Stylianou v Toyoshima and another [2013] All ER (D) 36 (Aug)

[2013] EWHC 2188 (QB)

Queen's Bench Division

EnglandandWales

Sir Robert Nelson (Sitting as a Judge of the High Court)

24 July 2013

Conflict of laws – Tort – Proper law of tort – Act committed abroad – Claimant suffering personal injury in Western Australia – Claimant bringing proceedings in Western Australia and subsequently in England – Claimant being granted permission to serve out of jurisdiction – Second defendant insurance company seeking to set aside permission and to strike out claim for abuse of process – Second defendant submitting permission granted on inadequate disclosure – Applicable law of claim – Proper place to bring claim – Whether English proceedings should be stayed for inadequate disclosure – Whether English proceedings abuse of process – Parliament and Council Regulation (EC) 864/2007, arts 4, 14, 15.

Abstract

Conflict of laws – Tort. The claimant suffered an injury in a car accident in Western Australia. She issued proceedings there and then in England. The second defendant insurance company sought the striking out of the claim in England. The Queen's Bench Division, in dismissing the application, held that the law of Western Australia applied, as the tort was not manifestly more closely connected with English law. However, the proper place in which to bring the claim was England.

Digest

The judgment is available at: [2013] EWHC 2188 (QB)

The claimant was a British citizen, habitually resident in England. In April 2009, while on holiday in Western Australia (WA), she was a passenger in a motor car driven by the first defendant when it was involved in a collision. The claimant sustained very serious injuries, which rendered her tetraplegic. The first defendant was Japanese and believed to be habitually resident in Japan. He was insured by the second defendant insurance company, registered in Queensland, Australia. In November 2009, the claimant issued proceedings against the first defendant in the District Court of WA. In April 2012, the claimant commenced a claim in England against the defendants, claiming damages in respect of her personal injury arising out of the accident. The detailed schedule of damages in the WA proceedings claimed AUS$9m. The incomplete first schedule served with the English proceedings claimed £8.6m. The likelihood of damages awarded in England being substantially in excess of those which would be likely to be awarded in WA was mainly due to the fact that, in WA, the discount rate for the assessment of future loss was fixed at 6%, considerably higher than in England. The claimant was granted permission to serve the claim form and particulars of claim out of the jurisdiction, and an order for substituted service on the first defendant at the second

defendant's Australian address was made. In the instant proceedings, the second defendant applied to set aside that order and to strike out the claim for abuse of process. The parties agreed that, under the general rule of art 4(1) of Parliament and Council Regulation (EC) 864/2007 (on the law applicable to non-contractual obligations) (Rome II), the applicable law was WA law. However, the claimant contended that English law was the applicable law as: (i) under art 4(3) of Rome II, the claimant's case was manifestly more closely connected with England, rather than WA; and (ii) alternatively, the central issue, namely the discount rate, was a procedural matter under art 15 of Rome II. The second defendant contended that, by her active pursuit of the claim in WA, the claimant had evinced an intention to be bound by WA law and, therefore, had demonstrated a choice with reasonable certainty, which constituted an agreement under art 14 of Rome II. It further sought a stay of the English proceedings due to the claimant's failure to disclose that the WA proceedings were still under way in the application for service out of the jurisdiction.

It fell to be determined: (i) whether the law of WA or England was the applicable law; (ii) whether WA or England was the proper place to bring the claim; (iii) whether the English proceedings should be stayed for inadequate disclosure; and (iv) whether the English proceedings were an abuse of process.

The claim would be dismissed.

(1) Generally, while it was clear that art 4(3) of Rome II was only intended to be an escape clause and it was only to be applied exceptionally so as to preserve the intended application of the general rule to most cases, art 4(3) of Rome II was not to be construed in the same manner as art 4(1) of Rome II and should not, therefore, apply to direct damage (see [61] of the judgment).

The use of the words 'in all the circumstances' in art 4(3) of Rome II required the court to consider all relevant material, so as to be able to assess whether the particular circumstances of the individual case were so exceptional that the general rule should not apply. Such a consideration was intended to include factors relating to the parties and would also include the consequences of the event or tort/delict. Such consequences would cover the injuries and damage arising from the tort, whether direct or indirect. If such a broad interpretation was not given to art 4(3) of Rome II so that all the circumstances could be considered, the court would not be able to exercise its judgment properly in the individual case and decide whether those circumstances revealed that the tort was manifestly more closely connected with a country other than that indicated in art 4(1) of Rome II. Further, the availability of particular heads of damage was to be treated as a substantive matter under art 15(c) of Rome II. Rules imposing a statutory ceiling on the level of damages affected the assessment of those damages and were to be treated as substantive so that the applicable law, rather than the law of the forum, would be applied (see [62] of the judgment).

In the instant case, no agreement had been entered into within the meaning of art 14 of Rome II. When all the circumstances were taken into account, under art 4(3) of Rome II, including the WA litigation, the tort/delict was not manifestly more closely connected with English law. The instant case was not one of those exceptional cases where the general rule under art 4(1) of Rome II should be displaced. Further, the assessment of damage was, by virtue of art 15(c) to be governed by the applicable law, not by evidence and procedure of the forum, save insofar as the assessment related to matters of the powers of the court and the mode of trial. Accordingly, by virtue of art 4(1) of Rome II, the applicable law was WA law and none of the routes submitted by the claimant displaced the general rule or otherwise established that it was inapplicable (see [82], [83], [93], [97] of the judgment).

The applicable law was WA law (see [120] of the judgment).

Booth v Phillips [2004] All ER (D) 191 (Jun) applied; *Cooley v Ramsey* [2009] All ER (D) 204 (Mar) applied; *Wall v Mutuelle De Poitiers Assurances* [2013] 2 All ER 709 applied.

(2) Applying established principles, the most real and substantial connection with the action was England. That was the forum in which the case could be suitably tried for the interests of all parties and for the ends of justice. What had weighed most heavily in the balance was that the issue in the case was the quantum of the claimant's claim,

that she was English, resided here, and would continue to live and suffer the consequences of her grave injuries in England (see [111] of the judgment).

The proper place in which to bring the claim was England (see [120] of the judgment).

(3) The disclosure of the WA proceedings in the application for service out of the jurisdiction had been inadequate in that it had not stated that the proceedings had still been under way, and that a schedule of damage and counter-schedule had already been served. That had clearly been relevant information and should have been provided. However, it was probable that the order for service out of the jurisdiction would still have been made in all the circumstances, and it should not, therefore, be stayed for non-disclosure (see [117] of the judgment).

(4) The issuing of the claim in England, given the advanced state of the WA proceedings, had not been an abuse of process in all the circumstances. There were two essential reasons for bringing the proceedings in England: (i) the increased damages which it might result in; and (ii) the need for the claimant to have the trial in a place where she and the witnesses could attend and deal properly with the litigation. That had not amounted to an abuse of process (see [119] of the judgment).

The English proceedings would not be stayed and the second defendant's application would be dismissed (see [121] of the judgment).

Robert Weir QC and Richard Royle (instructed by Bridge McFarland) for the claimant.

Neil Block QC and Judith Ayling (instructed by Henmans Freeth LLP) for the second defendant.
Karina Weller Solicitor (NSW).
