Neutral Citation Number: [2020] EWHC 3227 (QB)

Case No: QB-2019-003770

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th November 2020

Before :

MR JUSTICE SOOLE

- -

Between :

DERRICK TATE **Claimant**

- and -

ALLIANZ IARD SA **Defendant**
(a company incorporated under the laws of France)

- -
- -

Ms Lucy Wyles (instructed by **Pierre Thomas & Partners**) for the Claimant
Mr Bernard Doherty (instructed by **DAC Beachcroft Claims Ltd**) for the Defendant

Hearing date: 1 October 2020

- -

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.

.....

MR JUSTICE SOOLE

Mr Justice Soole :

1. This is an application by the Defendant insurer to dismiss, alternatively stay, this action pursuant to the *lis pendens* provisions of Articles 29 or 30 of Regulation (EU) No. 1215/2012 ('Brussels 1 recast').

2. The Claimant is a British national domiciled in the United Kingdom. The Defendant insurer is domiciled in France. On 20 February 1991 the Claimant suffered injury as a pedestrian in Boulogne-sur-Mer when he was struck by a bus belonging to a local bus company and insured by the Defendant. The Claimant brought proceedings in France against the bus company and recovered compensation for his injury and loss. In the event of deterioration in a claimant's condition, French law allows a further claim, known as an *'action en cas d'aggravation'*, to be made for additional compensation.

3. By this action, commenced by Claim Form issued on 23 October 2019, the Claimant seeks damages against the Defendant for the alleged deterioration in his condition. There is no dispute that the allocation of jurisdiction for this claim is governed by Brussels 1 recast; and that, subject to lis pendens, this Court has jurisdiction pursuant to Articles 11 and 13(2). However the Defendant contends that, by reason of proceedings allegedly pending in the French Courts and the provisions of Articles 29 or 30, this Court must decline jurisdiction, alternatively stay the action.

Essential narrative

4. In February 1994 the Claimant issued a claim in the Tribunal de Grande Instance in Boulogne-sur-Mer ('the Boulogne Court') against the bus company for personal injuries and loss sustained in consequence of the accident. Under French law pedestrians have, subject to certain inapplicable exceptions, a right to compensation for injuries and loss suffered as a result of an accident with a motor vehicle, i.e. without proof of fault. The bus company admitted liability.

5. In accordance with French practice in such claims, the Boulogne Court appointed a medical expert, Dr Daniou, to examine the Claimant and provide an independent report to the Court. That translated report dated 26 February 1996 identified a number of injuries including multiple fractures of the pelvis/left hip. The overall level of 'partial permanent incapacity' was assessed at 8%; and pain and suffering at level 5 on a scale of 7.

6. Dr Daniou identified the 'consolidation date' for the injuries as 1 March 1993. As the parties' experts in French law agree, under French law the consolidation date is the date when the claimant's state of health is deemed to have stabilised, i.e. so that it is not expected to get better or worse. Compensation of past and future losses is assessed by reference to the consolidation date.

7. However this is subject to an *'action en cas d'aggravation'*. Under French law this is the right for a claimant to bring a claim for further damages in the event of a deterioration in his or her condition after the consolidation date; and the action constitutes separate proceedings from those which led to the initial compensation. The starting point for such fresh proceedings is the consolidation date of the deterioration.

8. Under the heading 'Aggravation/improvement', Dr Daniou had concluded in his report that, based on the x-ray results, there was a likelihood that the Claimant would need to be fitted with a femoral head prosthesis. The agreed translation continues : *'In fact, the femoral head and femoral neck in the left leg are in poor condition. Hence a provision should be made for such fitment in a short period of time after which another examination would then be desirable.'*

9. On 20 April 1999 the Boulogne Court gave judgment for the Claimant in the total sum of 234,770 FF, supplemented by 8,000 FF in a 'rectifying judgment' dated 22 June 1999. The judgment of 20 April also awarded the costs of fitting and replacing prostheses *'on production of supporting documentation'*.

10. The Claimant considered this all to provide inadequate compensation and appealed the judgment to the Court of Appeal of Douai ('the Douai Court'). The appeal was successful in that by its judgment dated 6 May 2004 the Douai Court increased the award to a total sum expressed in Euros and Sterling as €27,095.30 and £25,741.22.

