C-814/19-1

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BIRMINGHAM DISTRICT REGISTRY

CLAIM NO E90BM227

BETWEEN

AC — FIRST CLAIMANT

AND

TM — SECOND CLAIMANT

AND

GM — THIRD CLAIMANT

(by his mother and litigation friend AC)

AND

MM — FOURTH CLAIMANT

(by her mother and litigation friend AC)

AND

ABC SL — FIRST DEFENDANT

AND

XYZ PLC — SECOND DEFENDANT

Before His Honour Judge Rawlings sitting as a High Court Judge at Stoke on Trent Combined Courts Centre, Bethesda Street, Hanley, Stoke on Trent on 4 October 2019

UPON THE APPLICATION OF THE First Defendant for a reference to the Court of Justice of the European Union (Court of Justice) for a preliminary ruling on the questions set forth in the Schedule annexed to this order

AND UPON HAVING HEARD Counsel for the Claimant and Counsel for the First Defendant

AND UPON FINDING that, in order to enable the Court to give judgment in this case, it is necessary to resolve questions concerning the interpretation of European Union (EU) law 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 (2) and (3) of The Recast Brussels 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. This order be served by the First Defendant upon the Claimant and Second Defendant

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 Queen's Bench Division (Birmingham District Registry) of the High Court of Justice of England and Wales. All communications with the national Court regarding it should be made to the Senior Master, the Royal Courts of Justice, Strand, London WC2A 2LL.

B: The parties

2. The Claimants are represented by Philip Banks of Irwin Mitchell LLP, Imperial House, 31 Temple Street, Birmingham B2 5DB.

3. The First Defendant operates a clinic providing assisted reproduction treatment in Madrid and has its seat in Spain. It is represented by Tom Price of Gowling WLG (UK) LLP, Two Snowhill, Birmingham, B4 6WR.

4. The Second Defendant is the public liability insurer of the First Defendant at the relevant times with its seat in Spain. It is taking no part in the First Defendant's jurisdiction challenge or in this reference.

C: The subject matter and the facts of the dispute

5. In late 2010 the First and Second Claimants, who were and are domiciled in England, contracted with the First Defendant for the provision of assisted reproduction treatment at its clinic in Madrid using donor eggs. Treatment was provided in Madrid in late 2010 and 2011 and the First Claimant fell pregnant in the summer of 2011 using embryos created in the First Defendant's laboratory in Spain with donor eggs sourced by the First Defendant from a Spanish donor and sperm from the Second Claimant. The Third and Fourth Claimants were born in the UK as a result of this treatment on 27 March 2012. They were subsequently both diagnosed with cystic fibrosis. The Second Claimant and the donor were together the source of the relevant mutation.

6. The First Defendant was the operator of the Madrid clinic which supplied assisted reproduction treatment to the First and Second Claimants which resulted in the birth of the Third and Fourth Claimants.

7. The Claimants seek to bring claims against the First Defendant for the injuries and losses sustained by the four of them consequential on the Third and Fourth Claimants being born with cystic fibrosis. The Claimants contend that the First Defendant owed them all a duty in tort under Spanish law to provide medical services and treatment with the care and skill of a standard recognised as proper by a responsible body of like qualified professionals, and that duty was breached. The First and Second Claimants additionally contend that they were owed a contractual duty in like terms, which was breached. Liability is denied by the Defendants.

8. Proceedings were issued out of the Birmingham District Registry on 17 October 2018 and thereafter served on the Defendants, who are separately represented. The Claimants asserted jurisdiction over the Second Defendant pursuant to Articles 11(1)(b) and 13(2) of the recast Judgments Regulation (No. 1215 of 2012) ("Recast Brussels 1"). The Second Defendant did not dispute jurisdiction.

9. By application made on 4 February 2019 the First Defendant challenged the jurisdiction of the Courts of England and Wales to entertain the claims against it.

10. By the date of the hearing the Claimants contended that there was jurisdiction over the First Defendant pursuant to Article 13(3) of Recast Brussels 1. The Claimants additionally asserted jurisdiction pursuant to Articles 17 and 18.

