

Date: 20th February 2014

Before :

HIS HONOUR JUDGE B C FORSTER QC
Sitting as a DEPUTY JUDGE

Between :

(1) HENDRIK DONKERS	<u>Claimants</u>
(2) BERUFGGENOSSENSCHAFT FUR TRANSPORT UND VERKEHRSWIRTSCHAFT	
- and -	
STORM AVIATION LIMITED	<u>Defendant</u>

and

LUFTHANSA CITYLINE GMBH	<u>Third Party</u>
-------------------------	---------------------------

Mr Quintin. Tudor Evans (instructed by Neill Hudgell) for the **Claimants**
Mr Robert Lawson Q.C. and Miss Katherine Howells (instructed by Clyde&Co LLP) for the
Defendant
Mr John Kimbell (instructed by Kennedys) for the **Third Party**

Hearing dates: 27th & 28th November 2013

JUDGMENT

His Honour Judge Brian C Forster QC :

1. The case is listed for the determination of four legal issues which demand consideration as preliminary issues.
2. The facts upon which I am asked to decide the preliminary legal issues are agreed and have been set out in the factual matrix (bundle page 12).
3. The First Claimant is a German national who was employed by the Third Party (Lufthansa) as an aircraft technician. He was based in Hamburg and his contract of employment with the Third Party was governed by German law.

As part of his duties it was necessary for the First Claimant to work on Lufthansa aircraft anywhere in Europe.

4. The First Claimant and Third Party are covered by compulsory workplace accident insurance pursuant to the German codified Social Security law, the Sozialgesetzbuch of 31.07.2004 (the SGB). The Second Claimant (the BGT) is the social insurance carrier for the transport sector in Germany. It is a public law body created by the SGB. It administers a fund for the benefit of the class of beneficiaries defined in the SGB including in particular persons employed in the transport sector and makes payments out of that fund pursuant to the detailed provisions of the SGB.
5. On 13 November 2008 the First Claimant travelled to Manchester for the purpose of carrying out a maintenance check on a Bombardier aircraft operated by the Third Party. He expected to be in England for only a short period of time because the necessary work was due to last no more than two hours.
6. Whilst carrying out the maintenance check the First Claimant noticed that one of the aircraft tyres was insufficiently inflated.
7. The Defendant (Storm) is a company registered and based in England. It provides ground handling services for the Third Party at Manchester airport. The Defendant and the Third Party had entered into an IATA standard form written ground handling agreement in relation to the provision of these services. The agreement does not contain an express choice of law clause.

8. By article 8 of the Main Agreement forming part of that IATA Ground Handling Agreement it was agreed that... the Carrier (Lufthansa) shall not make any claim against the Handling Company (Storm) and shall indemnify it against any legal liability for claims... including costs and expenses incidental thereto, in respect of... injury or death of any employee of the Carrier... arising from an act or omission of the Handling Company in the performance of this agreement...
9. The Defendant supplied to the First Claimant a nitrogen gas rig. The Provision and Use of Work Equipment Regulations 1998 and The Pressure Systems Safety Regulations 2000 applied to the rig.
10. The First Claimant used the rig to inflate the tyre of the aircraft. The rig was faulty. The faulty rig supplied an excessive amount of gas so quickly that the wheel being inflated exploded causing the First Claimant serious injury.
11. The Defendant has admitted liability for the accident subject to a 15% reduction for contributory negligence on the part of the First Claimant.
12. The First Claimant suffered very serious injuries in that he lost his left forearm and hand and the lower part of his left leg.
13. The First Claimant has received monetary payments from the BGT which payments are set out at paragraph 43 of the factual matrix. The BGT provide the same type and level of benefits regardless of the location of an employee's accident.
14. The Claimants issued the Claim in the Hull County Court and it was later transferred to this Court.

15. The First Claimant claims damages for personal injury and loss arising out of the accident. The Second Claimant claims the benefits which it has already paid to the First Claimant and an estimated sum for the future benefits that it will continue to pay him.
16. No issue as to jurisdiction or the applicable law was raised by the Defendant. A Part 20 Claim was brought against Lufthansa on the basis of the indemnity contained in the IATA Ground Handling Agreement. The Third Party has raised the issues which now have to be determined.
17. By the Order of this Court made on 24 April 2013 the following issues are to be determined as preliminary issues:
 - (a) Whether and, if so, to what extent, the claim of Mr Donkers against the Defendant in tort is governed by German law;
 - (b) Whether and, if so, to what extent the claim of the BGT against Storm is governed by German law;
 - (c) Whether Storm's claim against Lufthansa for a contractual indemnity under the Ground Handling Agreement is governed by German law; and
 - (d) Whether and, if so, to what extent, Lufthansa is entitled in principle to rely on any of the defences, exclusions, limitations, or conditions governing employer's liability in German Social Accident Insurance Law (in particular those provisions contained in SS104 - 113 of SGB V11) in response to Storm's claim against it, pursuant to Regulation (EC) 883/2004, or Article 93(1) of EEC Regulation 1408/71, or otherwise.