11. In its judgment the Douai Court noted the absence of evidence that a prosthesis procedure had been carried out and refused the requested award of £10,075. However it continued : *'...should the operation be carried out later, he will have to present a new claim for aggravation of his injuries; it is consequently appropriate to simply reserve his rights under this head of loss.'* This is matched by an earlier passage in which the Court *'Takes due note that Mr Tate reserves his rights in the event that his condition should worsen, especially if he were to proceed with the fitment of a prosthesis of the femoral head.'*

12. On the Claimant's case in this present action, his condition – in particular of his hip – had deteriorated since 1996. A prosthesis was inserted in the left hip in November 2005. In accordance with French practice, medical experts were instructed by the parties to jointly assess the deterioration. By joint report dated 25 February 2016, Drs Chemin and Sannier concluded that the 'aggravation' dated from 18 March 1996 and that the 'consolidation date' of the aggravation was 10 February 2011. The report assesses AIPP ('permanent impairment of physical and mental integrity') at 20%, namely a 12% aggravation from the previous impairment of 8%.

13. The Claimant did not present a claim of 'aggravation' to a French Court, but instead issued these proceedings in October 2019.

Brussels 1 recast

14. Brussels 1 recast is the successor to the Council Regulation (EC) No 44/2001 (the 2001 Regulation), which itself replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the 1968 Convention). At least for the purposes of this application, it is common ground that the relevant provisions of Brussels 1 recast are in substance unchanged; and accordingly that the authorities based on the two previous instruments have continuing application.

15. The Recitals include:

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor…

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

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

…

(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. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.

16. The Articles include :

CHAPTER II - JURISDICTION

SECTION 1

General provisions

4(1) Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

…

SECTION 3

Jurisdiction in matters relating to insurance

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;
…

13 (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.

...

SECTION 9

Lis pendens — related actions

29 (1) Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

29 (2) In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

29 (3) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

30 (1) Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

30 (2) Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

30(3) For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

...

32(1) For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court...

...

CHAPTER III – RECOGNITION AND ENFORCEMENT

36(1) A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

…

45(1) On the application of any interested party, the recognition of a judgment shall be refused:

…(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed…'

Application to this case

17. Section 1 Article 4 provides the starting point for the allocation of jurisdiction; and of itself would allocate jurisdiction in a claim against a defendant domiciled in France to the courts of that country.

18. However Section 3 provides an exception in matters relating to insurance. There is no dispute that, subject to the lis pendens provisions, the combined effect of Articles 11 and 13(2) entitles the injured party to bring proceedings against the insurer in the courts of the member state in which he is domiciled : FBTO v. Odenbreit (C-463/06) [2008] Lloyd's Rep. I.R. 354. There is equally no dispute that French law entitles the injured party to bring a direct claim against the insurer; and that this provision of French law applies to the present action.

19. Accordingly, and subject to the 'lis pendens' issue, the Defendant accepts that the Court otherwise has jurisdiction to hear this claim.

20. It is common ground that one of the necessary ingredients for the application of each of Articles 29 and 30 is that there is a lis pendens in a French court; and that that question is to be determined by European Union law, not by national law.

The expert evidence on French law

21. The experts in French law instructed by the parties, to whose evidence I have already referred, are respectively Maître Thomas Ricard and Maître Solenn Le Tutour. Their Joint Statement dated 24 April 2020 also includes the following relevant points of agreement :

'The 'action en cas d'aggravation' *is…the right for the Claimant to claim for further damages in the case of a deterioration post-consolidation and after the initial decision awarding damages of his physical or psychological condition, that was caused by the accident.*

The 'action en cas d'aggravation' *constitutes a separate proceeding from the proceedings which led to the initial compensation. The experts agree that from a*

procedural point of view, such claim for aggravation is a new claim. They differ on the meaning to be given to a "new claim".

The decision from the Douai Court of Appeal dated 6 May 2004 is a final decision. Neither the Douai court of appeal nor the Tribunal de grande instance of Boulogne are still seized at this date under French civil procedure rules. The decision of the Court of appeal of Douai was not a judgement for provisional damages.

