HQ18P03916

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

[2019] EWHC 1028 (QB)

Date: 30 April 2019

Before :

MASTER DAVISON

- -

Between :

BONNIE LACKEY	**Claimant**
- and -	
MALLORCA MEGA RESORTS SL (1) **GENERALI ESPANA DE SEGUROS Y REASECUROS SA (2)**	**Defendants**

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Ms Sarah Prager (instructed by **Stewarts LLP**) for the **Claimant**
Ms Katherine Deal QC (instructed by **Keoghs**) for the **First Defendant**
Ms Meghann McTague (instructed by **DAC Beachcroft**) for the **Second Defendant**

Hearing date: 9 April 2019

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Approved Judgment

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

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Master Davison:

Introduction

1. The claimant was one of a party of 22 friends who, in the early summer of 2017, went on holiday to Magaluf in Mallorca. The booking was made by Ms Donna Bond, who was one of the party. The confirmation of booking and the flight and accommodation vouchers were sent to her by letter dated 25 April 2017. The agency that they used was Chadwell Travel Ltd, trading as A1 Travel. The party flew out to Mallorca on 3 May 2017. They were staying at the BH Mallorca Hotel owned and operated by the first defendant ("the hotel"). The hotel had a pool complex which included a wave pool. On 5 May 2017, the claimant was in the wave pool. She was on a large doughnut shaped inflatable ring. The wave machine was activated. The Particulars of Claim recite that she was "upended" in the shallow end of the pool landing awkwardly on her head and neck and sustaining a fracture dislocation to her cervical spine. The injury has been described by Mr Manish Desai, a consultant in spinal injuries at RNOH, as ASIA C4 AIS B. She is tetraplegic. She is currently 41 years of age. The Schedule of Loss pleads financial losses of around £9 million.

2. The hotel had public liability insurance with the second defendant, ("Generali").

3. A Claim Form was issued on 2 November 2018. Under Spanish law, the claimant had a direct right of action against Generali. Generali, acting under the terms of the insurance contract, had the right to take control of the proceedings on behalf of itself and its insured. The Claim Form was served on 23 November 2018. By prior agreement, service was on DAC Beachcroft who were then acting for both defendants. (They had assumed conduct of the hotel's defence of the claim pursuant to the "control clause" of the policy.) They filed an Acknowledgement of Service which accepted the jurisdiction of the English court on 4 December 2018.

4. The public liability insurance effected by the hotel with Generali had a cover limit, which is either E300,000 or E450,000 – in either case far short of the overall value of the claim. No doubt for that reason, on 20 December 2018, Keoghs were instructed to represent the hotel separately. On 31 December 2018 a formal Notice of Change of solicitor to this effect was filed. On 17 January 2019, the hotel applied for a declaration that the English court did not have jurisdiction over the claim against it. The hotel also applied for relief from sanctions so as to enable them to make the application contesting jurisdiction. (This was necessary because, pursuant to CPR rule 11(4), any such application ought to have been made by 18th December 2018 and so the application was one month late.) If successful, the practical effect of the application would be to force the claimant to bring her claim against the hotel (though not Generali, the insurer) in Spain rather than London. As to the claim against Generali, she would then be faced with the dilemma whether to abandon that claim here and bring both claims in Spain, or have them tried in two separate jurisdictions. However this application were to be decided and however the claimant were to exercise the choice she would be put to if the application was upheld, the substantive law of liability and quantum will be Spanish law. This application concerns only the place (and therefore the procedural law) of trial. But this is a very important practical matter and especially so for a claimant who is tetraplegic and for whom having to conduct her claim and attend hearings in Spain would be very disadvantageous and burdensome.

5. The application turns on two Sections of European Regulation 1215/2012, known as the "Recast Brussels Regulation", on the jurisdiction and regulation and enforcement of judgments in civil and commercial matters. The Claim Form pleaded that jurisdiction was conferred on the English courts by (a) Regulations 11 and 13 (contained in Section 3) which permitted a claim here against the insurer and the joinder of the hotel to that claim and by (b) Regulations 17 and 18 (contained in Section 4) which permitted a claim here by the claimant against the hotel in her capacity as "a consumer". The applicability of these Sections had been conceded by DAC Beachcroft when they were acting for both defendants. But when Keoghs took over the case for the hotel they took a different view.

