Neutral Citation Number: [2020] EWHC 178 (QB)

Case No: QB-2019-000852

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2020

Before:

THE HONOURABLE MRS JUSTICE ANDREWS DBE

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Between:

JONATHAN HUTCHINSON	**Claimant**
- and -	
(1) MAPFRE ESPANA COMPANIA DE SEGUROS Y REASEGUAROS S.A..	
(2) ICE MOUNTAIN IBIZA S.L. (trading as OBEACH IBIZA)	**Defendants**

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Sarah Crowther QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Bernard Doherty (instructed by **DAC Beachcroft**) for the **First Defendant**
Lucy Wyles (instructed by **BLM**) for the **Second Defendant**

Hearing dates: 16 and 17 January 2020

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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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Mrs Justice Andrews:

INTRODUCTION

1. The Second Defendant ("Ice Mountain") is a Spanish private limited company which, under its trading name of "OBeach Ibiza", runs an entertainment venue and bar in San Antonio, Ibiza, which in 2016 was known as the Ocean Beach Club ("the Club"). Its target market is young adult British holidaymakers. The Claimant, ("Mr Hutchinson") described it as basically an English bar, in which some Spanish people were working. Entry to the Club is by means of a ticket which affords access to all the general areas, including its swimming pool. There are also certain areas designated only for those who purchase "VIP" tickets (at a premium).

2. "OBeach Ibiza" has an English website, whose home page provides the facility to pre-book tickets for entry to the Club. A selection of its promotional materials, written in English and using iconic images such as Routemaster buses and black London taxi cabs, was included in the evidence of the Claimant's solicitor, Cheryl Palmer-Hughes. Ms Palmer-Hughes also attested to the plethora of social media activity on Instagram and Twitter promoting the Club and its activities. She provided a few screenshots of posts by way of example. Her evidence has not been challenged.

3. In the early evening of 3 June 2016, Mr Hutchinson, then aged 34, was found floating in the Club's swimming pool by other guests, who dragged him to safety. It appears that he had either fallen or dived into the pool and hit his head. He suffered life-changing injuries: he is now tetraplegic and requires round the clock care. Mr Hutchinson has no recollection of the circumstances leading to the accident. CCTV footage of the area round the pool, which may have shed some light on how it occurred, no longer exists. One of Ice Mountain's directors, Duane Lineker, says in his witness statement that he reviewed that CCTV footage after the incident. If that is right, Ice Mountain must have been aware that a serious accident had occurred on its premises. Despite this, it appears that nothing was done to prevent the critical footage from being automatically overwritten, which Mr Lineker states happened after 14 days.

4. Mr Hutchinson knew about the Club before the occasion on which he had the accident, as he had been there before (most recently in 2015) and he was a follower of "OBeach" on Twitter. He had seen OBeach's promotions on his newsfeed. On this occasion, however, he and his friend Samuel Russell had each purchased a ticket for general entry to the Club after being handed a promotional flyer by one of Ice Mountain's representatives on the promenade in San Antonio. There is no dispute that when he purchased the ticket, Mr Hutchinson was acting as a consumer within the meaning of Articles 17 and 18 of the recast Brussels Regulation 1215/2012 in relation to jurisdiction and enforcement of judgments in civil and commercial matters ("Recast Brussels 1").

5. On 12 March 2019 Mr Hutchinson issued a claim form claiming damages in excess of €10 million against Ice Mountain and their Spanish liability insurers, the First Defendant ("Mapfre"). The claim against Ice Mountain is pleaded in contract, in tort and for breaches of statutory duty under the provisions of the Spanish Consumer Protection Act 1/2007 and other Spanish legislation. However, Ms Crowther QC on behalf of Mr Hutchinson accepted that under Spanish law (which it is common

ground applies to all the claims) there is no material difference between the claim for breach of the contractual duty of care, and the claims made under the alternative causes of action.

6. The claim against Mapfre is brought under a provision of Spanish law (Article 76 of the Insurance Contracts Act 50/1980) which enables an injured party to bring a claim governed by and actionable as a matter of Spanish law directly against the liability insurer of the party who is primarily liable, instead of (or as well as) against that party.

7. Under Article 13(2) of Recast Brussels 1, the right of an insured to pursue an insurer in the Member State of his own domicile is extended to cover a direct claim that the injured party has against the insurer, if such a direct claim is allowed under the law applying to the insurance contract: see *Odenbreit v FBTO Schadeverzekeringen NV,* Case C-463/06 ("*Odenbreit*"). The consequence is that the injured party can bring a claim against the insurer in the courts of the Member State of *his* own domicile, which is what Mr Hutchinson has done in the present case.

8. Both Defendants have challenged the jurisdiction of the English court to try these claims. For the reasons set out in this judgment, I am satisfied by Mr Hutchinson that he has a good arguable case that one of the special jurisdictional exceptions to the general rule that a party should be sued in the courts of his own domicile applies to each Defendant.

9. In summary:

   i) This Court has jurisdiction over the contractual claim against Ice Mountain under the consumer jurisdiction provisions of Recast Brussels 1.

   ii) Those provisions do not apply to the alternative causes of action in tort or for breaches of statutory duty. I have stayed those claims pending the determination by the CJEU of a preliminary reference made in another case concerning the interpretation and scope of Article 13(3) of Recast Brussels 1, which is the only potential jurisdictional gateway by which this Court would have jurisdiction over them.

   iii) The Court also has jurisdiction over the claim against Mapfre. The provision in the contract of insurance upon which Mapfre seeks to rely as demonstrating that there is no good arguable case against it on the merits cannot be relied on, as that would substantially undermine the protection to the weaker party specifically provided for in the insurance provisions of Recast Brussels 1.

   iv) Even if that analysis is wrong, 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 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.

THE APPLICABLE LAW

10. There was no dispute between the parties as to the approach that the Court should take when considering a jurisdictional challenge of this nature. Once the jurisdiction has been challenged, the Claimant bears the burden of establishing that the Court has the right to hear and determine the claim. The standard of proof is "good arguable case", which means that the Claimant must have the better argument on the material available that one of the jurisdictional gateways applies: *Canada Trust v Stolzenberg (No 2)* [2002] 1 AC 1.

11. The way in which this test is to be applied, particularly when there is a dispute of fact or law which the Court must resolve in order to determine whether a particular jurisdictional gateway applies, was considered by the Supreme Court in *Brownlie v Four Seasons Holdings* [2017] UKSC 80 at [7] and *Goldman Sachs v Novo Banco* [2018] UKSC 3 at [9], and by the Court of Appeal in *Kaefer v AMS Drilling* [2019] EWCA Civ 10, [2019] 1 WLR 3514. These authorities establish that:

    i) the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway.

    ii) if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so, but

    iii) if the nature of the issue and the limitations of the material available at the interlocutory stage mean that no reliable assessment can be made, there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

12. Recast Brussels 1 is to be interpreted autonomously and purposively. The Court must have regard to the purposes set out in the recitals. In this case recitals 15, 16 and 18 are particularly pertinent:

    15. Jurisdiction rules should be highly predictable and based on the defendant's domicile save for certain well-defined exceptions;

    16. Alternative grounds of jurisdiction should be based on a close connection between the court and the action;

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

13. Where a claimant seeks to rely upon one of the special jurisdictional rules in Recast Brussels 1, the Court must bear in mind that those rules constitute a derogation from the general rule that a defendant should be sued in the courts of the Member State of his own domicile. That requires a restrictive interpretation, in order to avoid

undermining that general rule: *Kalfelis v Bankhaus Schroder* (Case C-189/87), *Kolassa v Barclays Bank (*Case C-375/13).