11. The First Defendant disputed that the Claimants' claims fell within the scope of Article 13(3); it further disputed that the Third and Fourth Claimants were 'injured parties' for the purposes of Article 13(3); it disputed that it directed activities to England and Wales for the purposes of Articles 17 and 18; and it disputed that the Third and Fourth Claimants were consumers.

12. Its challenge was heard before His Honour Judge Rawlings sitting as a Judge of the High Court on 23 June 2019. By its judgment handed down on 24 September 2019, the Court held that the Third and Fourth Claimants cannot be categorised as consumers but there was direction of activities to England and Wales so the First and Second Claimant are entitled to rely on the gateway provided by Articles 17 and 18. The First Defendant is seeking to appeal the finding regarding direction of activities but this reference does not in any case concern questions arising under Section 4 of Recast Brussels 1. 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 First Defendant's challenge to the jurisdiction of the English court.

D: Relevant rules of national law

13. In 2015 in Hoteles Piñero Canarias SL v Keefe [2016] 1 WLR 905 the Court of Appeal of England and Wales considered the scope of Article 11(3) of the Brussels I Regulation (No. 44 of 2001) ("Brussels 1") (now Article 13(3) of Recast Brussels 1) and held that it did have jurisdiction over the Spanish-domiciled hotel when coupled to the claim brought against the hotel's liability insurer direct.

14. 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 1[now Article 13(3) Recast Brussels 1] 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)?

15. Following submission of written observations by the parties and by the Commission the claim was settled, and the reference withdrawn.

16. 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 Birmingham District Registry of the Queen's Bench Division of the High Court is inferior to the Court of Appeal.

17. The parties are in agreement that the claims are governed by Spanish law pursuant to the provisions of the Rome I and Rome II Regulations. The High Court did not hear evidence as to the relevant provisions of Spanish law or the approach taken under Spanish law to any of the issues in the claim. There are accordingly no relevant rules of the national law of the contractual and non-contractual obligations on which the parties rely.

E: Relevant provisions of European Union law

18. Article 13 of Recast Brussels 1 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.'

19. 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 1. Advocate General Bobek addressed in his opinion whether the matter could be classed as 'a matter relating to insurance'. He 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'.

20. 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.*"

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

22. The Court of Justice has considered what is meant by an 'injured party' for the purposes of Article 11 of Brussels 1 [Article 13 Recast Brussels 1] and has interpreted it as referring '*not only to persons who directly suffered the damage, but also to persons who suffered it indirectly*', see Vorarlberger Gebietskrankenkasse v WGV-Schwabische Allgemeine Versicherungs AG Case C-347/08 at paragraph 25. It has not considered whether persons in the position of the Third and Fourth Claimants can meet that criteria, which may involve consideration of what is meant by 'the damage'.

F: Summary of the parties' contentions

23. The Claimants contend that:

    a. Under the English authority of Keefe a claimant may join a foreign domiciled insured to a claim against a foreign domiciled insurer.

    b. A purposive interpretation 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. 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. The Third and Fourth Claimants should be assumed (in the absence of evidence of the position under the governing law) to have a claim in tort against the First Defendant and so they should be regarded for that purpose as 'injured parties'.

24. The First Defendant contends that:

a. There is no gateway to jurisdiction under Article 13(3) for any of the Claimants. Derogations from the general rule that a person should be sued where he is domiciled should be construed strictly and purposively, and Section 3 only applies to claims which are a matter relating to insurance.

b. The Claimants' claims are for damages for injury and consequential losses arising out of allegedly negligent assisted reproduction treatment. They are not a matter relating to insurance and do not become so merely by dint of being brought in the same claim as the direct claim against the insurer.

c. Additionally, the Third and Fourth Claimants cannot be categorised as 'injured parties' (which must be given an autonomous interpretation rather than one specific to the applicable law) in circumstances where the only basis on which they could be said to have sustained damage is that they were each born with cystic fibrosis as a result of assisted reproduction techniques used in their conception, and without which they would not have been born.

