Neutral Citation Number: [2021] EWHC 3381 (QB)

Appeal Ref: BM00093A

IN THE HIGH COURT OF JUSTICE

HIGH COURT APPEAL CENTRE BIRMINGHAM

ON APPEAL FROM THE COUNTY COURT AT TELFORD

(HIS HONOUR JUDGE RAWLINGS)

Birmingham Civil Justice Centre

33 Bull Street, Birmingham, B4 6DS

Date: 14 December 2021

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

GEOFF HILL

Clai

App

- and -

GENERALI BIZTOSITÓ ZRT

Defen

Respo

- -

Bernard Doherty (instructed by **DAC Beachcroft Claims Ltd**) for the **Appellant**

Tom Collins (instructed by **Hudgells Solicitors**) for the **Respondent**

Hearing date: 30 November 2021

- -

Approved judgment

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1.

The issue in this appeal is whether a subrogated claim by an insurer can be brought in the name of an English motorist in an English court together with his claim for uninsured losses against a Hungarian insurer in respect of a pre-Brexit accident in Germany. The judge below held that it could not but acknowledged that the question was not free from doubt and granted the motorist permission to appeal.

2.
The issue arises in a low-value claim proceeding in the County Court. When the case was argued before the judge, it was thought that it might be of some wider significance. I am told that there may be a number of cases awaiting the resolution of this issue. That may be so, but I am sceptical as to the true importance of the issue given that it has not troubled the senior courts before now and the proper application of EU law in England & Wales is now a matter of historical interest.

THE COUNTY COURT PROCEEDINGS

3.
Geoff Hill is domiciled in England. On 18 December 2018, he was driving his car on a German autobahn when it was damaged in a collision with a car insured by the Hungarian insurer, Generali Biztositó Zrt. By this claim, Mr Hill sues Generali for the alleged repair costs of £4,073.27. His Particulars of Claim break his claim down into his uninsured loss of £350 (being the excess payable under his insurance policy) and his insured loss of £3,723.27 (being the balance of the repair costs that were paid by his motor insurer, Admiral Insurance). The claim is therefore brought both for his own benefit and in order to pursue Admiral's subrogated claim.

4.
By an application dated 15 January 2020, Generali disputed the English court's jurisdiction in respect of the subrogated claim. Its application was heard by His Honour Judge Rawlings on 15 May 2020. By a reserved judgment handed down on 4 August 2020, the judge declared that the court had no jurisdiction in respect of the subrogated claim. Accordingly, he stayed that claim. Further, he stayed the balance of the claim for the recovery of the excess until 21 days after the determination of any appeal from his ruling.

THE RECAST REGULATION

5.
The United Kingdom was of course a Member State of the European Union at the time of Mr Hill's accident and accordingly the question of jurisdiction is governed by the Recast Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil & Commercial Matters. The starting point is that Generali must be sued in Hungary or Germany:

5.1
Article 4(1) provides that persons domiciled in a Member State should be sued in the courts of that state.

5.2
Article 5(1) provides that such persons can only be sued in the courts of another Member State by virtue of the rules set out in Sections 2 to 7 of Chapter II of the Regulation.

5.3
Article 7(2) (which is within Section 2) provides that a person domiciled in one Member State might also be sued in tort in the Member State in which the "harmful event" occurred.

6.
Article 10 provides that in matters relating to insurance, jurisdiction shall, with exceptions not relevant to this case, be determined by the rules in Section 3. Article 11(1) (which is within Section 3) then provides:

“An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.”

7.
In addition:

7.1
Article 12 provides that the insurer may also be sued in the courts for the place where the “harmful event” occurred.

7.2
Article 13(2) provides that Articles 10, 11 and 12 apply to actions brought by the injured party directly against the insurer.

7.3
Article 14(1) provides that an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether the defendant is the policyholder, the insured or a beneficiary.

8.
Thus:

8.1
Generali can be sued in Hungary, being its place of domicile, or Germany, being the place of the accident: Arts 4(1), 7(2), 11(1)(a) and 12.

8.2
As the insured, Mr Hill can also sue Generali in England & Wales, being his place of domicile: Art. 11(1)(b).

8.3
As the insurer, and subject to being permitted to join an action already proceeding in another jurisdiction, Admiral cannot take advantage of the more favourable rules as to jurisdiction available to the policyholder, the insured and beneficiaries.

9.
There is therefore no dispute as to Mr Hill’s right to sue for his uninsured losses in England & Wales. The issue is whether Admiral’s subrogated claim:

9.1

is a claim brought by the insured such that it may be pursued in England & Wales under Article 11(1)(b); or

9.2
is a claim that must be treated as brought by the insurer such that it cannot, subject to questions of joinder, be pursued in this jurisdiction.