THE CLAIMS AGAINST ICE MOUNTAIN

A. THE CLAIM UNDER THE CONSUMER CONTRACT

14. The issues relating to the contractual claim against Ice Mountain are relatively straightforward, and for that reason I will deal with them first.

15. Mr Hutchinson relies on Section 4 of Chapter II of Recast Brussels 1 and, specifically on Articles 17 and 18 of that Regulation, the relevant provisions of which are as follows:

Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to article 6 and point 5 of Article 7, if:

…

(c) …the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State, or to several states including that Member State, and the contract falls within the scope of such activities.

Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled."

16. Mr Hutchinson contracted with Ice Mountain as a consumer, and the evidence of Ms Palmer-Hughes establishes that Ice Mountain directs its commercial and professional activities to consumers in the United Kingdom (and was doing so at the material time). The contract with Mr Hutchinson fell within the scope of the activities that were being directed to UK consumers. On the face of it, therefore, Mr Hutchinson has much the better of the argument that the provisions of Articles 17 and 18 provide this Court, as the court of his domicile, with jurisdiction over his claim in contract.

17. However, Ms Wyles, on behalf of Ice Mountain, submitted that Article 17(1) should not be interpreted to apply to a consumer contract that was entered into by a consumer in a Member State which is not his domicile (in this case, Spain) without any reference to, and therefore, as she put it "entirely incidentally to" the direction by the defendant of its activities to his Member State of domicile. Mr Hutchinson had not purchased his entry ticket to the Club on this occasion as a result of reading her

client's promotional material in the UK, but as a result of its promotional activities in Ibiza.

18. The CJEU held in *Emrek v Sabranovic*, (Case C-218/12) [2014] IL Pr. 39 that there was no requirement for there to be a causal link between the direction of the defendant's commercial activities to the Member State of the claimant's domicile and the contract that was subsequently concluded, because the introduction of such a requirement would serve to undermine the consumer protection at which these provisions were aimed. The court referred to the difficulties of proving a causal connection between consulting an internet site and concluding a contract, which might deter consumers from bringing actions before their national courts. However, it said that if such a causal link could be established, it might constitute strong evidence that the defendant's activities were directed to the Member State in which the claimant consumer was domiciled.

19. In the present case, there was ample evidence to satisfy that requirement, irrespective of whether Mr Hutchinson purchased his ticket via the Obeach website. Ms Wyles sought to distinguish *Emrek* on its facts, but the principles laid down in that case are clear. Articles 17 and 18 do not expressly require proof of a causal link and no such requirement is to be implied. Ice Mountain was deliberately targeting British tourists with its online marketing campaign, with the intention that they would buy tickets to enter and use the facilities of its Club. It cannot escape the consequences of the provisions of Recast Brussels 1 that are aimed at the protection of consumers, by relying on the fortuity that the particular British tourist who was injured on its premises did not buy his ticket as a direct result of those promotional activities on his home territory, but rather as a result of promotional activities aimed at British tourists who happened to be already in Spain.

20. Ms Wyles' primary argument, however, was that Mr Hutchinson's claim did not relate to any breach of the contract under which he gained access to standard Club facilities, because he was not using the facilities he was contractually entitled to use at the time of his accident. She relied on the evidence of Mr Lineker that Mr Hutchinson had been seen in the VIP area of the Club immediately prior to the accident. The consumer contract which he had purchased did not entitle him to go into that area.

21. Even assuming that it can be established at trial that Mr Hutchinson approached the swimming pool from the VIP area, that argument appeared to me to be hopeless, given that Ms Wyles confirmed that the pool, which is where the accident occurred, was in an area of the Club to which anyone with a standard entry ticket had access. Using the pool was an activity which fell within the contractual rights and obligations assumed by the parties to the consumer contract. Indeed, the OBeach promotional material included the strapline: "*we didn't invent the pool party, we just perfected it*." The existence or scope of a contractual duty to take reasonable care for the health and safety of ordinary members of a Club using its swimming pool cannot depend on which side of the pool they happened to be standing on immediately before they entered the water. In those circumstances it is irrelevant whether Mr Hutchinson was in the VIP area before he had his accident and if so, whether he was invited there by someone else (which will be a matter of evidence to be tested at trial).

22. I therefore conclude that the court has jurisdiction over the claim in contract against Ice Mountain.

B. THE NON-CONTRACTUAL CLAIMS

23. As to the claims against Ice Mountain in tort or for breach of statutory duty, Article 13(3) of Recast Brussels 1 provides that if the law governing 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. There is no dispute that Spanish law does allow the joinder of the policyholder or insured to an action brought by the injured party directly against the insurer. If this Court has jurisdiction in respect of the claim against Mapfre, (as I am satisfied it does, for reasons that will appear later in this judgment) Article 13(3) is the only arguable jurisdictional basis upon which the non-contractual claims against Ice Mountain could be brought here. If applicable, it would also constitute an alternative jurisdictional basis for the contractual claim. However, the Court is not presently in a position to form a clear view as to whether the Claimant can rely upon Article 13(3).

24. The decision of the Court of Appeal in *Hoteles Pineiro Canarias SL v Keefe* [2015] EWCA Civ 598 [2016] 1 WLR 905 to the effect that the policyholder/insured may be joined in circumstances such as this, is binding on this Court as a matter of domestic precedent. That claim concerned an accident in a Spanish hotel. The insurer (as it happens, Mapfre) had accepted its liability to indemnify the insured, and submitted to the jurisdiction of the English court, but if the claim in tort against the hotel owner succeeded, the damages were likely to exceed the policy limits. The claimant therefore had a good reason for suing both the hotel owner and its insurer.

25. The claimant started proceedings against the insurer under Article 11(2) of Brussels 1 (the equivalent of Article 13(2) of Recast Brussels 1) and sought to use Article 11 (3) (the equivalent of Article 13(3)) to bring the claim for damages for personal injuries against the insured in the English courts. The Court of Appeal held that he could, rejecting the hotel owner's argument that the jurisdiction under Article 11(3) was confined to circumstances in which (i) the claim against the insured concerned a policy dispute or some other insurance dispute and (ii) there was a risk of irreconcilable judgments.

26. However, there is doubt as to whether, as a matter of EU law, the interpretation of the insurance provisions that was adopted in *Keefe* is correct. The Supreme Court gave permission to appeal in *Keefe*. It then made a reference to the CJEU to determine, among other matters, whether a parasitic claim against the policyholder or insured under Article 11(3) of Brussels 1 had to involve "*a matter relating to insurance*", in the sense that it raises a question about the validity or effect of the policy. The European Commission made submissions to the CJEU to the effect that, in order to fall within those provisions, the parasitic claim did have to involve a matter relating to insurance (and thus that the interpretation of Article 11(3) adopted in *Keefe* was wrong), but the case settled before the Advocate General or the CJEU considered the matter.