6. The application contesting the jurisdiction is practically identical to the application that was made in *Hoteles Pinero Canarias SL v Keefe* [2015] EWCA Civ 598. The application in that case came before Master Cook, who rejected it and whose decision was upheld by the judge and the Court of Appeal. A further appeal to the Supreme Court was compromised, but not before that court had referred the case to the CJEU for the determination of three questions; see paragraph 20 below for the text of the questions. (The reference was withdrawn once the compromise had been concluded. But, in this application, I was asked to consider referring afresh the very same three questions.)

7. I have come to the conclusion that, so far as Section 3 of the Regulation is concerned, I am bound by the decision of the Court of Appeal in *Keefe* and that this application should be refused. It should be refused for the additional reason that jurisdiction in this claim is also established under Section 4. I have not found it "necessary" to refer questions to the Court of Justice of the European Union for its opinion.

8. My reasons follow.

Relief from sanctions

9. The application faced the threshold requirement of satisfying me, on *Denton* principles, that I should allow it to go forward in circumstances where it had been made a month late. That is quite a long delay in relation to the time allowed by the rule (which is only 14 days). But there was a change of solicitors and a change of opinion as to the stance to be taken to jurisdiction. That, combined with the intervening Christmas break, invites sympathy. Further, this is a £9 million claim and jurisdiction is a central, important and moderately complicated issue. Having regard to those factors, it is obvious that I should grant relief from sanctions and allow the application to be made and I will so order.

The test to be applied under CPR 11

10. There was no dispute about this between counsel. Once jurisdiction is challenged the claimant bears the burden of establishing that the English court has jurisdiction to entertain her claim against the hotel. The standard is 'a good arguable case'; *Canada Trust v Stolzenburg (No.2)* [2002] 1 AC 1 at 13, upholding Waller LJ in the Court of Appeal at [1998] 1 WLR 547 at 555. This was endorsed by the Privy Council as the appropriate test in a Brussels regime claim in *Bols Distilleries v Superior Yacht Services Ltd* [2006] UKPC 45, Lord Rodger confirming at paragraph 28 that:

> … if the standard of "a good arguable case" is properly understood and applied, there is no risk that the effectiveness of the Regulation will be impaired. The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction.

11. That a good arguable case means 'a much better argument on the material available', as Waller LJ had identified, has been upheld by the Supreme Court in *Brownlie v Four Seasons Holdings International* [2017] UKSC 80 per Lord Sumption at paragraph 62. Lord Sumption clarified that this means that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; if there is an issue of fact or for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; and if no reliable assessment can be made because of the nature of the issue or the limitations of the material available at the interlocutory stage, there is a 'good arguable case' if there is a plausible albeit contested evidential basis for it.

General

12. The Recast Brussels Regulation is part of English law. But in order to ensure equality and uniformity of rights and obligations across Member States, it has been emphasised that terms and concepts in the Regulation should not be interpreted simply as referring to the national

law of one or other State; see e.g. *Kalfelis v Bankhaus Schrodere Munchmeyer Hengst & Co GmBH* Case C-189/ at paragraph 15 and 16. Hence, they are sometimes referred to as "autonomous concepts" of European law.

13. The default position established under the Regulation is that a person or corporation domiciled in a Member State must be sued in that Member State. The derogations from that default position are construed restrictively. Further, the "gateways" to jurisdiction fall to be applied separately. Establishing jurisdiction under one of the gateways does not operate as a licence or permission to bring other categories of claim. But that does not mean that a claimant is not allowed to rely on more than one gateway, as this claimant seeks to do in this case.

14. Some assistance as to interpretation of the Sections of the Recast Regulation relied upon in this application is derived from the recitals to the Regulation. The relevant ones, for present purposes, are as follows:

> (15) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. …
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> (16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice. …
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> (18) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.
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> (21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. …

First limb of the application – Jurisdiction in matters relating to insurance – Section 3 of the Regulation

15. It's convenient to state at the outset the claimant's position on this. Ms Prager submits that Section 3 allows a claim (an "anchoring" claim) to be made here against Generali, the insurer, and Regulation 13(3) then allows a "parasitic" claim against the insured (in this case, the hotel) to be added – the policy objective being to discourage multiplicity of proceedings and the possibility of conflicting judgments.