18. **Whether and, if so, to what extent, the claim of Mr Donkers against Storm in tort is governed by German Law.**
19. It is agreed that the issue of the applicable law in this case is determined by the Private International Law (Miscellaneous Provisions) Act 1995 (the 1995 Act).
20. Under Section 11 (1) of the 1995 Act the general rule is that the applicable law is the law of the country in which the events constituting the tort in question occur.
21. The Third Party submits that the general rule should be displaced under Section 12 of the Act because it is substantially more appropriate for German law to determine the issues arising in the case. The submission has been further refined. The refined submission made by the Third Party is that German law should be applied to determine the recoverable heads of loss this being the only remaining issue of practical importance. The Court is asked to take into account a number of factors which include:
- (a) The triangular relationship between the parties. The Third Party employs the First Claimant. The Defendant provides ground handling services under an agreement with the Third Party which agreement provides the basis for the Third Party indemnity claim;
 - (b) The normal residence of the First Claimant and Third Party;
 - (c) The extent to which the First Claimant's presence in the jurisdiction where the accident occurred was purely temporary;
 - (d) The location of the accident;
 - (e) Where the loss and damage is and will be suffered.

22. The Claimants and the Defendant submit that Section 12 does not operate to displace the general rule on the facts of this case. They stress that:

- (a) The accident took place in England;
- (b) The First Claimant suffered his serious personal injuries in England;
- (c) The Defendant is registered in England and provides ground handling services at Manchester airport;
- (d) The First Claimant is entitled to the benefit of the applicable English health and safety regulations;
- (e) The IATA Ground Handling Agreement entered into by the Defendant and Third Party in relation to the provision of ground handling services should be found to be governed by English law.

23. It is clear from a consideration of Section 12 that all factors can be taken into account because the Court must take into account all of the circumstances. It is necessary to carry out a case specific examination of all of the facts and circumstances when considering whether it is substantially more appropriate for the applicable law to determine the issues arising in the case, or any of those issues, to be the law of the other country.

24. The displacement of the general rule is governed by section 12 which provides:

12. Choice of applicable law: displacement of general rule

(1) If it appears, in all the circumstances, from a comparison of-

- (a) the significance of the factors which connect a tort or delict with the country whose law would be applicable under the general rule;
- and

(b) the significance of any factors connecting the tort or delict with another country,

that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.

25. An illustration of the consideration of factors is to be found in Roerig v Valiant Trawlers Limited [2002] 1 WLR 2304, a case in which liability was not in dispute. At page 2310 Waller LJ stated:

Mr Leonard submits that it is the fact that the deceased was Dutch, employed by a Dutch company, paying Dutch taxes and making contributions to obtain Dutch security benefits and the fact that the dependants will suffer their loss of dependency in Holland as Dutch citizens which are the most significant factors. That, he submits, makes it logical to assess this aspect of the damages by Dutch law. But it seems to me that the logic of that argument leads almost inevitably to the consequence that, where a claimant injured in England is a foreigner living and employed in that country, any head of damage should be assessed in accordance with the law of his or her country. Indeed in one sense I suppose it could be said to be appropriate that that should be so since the injured party or the dependants thereof are likely to feel the loss

only in that foreign country. But it seems to me that it was not intended that the general rule should be dislodged so easily. Where the defendant is English and the tort took place in England it cannot surely be said that it is substantially more appropriate for damages to be assessed by Dutch law simply because the claimant or the deceased is Dutch.

26. In Harding v Wealands [2005] 1 WLR 1539 at p 1550, Waller LJ emphasised that where the general law, being the law where the tort occurred, is also the national law of one of the parties, it would be very difficult to envisage circumstances that will render it is substantially more appropriate that any issue could be tried by reference to some other law.
27. In Edmunds v Simmonds [2001] 1 WLR 1003, the Court emphasised that heads of damage is an issue strongly linked to the country where the Claimant normally resides. I keep this in mind but in making my decision all factors have to be considered.
28. In applying the test I must compare the factors that connect the tort with the respective countries and not the issue or issues with the respective countries. I have carefully considered the factors identified by each party. The majority of the factors identified by the Third Party arise from the fact that the First Claimant resides in Germany. In my judgment the tort is strongly connected to England having regard to the location of the accident and the fact that the Defendant is a company registered in England. The factors identified by the Third Party do not make it substantially more appropriate for any of the issues to be determined by the law of Germany. In making this judgement I have considered the relationship between those involved. In doing so I have also

considered the finding that I make later in this judgement that the agreement between the Defendant and the Third Party is subject to English law.