27. The opinion of Advocate General Bobek in a subsequent case, *Kabeg v Mutuelles du Mans* (C-340/16) provides further support for the view that a parasitic claim under Article 11(3) of Brussels 1 (and thus Article 13(3) of Recast Brussels 1) must involve "*a matter relating to insurance*". However, he took the view that this phrase is not confined to questions about the validity or effect of the policy, but rather that the claim must concern the rights and duties arising out of an insurance relationship. That

interpretation would have the salutary effect that the injured party would be able to join the insured as a party to a claim brought against the insurer in order to resolve in one set of proceedings any potential issue about whether the former was obliged to indemnify the latter in respect of the injured party's claim. The CJEU adopted much of the Advocate General's reasoning in that case, but they did not expressly address those aspects of it.

28. As matters stand, I am satisfied that despite the Court of Appeal's decision in *Keefe* there is genuine uncertainty as to the proper interpretation of Article 13(3). There are strong arguments either way. My attention was drawn to the fact that very similar issues as to the interpretation of Article 13(3) of Recast Brussels 1 arose in the case of *Cole v IVI Madrid SL* (Claim no E90BM227) ("*Cole*") in which judgment was handed down on 24 September 2019. In that case, after careful consideration of the relevant domestic and European case law, HH Judge Rawlings (sitting as a judge of the High Court in the Birmingham District Registry) made a reference to the CJEU, which I understand seeks guidance on two issues, namely: (i) whether the jurisdiction to join the assured under Article 13(3) only applies to "a matter relating to insurance" and (ii) if so, what that phrase encompasses.

29. Nothing would be achieved by my making a duplicate reference, even though Ms Wyles sought to persuade me to do so in order to enable her client to advance the additional argument that any joinder under Article 13(3) must be at the behest of the policyholder/insured and not the claimant. That argument was rejected by Moore-Bick LJ (with whom Mummery and Etherton LJJ agreed) in *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, [2010] 1 WLR 1564, for reasons he repeated in his judgment in *Keefe* at paragraph [85], and which I regard as compelling. He said that Article 11(3) of Brussels 1 is concerned only with jurisdiction; it says nothing about the capacity in which a party may be joined, and there are powerful policy reasons for ensuring that all issues arising between the claimant, the defendant and the insured are decided in the same proceedings. Although those observations were technically *obiter*, they cannot be faulted. There is no lack of clarity on this aspect of interpretation of the regulations on which I would find it necessary to seek guidance from the CJEU.

30. It is unnecessary for the purposes of this judgment to address the arguments in relation to Article 13(3) in any greater detail or to go over the same ground as HH Judge Rawlings. Given Ms Crowther's acceptance that Mr Hutchinson's alternative causes of action add nothing material to his claim in contract, there is no pressing need for a decision whether Ice Mountain as the policyholder can be joined to the claim against Mapfre under Article 13(3).

31. I have concluded that, as Ms Crowther ultimately submitted, the appropriate course is to stay the non-contractual claims against Ice Mountain until the CJEU has answered the questions referred to it by Judge Rawlings in *Cole,* with permission to apply to lift the stay (to cater for any material change of circumstances).

C. LIS ALIBI PENDENS – ARTICLES 29 AND 30

32. Those conclusions are subject to a further argument that Ice Mountain belatedly sought the Court's permission to raise, namely, that the Court of Ibiza is already seised of any civil claim for damages arising out of Mr Hutchinson's accident, and

therefore by virtue of Article 29 of Recast Brussels 1, the Court must stay these proceedings at least until such time as the jurisdiction of the Spanish court over the civil claim is established. Alternatively, if the Spanish proceedings are related proceedings but the parties are not identical, the Court should exercise its discretion under Article 30 to stay these proceedings so as to avoid the possibility of conflicting judgments.

33. Article 29 of Recast Brussels 1 provides as follows:

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

Article 30 provides that:

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

34. Ms Crowther submitted that the Court should not entertain that basis of challenge to the jurisdiction, given that Ice Mountain had failed to raise it timeously. The application to amend to raise this point was served on her firm out of working hours on 8 January 2020, just over one week before the hearing. Ice Mountain's solicitor, Mr David Thompson, had mentioned criminal proceedings in Spain in his witness statement of 8 July 2019, but without identifying the parties to those proceedings or making any point about those proceedings requiring this Court to stay the civil claim. Ice Mountain has been aware of the existence of the Spanish proceedings since, at the very latest, November 2016. There has been no explanation given by Mr Thompson for the delay in raising this issue.

35. Moreover, on 13 December 2019 (by which time Ice Mountain had all the documents on which it now seeks to rely, and an opinion from its expert on Spanish law, Professor Carreras) the parties agreed the terms of a consent order defining the issues that were to be the subject of expert evidence on matters of Spanish law. There was no mention of this issue at that stage. Ms Crowther contended that Mr Hutchinson was severely prejudiced by the delay, as his Spanish law expert Mr Villacorta had been given barely a week in which to respond, and he had been unable to consider the documentation on which Ice Mountain relied.

36. There seemed to me to be a great deal of force in those submissions, but in any case in which there is some reason to suspect that a competent court of another Member State may already be seised of the same matter, this Court is obliged to investigate the position for itself and satisfy itself that it has jurisdiction, irrespective of the position taken by the parties to the litigation. Article 29 is couched in mandatory terms. In those circumstances, the only course that would be open to the Court to try and ameliorate the prejudice to Mr Hutchinson would be to grant an adjournment of the hearing at Ice Mountain's expense. Pragmatically, Ms Crowther did not seek an

adjournment, because she submitted that the material relied upon by Ice Mountain did not establish that there were any extant proceedings in Spain that would engage Articles 29 or 30.

37. Professor Carreras has very properly told the Court in his expert report that he is not satisfied that the documents obtained by Ice Mountain's solicitors are a complete copy of the Spanish court file and that he is not in a position to express a definitive opinion without reading the entire file. Ice Mountain's application is founded on the submission, based on Professor Carreras' understanding of the limited number of documents that he has been shown, that there are ongoing criminal proceedings in Spain arising out of the accident which led to Mr Hutchinson's injuries, and because Mr Hutchinson has failed to expressly reserve his right to bring separate civil proceedings, the Public Prosecutor is obliged to bring civil proceedings on his behalf within the ambit of those criminal proceedings. For that reason, Ms Wyles contended that the Spanish court is seised of any civil claim arising from the same facts as are under investigation in the Spanish criminal proceedings, and has been since 2016, long before these proceedings were commenced.

38. Such documents as have been obtained from the Spanish court and translated are exhibited to a witness statement from Mr Thompson, dated 8 January 2020. Having examined those documents and their translations carefully, and read the expert reports, I have concluded that there is no evidential basis for staying these proceedings under either Article 29 or Article 30 of Recast Brussels 1.

39. After his accident, Mr Hutchinson was taken to hospital (the Policlinica Nuestra Senora Del Rosario) and admitted to the Intensive Care Unit. His friend Mr Russell attended the hospital while he was being treated. According to a document headed "Report to the Duty Court" which bears the date 20 July 2016, the duty doctor reported the accident for legal purposes to the Court of First Instance No 2 of Ibiza (a criminal court) on the night it occurred, 3 June 2016. The doctor provided details of the injuries sustained, Mr Hutchinson's name, his then address, his age, and in the box for contact details, a mobile telephone number for a "friend", presumably Mr Russell.

