Neutral Citation Number: [2022] EWHC 427 (QB)

Case No: QB-2021-000140

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2022 (11.30am)

Before :

MASTER DAGNALL

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Between :

SYLVIE KLIFA	**Claimant**
- and -	
(1) SIMON SLATER	**Defendant**
(2) INSURE AND GO INSURANCE SERVICES LIMITED	

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- -

Bernard Doherty (instructed by **Pierre Thomas Law**) for the **Claimant**
Sarah Prager (instructed by **Plexus Law**) for the **Defendants**

Hearing dates: 2 November 2021

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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 DAGNALL

MASTER DAGNALL :

Introduction

1. The Application before me arises as one of the consequences of Brexit. On 27 January 2018 in the ski area of Courchevel in France, the First Defendant (who is insured by the Second Defendant) negligently skied into the Claimant causing her significant personal injury. The Claim Form was issued on 14 January 2021, just within the three year limitation period of this jurisdiction but just after the Brexit "Exit Day" (of 31 December 2020) when relevant transitional arrangements, including the continued effect in England & Wales law of the European Union Judgments Regulation 1215/2012 ("the Judgments Regulation") ceased to apply. In consequence, the Defendants have brought an Application by Application Notice dated 29 January 2021 for this court to decline jurisdiction and the Claim to be stayed on grounds of forum non conveniens on the basis that it is the courts of France which are "the most appropriate forum". The matter is thus itself transitional in that it concerns the consequence of a tort which occurred whilst the Judgments Regulation did apply.

History and Matters of Common-Ground

2. The skiing accident ("the Accident") took place on 27 January 2018 and when (and as still is the case) the Claimant was domiciled and resident and habitually resident in France (in the Orleans area), the First Defendant was domiciled and resident (they being on holiday) in England & Wales, and the Second Defendant was domiciled in England & Wales.

3. It is common-ground that the Accident was the sole fault of the Defendant and that the Claimant was injured as a result. Thus the question which remains is the quantification of the loss which the Claimant has suffered (together with interest) and which it is common-ground (under the Rome II Regulation; see paragraph 1 of its Article 4 as the Accident, and resultant damage, took place in France and the Claimant is habitually resident in France) is to be governed as a matter of substantive law by French law. However, procedural law, including as to recovery of legal and other costs of the litigation, is a matter for the lex fori that is the law of the place in whose courts the proceedings are brought.

4. The quantum of the Claim is not entirely clear but the Claimant seems to be advancing a claim within something of a range of £150-200,000 inclusive of interest.

5. While the Judgments Regulation was applicable, the Claimant was entitled to bring the Claim in the courts of England & Wales under paragraph 1 of its Article 4 as the Defendants are both domiciled in this jurisdiction and (as then was) Member State; although the Claimant could have sued in France as the place in which the damage had occurred (Article 7(2)). Moreover, the Judgments Regulation overrode any principles of forum non conveniens so that a claimant had a right to pursue the claim in any court permitted by the Judgments Regulation whether or not it was the most (or even a) convenient or appropriate forum – see Owusu v Jackson [2005] QB 801; and where proceedings were permitted and pending in two Member States then it was the courts of the Member State which was "first seised" which were to determine the matter again

whether or not that was the most (or even a) convenient or appropriate forum (see Articles 29 and 30 onwards). However, as a result of the transition provisions contained in Article 67(1) of the Withdrawal Agreement of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Committee (2019/C384/1/01) ('the Withdrawal Agreement') ceasing to have effect, the Judgments Regulation has, following Brexit, ceased to apply in relation to Claims issued on or after 1 January 2021.

6. The Claimant's solicitors sent a Letter of Claim to the Defendant's solicitors on 20 April 2018 referring to her having suffered a displaced fracture of the right shoulder and an undisplaced fracture of the pelvis. Liability was admitted by an email of 11 June 2018, and the Defendant's solicitors wrote to request medical evidence by email of 11 July 2018 resulting in correspondence in which the Claimant's solicitors explained there would be a delay due to the need to experts to identify the "date of consolidation" in French law to which I refer below.

7. The Claimant's solicitors obtained medical-legal reports from a Dr Daniel Lerede (General Practitioner and qualified in medico-legal compensation of personal injury) and a Professor Luc Favard (and expert in orthopaedics) and sent them with some documentary evidence and a "without prejudice" Schedule of Loss to the Defendant by letters of 29 May 2020 and 18 June 2020. The Defendants' solicitors responded to say that they were seeking their own French law expert advice.

8. By letter of 25 August 2020 the Defendants' solicitors wrote to say that they were instructed to accept service of proceedings.

9. By email of 15 September 2020 the Claimant's solicitors made a settlement offer to the Defendants' solicitors and also requested an interim payment which resulted in a response of that day to the effect that instructions were being taken but nothing further.

10. By email of 15 December 2020 the Claimant's solicitors (expressing disappointment that they had not heard further) sought the names and addresses of the Defendants (and referred to the fact that they did not know the actual identity of the Second Defendant), and the Defendant's solicitors responded by email of 22 December 2020 to confirm the address of the First Defendant and to supply the name and address of the Second Defendant.

11. The Claim Form was issued on 14 January 2021 with a statement of value of "expected to be over £200,000".

12. The Claim Form was served on 15 January 2021. An Acknowledgment of Service indicated an intention to contest jurisdiction was filed on 29 January 2021 and the Application to contest jurisdiction was issued on 12 February 2021. It is common-ground that the Defendant adopted the correct process and complied with the requisite time-limits under CPR Parts 10 and 11.

The Claim Form Documents

13. The Claim Form and Particulars of Claim were accompanied by finalised medico-legal reports from Dr Larede and Professor Favard and also by a Schedule of Loss. As to these:

i) Both medical reports were written in French but have been translated into English. They are written so as provide not merely pure medical opinions but also (as is the French law procedure) so as provide medico-legal assessments of the particular scale points and percentages and other material required to enable calculations to take place under French law

ii) The Schedule of Loss referred to:

a) Damages in French law being calculated by reference to particular heads of loss as set out in "the Dintilhac classification" including by reference to "Permanent losses" which exist by reference to a "date of consolidation" which is by when injuries have stabilised and treatment is no longer needed except to avoid a deterioration (and where if a subsequent deterioration or aggravation occurs then a second action can be brought as damages for such or the risk of such cannot be awarded in the first claim ("a Subsequent Deterioration Claim"))

b) Professor Favard opining that "consolidation" had occurred on 30 June 2019 but there are risks of a future "deterioration"

c) Damages in French law for temporary functional incapacity being calculated by reference to the "AREDOC Scale" and €4,608 being sought

d) Damages in French law for pain and suffering being a discretionary award being calculated by reference to a "Sliding Scale" and €20,000 being sought

e) Damages in French law for "temporary aesthetic damage" being compensated autonomously and €2,500 being sought

f) Damages in French law for "permanent functional incapacity" being the product of a mathematical calculation based on "Percentage/Points Values" and €12,000 being sought

