording is significant as it would require to be glossed if it were to be read as “Matters relating to an insurance contract”. Such a gloss would not be consistent with the requirement of a high level of predictability of which recital (15) speaks...”

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<sup>20</sup> See paragraph 89 above and the extract provided

103. The bank was entitled to utilise the insurance gateway as beneficiaries, and the “weaker party” exception was held to be inapplicable.

“43. I respectfully disagree with that conclusion. There is no “weaker party” exception which removes a policyholder, an insured or a beneficiary from the protection of Article 14 . I have come to this view for the following six reasons, which I will vouch when I discuss the case law below. First, the reason why Article 14 protects the policyholder, the insured and the beneficiary of an insurance policy is because they are generally the weaker party in a commercial negotiation with an insurance company and are as a matter of course presented with a standard form contract. Secondly, while recital (18) explains the policy behind, among others, section 3 of the Regulation, it is the words of the relevant Articles which have legal effect and the recitals are simply an aid to interpretation of those Articles. Thirdly, derogations from the jurisdictional rules in matters of insurance must be interpreted strictly. Fourthly, the CJEU in its jurisprudence has set its face against a case by case analysis of the relative strength or weakness of contracting parties as that would militate against legal certainty. Instead, it has treated everyone within the categories of the policyholder, the insured or the beneficiary as protected unless the Regulation explicitly provides otherwise. Fifthly, the CJEU looks to recital (18) not to decide whether a particular policyholder, insured or beneficiary is to be protected by section 3 but in the context of reaching a decision whether by analogy those protections are to be extended to other persons who do not fall within the list of expressly protected persons. Sixthly, the policy which underlies the jurisprudence of the CJEU when it decides whether to extend the protection to persons not expressly mentioned in section 3 is that the court seeks to uphold the general rule in Article 4 that Defendants should be sued in the courts of the member state of their domicile and allows extensions to the protection of section 3 only where such an extension is consistent with the policy of protecting the weaker party.”

104. This supported the proposition that even within the insurance exception the concept of “weaker party” was not a tool which could be utilised to extend the categories of persons entitled without limit, and this undermined any argument of analogy with regard to the consumer protection gateway, taking into account recital 18.

105. Her fourth point was that both the regulations and the interpreting European jurisprudence were aimed at achieving predictability as demonstrated in the authorities already referred to.

106. The fifth point was based upon a similar premise, that the jurisdiction was intended to be exceptional, and a departure from the cornerstone rule.

107. Ms Healy’s final point on this limb of her submissions was that the Defendants’ position was supported by domestic case law. She referred in particular to **Cole v IVI Madrid [2019] 9 WLUK 373**, a claim concerned with defective IVF treatment in which the Claimants sought to recover damages for themselves as parents, and two of their children who were born with cystic fibrosis following treatment at a private clinic in Spain. One of the issues which arose was whether or not the children were entitled to make use of the consumer contract gateway, as having not been parties to the original contract. The matter was heard before His Honour Judge Rawlings, sitting as a deputy High Court judge. Ms Healy relied upon the following passage, where the judge, having referred to the opinions of the advocates general in both **Shearman** and **Schrems** held at paragraph 122 that:

121. I have read the opinions of Advocate General Darmon and Advocate General Bobek in *Shearman Leahmann* and **Shrems** respectively and the judgments of the CJEU in those cases. I am satisfied that the Advocate Generals and the CJEU in those cases did make it clear that "consumer" under Article 18 has the same meaning as "consumer" under Article 17 . I refer by way of example to:

- (a) paragraph 21 of the opinion of Advocate General Darman in *Shearman Lehmann* where he says "the alternative jurisdictions and the special jurisdiction for which a consumer qualifies under the first paragraph of Article 14 of the Brussels Convention [18 RB1 ] apply only where "a consumer"... brings proceedings against the other party to the contract.. The concept of "consumer" within the meaning of Article 14 [18 RB1] necessary refers to that contained in Article 13 [17 RB1] . It is inconceivable in the absence of an express provision that the term "consumer" used in two consecutive Articles should refer to two different things"...; and
- (b) paragraphs 28 – 32 of the opinion of Advocate General Bobek in **Shrems** as to Article 15 and 16 [17 and 18 of RB1] "... Two elements are discernible under Article 15 [17 RB1] : first the consumer is not defined in general, abstract terms, but always with regard to "a contract..." It means that an assessment of the consumers status is always contract – specific: the specific contractual relationship at issue must be considered... The determination of consumer status must be made by reference to the position of that person in a particular contract..."

122. I am also satisfied that Article 17 provides that to be regarded as a consumer for the purposes of Article 17 (and therefore, on my findings also for the purposes of Article 18 ) the proceedings must relate to a contract entered into by a consumer with a party pursuing commercial or professional activities. That is the clear wording of Article 17 which provides "In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this section ..... If: ....(c)... The contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumers domicile or, by any means, directs such activities to that member state....."

108. Accordingly, there was no basis for a claim under the consumer contracts gateway by the heirs.

### Discussion

109. Following the obvious order of the several sub-issues, I deal first with the question as to whether there is plausible evidence of a contractual arrangement between the late Mrs Flowers and/or her husband, and the hospital, D1. I have little difficulty in coming to the conclusion that there is, for several reasons.

110. First, at this stage of determining jurisdiction it is clear that the court is not required to undertake a detailed enquiry into the evidence or to analyse the complexities of the legal relationship. This is clear from **Benincasa supra**. I agree with Ms Deal that assistance can also be derived from the case of **Brogstter** where a claim which was on its face was for tortious liability could still concern "matters relating to a contract".

111. I accept that the guidance in **Brogstter** and its interpretation in subsequent cases, in particular in the English case of **Committeri**, requires the question of "indispensability" in considering a breach of the rights and obligations set out in the contract, and whilst this is a question



which cannot be ignored even at the jurisdictional determination stage, it is not a matter which requires a fine analysis, bearing in mind that the court should not be looking at either the national law of the state in which jurisdiction is being sought, or the law of the state in which the contract is said to have arisen (although this may require more detailed examination if jurisdiction is accepted) but an independent autonomous interpretation of the concept of a contract in the context of the objectives of the Convention, and the protection which it affords.

112. I am not assisted by the assessment of the Spanish legal experts as to whether or not the admission of Mrs Flowers into hospital is one which would have been regarded as for insurance reimbursement or a hospitalisation contract, or a tripartite arrangement whereby the insurer was not the agent but the party directly contracting with the hospital. In any event the factual scenario here was far from straightforward. There is no dispute that Mrs Flowers had no obligation to pay for the initial admission which was on an emergency basis. Equally, I have seen no evidence which suggested that her insurance policy would have paid for the seven days of care which followed thereafter, and these were crucial days in the terms of the treatment that was provided. In fact, the evidence points to the contrary. Whilst the invoice may have been issued to a “dead person” in error, it is the inescapable fact that this private hospital required payment in principle for those seven days of hospitalisation, and at one stage looked to the family of Mrs Flowers for such payment. It may well be right that such documentation would be regarded as null and void in terms of establishing any contract in Spanish law, yet the fact remains that Mr Flowers asserts that there was a verbal agreement which enabled his wife to stay on in hospital when she might otherwise have been discharged.