40. On 20 July 2016, a medical report from the hospital was filed with the criminal court in Ibiza. Although the court document which records the receipt of that report identifies Mr Hutchinson as the "reporting party," he knew nothing about it, or about the preliminary judicial investigation into a possible criminal offence that the filing of the report set in train. Mr Hutchinson had never seen any of the documents relied on by Ice Mountain until they were produced in this litigation a week before the hearing. He has taken no part in the criminal proceedings, and he says he has no intention of doing so.

41. Through no fault of his own, Mr Hutchinson has never been in a position knowingly to take any formal steps to reserve his position in Spain to commence separate civil proceedings against anyone he alleges to be legally liable for his injuries. Yet, 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.

42. Documents from the court file following the initial report bear the title "Court of First Instance No 2 IBIZA/EIVISSA" and are either headed "DPA *Preliminary* Procedure for Abbreviated Proceedings 0001026/2016" or "DPA Proc. Abbreviated *Preliminary* Proceedings 000126/2016." [Emphasis added.]

43. On 19 September 2016 the Spanish criminal court made an order which recorded that the proceedings were filed from [i.e. initiated by] a medical report from the hospital, for the alleged crime of "injury", and that, as the nature and circumstances of the events and the persons involved in them had not been established, it was appropriate to carry out *a preliminary investigation to establish the same and, where applicable, bring relevant proceedings*. For those purposes, Mr Hutchinson was to be represented by the "Justice Administration Counsel". At that stage, therefore, the court had not even identified the potential defendant(s) to any future criminal charge. The investigating judge was carrying out a fact-finding and evidence-gathering exercise, with a view to seeing if there were grounds for prosecuting anyone in due course.

44. The same document envisages that the Coroner would make findings about the nature and extent of Mr Hutchinson's injuries and that there would be periodic updates on his medical condition. It would be almost impossible to get those updates without Mr Hutchinson becoming actively involved in the proceedings; but he obviously could not do that unless he knew about them.

45. On 29 September 2016 it was formally recorded by a judge that an attempt had been made by an English interpreter to contact the friend of Mr Hutchinson on the mobile telephone number provided to the hospital, "*for the purposes of the ruling of 19 September*", (i.e. to investigate the circumstances of the accident) but that this was impossible, because there was no connection. The documents do not state whether any attempt was made to contact Mr Hutchinson by letter, but it would appear not, because the next ruling was made on the following day. Mr Hutchinson no longer lives at the address given in the hospital report.

46. The court ruling of 30 September 2016 is an important document. It indicates that on completion of its preliminary investigations the Spanish court was satisfied that there was insufficient information to proceed with a criminal prosecution and that "*therefore the provisional dismissal of the actions must be ruled in accordance with the provisions of Article 641-10c and where applicable Article 779.1a of the Criminal Procedure Act*". The translation of the operational part of the ruling that was provided to this Court stated that "*the provisional overseimation of this cause is resolved*" and that the proceedings were being archived. "Overseimation" is not a recognisable English word; but the Spanish word "sobreseimiento" of which it was a purported translation means "dismissal". Therefore, the correct translation of the operational part of the ruling is that "*the provisional dismissal of this cause is resolved.*"

47. Professor Carreras does not mention that document in his expert report, let alone explain what it means. He does not address the statutory provisions referred to in it. I can only assume that he must have overlooked it when he stated that "*the case appears to be pending before the Court of Ibiza"*. If that document is taken at face value, (and in the absence of contrary evidence from Professor Carreras I have no reason to do otherwise) there is no criminal prosecution in Spain, let alone conjoined civil proceedings to which Mr Hutchinson could be made a party (with or without his knowledge or consent). It quite clearly indicates that the preliminary investigation has

come to an end, and that the decision was reached by the court that there was no evidence to support a prosecution. One would not archive proceedings that are ongoing.

48. Although the dismissal of the actions on 30 September 2016 was described as "provisional" rather than final, that word needs to be approached with some caution. The word may simply reflect the fact that a dissatisfied party had three days from the date of notification of the ruling in which to ask the court to reconsider the ruling, or five days in which to make a direct appeal against it. There is no evidence that anyone did either of those things. Alternatively, the dismissal might be "provisional" in the sense that it would be open to the investigating judge to re-open the case if fresh evidence subsequently came to light. That is consistent with the documents being archived.

49. Consistently with that interpretation, the remaining documents from the court file indicate that all that has happened since that ruling is that Spanish lawyers acting on behalf of Ice Mountain made applications to the criminal court from time to time for certain documents to be supplied to them, or for the court to send letters requesting such documents from third parties, such as the emergency services who first attended Mr Hutchinson.

50. The first application, in November 2016, sought copies of the proceedings themselves. It appears from the document recording the application that this was in order to find out what was going on (and whether Mr Hutchinson was actively involved). The lawyers then applied to the criminal court on various occasions in 2017 and 2018 to seek copies of certain documents of relevance to Mr Hutchinson's claim before this Court for damages for personal injury, such as medical reports relating to the accident, and the results of any blood and urine tests that may have been performed on Mr Hutchinson during his stay at the hospital or when he was initially treated at the Club by the emergency services. Ice Mountain clearly wished to investigate whether and if so to what extent Mr Hutchinson (who accepts that he had been drinking alcohol) may have been intoxicated at the time of the accident and if so, whether that had any causative effect.

51. The Spanish court was expressly informed that Mr Hutchinson's lawyers in England had submitted preliminary proceedings in the United Kingdom "*requesting that a series of documents be submitted, in order to prepare their claim for compensation for damages*" (i.e. they sought an order for pre-action disclosure) and that there was an oral hearing scheduled in the English court on 21 March 2018. It appears that the Spanish court gave such assistance as it could by providing the requested documentation – most of which it must have had at the time when it decided there was insufficient evidence to prosecute – or requesting its production by third parties. Tellingly, there is no record that the judge expressed any concern about civil proceedings being commenced in England, as one might have expected if the Spanish court regarded itself as being already seised of civil claims arising out of the accident.

52. Miss Wyles told the Court on instructions that at the time when these attempts were being made to obtain the documents, her instructing solicitors assumed that Mr Hutchinson had reserved his right to bring separate civil proceedings, because in their experience of personal injury claims in relation to accidents in Spain, claimants invariably did so. It was only when they obtained the documents and saw no reference

in them to a reservation of rights that it occurred to them that Mr Hutchinson may not have taken that course. That may well be so, but it would not have taken them very long to deduce why, at least once they read the translation of the document of 29 September 2016, from which it would have been apparent that there was at least a very good chance that Mr Hutchinson was unaware that he was actually or potentially a party to criminal proceedings in Spain.

