Neutral Citation Number: [2021] EWHC 1042 (QB)

Case No: QB-2019-001282

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2021

Before :

THE HONOURABLE MRS JUSTICE STACEY

- -

Between :

Kevin Michael Johnson	**Claimant**
- and -	
Johannes Berentzen (1)	**Defendant**
Zurich Insurance Plc (UK) (2)	

- -

- -

Mr McDermott QC and Mr Denham (instructed by **Stewarts Law LLP**) for the **Claimant**
Mr McParland QC (instructed by **DAC Beachcroft Claims Ltd**) for the **Defendants**

Hearing dates: 29-31 March 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Monday 26th April 2021 at 10.30am.

.....

MRS JUSTICE STACEY

The Honourable Mrs Justice Stacey:

1. This is the trial of a preliminary issue to determine whether the claimant's claim in tort for damages for personal injury in a road traffic accident which occurred in Scotland but was issued in the jurisdiction of England and Wales was brought within the limitation period or is time barred. It raises issues of the proper role and operation of the applicable law in tort selected under the conflict of laws rules in Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) ("the Rome II Regulation").

2. The claimant was on holiday in Scotland riding his BMW R 1200 GS motorcycle with a pillion passenger, Lesley Venables, when it collided with the first defendant's vehicle on the A836 near John O'Groats on 15 June 2016. The claimant is habitually resident in England and Wales and the first defendant, who was also on holiday in Scotland at the time is a German resident and national. The second defendant is the first defendant's insurer. The claimant suffered serious, life changing spinal-cord injuries as a result of the accident. His schedule of loss claims damages in excess of £9 million. Proceedings were issued in the High Court of England and Wales on 8 April 2018 and served on the defendants on 7 August 2019.

3. The court is asked to determine the following three preliminary issues:

   i) Pursuant to the Rome II Regulation, and if applicable, (as the claimant alleges and the defendants deny), the Foreign Limitation Periods Act 1984 ("the 1984 Act"), what are the relevant rules that govern the commencement of this action, in particular which stop time running for the purposes of limitation?

   ii) If the relevant rules identified in (i) are those of Scots law, was the claimant's action commenced outside the relevant limitation period?

   iii) If the claimant was out of time when he commenced the proceedings, whether the discretion available to the court under s.19A Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") should be used so as to allow the claimant's action to continue.

4. Following service of the claim, the defendants took the point on limitation asserting that the claim was statute barred since the claim had only been issued, but had not been served on the defendants before the expiry of the applicable three-year limitation period for the commencement of a claim for damages for personal injury, as required under Scots law in order to stop time running.

5. In the reply drafted by Mr McDermott QC and Sarah Crowther QC served on 10 October 2019, the claimant asserted that service of the claim was a procedural matter and not a substantive law issue and was therefore to be governed by the procedural rules and provisions of England and Wales as the *lex fori* or place where the litigation is being conducted, not Scotland. The claimant therefore had a further period of four months from issue of the proceedings in which to serve the claim and since the defendants had been served within that further period the claim was not out of time. In the alternative the claimant sought an extension of time pursuant to the discretion provided by s.19A of the 1973 Act.

6. The parties agreed that the limitation issues, including whether the court should exercise its discretion under s.19A of the 1973 Act should be determined as preliminary issues and agreed the evidence to be before the court. The hearing was conducted remotely via Teams at the request of the parties in light of the current pandemic. Both sides agreed and were permitted to call live expert evidence on Scots law – Ms Angela Grahame QC for the claimant and Mr Robert Milligan QC for the defendants. The instructing solicitors, Mr Scott Rigby for the Claimant and Mr David Johnson for the defendants also gave live evidence to the court. The medical reports of Mr Manish Desai (MBBS, MS (Tr&Orth), MRCS, FRCP) and Professor Anjum Bashir (MBBS, MCPS(Psych), MRCPsych, FRCPsych) were in the bundle of documents for the hearing (the defendants having acceded to the claimant's late request for Professor Bashir's report to be included on the day of the hearing), together with relevant party and party correspondence and other relevant documents as had been agreed by the parties. The parties had reached a memorandum of understanding limiting the extent to which the court would be permitted to know the details of the without prejudice negotiations between them. Skeleton arguments were exchanged in accordance with the case management directions of HHJ Sarah Richardson sitting as a Deputy Judge of the High Court and permission was given to the claimant to submit a further case note shortly before the hearing.