113. In my judgment this provides sufficiently plausible evidence of an agreement notwithstanding the challenge that is mounted by the Defendants in terms of the inconsistency with the pleading, and the contradictory evidence of the hospital manager. Ultimately that is an enquiry which may have to be the subject of more rigorous testing but for the purposes of this determination, in my judgment the threshold is passed. Further, whilst it might be argued that this is a tortious claim dressed up as a contractual dispute, in fact if Mr Flowers is correct and the hospital accepted the later admission of his wife, this must have been on an undertaking that treatment would be provided (principally to alleviate her discomfort) and on the understanding that it was not being paid for by the insurance company. I have little doubt that in such circumstances, regardless of the nuanced position in Spanish law, in the context of the autonomous interpretation of matters relating to a contract for the purposes of regulation protection, a broader approach must be adopted.

114. Further support is derived for this conclusion from the circumstances in which Mrs Flowers became ill, and sadly succumbed to the infection which was treated by the hospital. It is not an elaborate construct that the putative agreement between Mrs Flowers and the hospital (through the agency of a husband) required such treatment to be carried out with reasonable care and skill, with the administration of appropriate medication and to the standard expected of reasonably competent medical practitioners. Whilst ostensibly tortious matters, and undoubtedly touching upon statutory requirements under Spanish law in terms of civil liability, on their face they are matters which in my

judgment may require an analysis of the obligations under the contractual arrangement applying autonomous EU law considerations.

115. Therefore, on the first question was there a contract between Mrs Flowers and the hospital, I have little difficulty in answering this in the affirmative.

116. As both counsel appear to acknowledge, the question as to whether this was a contract between a *consumer* as a person acting outside his or her trade or profession and the other party whose domicile is in the state where the contract was concluded who seeks to challenge the jurisdiction sought in the “consumer’s” domicile, and the wider issue as to whether the family members or heirs can inherit the claim and take advantage of the consumer contract exception gateway under Article 18, effectively merge, and it is expedient to deal with them together.

117. The more simple issue, *per se*, as to whether Mrs Flowers would have qualified as a consumer had she lived is straightforward to resolve. I am quite satisfied that in the event the jurisdiction of the English and Welsh courts had been sought, hypothetically, for Mrs Flowers if she had survived, she would have been regarded as acting outside her trade or profession; applying autonomous EU law touching upon matters relating to a contract the element of consumer protection would have been paramount, regardless of the potential complexities of the Spanish legal position as to whether a hospitalisation contract existed, or this had been a tripartite legal arrangement where the hospital was obliged to look to the insurer for reimbursement. It may be an academic question, of course, because all would have been revealed when the bill was ultimately paid. However, as the ECJ made clear in **Shearson Lehman**, the principle applies as much to interpreting matters relating to a contract, as to the concept of a consumer, who is clearly the weaker party and entitled to the protection of the regulation on the question of jurisdiction. This position is further emphasised in **Schrems** not only in the opinion of the Advocate General, but also in the judgment of the court.

118. Without doubt the more difficult question is whether that which could be interpreted as a consumer claim which can no longer be pursued because the contracting (and thus weaker) party is now deceased, can be picked up by heirs in the same jurisdictional gateway and pursued on the basis of the domicile of either the deceased or the heirs.

119. In this regard I agree with Ms Deal QC that the European jurisprudence has demonstrated a broadening of the class of those entitled to utilise the *insurance* gateway for direct claims against insurers as “injured persons” and that there is now a clear acceptance that heirs would qualify in this category. She has provided an elaborate and well-constructed argument that the parallel jurisprudence arising from the consumer gateway cases has not specifically precluded the heirs of a consumer from the category of entitled persons, and potentially they could be the weaker parties in relation to any identified contract, but the restrictions have been confined to those cases where the

person or persons seeking the jurisdictional exception have been assignees, save, of course, for the Claimants in the case of **Cole** *supra*, which whilst persuasive, was not binding on this court.

120. It is important to acknowledge that a purposive interpretation of the European regulations which provide protection for consumers, and in particular the Brussels Regulation Recast, is required. In my judgment it should not be ignored that cases have repeatedly emphasised the need for a focus on an individual contract, and the parties to that contract. The purpose of that, it seems to me, is clear. It is the rights and obligations of individuals, particularly in a consumer context, who are easily identified as the weaker party, which the court being asked to exercise a jurisdiction is seeking to enforce. Whilst the subject matter (or even the object) of a contract is not necessarily extinguished by the death of the contracting party, (and in many instances there will be an identifiable financial loss which an estate might be able to pursue), the need for the protection of the weaker party becomes far less obvious. Rights and obligations in a consumer context will often involve issues of delivery, quality, reimbursement, rectification and the like, by reference to contractual terms, and where there are heirs to the estate of a contracting party many of those issues will fall away, with any residual loss being limited.

121. Further, and continuing the purposive approach which is not only to ensure the protection of the weaker party, but also to provide predictability, there is a clarity of language in section 4 of the Brussels Regulation Recast which associates the entitlement to protection with the consumer as the individual, and not with a broader class of persons. In my judgment, the point is well made by Adrian Briggs in his text that the restrictive nature of the language cannot be overlooked, compared to section 3 which refers to *all* insurance matters.

122. Both parties have sought to rely upon the authoritative guidance given by Advocate General Bobek in his various opinions, which though not the judgment of the court, nevertheless have carried sway in other cases, including those decided within this jurisdiction.<sup>21</sup> In my judgment the position which he has adopted in both **Schrems** and **KABEG** is unequivocal, and despite the valiant attempts by Ms Deal to provide points of distinction, those opinions are largely unresponsive to a broadening of the category of *consumer* in section 4 which is contended for by her. In particular at paragraph 79 in **Schrems**:

“.....The wording of both art.15 and art.16 of Regulation 44/2001 clearly stresses the importance of the identity of the parties to the concrete contractual relationship in the determination of the applicability of those provisions....”

123. This was reinforced in paragraph 44 of the judgment of the court in the same case, in which it was held that the consumer is protected only insofar as he is the plaintiff or the defendant in his personal capacity in any proceedings.

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<sup>21</sup> See, for example, **Cole**, *supra*.

124. Insofar as the concept of the “weaker party” is being relied upon by the heirs of the late Mrs Flowers to enable a purposive interpretation of the consumer contract gateway, I find myself in agreement with Ms Healy that by itself this cannot justify an extension of the category of persons entitled to take advantage of the jurisdictional exception, especially when the language of the section was clear. Although the recent Supreme Court decision of **Aspen Underwriting Ltd** was dealing with the insurance gatewaying in its consideration of the applicability of the weaker party exception to the bank, Lord Hodge provided in his analysis a helpful observation:

“.....the CJEU in its jurisprudence has set its face against a case by case analysis of the relative strength or weakness of contracting parties as that would militate against legal certainty....”