*According to the res judicata principle, it is not possible to re-examine a claim which has been already judged or settled. Therefore, the issues decided by the Douai court of appeal cannot be subsequently challenged. The "*action en cas d'aggravation*" shall be strictly limited to the consequences of this aggravation. To that extent, the claimant of an "*action en cas d'aggravation*" cannot request a re-evaluation of the damages which were initially awarded, nor challenge the liability issue decided by the judgement ordering the initial damages.'*

22. As to the difference between them on the meaning to be given to a "new claim", Maître Ricard contends that *'action en cas d'aggravation'* is a new claim *'only from a procedural point of view'*. Thus the court seised of such an action is bound by the initial decision on liability; and the assessment of compensation for the *'aggravation'* cannot modify the initial assessment of the injury made by the previous court decision. The court will need to identify and separate the damages resulting from the aggravation from the damages already included and determined in the initial proceeding.

23. Maître Le Tutour in fact acknowledged in her report that the issues ruled on in the first action, i.e. liability and amount of damages, cannot be called into question by a judge subsequently ruling on the aggravation of the damage. In the Joint Statement she noted the point of disagreement raised by Maître Ricard; and stated that in her opinion this concerned the evaluation of the damages under French law.

The Defendant's argument

Article 29

24. Under Article 29, Mr Doherty submits that (i) there is a pending action in the French courts; (ii) the French proceedings and this present action involve the same cause of action and are between the same parties; accordingly (iii) this Court must decline jurisdiction.

25. This argument is underpinned by three central and linked principles. First, that the approach to interpretation of instruments of the European Union is teleological or purposive; so as to lead to an interpretation that gives effect to its objectives. Secondly, that the fundamental purpose of Brussels 1 recast is to ensure the free movement of judgments and their enforceability; and hence to ensure that Courts of Member States do not give irreconcilable or inconsistent judgments on the same matter. Thirdly, that the various concepts in issue, including 'cause of action' and 'lis alibi pendens' are to be construed as autonomous Community rules, independent of systems of national law.

26. As to the second proposition, he points in particular to recital (21), which anticipates the provisions of Section 9; Article 30(3); and to the various recognition and enforcement provisions in Chapter III, including Article 45(1)(c) and (d). Further, in Gubisch Maschinenfabrik KG v. Giulio Palumbo [1989] E.C.C. 420, concerning the like provisions on lis alibi pendens in the 1968 Convention, the CJEU[1] stated that the section was *'…intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.'* [8].

27. Furthermore, in The Tatry [1999] QB 515 the CJEU held that the concept of 'irreconcilable judgments' must be given a broad interpretation. Thus it is not confined to a meaning which results in the refusal of recognition and enforcement; but extends to all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive : see at [53]-[58].

28. As to the third proposition, Gubisch held that the terms used in [Section 9] in order to determine whether a situation of *lis pendens* arises are independent of systems of national law and to be construed as an autonomous Community rule: [11]. This applies equally to interpretation of the concept of a 'cause of action' and 'the same cause of action'.

29. Supported by these propositions, he submits that the rules of Section 9 of Brussels 1 recast are to have a broad interpretation; such that, where there are two claims in different Member States so closely intertwined that they might give rise to inconsistent or irreconcilable judgments, then the Court should be ready to use those rules so as to avoid that outcome.

Same cause of action

30. As to whether the French proceedings and this present action involve 'the same cause of action', it follows that the question is not determined by the agreed expert evidence that an *'action en cas d'aggravation'* is treated by French law as a new claim. Such procedural national law cannot determine a question which is to be interpreted as an autonomous concept of European law.

31. For this purpose, the CJEU has applied the French text and distinguished between a 'cause' ('la même cause') and its 'object' ('le même objet') : The Tatry at [37-45]; see also Dicey, Morris & Collins, Conflict of Laws (15th ed.) at para. 12-069. The 'cause' comprises the facts and the rule of law relied on as the basis of the action [39]; the 'object' means the end which the action has in view [42]. In this case the cause and its object were each the same in the French proceedings and the present action. The 'cause' was the legal liability of the bus company, and hence its insurer, for the consequences of the accident. The common 'object' in each case was the recovery of

[1] Regardless of their date and for simplicity, I will refer to all European Court decisions as of the CJEU.

full compensation for the injuries suffered and their consequences. None of this was altered by the fact that, on the Claimant's case, his condition had deteriorated since the award in the Douai court.

