

IN THE COUNTY COURT AT BIRKENHEAD

Claim No. F52YJ559

BETWEEN

B [REDACTED]

Claimant

-and-

(1) SEGUROS CATALANA OCCIDENTE

(2) Ms E [REDACTED] B [REDACTED]

Defendants



ORDER

Before District Judge Hennessy sitting at the County Court at Birkenhead at 76 Hamilton Street, Birkenhead, England, CH41 5EN on 30 December 2020, having handed down the written judgment in this matter on 22 December 2020 when it heard the Claimant's application for permission to appeal before adjourning the matter for the parties to consider the terms of reference to the Court of Justice

UPON THE APPLICATION OF THE Second Defendant for an order that the English Court lacks jurisdiction to try the claim against the Second Defendant on 22 December 2020 and Counsel for the Claimant and Second Defendant on 30 December 2020

AND UPON HAVING HEARD Counsel for the Claimant, Counsel for the First Defendant and Counsel for the Second Defendant by telephone

AND UPON the Court declaring that it has no jurisdiction to try the claim against the Second Defendant pursuant to articles 17 and 18 of Regulation (EC) No. 1215/2012

AND UPON the Court considering that, in order to enable the Court to give judgment in this case, it is necessary to resolve questions concerning the interpretation of Article 13(3) of Regulation (EC) No. 1215/2012 and that it is appropriate to request the Court of Justice to give a preliminary ruling thereon

IT IS ORDERED that:

1. The questions set out in the attached Schedule concerning the interpretation of Article 13(3) of Regulation (EC) No. 1215/2012 be referred to the Court of Justice for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union (TFEU);
2. This Order be communicated to the Court of Justice forthwith;
3. The claims against both Defendants are stayed generally pending the resolution of the reference.
4. The hearing listed on 3 February 2021 is adjourned.
5. Costs reserved.
6. The Claimant's application for permission to appeal in relation to the findings on Articles 17 and 18 of Regulation (EC) No. 1215/2012 is refused. A copy of the N460 shall remain on the Court file given the remote nature of the hearing.

DATED this day of December 2020

SCHEDULE

A THE REFERRING COURT

1. This reference pursuant to Article 267 of the Treaty on the Functioning of the European Union is made by the County Court at Birkenhead, in England and Wales. All communications with the national Court regarding it should be made to District Judge Hennessy, County Court at Birkenhead, 76 Hamilton Street, Birkenhead, England, CH41 5EN. Alternatively, by email at civil.birkenhead.countycourt@justice.gov.uk (marked "for urgent attention of DJ Hennessy").

B THE PARTIES

2. The Claimant is domiciled in England and Wales and is represented by **C M** of Leigh Day, Building C, Central Park, Northampton Road, Manchester, M40 5BP.
3. The Second Defendant is domiciled in the Republic of Ireland and is the owner of a property situated at 18 Callais Australia, Alicante, Spain ("the Property"). She is represented by **J H** of James Hanley and Co Solicitors, North Mall, Westport, County Mayo, The Republic of Ireland, F28 P033.
4. The First Defendant was, at all relevant times, an insurer with its seat in Spain and provided public liability insurance to the Second Defendant in relation to the Property. The First Defendant is taking no part in the Second Defendant's jurisdiction challenge or in this reference.

C THE SUBJECT MATTER AND THE FACTS OF THE DISPUTE

5. The Claimant's case, which is not admitted by the Second Defendant, is that:
 - a. By a contract entered into by a member of her family on the Claimant's behalf, the Second Defendant agreed to provide the Claimant and her family with seven nights' accommodation at the Property from 31 March 2018.
 - b. The accommodation was booked and paid for online.
 - c. The Property's facilities included an outdoor tiled patio area, which led to a swimming pool.