125. It is quite correct that if this jurisdictional gateway cannot be used, the heirs of the late Mrs Flowers are being denied a *forum actoris* for any residual claim which might arise from the contract which she is deemed to have concluded with the hospital. However, if there is no longer a need for protection of the individual who has passed away, the absence of this forum is not defeating the purpose of the regulation.

126. The most compelling reason for precluding a route for the heirs through this gateway, apart from the difficulty of interpreting the restrictive language in the way contended for by Ms Deal QC, is that it is totally unprecedented within the European jurisprudence, and in my judgment this arises not simply because there has never been a similar situation facing the court upon which a ruling could be made, but because it would open the floodgates for potential claimants as the estates and heirs of contracting parties in a way that could not have been intended when the legislation was put in place. The provision of a special forum meant that the disadvantaged and naturally weaker consumer would not be forced into suing in a foreign and unfamiliar jurisdiction, as an exception to the cornerstone rule, as it has been described, when required to enforce rights and obligations, or to seek monetary recompense arising out of an individual and personal contract for goods or services. Quite apart from the need for a predictive regime, if the entitlement included “estate” or “heirs”, this could be as close as a widowed spouse, sibling, son or daughter, or a distant relative perhaps significantly removed geographically from the place where the contract was concluded, with little or no knowledge of the contract circumstances, and with little to gain from the consumer rights which are intended to be protected. It would make no difference in my judgment, whether the *forum actoris* arose because there was a subrogated claim, or whether this was the claim of the consumer which was inherited; by either approach, even if those stepping into the shoes of the deceased were the weaker party in relative terms, this would be stretching the category of entitlement beyond the purposes of the protective regulation, which was intended to be exceptional. In any event, even if there was some persuasive force in the invited approach, which I am presently unable to find, it would be a bold step for a court at this level of judiciary to create such a category.

127. In the circumstances, I am unable to accept the submissions of the Claimants through counsel that the consumer contract gateway is open to them.

## SECTION 4

### **INSURANCE GATEWAY**

#### Common Ground

128. Before dealing with the substance of the dispute in this section, it would be helpful to identify the common ground between the parties. Further, I will confine consideration to the question of a potential gateway for jurisdiction in relation to the claim against the insurer, D2, and defer the question of a parasitic claim (Article 13(3)) against the hospital, D1 to the next section.

129. The issue is expressed in simple terms as to whether the Claimants, (with the First Claimant included on the assumption that he can establish domicile) can bring a direct claim within this jurisdiction against the public liability insurer, D2, pursuant to Article 13 (2) on the basis that such a direct claim would be available in Spain, or whether it is precluded by virtue of the territorial scope clause within the insurance contract between D1 and D2.

130. The court has already considered in the context of the consumer contract gateway the European jurisprudence which has seen a broadening of the categories of those entitled, in insurance related matters, to rely upon the provisions of Article 10, 11 and 13. It is not in dispute that for the purposes of Article 13 (2) the injured party can be considered to include the heirs of a person who would have been an injured party had he or she not died.

131. A direct claim can be brought by the “injured parties” (including the heirs) against the liability insurer in principle under Spanish law. This is derived from Article 76 of the Insurance Contracts Act 50/1980:

*“The injured party or his heirs will have direct action against the insurer to demand the fulfilment of the obligation to compensate, without prejudice to the insurer's right to repeat against the insured person, in the event that it is due to the malicious conduct of the latter, the damage or harm caused to a third party. The direct action is immune from the exceptions that may correspond to the insurer against the insured person. The insurer can, nevertheless, enforce the exclusive fault of the injured party and the personal defences that he has against the latter. For the purposes of the exercise of the direct action, the insured person is obliged to inform the injured third party or his heirs of the existence of the insurance contract and its content.”*

132. In terms of any exception to the application of section 3 of the Brussels Regulation Recast and the provisions relating to the insurance gateway, this would only arise if there was a jurisdiction agreement between the insurer and the insured which complied with Article 15, but in any event such an agreement would not and could not bind an injured party. Accordingly if the territorial scope clause relied upon by D2 was considered to be a jurisdiction agreement it would have no effect on the direct right of action, and the use by the Claimants of the insurance gateway.

### Applicable legal principles

133. In **Odenbreit**,<sup>22</sup> the ECJ held that a proper interpretation of Article 11 (2) of regulation 44/2001 was that an injured party did not have to be classified as a beneficiary under Article 9 (1)(b)<sup>23</sup> and that a person injured in a road traffic accident was entitled to bring a direct action against the insurer in the country of his domicile. As indicated above, this now includes the heirs of the injured party.

134. In circumstances where an exclusive jurisdiction clause exists between the insurer and the policyholder, which might otherwise provide the exception to the application of section 3 above, this could not be used to compel an injured party exercising his right to sue in the country of his domicile under the insurance gateway and Article 13(2), or in the courts of the place where the harmful event occurred. In **Société Financière et Industrielle du Peloux v Axa Belgium (C-112/03)** a French company which manufactured insulation panels and which wished to pursue a direct claim against its insurer in France, where the policy taken out by the parent company contained an exclusive jurisdiction clause for proceedings to be brought in Belgium, was held by the ECJ to be entitled to do so. The policyholder, as the beneficiary under the policy, was considered to be the weakest party, and the court endorsed the approach to be taken when considering whether the autonomy afforded by the exceptions within the regulation to allow agreements in relation to jurisdiction should not take away the protection which the regulation otherwise afforded. In its judgment the court said at paragraph 33:

“Thus, the principle of party autonomy enables the policyholder, the weakest party to the contract, to waive either of the two forms of protection afforded by the Brussels Convention . However, by virtue of the overriding aim of protecting the economically weakest party, that autonomy does not extend so far as to allow such a policyholder to waive entitlement to the jurisdiction of the courts of his domicile. As the weakest party, he must not be discouraged from suing by being compelled to bring his action before the courts in the State in which the other party to the contract is domiciled.”

135. The relevant provision was Article 12 (3) which is an early incarnation of Article 15 in the Brussels Regulation Recast, and the court went on to make the following helpful observations at paragraph 38ff:

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<sup>22</sup> Considered at paragraph 83 above

<sup>23</sup> In both respects the predecessor provisions to 13(2) and 11 (1)(b) in the current regulation.

“38. Consequently, a jurisdiction clause based on Art.12(3) of the Convention cannot in any event be accepted as enforceable against a beneficiary unless it does not undermine the aim of protecting the economically weakest party.