10.
In construing the Recast Regulation, it is necessary to consider four recitals that are pertinent to the issue in this case:

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

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

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

21 In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions …”

11.
As to these policies:

11.1
The policy of providing rules that are more favourable to weaker parties is given effect to by:

a)
rules allowing the policyholder, the insured or a beneficiary to sue in his or her place of domicile (Art. 11(1)(b)), while otherwise insisting on proceedings being brought in the place of domicile of the defendant or the place of the accident (Arts 4(1), 7(2), 11(1)(a), 12 and 14);

b)
provisions that protect such parties when sued from unintentionally conceding jurisdiction (Art. 26(2)); and

c)
provisions that protect such parties from contracting out of the more favourable rules (Arts 15 and 31).

11.2
The policy of promoting predictability is furthered by provisions that determine when the more favourable rules are to be applied according to the class of litigant rather than by a case-specific

enquiry as to whether one party is in fact weaker than another. Thus, policyholders, insured parties and beneficiaries are deemed to be weaker and gain the protection of Article 11(1)(b) regardless of whether they are private individuals or wealthy corporations, while insurance companies are deemed not to be weaker parties whatever their financial position.

11.3
The policies of allowing courts with a close connection to hear a case, of facilitating the sound administration of justice, of minimising concurrent proceedings and ensuring that irreconcilable judgments are not given, are furthered by the provisions:

a)
allowing joinder of additional parties (Arts 8 and 13) and counterclaims to be pursued (Art. 14(2)) in a court in which related proceedings are already pending;

b)
requiring courts to stay proceedings involving the same cause of action between the same parties in favour of the court of another Member State that was first seised of the case (Art. 29); and

c)
permitting courts to stay “related” proceedings (being an action so closely connected with another action that it would be expedient to hear and determine the actions together to avoid the risk of irreconcilable judgments) in favour of the court of another Member State that was first seised of the case (Art. 30).

12.
Not only are irreconcilable judgments undesirable, but they give rise to the risk that one or both judgments might be unenforceable:

12.1
The courts of a Member State shall refuse recognition of a judgment if it is irreconcilable with a judgment given between the same parties in that or another Member State: Art. 45(1)(c)-(d).

12.2
Where such grounds arise, the judgment shall not be enforceable: Art. 46.

THE JUDGMENT BELOW

13.
Judge Rawlings concluded, at [44], that

“… a claim made by a directly injured party, the benefit of which accrues to an indirectly injured party under the English concept of subrogation, should be assimilated with or treated in the same way as a claim made by an indirectly injured party in their own name, pursuant to an assignment.”

14.
He then tested his conclusion against the principles in recitals 15, 18 and 21:

14.1
He concluded that his judgment did not “score as well” on predictability as the contrary conclusion given that it required an enquiry into who would benefit from the claim. He observed, however, that such position would only be likely to affect insurers and that the exercise of rights of subrogation was likely to be apparent from the claim.

14.2
He considered that his judgment accorded with the policy of not extending the more favourable jurisdiction rules to parties who are not in a weaker position. There was, he concluded, no reason why an insurer exercising a right of subrogation should benefit from such rules in circumstances where the insurer would not so benefit if the cause of action were assigned.

14.3
He accepted that his judgment might result in related claims being commenced in different Member States. He added, however, that it was always open to the directly injured party to bring his claim in the state in which the defendant was domiciled.

14.4
Considering these factors in the round, he concluded that "the balance comes down in favour of promoting the purpose set out in recital 18 … because the reduction in predictability (recital 15) and risk of multiple actions for related claims (recital 21) are in each case minimised … whereas there appears to be no justification for allowing an indirectly injured insurer relying upon its rights of subrogation, to take advantage of the Jurisdiction Privilege which would not be available to it if it took an assignment of the directly injured insured's right of action. This is particularly so where the amount of control that the indirectly injured insurer has over the subrogated claim, brought in the name of its directly injured insured, is likely to be, substantially the same as the indirectly injured insurer would have, if they took an assignment of the right of action and pursued the claim, in its own name."

THIS APPEAL

15.
Tom Collins, who appears for Generali, argues that this appeal court should accord deference to the judge's broad evaluative assessment of the application of the conflicting principles in this case. I disagree and in my judgment Bernard Doherty, who appears for Mr Hill, is right to argue that the proper interpretation of the Recast Regulation is a matter of pure law. While it is always helpful to see how another experienced judge ruled, it is ultimately for me to determine the issue of law that arises on this appeal.

