IN THE SENIOR COURT COSTS OFFICE
ON TRANSFER FROM
THE COUNTY COURT IN CENTRAL LONDON

Claim No. 8ED06414
SCCO REF: CCD 1405291

B E F O R E

Deputy Master Friston

B E T W E E N

MR PAUL HAILEY

Claimant

and

ASSURANCE MUTUELLE DES MOTARDS

Defendant

JUDGMENT ON THE INDEMNITY PRINCIPLE

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1. The issue that arises is whether there has been a breach of the indemnity principle by virtue of the ambit of the Claimant's contract of retainer not including the claim against the Defendant.

2. At all material times the Claimant lived in Enfield, north London. On 7 July 2007 he went on a day trip to Boulogne-Sur-Mer in northern France. That afternoon, whilst crossing Boulevard Gambetta, he was hit by a motorcycle being ridden by Mathieu Tourneur ("the

Rider"), a French national domiciled in France. The Claimant (who is right handed) suffered a fractured right elbow and a fractured right scaphoid.

3. The Rider had a policy of insurance written by the Defendant.

4. On 19 July 2007 the Defendant wrote to the Claimant to accept liability. I have seen only part of that letter (which is in French) as the other half has been torn away. I do not know the terms on which the Defendant accepted liability.

5. Shortly after his accident, the Claimant instructed Messrs Curwens LLP ("the Solicitors") to represent him in a claim for damages arising out of his injuries. As I understand matters, there was a private retainer from the date of instruction (21 August 2007) up until 12 June 2008, this being when the Claimant and the Solicitors entered into the conditional fee agreement ("the Agreement") that is the subject of this judgment. The terms and layout of the Agreement appear to me to have been based on the Law Society's 2005 draft conditional fee agreement. I am told (and I accept) that the Agreement was accompanied by the 2005 version of the Law Society's terms.

6. The Agreement defines its scope in these terms (NB the emphasis is original):

> **What is covered by this agreement**
>
> Your claim against [the Rider] for damages for personal injury suffered on 7 July 2007. **(if either the name of the opponent or the date of the incident are unclear then set out here in as much detail as possible to give sufficient information for the client and solicitor to understand the basis of the claim being pursued)**
> Any appeal by your opponent.
> Any appeal you make against an interim order.
> Any proceedings you take to enforce a judgment, order or agreement.
> Negotiations about and/or a court assessment of the costs of this claim.
>
> **What is not covered by this agreement**
>
> Any counterclaim against you.
> Any appeal you make against the final judgment order.

7. On 23 December 2008, the Claimant issued proceedings in what was then the Edmonton County Court. Proceedings were issued against the Rider (who at the time was the First Defendant) and the Defendant (who was then the Second Defendant), both of whom were represented by the same solicitors, Pierre Thomas & Partners. I note that the proceedings were served upon the Defendants' representative in the UK, namely, Anglo French Adjusters in Shepherds Bush, west London.

8. In due course the Defendant (or, more accurately, Defendants) filed a Defence. The Rider disputed jurisdiction and applied for the claim against him to be struck out. That application was heard on 30 October 2009. The Rider obtained the order he sought.

9. In essence, the Rider said that pursuant to Clause 1 of Article 2 of Council Regulation EC 44/2001 (made on 22 December 2000), the Claimant had no cause of action to bring a claim against him in England and Wales. It seems to have been accepted that this assertion was correct. The reason this was so is because Article 2 of those regulations provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. There are exceptions to this, but none of those exceptions applied to the Rider. As such, the Claimant had a claim against the Rider, but not one that could be pursued in England and Wales.

10. On 30 November 2009 the Particulars of Claim were amended so as to read as follows:

> 2. The … collision was caused or contributed to by the negligence of [the Driver], …
>
> 3. At all times [the Rider] was insured to drive [a motorcycle] with the Defendant who had issued a policy of insurance relating to the motorcycle and by letter dated 19th July 2007 the Defendant has agreed in principle and, it is assumed, in accordance with the *Loi Badinter* to give an indemnity and compensate the Claimant for damages for personal injury and sequential losses incurred as a result of the accident.