39. As the Advocate General observed in points AG62 and AG67 of his Opinion, the enforceability of such a clause would have serious repercussions for a third-party beneficiary domiciled in another contracting state. First, it would deprive that insured of the opportunity to bring proceedings before the courts for the place where the harmful event occurred or to bring proceedings before the courts of his own domicile, by compelling him to pursue the enforcement of his rights against the insurer before the courts of the latter's domicile. Secondly, it would enable the insurer, in proceedings against the beneficiary, to have recourse to the courts of his own domicile.

40. The result of such an interpretation would be to accept a conferral of jurisdiction for the benefit of the insurer and to disregard the aim of protecting the economically weakest party, in this case the beneficiary, who must be entitled to bring proceedings and defend himself before the courts of his own domicile.”

136. In **du Peloux**, the court was of course dealing with an agreement in relation to jurisdiction to which the policyholder/beneficiary of the insurance was a party, but the principle upheld in that case was followed and extended to the *victim* of insured damage who was even more removed from the contract of insurance than the beneficiary, in the case of **Assens Havn v Navigators Management Ltd (Case 368/16)**. A Danish port suffered damage from collision with a vessel which was insured by the defendant insurance company, but the owner of the vessel subsequently went into liquidation. A direct claim was brought against the insurance company in the Danish courts utilising the insurance gateway, and the predecessor provision in (11)(2). The reasoning of the court can be found at paragraph 33 and following, and it provides a helpful context for the present case; accordingly I set it out in full:

“33. As regards whether an agreement on jurisdiction may be invoked against the victim of damage, it is apparent, firstly, that, under art.13, Point 5, of Regulation 44/2001, read in conjunction with art.14 , Point 2(a), thereof, it is possible to derogate by such an agreement from the provisions of s.3 of that Regulation, in particular in the case of insurance contracts covering all liabilities arising from the use or operation of vessels.

34. Secondly, it is not in dispute that art.11(2) of Regulation 44/2001, pursuant to which arts 8, 9 and 10 of that Regulation apply to direct actions brought by a victim against an insurer, does not refer to arts 13 and 14 of that Regulation and, accordingly, agreements of prorogation of jurisdiction.

35. It is therefore not apparent from the scheme of the provisions of Ch.II, s.3, of Regulation 44/2001 that an agreement on jurisdiction may be invoked against a victim.

36. In that regard, the Court has previously noted that, in matters of insurance, prorogation of jurisdiction is strictly circumscribed by the aim of protecting the economically weaker party (see, to that effect, judgment of 12 May 2005, *Société financière et industrielle du Peloux (C-112/03) [2005] I.L.Pr. 32, [31]*).

37. Thus, art.13 of Regulation 44/2001 lists exhaustively the cases in which the parties may derogate from the rules laid down in its Ch.II, s.3.”

137. Both these cases, and the relevance of an exclusive jurisdiction clause were considered recently by Andrews J (as she then was) in the High Court in the case of **Hutchinson v Mapfre & Ice Mountain [2020] EWHC 178 QB** in circumstances which are said to be very similar to the present case, and upon which counsel for the Claimants places heavy reliance, whilst counsel for D2 asks me either to decline to follow or distinguish it. Accordingly, it requires careful consideration both in relation to the application of any general principle it establishes, and in the context of counsels’ arguments.

138. In brief outline, Mr Hutchison sustained serious injuries when using a swimming pool at the premises of the insured/policyholder Ice Mountain, which ran a beach bar in Ibiza. He chose to bring

proceedings in England utilising both the consumer contracts gateway and the insurance gateway against the beach bar owner and the insurer respectively. He also sought to bring in a parasitic claim under Article 13(3).<sup>24</sup>

139. On the jurisdiction challenge, Andrews J wrestled with a number of issues, and her findings in respect of several of these are not relevant to the present case. However, she was required to address the question as to whether a territorial scope clause in the policy of insurance held by the beach bar and governing the contract with the insurer operated to prevent a direct claim against the insurer in respect of proceedings not brought in Spain. The terms of the clause under territorial scope bear a striking resemblance to the relevant clause in this case:

*“this policy will only cover claims submitted within Spanish jurisdiction for events that taken place in Spain leading to liability or other obligations imposed in accordance with the legal provisions in force within the territory of Spain.”*

140. Both parties on this specific question relied upon the evidence of Spanish legal experts as to the interpretation of Spanish law. Andrews J chose to determine the matter initially by reference to EU principles, but considered in the alternative, whether as a matter of Spanish law, and the enforceability of the direct claim against the insurer, the territorial scope clause would render the claim invalid because proceedings had not begun in Spain.

141. The learned judge dealt with the decisions in both **du Peloux** and **Assens Havn**, and the argument advanced by counsel for the insurer that the clause in question was not a traditional exclusive jurisdiction clause because it was only the policyholder or an insured beneficiary which was required to bring claims under the policy before the Spanish court, and the fact that this was not a claim by Ice Mountain, but against Ice Mountain was a significant distinguishing factor. She noted that the effect of counsel’s submission was that the right of direct action was lost if proceedings were not brought in Spain, before addressing the effect of Article 15 in the light of the clause relied upon. At paragraphs 83 and following she said:

“83. Article 15 is concerned with an agreement between a liability insurer and an insured who are domiciled or habitually resident in the same Member State " *which has the effect of conferring jurisdiction on the courts of that state*". That is precisely the effect of this clause, albeit that the effect is indirect. The reasoning in *Assens Havn* applies with equal force to a clause of this nature. It cannot be used to force a stranger to the contract to give up his rights to sue Mapfre (or Ice Mountain) in the courts of his own domicile or make those rights meaningless. It is an impermissible derogation from the special jurisdictional rules.

84. If a clause which has that effect can be relied on against a person such as Mr Hutchinson it would drive a coach and horses through the special rules on insurance laid down under Section 3 of Chapter II . It would provide every liability insurer (not just Spanish insurers) with the simplest means of depriving the injured party of the choice of additional jurisdictions conferred upon him by Articles 11 to 13 of Recast Brussels 1 . It would be the easiest thing in the world for an insurer, as the economically strongest party, to include a standard term in the policy that he is only liable for claims that have been brought against the policyholder in the courts of the policyholder's and/or the insurer's own domicile.”

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<sup>24</sup> Dealt with in more detail in the following section.



142. Although determining the jurisdiction question in favour of the Claimant on the basis of European law principles, the judge went on to address an alternative approach by considering the Spanish law arguments, dealing of course, with the threshold on a jurisdictional dispute as to whether the Claimant had a good arguable case on the merits. She concluded that he did, drawing a distinction between terms which defined the risk, and terms which restricted the rights of the insured party or policyholder. She acknowledged that the specific clause relied upon appeared to contain both elements, but after considering the respective positions of both legal experts, and in particular the opinion expressed by the Claimant's expert that the clause which deals with an event which must take place after the risk had arisen could only be *rights defining or restricting* rather than *risk defining*, she concluded at paragraph 98:

“98. At this stage, I find Mr Villacorta's argument far more persuasive. The object of liability insurance is the legal liability of the assured to pay compensation to third parties arising from a specified event or occurrence, and that liability will not be defined by the place where the injured party makes his claim. In fact, it will already have arisen before any claim is made. It is highly artificial to define the insured risk as "the risk of being liable to pay a Spanish judgment" or "the risk of being liable to pay a claim made in Spain" rather than "the risk of being liable to pay damages under Spanish law for an event that happened in Spain".”