16. Section 3 is titled *Jurisdiction in matters relating to insurance*. The relevant Articles are as follows.

> Article 10
> In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.
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> Article 11
> 1. An insurer domiciled in a Member State may be sued:
> (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;
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> 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. The wording of Article 13(3) does indeed seem to support Ms Prager's very simple submission that it allows a claim against the insured to be "added on" to a claim against the insurer and that the Article is, in this respect, similar to Article 8 which allows a person domiciled in one Member State to be sued in another Member State if he is one of "a number of defendants" at least one of whom is domiciled in that other Member State – providing that the claims are so closely connected as to make it "expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings". (These words are an echo of Recital 21 quoted above.)

18. Put shortly, (and notwithstanding the apparently clear wording of Article 13(3)), the argument in *Keefe* and raised again by the hotel in this claim is that the wording of the Article has to be construed in the context of the Section as a whole, which is expressed as determining jurisdiction "in matters relating to insurance". It is said that the claim against the hotel cannot be characterised as a "matter relating to insurance" and therefore this gateway is not open to the claimant.

19. Gloster LJ in the Court of Appeal dealt with the argument as follows, (NB that in *Keefe* the Regulation was in its previous form and the relevant Article was then Article 11 (the wording of which was the same as Article 13)):

> 44. It is clear from the decision in *Odenbreit* that the Judgments Regulation has to be construed purposively with due regard to the objectives set out in the recitals to the Preamble. As the CJEU said at paragraph 28 cited above, according to Recital 13 the Regulation aims to guarantee more favourable protection to the weaker party than the general rules of jurisdiction provide for. Given that aim, there is no possible justification, whether linguistic or purposive, for construing the words in Article 8 "in matters relating to insurance", or any of the respective provisions of Article 11(1), Article 11(2) or Article 11(3), as subject to some sort of implied restriction that the insurer may only be joined under Article 11(1) or Article 11(2), or likewise the insured/alleged tortfeasor may only be joined under Article 11(3), in circumstances where there is a policy dispute. Indeed, a similar argument in relation to Article 11(2), based on the characterisation under German law of the direct action against the insurer as a tort claim, was expressly rejected in *Odenbreit*. There would be no logical reason for imposing such a restriction only for the purposes of Article 11(3), when the injured party sought to add the insured to the action already started against the insurer, and not imposing such a restriction under Article 11(1) and Article 11(2). In many cases a direct action against an insurer will not involve a policy dispute, but merely raise questions about liability and quantum.
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> 45. As Ms Deal pointed out in her submissions, one of the objectives of the Judgments Regulation is that jurisdiction "must be predictable" and ascertainable by a claimant at a time before proceedings are issued and jurisdiction established; see recital (11) and *Canada Trust Co v Stolzenburg (No. 2)* [2002] 1 AC 1. In many situations (such as the present case), the need to bring proceedings against the insured/alleged tortfeasor – for example because of the insolvency of the insurer, a coverage dispute or a limitation in respect of the sum insured under the policy – might well not be known at the time proceedings are issued against the insurer. If the requirement for a policy dispute were determinative, it could produce the illogical result of there being no jurisdiction if the party injured attempted to join the insured/alleged tortfeasor as a defendant to the original proceedings (because no policy dispute was evident at the time of issue) but there being jurisdiction if the insured/alleged tortfeasor was joined subsequently once the dispute became apparent. That would be likely to result in an increased risk of separate proceedings in separate Member States, since in many cases there might be a need to issue proceedings against the insured/alleged tortfeasor as a matter of some urgency, before the existence of any policy dispute emerged – for example, to comply with time limits in personal accident claims, to ensure the preservation of relevant evidence, or to obtain pre-judgment freezing order relief.

