OUTER HOUSE, COURT OF SESSION

[2024] CSOH 34

PD120/19

OPINION OF LORD RICHARDSON

in the cause

SIMON MORRISON

Pursuer

against

MAPFRE MIDDLESEA INSURANCE PLC

First Defender

and

CITY SIGHTSEEING MALTA LIMITED

Second Defender

Pursuer: Primrose KC; C S Wilson KC; Digby Brown LLP
First Defender: Not represented
Second Defender: Cowan; DWF LLP

21 March 2024

Introduction

[1] This case concerns a claim by the pursuer arising out of a bus accident which occurred on 9 April 2018 at Zurrieq, Malta. The bus concerned was a tour bus. The pursuer has brought the present action seeking reparation arising from injuries which he alleges were sustained by him in the course of that accident.

[2] This is the second opinion I have issued in respect of this case. In my opinion dated 16 December 2021 ([2021] CSOH 126), I upheld a plea of no jurisdiction by the then third party, Transport for Malta, on the basis of section 14 of the State Immunity Act 1978. My decision was upheld by the First Division ([2022] CSIH 45).

[3] Initially, the pursuer directed his action solely against the first defender on the basis that he contended that the first defender was the insurer of the operator of the tour bus, City Sightseeing Malta Limited. However, on 24 February 2022, following my decision, the pursuer amended his pleadings to direct a case against the operator as second defender. Service was effected against the second defender on 8 August 2022.

[4] The pursuer asserts that this court has jurisdiction in respect of the second defender on the basis of Article 13(3) of Regulation (EU) No 1215/2012 ("Recast Brussels I"). The second defender disputes that this court has jurisdiction over it and seeks dismissal of the action insofar as directed against it. Article 13 is in the following terms:

> "Article 13
>
> 1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
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> 2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
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> 3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."

[5] I heard a preliminary proof on this question of jurisdiction. The first defender took no part in this hearing and was excused from both attendance and representation at the hearing.

[6] In the event, no evidence was led because the pursuer and the second defender entered into two joint minutes of agreement in which all material facts were agreed.

The issues

[7] The parties were agreed that resolution of the question of jurisdiction turned on two issues:

[8] First, whether following the withdrawal of the United Kingdom from the European Union, Recast Brussels I continued to apply to the second defender in the present case.

[9] Second, in the event that Recast Brussels I did apply, whether this court had jurisdiction to hear claims against the second defender in terms of Article 13(3) thereof.

The first issue

The second defender's argument

[10] Following the United Kingdom's withdrawal from the European Union on 31 December 2020, the ongoing applicability of Recast Brussels I is governed by Article 67(1) of the 2019 EU-UK Withdrawal Agreement which provides as follows:

> "1. In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Articles 29, 30 and 31 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council, Article 19 of Regulation (EC) No 2201/2003 or Articles 12 and 13 of Council Regulation (EC) No 4/2009, the following acts or provisions shall apply:
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> (a) the provisions regarding jurisdiction of Regulation (EU) No 1215/2012; …"

[11] Although the transition period ended on 31 December 2020 and the Withdrawal Agreement was revoked by regulation 89 of the Civil Jurisdiction and Judgments

(Amendment) (EU Exit) Regulations 2019, the ongoing application of the Withdrawal Agreement was preserved by Regulation 93A of those regulations.

[12] Against this background, the second defender's short point was that the present proceedings had not been instituted against it before the end of the transition period. Counsel accepted that proceedings against the first defender had been instituted prior to the end of the transition period but, as noted above, it was a matter of agreement that proceedings were not instituted against the second defender until 8 August 2022.

[13] Counsel accepted that such authority as there was on this point did not assist him. He drew my attention to *Simon* v *Taché* [2022] QB 917. In that case, the High Court in England was dealing with a situation in which proceedings had been raised in Belgium prior to the end of the transition period. Subsequently, after the end of the transition period, related proceedings between the same parties were raised in England. His Honour Judge Cawson QC (as he then was) held that, in terms of Article 67(1), Recast Brussels I applied to both the English and Belgian proceedings. In reaching that conclusion, he said the following (at paragraph 74):

> "Mr Ruddell, on behalf of the defendants, makes the point that Article 67 preserves the applicability of Brussels Recast to 'proceedings' and not to particular claims in proceedings. On that basis, and having regard to what I consider to be the proper construction of Article 76, I accept Mr Ruddell's submission that Brussels Recast continues to apply to new claims added to proceedings commenced prior to 31 December 2020 and claims against new defendants joined to such proceedings after that date. …"

[14] However, counsel submitted that *Simon* was dealing with a different factual situation involving related proceedings between the same parties and that the learned judge's observations were obiter and went further than he needed to in order to resolve the case before him. Counsel stressed that the present case involved a new defender being made subject to the jurisdiction of the court after the end of the transition period.