Issues 1 and 2

7. It is convenient to deal with issues 1 and 2 together and as entirely discrete from issue 3.

8. There was a considerable measure of agreement between the parties. There is no dispute that pursuant to Art. 4(1) of the Rome II Regulation the applicable law is that of Scotland and that this claim proceeds in the courts of England and Wales pursuant to the rules of procedure and evidence of the English and Welsh courts pursuant to Art. 1(3) of the Rome II Regulation. It is further agreed that the limitation period is to be determined in accordance with Scots law pursuant to Art. 15(h) which provides that:

> "The law applicable to non-contractual obligations under this Regulation shall govern in particular
>
> …
>
> (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation"

9. The Scots legal experts agreed that the relevant limitation period to be applied is contained in s.17 of the 1973 Act which imposes a three-year limitation period for actions in respect of personal injuries not resulting in death, which is referred to as "the triennium." The parties also agreed that time ran from the day of the accident on 15 June 2016 and the triennium expired on the third anniversary of the accident (the claimant having abandoned an argument for a later date during the course of the hearing).

10. The parties also agreed that an action is commenced for the purposes of stopping or interrupting the running of the limitation period under the 1973 Act when the defender (as it is referred to in Scotland) has been served with a copy of the Summons (claim form). This is also known as the citation of the defender and the date of execution of service on the defender. Under Scots law, notification or intimation of a claim to a defender's solicitor is not sufficient to stop the limitation clock running. As the defendants' solicitors were only formally served on 7 August 2019, after the expiry of the triennium, the Scots law experts were agreed that there is a procedural barring of the action which is generally referred to as the action being time barred. In order to stop or interrupt the relevant limitation period, in Scotland, it is necessary to effect service on the defender quite unlike the position in England and Wales.

11. The claimant's argument therefore was that the service of the proceedings is a procedural step within the scope of the exception in Art. 1(3) of the Rome II Regulation and therefore to be governed by the law of England and Wales where the proceedings have begun.

12. In *Pandya v Intersalonika General Insurance Co SA* [2020] EWHC 273 (QB) Mrs Justice Tipples has recently decided the point in the context of a road traffic accident in Greece. Having carefully reviewed the authorities, academic literature and textbooks cited to her she reached the following conclusion at para 40:

> "There is no dispute between the parties that the law of limitation in this case is governed by Greek law. On the agreed expert evidence before me, it is clear that it is a rule of Greek law that, in order to interrupt or stop the period of limitation, the claim form must be both issued and served….Further, the experts agree that as a matter of Greek law, a claim that is served after the five-year period is time-barred. Therefore, service of the claim form is, as a matter of Greek law, an essential step which is necessary to interrupt the limitation period. Service of the claim cannot be severed, carved out or downgraded to a matter of mere procedure which falls to be dealt with under English Civil Procedure Rules. That, apart from anything else, would give rise to a different limitation period in England and Wales than in Greece. The clear intention of the Rome II Regulation is to promote predictability of outcomes and, in that context, it seems to me that such an outcome is not what the Regulation intended to happen in these circumstances"

13. Ms Pandya's claim which had been issued, but not served, within the Greek limitation period was therefore time barred and she could not avail herself of the provisions of the CPR which stop the limitation clock on issue and give a further period of time in which to serve the proceedings on a defendant. The claim was dismissed.

14. Ms Pandya's application for permission to appeal the judgment of Tipples J was refused on the papers by Lord Justice Stuart-Smith who considered:

> "it is not reasonably arguable that the requirement to serve a copy on the Defendant is merely a procedural requirement and therefore excluded from the ambit of Article 15(h). The effect of Article 261 of the CC [Greek Civil Code]

> read in conjunction with Article 215 of the CCP [Greek Code of Civil Procedure] is that both requirements [viz. issue/filing and service] are substantive pre-requisites to the interruption of the period of limitation."

The matter went no further.