29. The second and fourth issues fall to be considered together:

- (a) **Whether and, if so, to what extent the claim of the BGT against Storm is governed by German law;**
- (b) **Whether and, if so, to what extent, Lufthansa is entitled in principle to rely on any of the defences, exclusions, limitations, or conditions governing employer's liability in German Social Accident Insurance Law (in particular those provisions contained in SS104 - 113 of SGB V11) in response to Storm's claim against it, pursuant to Regulation (EC) 883/2004, or Article 93(1) of EEC Regulation 1408/71, or otherwise.**

30. The Second Claimant has paid and will continue to pay benefits to the First Claimant. The Second Claimant claims the money paid and to be paid from the Defendant. The basis for the claim is set out in paragraph 8 of the Amended Particulars of Claim. It makes the claim pursuant to Article 93 (1) EEC Regulation 1408/71 and/or Article 85 of 883/2004 (the Regulations) in respect of rights derived from Paragraph 116 of Part X of the German SGB.

31. It is necessary to consider what rights have passed to the Second Claimant. Paragraph 116(1) provides:

an entitlement which is based on other statutory provisions to compensation of a loss passes to (the Second Claimant) where the latter has to by virtue of the loss event- provide welfare benefits which

are intended to remedy a loss of the same nature and which relate to the same period as the damages payable by the tortfeasor....

32. The Second Claimant asserts that the entitlement has then to be recognised by other Member States pursuant to Article 85(1)/Article 93(1) of the Regulations. The Articles which are in the same terms provide:

If a person receives benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, any rights of the institution responsible for providing benefits against a third party liable to provide compensation for the injury shall be governed by the following rules:

- (a) where the institution responsible for providing benefits is, under the legislation it applies, subrogated to the rights which the beneficiary has against the third party, such subrogation shall be recognised by each Member State
- (b) where the institution responsible for providing benefits has a direct right against the third party, each Member State shall recognise such rights.

33. The Defendant and the Claimants, who have adopted the submissions of the Defendant, submit that the Article require the English courts to recognise the entitlement of the Second Claimant to bring their claim.
34. The Third Party submits that the regulation exports the law of the Member State of the claiming social security benefits institution into the country where the third party is sued by the social benefits institution. It is asserted that Article 85 and Article 93 are both intended to create choice of law rules governing claims by benefits institutions based in one Member State against Third Party

tortfeasors in respect of injuries suffered by workers in another Member State. It is further submitted that the Articles require a Court to apply the exclusions from civil liability contained in the social law of the Member State where the benefits institution is based.

35. The Defendant asserts that the submission made by the Third Party is incorrect and represents a misunderstanding of the effect of Article 85(1)/Article 93(1).

36. Each party claims support for their submission from the decision in Deutsche Angestellten-Krankenkasse v Laerersandens Brandforsikring G/S Case 428/92.

The case concerns a claim by a German social insurance institution for reimbursement from a Danish insurance company of benefits paid following an accident in Denmark. The European Court of Justice held that the entitlement to recover the benefits paid in Germany was to be determined solely in accordance with German law being the law of the place where the social insurance institution was based. The court stated at paragraph 18:

Article 93(1) must thus be seen as conflict of laws rule, which requires the national court hearing an action for compensation brought against the party liable for the injury to apply the law of the Member State to which the institution responsible is subject, not only to determine whether that institution is subrogated by law to the rights of the injured party or has direct rights against the third party liable, but also to determine the nature and extent of the claims to which the institution responsible for benefits is subrogated or which it can bring directly against the third parties.

37. Mr Lawson QC (for the Defendant) relies upon paragraph 21:

Finally, it should be noted that Article 93(1) of the regulation is intended only to ensure that the rights which the institution responsible may have by virtue of the legislation which it administers are recognised by the other Member States. Its purpose is not to alter the rules applicable for determining whether and to what extent there is non-contractual liability on the part of the third party who has caused the injury. The third party's liability remains subject to the substantive rules which are normally to be applied by the national court before which proceedings are brought by the institution responsible or by the victim, in other words, in principle the legislation of the Member State in whose territory the injury has occurred.