> 46. But the whole point of Article 11 was to enable direct actions against liability insurers to be brought in the courts of the injured party's domicile (irrespective of whether there was any dispute in relation to the policy of insurance). Once that is taken as a given, there is no logical reason for restricting joinder of the insured/alleged tortfeasor under Article 11(3) to situations where there is a policy dispute, even taking into account the well-recognised principle that Article 11(3) was an exception to the general rule on jurisdiction prescribed by Article 2, (viz. that a defendant should be sued in the court of the Member State where he is domiciled), and therefore should be narrowly construed.
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> 47. Nor, in my view, can any assistance be obtained from the CJEU cases of *Brogsitter v Fabrications de Montres Normandes EURL supra* or *Folien Fischer AG and another v Ritrama SpA supra* upon which Mr Mead sought to rely. *Brogsitter* was another case where, in the context of considering whether, for the purposes of the Judgments Regulation, certain claims should be characterised as "matters relating to a contract" or as "matters relating to a tort, delict or quasi-delict", the CJEU emphasised that the concepts had to be interpreted autonomously and by reference to the scheme and purpose of the Judgments Regulation, not by reference to the characterisation of the legal relationship under the national state's law 24 . The articulation of the test in *Brogsitter* for determining whether a civil liability claim was a "matter… relating to a contract" is of no relevance to the determination of the issues in the present case.
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> 48. In *Folien Fischer* the CJEU restated the proposition that the objective of ensuring that the court with jurisdiction is foreseeable and certain is not connected to the allocation of the respective roles of the parties or "to the protection of either". In particular the court stressed that that objective was not the same as that pursued by the rules of jurisdiction laid down in sections 3 to 5 of Chapter II of the Judgments Regulation "which are designed to offer the weaker party stronger protection". But again, that obvious proposition is of no assistance in the present case. Contrary to Mr Mead's submission, I see no reason why the Second Defendant should be entitled to assert some sort of legitimate expectation on grounds of certainty and predictability that it was entitled to be sued in Spain as the place where "it knew it would be answerable for its tortious conduct". In my view, given that it is running a hotel intended to attract tourists from throughout the EU, the Second Defendant had no basis for an assumption that it was somehow immune from the joinder provisions of Article 11(3) just because the foreign tourists staying at the Second Defendant's hotel might have a variety of domiciles. The principle is certain, irrespective of the fact that the guests might have come from many different member states.

She concluded this part of her judgment with the observation, in paragraph 57:

> The policy objectives of the Judgments Regulation, as well as practical and cost considerations, clearly point to the action being heard in one place against both Defendants.

20. I was invited to depart from the decision in *Keefe* because it was now in conflict with subsequent European jurisprudence. Alternatively, I was invited to make a reference to the CJEU of the same questions as had been referred by the Supreme Court. These questions were:

    (i) Is it a requirement of Article 11(3) 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?
    (ii) Is it a requirement of Article 11(3) that there is a risk of inconsistent judgments unless joinder is permitted?
    (iii) Does the court have a discretion whether or not to permit joinder of a claim which falls within Article 11(3)?

Discussion

21. I was taken by Ms Deal QC to a number of recent decisions of the CJEU and one of the German Federal Court of Justice, which, it was said, amounted to additional Community input which had to be heeded "lest the application of European law ahead of domestic law be jeopardised". The principal decision relied upon was *KABEG V MMA IARD* Case C-340/16. A cyclist living in Austria was knocked off his bike and injured in Italy. His Austrian employer paid him sick pay, which it then sought to recover as a subrogated claim against the driver's insurer (which was based in France) by means of an action brought in Austria. The "gateway" it sought to deploy was Article 13(2), (at that time Article 11(2)). The discussion in the case focused on the questions whether such a claim could be characterised as "a matter relating to insurance" and whether the employer was "an injured party". Advocate General Bobek opined that the former question was "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 an insurance relationship". In the context of Section 3 of the Regulation, a "matter relating to insurance" concerned "the ascertaining of rights and duties of any of the parties referred to in Article 9(1)(b) and Article 11(2) to the extent that these rights and duties are said to arise out of an insurance relationship".

22. The CJEU resolved both questions in favour of the claimant, though, as to the part relied upon by Ms Deal QC, namely AG Bobek's remarks about what constituted a matter relating to insurance, the judgment is practically silent.

23. If I understood Ms Deal QC correctly, her argument was that *KABEG* had made it clear that it was incumbent on the claimant to show that the claim against the hotel concerned rights and duties arising out of the insurance relationship. To put it another way, the question which *KABEG* required to be posed was this: "Does Ms Lackey's cause of action seek to ascertain the rights and duties arising out an insurance relationship?".