32. Furthermore, the Court of Appeal has held that an action *'en cas d'aggravation'* does not constitute a new cause of action for the purposes of the Brussels regime. Thus Henderson v. Jaouen [2002] 1 WLR 2971 : *'The aggravation…is not a fresh wrong done to the claimant : it is a worsening of his condition deriving directly from the original wrong. The fact that in French law it constitutes a fresh cause of action is…at best procedural'*: [19]. Although that decision concerned the distinct question of whether the 'aggravation' constituted a tortious 'harmful event' so as to confer jurisdiction on the courts of England & Wales, the point was of equal application in the present case.

The same parties

33. As to the requirement that the respective proceedings be between the same parties, that is satisfied where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings : Drouot Assurances v. C.M.I. (Case C-351/96) [1999] QB 497 at [19]. In such a case there is a sufficient degree of identity between the interests of the insurer and the insured. This was the present case.

Pending action

34. Mr Doherty accepted that ('at least in most cases') if there has been a final judgment on all issues by the court first seised, then lis alibi pendens will not arise. However, in this case there was no 'final' judgment of the French courts.

35. Once again, the issue was not determined by the experts' agreement that the judgment of the Douai court was a 'final decision' and that neither of the two French courts was still seised of the matter under French civil procedure rules. It fell to be determined by the autonomous concepts of Community law, not by national law. For this purpose, the focus must be on the fundamental guiding principle, namely the avoidance of the risk of irreconcilable judgments. The CJEU would want to interpret, in a unified way, all the situations in which an injured claimant gets a 'second chance' to have damages assessed; and would look for an overarching theme of return to the court which made the first assessment.

36. In the present case, there was a real risk of irreconcilable or inconsistent judgments. The complexity, of attempting to keep separate the matters which were compensated at the time of the first case (which included damages for permanent deficit on the basis of the injuries at the consolidation date of March 1993) from the matters of alleged aggravation, was not to be visited on any courts other than those which gave the original judgment. The complexities in this case would be particularly severe, given that the aggravation allegedly first arose in 1996, i.e. some 8 years before the judgment of the Douai court.

37. The risk of irreconcilable judgments was further demonstrated in three particular ways.

38. First, the English court would have to apply the common law choice of law rules, which included the double actionability rule. This was because the date of accident (20 February 1991) was before that rule was prospectively abolished with effect from 1 May 1996 by the Private International Law (Miscellaneous Provisions) Act 1995. Under French law it was not necessary for the Claimant to prove fault. By contrast, in this jurisdiction he would have to prove negligence and would be subject to reduction for contributory negligence. Whilst the Court had power to disapply the double actionability rule so as to apply only the *lex fori* or the *lex loci delicti* (Boys v. Chaplin [1971 AC 356; Durham v. T & N Plc (1 May 1996, CA unreported), the starting point would be that a claimant who chose this forum should take the law as he found it.

39. Accordingly there was a risk of irreconcilable judgments, e.g. with compensation awarded in France but not in England. On the narrow meaning of 'irreconcilable' in the context of Article 45, there would be mutually exclusive legal consequences. On the broad meaning there would be conflicting and contradictory decisions.

40. Secondly, this being an accident which predated the introduction of Regulation (EC) No. 864/2007 (Rome II) in 2009, the assessment of damages would be treated as a matter of procedure and therefore governed by English law : Harding v. Wealands [2007] 2 AC 1. The English court would therefore have to apply English law to the assessment of a type of claim which English law does not recognise; and in doing so to avoid any overlap with the damages already awarded by the Douai court. There would be a heightened risk of inconsistency when attempting to fill the space left by the French award. There would be no such risk if the aggravation claim were determined by a French court.

41. The same results would follow even if (contrary to the Defendant's case) the aggravation was a separate cause of action arising on 18 March 1996, i.e. before the 1995 Act came into force.

42. All these considerations on the risk of irreconcilable or inconsistent judgments supported an interpretation that the judgment of the Douai court was not 'final'; and so that the French courts remained seised of the matter.