[15] Counsel recognised that His Honour Judge Cawson's opinion on Article 67(1) had been referred to and followed by Mr Justice Richard Smith in *Bourlakova & Ors* v *Bourlakov & Ors* 2023 EWHC 2233 (Ch) at paragraphs 116 and 117. That case dealt with a situation in which, after the end of the transition period, claims were added to proceedings against existing defendants by new claimants.

[16] Counsel also recognised that textbook references also did not support his argument. In Briggs' *Civil Jurisdiction and Judgments* (7th edition), the learned author stated at paragraph 2.05:

> "It therefore appears to follow that if a court is seised of a claim against a defendant before Completion Day, but after Completion Day the claimant seeks to add a new claim against the original defendant or join a new party as second defendant, or the defendant seeks to join a third party, it will be the relevant European instrument … which will say whether this may or may not be done."

Counsel also referred to the more equivocal views of the authors of the 15th edition of *MacGillivray on Insurance Law* at 13-027.

[17] Notwithstanding these authorities, counsel submitted that Article 67(1) should not be construed so as to subject a potential defender to the jurisdiction of the court who, at the end of the transition period, was not so subject. Construing "legal proceedings" in Article 67(1) narrowly as contended for by the second defender would ensure continuity of proceedings without subjecting new defendants to the jurisdiction of the court.

[18] Counsel also drew support for his construction of Article 67(1) from Article 8(2) of Recast Brussels I which distinguished between "the court seised of the original proceedings" and "other third-party proceedings". As a matter of logic, there was no reason to distinguish between third party proceedings and the convening of a new defender as in the present case.

The pursuer's argument

[19] As it was developed before me, the pursuer's position in response was straightforward. The phrase "legal proceedings" in Article 67(1) referred to the case as a whole. In the present case, there was no dispute that the pursuer had instituted the case against the first defender prior to the end of the transition period. Accordingly, the rules provided in Recast Brussels I should apply to determine jurisdiction for the case as a whole.

[20] Senior counsel relied upon the same authorities to which counsel for the second defender had referred: *Simon* and *Bourlakova* as well as what was said in Briggs and *MacGillivray*. All of these authorities were supportive of the pursuer's construction of Article 67(1).

Decision on the first issue

[21] Resolution of the first issue between the parties turns on a construction of Article 67 and, in particular, the meaning of "legal proceedings". The pursuer submits that this phrase should be taken to mean the case as a whole whereas the second defender argues it should be construed more narrowly to mean the proceedings brought against a particular defender.

[22] Considering the language of Article 67(1), the straightforward construction of Article 67(1) is that put forward by the pursuer. I can see no basis in the wording of the provision for the narrower construction contended for by the second defender. Notably, the phrase used is the more general "legal proceedings" as opposed to either something akin to "original proceedings" (as used in Article 8(2) of Recast Brussels I) or to "claims in the proceedings" (see *Simon* at paragraph 74). The language used also avoids reference either to the parties or to the cause of action (see Briggs at paragraph 2.05). The language of Article 67(1) is supportive of the broader construction argued for by the pursuer.

[23] Furthermore, there is another argument against the second defender's construction. The narrow construction contended for by the second defender would result in a greater number of cases requiring to use jurisdictional rules from both Recast Brussels I (in respect of the "original" proceedings") as well as the common law (in respect of additional parties convened after the end of the transition period). This increased complexity would not seem consistent with the intention of the Withdrawal Agreement, stated in the Preamble:

> "… to ensure an orderly withdrawal through various separation provisions aiming to prevent disruption and to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom".

Greater certainty will be achieved on the basis of the pursuer's construction.

[24] Accordingly, I find myself in agreement with the approach of His Honour Judge Cawson KC in *Simon* (at paragraph 74) that Recast Brussels I continues to apply to new defenders added to legal proceedings which were instituted before the end of the transition period.

The second issue

The second defender's argument

[25] On the assumption that Recast Brussels I applied to determine jurisdiction in respect of the second defender, the general principle was that a defender was to be sued in the member state in which they were domiciled – Article 4. Derogations from this principle were exceptional in nature and required to be interpreted strictly (*Aspen Underwriting Limited* v *Credit Europe Bank NV* [2021] AC 493 at paragraph 57 per Lord Hodge).