24. I do not agree that *KABEG* requires me to address a question phrased in that way. I find *KABEG* of no assistance at all. It did not concern an "anchoring" and a "parasitic" claim under Article 13(3). Unlike *KABEG*, the issue in this claim is not whether there is a valid claim (in the sense of one meeting the requirements of Section 3) against the insurer. It's common ground that there is a valid claim against the insurer. The issue is whether the existence of that claim permits an additional, related claim against the insured under Article 13(3). On any ordinary reading of it, the Article appears to permit that. To the extent that Article 13(3) has to be read in the context of Section 3 as a whole, such a claim is, as it seems to me, "a matter relating to insurance" in the broad sense that is coupled to and connected with the claim against the insurer. There is nothing in *KABEG* to cast doubt upon that construction of Article 13(3). As the Court of Appeal in *Keefe* observed, there seems no linguistic or purposive ground for requiring that there be some kind of policy dispute between insurer and insured for Article 13(3) to bite. I agree with the submission of Ms Prager that such a requirement would render the Article of very limited use because it would only be in a small minority of cases that this would arise and the injured party would not, ordinarily, be concerned with such a dispute.

25. However, and unusually, it happens that in this case, there <u>is</u> such a dispute. As briefly alluded to in paragraph 4 above, there are, I was told, two policies, one giving cover up to E300,000 and one giving cover up to E450,000 and it is not clear – at least at the present time – which one responds to this accident. Furthermore, I was told that it was not accepted by the claimant that, as a matter of Spanish law, Generali was entitled to limit its public liability cover at all. Thus, even if I were to adopt the much more restrictive interpretation of Article 13(3) urged on the Court of Appeal in *Keefe* and on me in this case, such interpretation would be satisfied on the material I have. (I make it clear, however, that I regard such a restrictive interpretation as unwarranted by the words of Article 13(3) and in this respect I am clearly bound by the Court of Appeal's decision.)

26. Ms Deal QC relied upon a number of other cases. I will not set those out. They were even more tangential to the construction of Article 13(3) and of even less relevance. (The decision of the German Federal Court of Justice decision laboured under the additional disadvantages that (a) it was not binding on an English court – though, of course, entitled to great respect – and (b) had been rendered in a translation that was very difficult to follow, indeed in places incomprehensible.)

27. I will not make a reference to the CJEU. It is not necessary for me to refer or re-refer any of the questions referred by the Supreme Court because I am bound by the decision of the Court of Appeal in *Keefe* and because (as appears below) the claimant has another and different gateway anyway. Furthermore, in relation to question (i), (and unlike *Keefe*), this case does raise a question about the validity or effect of the policy; in relation to question (ii) there is a risk in this case of inconsistent judgments (as there was in *Keefe* and would be in any case where the issue was whether joinder under Article 13(3) was permitted; hence the purpose of seeking an answer to this question is obscure); and in relation to question (iii), it is not suggested that if I have a discretion whether to permit joinder I should do otherwise than to permit it. In short, answers to the questions would take matters no further.

Second limb of the application – Jurisdiction over consumer contracts – Section 4 of the Regulation

28. Again, it is convenient to begin by setting out the claimant's case on this. The effect of Articles 17 and 18 of the Recast Regulation is to allow a consumer to bring a claim against the counterparty to a consumer contract in the Member State where the consumer is domiciled, providing that the counterparty had directed its commercial activities to that Member State. The hotel (like many in Spain) had done precisely that. So the claimant could bring her claim here as a consumer.

29. The only part of that very simple analysis that the hotel opposed was the claimant's characterisation of herself as a consumer. Ms Deal QC submitted that the effect of Articles 17 and 18 was to restrict this term to the person who actually concluded the contract. This person was Ms Donna Bond, who was the member of the group who had made the booking.

30. Section 4 is titled *Jurisdiction over consumer contracts*. The relevant Articles are:

> 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:
> (c)…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.
> 2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.
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> 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.

31. It was not in dispute that the hotel directed its marketing to the UK market and that Article 17(1)(c) was therefore satisfied. Ms Deal QC focused attention on Article 17(1) and the definition of consumer. As already noted, she maintained that this concept embraced only the person who actually concluded the contract. She submitted that this was the clear wording and intention of Article 17.1. She did not shrink from acknowledging the breadth of her submission. It meant, for example, that in the case of a family who arranged a trip like the one under consideration through, say, the mother and all went down with, say, food poisoning at the hands of the hotel, only mother would be a consumer and could bring her claim here. Mother's partner and the children would have to bring their claims in Spain, (unless the holiday, unlike this case, was one governed by the Package Travel Directive, where "consumer" is more loosely defined).

