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TRAVEL AND TOURISM LAWYERS' ASSOCIATION

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INTRODUCTION

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One of the (very few) consolations of the present emergency has been the chance to catch up on the great television of years past. I have spent this week bingeing on the BBC's 1994 adaptation of *Middlemarch*. My own advancing years have lent a new sympathy for Eliot's Reverend Edward Casaubon (brilliantly played by Patrick Malahide in the TV series). The ageing Casaubon labours unceasingly at home on a scholarly work which aims to "*... elucidate those elements which underpin every system of belief known to man.*" This great project both diverts him from all other sources of earthly pleasure and (seemingly) never ends: welcome to lockdown.

In this edition of the Newsletter, our authors have concentrated on the great project of EU insurance jurisdiction in its many varieties. What links these recent contributions is the term "*Matters relating to Insurance*" where it appears in the sub-heading to section 3 of the recast Brussels I Regulation No 1215/2012. We can now add ***Cole, Hutchinson*** and ***Aspen Underwriting*** to the considered thoughts of the Court of Appeal in ***Keefe v Mapfre*** [2016] 1 WLR 905. Moreover, ***Cole*** and ***Hutchinson*** on the one hand and ***Aspen Underwriting*** on the other provide further content (respectively) to (i) the consumer contracts ground of jurisdiction (section 4 of recast Brussels I) and (ii) the treatment of exclusive jurisdiction clauses. Also hot off the press (if this were not excitement enough) is the recent CJEU decision – further expanding our understanding of the consumer contracts ground of jurisdiction – in ***AU v Reliant Co Investments Case*** C-500/2018 (2020), about which we will be briefing shortly. So there you have it – not, perhaps, "*The Key to all Mythologies*" – but, instead, a reliable, readable *and succinct* guide to "*those elements which underpin*" our understanding of section 3 of recast Brussels I.

Cole v IVI Madrid SL [2019] 9 WLUK 373

This case has a slight vintage now, judgment having been handed down in September 2019 (which, given current Coronavirus pandemic circumstances, feels like a lifetime ago), but it is worth revisiting and reminding ourselves of the important (though complicated) jurisdictional questions raised and referred to the CJEU for final determination.

The first and second Claimants were a couple who in 2010 received fertility treatment at the first defendant's clinic in Madrid. The third and fourth Claimants were born as a result, and suffered from cystic fibrosis owing to a mutation which took place during the treatment. The claims were brought against the first Defendant in both tort and contract. A direct claim was also brought against the second Defendant's insurer.

Pursuant to CPR r.11 the first Defendant sought an order that the English courts had no jurisdiction to hear any parts of the claims. It relied on the general rule under Regulation 1215/2012 (the recast "Brussels 1" regulation) that a Defendant had to be sued in the Member State in which it was domiciled. The Claimants however relied on two exceptions to that rule; the so-called "insurance exception" and the "consumer exception". A number of questions arose:

1) The insurance exception: should Keefe be followed?

The crux of this exception is Section 3 of recast Brussels 1, dealing with "matters relating to insurance", which essentially allows for an insurer (in this case the second Defendant) to be sued in the Claimant's domiciled member state. The Claimants relied on a 2015 Court of Appeal decision, *Hoteles Pinero Canarias SL v Keefe*, which allowed for the insured to be sued alongside the insurer in the Claimant's member state as a "parasitic claim". This decision was followed in a 2019 High Court decision in *Lackey v Mallorca Mega Resorts*. There had been significant judicial doubt cast over this principle, both by the UK Supreme Court and the European Commission, as to whether the claims had to involve – as per the strict wording of the regulation – "a matter relating to insurance". The question was referred to the CJEU.

2) Insurance exception: could the third and fourth Claimants be regarded as "injured parties"?

Neither party actually made submissions on this issue, though the Judge identified a conceptual difficulty with finding that the two children born of the fertility treatment could be regarded as "injured parties" under Article 13(2) of the regulation. Where a person would not have come into existence but for the allegedly negligent act, there is room for debate as to whether they were properly speaking injured by that act. This question, as above, was referred to the CJEU.

3) Consumer exception: did the first Defendant direct its activities to England and Wales?

Article 17(1)(c), relating to jurisdiction over consumer contracts, requires that the contract has been concluded with a person (in this case the fertility clinic) who pursues commercial or professional activities in the Member State of the consumer's domicile. This was a factual interrogation, and one which the Judge resolved in the Claimants' favour. It accepted English consumers referred to it, its website could be converted to use in English, it operated an international department to assist non-Spanish consumers in other member states, and two articles from a Scottish newspaper promoting its services had appeared on a 2010 iteration of its website. As such the court had jurisdiction to determine the first and second Claimants' claims under Article 18.

4) Consumer exception: were the third and fourth Defendants "consumers"?

As described above, Article 17 refers to "consumers". The question therefore arose as to whether the third and fourth Claimants could be described as such; the Judge found not, as they were clearly not parties to any contract with the fertility clinic.

Questions 1 and 2 were referred to the CJEU.