[26] In the present case, the pursuer relied upon such a derogation, namely Article 13(3) (above at paragraph [4]). Article 13(3) provided:

> "3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."

Article 13(3) was part of the provisions contained in section 3 of chapter II of Recast Brussels I which dealt with "Jurisdiction in matters relating to insurance". The introductory provision for section 3 was Article 10 which provided:

> "In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and Point 5 of Article 7."

[27] In the present case, the pursuer's case was that the Scottish courts had jurisdiction over the second defender on the basis that he was permitted, under Maltese law, to bring a direct action against the insurer, the first defender, in terms of Article 11(b) read with Article 13(2) of Recast Brussels I. Accordingly, argued the pursuer, as Maltese law allowed the insured to be added as party to the direct action against the insurer, he was also entitled under Article 13(3) to sue the second defender, in the same jurisdiction.

[28] The position of the second defender was that Article 13(3) did not apply because the claim being made by the pursuer against it was not a matter "relating to insurance" in terms of Article 10. Counsel recognised that the correct interpretation of Article 13(3) had previously been uncertain owing to a series of unresolved preliminary references to the European Court of Justice (see *MacGillivray* at pages 327 and 328). However, a decision on this point had now been issued by the CJEU in *BT* v *Seguros Catalana Occidente & Anr* (Case C-708/20) [2022] 1 WLR 1887.

[29] Although this judgment had been issued on 9 December 2021, after the end of the transition period, it was in respect of a reference made prior to the end of that period. Accordingly, the decision remained binding (see Withdrawal Agreement – Articles 86(2) and 89(1)).

[30] Given the centrality of this decision to the arguments of both parties, it is necessary to consider it in a little detail. The facts of this case were that the claimant, who was domiciled in the United Kingdom, had brought a claim in England seeking damages in respect of injuries sustained while staying at a holiday property in Spain. The defendants were the owner of the property, who was domiciled in the Republic of Ireland, and the property owner's civil liability insurer, who was domiciled in Spain. The claimant asserted that the English courts had jurisdiction over the property owner under Article 13(3). The property owner challenged jurisdiction. The English court made a preliminary reference to the European Court of Justice. The insurer did not dispute jurisdiction but contended that the policy did not extend to the owner's use of the property for paying guests. Accordingly, the insurer refused to indemnify.

[31] The questions referred to the CJEU were as follows:

> "(1) Is it a requirement of Article 13(3) of [Regulation No 1215/2012] that the cause of the action on which the injured person relies in asserting a claim against the policyholder/insured involves a matter relating to insurance?
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> (2) If the answer to [question (1)] is in the affirmative, is the fact that the claim which the injured person seeks to bring against the policyholder/insured arises out of the same facts as, and is being brought in the same action as the direct claim brought against the insurer sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance even though the cause of action between the injured person and the policyholder/insured is unrelated to insurance?
>
> (3) Further and alternatively, if the answer to [question (1)] is in the affirmative, is the fact that there is a dispute between the insurer and injured person concerning the validity or effect of the insurance policy sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance?
>
> (4) If the answer to [question (1)] is in the negative, is it sufficient that the joining of the policyholder/insured to the direct action against the insurer is permitted by the law governing the direct action against the insurer?"
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> (Quoted at paragraph 21 of the CJEU judgment).

[32] In its judgment, the CJEU addressed the first three questions together and, having done so, considered that it did not require to address the fourth question.

[33] The starting point of the Court's judgment was a recognition that the wording of Article 13(3), necessarily read in conjunction with Article 13(2) did not provide an answer to the questions referred to it (paragraph 25). The Court then went on to note that Article 13 belonged to Section 3 of chapter II of Recast Brussels I which established an autonomous system for the allocation of jurisdiction in insurance matters (paragraph 26). The Court noted further that it was apparent from its previous case law that the nature of an injured person's direct action against an insurer under national law was irrelevant for the purposes of the application of Section 3. The Court then went on:

> "30. It must therefore be considered that, in order to justify the application of the special rules of jurisdiction laid down in Section 3 of that Regulation, the action before the court must necessarily raise a question relating to rights and obligations arising out of an insurance relationship between the parties to that action.
>
> 31. That interpretation of the concept of 'matters relating to insurance' implies that a claim brought by the injured person against the policyholder or the insured cannot be considered to be an insurance claim merely because that claim and the claim made directly against the insurer have their origin in the same facts or there is a dispute between the insurer and the injured person relating to the validity or effect of the insurance policy.
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> 32. As regards, in the third place, the teleological interpretation, it should be recalled, first, that, according to the case law of the court, it is apparent from recital (18) of Regulation No 1215/2012 that actions in insurance matters are characterised by a certain imbalance between the parties, which the provisions of Section 3 of Chapter II of that Regulation are intended to correct by giving the weaker party the benefit of rules of jurisdiction more favourable to his or her interests than the general rules (see *KABEG* [2017] IL Pr 31, para 28 and *AAS "Balta" v UAB "Grifs AG"* (Case C-803/18) [2022] IL Pr 5, paras 27 and 44).
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> 33. That imbalance is generally absent where an action does not concern the insurer, in relation to whom both the insured and the injured person are considered to be weaker (see *Groupement d'intérêt économique (GIE) Réunion européenne* v *Zurich Espaňa* (Case C-77/04) [2005] ECR I-4509; [2006] 1 All ER (Comm) 488, paragraph 17 and the case law cited and *Vorarlberger Gebietskrankenkasse* v *WGV-Schwäbische Allgemeine*

> *Versicherungs AG* (Case C-347/08) [2009] ECR I-8661; [2010] 1 All ER (Comm) 603, para 44)."

[34] In respect of the issue of parties being stronger or weaker, counsel drew my attention to the observation of Lord Hodge in *Aspen* (as above at [25]) that the CJEU does not inquire into the relative positions of particular parties as such an exercise would risk giving rise to legal uncertainty (at paragraph 47). In relation to insurance matters, both the insured and the injured party were regarded by the CJEU as being weaker than the insurer. However, neither was treated as being weaker than the other.

[35] Returning to the judgment in *Seguros,* the CJEU went on to note, from the Jenard Report on the Brussels Convention (OJ 1979 C59 at page 1), that the purpose of Article 13(3) was to give an insurer the right to challenge the insured as a third party in proceedings brought against it by the injured party. This right was given to insurers to protect them against fraud and to prevent courts handing down irreconcilable judgments. On this basis, where an action has been brought by an injured party against an insurer and the insurer has not convened the insured, the court seised with the dispute cannot rely on Article 13(3) to assume jurisdiction over the insured (paragraph 34).

[36] Finally, the CJEU recognised that the provisions of Recast Brussels I should be interpreted in such a way as to ensure the proper administration of justice and to, where possible, avoid the risk of the co-existence of two parallel sets of proceedings (paragraph 35). However, the CJEU went on to point out that to allow an injured party to bring an action against the insured on the basis of Article 13(3) would amount to circumventing the rules determining jurisdiction in cases of tort or delict (paragraph 36). The Court considered that the proper administration of justice was achieved by Article 13(1) which allowed an insurer to be joined to proceedings brought by the injured party against the insured.

[37] On this basis, the CJEU concluded:

> "38. In the light of the foregoing, the answer to the first three questions is that Article 13(3) of Regulation No 1215/2012 must be interpreted as meaning that, in the event of a direct action brought by the injured person against an insurer in accordance with Article 13(2) thereof, the court of the member state in which that person is domiciled cannot also assume jurisdiction, on the basis of Article 13(3) thereof, to rule on a claim for compensation brought at the same time by that person against the policyholder or the insured who is domiciled in another member state and who has not been challenged by the insurer."

[38] In respect of the reference to an insured "who has not been challenged by the insurer", counsel for the second defender submitted that this must be a reference back to paragraph 34 of the judgment and the situation in which an insurer brings an insured into proceedings brought against it by the injured party. Otherwise, there was an apparent contradiction in the judgment. The CJEU had indicated that the purpose of Article 13(3) was to allow insurers to join insureds to direct claims brought against them by injured parties. Moreover, it did not seem likely that the CJEU had intended to give a wider meaning to "challenged". Such an approach would give rise to unpredictability and uncertainty in respect of the allocation of jurisdiction. This would not be consistent with what was said in the recitals of Recast Brussels I (recital 15).

[39] On the basis of the CJEU's decision in *Seguros*, counsel for the second defender submitted that it was now clear that an injured party, such as the pursuer, could not rely on Article 13(3) to assert jurisdiction over the insured. That was apparent from the fact that the CJEU had indicated that claims brought by an injured party against an insured were not to be considered to be "matters relating to insurance" merely because they arose out of the same facts as a direct claim made by the injured party against the insurer. The CJEU had also made clear that the existence of a dispute between the insurer and insured was not sufficient to render a claim by the injured party against the insured such a matter.