16.
Mr Doherty argues that Mr Hill sues in respect of his own indivisible claim for losses suffered in the accident. Under English law, the claim remains his even though his insurer had paid part of the repair costs and the claims for insured and uninsured losses were required to be brought in a single action. While the caselaw establishes that insurers and insurance professionals cannot avail themselves of the more favourable jurisdiction rules, other indirectly injured claimants, such as the employer suing to recover wages paid to an injured employee in Landeskrankenanstalten- Betriebgesellschaft - KABEG v. Mutuelles Du Mans Assurances (Case 340/16), [2017] I.L.Pr. 31, can do so.

17.
Mr Doherty relied on the decision in SOVAG v. If Vahinkovakuutusyhtiö Oy (Case 521/14), [2016] Q.B. 780 in which a Finnish national, who was injured in a road accident in Germany, brought a claim against the other driver's German insurer in Finland. The accident had happened in the course of the man's work and he had therefore recovered some compensation from his Finnish work insurer. Under Finnish law, the injured worker had to give credit for the compensation already recovered from the work insurer but such insurer was entitled to claim reimbursement from the party liable. The Court of Justice of the European Union held that while the Finnish insurer was not entitled to take advantage

of the more favourable jurisdiction rules available to weaker parties, its claim against the German insurer for reimbursement of compensation paid to the injured worker could be brought in Finland pursuant to the predecessor to Article 8(2) of the Recast Regulation.

18.
Such conclusion would not readily appear to be available from the English version of Article 8(2), which provides:

“A person domiciled in a Member State may also be sued as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.”

19.
The identically worded predecessor provision was, however, inconsistent with several other language versions which permitted third parties to bring claims against one of the parties to the original case. The European Court therefore had regard to the purpose and general scheme of the rules and concluded:

“39 The hearing, in the course of the same proceedings, of both the original action and an action brought by a third party against one of the parties to the original action and closely linked to the original action, is such as to further the above-mentioned objectives in a situation in which an action has been brought by the injured party against the insurer of the person liable for the damage and another insurer, which has already paid the injured party some compensation for his injuries, seeks reimbursement of that compensation from the first-mentioned insurer.

40 If that were not permissible, there would be a risk of two courts, in the same case, arriving at different solutions, whose recognition and enforcement would therefore be uncertain.”

20.
Further, Mr Doherty points out that the right of subrogation arises only on payment. He argues that a rule that prevents subrogated claims from being brought in the place of domicile of the insured would lead to uncertainty. What, he asks rhetorically, would the position be where the insured chose not to make a claim upon his or her policy, perhaps to protect a no-claims bonus, or the insurer only paid out on the policy after proceedings were issued after first disputing cover? The insured would, he argues, plainly be entitled to sue in the court for the place of his or her domicile under Article 11(1)(b) in such cases and, once seised of the matter, such court would not lose jurisdiction upon the insurer paying out under the policy.

21.
Mr Collins stresses that recital 15 is founded on the principle that jurisdiction should generally be based on the defendant’s domicile and that the underlying policy in recital 18 of seeking to protect the weaker party should not lead to a result that allows a claim to be pursued for the benefit of the insurer other than in the place of the defendant’s domicile. He submits that Judge Rawlings was right to “look through” the identity of the claimant and see the reality of the situation. Further, he argues that nothing in the judge’s ruling requires the cause of action to be severed. Mr Hill can, he argues, still pursue his claim for both insured and uninsured losses in Hungary.

22.

Although he argued in his written submissions that the mere fact of insurance cover was sufficient to prevent reliance on the more favourable jurisdiction rules, Mr Collins did not press the point when I observed in argument that the right of subrogation could only arise upon payment of the insurance claim. He asserted that those were not the facts of this case and it was not necessary for the court to determine that issue.

23.
Noting that in many European legal systems insurers take an assignment of the insured's claim and sue to recover their outlay in their own names, Mr Collins asks why English insurers should be in the preferential position of being able to hide behind the common law's approach that the claim for insured losses remains vested in the insured. SOVAG , he argues, provides a practical answer to the problem but is dependent first upon an assignment.