11. I pause here to point out that *Loi Badinter* is a reference to Loi n°85-677, a French law which was made on 5 July 1985. There was no evidence before me as to what this law is, but I understand it to be a no-fault scheme which compensates victims of road traffic accidents (other than the drivers) for any injuries they might sustain. I understand that (subject to certain very narrow exclusion criteria) it imposes upon the keepers and drivers of cars (or

riders of a motorcycles) a strict liability for personal injuries caused to other road users as a result of a road traffic accident involving their vehicle. I also understand that *Loi Badinter* also created the French equivalent of the MIB.

12. I return to the pleadings. The Amended Particulars of Claim continued:

> 3.A. Whilst the Defendant does not seek to challenge the Court's jurisdiction to determine the claim, the Claimant contends for the following legal framework to assist in its resolution:
>
> > (i) The Claimant has a direct right of action under French Law (against the Defendant) pursuant to the provisions of lf Law No 85-677 of 1985 and the relevant provision of the insurance code (Codes des Assurances");
> >
> > (ii) Pursuant to Articles 9(1)(b) and 11(2) of Council Regulation No 44/2001 ("the Judgments Regulations") the Claimant, who is domiciled in England, is entitled to bring this action in this Court.
> >
> > (iii) The Law of the insurance contract is French Law.
> >
> > (iv) If (primary) liability is established or admitted, damages fall to be assessed according to English Law principles ...
>
> B. The onus is on the Defendant to raise and prove and [sic] points of French Law on which they might seek to rely.
>
> C. The Defendant is invited to clarify its position ... as to (i) Primary liability and the operation, from its perspective, of the Loi Badinter. (ii) Whether, but for the allegations of contributory negligence, liability would attach to [the Rider].

13. Whilst the Defendant (somewhat curiously) took issue with the assertion that it bore responsibility for raising and proving any points of French law upon which it intended to rely, for all practical purposes, the Defendant admitted the extracts quoted above. In view of this, it seems that the parties had agreed that French Law would apply in so far as liability was concerned. I note from *Middleton v Allianz IARD SA* [2012] EWHC 2287 (QB) (the facts of which were similar to the present case) that this would almost certainly have been the case even if the parties had not reached that agreement. I also note that the Claimant's own case (as pleaded) was that under French Law he had a direct right of action against the Defendant.

There was no suggestion that the Claimant was suing the Defendant in some sort of representative capacity.

14. On 23 May 2012, the claim settled for £400,000.00. The Defendant was ordered, by consent, to pay the Claimant's costs of the action.

The parties' submissions

15. I was greatly assisted by the parties' advocates, Mr Modha (costs draftsman) for the Claimant and Mr Gibbs (costs lawyer) for the Defendant. I should record my gratitude to them not only for their helpful submissions (which included Skeleton Arguments from each of them), but also for having managed to settle all aspects of the dispute save for the indemnity principle.

16. Mr Gibbs says that after the claim against the Rider was struck out, the claim that was defined in the Agreement (i.e. the claim against the Rider) had been lost. Therefore, he says, no costs are payable. He says that if the Claimant and the Solicitors wished the claim against the Defendants to be covered by a conditional fee agreement, then a new/amended conditional fee agreement should have been made. That was not done. Therefore, he says, there was no retainer in respect of the claim against the Defendant and, again, no costs are payable. In his Skeleton Argument dated 28 February 2015, Mr Gibbs goes on to say this:

> There are two ways to view the issue:
>
> > i. The retainer of 12 June 2008 is limited to a claim against M. Tourneur. As it does not cover a claim against AMDM no costs are recoverable under it; and/or
> >
> > ii. Costs are only payable under the CFA in the event of the claim being successful. The "claim" that is to be successful must be that claim which "is covered by this agreement" – i.e. the "claim against Mathieu Tourneur". In the absence of a win against that defendant a "win" has not been achieved and no costs are payable.