[40] Counsel submitted that the decision in *Seguros* was consistent with the principles underlying the allocation of jurisdiction in Recast Brussels I. The general principle was that a defendant was to be sued in the jurisdiction of his domicile. The exceptions to this principle were based on the existence of a "close connection" between the court and the action or in order to facilitate the sound administration of justice (recital 16). In this context, it was difficult to see how the existence of an insurance policy affected the relationship of the injured party and insured.

[41] Counsel recognised that it might be said that allowing an injured party to sue the insured using Article 13(3) would avoid a multiplicity of proceedings. Prior to *Seguros*, that view had received some support (*Maher* v *Groupama Grand Est* [2010] 1 WLR 1564 at paragraphs17 and 18). However, counsel submitted that in *Seguros* the CJEU had expressly addressed and rejected that argument. As noted above (at paragraph [36]), the Court considered that there were policy reasons against allowing an injured party essentially to circumvent the normal jurisdictional rules applying to delict and tort. The Court also took the view that the objective of the proper administration of justice was achieved, without allowing the injured party to use Article 13(3) to sue the insured, through Article 13(1).

[42] In addition, counsel relied on Article 14 of Recast Brussels I. This provision stipulated that, without prejudice to Article 13(3), an insurer could only bring proceedings in the domicile of the defendant, irrespective of whether the defendant was the policyholder, the insured or a beneficiary. There was not provision made for a direct action against the insured by the injured party.

[43] Accordingly, counsel for the second defender submitted, applying *Seguros* to the present case, that the pursuer's cause of action was not a "matter relating to insurance"

falling within the scope of Article 10. On this basis, Article 13(3) was not open to the pursuer.

[44] The second defender had also not been brought into the proceedings by the insurer, the first defender. In that sense, the second defender had not been "challenged" as that word was used by the CJEU in paragraph 38 of *Seguros* (see above at [37] and [38]). The first defender's averments as to a limit on indemnity were not a "challenge" in this sense.

[45] Finally, senior counsel submitted that the pursuer's reliance on proceedings in Malta was ill-founded.

[46] The pursuer relied upon proceedings brought by the first defender against the second defender and Mr Charles D'Amato, the bus driver. Those proceedings had been filed before the First Hall of the Civil Court in Malta on 29 March 2021. In those proceedings, the first defender sought various declarators essentially disputing liability in terms of the second defender's policy. The first defender also made arguments in respect of the limit of liability in the policy. The pursuer, along with other people injured in the bus accident, intervened in the Maltese proceedings. The interveners challenged the jurisdiction of the Maltese court on the basis of *lis alibi pendens.* On 15 December 2022, the Honourable Mr Justice Toni Abela LL.D declined to exercise jurisdiction. That decision has been appealed by the first defender. It appeared from the translation of the Honourable Mr Justice Abela's judgment which was available to me that the plea by the interveners was based upon proceedings which were then ongoing in England as well as these proceedings.

[47] Counsel for the second defenders submitted that the existence of these foreign proceedings was of no relevance to the issue before the court, namely whether the pursuer was entitled to rely on Article 13(3) to assert jurisdiction over the second defender. Further, as recital 21 to Recast Brussels I made clear, the purpose of the Regulation was to minimise

the possibility of concurrent proceedings and to ensure irreconcilable judgments are not given. It would be contrary to that purpose if the existence of foreign proceedings could be used to justify a court assuming jurisdiction in terms of Article 13(3).

The pursuer's argument

[48] As developed by senior counsel, the pursuer's position was essentially that *Seguros* fell to be distinguished from the present case.

[49] Senior counsel drew attention to the background to the present proceedings. Prior to the second defender being convened to these proceedings, the first defender had made averments in respect of the policy issued by the first defender to the second defender. Those averments had raised issues including the proper interpretation of the limit of indemnity contained in that policy (see Answer 6 for the first defender). The pursuer disputed the first defender's interpretation of the policy.

[50] Thereafter, the first defender had raised proceedings in Malta (see paragraph [46]). In those proceedings, the first defender had challenged the second defender in respect of the policy both in terms of cover and the extent of any liability. In relation to the Maltese proceedings, senior counsel was careful to emphasise that he was not seeking to argue that this court had jurisdiction because of those Maltese proceedings. Rather he drew attention to them because they emphasised that very real issues of insurance were raised between the parties.

[51] Against that background, senior counsel submitted that the first defender had "challenged" the second defender as that term was used in *Seguros*. Furthermore, senior counsel submitted that, taking into account the particular circumstances of the present case,

it fell properly to be regarded as a "matter relating to insurance" in terms of Article 10 of the Recast Brussels I.