g) Damages in French law for "impossibility of practicing sports activity and/or hobbies" being a freestanding head of loss assessed by reference to French case-law and €3,000 being sought

h) Damages in French law for "permanent cosmetic damage" being sought of €2,000

i) Various expenses being sought totalling €4,603

j) A claim being made for paid assistance from a housekeeper of €2,893.04 and gratuitous care being provided by the Claimant's husband at a total of €3,240

k) A claim being made for loss of earnings in accordance with the Dintilhac classification (i) for the period before consolidation (ii) for the period after consolidation and (iii) for "professional impact" and which was said "TBC". It was said that the Claimant had worked as an occupational

health doctor and was unable to work as a result of the accident but remained in receipt of basic salary (but not premiums or bonuses) until July 2020 leading to her retiring in August 2020 and when she would, but for the accident, have worked to March 2022 and at which date it is said that she would have achieved a higher pension (by some €7,531 per annum) than that which is and has been her entitlement

l) A claim being made for future medical expenses of €23,271.88

m) And thus being a claim for €44,108 non-financial losses and with figures to be provided in the future for financial losses.

14. No suggestion has been made to the effect that those documents do not represent the general approach of French law and procedure to the assessment of damages in a claim such as this; although, of course, no admissions have been made as to any particular or head of damage or loss.

The Application

15. The Application Notice was supported by a witness statement of Nathaniel Martindale ("Martindale") of the Defendants' solicitors of 12 February 2021. In it, he gave a list of what he said were relevant factors and which I will deal with when considering counsel's submissions. It was responded to by a witness statement of Maud Lepez ("Lepez") of the Claimant's solicitors of 8 October 2021 and who is a qualified French Avocat and who responded to the list of factors identified by Martindale and advanced further asserted factors said to favour the Claim being progressed in this jurisdiction, and also a supplemental witness statement of Lepez of 29 October 2021. I will deal with these also when considering counsels (Mr Doherty for the Claimant and Ms Prager for the Defendants)'s submissions.

The Law of Forum Non Conveniens

16. It was common-ground (in my judgment correctly) that as the Defendants had been served within this jurisdiction:

i) the burden is on the Defendants to satisfy the court that another forum (i.e, here, France) is a more appropriate forum than England & Wales – see Spiliada Maritime Corporation v Cansulex 1987 AC 460 @ 464H; but

ii) if the court is so satisfied, then the court may grant a stay on "forum non conveniens" grounds.

17. I was further taken to material passages in Spiliada in the judgment of Lord Goff as follows:

i) At page 474 Lord Goff said:

"(5) The fundamental principle

In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens… In The Abidin Daver [1984] A.C. 398 , 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

ii) At page 475 Lord Goff made clear that the question was not one of convenience but as to which was the or the more appropriate forum:

"In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did, to the appropriate forum."

iii) Lord Goff then dealt with the application of the principle, and held at page 476:

"In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Société du Gaz case, 1926 S.C.(H.L.) 13 , 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below)."

iv) Lord Goff then returned to the need for the Defendant to show that the alternative forum was "more appropriate" saying at pp477-478:

"(c)… In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish

that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795 , per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795 , 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 398 , 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business."

v) Lord Goff then stated that the consequence of this was that ordinarily if another forum was shown to be "more appropriate" then a stay would be granted but not if justice required that it should not, saying at p478-9:

"(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356 . It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see The Abidin Daver [1984] A.C. 398 , 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in

proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."

vi) Lord Goff went on a p482 to consider how and to what extent other advantages to a claimant of proceeding in this jurisdiction should be taken into account, saying:

"(8) Treatment of "a legitimate personal or juridical advantage"

Clearly, the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive. As Lord Sumner said of the parties in the Société du Gaz case, *1926 S.C.(H.L.) 13* , 22:

"I do not see how one can guide oneself profitably by endeavouring to conciliate and promote the interests of both these antagonists, except in that ironical sense, in which one says that it is in the interests of both that the case should be tried in the best way and in the best tribunal, and that the best man should win."

Indeed, as Oliver L.J. *[1985] 2 Lloyd's Rep. 116* , 135, pointed out in his judgment in the present case, an advantage to the plaintiff will ordinarily give rise to a comparable disadvantage to the defendant; and simply to give the plaintiff his advantage at the expense of the defendant is not consistent with the objective approach inherent in Lord Kinnear's statement of principle in *Sim v. Robinow, 19 R. 665* , 668.

The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice." Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum. Take, for example, discovery. We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas. In this, I recognise that we appear to be differing from the approach presently prevailing in the United States: see, e.g., the recent opinion of Judge Keenan in *Re Union Carbide Corp. (1986) 634 F.Supp. 842* in the District Court for the Southern District of New York, where a stay of proceedings in New York, commenced on behalf of Indian plaintiffs against Union Carbide arising out of the tragic disaster in Bhopal, was stayed subject to, inter alia, the condition

that Union Carbide was subject to discovery under the model of the United States Federal Rules of Civil Procedure after appropriate demand by the plaintiff. But in the *Trendtex case [1982] A.C. 679* , this House thought it right that a stay of proceedings in this country should be granted where the appropriate forum was Switzerland, even though the plaintiffs were thereby deprived of the advantage of the more extensive English procedure of discovery of documents in a case of fraud. Then take the scale on which damages are awarded. Suppose that two parties have been involved in a road accident in a foreign country, where both were resident, and where damages are awarded on a scale substantially lower than those awarded in this country. I do not think that an English court would, in ordinary circumstances, hesitate to stay proceedings brought by one of them against the other in this country merely because he would be deprived of a higher award of damages here.

But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. For example, it would not, I think, normally be wrong to allow a plaintiff to keep the benefit of security obtained by commencing proceedings here, while at the same time granting a stay of proceedings in this country to enable the action to proceed in the appropriate forum. Such a conclusion is, I understand, consistent with the manner in which the process of saisie conservatoire is applied in civil law countries; and cf. section 26 of the Civil Jurisdiction and Judgments Act 1982 , now happily in force. Again, take the example of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. and practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country. This approach is consistent with

that of Sheen J. in *The Blue Wave [1982] 1 Lloyd's Rep. 151* . It is not to be forgotten that, by making its jurisdiction available to the plaintiff - even the discretionary jurisdiction under R.S.C., Ord. 11 - the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country. Furthermore, as the applicable principles become more clearly established and better known, it will, I suspect, become increasingly difficult for plaintiffs to prove lack of negligence in this respect. The fact that the court has been asked to exercise its discretion under R.S.C., Ord. 11, rather than that the plaintiff has served proceedings upon the defendant in this country as of right, is, I consider, only relevant to consideration of the plaintiff's conduct in failing to save the time bar in the other relevant alternative jurisdiction. The appropriate order, where the application of the time bar in the foreign jurisdiction is dependent upon its invocation by the defendant, may well be to make it a condition of the grant of a stay, or the exercise of discretion against giving leave to serve out of the jurisdiction, that the defendant should waive the time bar in the foreign jurisdiction; this is apparently the practice in the United States of America."