15. Mr McDermott QC accepts that if *Pandya* is correctly decided the claimant's argument must fail as it cannot be distinguished on the facts in Mr Johnson's case and is materially identical and that under Scots law both issuing and service of a claim form or summons are substantive pre-requisites to the interruption of the limitation period. He also acknowledges and accepts that as a decision of the High Court the doctrine of *stare decisis* applies and the court must apply the doctrine as concisely explained by Lord Neuberger in *Willers v Joyce and Another (No. 2)* [2016] UKSC 44, [2018] AC 843:

> "So far as the High Court is concerned, puisne judges are not technically bound by the decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance Judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary; see *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63, para 59"

16. Mr McDermott QC acknowledged that he would first have to establish that *Pandya* was wrongly decided before this court could depart from it, an admittedly stiff task. His assertion that *Pandya* wrongly interpreted Art. 15(h) in concluding that the provisions of Art. 15 are to be construed widely consistent with the promotion of legal certainty and case law such as *KMG International NV v Chen* [2019] EWHC 2389 (Comm) was unsustainable and not supported by authority.

17. Nor was I persuaded in the argument that service of proceedings was a matter of procedure, not substantive law in Scotland. As per Lord Hope of Craighead in *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1.

> "the date of the commencement of an action in Scotland is the date of the execution of service on the defender: Erskine's Institutes, III vi 3; *Alston v Macdougall* (1887) 15 R 7; see also *Smith v Stewart & Co,* 1960 SC 329, 334 per Lord Clyde, Lord President"

I agree with Mr McParland's submission that it is plain and obvious that the Scots law rule on the commencement of proceedings under s.17 of the 1973 Act is a rule of "limitation" that is to be applied pursuant to Art. 15(2)(h) of the Rome II Regulation and that commencing proceedings by both issuing and serving them sets the date which determines under Scots law when the limitation period has been interrupted. As Mr McParland stated it is that date which determines whether the action has been commenced within or outside the permitted three-year limitation period and it is key to the Scots law of limitation.

18. Furthermore, it was uncontroversial (and agreed between the parties in *Pandya*) that Art. 1(3) is an exception to the general rule set out in Art. 4 and, as an exception, is to be construed narrowly. In this case, as in *Pandya*, the claimant has not succeeded in arguing that the service of proceedings falls within that exception.

19. I can see no error in Tipples J's conclusion that Dicey, Morris & Collins correctly identified that Art. 15(h) includes matters which historically or traditionally had been regarded as procedural but which are no longer to be considered so and her approval of the following passage at p.2166:

> "This list includes issues which, at common law, were characterised as matters of procedure, to be governed by the law of the forum. Foremost among these are 'the nature and assessment of damage to the remedy claimed' and 'rules of prescription and limitation'. Whatever may be the position in cases to which the Regulation does not apply, these issues cannot be considered to fall within the scope of the exclusion of matters of 'evidence and procedure' in art. 1(3), and they will henceforth be governed not by the *lex fori* but by the law to which the Regulation refers. In order to secure the objectives of the Regulation in enhancing the predictability of litigation, and the reasonable foreseeability of court decisions, it is suggested that the art.1(3) exclusion should be interpreted narrowly as covering only matters, such as the constitution and powers of court and the mode of trial, that are an integral and indispensable feature of the forum's legal framework for resolving disputes such that they cannot satisfactorily be replaced by corresponding rules of the *lex causae*"

I agree and also agree that support for the proposition is contained in *Wall v Mutuelle de Poitiers Assurances* [2014] WLR 4263 per Longmore LJ.

20. Mr McDermott's submissions on the 1984 Act failed to grasp the full implications of s.8 (in force since 17 December 2009), which provides that:

> "(1) Where in proceedings in England and Wales the law of a country other than England and Wales falls to be taken into account by virtue of any choice of law rule contained in the Rome I Regulation or the Rome II Regulation, sections 1, 2 and 4 above shall not apply in respect of that matter"

and that s.1(3) no longer applies where, as here, the applicable law was selected under the Rome II Regulation. His argument that the draftsperson's choice of the words "that matter" instead of "proceedings" in the clause lead to the conclusion that ss.1, 2 and 4 are disapplied only to the extent that the Rome II Regulation requires it, is not consistent with a natural and purposive reading of Arts. 1(3) and 15(h) of the Rome II Regulation and is unsustainable.

21. Similarly the arguments concerning a distinction between the "interruption" of the running of time and the concept of "terminus ad quem" in Scots limitation law did not assist him. Nor do I accept his assertion that determining the method of commencement

of proceedings by reference to the *lex causae* will likely increase uncertainty than reduce it. Certainty will be provided by all aspects of limitation being governed by the same law which, by Art 15(h), is stipulated to be the *lex causae*.