Jonathan Hutchinson v (1) Mapfre Esapana, (2) Ice Mountain Ibiza (t/a OBeach Ibiza) [2020] EWHC 178 (QB)

One summer's day in 2016 the Claimant made a decision that would alter the rest of his life; he decided, after seeing various promotions, to go to a bar called the Ocean Beach Club. That club was run by the Second Defendant ("Ice Mountain"), a Spanish company. The club was an entertainment venue which included a bar and swimming pool. Entry to the venue

was by way of a ticket that allows access to all the general areas, including the pool. There was also a VIP area reserved for those who purchased a premium ticket.

Later that day the Claimant was found floating in the pool and was dragged to safety. Unfortunately, he suffered life changing injuries having been rendered tetraplegic after hitting his head on the bottom of the pool.

The Claimant had purchased his ticket (whilst in Ibiza) and was a consumer for the purposes of Articles 17 and 18 of Recast Brussels I.

On 12 March 2019 the Claimant issued a claim form against the Second Defendant and their Spanish liability insurers, the Second Defendant (Mapfre). The claim against Mapfre was brought under a provision of Spanish Law (Article 76 of the Insurance Contracts Act 50/1980) that allows an injured person to bring a claim directly against the liability insurer of the party who is primarily liable.

Further under Article 13(2) of Recast Brussels 1, the right of an insured to pursue in the member state of his own domicile is extended to cover a direct claim by an injured person against the insurer so that the injured party can bring a claim against the insurer in the Courts of his own domicile – just what Mr Hutchinson did in bringing a claim in England.

Both Defendants sought to challenge the jurisdiction of the English Courts. As such the Claimant had to demonstrate a "*good arguable case*" that the English Courts had jurisdiction.

The Claim against Ice Mountain

The Second Defendant argued that as the Claimant had not purchased his ticket as a result of promotions he had read in the UK but rather due to promotional activities being undertaken in Ibiza and Article 17(1) of Brussels Recast should not be interpreted so as to apply to the consumer contract. However, relying on *Emrek v Sabranovic* the Court concluded there was no requirement for there to be a "*causal link*" between the direction of the Defendant's commercial activities to the Member State of the Claimant's domicile and the contract that was subsequently concluded: "*Ice Mountain was deliberately targeting British tourists with its online marketing campaign, with the intention that they would buy tickets to enter and use the facilities of its Club. It cannot escape the consequences of the provisions of Recast Brussels 1 that are aimed at the protection of consumers, by relying on the fortuity that the particular British tourist who was injured on its premises did not buy his ticket as a direct result of those promotional activities on his home territory, but rather as a result of promotional activities aimed at British tourists who happened to be already in Spain*".

The Second Defendant also argued that the claim did not relate to any breach of contract under which the Claimant had gained access to the facilities as he had been seen in the VIP area, which he had no contractual entitlement to use. That argument was swiftly dealt with by the simple observation that the swimming pool was located in the area of the premises to which anyone who had a standard ticket had access and it matters not at all the route by which the Claimant found his way to the pool.

On that basis the Court concluded that the English Courts had jurisdiction to hear the contractual claim against the Second Defendant[1].

The Claim against Mapfre

Mapfre accepted that there was a direct right of action against it under Spanish law, however it was suggested that there was no arguable case that the insurance contract covered any liability to indemnify Ice Mountain's liability under a judgment of an English Court. This, it was argued, was because the policy of insurance taken out by the Second Defendant with Mapfre contained a provision that stated it would only entertain claims that had been submitted within Spain's jurisdiction. As the Claimant's claim had not they argued that the Second Defendant was essentially uninsured against a claim brought by an English consumer in an English Court.

The Court noted: "*If that is right, it is difficult to imagine a greater disincentive for a consumer (particularly one whose claim, like Mr Hutchinson's, is for a significant sum because of the nature and extent of his injuries) to exercise the special right expressly conferred upon him as the weaker*

party to sue a wrongdoer for breach of contractual duties in the courts of his own domicile. If he wins and the uninsured Defendant is not good for the money, he would be left without a remedy, whereas if he sued in Spain, the same Defendant would be insured in respect of the same liability, and he would recover from the insurer up to the policy limits" .

The Court was not convinced that the effect of the territorial scope clause in the insurance contract did, as a matter of Spanish Law, have the effect argued for by Mapfre but in any event the Court held that it also had jurisdiction over the claim against Mapfre as a matter of EU law.

The provision in the contract of insurance upon which Mapfre sought to rely as demonstrating that there is no good arguable case against it could not be relied on as that would drive a coach and horses through the protection afforded the Claimant as the weaker party specifically provided for in the insurance provisions of Recast Brussels 1: "*But if he does insure [i.e. Ice Mountain in this case], and a direct of action exists against the insurer under the law which governs the insurance contract,* ***then Recast Brussels I does not contemplate that he should be permitted to contract with the insurer on a basis that acts as a disincentive to consumers to exercise their rights to sue him (and his insurer) in the courts of their own domicile*** *or which renders any rights of suit against the insurer in that jurisdiction completely worthless by using the exercise of those rights as grounds for avoiding the insurer's obligation to indemnify him. That is what Mapfre and Ice Mountain have attempted to do.*"

On that basis Andrews J concluded that the Court also had jurisdiction to hear the case against Mapfre. While the decision is welcome for Claimants injured abroad it will cause a degree of anxiety for international insurers who have in the past used territorial jurisdiction clauses to limit their exposure to the English legal system. Insurers will need to think more carefully about whether to pursue expensive jurisdictional challenges in the future given the Court's clear desire to interpret Recast Brussels I in favourable terms for the weaker Claimant party.