18. While I have borne in mind all of the above, I draw in particular from it that:

i) The Defendant has to satisfy the court that France is the "distinctly" or "clearly" more appropriate forum in order for the court to potentially impose a stay

ii) This will involve the court considering the factors pointing in both directions including convenience and expense (including availability of witnesses), the governing law, and the residence and places of business of the parties

iii) Even if France is the more appropriate forum then a stay may still be refused after considering other "circumstances" being factors relating to the achieving of "the ends of justice" (but also the interests of the parties) and asking (a) whether they mean that the Claimant will not obtain "substantial justice" in France, a test which requires something more than there simply being different approaches to damages or procedure but where the system will still afford a procedural process and substantive outcome which is a reasonable one (even though different from those adopted in this jurisdiction) Or (b) whether they involve some particular factor(s), being a legitimate personal or juridical advantage, such as a limitation advantage or security for costs existing in this forum (and which is recognised by this forum as being "legitimate" and which will generally be so if it is part of the law of this forum), of which justice "requires" (and again a mere difference in approach as to damages or procedure, as long as the other approach is a reasonable one, will not be sufficient to "require") that a claimant (who may have had to have acted reasonably for this to be the case) should not be deprived

iv) I am not entirely sure whether this is strictly a two-stage test where the Claimant has to fail at both stages (although it is clear that the burden of satisfying the court is on the Claimant with regard to the second stage) for the stay to be granted rather than a two-stage analysis with an holistic consideration of all the matters together. However, that is unlikely to (and in the circumstances of this

case, I hold does not) result in a different outcome in practice, and I have come to the same eventual conclusion having applied both approaches separately.

19. I was also taken to VTB Capital v Nutritek International [2013] 2 AC 337 where at paragraph 51 it was stated that:

> "51. The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

That case was very different from this one but the citation makes clear that the place of the tort (here France) is something of a starting point but need not be more than that depending on the individual circumstances.

20. I was also taken to International Credit v Adham [1999] I.L.Pr 302 where at paragraph 25 it was said:

> "[25] The new defendants contend that in the Spiliada case, Lord Goff, in dealing with the question of the treatment of what had become known as a legitimate personal or juridical advantage, was in terms considering the trial of the action and not its aftermath. It is pointed out, correctly, that all the examples he gives relate to what might be described as the pre-judgment stage. I have no hesitation, though, in rejecting the submission. Litigation is not an end in itself. A plaintiff is concerned not only to obtain judgment in his favour, but to enforce it by whatever means are available to him so as actually to receive the compensation the court thought fit to award him. Advantages in the mechanics of enforcement in one jurisdiction, as opposed to another, are no less advantageous than advantages in the procedure whereby the judgment is obtained in the first place. The fact that Lord Goff did not advert to them expressly because they did not arise in the case with which he was dealing is no reason for denying legal recognition to the factually obvious."

21. I am not entirely clear as to whether this enforcement advantage is being held as being relevant to the first stage "more appropriate forum" or to the second stage "achieving the ends of justice". The above citation appears to relate it to Lord Goff's references to "personal or juridical advantage" and thus to the second stage. However, it is difficult to see why it should not also be relevant to the first stage as the citation requires the litigation to be seen as a whole (rather than splitting the substantive determination element from the enforcement element) at least where, as here, the Defendants are located within this (enforcement) forum and thus where the potential for enforcement here enhances the relevance to "appropriateness" of their being located here.

Procedural and Substantive Law as to Quantifying French law damages in the Courts of this Jurisdiction

22. Specifically in relation to the conducting by a court in this jurisdiction of a quantification of damages in accordance with French law, I was taken to Wall v Mutuelle de Poitiers [2014] 1 WLR 4263 (Court of Appeal).

23. The actual dispute which was determined in that appeal was as to how and what relevant expert evidence was to be adduced. It was framed by Longmore LJ as follows in paragraph 3:

> " 3. The dispute between the parties relates to the way in which expert evidence is to be adduced. The claimant, in the usual English way, has asked for permission, pursuant to CPR Pt 35 , to call expert evidence in a number of relevant disciplines. The defendant insurers say that that is not appropriate since the applicable law is the law of the country in which the damage occurred and is thus French law. Under French law the court selects one (or sometimes) two medico-legal expert(s) to assist the judge, although such expert(s) may have recourse to experts in other disciplines if he/they feel it necessary and may incorporate their opinions in the report made for the court. These sub-experts are known to French lawyers as "sapiteurs". There is usually very limited opportunity to cross-examine the expert chosen by the court or his sapiteurs."

24. Longmore LJ held at paragraphs 12-15 that the expert evidence, albeit regarding French law and French legal matters, should take the form required by and be adduced in accordance with the procedural law of this jurisdiction even though this might result in a different damages award from what would have been obtained in France:

> "12. I have no doubt that Mr Weir's arguments should prevail. It cannot be the case that the Regulation envisages that the law of the place where the damage occurs should govern the way in which evidence of fact or opinion is to be given to the court which has to determine the case. An English court is ill-equipped to receive expert evidence given in the French manner. First, our rules of disclosure will not be the same as they are in every foreign country. It would be very odd if the rules of disclosure were not matters of "evidence and procedure"; but on the assumption that they are, how do they apply to a French-style single expert report? Not only would a French expert not regard himself as bound by any English rule; neither would he be able, in any sensible way, to take advantage of the English rules if he wished to do so.
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> 13. Second, our rules of evidence contemplate the giving of oral evidence by a procedure of examination-in-chief, cross-examination and re-examination of witnesses. Even if the author of a French-style expert report were prepared (as he would have to be) to submit to such a procedure, it would be meaningless, to the extent that his or her report incorporated material outside his or her personal expertise.
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> 14. Third, I have little doubt that, in the reverse situation, a French court would think it unhelpful (to put it mildly) to be presented with English-style expert evidence about the consequences of an English accident to a French driver or motorcyclist, in the form of reports from experts in (say) ten disciplines presented by each party and having to choose between them without resort to its own method of dealing with expert evidence.
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> 15. In these circumstances it is indeed inevitable that the same facts tried in different countries may result in different outcomes and I am unable to accept Mr Browne's starting point that the English court must strive to reach the same result as a French

court would, let alone his finishing point that evidence must be given to the English court in the form of a French-style expert report…

18. In this extract the author distinguishes between the "basis" of assessment and the "mode" of assessment. The fact that he explains the basis of assessment as including "judicial conventions and practices which will facilitate the assessment of damages … in a manner which reflects, as closely as possible, the result that would be achieved in a court of the country whose law applies," is not a statement that the result which would be achieved in the foreign (here, French) jurisdiction must be achieved in England which would, indeed, contradict para 3.39. Rather it is no more than the reason why it is desirable that "judicial conventions and practices" of the applicable law should apply in the court of forum, a matter to which I will have to return. That is further shown by the author's view (with which I would respectfully agree) that proof of the underlying facts "remain[s] a matter for the law of the forum".