22. The claimant's late submitted additional case note suggesting that *Pandya* had not considered the authority of *Actavis UK Ltd and others v Eli Lilly & Company* [2016] RPC 2 which had led the court to fall into error , turned out to be incorrect on closer analysis. Although *Actavis* was not referred to directly in the judgment, *Pandya* considered *KMG International NV v Chen* [2019] EWHC 2389 (Comm) in great detail– see paragraphs 26 and 29 for example –and *KMG International NV* had considered and dealt with all the points made in *Actavis.* There was nothing in *Actavis* that had not been considered by Tipples J in her careful judgment in *Pandya*.

23. In summary, none of Mr McDermott QC arguments could overcome the central difficulty that the requirement to serve the proceedings in order to stop the limitation clock is not merely procedural but a long standing matter of substantive Scots law. His argument that *Pandya* was wrongly decided could not succeed.

24. Since the claimant has not established a powerful reason for not following *Pandya*, which in any event I agree with, the answer to the first issue is that it is the Scots law rules which govern when time stops running, or is interrupted, for the purposes of limitation and that the claimant's action was commenced outside the relevant limitation period (issue (ii).

Issue 3: s.19A of the 1973 Act

25. In light of my conclusions on the first two issues, it becomes necessary to consider the third: the court's equitable discretion to allow an action to proceed out of time. S.19A of the 1973 Act provides that:

> "(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems equitable to do so, allow him to bring the action notwithstanding that provision"

26. Once again there was helpfully a considerable measure of agreement between the parties and the Scots law experts as to how the Court should approach this task. A number of principles were uncontroversial. S.19A confers an unfettered discretionary power and each case turns on its own facts and particular circumstances. However since this Court is required to approach the exercise of the unfettered discretion as a Scots judge would do it is therefore helpful and informative to play close attention to the case law to understand how Scottish judges have exercised their discretion and approached cases with some similar, albeit not identical features.

27. The onus is on the pursuer, or in English law the claimant, to persuade the court to exercise the discretion.

28. Subject to the important caveat that limited assistance is provided by the case law since each case is fact sensitive and the court is considering the exercise of a discretion, the parties agreed that the lead cases on the application of s.19A are: *Donald v Rutherford* 1984 SLT 70, *Forsyth v A.F. Stoddard & Co Ltd* 1985 SLT 51, *McCabe v McLellan*

1994 SC 87, *Clark v Mclean* 1994 SC 410 and *B v Murray (No. 2)* 2008 SC(HL) 146. The most recent decisions of the Inner House are *A v Glasgow City Council* [2019] SC 295 and *Jacobsen v Chaturvedi* [2017] CSIH 8. In the majority of reported cases the courts have declined to exercise their discretion.

29. In cross examination Ms Grahame QC accepted Mr Milligan QC's proposition that the prejudice to the claimant from not being able to pursue his claim is counterbalanced by the loss to the defendant of the ability to avail themselves of the statutory defence. So that if the claimant cannot point to any other factor, the court will not exercise its discretion in favour of the claimant.

30. The availability and strength of an alternative remedy against a pursuer's solicitor are strong and important factors for the court to consider, but will not per se or automatically result in a refusal by the court to exercise its discretion in favour of a claimant. Ms Grahame QC accepted the weight that Scottish courts have placed on the ability of a claimant to recover from a negligent solicitor in deciding not to extend time and Mr Milligan accepted that it was not determinative, so by the close of their evidence there was no material difference between them.

31. The particulars relied on by the claimant in his reply were agreed to all be relevant factors to be considered by the Court in the exercise of the discretion conferred by s.19A. They were (1) that there is no prejudice to the defendants who were well appraised of the claim and the details concerning both liability and quantum and the delay complained of was only a few weeks; (2) following a joint settlement meeting the parties had come to terms to settle the claim subject only to the finalisation of an agreed form of order; (3) exceptional circumstances delayed the conclusion of the proposed compromise, which in turn, necessitated the issue of proceedings because of the claimant suffering an unexpected and serious heart attack in early 2019 which was promptly brought to the defendants' attention; (4) the claim form was issued well within the three year period and served in good faith in accordance with the law of England and Wales which the claimant's representatives thought would apply to these proceedings; (5) a copy of the claim form had been sent to the defendants' solicitors on the day it was issued on 8 April 2019; and (6) there would be significant prejudice to the claimant in the loss of his claim against the defendants. An unfettered discretion means that all factors that are relevant must be weighed in the balance.