17. Mr Gibbs goes on to say that the naming of the correct defendant is a crucial term of any contract of retainer. He says that an agreement which states it covers "*your claim against [the Rider] for damages for personal injury suffered on 7 July 2007*" would not cover the following

(which Mr Gibbs gave as examples):

- an accident at work on 14 January 2007;
- a tripping claim against a local authority for another accident on 7 July 2007; and
- a claim against a totally different defendant (e.g. AMDM) in respect of the accident on 7 July 2007.

18. Mr Gibbs says that the emphasised text (i.e. the text in bold) in the Agreement indicates that where there is uncertainty as to who the opponent should be, as much detail as possible should be given to enable to parties to understand the basis of the claim. He says that the decision not to record any degree of flexibility as to the identity of the opponent strongly implies that there was no uncertainty and that the terms of the Agreement were purposefully and intentionally restrictive.

19. He says that as the Agreement does not specify that it covers a claim made against any other defendant other than the Rider, it must be treated as being accordingly restricted to that named defendant. He says that where a party is struck out following a contentious hearing, that would undoubtedly be a "loss" within the meaning of the terms of the Agreement.

20. Mr Modha countered all that Mr Gibbs had said. He drew my attention to a witness statement that the Claimant had made (dated 2 March 2015), in which the Claimant had said that he did not really know about the distinction between the claim against the Rider and the Claimant against the Defendant.

21. Mr Modha said that the question for the court to decide is ultimately one of contractual construction. He drew my attention to *Brierley v Prescott* [2006] EWHC 90062, in which – he said – Master Gordon-Saker had emphasised the need to take the 'matrix of fact' into account. Mr Modha reminded me of the principles in *Investors Compensation Scheme Ltd v West Bromwich Building Socie*ty [1998] 1 WLR 896.

22. In his Skeleton Argument (dated 2 March 2015) Mr Modha had this to say:

> 11. The "relevant background" at the time of the Claimant on the index claim, Paul Hailey, signing up to the CFA dated 12th June 2008, is as follows:

a. A claim, be it against Mathieu Tourneur or AMDM, arose out of exactly the same factual circumstances. AMDM were standing in the shoes of Mathieu Tourneur as his insurer

b. The Claimant, before even approaching Curwens to pursue a claim, received a letter from AMDM dated 19th July 2007 stating "we have established a file to make you an offer for compensation within the limit of your rights". This letter made no reference to Mathieu Tourneur.

c. This is referenced in Curwens' letter dated 28th August 2007 wherein it is stated "this means that the insurance company will make a compensation payment for your injuries".

d. In the same letter, the fee earner at Curwens confirms that "I formally wrote to Assurance Mutuelles des Motards on your behalf informing them of your personal injury claim".

e. The same letter further states "If you have to issue a claim in the County Courts against the individual who caused the accident (through their insurers), you will need to take out an insurance policy called After the Event insurance. This insures you against paying the French insurer's legal costs if your claim is not successful".

f. The attendance note of the Claimant's personal attendance at Curwens' offices on 3rd September 2007 makes no reference to Mr Tourneur, only the "French insurers".

g. All references by Curwens to obtaining an interim payment are to obtaining an interim payment from the "French insurers" – e.g. letter to Paul Hailey dated 23rd January 2008. In the same letter, references to the need to issue proceedings are made in the context of the French insurers not being "forthcoming with an interim payment".

h. The letter from the Defendant's medical expert dated 9th January 2008 states, "I am instructed by the Company Mutuelles des Motards to examine you in order to assess your present condition as a result of the injuries sustained in your accident".

i. An attendance note dated 15th April 2008 records, "Mr Hailey stating that he has still not heard from the French insurer in relation to the interim payment". In the same attendance note the fee earner confirms that Counsel has been instructed to draft proceedings. The attendance note goes on to record "AGC stating that clearly once these proceedings had been issued, we could immediately make an application for interim payment".

j. At the meeting at Curwens' offices when the CFA was signed on 12th June 2008, an attendance note records the Claimant asking if an elbow replacement could be obtained privately and "AGC stating that this is something that we would certainly be seeking from the French insurer".