19. This is a matter of some importance because experts in personal injury cases will, not unusually, give evidence of matters of fact as well as of opinion. It will, for example, be necessary for the court to receive evidence *4271 of what care or what accommodation the claimant needs. This will be partly a matter of fact relating to the claimant's current condition and current accommodation and partly a matter of opinion relating to the current and future needs of the claimant with his current condition and his current accommodation. It is convenient for such evidence to be given in a single care report or a single accommodation report, as the case may be. If the method of proving the relevant facts is for the court of the forum, it must follow that the method of proving any relevant opinion must be for the court of the forum also."

25. I would add, and which is relevant in this case and to which I will come, that, in consequence of the difference in their methods of adducing expert evidence, the English & Welsh jurisdiction procedural approach is likely to be considerably more expensive than that in France, and which is reflected in the costs rules and approach of each country.

26. Longmore LJ then went on to deal with the fact that the English & Welsh courts would, nonetheless, apply the Dintilhac approach for quantification even though it represents, strictly speaking, "guidelines" rather than hard-edge law. It was said that:

"24. I prefer the view of Professor Dickinson and Dicey to that of the authors of Cheshire . It seems to me that in the context of a Regulation (or Convention) intended to have international effect, a narrow view of "law" is inappropriate. If there are guidelines, even if they can be disapplied in an appropriate case, judges will tend to follow them. No doubt one can call this "soft law" rather than "hard law" but it is law nevertheless. Any foreign judge having to apply English law on the assessment of damages would find the Judicial College guidelines helpful as a starting point. If, therefore, French law had the equivalent of these guidelines, I would hold that the master could permit evidence of them to be given by an English court."

Longmore LJ then referred to the evidence of French medico-legal experts, and went on to say:

"26… It is unnecessary to set out Monsieur Dintilhac's list of personal damages "of the direct victim" in full, (they are in fact set out in Annex 1 to the report of the defendants'

expert, Monsieur Pierre Jung) but, as stated by M Charpentier, it is divided into 12 pecuniary losses (patrimonial) and 13 non-pecuniary (non-patrimonial) losses and that division is then further sub-divided into temporary (before consolidation) losses and permanent (after consolidation) losses. There is no attempt to give a figure or even a method of calculating the various losses identified.

27. At a later stage of his report, however, M Charpentier isolates, by way of example, a particular loss (permanent aesthetic loss) and in respect of that loss gives figures normally adopted by the Paris Court of Appeal in 2011/2012 on a scale of one to seven with a final category of "wholly exceptional" being €80,000 and over. This is just one example applicable to one head of loss out of M Dintilhac's 13 separate heads of non-pecuniary loss.

28. To the extent that these are figures normally adopted by the Paris Court of Appeal for the various heads of non-pecuniary losses in M Dintilhac's list, I can see that the combination of those heads and such figures could well amount to the equivalent of the Judicial College guidelines. I therefore consider that it would be appropriate for the master to permit either M Charpentier or M Jung (or, if necessary, both) to place evidence of such heads and figures before the English court. It seems to be agreed that French judges have a discretion to depart from these guidelines in an appropriate case and no doubt the English judge trying quantum will feel he has the same discretion. But he should, at least, be informed of what a French judge would regard as an appropriate starting point.

29. In the light of recital (33) to the Regulation, I do not consider that the same evidence is necessary or called for in respect of the pecuniary losses suffered by the claimant."

27. The other members of the Court of Appeal concurred with Longmore LJ's conclusions. Jackson LJ (who noted the costs consequences following on from this) said:

"43. Secondly, it is unrealistic and inefficient to expect courts to adopt the evidential practices of a different jurisdiction when determining questions of fact. The courts of each European jurisdiction have developed evidential practices with which both their judges and practitioners are comfortable. Germany, for example, has developed the "Relationsmethode", in which the judge exercises a high degree of control over the evidence to be received as the case develops. The Netherlands have a different procedure, although there too the judge takes a dominant role in the questioning of any oral witnesses. France has the procedures described by the experts in this case. If an Englishman is injured in one of those jurisdictions and sues there, it is inconceivable that the local courts will meekly adopt English evidential practices. There is no way that those courts would countenance several days of oral evidence and extensive cross-examination of experts in order to assess quantum of damages. The judges and practitioners do not have the requisite experience to adopt our evidential practices. We do not have the requisite experience to adopt theirs.

44. The costs rules of each jurisdiction are linked to the evidential practices. Germany, for example, has a scheme of fixed costs for all categories of litigation. This is set out in (a) the Court Fees Act and (b) the Lawyers' Fees Act. A scale of fees is prescribed according to the type of case, the sum in issue and the stage at which it is resolved. For example, in a commercial claim for €30m, the costs payable by the losing party at trial

are €558,510·50. This statutory costs regime would become unworkable if the German courts were suddenly required to adopt English evidential practices.

Conclusion

45. In the present case the court should follow English evidential practices. Accordingly the court should follow its usual practice in relation to receiving expert evidence concerning the extent of the claimant's injuries, the amount of the claimant's financial losses (in so far as such losses are recoverable under French law) and similar matters.

46. In the result, therefore, the court will establish the facts using English evidential practices. It will then assess damages in accordance with French law ("law" being broadly construed, as set out above)."

28. Christopher Clarke LJ said:

"48. Any question as to (i) the extent to which, and the form and manner in which, expert evidence may be given, (ii) how many experts may give evidence, and (iii) whether such evidence shall be the subject of cross-examination is, almost self-evidently, an issue of evidence and procedure, to which, by virtue of article 1(3), Parliament and Council Regulation (EC) No 864/2007 does not apply. What is less clear is what evidence the English court should permit in a case where damages are to be assessed under French, or any other foreign, law.

49. I agree with Longmore and Jackson LJJ that the evidence should not be confined to rules which dictate a result or to black letter rules; but should extend to judicial conventions and practices such as tariffs, guidelines or formulae used in practice by foreign judges in the calculation of damages, as suggested by Professor Dickinson.

50. In England and Wales damages in a personal injury case would be assessed by reference to: (a) common law rules and principles as to what measure of damages is applicable and the permissible heads of recoverable loss; (b) statutory provisions; (c) over-arching decisions of the courts, eg Simmons v Castle (Practice Note) [2013] 1 WLR 1239 (providing for a 10% increase in general damages from 1 April 2013); (d) guidance from decided cases on the appropriate level of damages for different injuries; and (e) published guidelines such as those of the Judicial College or tables such as the Ogden tables.

51. French law as to the assessment of damages should not be treated as any more restricted than as set out in the previous paragraph in respect of English law. "Law" should be interpreted so as to cover whatever rules, principles, practices and guidance a French court would adopt in making its assessment. For that purpose it is necessary for the English court to understand what is the reach of their application.