### Relevant evidence

143. The evidence which falls to be considered on this issue is comprised in the two reports of the Spanish legal experts.

144. Mr Ybarra, instructed on behalf of the Defendants, from paragraph 86 onwards deals with the question of the direct claim against the insurer. He provides his understanding of the Spanish legal position in relation to a direct claim by an injured person or his heirs as per Article 76 *supra*. He points out that whilst the right of a direct action is immune to any exceptions in the insurance contract between the insured and the policyholder this did not extend to entitle an injured party to claims which could not be made under the insurance contract, and was confined to personal exceptions, such as bad faith and the like. He made reference to a number of Spanish Supreme Court decisions which dealt with direct action claims against insurers and the way in which the risk was defined, to support his primary contention that there could not be any greater cover available to the injured party than to the insured policyholder, before dealing with the specific the clause in the relevant public liability insurance agreement.

“b. Clause 6 of the Special Conditions states:

“6. GEOGRAPHICAL LIMITATION The guarantee under this policy includes the liability of the insured derived from acts performed or damages caused within the geographic scope specified under the Specific Terms and Conditions, insofar as the claim is filed with the Spanish courts and pursuant to the Spanish law. Any indemnity and cost arising from this insurance shall be always paid in euros and in Spain.

.....

This insurance guarantee is applicable and limited to the liability derived from damages caused within the Spanish territory and claimed or recognised by the Spanish courts as per the Spanish legal system.”

145. After explaining the way in which Spanish insurance policies were constructed, including the distinction between general and specific terms, Mr Ybarra expressed the opinion that the clause set out above was one which created a *geographical delimitation of the risk* which was insured, that is describing the nature and extent of the cover, and was not a clause which purported to limit the rights of the insured policyholder. If it had been the latter, there would have been a requirement under section 3 of the Insurance Contracts Act (under Spanish law) for the provision to be emphasised and signed, but in any event that was a requirement which had been complied with.

146. He made further extensive reference to Spanish Supreme Court jurisprudence to support his argument that special geographical delimitation in an insurance agreement is a clause which is delimitative of the risk, which is precisely what the clause here purported to do. The fact that there was also a requirement that the claim be filed within the Spanish courts and be governed by Spanish law did not change the position; this was a matter which was central to a definition of the cover and the premium which was charged for the public liability insurance.

147. Insofar as the case of **Hutchinson**, on the Spanish law question, appeared to favour a contrary view with a clause which was similar if not entirely identical, he expressed the view that the judge had come to the wrong conclusion, or did not have sufficient evidence before her, having acknowledged that the material was limited. He also suggested that the court may have been influenced by the fact that the consumer protection element was somewhat different to the present case and that it made sense to have both claims dealt with in the same jurisdiction.

148. For the purposes of considering Article 13 (2), whilst accepting that under Spanish law a direct action would be available to the heirs of the deceased, i.e. the Claimants, this would be precluded on the basis of the territorial scope clause referred to if a claim had been commenced outside Spain, and therefore it could not be said that the provisions of the Article, which provided a gateway allowing an exception to the general rule on jurisdiction, had been complied with. As the Spanish Supreme Court has ruled, if the claim of the injured third party does not fall within the limits of what is covered under the insurance contract, there is no right to claim on the basis of the direct action.

149. On behalf of the Claimants, as might be expected, Ms Romero provides the opposite view. By referring to the terms of the geographical limitation clause, she points out that this not only contains a geographical limit of the risk covered (which in any event would not have been a bar in this case because the risk materialised on Spanish soil) but also a jurisdiction clause, i.e. the provision requiring claims to be brought within Spain, and therefore it is not a clause that delimits the insured risk but which provides a completely different nature and purpose. She states that the

Supreme Court cases relied upon by Mr Ybarra were confined to geographical scope clauses which delimited the risk, that is determined the extent of the cover on the basis that risk was defined by the place of occurrence of the harmful event, and did not provide authority for the premise which he contended for that a requirement that proceedings be brought within a defined geographical area fell into such a category.

150. She also made reference to the European Court jurisprudence, but this is a matter which is covered in the arguments of counsel and I shall deal with it below.

151. Mr Ybarra had a chance to respond, and expressed strong disagreement with Ms Romero that a stipulation in relation to identifying the country where the claim was to be filed, namely Spain and in accordance with Spanish law, imposed any jurisdiction, but instead related to the scope of cover and went to the risk underwritten by the insurance company.

### The respective arguments

#### *Claimants*

152. The primary argument advanced by Ms Deal QC is that whilst **Hutchinson** was determined in a court of parallel jurisdiction, and does not bind this court, it is highly persuasive with the decision of Andrews J considered in subsequent and recent High Court authority to be “*powerful and closely reasoned*” as per Jacobs J in **Alli-Balogun v On The Beach [2021] EWHC 1702 (QB)**. The principal requirement for a direct claim pursued in the domicile of the Claimant is that this is permissible under the relevant national law, that is the law of Spain, and the circumstances which prevailed in **Hutchinson** were strikingly similar to those in the present case.

153. In approaching a jurisdictional challenge, she submitted that the court should not be drawn into a detailed or analytical assessment of a public liability insurance contract between parties other than the injured party, not least because this would prejudice the subsequent determination of the claim, and also because the right to a direct action against the insurer should arise from the system of the law and not from a contractual analysis. In this respect it was unnecessary to dwell on the detail of the Spanish legal interpretation of the insurance contract and much of the evidence of the experts, particularly that of Mr Ybarra, should fall away. The central question which this court must ask, following the approach taken by Andrews J in **Hutchinson**, is whether the route is available to the Claimants under regulation 13 (2) or whether in the exhaustive circumstances provided for by Article 15 where there has been a jurisdictional agreement under the terms of that provision it can be excluded and considered as an appropriate derogation from the right. Andrews J was correct to follow the ratio of the CJEU in **Assens Havn** (and in **du Peloux**) that the prorogation of jurisdiction was strictly circumscribed to protect the position of the injured party, as the economically weakest party.

154. Further, the reasoning of the judge in **Hutchinson** applied with equal force here, that if the clause relied upon had the effect contended for, this would effectively cut off a route for the weaker party to pursue a claim in his or her own domicile, contrary to the purpose of the regulation, allowing an insurer to prevent direct actions on the part of the injured party by including territorial scope clauses for the issue of proceedings in every insurance contract.