32. There was minimal disagreement between the experts as to the Scots law in their respective and joint reports and by the end of their evidence there were no material disputes requiring a finding of fact. Inevitably both experts tended to focus more attention on the Scottish cases with the same outcome contended for by those who instructed them in this case. But it was merely a question of nuance and emphasis rather than disagreement. To reiterate both agreed that the court has an unfettered discretion and must consider and weigh in the balance all the facts and circumstances specific to the case in order to determine whether the claimant has established that equity lies in favour of exercising the discretion.

Material Facts and relevant circumstances

33. Much of the evidence was agreed, but where it was in dispute the facts and circumstances relevant to the exercise of the discretion are for the claimant to prove on the balance of probabilities.

34. The claimant sustained life changing and serious injuries in the accident on 15 June 2016. Following the accident, the claimant, who was then aged 57 was transferred via air ambulance to Glasgow Royal Infirmary after a CT scan at the local Wick Hospital where he had first been taken revealed a possible cervical spinal cord injury. He was eventually discharged in October 2016 to a rehabilitation unit.

35. He had suffered cervical spine fractures at C3, C4, C5 with anterior longitudinal ligament disruption at C6, C7 and posterior longitudinal ligament disruption at C3-C5 with a laryngeal ligament injury. He required C3/C4 laminectomy and lateral mass screw fixation. He is classified as having a C2 ASIA D (Incomplete) permanent spinal cord injury. He struggles to walk short distances or use his upper limbs in any meaningful way and likens his loss of manual dexterity to wearing boxing gloves. He will have a lifelong need for personal care, assistance with his activities of daily living, therapeutic input to improve his ongoing symptomology and aids and equipment to enable him to live as independently as possible. He will suffer with bowel, bladder and sexual dysfunction for the rest of his life. His symptoms are likely to worsen over time.

36. It was common ground that the accident occurred when the claimant was overtaking a line of 3 vehicles and that the first defendant, who was driving a rented Renault Captur which was the middle of the three vehicles that Mr Johnson was overtaking, also pulled out to overtake the vehicle in front of him. His vehicle collided with the claimant's motorcycle causing the very serious injuries to the claimant described above and less serious injuries to Ms Venables, his pillion passenger. The A836 is a single carriageway road with one lane in each direction with a dividing broken white line in the area where the accident occurred. The first defendant was prosecuted for driving without due care and attention by the Procurator Fiscal and returned to Scotland for the contested trial in the Sheriff Court of Grampian, Highland and Islands at Wick where the charge was found not proven.

37. In the civil claim the defendants deny liability and have pleaded allegations of contributory negligence.

38. The claimant initially instructed solicitors in Glasgow, Carpenters, as did his pillion passenger, Ms Venables, to bring personal injury claims against the defendants. It appears from the correspondence between Carpenters and the claimant that he was not proactive in pursing his claim and in July 2016 his failure to respond to their correspondence, led Carpenters to conclude that he was no longer inclined to pursue his claim, although by November of that year a letter of claim had been issued on his behalf by Carpenters so he must have re-engaged with them by then.

39. In early 2017 Mr Johnson changed solicitors to Scott Rigby a partner at Stewarts Law LLP solicitors in London who market themselves as experts in accidents and illnesses abroad. Mr Rigby is accredited by the Association of Personal Injury Lawyers (APIL) as, amongst other things, an accidents abroad specialist and is an assessor of applicants seeking accreditation for that panel.

40. By the autumn of 2017 Mr Rigby had instructions to issue proceedings and in December 2017 the defendants' solicitors suggested a settlement meeting. At that stage the claimant's solicitors considered a settlement meeting to be premature as the prognosis remained unclear and the claimant was protected as the defendants had agreed to the joint instruction of a case manager, Ms Diane Moss of HCML under the Rehabilitation

Code and to fund the claimant's continued rehabilitation and care needs. Thereafter and without any admission of liability the defendants made interim payments in July and August 2018. The defendants will not seek repayment of the interim payments which total £188,215.00 and payments made under the Rehabilitation Code regardless of the outcome of the trial of preliminary issue. There appear to have been no payments since August 2018.

41. For the purposes of the preliminary issues before me I had only the medical reports prepared on behalf of the claimant which were not disputed by the defendants for the purposes of today's hearing.