52. The problem is illustrated by the Dintilhac Headings ("the headings"). They are, according to the evidence of Monsieur Charpentier, without binding force but used in practice by lawyers, magistrates and insurers. Current case law makes use of the list. The evidence of Monsieur Jung for the defendants is that they are generally followed by all courts and Courts of Appeal.

53. A possible approach is to say that because the headings have no binding force an English judge applying French law is entitled to ignore them and award damages by adopting an entirely English approach to the assessment of the various heads of damage claimed which, as is common ground, are all heads recoverable in principle under French law. This is, in my view, too narrow an approach. In assessing damages in accordance with French law the English judge should endeavour to decide how, in practice, a French judge would assess damages. If that is, as it appears to be, by reference to the headings, the English court should adopt the same approach, although, to the extent that French judges have a discretion to adopt a different approach, an English judge will be similarly entitled. For that purpose it would be helpful to know the circumstances in which they would or might consider it appropriate to do so in order to see whether they are applicable to the present case.

54. The Paris Court of Appeal is said normally to adopt guidelines on quantum for loss under at least one of the headings and it may well be that it does so for all the others. Evidence of the figures normally adopted by the Paris Court of Appeal in relation to the headings is something of which evidence ought to be admitted. Such normally adopted figures: (i) do not appear to me to be different in kind to the guidelines published by the Judicial College which, themselves, "distil the conventional wisdom contained in the reported cases [and] supplement it from the collective experience of the working party" (see the foreword to the 1st edition (1992) by Lord Donaldson of Lymington MR); and (ii) are an indication of what, applying French law, the Court of Appeal regards as appropriate figures. The judge assessing non-pecuniary loss should have regard to any prevailing tariffs to the same extent as a French judge would do so. That renders it desirable to know in what circumstances the Paris Court of Appeal would or might not adopt such figures; and the circumstances in which that court, or judges at first instance, depart therefrom."

29. It flows from the above that if the matter remains in this forum:

i) English & Welsh rules will apply regarding the adducing of expert evidence and which may result in substantially higher costs than in France

ii) The English & Welsh courts will apply the French law approach to quantification and including (in principle but subject to the same or similar discretions to those exercised by the French judiciary) the Dintilhac guidelines and approach with the assistance of relevant French case-law

iii) The outcome may be different both as to level of damages and as to recovery (including as to amount) of legal costs than if the matter had proceeded in France.

Relevant Factors regarding Forum Non Conveniens Issues

30. The parties have in the witness evidence and counsels' written and oral submissions (all of which I have borne in mind even if I do not mention them specifically in this judgment) sought to identify material factors regarding both the "more appropriate forum" and "achieving the ends of justice" aspects.

31. Martindale and Ms Prager of counsel for the Defendants identify (and I do not think that any of these matters were disputed (and in any event I find them to be the case)):

i) The Claimant is domiciled in France. They accept that the Defendants are domiciled in England and any award will be paid from England

ii) The skiing accident, and thus the tort, happened in France

iii) The applicable law, including as to quantum, is French law

iv) The Claimant's loss has been and will be sustained in France

v) The only relevant witnesses of fact will be French as liability is admitted

vi) The medico-legal experts of the Claimant, Dr Lerede and Professor Favard, are both resident in France and have French as their first language, and so that interpreters may be required.

32. Lepez and Mr Doherty of counsel for the Claimant identify (and I do not think that any of these matters were disputed (and in any event I find them to be the case)):

i) Liability is admitted and thus the circumstances and location of the accident are evidentially irrelevant. This is quantum only with the relevant documentary evidence being mainly medical records, with limited financial material, and the injuries, prognosis and consequences being relatively simple and straightforward with only limited issues

ii) If the Defendants are not going to accept the Claimant's medico-legal experts' evidence, at least as to her injuries and prognosis, and where they have not yet declared their position notwithstanding that 1.5 years have passed since they were provided with the medico-legal reports, the Claimant can easily come to England to be examined

iii) The Claimant's main witness is the Claimant herself who speaks English and can give her oral evidence in English. Mr Doherty indicated in an email following the hearing (but which I had invited for clarification of the position) that the Claimant's present (as matters could always change) intention was that she would be her only witness of fact

iv) The Claimant would ensure that any expert accountant instructed by her would be able to produce a report and give oral evidence in English (this was confirmed by Mr Doherty's email)

v) The matter has been proceeding properly (and including under the various Brexit provisions and the Withdrawal Agreement) in this forum for over two years in accordance with this forum's Personal Injuries Pre-Action Protocol and requirements

vi) The effect of the territorial jurisdiction of French law (Article 46 of the Code of Civil Procedure) is that the Claimant would have to sue in France in the court of the region where the skiing accident took place being in Albertville. The Claimant lives near Orleans which is 364 miles and 6.5 hours drive away, a comparable distance and travel time to London. The Defendants are located in this jurisdiction and would have to travel even further to Albertville. Further both the Claimant and the Defendant would have to instruct local lawyers

registered at the Albertville Bar (and where Lepez is only registered at the Paris Bar and so could not act) and where they have so far instructed for a considerable period (and at considerable cost and much of which might be "thrown away") English solicitors firms and counsel

vii) Any English & Welsh judgment could be easily enforced against the Defendants. A French judgment would have to be registered in the High Court under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("the 1933 Act") and CPR Part 74, and which would incur a cost and delay, and enforcement would be somewhat more complex. Under the Brussels Regulation, enforcement in this forum would have been automatic (without need for any registration) whether judgment had been obtained in this forum or in France.

33. The parties were more at issue on particular matters, being as follows:

i) With regard to French law experts:

a) The Defendants' position was that, if the matter proceeds in England & Wales, it may be necessary for the parties to instruct French law experts when otherwise French law would be dealt with by French lawyers within the French courts. Further, the parties will continue to instruct English lawyers

b) The Claimant submitted in response that there is unlikely to be any need for any specific expert evidence as to French law. However, if the claim were to proceed in a French court it would be likely that the court materials would have to be translated into English for the Defendants (but the reverse does not apply to the Claimant who speaks and reads English and has Lepez). The Defendants countered to say that they can instruct French lawyers, but the Claimant countered further by pointing out that insurers (although the Defendants say that the Second Defendant may have a French office) are likely to need reports from whoever is instructed

ii) With regard to the quantification of damages in French law:

a) The Defendants submitted that the French courts will have a particular knowledge of the Dintilhac tables and the French law approach to quantification of loss, including the need to set a "date of consolidation", while the English courts will, in effect, have to "learn it" from expert evidence.

b) The Claimant responded that the English & Welsh High Court has experience of quantifying personal injury damages in accordance with French law as appears from the Wall decision, and which was previously a standard procedure under the Brussels Regulation (which envisaged a claim being brought by a foreign claimant against an English Defendant in England and excluded any forum non conveniens argument – see Owusu)

iii) With regard to the potential for a Subsequent Deterioration Claim:

a) The Defendant referred to the Claimant having reserved her position to making a Subsequent Deterioration Claim and submitted that such a claim, and the need for damages in a present claim to be as a result somewhat provisional in nature, is not a concept usual to the English & Welsh courts, and is best left to the French courts

b) The Claimant submitted that a Subsequent Deterioration Claim is simply a separate matter in French law, and that the present proceedings in this forum (or in France) would just disregard the possibility of a further deterioration thus not giving rise to any problem.