- d. On 3 April 2018, the Claimant, who was then 83 years old, was walking across the patio towards the swimming pool when she fell down an unseen step, landing on her right side (“the accident”).
 - e. As a result of the accident she sustained a fractured right hip and wrist together with cuts to her forehead for which she underwent surgery in Spain. She continues to require care and treatment as a result of her injuries.
6. The Claimant seeks to bring a claim against the Second Defendant in respect of her injuries and losses. The Claimant contends that the Second Defendant owed her a duty in contract and tort to exercise reasonable care and skill so as to ensure that the Property was reasonably safe to use, and that duty was breached. The Claimant asserts (*inter alia*) that there was a duty to install handrails adjacent to the step and/or a warning sign and/or mark the step in some way. Liability is denied by the First Defendant, the Second Defendant not having submitted to the jurisdiction of the English court or served/filed a Defence.
7. Proceedings were issued out of the County Court Money Claims Centre in England and Wales on 14 April 2019 and thereafter served on the Defendants (who were at that time, represented by the same firm of solicitors). The Claimant asserted jurisdiction over the First Defendant pursuant to Articles 11(1)(b) and 13(2) of Regulation (EC) No. 1215/2012 (“Recast Brussels I”). The First Defendant did not dispute jurisdiction and filed a defence to the claim. In its defence the First Defendant admitted that (i) it insured the Second Defendant in respect of her renting out the Property to paying guests and (ii) it was required to indemnify her in respect of her liability for the accident subject to ‘*any limitations or restrictions on the policy*’. The claim was thereafter transferred to the County Court at Birkenhead.
8. By an application made on 29 January 2020 the Second Defendant challenged the jurisdiction of the Courts of England and Wales to entertain the claim against her.
9. Before the application could be heard, and as a result of further information received in response to Part 18 Requests for Further Information from the Claimant, the First Defendant clarified its position and contended that the limitations and restrictions under the insurance policy meant that it did not extend to the Second Defendant’s use of the Property as holiday accommodation for paying guests. The First Defendant therefore denied that it was required to indemnify the Second Defendant in respect of the accident and thereafter, applied to strike out the Claimant’s claim against it. The validity and extent

of the insurance coverage remains in dispute as between the Claimant and First Defendant (only). The First and Second Defendant are now separately represented in proceedings. The First Defendant's application to strike out the claim has been stayed pending the resolution of this reference.

10. By the date of the hearing of the Second Defendant's application the Claimant contended that there was jurisdiction over the Second Defendant pursuant to Article 13(3) of Recast Brussels I. The Claimant additionally asserted jurisdiction pursuant to Articles 17 and 18.
11. The Second Defendant's challenge came before District Judge Hennessy on 7 December 2020. By its judgment handed down on 22 December 2020, the Court held that it did not have jurisdiction pursuant to Articles 17 and 18. The Claimant is seeking to appeal that finding but this reference does not in any case concern questions arising under Section 4 of Recast Brussels I. The Court summarised the parties' arguments on Article 13(3) and concluded that it was necessary to refer questions to the Court of Justice to enable it to give a final judgment on the Second Defendant's challenge to the jurisdiction of the English court.

D RELEVANT RULES OF NATIONAL LAW

12. In 2015 in *Hoteles Pinero Canarias SL v Keefe* [2016] 1 WLR 905 the Court of Appeal of England and Wales considered the scope of Article 11(3) of Regulation (EC) No. 44/2001 ("Brussels I") (now Article 13(3) of Recast Brussels I).
13. The facts were as follows:
 - a. The second defendant, Hoteles Pinero Canarias SL, was a Spanish company that owned and operated a hotel.
 - b. The first defendant, Mapfre, was the second defendant's liability insurer.
 - c. The claimant was an English holidaymaker who was injured in the second defendant's hotel.
 - d. The claimant brought a claim against the defendants in the English court.
 - e. The first defendant accepted the jurisdiction of the English court.
 - f. The second defendant challenged the jurisdiction of the English court.
 - g. The claimant relied on Article 11(3) of Brussels I to found jurisdiction.

14. The Court of Appeal held that it did have jurisdiction over the Spanish-domiciled hotel when coupled to the claim brought against the hotel's liability insurer direct.
15. The hotel appealed that decision to the Supreme Court, which in August 2017 referred to the CJEU the following questions (see Case 491/17, OJ 19 October 2017).
 - a. *Is it a requirement of Article 11(3) Brussels I [now Article 13(3) Recast Brussels I] that the injured person's claim against the policy holder insured involves a matter relating to insurance in the sense that it raises a question about the validity or effect of the policy?*
 - b. *Is it a requirement of Article 11(3) that there is a risk of inconsistent judgments unless joinder is permitted?*
 - c. *Does the court have a discretion whether or not to permit joinder of a claim which falls within Article 11(3)?*
16. Following submission of written observations by the parties and by the Commission the claim was settled, and the reference withdrawn.
17. Under the ordinary rules of precedent in England and Wales, a lower Court is bound by the findings of a superior Court. In this case, the County Court at Birkenhead is inferior to the Court of Appeal.
18. There are no further rules of the national law of the contractual and non-contractual obligations on which the parties rely.