[52] Senior counsel submitted that "matter relating to insurance" ought not to be given a restrictive meaning. Guidance as to how this phrase should be construed could be taken from the decision of the Court of Appeal in *The London Steam-Ship Owners' Mutual Insurance Association Limited* v *Spain (The Prestige) (Nos 3 & 4)* [2021] EWCA Civ 1589 (at paragraphs 133 to 135). In the passage referred to, the Court of Appeal also referred back to Lord Hodge's judgment in *Aspen* (as above at [25]) at paragraph 35. Senior counsel relied, in particular, on the principles articulated by the first instance judge, Mr Justice Butcher, which had been endorsed by the Court of Appeal:

> "(1) Section 3 is not to be restrictively construed.
>
> (2) 'Matters relating to insurance' are not confined to 'matters relating to insurance contracts'.
>
> (3) 'Matters relating to insurance' can extend to determinations of rights of persons who were not parties to an insurance contract, including beneficiaries and, in the context of liability insurance, injured parties.
>
> (4) The question of whether particular proceedings are or involve a 'matter relating to insurance' calls for an evaluative judgment. It will not generally be enough that insurance forms part of the history or 'pathology' of a claim for it to be a 'matter relating to insurance'. On the other hand, a claim is not prevented from being a 'matter relating to insurance' by the intervention of some other legal connexion between the parties (such as the settlement agreements in *The Atlantik Confidence*).
>
> (5) In making the evaluation, the court is concerned to see whether, as a matter of 'substance and reality', and applying common sense, the proceedings can be said 'fairly and sensibly' to be matters relating to insurance."

[53] Applying this approach, senior counsel submitted that the circumstances of the present case meant that it fell within the meaning of matters "relating to insurance". In the present case, the issues raised by the first defender had the potential to impact upon the pursuer if, for example, the first defender's liability was limited under the policy, the

pursuer would have to recover any shortfall from the second defender. These issues were not merely part of the history of the claim.

[54] Senior counsel also relied upon what the Court of Appeal had said in respect of Advocate General Bobek's observations in *KABEG* v *Mutuelles du Mans Assurances – MMA IARD SA* (Case C-340/16) [2017] I.L.Pr 31 (at paragraph AG36 of *KABEG*, referenced at paragraph 134 of *London Steam-Ship*). Advocate General Bobek had suggested that the basis for determining whether something was a "matter relating to insurance", essentially involved considering the title for which action was raised – the cause of action. The Advocate General considered that one required to ask whether the cause of action was the ascertaining of rights and duties arising out of an insurance relationship. The CJEU did not adopt the test and the Court of Appeal considered that, although the nature of the cause of action was an important matter, it could not detract from the need "for an evaluative judgment looking at the substance and reality of the matter overall and applying common sense" (paragraph 135 of *London Steam-Ship*).

[55] In respect of *Seguros,* senior counsel stressed the fact that the CJEU had made clear that "matters relating to insurance" was an autonomous concept which was dealt with under a separate scheme (paragraph 29). The Court had gone on to emphasise that in order to justify the application of the special rules of jurisdiction it was necessary for the action to raise a question relating to rights and obligations arising out of an insurance relationship (paragraph 30). That was the position in the present case.

[56] Senior counsel recognised that, at paragraph 31 (quoted above at [33]), the CJEU had made clear that it was not sufficient that the claim made by an injured party against the insured arose out of the same facts as a direct claim against the insurer or that there was a dispute between the insurer and injured party relating to the validity or effect of the

insurance policy. However, in the present case there were more than these two factors. There was also a dispute between the insured and the insurer in respect of the policy and that dispute had the potential to have a material effect on the pursuer. Senior counsel also stressed the fact that the dispute between the parties in respect of the potential limit of indemnity under the policy could result in issues of apportionment among those affected by the bus crash.

[57] Senior counsel submitted that paragraph 34 of the decision was a very important passage. He submitted that counsel for the second defender was construing it far too narrowly. The CJEU referred to Article 13(3) being intended to grant the insurer the right to challenge the insured "as a third party" in the proceedings between it and the injured party. The term "third party" should not be understood in the technical way in which that term was used in Scottish legal terminology. Neutrally, it meant merely a party who was not a party to the original proceedings. The final sentence of paragraph 34 was as follows:

> "It follows that when an action for damages has been brought by the injured person directly against an insurer and the latter has not brought such an action against the insured concerned, the court seised cannot rely on that provision to take jurisdiction over the latter."

Senior counsel submitted that the circumstances of the present case were consistent with this: the insurer had brought an action against the insured. The final sentence of paragraph 38 and the reference to the insured being "challenged" could also be read in this way.