32. I was told that there was no decision of a higher court on this point.

Discussion

33. As already mentioned, the difficulty with Ms Deal QC's construction of Articles 17 & 18 is that it would draw arbitrary boundaries between members of the same group and also between holidays arranged on a "Flight-Plus" or "Agency" basis on the one hand and those arranged on a "Package" basis on the other. Her argument would also appear to offend Recital 18 (protection of the weaker party) and Recital 21 (avoidance of concurrent proceedings and irreconcilable judgments). Lastly, it would offend against common sense in that it would deprive someone who was, on any ordinary meaning of the word, a 'consumer' of the right to bring proceedings in his or her own country where the evident policy and intention of the Regulation was to confer precisely that right.

34. There is nothing in the wording of the Articles that mandates such a strange result. Article 18 says that 'a consumer may bring proceedings' against the other party to the contract in the courts of the consumer's domicile. There is nothing in the Regulation to say that that consumer must be the one who actually concluded the contract. As Ms Prager pointed out, Article 18 does not say, for example, 'that consumer', or 'the consumer in question', or even 'the consumer'. It refers to 'a consumer', and she was correct to observe that the claimant certainly qualified as a consumer. How else, indeed, could she be described?

35. It is no answer to this straightforward reading of Articles 18.1 and 17.1 to pray in aid cases where claimants have taken an assignment of a consumer's cause of action. The cases that Ms Deal QC relied upon were *Shearman Lehmann Hutton Inc v TVB* [1993] ECR I-139 and *Schrems v Facebook Ireland Ltd* Case C-498/16. In *Shearman Lehmann Hutton* a consumer (a German judge) had instructed a broker to carry out currency, security and futures transactions. He lost most of his investment. He assigned (i.e. sold) his cause of action against the broker to a corporation, TVB. TVB brought a claim against the broker in Germany. The broker disputed the jurisdiction of the court. As to this, the Advocate General stated as follows in his opinion:

> The alternative jurisdictions and the special jurisdiction for which a consumer qualifies under the first paragraph of Article 14 of the Brussels Convention [Article 18 of the recast Regulation] apply only where 'a consumer (...) bring [s] proceedings against the other party to the contract'… the concept of 'consumer' within the meaning of Article 14 necessarily refers to that contained in Article 13. It is inconceivable in the absence of any express provision that the term 'consumer' used in two consecutive articles should refer to two different things. According to Article 13, the status of consumer attaches only to a consumer who has concluded a certain type of contract. This must also be true for the purposes of the application of Article 14. Consequently, only the party to the proceedings who himself satisfies the requirements laid down by Article 13 and therefore took part in concluding the contract with the trader or professional person can benefit from the special jurisdiction rules applying to consumers. The action covered by Article 14 can therefore, in my view, by brought only by a consumer in relation to a contract which he himself concluded.

36. Having re-stated the general principle that the national courts of the Contracting State in which the defendant is domiciled have jurisdiction, the CJEU ruled as follows:

> [18] … it should be borne in mind that the special arrangements laid down in Article 13 et seq. of the Convention are prompted by a concern to protect the consumer as the party to the contract who is deemed to be economically weaker and legally less experienced than the other party and that, therefore, he should not be discouraged from taking legal proceedings by being obliged to bring an action before the courts of the State where the other party is domiciled.
> [19] The protective function of these provisions means that the application of the special jurisdictional rules laid down for this purpose by the Convention should not be extended to persons for whom such protection is not justified.
> [20] In this connection it is important to observe, firstly, that Article 13(1) of the Convention defines 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession' and provides that the different types of contract

> which it lists and to which Section 4 of Title II of the Convention applies must have been concluded by the consumer.
> [21] Secondly, Article 14(1) of the Convention confers jurisdiction upon the courts of the Contracting State where the consumer is domiciled for proceedings 'brought by the consumer against the other party to the contract.'
> [22] It is clear from the wording and the function of these provisions that they refer only to final consumers acting in a private capacity and not in the course of their trade or profession, who are bound by one of the contracts listed in Article 13 and who are a party to proceedings in conformity with Article 14.
> [23] As the Advocate General points out in paragraph 26 of his Opinion, the Convention protects the consumer only if he personally is the plaintiff or defendant in proceedings.
> [24] It follows that Article 13 of the Convention must be interpreted as meaning that a plaintiff, acting in the course of his trade, business or profession, who is not therefore himself a consumer, party to one of the contracts listed in paragraph (1) of that Article, cannot take advantage of the special rules concerning jurisdiction provided for by the Convention in relation to contracts concluded by consumers.