E RELEVANT PROVISIONS OF EUROPEAN UNION LAW

19. Article 10 of the Recast Brussels I provides as follows:

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

20. Article 13 of Recast Brussels I provides as follows:

'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.'

21. In *Kabeg v MMA Iard* (Case C-340/16), the question referred to the Court of Justice was whether an employer which paid sick leave to the injured victim was the 'weaker party' as against the third-party liability insurer for the purposes of relying on the rules of jurisdiction in Section 3 Brussels I. Advocate General Bobek addressed in his opinion whether the matter could be classed as 'a matter relating to insurance'. His opinion contains the following passage (at [36]):

I do not think that it would be either necessary or wise to attempt to provide a general and exhaustive definition of what is a 'matter relating to insurance' and, hence, what is 'insurance'. That can be left in the hands of legal scholarship. There is, however, one element that emerges from the reviewed case-law, naturally tied to the logic of the Brussels Convention/regulations system: for the purpose of international jurisdiction, the basis for ascertaining what is a 'matter relating to insurance' is essentially 'title-based'. Is the title for which an action is launched against a specific defendant (in other words, the cause of that action) the ascertaining of rights and duties arising out of the insurance relationship? If yes, then the case can be deemed as a matter relating to insurance.

22. Advocate General Bobek concluded that the notion must be interpreted autonomously and uniformly. It is 'title-based' (in other words, one has to consider what is the cause of action against a specific defendant). He concluded that it falls within the scope of Section 3 'if it concerns the rights and duties arising out of an insurance relationship.' The Court of Justice by its ruling did not directly address the extent to which a claim needs to be 'a matter relating to insurance' to fall within the scope of Section 3, nor what is meant by a 'matter relating to insurance'.
23. However, in *Kabeg* the Court did conclude: (1) that 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; (2) employers, to whom may have passed the right of an employee to compensation, may be regarded as persons suffering damage within the meaning of section 3 of the Regulation (whatever their size and legal form); (3) the relevant

employer may be regarded as “*the weaker party*” relative to the insurer; and, it therefore followed, (4) “... *an employer to which the rights of the employee injured in a road traffic accident have passed and for whom it continued to pay his salary may, as the 'injured party', sue the insurer of the vehicle involved in that accident before the courts of the Member State in which the employer is established where a direct action is permitted.*”

24. The Court of Justice did not get to consider the questions referred in *Keefe*; nor had an opinion been obtained from an Advocate General.

F SUMMARY OF THE PARTIES' CONTENTIONS

25. The Claimant contends that:

- a. Under the English authority of *Keefe* a claimant may join a foreign domiciled insured to a claim against a foreign domiciled insurer pursuant to Article 13(3).
- b. A purposive interpretation of Article 13(3) would, for the reasons given in *Keefe*, support the joinder of the insured to the claim against the insurer where the claimant is claiming damages from each for injury and consequential loss sustained.
- c. It is not necessary for there to be a ‘dispute’ between the insurer and insured concerning the validity or effect of the insurance policy. The only condition that has to be met under Article 13(3) is that the joining of the insured to the direct action against the insurer is allowed by the law governing the direct action against the insurer, in this case Spanish law.
- d. Further and in any event, where there is such a dispute between the insurer and insured, Article 13(3) permits the joinder of the insured to the claim against the insurer.

26. The Second Defendant contends that:

- a. Article 13(3) only applies to claims which are a matter relating to insurance.
- b. The Claimant’s claim is for damages for injury and consequential losses arising out of allegedly negligent provision of holiday accommodation. It is not a matter relating

to insurance and does not become so merely by dint of being brought in the same claim as the direct claim against the insurer.

- c. Further, it does not become a matter relating to insurance by dint of there being a dispute between the insurer and the injured party concerning the validity or effect of the insurance policy.