G: Why a ruling from the Court of Justice is sought

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

(a) if an injured party sues an insurer of a tortfeaser, in the Member State of their domicile, pursuant to Article 13 (2) of Recast Brussels 1, can the injured party join the alleged tortfeasor to that action under Article 13 (3) of Recast Brussels 1, 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 1 **(Issue 2");** and

(c) can the third and fourth claimants in this action be regarded as "injured parties" for the purposes of Article 13 (2) of Recast Brussels 1 ("Issue 3").

26. The questions under the **Issue 1** (questions (a) and (c)) 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 1 (Article 11 (1) (b) of Recast Brussels 1) 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 1) could also join the alleged tortfeasor to that direct action against the insurer pursuant to Article 11 (3) of Brussels 1 [Article 11 (3) Recast Brussels 1]. The Court of Appeal decided that the injured party could join proceedings against 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 allowed under the law governing the tortious act) 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 1;

(ii) Article 11 (2) of Brussels 1 [13 (2) of Recast Brussels 1] 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 Stater);

(iii) Article 11 (3) of Brussels 1 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 1) 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 1 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 1); and

(v) the Court of Appeal considered that their interpretation of Article 11 (3) of Brussels 1 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 1 [Recitals 18 and 21 of Recast Brussels 1];

(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 1 had to involve a matter relating to insurance. Advocate General Bobek, in giving his advice had regard to Recital 11 of Brussels 1 [Recital 15 of Recast Brussels 1] 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 by no means clear that 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 1 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 1, 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 1, to a claim brought direct against the alleged tortfeasor's insurer under Article 13 (2) of Brussels 1 (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 1 should take precedence is uncertain and a matter on which guidance from the Court of Justice is desirable.

27. As to the question under **Issue 2 (question (b)**:

(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, 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 1. 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 14 (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 1 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 1 in their Member State is attempting to join to that claim, a claim against the alleged tortfeasor under Article 13 (3) of Recast Brussels 1, where the alleged tortfeasor is domiciled in another State.

28. As to the question under **Issue 3 (question (d)**:

(a) the claimants in this action alleged that the first defendant was negligent in providing fertility treatment to the first and second claimants in that, as a result of the treatment provided, the third and fourth claimants were born with cystic fibrosis;

(b) the claimants say that the first defendant was negligent in that it was the combination of the donor egg and the sperm of the second claimant which caused a mutation which resulted in the third and fourth claimants being born with cystic fibrosis. The claimants assert that the first defendant should have screened the donor of the egg to ensure that the DNA in their egg, in combination with the DNA in the second claimant's sperm would not cause the mutation which resulted in the third and fourth claimants being born with cystic fybrosis;

(c) the third and fourth claimants could not have been born in circumstances where the alleged negligence had not occurred (in other words the third and fourth claimants only exist because of the combination of the second claimant's sperm with the donor egg, which combination is said to be the negligent act of the first defendant); and

(d) it is uncertain whether, in those circumstances the third and fourth claimants can be properly regarded as "injured parties" for the purposes of Article 13 (2) of Recast Brussels 1. If the third and fourth claimants are not injured parties under Article 13 (2) of Recast Brussels 1 then, on the face of it they cannot sue the First Defendant's insurer in England and cannot therefore join the First Defendant to those proceedings under Article 13 (3) of Recast Brussels 1.

29. Accordingly the Queen's Bench Division (Birmingham District Registry) of the High Court respectfully refers to the Court of Justice the questions set out in the Annex:

ANNEX

Questions referred to the Court of Justice of the European Union

a. Is it a requirement of Article 13(3) of the recast Judgments Regulation 1215/2012 that the cause of action on which the injured person 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 person 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 person's claim is a matter relating to insurance?

c. If the answer to (a) is no, is it sufficient 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?

d. Does the term 'injured party' under Article 13(2) cover a person born as a result of assisted reproduction techniques in circumstances where that person seeks to bring a claim asserting negligence in the performance of the assisted reproduction techniques used in that person's conception.