Establishing jurisdiction for Claimants injured abroad

Cross border PI specialists are relatively well accustomed to bringing claims in the Courts of England and Wales against foreign insurers, on behalf of injured Claimants. For EU member states, the "Brussels I (Recast)" Regulation[1] governs jurisdiction in relation to civil and commercial matters and English Claimant lawyers have long relied upon the provisions[2] which allow Claimants to sue Defendant insurers directly in their home Courts.

Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another [2020] EWHC 178 (QB), concerns the Defendants' respective attempts in such a case to dispute the English Court's jurisdiction to hear the claims made against them. The Defendants raised a number of objections including, significantly, whether a clause within the insurance contract purporting to limit indemnity for claims made by injured parties to those brought within the Spanish jurisdiction, could be enforced against the injured Claimant.

Background Facts

- Mr Hutchinson was injured in a club in Ibiza while he was on holiday in June 2016. Mr Hutchinson was and is domiciled in England, and the club was and is owned by Ice Mountain Ibiza S.L, a company registered in Spain and insured, by Mapfre España Compañia de Seguros Y Reaseguros SA ("MAPFRE"), also registered in Spain.
- As a result of the incident, Mr Hutchinson, a former footballer in his thirties, was left tetraplegic, unable to work and reliant upon carers around the clock.
- Mr Hutchinson pursued the Insurer, MAPFRE, in the English Court, pursuant to Article 11(b) of the Brussels recast regulation, and the owner of the club, Ice Mountain Ibiza, pursuant to Article 18 of the same regulation ("*the contractual claim"*).
- Mr Hutchinson also argued that Ice Mountain Ibiza was a proper party to the claim further to Article 13(3) of the aforementioned Regulations, which provides that *"If the law governing such direct actions* [against the insurer] *provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them" ("the non-contractual claim")*.

[1] Regulation (EU) No 1215/2012 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN
[2] See Articles 11 and 13 Brussels I (Recast)

Issues before the Court

The issues before the Court were complex and necessitated consideration of both English and Spanish law. The Claimant instructed a team of PEOPIL members to oppose the Defendants' attempts to have his claim struck out of the English courts – namely, Carlos Villacorta of BCV Lex, Sarah Crowther QC of Outer Temple Chambers, and Cheryl Palmer-Hughes of Irwin Mitchell LLP. The main issues are summarised below:-

1. In respect of the contractual claim, Ice Mountain Ibiza argued that because Mr Hutchinson bought a ticket to attend the club in Spain, and not in England, which is where its marketing activity was directed, he did not satisfy the criteria to enable him to bring a claim against it in the English jurisdiction. It also argued that Mr Hutchinson was in the VIP area of the club shortly before the incident and that his general admission ticket did not permit him to be in the VIP area and that he was therefore outside of the terms of the consumer contract he had entered into with the club.

2. In respect of the non-contractual claims against it, Ice Mountain argued that unless the claim concerned a '*matter of insurance'* then such a claim cannot be joined to another already proceeding against another Defendant in the English jurisdiction – i.e. there was no basis upon which to join the claim against Ice Mountain Ibiza to the claim against MAPFRE by simple virtue of the fact that the former was the party insured by the latter.

3. Ice Mountain also sought to argue, "*belatedly*" in the words of Mrs Justice Andrews[3], that Spanish criminal proceedings were ongoing in Spain, which would have the practical effect of the Spanish Court having already been seized, prior to the English action commencing, thus preventing the English Court from hearing the claim in its entirety[4].