53. As to the position of Mapfre with regard to the criminal proceedings, local counsel for Mapfre is mentioned in connection with one of Ice Mountain's applications in a court ruling of 27 September 2017, and Mapfre and Ice Mountain, together with Mr Hutchinson, are identified as "*reporting party/complainant"* in a number of the subsequent court documents in 2018 relating to the various applications for production of documents. Professor Carreras says in his report that Ice Mountain and Mapfre have joined in the proceedings *as defendants*, though he does not explain how he reaches that conclusion, or why they are not named as defendants on the record.

54. I cannot understand why Mapfre would be joined as potential defendants to criminal charges. On the face of the documents it appears as if both they and Ice Mountain had joined the criminal proceedings solely for the purpose of obtaining documents from the court (or asking the court to exercise its powers to request them from third parties) for use in the civil proceedings that Mr Hutchinson was planning to bring against them in England. I have no idea whether as a matter of Spanish criminal procedure they would need to constitute themselves defendants in order to be able to make applications of that nature. What does clearly emerge from these documents is that whenever anything has happened in the case since the action was "provisionally dismissed" it has been driven by Ice Mountain's lawyers, and has had nothing to do with re-opening or progressing the substantive investigations in Spain.

55. If Ice Mountain or its directors were currently facing an ongoing criminal prosecution in Spain, it would no doubt have been able to provide much better evidence of it than this, including details of the charges. The most favourable view one might take of the evidence from Ice Mountain's perspective, in the light of the possible gaps in the court file, is that the action was somehow reinstated to the extent that was necessary to enable the Court to entertain applications by Ice Mountain and/or Mapfre for assistance in obtaining documents. Even if one were to make the assumption that in consequence of that the criminal proceedings in Spain are still on foot, they have plainly not reached the stage where a decision has been taken to prosecute and charges have been formulated against anyone, let alone the stage at which someone is facing trial to answer any form of charge or civil claim arising from Mr Hutchinson's accident. Nothing in the post-September 2016 documents indicates that anyone, including the judge, has been actively pursuing the investigation into the accident with a view to getting to that stage, or that anyone has any interest in doing so.

56. Mr Villacorta states that a criminal investigation by a judge with a view to deciding whether or not a prosecution should follow is <u>not</u> the stage of the proceedings at which there is a criminal action to which the victim will be joined as a civil party unless he opts out. Actions are only formed once the investigatory stage is complete and the case reaches what Mr Villacorta dubs the "intermediate phase". He cites Articles 780-784 of the Spanish Code of Criminal Procedure in support of that analysis.

57. Whilst Mr Villacorta agrees with Professor Carreras that in the absence of the victim, the Public Prosecutor will exercise the victim's right to bring a civil action within the ambit of the criminal prosecution, Mr Villacorta explains that this only happens once the preliminary investigation has finished and the criminal case is brought to another judge or court (depending on the gravity of the alleged criminal offence) for trial. It is only at that stage of the procedure that the Public Prosecutor is bound to file his criminal accusation or indictment, and eventually the civil claim on behalf of the victim, which he will only do if the victim has not already commenced a civil action or expressly reserved his rights, or renounced them.

58. Mr Villacorta explains that Spanish law is founded on Roman law principles which make it clear that the right of civil suit belongs to the victim of the wrongdoing, and that he has the right to choose where to bring his civil claim. Once he has elected to bring proceedings in a civil jurisdiction, he cannot change his mind and bring a civil claim in the context of a criminal proceeding. The Code of Criminal Procedure entitles the injured party to commence a separate civil action whilst a preliminary investigation is still ongoing with a view to finding out whether there are grounds for a prosecution. It is only if the injured party has done nothing to make such a claim, and has not reserved his rights by the time that the preliminary investigation has concluded, that the public prosecutor will exercise the right, in his absence, to bring a civil claim within the criminal proceedings.

59. I have no reason to doubt Mr Villacorta's evidence, which is cogent, and backed by reference to provisions of the relevant Code and underlying legal principles. However, the resolution of the issue of *lis alibi pendens* does not depend on expert evidence so much as on my assessment of the factual situation in Spain. The documents upon which Ice Mountain seeks to rely indicate that the Spanish court concluded its preliminary investigations in September 2016 and decided that there is no basis for a prosecution. It dismissed the cause and archived the files. There is no evidence that the "provisional" dismissal has been reversed in substance, or that the judge has changed her mind about whether there is enough evidence to prosecute (let alone identified the defendant to prospective criminal charges). Therefore, there is no ongoing criminal action leading to trial, to which any civil action would attach.

60. Even if I am wrong about the effect of the "provisional dismissal" and for some reason that Professor Carreras has not explained, the Spanish criminal proceedings initiated by the filing of the medical report have been resurrected, they are obviously still at the preliminary stage of investigation. The heading of all the post-2016 court documentation makes that clear. The time has not yet come for any right of action, criminal or civil, to be exercised by the Public Prosecutor.

61. Irrespective of whether the action has been dismissed or is ongoing but still at the preliminary investigation stage, Mr Hutchinson was free to choose to start separate civil proceedings at the time when he did. There were no civil proceedings subsumed within the criminal proceedings, and the time for him to elect where to bring civil proceedings had not run out by the time that he issued his claim form in England and served it on these Defendants. Even if his initiation of the proceedings in England would not count as an express reservation of the right to bring separate civil proceedings, and in the unlikely event of a future prosecution of Ice Mountain, the prosecutor would still be obliged to bring a civil claim within the criminal

proceedings on Mr Hutchinson's behalf, this Court is the court first seised of the civil claim for the purposes of Articles 29 and 30.

62. Accordingly, even if the parties to the Spanish proceedings are the same (which is not entirely clear) Mr Hutchinson has satisfied me that I am not obliged to stay this action. If it were a matter of discretion, and the Spanish proceedings are "related" proceedings, I would refuse a stay. There is no realistic risk of inconsistent judgments, since on the evidence before me, there is no risk of any judgment on the merits of a claim for damages for personal injuries in Spain.

63. For those reasons, the contractual claim against Ice Mountain will not be stayed. The non-contractual claims will be stayed pending the reference to the CJEU in *Cole*, for the reasons I have already explained.

THE CLAIM AGAINST MAPFRE

64. Mapfre accepts that under Spanish law, there would be a direct right of action against it as Ice Mountain's liability insurer if it were liable to indemnify Ice Mountain under the policy, but it contends that Mr Hutchinson does not have a good arguable case that Mapfre's policy of insurance covers Ice Mountain's liability to him under a judgment given by an English court. The policy would, however, cover Ice Mountain's liability to him for the same accident, based on the identical cause (or causes) of action, under a judgment given by a Spanish court.

65. Ice Mountain adopts the same position, thereby contending that it is uninsured in respect of any claims which the English consumers who are its targeted customers might bring in the courts of their own domicile pursuant to Articles 17 and 18 of Recast Brussels 1.

66. If that is right, it is difficult to imagine a greater disincentive for a consumer (particularly one whose claim, like Mr Hutchinson's, is for a significant sum because of the nature and extent of his injuries) to exercise the special right expressly conferred upon him as the weaker party to sue a wrongdoer for breach of contractual duties in the courts of his own domicile. If he wins and the uninsured defendant is not good for the money, he would be left without a remedy, whereas if he sued in Spain, the same defendant would be insured in respect of the same liability, and he would recover from the insurer up to the policy limits.