37. The finding of the court was that the special protections afforded to consumers did not extend to the assignee of a consumer's cause of action. The claimant himself had to be before the court and had to be acting in his capacity as a consumer. A commercial assignee was not entitled to step into the shoes of the consumer. It is difficult to see how that conclusion and the reasoning behind it can be applied to this case. Plainly, the judgment addressed a very different factual situation from that of a group of consumers who had entered into a contract through one of their number. The court made no ruling to the effect that, in that situation, it would only be the 'lead passenger' who qualified as a consumer. The case is of no assistance on that point. It is true that Advocate General Darmon said that the consumer in (the statutory predecessors of) Article 17.1 and Article 18.1 meant the "same thing" and that the action could only be brought by the consumer "in relation to a contract which he himself concluded". But these statements have to be read in their particular context, i.e. that of a consumer who had assigned his contract to a commercial entity. The Advocate General did not mean his Opinion to be cited like a statute in a completely different context.

38. The *Schrems* case also involved a claimant to whom others had assigned their claims. The claimant alleged breaches of data protection rules by Facebook Ireland Ltd. He brought his claim in Austria. He included in his claim the claims of 7 others of which he was the assignee; (this was a small proportion of the total; the report of the case notes that over 25,000 people had assigned their claims to him). The CJEU refused to allow this. Article 16.1 (the predecessor of Article 18.1) "does not apply to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State, or in other Member States of in non-member countries"; see paragraph 49. Ms Deal QC relied principally upon the statement in paragraphs 44 and 45 of the judgment that:

> … 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 … The rules on jurisdiction laid down, as regards consumer contracts, in Article 16(1) of the regulation [Article 18(1) of the recast 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.

39. *Schrems* does no more than re-state the principles set out in *Shearson Lehman Hutton*. To the extent that it adds anything at all, such addition is found in paragraphs 78 – 80 of Advocate General Bobek's opinion. I will not set out those paragraphs. Essentially, he rejected the argument put forward by the claimant that the consumer bringing the claim did not need to be the same consumer who was a party to the consumer contract and that "a consumer" within the meaning of Article 18.1 did not have to be the same person as "the consumer" in Article 17.1. This, it was submitted by Ms Deal QC, dealt a heavy blow to the argument of Ms Prager set out in paragraph 34 above. I disagree. Plainly, the consumer bringing the claim must be a beneficiary of the consumer contract or at least within its ambit.

That does not mean that she personally must have concluded it. To borrow again from the judgment of Gloster LJ in *Keefe*, there would be no linguistic or purposive justification for such a restrictive interpretation.

40. But even if it were necessary for a claimant to show that she had "concluded" the consumer contract, (rather than being a beneficiary of it or someone falling within its ambit), this claimant can do so in this case. It is plain beyond argument that Ms Bond contracted for and on behalf of herself and all the other members of the group – including the claimant. Chadwell Travel Ltd's Booking Conditions stated that references to "you" and "your" "include the first named person on the booking and all persons on whose behalf a booking is made …". Section A, applicable to all bookings stated: "By making a booking, you agree on behalf of all persons detailed on the booking that you have read these terms and conditions and agree to be bound by them". The hotel deployed no evidence of any kind to displace the effect of these terms, (which, I would add, are standard terms to be expected in a contract of this kind). A person who contracts through an agent has still "concluded" a contact. Thus, all argument about the need for complete identity between the consumer referred to in Article 17.1 and the consumer referred to in Article 18.1 is redundant. In each case it was the claimant, Ms Lackey.

Conclusion

41. For these reasons, the challenge to the jurisdiction of the court fails. I will declare that the English court has jurisdiction over the claim pursuant to Sections 3 and 4 of the Recast Regulation.