43. The Douai judgment was akin to an award of provisional damages pursuant to s.32A Senior Courts Act 1981, where the claimant was entitled to return for further damages in the event of the occurrence of a specified deterioration in his condition. To the same effect, and whilst 'final' on the issues which it determined, the Douai judgment left open a potential claim for further damages in the event of 'aggravation' of his condition.

44. Mr Doherty accepted that, as a matter of French law, there was no need to 'reserve' the right to bring an aggravation claim. However, the question had to be determined by reference to the underlying principles of European law which he had identified. Having particular regard to (i) the purpose of avoidance of the risk of irreconcilable or inconsistent judgments and (ii) a 'cause of action' whose 'object' was to obtain full compensation for all the injuries and loss sustained as a result of the road traffic accident, the Douai court decision should not be regarded as a 'final' judgment.

45. Furthermore, there was no difference of substance between a decision on jurisdiction whose effect was to require a claimant to pursue an extant (if dormant) claim in the Member State first seised and a decision whose effect was to require him to institute a claim in that State. Thus, given the risk of irreconcilable/inconsistent judgments if the present action were allowed to continue in England, it would be no bar to the application of Article 29 (or 30) if its effect would be to require the Claimant to commence an *'action en cas d'aggravation'* in France. Nor was it necessary for the Defendant to identify the particular French court in which such a claim should be instituted.

46. In his skeleton argument and initial oral submissions Mr Doherty cited De Wolf v. Harry Cox BV (C-42/76) [1977] 2 C.M.L.R. 43 as an example of a case where the lis pendens rules were applied even in circumstances where there had been a final judgment in the first action. The claimant obtained a money judgement in the Belgian court against a Dutch defendant. Payment not being made, he brought an action to enforce the judgment in the Dutch courts. It was held that this was impermissible since the 1968 Convention created an exclusive code for enforcement of judgments between Convention states. The CJEU continued: *"It also results from Article 21 of the Convention, which covers cases in which proceedings 'involving the same cause of action and between the same parties are brought in the courts of different Contracting States' and requires that a court other than the first seised shall decline jurisdiction in favour of that court, that proceedings such as those brought before the* [Dutch court] *are incompatible with the objectives of the Convention. That provision is evidence of the concern to prevent the courts of two Contracting States from giving judgment in the same case'* : [5].

47. In the light of further argument, Mr Doherty accepted that De Wolf was not decided as a lis pendens case; but contended that it provided a powerful illustration of the importance of the underlying principle of avoiding the risk of irreconcilable or inconsistent judgments in different Member States.

Article 30

48. Under Article 30, the fundamental principle of avoiding the risk of irreconcilable judgments was made explicit in the language of Article 30(3). In this case it was unnecessary to establish that the respective proceedings involved the same cause of action and were between the same parties; and the actions were plainly 'related' within the meaning of Article 30(3).

49. As to whether there is a pending action in France, this was established for the same reasons as advanced under Article 29. Accordingly, if it were held that the other conditions of Article 29 were not satisfied, the application should succeed in the alternative under Article 30.

Conclusion and reasoning

50. For the reasons essentially advanced by Ms Lucy Wyles on behalf of the Claimant, I consider that the application must fail.

The principles

51. There is no dispute as to the principles which apply to Articles 29 and 30. They are summarised by the Supreme Court in Starlight Shipping Co v. Allianz Marine & Aviation Versicherungs AG (the 'Alexandros T') [2013] UKSC 70 in respect of the 2001 Regulation; and in particular citing Gubisch and The Tatry:

'First, the purpose of article 27 [i.e. Article 29] *is to prevent the courts of two member states from giving inconsistent judgments and to preclude, so far as possible, the non-recognition of a judgment on the ground that it is irreconcilable with a judgment given by the court of another member state...*

Second, the objective of article 28 [i.e. Article 30] *is to improve co-ordination of the exercise of judicial functions within the European Union and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice...*

The phrase "same cause of action" in article 27 has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law…'

[There is equally no dispute that the concept of 'lis alibi pendens' likewise has an independent and autonomous meaning under European law : Gubisch]

'In order for proceedings to involve the same cause of action they must have 'le même objet et la même cause'. This expression derives from the French version of the text. It is not reflected expressly in the English or German texts but the Court of Justice of the European Union has held that it applies generally…

Identity of cause means that the proceedings in each jurisdiction must have the same facts and rules of law relied on as the basis for the action…

Identity of objet means that the proceedings in each jurisdiction must have the same end in view' : [27]-[28].