67. Mr Doherty, on behalf of Mapfre, and Ms Wyles correctly pointed out that there is no compulsion on a party such as Ice Mountain to take out liability insurance at all, let alone in any particular form. Whilst that is true, I am not impressed by the argument that if it wanted to give the injured consumer full protection, it would have been open to the legislature in Brussels to make provision for a system of compulsory insurance throughout Europe, as it did in the case of motor insurance. The legislature respects the principles of party autonomy by allowing a party that owes contractual duties to consumers to choose whether to take out liability insurance and if so, how much cover to purchase. If he does not insure, then there is no insurer against whom there is a direct right of action. But if he does insure, and a direct of action exists against the insurer under the law which governs the insurance contract, then Recast Brussels I does not contemplate that he should be permitted to contract with the insurer on a basis that acts as a disincentive to consumers to exercise their rights to sue him (and

his insurer) in the courts of their own domicile or which renders any rights of suit against the insurer in that jurisdiction completely worthless by using the exercise of those rights as grounds for avoiding the insurer's obligation to indemnify him. That is what Mapfre and Ice Mountain have attempted to do.

68. Mapfre relies on a clause in the liability policy which is entitled "Territorial Scope". In translation it provides as follows:

"*This policy will only cover claims submitted within Spanish jurisdiction for events that have taken place in Spain leading to liability or other obligations imposed in accordance with legal provisions in force within the territory of Spain*."

"Claim" is defined in the policy as

"a court or out of court claim made in accordance to law against the Insured for alleged responsibility for a loss event covered by the policy, or against the Insurer in the exercise of direct action for such reason."

69. There are three conditions of cover set out in the clause:

i) A claim must be submitted against the insured (or against Mapfre directly) *within Spanish jurisdiction*;

ii) The claim must relate to an event that took place in Spain;

iii) The event must lead to a legal liability under Spanish law.

Two of the three conditions are fulfilled: the accident took place in Spain and if Mr Hutchinson establishes liability it will be in accordance with the principles of Spanish law. However, the claim has not been "submitted within Spanish jurisdiction."

70. There is a dispute between the experts as to the nature and effect of that provision in Spanish law. In broad terms, Mapfre's legal expert Mr Diez (supported by Professor Carreras) says that the requirement that the claim be submitted in Spanish jurisdiction defines or delimits the risk under the policy, whereas Mr Villacorta says that it restricts the rights of the insured after that risk has arisen. The reason why this matters is that Article 76 of the Spanish Insurance Contract Act 50/1980 (which provides for the injured party to have a direct right of action against the liability insurer) provides that "*the direct action is immune from any exceptions that the insurer may have against the insured."*

71. Accordingly, there may be situations in which the injured party is able to recover directly under the insurance policy even if the insurer is not obliged to indemnify the insured because he can rely on a policy exception, such as a contractual time limit for making a claim.

72. In STS 78/2006 (15 February 2006) the Spanish Supreme Court held that the immunity under Article 76 "*cannot extend to the definition of the insured risk and the*

insurance coverage, elements that integrate the framework in which the insurance operates and, therefore, being decisive for the calculation of the insurance premium, as well as the delimitation of the insurer's obligation to indemnify."

73. There is also a requirement under Spanish law that in order to be able to rely on a rights limitation clause or provision in an insurance policy, it must be specifically highlighted in the policy (e.g. in bold typeface) and the insured must accept it in writing. That is not the case with a clause defining the scope of the assured risk. The "territorial scope" clause happens to be highlighted in bold in this policy, but there might be all kinds of reasons for that.

THE EU LAW ARGUMENTS

74. Before considering the differences of opinion between the experts, it is necessary to address Ms Crowther's preliminary riposte which is that as a matter of European law, Mapfre cannot rely on the requirement of the clause in question that the claim be made in Spain, to avoid the exercise by Mr Hutchinson of his right to sue them in his member state of domicile pursuant to the special jurisdiction over insurance matters conferred on him by Section 3 of Chapter II, and in particular Articles 11-13 of Recast Brussels 1. She relied on Article 15, which provides that:

The provisions of this Section may be departed from only by an agreement…

(3) Which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same member state, and which has the effect of conferring jurisdiction on the courts of that state even if the harmful event were to occur abroad, provided that such agreement is not contrary to the law of that Member State…."

75. Article 25 makes provision for prorogation of jurisdiction by, among other means, a written agreement to confer exclusive jurisdiction on the courts of a particular Member State. Article 25(4) provides that agreements conferring jurisdiction shall have no legal force if they are contrary to Article 15. Article 25(5) provides that an agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

76. Thus, it would be open to Mapfre and Ice Mountain, both of whom are domiciled in Spain, to enter into an agreement conferring exclusive jurisdiction over any claims made under the insurance policy upon the courts of Spain. However, the CJEU has established that such an exclusive jurisdiction clause cannot be used to compel the injured party who is exercising his right to sue the insurer directly under the special insurance jurisdiction of Recast Brussels 1 to bring that claim somewhere other than in the courts of his own domicile or the courts of the place where the harmful event occurred.

77. In Case C-112/03, Société financière et industrielle du Peloux v *Axa Belgium*, [2006] QB 251, ("*Axa Belgium")* the parent company of a group of companies, which was domiciled in Belgium, entered into a policy of insurance with a Belgian insurer on behalf of itself and various European subsidiaries. The issue before the CJEU was

whether an exclusive jurisdiction clause in the insurance policy (in favour of the courts of Belgium) operated to preclude a French subsidiary, which was a beneficiary under the policy, from suing the insurer in the courts of its own domicile under the special insurance jurisdiction of Brussels 1. The Court held that the clause could not be relied upon against an insured beneficiary who had not expressly subscribed to it and was domiciled elsewhere. After referring to the fact that the beneficiary, like the policyholder, is protected as the economically weakest party, the Court observed at [38] that a jurisdiction clause "*cannot in any event be accepted as enforceable against a beneficiary unless it does not undermine the aim of protecting the economically weakest party*".

78. Paragraphs 39 and 40 of the judgment are worth quoting in full:

> *39. As the Advocate General observed in paras 62 and 67 of his opinion, the enforceability of such a clause would have serious repercussions for a third-party beneficiary domiciled in another contracting state. First, it would deprive that insured of the opportunity to bring proceedings before the courts of the place where the harmful event occurred or to bring proceedings before the courts of his own domicile, by compelling him to pursue the enforcement of his rights against the insurer before the courts of the latter's domicile. Secondly, it would enable the insurer, in proceedings against the beneficiary, to have recourse to the courts of his own domicile.*
>
> *40. The result of such an interpretation would be to accept a conferral of jurisdiction for the benefit of the insurer and to disregard the aim of protecting the economically weakest party, in this case the beneficiary, who must be entitled to bring proceedings and defend himself before the courts of his own domicile.*

79. More recently, in *Assens Havn v Navigators Management Ltd,* (Case 368/16) [2018] QB 463 the CJEU held that an exclusive jurisdiction clause in an insurance policy between an insurer and insured did not bind a victim of the insured damage who was entitled under national law to bring an action directly against the insurer in the courts for the place where the harmful event occurred (Denmark). The injured party's direct right of action against the insurer could be brought in those courts under what was then Article 11(2) of Brussels 1 (now Article 13(2) of Recast Brussels 1). That Article does not refer to agreements of prorogation of jurisdiction. It was therefore not apparent from the special provisions relating to insurance contracts that an agreement on jurisdiction may be invoked against a victim.