G WHY A RULING FROM THE COURT OF JUSTICE IS SOUGHT

27. The questions referred in this reference raise three distinct issues:

- a. If an injured party sues an insurer of an alleged tortfeasor, in the Member State of their domicile, pursuant to Article 13(2) of Recast Brussels I, can the injured party join the alleged tortfeasor to that action pursuant to Article 13(3) of Recast Brussels I, if the claim against the alleged tortfeasor does not involve “a matter relating to insurance” (“Issue 1”);
- b. What is meant by “a matter relating to insurance” under Section 3 of Recast Brussels I (Issue 2”); and
- c. Where there is a dispute between the claimant and the insurer concerning the validity or effect of the insurance policy, does the existence of such a dispute permit the claimant to join the alleged tortfeasor pursuant Article 13(3) to a claim against the insurer in the Member State of their domicile, pursuant to Article 13(2) (“Issue 3”).

28. The questions under the Issue 1 (questions (a) and (d)) are referred to the Court of Justice because:

- a. In *Odenbreit v FBTO Schadeverzekeringen NV* (Case C-463/06) the Court of Justice confirmed that Article 9 (1) (b) of the Brussels I (Article 11 (1) (b) of Recast Brussels I) allowed a policy holder to sue his insurer in the Member State in which he is domiciled even if the insurer is domiciled in another State (provided that such direct right of action is allowed under the law applying to the insurance contract);
- b. In the case of *Keefe* the English Court of Appeal had to decide whether an injured party who was entitled to bring proceedings and did bring proceedings against an

insurer of an alleged tortfeasor in the Member State in which the injured party was domiciled (under Article 9 (1) (b) of Brussels I) could also join the alleged tortfeasor to that direct action against the insurer pursuant to Article 11(3) of Brussels I [Article 13(3) Recast Brussels I]. The Court of Appeal decided that the injured party could join the alleged tortfeasor to the direct action against the insurer, even if the alleged tortfeasor was domiciled in another Member State (provided that the joining of the tortfeasor to the action against the insurer was permitted by the applicable law) and (importantly, for present purposes) even if the dispute with the alleged tortfeasor did not involve a matter relating to insurance;

- c. The basis for the Court of appeal decision in *Keefe* in simple terms was that:
- i. *Odenbreit* did not require there to be a dispute concerning the terms of the insurance policy, in order for an insurer to be sued direct in the Member State in which the policy holder was domiciled (where the insurer was domiciled in another State) under Article 9 (1) (b) of Brussels I;
 - ii. Article 11(2) of Brussels I [Article 13(2) of Recast Brussels I] allows an “injured party” to bring proceedings against the tortfeasor’s insurer in the Member State of the injured party’s domicile (where the insurer is domiciled in another State);
 - iii. Article 11(3) of Brussels I allows an injured party to join the tortfeasor to a direct action taken against the alleged tortfeasor’s insurer (under Article 11(2) of Brussels I) in the injured party’s Member State even if the alleged tortfeasor is domiciled in another State (if the law governing the direct right of action against the insurer allows it);
 - iv. If Article 9(1)(b) of Brussels I did not require there to be a dispute concerning the policy of insurance (as confirmed in *Odenbreit*) before the insurer could be sued direct by a policy holder there was no reason to require there to be a dispute concerning the policy of insurance before the alleged tortfeasor could be joined (under Article 11(3) of Brussels I); and
 - v. The Court of Appeal considered that their interpretation of Article 11(3) of Brussels I was consistent with the purposes set out in Recital 13 (protecting the weaker injured party) and Recital 15 (minimising the chances of

irreconcilable judgements in two Member States) of Brussels I [now contained in Recitals 18 and 21 of Recast Brussels I];