23. Mr Modha went on to say that the above shows that references to the Rider all but fell away. He says that by the time of the Agreement being signed, both the Claimant and the Solicitors referred to the opponent as being "the French insurer". The implication was that the parties knew what they had meant when they described the ambit of the claim in the Agreement, and in particular, they knew that the reference to the Rider was intended to include the Defendant.

24. I should add that both parties made extensive reference to certain authorities which they each vied to rely upon or to distinguish. The difficulty with both of those submissions is that they related either to County Court cases or to decisions at first instance. As such, none of the decisions referred to was binding on me.

Discussion

25. I agree with Mr Modha that the issue is ultimately one of contractual construction. I also agree with him that I have to take into account the matrix of fact. I should add, however, that the relevant facts are those that existed at the time the Agreement was made.

26. In my view, in order for me to find that the phrase "Your claim against [the Rider] for damages for personal injury suffered on 7 July 2007" included a claim for damages against the Defendant, I would have to find that one of the following was correct:

    a. That the reference to "against [the Rider]" was mistaken in the sense that it was not meant to be in the Agreement at all;

    b. That the reference to "against [the Rider]" was mistaken in the sense that it ought to have read "against [the Rider] and the Defendant" (or "against [the Rider] or any other person who may be liable for damages");

c. That the reference to "against [the Rider]" was not a mistake, but that the parties understood it to mean "against [the Rider] and the Defendant" (or "against [the Rider] or any other person who may be liable for damages"); or

d. That the reference to "against [the Rider]" was not intended to restrict the ambit of the Agreement, but was merely intended only to better identify the accident.

27. There is no basis for me to make a finding that the use of the phrase "against [the Rider]" was a mistake. It plainly was not. As such, I can immediately rule out a. and b.

28. As to c., the Claimant's witness statement made on 3 March 2015 reads as follows:

> So far as I was aware Curwens were pursuing the claim for damages on my behalf throughout. I was unaware of any difference between a claim against the French insurers with whom Curwens dealt with from the beginning or the driver of the motorcycle involved in the accident. Curwens were acting on my behalf to recover damages irrespective of whether the claim was brought against the driver or his insurers.

29. In my view, this evidence does not take the matter any further forward. It is not surprising (and is perfectly understandable) that the Claimant did not care very much about the legal niceties such as the precise identity of his opponent. The same can be said for the fact that his focus was on the fact that the Solicitors were pursuing his claim for damages. This evidence, however, is no more than evidence of the fact that the Claimant was happy to allow his solicitors to be his guide. If, at the time the Agreement was made, an officious bystander had asked the Claimant whether it included or excluded a claim against the Defendant, the Claimant would probably have said, "I don't know; I leave all that to my solicitors", or words to that effect. There is no evidence that he (or any reasonable observer) would have said "of course it includes the Defendant."

30. Put otherwise, I am unable to find that the Claimant's ambivalence as to the distinction between the Rider and the Defendant is evidence of an intention that the Agreement should have a wider ambit of application than the meaning of its words would ordinarily convey. Certainly, no reasonable bystander would have come to that conclusion.

31. Mr Modha told me that as the claim proceeded it became more and more obvious that the claim was against the Defendant rather than the Rider; I accept that that was the case and I accept that by the end of the claim, the Claimant probably knew that the claim was against the Defendant, but that does not assist the Claimant. This is because it is the matrix of fact at the time the Agreement was made that matters.

32. As to d. in paragraph 26 above, there is no evidence to suggest that reference to "against [the Rider]" was not intended to restrict the ambit of the Agreement, but was merely intended only to better identify the accidence. Similarly, there is no evidence to suggest that anything has gone wrong with the language.

33. In any event, even if the evidence had pointed towards the Claimant's true intention being that he intended the claim against the Rider to include the claim against the Defendant, I would probably not have accepted that this was sufficient. This is not only because that evidence would be parol evidence, but also because (as will be explained below) I am unable to find that there is just one cause of action. In those circumstances, I cannot find that the reference to the claim against the Rider is capable of also being a reference to the claim against the Defendant. I say more on this below.