DISCUSSION

24.
Mr Hill is the insured and the sole claimant in this case. The damage to his car is his loss and he is solely entitled, as a matter of English law, to sue for the diminution in value of his car even though Admiral has paid the bulk of the repair costs: Coles v. Hetherton [2013] EWCA Civ 1704, [2015] 1 W.L.R. 160. Absent assignment, Admiral has no cause of action against Generali. While Mr Hill's insurance recovery is left out of account in his action against Generali, the English doctrine of subrogation intervenes to require Mr Hill to account to Admiral for any sums recovered. Further, the claim for Mr Hill's uninsured losses and Admiral's subrogated claim for the insured losses are required in English law to be brought in a single action: Talbot v. Berkshire County Council [1994] Q.B. 290.

25.
On the clear wording of Article 11(1)(b), Mr Hill is entitled to sue Generali in the English courts. Indeed, it is not disputed that he can sue for his uninsured losses in this jurisdiction.

26.
There is no direct authority on the issue before me. As Judge Rawlings observed, the discussion of the position in Advocate General Bobek's opinion in KABEG was concerned not with subrogation as understood in English law but the position where the insurer is the assignee of the claim for insured losses and able to sue in its own name. The leading textbooks are split on the issue:

26.1
MacGillivray on Insurance Law offers the view at para. 13-011, but without any detailed analysis or citation of authority, that the rules in Section 3 of the Regulation do not apply to subrogated claims brought on behalf of insurers.

26.2
Colinvaux and Merkin's Insurance Contract Law draws a distinction at para. D-0710/1 between cases in which an insurer takes an assignment of the claim such that the claim is one between insurers and not within Section 3, and subrogation proceedings in England in which the claim is brought in the name of the insured. Colinvaux refers to the decision of Tomlinson J, as he then was, at first instance in Youell v. La Réunion Aérienne [2008] EWHC 2493 (Comm), [2009] I.L.Pr. 23. In Youell , English and French insurers both insured the same assured. The English insurers issued proceedings in England & Wales seeking a declaration that they were not liable to contribute to a settlement reached by the French insurers in a claim brought against the assured. The French insurers challenged jurisdiction

on the basis that jurisdiction was governed by the rules under Section 3 of the Regulation. Tomlinson J rejected such contention holding that Section 3 did not apply to claims by one insurer against another. Colinvaux observes, with an obvious correction to the text:

“The learned judge distinguished the present case from one involving subrogation rights. In subrogation proceedings brought in England the action is in the name of the assured rather than the [insurer]. Accordingly, the Youell ruling would not apply in a subrogation action where, for example, a property insurer having indemnified its assured was to commence direct proceedings against liability insurers in circumstances where a direct action was permissible. In these circumstances, the action is in the name of the assured under the property policy and not in the name of the insurers, so the claim remains one relating to insurance.”

26.3
That said, the commentary in Colinvaux is somewhat equivocal in that the footnote to the last sentence adds:

“But see Bayern v. Blijdenstein (Case 433/01), [2004] E.C.R. I-981, in which the European Court of Justice held that a public body exercising subrogation rights was not to be treated as a maintenance debtor for the purposes of establishing jurisdiction under Regulation 44/2001 because it was not a weaker party. This potentially means that even a subrogated insurer is unable to rely upon the special jurisdiction rules.”

26.4
Bayern was not, however, an insurance case; nor was it a case of subrogation as understood in English law since the claim was brought directly in the name of the public body seeking judgment.

27.
I take the following matters from the text of the Regulation and the decided cases:

27.1
Upon its proper construction, the Recast Regulation does not require analysis of whether a particular party is or is not in a weaker position. In the interests of predictability and legal certainty, the question is whether the party is in a class that is deemed by law to be weaker: KABEG ; Hofsoe v. LVM Landwirtschaftlicher Versicherungsverein Münster AG (Case 106/17), [2018] I.L.Pr. 12.

27.2
The policyholder, the insured and other beneficiaries are expressly deemed to be weaker while insurers, reinsurers and other insurance professionals are deemed not to be: FBTO Schadeverzekeringen NV v. Odenbreit (Case 463/06), [2008] I.L.Pr. 12; UGIC v. Group Josi Reinsurance Co. SA (Case 412/98), [2001] Q.B. 68; GIE Réunion Européene v. Zurich España (Case 77-04), [2005] I.L.Pr. 33; Hofsoe ; Aspen Underwriting Ltd v. Credit Europe Bank NV [2020] UKSC 11, at [43]; Youell .

27.3
Since Article 11(1)(b) contains a derogation from the general principle of jurisdiction of the defendant’s domicile, it has to be regarded as exceptional in nature and be interpreted strictly: Hofsoe .

27.4
While an insurer pursuing an assigned claim cannot take advantage of the weaker-party rules, it might be able to apply to join an existing claim brought by the insured in the insured’s place of

domicile pursuant to Article 8(2): SOVAG . Such decision and the policy of “ensuring” that irreconcilable judgments are not given underline the importance to be accorded to avoiding a multiplicity of actions.