4. Finally, and crucially, MAPFRE argued that, while there is a direct right of action against insurers under Spanish law[5], the policy wording provided that it would only indemnify Ice Mountain Ibiza for claims brought against it in the Spanish jurisdiction and that, therefore, there was no indemnity for a claim pursued in England, and so Mr Hutchinson was precluded

[3] Para 32 *Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another* [2020] EWHC 178 (QB)

[4] Brussels I (Recast) Articles 29 and 30

[5] Article 76 of the Spanish Insurance Contracts Act 50/1980. See also Articles 17 and 18 Brussels I (Recast)

from bringing his claim in his home Courts. Ice Mountain agreed with this argument, which meant that on a practical level, Ice Mountain was accepting that it was effectively uninsured for any claim made against it in the English Courts.

 [6]

Outcomes

1. In respect of the contractual claim, the Court agreed[7] with the Claimant's submission that the fact that he bought the ticket as a result of marketing activity locally in Ibiza did not deprive him of pursuing a claim against Ice Mountain in his home Courts. The Court rejected Ice Mountain's attempt to distinguish the CJEU case *Emrek,* in which the CJEU considered whether a causal link between marketing activity and formation of a consumer contract needed to be established in order for a Claimant to rely upon the jurisdictional options afforded under Article 18 Brussels Recast.

   Further, the Court resisted Ice Mountain's attempt to suggest that Mr Hutchinson's ticket did not cover him for the incident and, in this respect, Mrs Justice Andrews stated that the argument advanced by Ice Mountain was "*hopeless*" and that "*it was irrelevant whether* [the Claimant] *was in the VIP area before he had his accident*".[8]

2. In respect of the non-contractual claims, while the Claimant accepted that these were effectively the same as the claim made under the consumer contract, the question as to whether joining the insured as a Defendant to a claim made directly against its insurer (pursuant to Article 13(3) Brussels Recast) required the claim against the party to *"relate to*

[6] Photo from OceanBeach.com
[7] Para 19 *Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another* [2020] EWHC 178 (QB)
[8] Para 21 *Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another* [2020] EWHC 178 (QB)

insurance" was stayed[9], pending the outcome of the referral made to the CJEU on the same point in the case of *Cole and Others v IVI Madrid SL and Zurich Insurance Plc*[10].

3. The *lis alibi pendens* argument was dismissed by the Court[11]. The Court found that the Claimant had never been aware of the criminal proceedings in Spain, which were only commenced on the basis of a report filed by a doctor while the Claimant was in a coma, which in turn triggered an automatic investigation into the circumstances of the incident. Moreover, the Court found that the criminal proceedings had in fact been closed and that there was no prospect of a criminal trial taking place, to which Mr Hutchinson could attach a civil claim. Mrs Justice Andrews commented that :

'If Ice Mountain is right, he will have been deprived of any choice in the matter of where to bring his civil claim merely because, without his knowledge or consent, a doctor in the hospital filed a report which triggered a criminal investigation into the accident, of which he was never told. That is not an attractive proposition, and I would take a great deal of persuasion to accept it. Fortunately, the evidence falls a long way short of supporting that conclusion.'

4. As to the claim against MAPFRE, it was upon consideration of this part of the case that the real issues presented by this case came to light: is it the case that insurers can 'contract out' of provisions laid out in European supranational law and thereby deprive Claimants, consumers and other 'weaker parties' in insurance scenarios the right to pursue an insurer in their home Courts? This seems to be crux of why MAPFRE pursued this argument – it wanted a High Court decision to uphold its previous success in the English County Court in the case of *Williams v Mapfre*[12], where the Court found that an extremely similar clause meant that a Claimant was precluded from bringing his claim directly against the tortfeasor's insurer in his home Court. While cross border Claimant practitioners, Spanish domestic lawyers and, perhaps, some Defendant cross border practitioners, considered *Williams* to have been incorrectly decided, MAPFRE pushed ahead with its jurisdictional dispute in this case, funding both its and Ice Mountain's costs (despite the argument that the insurance

[9] Para 31 *Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another* [2020] EWHC 178 (QB)
[10] Unreported
[11] Para 9 (iii) *Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another* [2020] EWHC 178 (QB)
[12] *Williams v Mapfre* (Case No 3YU55490), 3 March 2015

policy did not provide indemnity for claims pursued in the English jurisdiction) as it went along.