34. In view of the above, I find that there has been no mistake in the use of language. I find that the fact that the Agreement states that it related to the Rider meant just that: namely, that it related to a claim against the Rider.

35. The next question is whether the litigation *was* a claim against the Rider. This point was not argued before me, but I have examined it nonetheless. The main reason I have done this is because Mr Modha repeatedly referred to the fact that the Defendant was standing in the shoes of the Rider. The question I posed myself was whether the claim against the Defendant could be said to be a claim against the Rider.

36. I understand that the Claimant was entitled to bring proceedings directly against the Defendant (as a French-registered insurer) in the English Courts (being the Courts of the Claimant's domicile) by virtue of section 3 of EU (Council) Regulation 44/2001 and by virtue of the decision of the European Court of Justice in *FBTO Schadeverzekeringen NV v*

Jack Odenbreit ECJ [2007] EUECJ C-463/06 (13 December 2007). The question is whether this is the same as a claim against the Driver or whether it is a different cause of action.

37. I note that Article 3 the Fourth Motor Insurance Directive (Council Directive No 2000/26/EC, made on 16 May 2000) provides as follows:

> 'Each Member State shall ensure that injured parties referred to in Article 1 in accidents within the meaning of that provision enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability.'

38. The instrument that effected domestic implementation of that directive in the UK is the European Communities (Fourth Motor Insurance Directive) Regulations 2003 (SI No. 651/2003), paragraph 3(5) of which reads as follows:

> '(5) An injured party shall be entitled, without prejudice to his right to issue proceedings against the insured person, to issue proceedings against an insurance undertaking that is authorised to transact compulsory motor insurance business in the State in respect of an accident caused by a vehicle insured by that undertaking and the insurance undertaking shall be directly liable to the injured party to the extent that it is liable to the insured person.'

39. Thus, under UK law, there is clearly a difference between a claim against the tortfeasor (which will not be limited by the ambit of the insurance policy) and that against the tortfeasor's insurer (which will).

40. This matter was not governed by English law, however. It was governed by French law. It is entirely possible that the French law is different and that a claim against the insurer is based on the same cause of action. Indeed, given the fact that the *Loi Badinter* created an insurance-based compensation scheme, it would be entirely rational if French law did work in that way. The difficulty I have, however, is that French law is a question of fact that I can resolve only upon evidence. Here, there is no evidence as to what the French law is. In particular, there is no evidence before me as to how the Fourth Motor Insurance Directive was given domestic effect in France. As a result, I am not in a position to say that a claim against the Defendant was the same as a claim against the Rider.

41. I note that Article 9 of Council Regulation No 44/2001 reads as follows:

> 1. An insurer domiciled in a Member State may be sued:
>
> > (a) in the courts of the Member State where he is domiciled, or
> >
> > (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

42. I also note that Article 11 of Council Regulation No 44/2001 reads in this way:

> 1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
>
> 2. Articles 8, 9 and 10 shall apply to actions brought by the insured party directly against the insurer, where such direct actions are permitted.
>
> 3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

43. There is nothing here that takes the matter further forward. My reading of Article 11(2) (which, according to the pleadings, is the relevant provision) is that Member States are required to ensure that injured persons are able to bring claims directly against the insurer of the person who injured them. This says nothing about the nature of the cause of action, however.

44. Finally I note that regulation 3 of the European Communities (Rights against Insurers) Regulations 2002 reads as follows:

> 3.—(1) Paragraph (2) of this regulation applies where an entitled party has a cause of action against an insured person in tort or (as the case may be) delict, and that cause of action arises out of an accident.
>
> (2) Where this paragraph applies, the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person.

45. This is a provision that Mr Gibbs mentioned. I am not sure that it applies on the facts of this case, but even if it does, it is very similar to the European Communities (Fourth Motor

Insurance Directive) Regulations 2003. As such, it does not take the matter any further forward.