155. In the event that it was necessary to consider the Spanish legal question, and in this respect it should only be on the jurisdictional challenge threshold as to whether or not there was plausible evidence supporting the Claimant's position, Ms Deal invited the court to prefer the evidence of the Claimants' Spanish expert Ms Romero, and to note the approach which was taken by Andrews J to a near identical clause in **Hutchinson**, and where arguments very similar to those pursued in the present case were heard. A distinction has to be drawn between defining a risk by reference to the place where the event occurred, and how the claim was required to be resolved *after* the risk eventuated. Following the reasoning of Andrews J in this regard as well, (as set out in paragraph 98 of her judgment *supra*) liability should not be defined by the place where the claim is filed; this should not be regarded as a clause limiting the risk, but one which was relevant to the personal rights and obligations of the insured, and a question of jurisdiction. At the very least, noting the dispute between the experts, the Claimants have the better argument on this point, even if it could not be fully resolved in accordance with Spanish law until a final determination.

### *Defendants*

156. On behalf of the Defendants, and specifically D2 on this issue, Ms Healy contends that this court should not regard itself as bound by **Hutchinson**, which was in any event wrongly decided. The court on that occasion did not have the benefit of a full investigation into the Spanish legal position as exists in this case, and she invites the court to undertake the enquiry which is suggested by her expert Mr Ybarra as to whether the territorial scope clause relied upon is an appropriate geographical delimitation provision in relation to the risk covered.

157. It is plain, she submits, that if the hospital was not covered for public liability under the terms of this particular policy, because a judgment had been given in an English court and yet a direct action was still permitted to the Claimants in accordance with European law principles, they would be afforded a wider scope of cover than that which had been granted to the hospital. It was for this reason that the court should be considering the territorial scope clause in the context of Article 13 (2) and in particular should not dismiss the availability of the direct claim under Spanish law as lightly as that suggested by counsel for the Claimants.

158. She accepts that the effect of **Assens Havn** is that an insurer cannot defeat a direct action by an injured party by invoking a jurisdiction restricting clause in insurance agreement, but that is not what D2 is seeking to do in this case. Instead it is relying on the scope of cover which is defined by

the clause identified. In this respect she places significant reliance on the evidence of Mr Ybarra that a clause which is delimitative of the risk, and defining that risk by reference to the jurisdiction in which the claim is pursued, is enforceable under Spanish law without the need for any special requirements such as emphasis or signature, and this is directly relevant to the question which is posed under Article 13(2), because it would mean that the requirement that a direct claim is allowable under national law cannot be complied with. Even if the territorial scope clause is not a delimitative of the risk, but limited to the insured's rights, it was still an enforceable provision which impacted on the availability of a direct action because the requirements of section 3 of the Insurance Contracts Act been complied with, that is it had been emphasised and the subject of the signature of the policyholder.

159. It is accepted by Ms Healy that Andrews J regarded the territorial scope clause in **Hutchinson**, admittedly similar to the present one, as amounting to an exclusive jurisdiction agreement which is not permissible unless it meets the requirements of Article 25 of the Brussels Regulation Recast, and which in any event falls foul of Article 15. However she was wrong to do so, because there is a significant difference between a provision such as this which geographically delimits the risk and a true exclusive jurisdiction agreement. Accordingly, the decisions in **Assens Havn** and **du Peloux** should have no bearing on this case, and should not have had any bearing in **Hutchinson**.

160. Ms Healy challenges that a jurisdiction clause is not defined in the regulations, and points to Article 25 as making plain what is required. She further submits that the territorial scope provision in the Berkley policy could not bind a third party (such as the Claimants) to that insurance contract. On any construction of the clause in this case it is clear, she submits, that geographical delimitation of the risk does not come close to making this a jurisdiction clause, and the central question for this court should be whether a direct action is available under Spanish law. The submission of D2 is that Article 13 (2) is not engaged because the direct action is not so permitted.

161. Ms Healy gives four reasons as to why this court should depart from the reasoning of Andrews J in **Hutchinson**. First, the judge stated that she could not arrive at a definitive view. Second, not all the relevant Spanish authorities were before the court and particularly, as Mr Ybarra has said, there were some cases which were not mentioned in the judgment. Third on the basis of the evidence of Ms Romero, there is no disagreement that this was a delimiting rather than a limiting provision, and that the requirements of Article 3 of the Insurance Contracts Act were still met. Fourth, the observation of Jacobs J in **On the Beach** was a passing comment, and did not endorse the reasoning of Andrews J. Jacobs J did indicate that it had not been unreasonable to pursue the jurisdiction challenge which was subsequently withdrawn.

### Discussion

162. Whilst I do not regard myself as in any way bound to follow the decision of Andrews J in **Hutchinson**, which is of persuasive force only, and acknowledging as I must that a jurisdictional challenge should be considered on its own merits applying the necessary evidential threshold, I indicate at the outset of this determination for reasons which follow that I am in complete agreement with her and can find no basis to come to a different conclusion. There are of course points of distinction between the present claim and **Hutchinson**, not least because for Mr Hutchinson no issue of domicile arose, and he was entitled to pursue the contractual claim as a consumer under section 3 of the Brussels Regulation Recast, a course which is not open to the Claimants in this case for reasons set out above. However, I am unimpressed by the suggestion made by Mr Ybarra in his report/statement and picked up by Ms Healy on behalf of D2, that Andrews J may have been influenced by the advantage of keeping potential claims within the same jurisdiction, when it was clear that the consumer gateway was open to Mr Hutchinson. That is not a qualification or justification which appears anywhere within her judgment.

163. First, I remind myself that on this preliminary challenge to jurisdiction the court is not required to become involved in the scrutiny of the *minutiae* of the terms of an insurance contract, as Ms Deal QC puts it, to make the kind of determination which requires the investigation and analysis of competing legal arguments on the interpretation of Spanish law. The primary question must be whether or not the gateway is open to the Claimant's under Article 13 (2) because a direct right of action is permissible by an injured party against the insurer under the national law of the country concerned, namely Spain. This involves the application of EU principles first and foremost. Of course there will be circumstances where the direct right of action might be denied, and obviously so. For instance save in very limited circumstances there is no parallel right in the United Kingdom, but that is not the law which falls to be addressed. It seems to me that the approach adopted by D2 amounts to this: the court should somehow ignore the fact that Article 76 permits a direct right of action but instead focus on whether indemnity would be denied to the insured if the condition of commencing proceedings in Spain is not complied with. Whether it might be denied, with respect misses the point, because on the question of determining jurisdiction that is not an enquiry which has to be made.