80. The court stated in paragraph 37 that Article 13 of Brussels 1 (Article 15 of Recast Brussels 1) lists *exhaustively* the cases in which the parties may derogate from the rules laid down in Section 3 of Chapter II, and referred to the fact that agreements on jurisdiction have no legal force if they are contrary to that Article. Consistently with the reasoning in the *Axa Belgium* case, derogations from the jurisdictional rules in matters of insurance must be interpreted strictly. The court then pointed out that the victim of insured damage is even further removed from the contractual relationship involving an agreement on jurisdiction than a beneficiary under the policy who did not expressly consent to that agreement. Therefore an agreement on jurisdiction made between the insurer and insured cannot be invoked against a victim of insured damage who wishes to bring an action directly against an insurer either before the courts of

the place where the harmful event occurred or, as in *Odebreit*, in the courts of his own domicile.

81. In paragraph 41 of the judgment, the court held that the extension of the constraints of agreements on jurisdiction based on the combined provisions of Articles 13 and 14 of Brussels 1 (Articles 15 and 16 of Recast Brussels 1) could compromise the objective pursued by Section 3, to protect the economically and legally weaker party. Thus, it concluded, a victim with a direct right of action against the insurer is not bound by an agreement on jurisdiction concluded between the insurer and the party that caused the harm.

82. As Mr Doherty pointed out, the clause on which his client relies is not a traditional exclusive jurisdiction clause, in the sense that it compels the *policyholder* or an insured beneficiary to bring any claims *under the policy* before the Spanish court. Its subject matter is not a claim brought by Ice Mountain, but rather, claims brought against Ice Mountain in respect of which Ice Mountain seeks an indemnity under the policy, or claims brought against Mapfre directly by an injured party in respect of matters for which Mapfre would be liable to indemnify Ice Mountain under the policy. However, Mr Doherty was constrained to accept that the substantive effect of the clause would be to compel an injured party with a direct right of action against Mapfre under Spanish law in respect of an accident in Spain for which Mapfre's insured is potentially liable in Spanish law, to sue both the insured and the insurer in Spain. If he did not bring the proceedings in Spain, he would lose his direct right of action. He would not be able to pursue a direct action against the insurer alone in the courts of his own domicile, or pursue claims against both insured and insurer there, as Mr Hutchinson has sought to do.

83. Article 15 is concerned with an agreement between a liability insurer and an insured who are domiciled or habitually resident in the same Member State "*which has the effect of conferring jurisdiction on the courts of that state"*. That is precisely the effect of this clause, albeit that the effect is indirect. The reasoning in *Assens Havn* applies with equal force to a clause of this nature. It cannot be used to force a stranger to the contract to give up his rights to sue Mapfre (or Ice Mountain) in the courts of his own domicile or make those rights meaningless. It is an impermissible derogation from the special jurisdictional rules.

84. 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.

85. Acceding to Mapfre's argument would give rise to the first of the "serious repercussions" identified by the CJEU in paragraph 39 of its judgment in *Axa Belgium*, with precisely the same result as that identified in paragraph 40. This clause is an attempt to limit a claimant who is a stranger to the contract of insurance to a direct claim only before the Spanish courts and a thinly disguised attempt to avoid the

consequences of the decisions in *Axa Belgium* and *Assens Havn,* with the effect that the rights of the legally and economically weaker party would be rendered nugatory and the special jurisdictional rules would not afford them the intended protection.

86. As a matter of EU law, however it might be characterised as a matter of Spanish law, Mapfre cannot rely on the provision in that particular contractual term in the policy which purports to limit its liability to claims brought against the policyholder in Spain, so as to exclude Mr Hutchinson's direct right of action or to preclude him from bringing the claim against Ice Mountain or Mapfre in the courts of his own domicile. The Court must have regard to the substantive effect of the provision relied upon. In practical terms it would have the same effect, indirectly, that an exclusive jurisdiction clause would have directly. It operates as an ouster of, or derogation from, the special jurisdiction conferred on this court by Articles 11-13 (and indeed by Articles 17 and 18) of Recast Brussels 1 and falls foul of Article 15. An insurer cannot achieve by the back door, that which he cannot achieve by the front.

87. Mr Doherty sought to rely upon a decision of HH Judge Halbert in Chester County Court in the case of *Williams v Mapfre* (Case No 3YU55490), 3 March 2015, in which it was held, in reliance on the same clause in the policy, that the English claimant had no cause of action against Mapfre that could be brought before the English courts. The judge was more impressed by Mapfre's Spanish law experts than by the Claimant's and therefore accepted the argument that as a matter of Spanish law, the clause was a risk limitation clause. It is plain from reading the judgment (which is not, of course, binding on this Court) that the judge was not shown any relevant EU authorities apart from *Odenbreit*. *Axa Belgium* was not cited to him and the decision pre-dates *Assens Havn*. I also regret to say that I do not find his reasoning persuasive. In paragraph 7 he conflates the three different elements of the clause without considering whether they are different in nature from each other. He also appears to have determined the issue as a matter of Spanish, rather than EU law.

88. Since the requirement that the claim against Ice Mountain and/or Mapfre be "submitted within Spanish jurisdiction" cannot be relied on against Mr Hutchinson because that aspect of the clause falls foul of EU Law, that is enough to establish that this Court has jurisdiction in respect of the direct claim against Mapfre under Article 13(2) of Recast Brussels 1. However, I would have reached the same conclusion if the issue had turned on the question whether there is a good arguable case that that requirement cannot be relied on as against Mr Hutchinson as a matter of Spanish law.

THE SPANISH LAW ARGUMENTS

89. As mentioned above, the answer to that question depends on whether this contractual requirement is one which defines the risk assured, or whether it limits or restricts the rights of the insured once the risk has arisen. There appears to be a consensus between the experts that a Spanish Supreme Court, in STS6597/2006, described defining clauses as "*those that determine what risk is covered, in what amount, during what period, and in what spatial scope*." The Supreme Court explained that "*this makes it possible to distinguish the coverage of a risk, the indemnity limits and the amount insured or contracted, from the clauses of the contract that limit the rights of the insured once the object of the insurance has already been certified."*

90. There appears to be a consensus between the experts that a Spanish Supreme Court, in STS6597/2006, described defining clauses as "*those that determine what risk is covered, in what amount, during what period, and in what spatial scope*." The Supreme Court explained that "*this makes it possible to distinguish the coverage of a risk, the indemnity limits and the amount insured or contracted, from the clauses of the contract that limit the rights of the insured once the object of the insurance has already been certified."*

91. The experts agree that the distinction between a risk defining provision and a right limiting provision is not always an easy one to discern. They also appear to agree that (with one possible exception) the Spanish Courts have not considered whether a term requiring claims to have been brought by the injured party against the insured in Spain is a term defining the risk, or a term limiting the rights of the insured. The possible exception is a decision of the Court of Appeal of the Balearic Islands dated 31 March 2014 which is referred to by Professor Carreras in paragraph 20 of his report. The court in that case confirmed the insurer's liability to indemnify its insured, a hotel owner, in respect of a claim brought against it in England by an English tourist who had suffered personal injuries in an accident at the hotel.