Pending action

52. I will start with the central question of whether there is any pending action in the French courts. This is an explicit requirement for the application of Article 30; and an implicit requirement of Article 29 : see also the heading for Section 9.

53. Authority makes clear what is perhaps obvious, namely that there is no pending action if the proceedings in the court first seised have been terminated by judgment. There must be a concurrent, extant, action : see Tavoulareas v. Tsavliris [2005] EWHC 2643 (Comm.), citing Prudential Assurance Co Ltd v. Prudential Insurance Co of America [2003] 1 WLR 2295; and Dicey, Morris & Collins at 12-071.

54. Thus in Prudential Assurance it was stated:

'I find nothing in article 21 [i.e. Article 29] *to suggest that that article is intended to require a court in one contracting state to stay its proceedings or decline jurisdiction unless there is a concurrent action involving the same cause of action and between the same parties pending in another contracting state; and nothing in article 22* [i.e. Article 30] *to suggest that the article is intended to empower a court in one contracting state to stay its proceedings unless there is a concurrent related action… in another contracting state.'* : [26] per Chadwick LJ, with whom the other members of the Court agreed. He continued that, once one of the parties obtained a judgment in the state first seised, the [Section 9] provisions were not in point. Rather, the relevant provisions were those concerning the recognition and enforcement of that judgment.

55. It is a question of autonomous European law whether there is a lis pendens (Gubisch); and therefore of whether the proceedings in the court first seised have been terminated by judgment. It follows that the national law on that question cannot be determinative. However it does not follow that the position under the national law is irrelevant.

56. I do not accept that the judgment of the Douai court is akin to an award of provisional damages under s.32A Senior Courts Act 1981. In such a case the Court makes express provision for the claimant to return to that Court within the same proceedings to seek further damages upon the occurrence of the specified deterioration in his condition. Accordingly those proceedings remain extant for that purpose. To similar effect is the provision in a Tomlin order which gives liberty to apply for the enforcement of its terms : The Alexandros T at [78].

57. True it is that the Douai judgment recorded the Claimant's reservation of his right to make a claim *'en cas d'aggravation'* in the event that his condition should worsen. However the right under French law to commence an action *'en cas d'aggravation'* is free-standing and does not depend upon any prior order or permission from the court nor require any reservation of right by the claimant. Whilst that is only a matter of national law, it nonetheless provides powerful support for the conclusion that the proceedings before the French courts have, as a matter of European law, come to an end.

58. Putting the matter another way, the evidence provides no basis to conclude that there are extant proceedings in any French court. The Boulogne judgment of 1999 contains nothing to suggest that the action somehow remains live. The Douai judgment of 2004 refers to the Claimant's reservation of rights to make a further claim; but there is no basis to conclude that such further claim would be entertained by that appellate court.

59. Thus, the Defendant's application does not identify any French court wherein the Claimant can pursue extant proceedings. On the contrary, the effect of refusal of jurisdiction or stay of this action would be to require the Claimant to institute an *'action en cas d'aggravation'* in a (unidentified) French court. In my judgment that is a critical distinction; for if the only recourse is to institute fresh proceedings, it must follow that there are no pending proceedings.

60. If the available material otherwise points to the conclusion that there is no lis pendens, I do not consider that this can be avoided by reliance on the underlying rationale of the lis pendens rules, namely the avoidance of irreconcilable or inconsistent judgements.

61. That is to confuse the conditions for the application of the lis alibi pendens rules with their rationale. In AMT Futures Ltd v. Marzillier and ors [2018] AC 439, where the issue was whether the English Court had jurisdiction to hear a claim in tort, the Supreme Court observed that *'To invoke a special ground of jurisdiction the claimant must prove itself within that ground… A claimant cannot establish jurisdiction under the Judgments Regulation by merely invoking the justification or rationale of the ground'* : [29]. Equally, in my judgment, the Defendant cannot establish the absence of jurisdiction merely on that basis. Putting the same point another way, the lis pendens rules are the chosen mechanism for avoiding the risk of irreconcilable or inconsistent judgments.