42. Mr Manish Desai, the consultant orthopaedic surgeon and treating doctor in his report of 14 November 2018 noted that in addition to his physical difficulties the claimant was severely depressed with suicidal ideation and had no hope of further physical recovery. As well as his very restricted mobility, residual spasticity, spasms and the permanent pain in his lower back and neck he found the loss of dignity and privacy from his permanent neurogenic bladder, bowel and erectile dysfunction very distressing, requiring, for example, his carer to insert glycerine suppositories. He became tearful when discussing such matters in the consultation. He was struggling to cope psychologically with his reduced mobility and physical capacity. His sources of pleasure in life prior to the accident such as his work as an HGV driver, restoring motorcycle engines, cooking, DIY and gardening, touring with his motorcycle club and holidays, were no longer possible. He lacked any extended family support and was estranged from his ex-wife and children and the accident had placed considerable strain on his relationship with his partner. Mr Desai concluded that the ongoing medical issues would continue to impact on his psychological health to a great extent and recommended the obtaining of a psychiatric report.

43. Mr Desai also recommended private in-patient top-up/maintenance therapy and rehabilitation for 2-3 weeks every 2-3 years and 1-2 sessions of outpatient based therapy for his physical disabilities to bridge the shortfall in prompt and appropriate provision, treatment and care within the NHS.

44. Professor Anjum Bashir consultant neuropsychiatrist's report of 2 November 2018 also diagnosed that the claimant was clinically depressed with moderate clinical depression as a chronic psychiatric condition. Professor Bashir reported that the claimant felt no purpose anymore, was deeply dejected and had lost interest in everything. He had lost his drive and did not feel like doing anything. He described the claimant as distressed and hopeless about the future, deeply pessimistic and, again, purposeless. He did not however identify suicidal ideation. The claimant also had a previous history of depressive episodes from 2008 since the breakdown of his marriage.

45. Professor Bashir also noted that whilst the claimant had mental capacity, he was aware that he needed support and guidance from time to time from professionals. He found that he was prone to tiredness and fatigue which impaired his recall and ability to manage complex matters in his life. He found that his mental and physical fatigue were prominent impairments.

46. Professor Bashir noted that the claimant's drive state was low and his personal sense of self-being was very low. He was slow at processing information, had reduced attention and concentration and forgetfulness. He was being treated with anti-depressant

medication (mirtazapine 45mg daily and amitriptyline 20mg daily) and had counselling with a psychologist, but remained in a state of hopelessness and had a tendency to give up. Whilst he showed remarkable resilience in managing to continue with the routine of rehabilitative treatment he regarded it as a ritual. He noted that it was extremely important to reduce the claimant's emotional disability and morbidity by including rehabilitation activities to improve his quality of life, such as giving him access to holidays, leisure activities of his choice and taking part in his pre-accident hobbies to achieve a sense of normalisation by compensatory activities with an aim of reducing his emotional disability and reduce the risk of serious worsening of his mental health.

47. The parties have worked constructively and co-operatively together throughout and there has been a refreshing absence of petty point scoring. Both parties have been transparent with each other and shared information appropriately and sought to narrow the issues in dispute. Mr Rigby had contemplated issuing proceedings on various occasions, but considered that as the defendants had agreed to fund rehabilitation costs and then to make interim payments and good progress was being made by both sides in preparation for the settlement meeting suggested by the defendants, it would have been a potential waste of significant and irrecoverable costs to issue and serve proceedings unnecessarily.

48. Both parties were well advanced in their investigation of the liability issues. Statements from the lay witnesses have been obtained, accident reconstruction experts have been instructed and have prepared reports for both sides and some of the evidence from the Sheriff Court criminal case has been disclosed. The defendants' accident reconstruction expert had not visited the locus in quo, but their solicitor (confusingly also called Mr Johnson) conceded in cross examination that there is no suggestion that the road layout has changed or that a visit would be proportionate expenditure. The defendants certainly considered that they had sufficient information in order to form a view as to how to approach the settlement negotiations by mid December 2018 and Mr Johnson was unable to identify any further liability evidence that might be required. The medical reports and accident reconstruction reports had all been exchanged without prejudice between the parties.

49. The parties agreed that the claim fell to be determined under Scots law and Mr Rigby had obtained confirmation from the defendants that they would not oppose the claim being issued in the jurisdiction of England and Wales. Mr Rigby decided to defer issue of proceedings to see how much progress could be made at the settlement meeting. Prior to the meeting Mr Rigby obtained advice on the quantification of the claimant's claim under Scots law in November 2018 from Ms Grahame QC, but did not seek advice from her as to limitation periods and steps necessary to interrupt the running of time under Scots law and procedure.