164. Second, applying EU principles of law based upon the proper interpretation of the Brussels Regulation recast, the availability of the direct right of action against the insurer should be seen in the context that where there is an entitlement which is a derogation from the general rule on jurisdiction that is to be construed narrowly, regard should be had to the purpose of the entitlement that the weaker party is being protected by rules of jurisdiction more favourable to his interests. If the availability of the direct right of action depended upon the existence or otherwise of an agreement between the policyholder and the insurer to which the weaker injured party was not privy that would be a denial of the protection which was the purpose of the derogations from the general rule, and the EU jurisprudence has been consistent in making it clear that such a denial is unacceptable. I do not agree with Ms Healy that the decision in **Assens Havn** has no bearing on this

case. In my judgment, it is quite apposite, affirming that the victim of damage insured under the policy which is the subject of the insurance agreement is even further removed from the contractual arrangement than a beneficiary who did not consent to such an agreement. This was the natural progression of the position which had been established in **du Peloux**, giving primacy to the need to protect the weaker party. It is difficult to see how the European legislators, establishing such a purpose, would have contemplated allowing a derogation from the protection afforded by the direct right of action against the insurer if circumstances existed whereby some form of agreement between insurer and the policyholder could bypass the regulation. I am quite sure that it was this concern which caused Andrews J to express herself in these terms when describing the “coach and horses” effect of such a clause:

“It would be the easiest thing in the world for an insurer, as the economically strongest party, to include a standard term in the policy that he is only liable for claims that have been brought against the policyholder in the courts of the policyholder's and/or the insurer's own domicile.”<sup>25</sup>

165. Third, on the same application of EU law principles, it is an elaborate construct on the part of D2, in my judgment, that the availability of a direct action in Spain is dependent upon the provision of indemnity by the insurer to the hospital in relation to its liability, and this is precluded because the risk insured against only relates to claims which are commenced in Spain. Whilst it may be arguable (see subsequent paragraphs) that an indemnity would be refused to the hospital because this requirement has not been complied with, for the purposes of considering whether or not the gateway is open to the injured party, the provision which gives rise to this requirement, and thus the refusal of an indemnity, is not one which binds the injured party, who should be free to choose jurisdiction in accordance with Article 13 (2). It is clear that in **Hutchinson** when addressing the European law question the learned judge proceeded on the premise that this amounted to an exclusive jurisdiction clause which was subject to the strictures of Article 15 considered in conjunction with Article 25. In other words it was always open to the insured and the policyholder to agree such compliant exclusive jurisdiction clauses, but as Andrews J said in paragraph 76 of her judgment this did not compel the injured party to bring the claim other than in the court of his legitimate choice.

166. I also find myself in agreement with Andrews J, again for the purposes of considering the European law position that regardless as to how this clause is described (noting that in **Hutchinson** counsel for the insurer stated that it was *not a traditional exclusive jurisdiction clause* because it did not compel the policyholder or a beneficiary to bring the claim under the policy before the Spanish court), it is the effect which falls to be considered. The effect of this particular clause, described by D2 as a territorial scope clause delimiting the risk insured against, is that it compels the party to bring proceedings in Spain, on pain of losing the direct right of action against the insurer. In particular paragraph 82 she said:

“82. ....Mr Doherty was constrained to accept that the substantive effect of the clause would be to compel an injured party with a direct right of action against Mapfre under Spanish law in respect of an accident in Spain for which Mapfre's insured is potentially liable in Spanish law, to sue both the insured and the insurer in Spain. If he did not bring the proceedings in Spain, he would lose his direct right of action. He would not be

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<sup>25</sup> **Hutchinson** para 84

able to pursue a direct action against the insurer alone in the courts of his own domicile, or pursue claims against both insured and insurer there, as Mr Hutchinson has sought to do.”

The substantive effect of the clause in the present case is an entirely appropriate consideration, in my judgment, and determines this issue having regard to EU principles.

167. Fourth, if it were necessary to consider this matter by reference to Spanish law principles, and in my judgment it is not, for the reasons set out above, and because the position on the application of the Brussels Regulation Recast is clear, I would adopt the same position as Andrews J in **Hutchinson** on the basis that at this preliminary stage of enquiry the only question for the court is whether or not there is plausible evidence which supports the Claimants’ argument on jurisdiction. It was expressed in terms by Andrews J that Mr Hutchinson had a good arguable case on the merits, “*although there were respectable arguments on both sides*”.

168. Mr Ybarra in his statement believes that not all the Spanish law authority may have been before the court when the matter was considered in **Hutchinson** and he urges this court “*tasked with considering this application to consider the matter afresh*”. I decline to do so, not only because that level of enquiry is neither appropriate or necessary at this stage, but also because it is not clear what Spanish Supreme Court authority was available to Andrews J when she made her determination. The fact that an authority may not be referred to in her judgment, does not mean that it was not raised in argument.

169. What this court is faced with are diametrically opposed views expressed by two respectable Spanish legal experts as to how this territorial scope provision would be interpreted under Spanish law. Whilst I have already made it clear above that whether this is considered to be an exclusive jurisdiction clause or a territorial delimiting clause, as it has been put, which defines the risk, is immaterial when one considers the effect which the clause might have in relation to the injured party’s Article 13 (2) rights.

170. The position of D2 appears to be that if it is construed as the latter then it may well fall foul of the restriction against such jurisdiction clauses which preclude those rights, but it is strongly argued that Spanish Supreme Court authority is permissive of geographical scope provisions limiting the risk, and that on any interpretation this is a risk defining clause, rather than a rights defining clause.

171. However, Mr Ybarra, despite responding to Ms Romero’s statement, does not specifically address her objection that the Supreme Court authority does not deal with those clauses which made it a requirement that proceedings were brought within the Spanish jurisdiction for indemnity to be provided, or stipulate that in such circumstances the risk was defined by this requirement



notwithstanding that it related to matters which arose after the risk had eventuated.<sup>26</sup> Further, although the clause is not in precisely the same terms as that in **Hutchinson**, it has the same features, namely that the territorial scope requires the *event* giving rise to the liability to have occurred on Spanish soil, *and* any claim arising out of the event to be brought within the Spanish jurisdiction and determined in accordance with Spanish law. Clearly the first and third of these requirements would cause no difficulty for a direct claim pursued in the domicile of a foreign national who was injured on Spanish soil and they are fulfilled in this case, as they were in **Hutchinson**. However, of the threefold requirement, the third in relation to the place in which the insured is sued is arguably one which does not define the nature or type of the incident or event giving rise to the insured's liability for which an indemnity is to be provided, a feature which figured prominently in the reasoning of Andrews J.

172. In the circumstances, I have come to the conclusion that whilst this is an issue which cannot be resolved without a detailed enquiry, and full argument, which as I have indicated is inappropriate when considering the threshold which has to be crossed for the purposes of establishing jurisdiction, on the Spanish legal question Ms Romero provides sufficiently plausible evidence that the question will not necessarily be resolved as D2 contends, and there is a respectable argument, as there was in **Hutchinson**, that the Claimants' interpretation is correct.

173. In respect of the fallback position of D2, if this territorial scope clause is to be construed as rights defining rather than risk delimiting, the fact that it was signed and emphasised, and therefore in compliance with section 3 of the Insurance Contracts Act in Spain is in my judgment immaterial at this stage of enquiry into the arguments. It would not affect the plausibility of the argument advanced on behalf of the Claimants that this is a jurisdiction clause, even if it was enforceable against the hospital and affected its right to an indemnity.