34. The Claimant further relied on Lepez's second witness statement to contend that in French procedure, medico-legal experts are appointed and instructed by the Court (and not by the parties), although at the Claimant's expense and so that the equivalent to their fees are recoverable from a losing Defendant.

35. The Claimant went on from this to submit, as stated by Lepez, that that procedure would mean that the Claimant could not use in French proceedings the reports of Dr Larede and Professor Favard, and which reports would be wasted. Ms Prager disputed this in her Skeleton, stating that it might be possible for the French court to instruct those medico-legal experts and that the Defendants were taking advice as to this from their own French lawyers, but did not produce any expert evidence to contradict it, and did not object to Lepez's second witness statement being admitted. I have no reason or material upon which to reject Lepez's opinion, and accept it.

36. The Claimant further submitted that if this Claim was stayed then she would suffer a major costs disadvantage (it is common-ground that there would be no limitation problem in proceedings now being brought in France) as (and which I find to be the case on the evidence as stated in Lepez's second witness statement which has not been controverted) the costs recoverable in French law by a successful personal injuries claimant are distinctly limited in amount (and only in exceptional cases will recoverable lawyer's and own expert's fees exceed a band of €2-5,000 and which will be lower than the actual costs incurred even of only French lawyers before those of Dr Larede and Professor Favard). This is due to differences in the litigation procedures themselves which lead to much less lawyers' (and less experts') involvement (and consequent work and costs) in France than in England & Wales, differing approaches between jurisdictions as to quantification of recoverable costs, and also the different Pre-Action procedures and where the English & Welsh Personal Injuries Pre-Action Protocol (regarding the steps that the court normally expects to be taken prior to the institution of proceedings (see its paragraph 1.4.1), and existing under the Pre-Action Protocols Practice Direction) "front-loads" work and costs in an effort to enable the matter to be resolved by pre-action negotiation and avoid the need for expensive proceedings and judicial resolution.

37. The Claimant further submitted that the Defendants' position was somewhat tactical, and seeking to impose a collateral disadvantage on the Claimant by way of the effect of Brexit and the Withdrawal Agreement, and including as:

i) At no point prior to 31 December 2020 had the Defendant suggested that proceedings should be commenced in France or that French lawyers should be instructed and deal with the matter

ii) There is no reason suggested by the Defendants as to why it would be convenient to them to have the proceedings in Albertville, and which would, at first sight, be a location far from and inconvenient to them

iii) (although this was more implied than expressed) A grant of a stay would result in adverse costs consequences (the Defendants have indicated in Ms Prager's Skeleton that it is to be anticipated they would seek an order that the Claimant pay all the costs of this litigation to date), and also delay, to the Claimant, for no apparent purpose (as costs would simply have been wasted and thrown away), and potentially enhance the Defendants' ability to negotiate a settlement favourable to them.

38. The Defendants' response to this was, in effect, that they were entitled to take their stance on the law, and that they had at all times simply conducted their case on the basis of the then applicable law i.e. what it was before and after 31 December 2020, and that the Claimant could have simply issued her Claim by then and so that any trap she had fallen into was of her own making and she, and her lawyers, should have been aware of its importance. The Defendants could not have opposed the litigation taking place in England & Wales prior to 31 December 2020 (see Owusu), but can do so now and insist that it take place in France and where the Claimant could perfectly well have issued this Claim, and where (as I accept and so I can make no finding either way) there is no evidence that proceedings in this forum would reach trial faster than in France.

Discussion

"more appropriate forum"

39. It seems to me that applying the analytical approach set out in Paragraph 18 above, I have first to consider whether the Defendants (having been properly sued and served in this forum) have demonstrated that France is clearly and distinctly the more appropriate forum. In my judgment, only certain factors are relevant to this stage, others being relevant to the "achieving of the ends of justice" second stage, although, in the alternative, I have also considered those factors and as to whether they would have led me to a different conclusion were they to be relevant to the first stage in law.

40. I have borne in mind all the parties' contentions and the evidence, and consider the following to be particularly relevant factors:

i) There is a starting point of the place of commission of the tort (see VTB Capital) i.e. France, but that has to be considered in the light of why that is relevant to the proceedings and their just determination. Here there is no dispute as to liability and therefore the geographical location of the accident (and associated effects on evidence and law) is not of direct relevance. Thus the weight of this factor is much less than it would otherwise have been although it is still relevant in view of its consequences as to quantum and in particular the law governing assessment of quantum

ii) The Claimant's losses were and will be sustained in France (and the Claimant is French and the accident was in France). Thus the dispute and its subject-matter are clearly more "French" in nature than "English & Welsh", although this point is somewhat lessened by the Defendants being "English"

iii) The law governing assessment of quantum is French law. That points to France, but Wall v Mutuelle makes clear that the courts of this forum can and will deal with that law and assess damages accordingly, and that is reinforced by the pre-Brexit situation where in a case of this nature they would do that as a matter of course (as forum non conveniens could not apply – Owusu). Moreover, this purely quantum claim appears to relatively simple and straightforward, involving a formulaic and algorithmic process of analysis under French law (and not involving the exercise of complex or difficult discretions) so that, while a French Judge would, of course, be very much more used to the process, a Judge of this forum is unlikely to have any particular difficulty with either the process or the reasoning required to come to a right conclusion. On the other hand, there is potential for a need for French law experts, although that seems limited and I have little to suggest any major disagreement between the parties which would require such evidence

iv) The Claimant is French. However, she is able to give her evidence in English and is willing to come to this country (including for the purposes of any medical examination); and the location of the relevant French court and those lawyers whom she would have to instruct (Albertville) is far away from her geographically and (at most) no more convenient for her than London. As against this, her financial claim relates to matters of French employment and pension provision although expert evidence would be required for such a claim in any event. Her solicitors, who have been engaged during the Pre-Action Protocol are English and although, they have knowledge of French law, they could not act in Albertville

v) The Claimant says that she is unlikely to have other witnesses, and if she does then their involvement is likely to be marginal, and I have no reason not to, and do, accept that as being the case. However, those witnesses would be French and might require a French interpreter (although that might be the case in any event in view of the experts' position) which would point towards France although the likelihood of such evidence being adduced seems low on the material before me (and if it turned out that substantial such evidence was sought to be adduced then that might lead to this court either refusing permission for it or holding that there was a material change in circumstances justifying a fresh application for a forum non conveniens stay)