Aspen Underwriting Ltd & Ors v Credit Europe Bank NV; & anor case [2020] UKSC 11

Worse things happen at sea, as the well-known saying would have it and among the worst of things that happen at sea must be the total loss of a vessel. This was the fate which befell a vessel called the *Atlantik Confidence* in April 2013. At the time of her sinking in the Gulf of Aden, she was insured by various underwriters, including Aspen Underwriting Ltd on the basis of a valuation of $22 million. That policy contained an exclusive jurisdiction clause in favour of the courts of England and Wales.

The refinance of the vessel had been funded by Credit Europe NV, a bank domiciled in the Netherlands. As part of that arrangement, Credit Europe took a mortgage over the vessel and an assignment of the policy issued by Aspen naming it as the sole loss payee.

After the demise of the *Atlantik Confidence*, her owners requested Credit Europe to issue a letter to Aspen. This authorised the insurers to pay any claims relating to the loss to a nominated company, Willis Ltd. Eventually, after negotiations between the owners and Aspen (in which Credit Europe took no part), a settlement agreement was reached and Aspen made payment of $22 million to Willis.

Subsequently, in an action not involving Aspen, the Admiralty Court held that the vessel had been scuttled at the request of her owners. As a result of this, Aspen commenced proceedings against both the owners and managers and Credit Europe. These claims variously sought to avoid the settlement agreement and obtain damages or restitution, whether on the basis of Aspen's mistake or alternatively on the grounds of alleged misrepresentations by the owners and managers.

Credit Europe challenged the jurisdiction of the High Court to hear Aspen's claim against it in an argument arising from the application of the Brussels Regulation Recast (Regulation (EU) 1215/2012).

Initially, Teare J held that the High Court had jurisdiction in respect of Aspen's claims for damages for misrepresentation under article 7(2) of the Regulations, but that it did not have jurisdiction in respect of its claims in restitution. He also rejected the submission

that the Court had jurisdiction based on the exclusive jurisdiction clauses in the insurance policy and settlement agreement. Subsequently, in a second judgment, he held that the Court did have jurisdiction in respect of Aspen's claim for damages for misrepresentation pursuant to the Misrepresentation Act 1967.

Both parties appealed to the Court of Appeal with Teare J's permission. On that appeal, Teare J's decisions were affirmed. Aspen and Credit Europe both appealed to the Supreme Court.

Within the sole judgment (that of Lord Hodge) with which the remaining six Justices agreed, four issues are identified. They are as follows:

- Did the High Court have jurisdiction to hear Aspen's claim by reason of the exclusive jurisdiction clause contained in the policy of insurance?
- Were its claims against Credit Europe "matters relating to insurance" within the meaning of Chapter II, s.3 of the Regulation?
- If yes, was the Bank entitled to the benefit of s.3 by reason of it falling within a class of persons entitled to avail themselves of its protection? and
- Were Aspen's claims for restitution matters relating to tort, delict of quasi-delict under article 7(2) of the Regulation?

From the Court's answers to those questions, the following points are of particular note:

- The decisions below that Credit Europe was not bound by the jurisdiction clause were affirmed. It was not a party to the policy containing the clause and it had not engaged in any conduct which might allow it to be said to have consented to the jurisdiction clause or become a "successor" to the owner's rights under the policy. As a result, it was not required to submit to the jurisdiction of the English courts in relation to Aspen's action.
- The Court considered that Aspen's claim against the Bank was indeed a "matter relating to insurance". The existence of a settlement agreement did not alter the legal character of the claim so as to prevent it from being such a matter and thus falling withing s.3 of the Regulations. The concept of a "matter relating to insurance" is wider in scope than claims for breach of an insurance contract alone and, where there is a fraud alleged, this would in any event inevitably involve the question of whether or not there had been a breach of the policy of insurance.
- Contrary to the position adopted by the lower courts, there can be no exception to the rules of jurisdiction based upon the presence or otherwise of "circumstances of economic imbalance" between the parties. Whilst article 14 protects certain categories of person because they are a "weaker party" when negotiating with an insurer, it is undesirable that there should in every case be an assessment of the relative positions of the parties. The protection will be extended to all those identified in article 14 save where they are specifically excluded elsewhere in the Regulation. Credit Europe was therefore entitled to the benefit of protection of article 14, meaning that proceedings could only have been brought by Aspen in the Member State in which Credit Europe was domiciled. The High Court therefore did not have jurisdiction in respect of Aspen's claim.
- It was not therefore necessary to determine the final question in order to dispose of the appeals.

[1] And stayed claims in tort and breach of statutory duty pending the Court of Justices' determination of a referral in the matter of Cole v IVI Madrid SL

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