- d. In *potential* conflict with the English Court of Appeal decision in *Keefe*, Advocate General Bobek in *Kabeg* emphasised that all Articles under Section 3 of Brussels I had to involve a matter relating to insurance. Advocate General Bobek, in giving his advice had regard to Recital 11 of Brussels I [Recital 15 of Recast Brussels I] that the rules of jurisdiction must be highly predictable and that to achieve this, it was important that the exceptions to the general rule that a defendant should be sued in the Member State of their domicile should be construed strictly;
- e. It is unclear whether the Court of Justice in *Odenbreit* (as the Court of Appeal in *Keefe* suggests) did not require there to be a dispute relating to the contract of insurance in order for Article 11(2) of Brussels I to apply. The Court of Justice rejected the assertion that the classification of the direct claim against the insurer under German tort law determined the question of whether the insurer could be sued in the injured party's Member State, noting that it depended on whether, in general, the claim against the insurer concerned matters relating to insurance. The Court of Appeal's view that the decision of the Court of Justice in *Odenbreit* suggested that, for an insurer to be sued by the injured party under Article 11(2) of Brussels I, the claim against the insurer did not have to involve a "matter relating to insurance" may be based upon a difference of view of what "a matter relating to insurance" means (see **Issue 2** below);
- f. The English Supreme Court gave permission to the defendant (the alleged tortfeasor) in *Keefe* to appeal against the decision of the Court of Appeal. Prior to considering that appeal, the English Supreme Court referred questions to the Court of Justice. Those questions including, whether it is a requirement that the injured person's claim against the alleged tortfeasor involves a matter relating to insurance, in order for the claim against the alleged tortfeasor claim to be joined, under Article 11(3) of Brussels I, to a claim brought direct against the alleged tortfeasor's insurer under Article 11(2) of Brussels I (in each case in the injured party's Member State). The European Commission made submissions to the Court of Justice supporting the contention that the claim of the alleged tortfeasor does have to involve a matter relating to insurance. In the event the appeal to the English Supreme Court was withdrawn, before the Court of Justice considered the questions referred to it by the English Supreme Court; and

- g.** The choice of which of the underlying purposes and policies behind the “insurance exception” in Section 3 of Recast Brussels I should take precedence is uncertain and a matter on which guidance from the Court of Justice is desirable.


29. As to the questions under **Issues 2 and 3 (question (b) and (c))**:

- a.** Advocate General Bobek, in *Kabeg* appeared to consider that “a matter relating to insurance” meant that the relevant claim must concern rights and duties arising under the insurance contract but there was no requirement for there to be any dispute in relation to the policy of insurance. The opinion of Advocate General Bobek was expressed in *Kabeg* in the context of a direct claim made against an insurer under Article 11(2) of Brussels I. Advocate General Bobek considered that the requirement that the claim against the insurer involve “a matter relating to insurance” was satisfied simply because the claim against the insurer involved questions of the rights and duties of that insurer under the policy of insurance. It is less clear how a claim against an alleged tortfeasor (the insured under a policy of insurance) which is sought to be joined to the direct claim against the insurer could involve “a matter relating to insurance”;
- b.** The first question referred to the Court of Justice by the English Supreme Court (see paragraph 15 (a)) above suggested that “a matter relating to insurance” may mean (in contrast to the opinion of Advocate General Bobek in *Kabeg*) that the dispute must involve questions about the validity or effect of the insurance policy;
- c.** Clarification is therefore sought from the Court of Justice as to the nature and extent of the requirement that, in order for Section 3 of Recast Brussels I to apply it must involve “a matter relating to insurance” but, in particular where the injured party who is bringing a claim against an insurer direct under Article 13(2) of Recast Brussels I in their Member State is attempting to join to that claim, a claim against the alleged tortfeasor under Article 13(3) of Recast Brussels I, where the alleged tortfeasor is domiciled in another State.

30. Accordingly the County Court at Birkenhead respectfully refers to the Court of Justice the questions set out below:

QUESTIONS REFERRED TO THE
COURT OF JUSTICE OF THE EUROPEAN UNION

- a. Is it a requirement of Article 13(3) of the Judgments Regulation (EC) No. 1215/2012 that the cause of action on which the injured party relies in asserting a claim against the policy holder/insured involves a matter relating to insurance?
- b. If the answer to (a) is 'yes', is the fact that the claim which the injured party seeks to bring against the policy holder/insured arises out of the same facts as, and is being brought in the same action as the direct claim brought against the insurer sufficient to justify a conclusion that the injured party's claim is a matter relating to insurance even though the cause of action between the injured party and the policy holder/insured is unrelated to insurance?
- c. Further and alternatively, if the answer to (a) is 'yes', is the fact that there is a dispute between the insurer and injured party concerning the validity or effect of the insurance policy sufficient to justify a conclusion that the injured party's claim is a matter relating to insurance?
- d. If the answer to (a) is 'no', is it sufficient that the joining of the policy holder/insured to the direct action against the insurer is permitted by the law governing the direct action against the insurer?



D.J. HONESSY

30.2.20