vi) The Claimant's medico-legal experts (Dr Lerede and Professor Favard) are French, are located in France, and will require interpreters. The same will or may well apply for the Defendant. That points towards France but as against this (i) it is unclear whether there will be any relevant dispute (as the Defendant has not indicated any such) although I think I should assume that it is likely that there will be one, and (ii) if the matter were to proceed in France then there would be different judicially appointed experts (but who would not require interpreters)

vii) The Claimant's expert accountant will be able to travel to (and may be located in) and be fluent in English. However, I note that they will still be dealing with "French" matters (in particular relating to employment and pension provisions) and the Defendants may seek a French expert of their own. That points towards France but only to a degree

viii) The Defendants are located in England and deal in English; and their solicitors who have been engaged during the Pre-Action Protocol process are English. That points towards England although (but I do not have evidence as to this upon which I can rely) the Second Defendant may have some presence, or ability to have a presence, in France, and there is no suggestion that the Defendants might not accept service or not submit to French jurisdiction. I bear in mind that the Defendants will not themselves be giving evidence nor (it would seem) calling witness of fact. However, but the fact that they are "English" is relevant generally as well as in relation to enforcement (see below)

ix) Enforcement would take place in England and which would require an application under the 1933 Act and consequent delay and ability to the Defendants to challenge (by way of an application to set aside under section 4 of the 1933 Act). Such challenges can, at least in theory, be based on what has actually happened in the French courts although the grounds upon which such an application are distinctly limited (being mainly fraud and public policy). As I state above, I am unclear from the reasoning cited above from International v Adham as to whether this is only directly relevant to the second stage, but it seems to me that, when combined with the fact that the Defendants are located in this forum, it is at least indirectly relevant to this first stage (and I will proceed on the basis that it is so only indirectly relevant)

x) I do not see the prospect of a Subsequent Deterioration Claim or the relevant French law as having any real weight as a factor. On the evidence before me, in French law the court (of whichever forum) will simply ignore the possibility of a Subsequent Deterioration in quantifying the present claim, and if a Subsequent Deterioration Claim is brought then those proceedings (in whichever forum) will be entirely separate from those regarding this claim (albeit that facts found in this claim will be established as between the parties for the purposes of such second proceedings) i.e. it is essentially irrelevant.

41. Having balanced those factors together, and borne in mind all the evidence and counsel's submissions, I can see force in Ms Prager's submissions for the Defendants that France is the more appropriate forum, and, if the question before me was an open one of which forum was simply the more appropriate, I suspect that I would find it to be France. However, where the Defendants are domiciled in this forum, as is the case, and thus the proceedings were rightly issued and served here, the question as set out in Spiliada is whether the Defendants have shown that France is "distinctly" or "clearly" the more appropriate forum, and which is a higher test for them to satisfy.

42. I have concluded, albeit only on balance, that the Defendants have not satisfied that test. This is in particular because:

i) There are factors which point to this forum being appropriate, being that it is the actual location of the Defendants, who are and speak English (albeit that they

will not be adducing witness evidence of fact), and where enforcement would take place without need for a 1933 Act registration etc. process, and also the presence of the parties' English lawyers who have acted during a Pre-Action Protocol process for a substantial period (and during which period a claim could have been brought in this forum without there being any jurisdiction or scope for the grant of a forum non conveniens stay)

ii) While there are various factors in the other direction, this is simply a quantum case to be based on an formulaic/algorithmic approach applied to expert reports, albeit one under French law; where the only likely witness of fact is based (albeit in France) an equivalent distance to London from the relevant French court and can give evidence in English, albeit that medical experts (and probably accountancy experts) are in France, would need interpreters (should there be disputes, the likelihood of which are not at all clear) and will be dealing with matters which relate to France and, in the case of medico-legal experts, French assessment of damages law; and where the courts of this forum are perfectly capable of resolving the quantum in accordance with French law notwithstanding that the French courts are vastly more experienced in doing so

iii) And when balancing all, and in particular these, factors against each other I do not see the "distinctly or clearly more appropriate" test to have been met. This is not a case of Defendants with only a very limited connection to this forum (Lord Goff's example in Spiliada).

43. I make clear that I have not taken the factors which I refer to below as relevant to the "second stage" into account in deciding against the Defendants. However, I consider that those various factors, if relevant at the first stage, would merely reinforce my above conclusion as to the first stage.

"achieving the ends of justice"

44. In case I am wrong as to the first stage (i.e. that it has been shown that France is distinctly or clearly the more appropriate forum – and which I will assume for the purposes of this second stage), and because the correct test may be an overall holistic one, I now consider whether justice requires, and including because of the existence of legitimate personal or juridical advantages, but in the context of the interests of all of the parties, a stay to be refused and matter to proceed in this forum.

45. I have borne in mind all the parties' contentions and the evidence, and consider the following to be particularly relevant matters:

i) The underlying claim was progressed in accordance with the procedural requirements of this forum (i.e. compliance with the Personal Injuries Pre-Action Protocol; and involving the obtaining and disclosing of the medico-legal expert reports, the advancing of a quantified case and initial schedule of loss, and attempts to engage in alternative dispute resolution)

ii) That progress was (until 31 December 2020 and all the more so before then):

a) On the basis that the Claimant had an absolute right to bring proceedings against the Defendants in this forum and without fear of an application for a stay on forum non conveniens grounds (see Owusu)

b) In a way which resulted in a substantial front-loading of costs, that being one of the consequences (and, indeed a desired consequence, as the incurring of such costs means that the claim is to be properly formulated and sought to be justified (and countered) at a pre-action stage thus promoting the potential for alternative dispute resolution, settlement and the avoidance of court proceedings) of, but which cannot be avoided as a result of, the Pre-Action Protocol approach (and which is required by it and the Civil Procedure Rules and as representing what is expected by the courts of this forum)

c) But which costs cannot, to a very substantial measure if not entirely, be recovered under French law (and which would not permit recovery of English lawyers' costs or, on the evidence before me, of medico-legal experts instructed by the Claimant)

d) Without any suggestion from the Defendant that if the Claimant did not issue proceedings before 31 December 2020 the Defendants would be taking a forum non conveniens point, and which, if successful, would result in the above costs being potentially thrown away and the Defendants seeking to recover their costs of the proceedings (and which would potentially involve pre-action English lawyers' costs) from the Claimant

e) And without any actual contest from the Defendants as to the Claimant's medico-legal evidence (or factual assertions); and where it seems to me that, in the light of the Pre-Action Protocol which is designed to result in an early placing of "cards on the table", it is somewhat inconsistent for the Defendants now to say that the claim should be resolved in France because (in part) there are issues to be dealt with by French medico-legal experts when no such issues have been previously identified (and are only now identified by a general suggestion that the Defendants would not accept the Claimant's medico-legal reports and their conclusions – and so that a French court would have to appoint different medico-legal experts under its procedures)