[58] This reading was consistent with one of the underlying policy objectives of Article 13(3), as identified in the Jenard Report, namely to prevent irreconcilable judgments. That objective was recognised in recital 21 of Recast Brussels I. That objective would be

achieved were the pursuer to be allowed to join the second defender to the present proceedings. In that way, all of the parties' issues could be dealt with in a single process.

[59] Senior counsel submitted that there was no justification in the text for construing Article 13(3) as being restricted solely to insurers. As had been pointed out, there were policy reasons for not doing so – *Maher* (above at [41]) at paragraphs 17 and 18).

[60] Finally, in respect of *Seguros,* senior counsel submitted that it was important to appreciate that the pursuer was, for the purposes of Section 3, a "weaker party". As Lord Hodge had identified in *Aspen* (above at [34]) both insured and injured parties were weaker when compared with insurers. For the purposes of this argument, there was no need to compare the pursuer's position with the position of the second defender. What mattered was that the purpose of the rules in Section 3 was to protect "weaker parties" (see *AAS "Balta"* (cited in paragraph 32 of *Seguros*, quoted at [33] above) at paragraph 27).

Decision on the second issue

[61] In respect of the second issue, the critical question is whether the pursuer, as an injured party, is entitled to rely upon Article 13(3) of Recast Brussels I to convene the second defender, the insured, to the pursuer's direct action against the first defender, the insurer, within this jurisdiction.

[62] In general terms, authoritative guidance has been provided on this issue by the CJEU in *Seguros* (see Article 89(1) of the Withdrawal Agreement). The significance of the *Seguros* decision is clear, particularly given the pre-existing uncertainty as to the scope of Article 13(3) (see *MacGillivray* at pages 327 and 328). In answering the first three questions (see above at [31]) referred to it, the CJEU held:

> "38. In the light of the foregoing, the answer to the first three questions is that Article 13(3) of Regulation No 1215/2012 must be interpreted as meaning that, in the event of a direct action brought by the injured person against an insurer in accordance with Article 13(2) thereof, the court of the member state in which that person is domiciled cannot also assume jurisdiction, on the basis of Article 13(3) thereof, to rule on a claim for compensation brought at the same time by that person against the policyholder or the insured who is domiciled in another member state and who has not been challenged by the insurer."

[63] On its face, the CJEU's guidance indicates that, in the present case, this court cannot assume jurisdiction over the second defender. Accordingly, resolution of the second issue turns on whether the facts of the present case can be distinguished from those in *Seguros.*

[64] The pursuer principally advanced two related arguments in this regard.

[65] First, the pursuer argued that, unlike in *Seguros,* the substance and reality of its case against the second defender was a matter "relating to insurance". In *Seguros,* the CJEU made clear at paragraph 31 (above at [33]) that neither the fact that the injured party's claim against the insured originates from the same facts as the direct claim against the insurer, nor the existence of a dispute between the insurer and injured party in respect of the validity or effect of the policy were sufficient.

[66] As I understood the submissions advanced on behalf of the pursuer, two factors are relied upon in this regard. The pursuer points out that in this case there is also a dispute between the insurer and the insured in respect of coverage under the policy and limits to indemnity. The pursuer also stresses the potential impact of these issues in respect of the policy on its claim against the second defender.

[67] I am not satisfied that either of the factors relied upon by the pursuer represents a ground for distinguishing *Seguros.* As a starting point, it is important to bear in mind that the issue under consideration is the pursuer's claim against the second defender. The question is does that claim raise a matter "relating to insurance". I also consider that it is

relevant to remember that the pursuer's claim against the second defender is based in delict, breach of statutory obligation and breach of contract (see statement 6 of the summons).

[68] From this starting point, in respect of the first factor, I do not consider that the existence of a dispute between the first and second defenders as to the insurance policy is relevant to the correct characterisation of the pursuer's claim against the second defender. Further, it does not seem to me that the dispute between the first and second defenders adds very much to the overall picture. Given that the first defender is in dispute with the pursuer as to the nature and existence of any indemnity under the policy, it is hardly surprising that the first defender is also in dispute with the second defender in relation to some of the same issues.

[69] In respect of the second factor, again, I do not consider that the possible consequences to the pursuer of the policy issues about which the pursuer and first defender are in dispute are relevant to the nature of the pursuer's claim against the second defender. The CJEU's judgment in *Seguros* contains none of this type of consequential analysis even though in that case the insurer was disputing that the policy covered the losses claimed (at paragraph 19). That notwithstanding, the Court made clear that a dispute between the insurer and the injured party as to the validity and effect of the policy was not in itself sufficient to render a claim against the insured a matter "relating to insurance" (at paragraph 31 of *Seguros*).