Mrs Justice Andrews was acutely aware of the larger issues at hand beyond the remit of this individual case. At paragraph 84 of her judgment, she succinctly explains:

"If a clause which has that effect can be relied on against a person such as Mr Hutchinson it would drive a coach and horses through the special rules on insurance laid down under Section 3 of Chapter II. It would provide every liability insurer (not just Spanish insurers) with the simplest means of depriving the injured party of the choice of additional jurisdictions conferred upon him by Articles 11 to 13 of Recast Brussels 1. It would be the easiest thing in the world for an insurer, as the economically strongest party, to include a standard term in the policy that he is only liable for claims that have been brought against the policyholder in the courts of the policyholder's and/or the insurer's own domicile."

Both challenges to jurisdiction were dismissed, save that the issue concerning the Court's jurisdiction to hear and determine the non-contractual claims against Ice Mountain was stayed pending the outcome of the reference to the CJEU in *Cole* or further order, and the Defendants were Ordered to pay the Claimant's costs.

Future impact

The decision is undoubtedly helpful to all cross border practitioners. Not only does the judgment itself contain helpful reference to caselaw relevant to the issue of interpretation of insurance clauses alongside EU regulations, there is useful discussion of the test that ultimately applies to jurisdictional challenges and a helpful reminder that preliminary hearings such as these are not mini-trials. No witnesses were called and judgment was based on the paper evidence before the Court. As such, even if it would be later established that the insurance contract reigned supreme over Brussels I (Recast), Mrs Justice Andrews found that :

'on the basis of the expert evidence on Spanish law that is currently before the Court, at this stage of the proceedings the Claimant has established at the very least a plausible evidential basis for finding that the clause in question (the one which effectively limits pay-outs to judgments issued in Spain) is not binding upon him as a third party to the contract, and therefore is ineffective to prevent MAPFRE from being directly liable if his claim is otherwise well-founded on the merits. He has therefore

established a good arguable case that the jurisdictional gateway under Article 13(2) of Recast Brussels 1 applies.'[13]

The CJEU more recently considered the issue of territorial clauses in insurance contracts in Case C-581/18 *RB v TÜV Rheinland LGA Products GmbH, Allianz IARD SA*. While on this occasion, the CJEU rejected a challenge to a territorial restriction clause in a liability insurance contract, the facts of this case raise rather different considerations from those in *Hutchinson* and it seems that the latter will be readily distinguished by those representing Claimants who are pursuing damages for personal injury and financial losses as a result of incidents abroad, in the home Courts.

Collaboration of PEOPIL members

On a practical level, the Claimant's legal team took steps to ensure that the Defendants' applications proceeded to a hearing in as efficient a manner as possible. As such, attempts by the Defendants to have a case management hearing in order to set down a timetable to a hearing were circumvented by the proposal made that a timetable could be agreed by Consent. In addition, the directions timetable was kept as tight as possible so as to avoid any attempts to postpone the hearing. This necessitated conferences between our 3 PEOPIL members at short notice, particularly given Ice Mountain's belated attempt to argue *lis alibi pendens.* The legal team communicated regularly and reacted quickly to additional arguments made and documentation produced in the run up to the hearing. It was crucial that the Claimant had access to a specialist team of lawyers who were able to work closely under tight timeframes throughout this period, so as to co-ordinate the efforts on his behalf, and ultimately successfully oppose the Applications made against

The PEOPIL "Dream Team" from left to right: *Sarah Crowther QC of Outer Temple Chambers London, Cheryl Palmer-Hughes of Irwin Mitchell LLP, Manchester and Carlos Villacorta of BCV Lex, Madrid*

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[13] Para 9(iv) *Hutchinson v Mapfre España Compañia de Seguros Y Reaseguros SA and another* [2020] EWHC 178 (QB)