174. However, as I hope I have made clear, this is very much an academic question, because I do not accept that it would in any event trump the position of the Claimants in terms of their EU rights.

## SECTION 5

### **ALTERNATIVE ROUTE FOR JURISDICTION IN RESPECT OF CENTRO MEDICO – ARTICLE 13(3)**

175. Whereas Article 13.1 provides the Claimants with a route to jurisdiction by linking a permitted direct liability claim against the insurer D2, where jurisdiction is established against the

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<sup>26</sup> At paragraph 91 of her judgment, Andrews J appears to suggest that there may be one such case arising out of the Balearic islands, although the text of the particular clause was not examined, and the court in any event allowed a hotel to be indemnified against a claim brought in England by a holidaymaker who was injured at the hotel

insured D1, (i.e. the hospital), a route which is not pursued in any event by the Claimants (and which would not have been open even if it had been so pursued because of my determination that there is no jurisdiction in relation to the hospital claim via the consumer contract gateway), Article 13.3 is the converse, allowing for the anchor of a valid direct claim against the insurer being used for a parasitic claim against the insured. In other words other potential claims could still be pursued against the hospital in conjunction with the claim against the insurer if this jurisdictional route was available.

176. However at present, as counsel agree, the legal position is far from clear, and whilst there is not entire consensus between the parties as to how I should approach this alternative route, it is not a significantly contested issue. The question arises from an interpretation of the words “*a matter relating to insurance*”, within Article 10 in section 3. There are conflicting interpretations within European jurisprudence (albeit limited to expressed Advocate General opinions if not CJEU decisions) and in English and Welsh appellate case law.

177. In **Hoteles Pinero Canarias & Mapfre Mudalidad Compania de Seguros y Reaseguros SA v Keefe** [2015] EWCA Civ 598 (**Keefe**) the Court of Appeal, when considering a parasitic claim where the direct claim against the insurer was established on a jurisdictional basis, but where the Claimant wished to include the hotel where his accident happened in a potential claim because of the insurance policy limits for indemnity, held that such words should not be construed restrictively to require a policy dispute in relation to the insurance policy and the interpretation of its terms. It was sufficient that a direct action was available against the insurer brought by the injured party, an entitlement which had been confirmed in **Odenbreit**<sup>27</sup>. The decision in **Keefe** has been subsequently doubted. There was an appeal to the Supreme Court, which formulated a question for reference to the CJEU, but the matter settled without resolution.

178. Following **Keefe**, the CJEU was seized of **KABEG**<sup>28</sup> in which the Advocate General (Bobek) expressed a firm opinion that whilst “*matters relating to insurance*” were not necessarily limited to questions about the validity or effect of the policy, nevertheless required an issue about the rights and duties arising out of an insurance relationship. His opinion was not specifically addressed in the European court decision. In a further English case, **Cole v IVI Madrid SL** [2019] 9WLUK 373,<sup>29</sup> His Honour Judge Rawlings, sitting as a judge of the High Court in Birmingham was faced with a similar situation on a parasitic claim, and made a preliminary reference to the CJEU on the question of “*matters relating to insurance*” where two of the Claimants on a jurisdictional challenge, were seeking to add the hospital in Madrid where their parents had received fertility treatment to the direct claim against the insurer. It was this reference which was extant when Andrews J addressed the same issue in **Hutchinson**<sup>30</sup>. There, of course, as indicated above, she had allowed a direct claim against the insurer notwithstanding the territorial scope clause, and therefore had an anchor claim. She had

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<sup>27</sup> supra

<sup>28</sup> supra

<sup>29</sup> Referred to above in the context of the consumer contract gateway at paragraph 107

<sup>30</sup> supra

also allowed the consumer contract jurisdiction gateway against the insured, which did not permit the tortious / statutory breach claims to be pursued. In many respects those latter claims added little to the contractual claim. She saw little point in duplicating a reference, and declined to do so, but instead stayed the non-contractual claims against the hospital pending a determination of the CJEU reference in **Cole**.

179. History repeated itself, regrettably, in **Cole**, by the time of the first instance decision in **Betty Tattersall v Seguros Catalana Occidente S.A. [BT]** (unreported, District Judge Hennessy, Birkenhead County Court) and the **Cole** case resolved itself without a CJEU determination. The district judge herself referred the question to the CJEU in the circumstances (having just enough time left to do so before the end of the implementation period).

180. It was indicated to me that the referred question in BT may well have reached a stage where it can be reasonably anticipated that a final determination (again barring compromise) will be provided by the European court at the end of this year. Unlike the situation which prevailed in both **Hutchinson** and **Cole**, I am not in a position to make any reference, as that discretionary power has now disappeared.

181. It would be open to me either to follow the only national decision on the question, **Keefe**, which allows a far broader interpretation as to “*matters relating to insurance*”, on the basis adopted by Gloster LJ in that case, that this would favour the weaker party and therefore be the more purposive interpretation, or to adopt the restrictive approach of AG Bobek in **KABEG**. However, it seems to me sensible, in the circumstances, and at the very least proportionate in view of the fact that it may potentially avoid duplicate proceedings in another jurisdiction, to err on the side of caution and to stay the question as to whether or not there is a jurisdictional gateway available under Article 13.3, following the approach of Andrews J in **Hutchinson**.

## SECTION 6

### CONCLUSION

#### Summary of determination

182. I summarise my findings as follows:

1. The Claimants have provided plausible evidence and have thus passed the threshold of a good arguable case in relation to an English domicile for the late Mrs Flowers and the First Claimant.

2. Whilst there is plausible evidence of an agreement to pay certain private fees of the hospital, and that in principle this amounts to evidence of a consumer contract between Mrs Flowers and Centro Medico within the meaning of the consumer contracts section, I cannot be satisfied that the claim is being brought by a consumer within the meaning of the regulation. The Claimants cannot step in the shoes of the consumer on the basis of current European case law as her heirs.
3. The Claimants have a good arguable case of a direct claim against the insurer under Spanish law, pursuant to Article 13(2) notwithstanding the geographical limitation clause purporting to restrict cover;
4. The jurisdictional claim under Article 13 (3) whereby Centro medico might be joined in the English action should be stayed pending determination of the CJEU reference in BT.

### **Consequential matters**

183. I invite counsel to consider the consequential orders which might arise from this judgement. It may be that agreement can be achieved, in which case no further hearing is required. If it cannot, I am content to deal with any submissions either in writing, or remotely, and provide my further directions. It seems to me that one particular option might be to stay the entire claim for a brief period, say 3 to 4 months, if it is apparent that the CJEU will be providing its decision in BT fairly imminently. This would obviate the need for significant amendment or catch up in the event that the Claimants were permitted to use the 13(3) gateway against the hospital to pursue other claims which would otherwise be pursued directly against the insurer, D2.

GW

23.8.2021