27.5
Thus, an insurer who takes an assignment of the claim for insured losses:

a)
may be able to join an action brought by the insured for the uninsured losses in the place of his or her domicile; but

b)
where there is no such earlier action, will only be able to sue in the place of domicile of the defendant or the place of the tort.

28.
While Mr Collins is right to say that multiplicity of proceedings would not be inevitable in the event that the claim for insured losses is required to be brought in Hungary, Mr Hill cannot be required to pursue his uninsured losses in that jurisdiction. Article 11(1)(b) gives him the absolute right to sue in this jurisdiction and the courts of England & Wales are the courts first seised of the matter for the purpose of the lis pendens and related actions rules. In the event that, on the true construction the Recast Regulation, the subrogated claim is to be treated as the insurer’s claim:

28.1
it may be (although I do not purport to decide the issue) that the Hungarian court would not be required by Article 29 to stay a second case brought in respect of the insured losses;

28.2
there would in such circumstances be a strong case for a discretionary stay of the Hungarian proceedings pursuant to Article 30 since the claims for the insured and uninsured losses would be so closely connected that it would plainly be expedient to hear and determine the claims together to avoid the risk of irreconcilable judgments; and

28.3
there would in any event be a case for allowing Admiral to pursue the claim for insured losses in this jurisdiction pursuant to Article 8(2) either:

a)
in Mr Hill’s name; alternatively,

b)
in its own name following an assignment.

29.
It is no answer to point to the modest value or simplicity of the uninsured claim in this case. The issue could arise in many circumstances and the principle of predictability requires the court not to construe the jurisdiction rules on a case-by-case basis depending upon the facts of each case. Thus, for example, the same answer to the subrogation issue must be given in the case of a claimant pursuing a substantial uninsured claim for catastrophic injuries while also seeking to recover a relatively modest insured claim for the written-off value of a car. Upon such facts, it is very likely that

the second court would stay proceedings for the insured losses in order to allow the court first seised of the case to determine the personal injury claim.

30.
Mr Collins recognises the risk that the related-action rules might lead to a stay of any proceedings in Hungary but argues that that is not a matter for this court. Strictly he is right. What, however, is for me is to consider the proper interpretation of the Regulation against its purpose and general scheme, including the policies to promote predictability; to ensure that the rules are founded on the principle that jurisdiction will generally be based on the defendant's domicile; to allow alternative grounds of jurisdiction on the basis of a close connection to a jurisdiction; to facilitate the sound and harmonious administration of justice; to minimise the possibility of concurrent proceedings; and to ensure that irreconcilable judgments are not given.

31.
In my view, such considerations point to an interpretation of the Regulation that allows the insured to sue for both insured and uninsured losses in the place of his or her domicile without the unnecessary procedural steps of assigning the insured losses and leaving the insurer to make an application for joinder pursuant to Article 8(2). Such result achieves predictability, facilitates the sound and harmonious administration of justice, avoids the risk of multiple proceedings and ensures that irreconcilable judgments are not given. Further, it broadly, but not entirely, mirrors the position achieved in Europe through joinder of claims assigned to an insurer with an earlier claim for uninsured losses pursuant to Article 8(2). Accordingly, while an inroad into the principle that jurisdiction will generally be founded on the defendant's place of domicile, it achieves broad parity with the position in legal systems where the insurer takes an assignment.

32.
For these reasons I allow this appeal and answer the question posed at the start of this judgment in the affirmative.

33.
While it is certainly arguable on the simple wording of Article 11(1)(b) that a subrogated claim can be brought in the place of domicile of the insured even in the absence of an associated uninsured claim, that would indeed be a conclusion that preferred English insurers over their European counterparts. The principle of predictability might suggest that such a case should not be decided differently, but there would, on those facts, be no risk of multiple proceedings or irreconcilable judgments, or in an assignment case, of an application for joinder under Article 8(2). Since such modified question does not arise on the facts of this case, it is strictly unnecessary for me to rule upon the point and I do not purport to do so.

34.
Finally, while I am differing from Judge Rawlings on the narrow issue in this case, I should add that the judge did not have the benefit of argument upon the SOVAG case which, in my judgment, assists both in underlining the strength of the policy of minimising multiple proceedings and ensuring that irreconcilable judgments are not given but also in demonstrating that in practical terms an insurer who takes an assignment will often be able to be joined as an additional party to an existing claim in the courts of domicile of its assured.