38. I do not accept that the decision when read in its entirety supports the submission made by the Third Party. If the Articles have the effect suggested I am sure that such an important provision would have been stated in clear terms.
39. In my judgement the law of the state of the institution is only to be considered if issues concern the subrogation. Any issue as to whether there is a subrogation and any issue as to the extent of the subrogation must be considered in accordance with the law of the benefits institution.
40. The national court before which a claim is brought must recognise the claim of a responsible institution in another Member State but the extent of the claim and the assessment of damages remain to be determined by the law of the national court. Where there is subrogation the claim of the institution must be recognised in all Member States but it cannot exceed the rights that the victim has against the tortfeasor. The determination of the claim that passes from the benefits

recipient to the responsible institution must be determined in accordance with the law of the substantive claim.

41. My analysis is also consistent with the Judgment of the European Court of Justice in Caisse de Pension des Employes Prives v Kordel Case C-397/96. The Court confirmed that Article 93(1)(a) is intended only to ensure that any right of action which an institution may enjoy is recognised by other Member States. The provision does not purport to alter the applicable rules for determining whether and to what extent non contractual liability on the part of the third party who caused the injury is to be incurred.
42. The Third Party relies upon Article 85(2) and, in the absence of any decision in England, the decision of the Supreme Court of Germany in the case BGH 15/07/08 V1 ZE 105-07 in support of their submission that the Third Party can rely upon exclusions and limitations governing employers liability in German Social Accident Insurance Law.
43. Article 85(2) provides:
- If a person receives benefits under the legislation of one Member State in respect of an injury resulting from events occurring in another Member State, the provisions of the said legislation which determine the cases in which the civil liability of employers or their employees is to be excluded shall apply with regard to the said person or to the competent institution.
44. I find that Article 85(2) is concerned with the application of legislation which determines the civil liability of employers or their employees. The present case must be distinguished because the Court has to determine the liability of an independent tortfeasor not the liability of an employer.
45. I note that the German Court considered the case before them on the basis that the victim and the first defendant were both employed by the same Dutch

employer in the Netherlands. The case did not concern an independent tortfeasor.

46. In summary I find that the Regulations do not export the law of the Member State of the claiming responsible institution into the country where the third party tortfeasor is sued by the benefits institution. It is essential that the right of claim of the responsible institution is recognised in all Member States but the interpretation suggested would lead to uncertainty and complication particularly if the Court had to consider claims arising from the same accident where Claimants were resident in different countries.

47. **Whether Storm's Claim against Lufthansa for a contractual indemnity under the Ground Handling Agreement is governed by German Law.**

The Ground Handling Agreement does not contain an express choice of law clause. Accordingly in accordance with the Contracts (Applicable Law) Act 1990 the law applicable to the Ground Handling Agreement is governed by Article 4 of The Rome Convention which provides:

(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country...

48. The Third Party submits that the contractual indemnity in the Ground Handling Agreement is a severable part of that contract with a closer connection to Germany than England. It is asserted that the indemnity is a unilateral

obligation which is objectively separable from and independent of the other provisions of the agreement.

49. Mr Kimbell (for the Third Party) states that a provision is severable where “the object of that part is independent” from the other parts of the contract. He has helpfully drawn my attention to a number of cases which demonstrate when an obligation may be objectively separable.
50. The Defendant emphasises that it is an exception for a severable part of a contract to be governed by the law of a different country. They submit that the exceptional course must only be taken where the object of the severable part is independent of the rest of the contract.
51. Applying Article 4 of the Rome Convention the applicable law is English law. The Defendant is registered in England and the contract was to be performed in England.
52. In my judgement the object of the indemnity provision is not independent of the other provisions of the Ground Handling Agreement. The agreement makes provision for the arrangements between the parties and the agreement as to risk is an integral part of the agreement. If an indemnity clause is to be regarded as a simple independent obligation severance would have to be granted in many situations. Severance would become the norm rather than the exception.
53. In any event I find that the indemnity provision has a closer connection with England. The Defendant is registered in England. The contract is governed by English law and was to be performed in England.

54. I also note that if the Third Party contemplated the application of German law they could have made provision for the application of German law by the inclusion of an express choice of law clause to that effect

55. Summary

- (1) The Claim brought by the First Claimant is to be determined by English Law.
- (2) The Claim of the Second Claimant is subject to German law only to the extent that any issue arises as to whether there has been a subrogation or as to the extent of the subrogation. The applicable law of the claim is English law.
- (3) The Third Party cannot rely upon exclusions and limitations governing employers liability in German Social Accident Insurance Law.
- (4) The Claim by the Defendant against the Third Party is to be determined by English Law.