62. I should add that in my judgment Mr Doherty's concession on the case of De Wolf was rightly made. The subsequent CJEU decision in Gubisch makes clear that De Wolf at [5] was simply acknowledging the importance of the objective of avoiding irreconcilable judgments *'even outside the narrow field of* lis pendens*'* : Gubisch at [9].

63. In any event, I see no basis to conclude that there is any risk of irreconcilable or inconsistent judgments, whether on the broad or narrow interpretation of that phrase.

64. As to liability, if the action were dismissed in England because of failure to prove negligence (or a reduction applied for contributory negligence), that result would neither be irreconcilable nor inconsistent with the no-fault liability established in the French courts. On the contrary, the judgments would be reconciled through the contrasting ingredients of the causes of action under the respective national laws; and consistent for the same reason.

65. As to the assessment of damages, the English court would not be adjudicating on the claim which has been determined by the Douai court. That is res judicata. Its focus would be solely on the discrete *'aggravation'* claim, which has not been presented nor therefore determined in France. Accordingly, the obligation to assess the damages in accordance with English law, and whether or not a difficult task, cannot give rise to a risk of incompatibility or inconsistency with the Douai judgment.

Conclusion on lis pendens

66. In my judgment, neither the Boulogne nor the Douai judgments left any issues to be resolved. Neither judgment was akin to an award of provisional damages, nor contained anything akin to a liberty to apply. The judgments were final. In any event there is no risk of irreconcilable or inconsistent judgments. Applying the necessary autonomous European law interpretation of the concept, there is no pending action in the French courts.

67. It follows that neither Articles 29 or 30 can have any application. However I will deal with the other issues which were fully argued.

Article 29 : same parties

68. As to whether the French and English proceedings are between the same parties, there is no dispute as to the principles identified in Drouot. The identity of interest between insurer and insured is subject to the latter not being in a position to influence the

conduct of the defence to the claim. Although it is commonplace for liability insurance policies to give the insurer control of the defence of the action, there is no evidence of the terms of the policy in the present case. If that were the only issue, I would have allowed the Defendant to adduce the policy terms by way of further evidence, if they wished to do so.

Article 29 : same cause of action

69. As to whether the French and English proceedings involve the same cause of action, I do not accept that the observations of the Court of Appeal in Henderson provide support to a conclusion that an *'action en cas d'aggravation'* is the same cause of action for the purposes of the lis alibi pendens rules and Article 29. The issue before the Court was whether the 'aggravation' which had occurred in England constituted a distinct 'harmful event' which could found English jurisdiction for a claim in tort. The Court's statement (*'The fact that in French law it constitutes a fresh cause of action is…at best procedural'*) has to be understood in that specific context. The Court was not considering whether it was the same cause of action for the purpose of Article 29.

70. For that purpose, I duly apply the established test of whether they have the same 'cause' and the same 'object': see the citation above from The Alexandros T.

71. Ms Wyles concedes that the French and English proceedings have the same cause; but contends that they had different objects. In contrast to the French proceedings, the object of this present action is to recover damages for the aggravation of the injuries.

72. In my judgment Mr Doherty's rival argument, that both sets of proceedings have the same object of achieving full compensation for the injuries, identifies the 'object' too broadly. It is also at odds with the underlying rationale of Articles 29 and 30, i.e. avoiding the risk of irreconcilable or inconsistent judgments. As between the original claim in the French courts and a subsequent claim of 'aggravation' (and whether the latter is determined in France or England), there is no such risk.

73. Accordingly I conclude that it is right to identify the object of the 'aggravation' claim on the narrower basis advanced by Ms Wyles; and in consequence to hold that the two proceedings do not involve the same cause of action for the purpose of Article 29.

Conclusion

74. There is no pending action in the French courts. Accordingly Section 9 of Brussels 1 recast is not engaged. In any event, the French and English proceedings do not involve the same cause of action (Article 29); nor is there any risk of irreconcilable or inconsistent judgments. Accordingly the application to decline jurisdiction, alternatively for a stay, must be refused.