92. The policy contained a "territorial clause", but its text is not reproduced in the judgment. Professor Carreras and Mr Villacorta have made an educated guess that it might be in similar terms to the one in issue here. Since the insurer in that case was Mapfre, they may well be right. Both the court at first instance and the Court of Appeal held that the clause was a risk defining clause, but that finding was *obiter*. The Court of Appeal decided that the classification of the clause was irrelevant because the insured had not expressly accepted it by countersigning the insurance policy and nor had the claimant. I find that a little odd, if there is no legal requirement for a risk defining clause to be expressly accepted in writing. Be that as it may, the judgment cannot be relied on as a definitive ruling on the key point in issue in the present proceedings.

93. The Spanish Supreme Court has specifically held that a term limiting liability to damage "claimed or recognized by the Spanish courts" is a term which defines the risk rather than restricts rights. It has also held that a clause that limits liability for losses for casualties that occur in Spanish territory as one which defines the risk. On that basis, two of the three requirements set out in the clause in question would be regarded as risk defining. However, none of the experts has suggested that under Spanish law, if a single clause in a contract contains both risk defining and rights limiting terms, the entire clause is to be treated as risk defining. Mr Diez says is that it would offend the principle of legal certainty that the same clause could be regarded as both risk defining and limiting the rights of the assured, but I understand him to mean by this that the same provision or contractual requirement cannot have a dual character.

94. The starting point in the analysis must be that the policy is one of liability insurance. One would expect risk defining provisions in such a policy to delineate the nature and scope of the underlying liability of the insured to third parties against which he is to be indemnified under that policy. The clauses headed "object of the insurance" and "scope of the insurance" do precisely that. The object of the insurance is expressly defined in these terms:

"*Insurer guarantees to the Insured payment of the indemnities for which it might be responsible in civil law for bodily injuries or property damage caused to third parties, as well as the judicial and non-judicial costs and expenses, provided that the Insurer takes over conduct of the defence."*

The clause headed "Scope of the Insurance" gives examples of particular types of liability to third parties that are covered, including liability for certain types of risks such as personal injuries, food poisoning caused by consumption of food or beverages on the insured's premises, and robbery, theft, or damage to vehicles on the insured's premises.

95. Viewed from that perspective, there is a difference in nature between the requirements that the event takes place in Spain and is actionable/gives rise to a liability under Spanish law, on the one hand, and the requirement that the claim be brought in Spain, on the other. The former requirements define the nature or type of incident or event that gives rise to the insured party's underlying liability, for which the insurer promises to indemnify him – an event in Spain which gives rise to liability as a matter of Spanish law. The place where a claim is made *after* an accident of that type has occurred, has nothing to do with the nature of the insured's liability to the injured claimant for which he is seeking an indemnity from the insurer, or the factual circumstances giving rise to that liability. It is concerned with how, as a matter of procedure, the underlying liability is proved or enforced.

96. Mr Villacorta takes the view that the requirement that the claim be brought in Spain is rights defining because it relates to something that must necessarily occur *after* the event giving rise to the insured's liability to the injured party has arisen, and the risk insured is bound up with that liability. The right of the policyholder to obtain an indemnity in respect of that event, or the liability arising from it, is inhibited or restricted by the requirement that the claim against him must be made in Spain, in the same way as it would be inhibited by a requirement that the claim must be brought within six months of the accident.

97. Mr Diez and Professor Carreras, on the other hand, treat this requirement as no different in nature from the other two requirements of the clause and say that it does not restrict the right of the insured to obtain compensation once the right to an indemnity has arisen. However, that begs the question as to what gives rise to the right to an indemnity.

98. At this stage, I find Mr Villacorta's argument far more persuasive. The object of liability insurance is the legal liability of the assured to pay compensation to third parties arising from a specified event or occurrence, and that liability will not be defined by the place where the injured party makes his claim. In fact, it will already have arisen before any claim is made. It is highly artificial to define the insured risk as "the risk of being liable to pay a Spanish judgment" or "the risk of being liable to pay a claim made in Spain" rather than "the risk of being liable to pay damages under Spanish law for an event that happened in Spain".

99. In support of Mr Diez's approach Mr Doherty referred to clauses in the policy which concern the financial limits of cover. Those clauses are not relied upon by the experts and therefore any argument based on them must be approached with a little caution. In broad terms it appears that the policy cover extends to defence costs, and if the

legal action takes place in Spain those costs will not be subject to any financial limit that applies to claims under the policy. However, there is a clause highlighted in bold which says that:

" *if an express extension of the territorial scope of coverage is underwritten and the case is brought in foreign courts, this clause on the exclusion of costs shall not apply and they shall always remain included in the sum assured per claim, which shall in all cases be the maximum amount paid by the Insurer."*

That suggests that if Mapfre expressly agrees to cover the insured in respect of a claim brought against it outside Spain, (no doubt for an additional premium) the financial limits in the policy would apply to costs as well as damages.

100. Mr Doherty submitted that these provisions indicate that the territorial scope clause was all about making Mapfre's risk more manageable. He sought to draw an analogy between a financial cap, whose purpose is to safeguard against unexpected or excessive financial exposure, and a territorial limitation which he contended had the same effect. I am not persuaded that this advances Mapfre's argument in any way. It could be said of any exemption clause, properly so called, that it limits the insurer's exposure to risk. The fact that this policy contains provisions envisaging that the territorial restrictions might be removed on payment of an additional premium, and at the price of agreeing to an upper limit on recoverable costs which would not otherwise apply, does not really assist the court in determining whether the initial requirement to sue in Spain defines the risk or restricts the rights of recovery once the risk has arisen.

101. Although, for the reasons stated above, I consider that on the limited material before the Court at this stage Mr Villacorta has the better of the argument, this is a case in which there are respectable arguments to be aired on both sides and the Court is unable fairly to reach a definitive view without the experts giving their evidence and being subjected to cross-examination. Suffice to it to say that there is a plausible evidential basis for the Court to assume jurisdiction over Mapfre under Article 13(2) of Recast Brussels 1. Far from being obviously wrong, Mr Villacorta's argument appears to be the stronger at this stage of the proceedings.

102. There is no evidence that Ice Mountain agreed to the term in writing, and no suggestion that Mr Hutchinson did.

103. There is therefore a good arguable case on the merits that the policy would oblige Mapfre to indemnify Ice Mountain in respect of any liability to Mr Hutchinson that may be established in respect of the accident under Spanish law and that the requirement that the claim be brought in Spain cannot be relied upon by Mapfre, at least as against him. Likewise, there is a good arguable case that Mapfre has a direct liability to Mr Hutchinson because it is unable, as against him, to enforce the requirement in the "territorial scope" clause that he bring his claims against Ice Mountain or Mapfre in Spain.

CONCLUSION

104. Consequently, both the challenges to the jurisdiction must be dismissed, save that the issue concerning the jurisdiction to hear and determine the non-contractual claims

against Ice Mountain will be stayed to abide the outcome of the reference to the CJEU in *Cole* or further order.