iii) That the Claimant throughout knew, or should be taken to have known (and where she had legal representatives instructed), of the coming to an end of the Withdrawal Agreement and of the operation of the Judgments Regulation on 31 December 2020, and where she would have to issue the proceedings by 18 January 2021 to be within the primary England & Wales limitation period for personal injury claims (section 11 of the Limitation Act 1980), and where the Defendants had not given any positive encouragement or implication to the effect that they would not take a forum non conveniens point if such became open to them. I note that in decisions such as Bethell v Deloitte 2011 EWCA 1321 and Barton v Wright Hassall 2018 1 WLR 1119 it was held that there was nothing wrong in a party deliberately remaining silent (even if it knew, or hoped, that the other side was under a misapprehension) in the hope that the other side

would fall into a limitation trap and lose their claim. On the other hand, the law of limitation (including the time for and requirements for service of claim forms) is "hard-edged" (and not subject to relevant discretions) while whether to grant a stay on forum non conveniens grounds is much more a matter of discretion (albeit one to be exercised in accordance with principle and the case-law cited above)

iv) That the fact that enforcement will occur in this forum (and with the need for a 1933 Act process and the potential for challenge) is a legitimate procedural or juridical advantage of the Claimant and the potential for which adds weight to the contention that justice requires the claim to proceed in this forum (and as stated in International v Adham)

v) That (although this only has limited weight at most and my decision would be the same without it) London is probably more convenient to the Claimant than Albertville, and all the more so in the light of the history of instructing English/Paris lawyers.

46. It does also seem to me that the Defendants' approach is somewhat tactical. They have identified no advantage to them in the matter proceeding in Albertville and for it to do so would, at first sight, be distinctly inconvenient for them requiring the instruction of French lawyers and matters proceeding a substantial geographical distance away and where at least the substance of documents in and events using a foreign language would have to be translated/communicated to them. However, it could be said that there is some advantage to them in the light of both the lower costs of and lower costs recovery of a successful Claimant in French proceedings (neither side has taken any point on the availability of QOCS (Part II of CPR44) in this forum and I have no evidence as to the position of potential recoverability (if any) of Defendants' costs in personal injury quantum-only proceedings in France – and so have disregarded those matters).

47. I have not sought to proceed on the basis that the English & Welsh procedure is any way superior to that of the French courts in any sort of general terms. It seems to me that nothing has been raised here of that nature which could amount to a relevant "legitimate personal and juridical advantage" within Lord Goff's reasoning. The potential for costs recovery on an English & Welsh basis if the matter proceeds in this forum (as opposed to in France) is relevant not as a general rule (as it seems to me that Lord Goff would say that each forum can properly have its own level of costs rules and there is nothing before me which could lead me to conclude that France's rules are bound the ambit of reasonableness in English & Welsh terms) but because that potential is to be applied to the individual circumstance of the Claimant here that she has incurred substantial costs and obtained substantial work (wasted if the matter proceeds in France) at a time when the law was that she could insist upon the matter being determined in England.

48. It does seem to me that there is particularly important (although I have borne in mind all the above matters) that:

i) Enforcement will take place in this forum and that to enforce a French judgment will require a registration process involving cost, delay and potential opportunity for challenge, and

ii) (and more importantly) the Claimant had proceeded in accordance with and as required by the law of this jurisdiction, at a time when forum non conveniens and which was the most appropriate forum was irrelevant, to carry out substantial work and incur substantial expense which will be wasted if a stay was now to be granted and the matter have to proceed anew in Albertville in France. For those reasons and the reasons given above it seems to me that that aspect, and the costs recovery rules in this forum, are both a legitimate personal and juridical advantage and a reason why the concept of "achieving the ends of justice" favours the claim being allowed to proceed in this jurisdiction, and are "special circumstances" within Lord Goff's analysis, and

iii) On any basis, the courts of this forum are capable of dealing with the determination of quantum in accordance with French substantive law, and

iv) There is nothing else (other than the more beneficial costs rules) which is particularly "in the interest of the Defendants" as to why the Claimant (in whose interest it is clearly not) should have to proceed in France.

49. I further have borne in mind that the Claimant could have avoided the present circumstance by issuing before 31 December 2020 and that it is not the fault of the Defendants that the Claimant did not do so. However, I do not see this forum non conveniens jurisdiction as being equivalent to a limitation right such that the Claimant is to be treated as having missed a strict time limit which exists as a matter of public policy and having to accept its consequences. This jurisdiction is discretionary and, unlike the law of limitation is subject to "special circumstances" and the law regarding legitimate personal and juridical advantages and achieving the ends of justice as set out above. Moreover, the passing of the 31 December 2020 date has made no practical difference to anything, and has not affected the substantive rights of the parties, and there is the curiosity that the Defendants are relying upon it to seek to avoid proceedings being conducted in their own home jurisdiction although they accept that any enforcement would take place here. I regard all those points as limiting the weight to be given to this factor.

50. It seems to me that the various above matters when taken together do amount to (i) the Claimant enjoying "legitimate personal and juridical advantages" in being able to bring these proceedings in this forum, and which arise from the peculiar (in the sense of being outside the norm) situation and consequences of Brexit and the Withdrawal Agreement, and (ii) circumstances (indeed special circumstances) which (bearing in mind the interests of the parties) mean that the refusal of stay, even were France to be distinctly and clearly the more appropriate forum, is required in order to achieve the ends of justice. For such not to be the case would involve the waste of substantial properly incurred cost and resource, and in circumstances where, even if France is clearly the more appropriate forum, for the reasons given above, the courts of this forum are perfectly capable to dealing with the quantum dispute and resolving it justly and at proportionate cost in accordance with the CPR overriding objective.

51. I would therefore refuse a stay even were France to be (as I have assumed for these purposes) to be distinctly and clearly the more appropriate forum.

"Holistic Analysis"

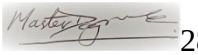
52. While I have dealt with the matter above on the individual "two stage" basis which I think is what Lord Goff envisaged and required, I have also considered it holistically. It seems to me that in the light of my conclusions on each stage, but also looking at the matter in the round, this is a situation where justice does not require the matter, properly commenced against and served upon these English Defendants, to be stayed in France but rather the opposite essentially for the reasons given above.

Conclusion

53. In all the above circumstances, I propose to dismiss the Application for a stay on forum non conveniens grounds.

54. I add that this decision has been reached on the facts of this particular case, and including where a substantial element of a Pre-Action Protocol process had taken place and substantial costs had been incurred while the Judgments Regulation still applied in this jurisdiction. The same outcome might not be reached on other facts, but I have had to deal with the situation before me.

55. As set out in my draft Judgment I am handing down this final judgment at 11.30am on Monday 28 February 2022 without attendance from the parties but with an adjournment of the hearing and of (with general extensions of time until further order) all questions of permission to appeal and time to appeal, form of orders and costs to a further date; with the parties to liaise and having until 4.30pm on 18 March 2022 to submit their proposed orders and any applications (including for permission to appeal and time to appeal) and a statement of whether they seek an oral hearing (and if so with dates to avoid until 31 May 2022).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