46. For all these reasons, whilst I am unhappy at having to do so, I have no option but to find that there has been a breach of the indemnity principle. I have to confess that I have found this matter to be very difficult to decide; if the Claimant would like permission to appeal my decision, I will readily grant it. I have had the benefit of having heard detailed and expert submissions on the meaning the Agreement, but I did not hear any detailed submissions about the nature of the claim. It is entirely possible that a different court, having had the benefit of hearing argument on that issue, may come to a different conclusion.

47. Having come to the conclusion that I have, I need to rule on whether the Claimant is able to recover disbursements. I find that he can. This is because the evidence shows that payment of the disbursements was never intended to be conditional; the Claimant knew he would be liable for them regardless of the outcome of the claim. I reject Mr Gibbs argument that the Agreement provided that the disbursements were not to be payable unless the claim was won. It is quite clear from the Law Society terms and conditions that this was not the case. In any event, the Defendant cannot approbate and reprobate the Agreement. Either it covers the costs in the Bill of Costs, or it does not. I have found that it does not.

48. If find that the fact that the contract of retainer (i.e. the Agreement) does not cover the claim against the Defendant is not fatal to the Claimant's ability to recover the disbursements from the Defendant, this being because the vacuum left by the absence of a contract of retainer would be filled by an implied agreement that the Claimant would pay disbursements in order to allow his solicitors to pursue his claim for damages. This is distinguishable from cases in which there has been a breach of the indemnity principle as a result of the contract in question being found to be unenforceable, because in those circumstances, there is no vacuum left by the absence of a contract of retainer.

49. Even if I am wrong on this point, it is relevant that the Claimant has not only paid the disbursements, but he has paid them for more than 12 months since invoices were delivered. As such, the Clamant has lost the right to have those monies assessed.

50. In view of the above, I find that the disbursements are, in principle, allowable.

Annex

51. The parties saw a draft of his judgment before it was handed down. They tell me that (subject to appeal) the costs in Part 1 of the Bill of Costs (during which there was a private retainer) are agreed in the sum of £4,000; I am also told that the disbursements in Parts 2-6 are agreed in the sum of £17,000. The means that the Claimant's Bill of Costs is assessed in the sum of £21,000.

52. I am told that the Claimant has agreed to pay the Defendant's costs of assessment. The parties have asked me to carry out a summary assessment on the basis of written submissions. I have been asked not to assess a global amount, but to deal only with the times to be allowed. It is convenient that I deal with these issues in this judgment.

53. The Claimant says that the time spent "Considering advice from costs draftsmen" (line 4 of Schedule of Work Done on Documents) is excessive bearing in mind the fact that time is also sought for considering Counsel's advice as well. The Claimant offers 30 minutes, this being against the hour that is claimed. This is a reasonable offer. I allow 30 minutes.

54. The Claimant says that the time spent on "Negotiations, instructing Counsel, advising etc" (line 9 of the Schedule of Work Done on Documents) is excessive. Mr Modha says that negotiations on this claim were limited with each party only ever making one offer each. He says that MGN Costs Ltd (Mr Gibbs predecessor) had already spent 10 hours on drafting the Points of Dispute and advising (line 10). The Claimant offers 2 hours for this item at line 9, this being as against 7 hours claimed. I allow 4 hours for this item.

55. I agree with Mr Modha's assertion that there is inevitably going to be a degree of overlap and duplication between the work undertaken by Mr Gibbs and MGN Costs Ltd. I agree with his assertion that the 1.3 hours spent "Reviewing papers" should be disallowed.

56. I agree with Mr Modha's assertion that the parties were at court for only half the day on 4 March 2015, but I also agree with Mr Gibb's assertion that he would have spent time on 5

March 2015 dealing with my enquiries and this draft judgment. In view of these things, I allow 4 hours "Attendance at hearing".

57. On my calculations, this means that the Claimant must pay £4,910.30 towards the Defendant's costs of the assessment. I would be grateful, however, if the parties could check the figures.

Deputy Master Friston