[70] Accordingly, I reject the pursuer's first argument. On the basis of the guidance given by the CJEU in *Seguros,* I do not consider that the pursuer's claim against the second defender is a matter "relating to insurance" in terms of Article 10 of Recast Brussels I.

[71] The pursuer's second ground for distinguishing *Seguros* is based upon what the CJEU says in paragraphs 34 and 38 of its judgment as to the insurer "challenging" the

insured. The pursuer argues that the Maltese proceedings represent such a challenge. Accordingly, the pursuer contends that the guidance in *Seguros* does not apply to the present case.

[72] I consider that the pursuer's second argument is misconceived.

[73] As its opening words indicate, the CJEU's conclusion in paragraph 38 has to be read in light of its reasoning in the previous paragraphs. The reference at the end of that paragraph to "the insured … who has not been challenged by the insurer" is clearly a reference back to paragraph 34 where the Court said, in the opening sentence:

> "Furthermore, it should be noted that, as is apparent from p 32 of the report on the Brussels Convention, prepared by Mr P Jenard (OJ 1979 C59, p 1), Article 13(3) of Regulation No 1215/2012 is intended to grant the insurer the right to challenge the insured, as a third party in the proceedings between it and the injured person, in order to provide him or her with a weapon against fraud and to prevent different courts from handing down irreconcilable judgments." (Emphasis added)

That formulation in paragraph 34 is consistent with what is said in the Jenard Report (at page 32):

> "Under the last paragraph of Article 10, the insurer may join the policy-holder or the insured as parties to the action brought against him by the injured party." (Emphasis added)

In both instances, what is being considered is the joining of the insured by the insurer to proceedings brought against the insurer by the injured party. The Court is not considering the raising of separate proceedings by the insurer against the insured in a different jurisdiction. That is not surprising given it is the right of joinder under Article 13(3) which is under consideration.

[74] Equally, contrary to the pursuer's submissions, the final sentence of paragraph 34, which follows from the first sentence, envisages the raising of proceedings by the insurer

against the insured in the same jurisdiction as the direct action by the injured party against the insurer.

> "It follows that when an action for damages has been brought by the injured person directly against an insurer and the latter has not brought such an action against the insured concerned, the court seised cannot rely on that provision to take jurisdiction over the latter." (Emphasis added)

There is only reference to one court. If one simplifies the sentence by removing the negative, where the insurer – the first "latter" – has brought an action against the insured, the court seised – with both the action by the injured party against the insurer and the action by the insurer against the insured – may rely on Article 13(3) to take jurisdiction over the insured – the second "latter".

[75] On this basis, I reject the pursuer's second argument. I do not consider that the Maltese proceedings in the present case represent a "challenge by the insurer" as that phrase is used in paragraph 38 of *Seguros.*

[76] For completeness, I also do not consider that the other arguments advanced on behalf of the pursuer lead to a different conclusion.

[77] The pursuer sought to rely on the policy objective of avoiding irreconcilable judgments as a justification for allowing the pursuer to rely upon Article 13(3). There are two problems with this argument. First, it is not clear to me that allowing this court to assume jurisdiction over the insured and thereby increasing the number of potential jurisdictions in which the case against the insured could be heard necessarily reduces the prospect of concurrent proceedings and irreconcilable judgments. Second, and in any event, the CJEU considered and rejected precisely this point in *Seguros.* Notwithstanding determining that the injured party could not rely on Article 13(3), the CJEU concluded that

the objective of the proper administration of justice was sufficiently achieved through Article 13(1).

[78] Finally, the pursuer relied on the fact that, as the injured party, he was "weaker" when compared with the insurer (see *Seguros* at paragraph 32). The pursuer argued that this was relevant to the construction of Article 13(3). I do not consider that this argument assists the pursuer. As the CJEU made clear in *Seguros,* the imbalance between stronger and weaker parties does not generally arise when one is dealing with questions between the injured party and the insured, both of whom are considered to be "weaker" when compared with the insurer (see paragraph 33).

[79] It follows that I consider that the answer to the second issue falls to be determined in line with the guidance provided by the CJEU in *Seguros.* On this basis, as the claim being advanced by the pursuer against the second defender is not a matter "relating to insurance", this court cannot assume jurisdiction over the second defender in terms of Article 13(3) of Recast Brussels I.

Disposal

[80] In light of my decision in respect of the second issue, I will dismiss the action insofar as directed against the second defender. I will reserve all questions of expenses meantime.