50. The without prejudice joint settlement meeting took place on 14 December 2018. It lasted several hours and the issues relating to both liability and quantum were discussed. Although no agreement was reached during the course of the meeting itself, the without prejudice settlement discussions were productive and by 3 January 2019 the defendants' solicitors emailed the claimant's solicitor that following exchanges between counsel

> "We may now be in a position to conclude the damages aspect of this claim, subject to some relatively minor tweaks."

The tweaking appeared to be around the wording of the periodic payment order (PPO), but by 4 February 2019 the defendants' solicitors confirmed that subject to final confirmation between counsel:

> "We are in principle in agreement around terms of settlement."

Mr Rigby decided that it was therefore not necessary to commence Part 7 proceedings, anticipating that once the final wording had been agreed he would conclude the matter with Part 8 proceedings and make arrangements for an approval hearing comfortably within the limitation period. However no formal concessions had been made by either side on either liability or quantum.

51. But there was then an unexpected turn of events as the claimant developed heart problems and was taken to hospital on 27 December 2018. He then returned to accident and emergency on 12 January 2019 with a heart attack a myocardial infarction and was admitted as an in-patient for a week and underwent triple vessel angioplasty. His solicitors were informed by the case manager on 28 February 2019 who informed Mr McDermott QC the same day. Mr Rigby liaised closely with counsel and obtained his client's authority and permission to inform the defendants. It was not a straightforward process but by 18 March 2019 Mr McDermott QC and Mr Rigby had both informed their counterparts on the defendants' team. Mr Rigby and Mr McDermott behaved quite properly and promptly consistent with their professional obligations in informing their counterparts in the defendants' team of Mr Johnson's heart attack.

52. On 18 March 2019 all offers were withdrawn by the defendants. Both sides needed to understand and work through the implications and consequences of the claimant's serious heart attack. The claimant provided consent for a cardiology report and Mr Rigby provided the claimant's cardiology records promptly to the defendants' solicitor, Mr Johnson. Mr Rigby also began preparing to issue proceedings.

53. In around March 2019 Mr Rigby obtained the defendants' solicitors written confirmation that they had authority to accept service of proceedings and when he then issued proceedings in the High Court in London on 8 April 2019 he informed the defendants' solicitors and enclosed a copy of the claim form, but he did not formally serve them.

54. Mr Rigby reviewed the quantum expert evidence and obtained up to date information from his client and supporting documentation subsequent to the settlement meeting. Mr Johnson had changed care provider and his care and therapeutic needs had changed following his coronary issues as he had received less therapeutic input which impacted on his schedule of loss. By 30 April 2019 counsel instructed by Mr Rigby had prepared the particulars of claim which were signed and returned by the claimant Mr Johnson on 18 May 2019. Mr Rigby was also continuing to supply the defendants with up to date medical records and details of Mr Johnson's medical condition as it was hoped that settlement terms could still be agreed, albeit that the intervening coronary issues were described as a "curve ball" and the news came "as a bolt from the blue" to the defendants' solicitor.

55. The claimant was admitted to hospital with heart problems again in March and also April 2019 and on 14 June 2019 he was fitted with a pacemaker. On 15 June 2019 the triennium expired.

56. Mr Rigby says that the claimant had some difficulty communicating his instructions during this period. He was very disappointed that his claim had not been settled and was coming to terms with that setback whilst coping with his heart attack. Mr Rigby was mindful of the pressures his client was under and did not want to force the pace. He had however received the signed particulars of claim from his client nearly a month before the end of the limitation period.

57. Meanwhile, prior to the expiry of the triennium the defendants compromised Ms Venables claim on terms which were not disclosed to me.

58. On 7 August 2019 the claimant formally served the defendants with the proceedings. The claimant alleged that the first defendant was negligent and had pulled out without looking or indicating and was entirely responsible for the accident. In their defence served on 13 September 2019 the defendants asserted that the claim was statute barred and pleaded in the alternative denying liability and alleging contributory negligence by the claimant. They contended that the claimant was in the first defendant's blind spot – as he had not seen him and had seen nothing to indicate that it was unsafe to overtake the vehicle in front of him when he did so. In the alternative it was alleged that the accident was caused or contributed to by the claimant's own negligence. In his reply the claimant disputed the limitation point as set out above and denied contributory negligence.

59. On 6 November 2019 the defendants' cardiologist expert had completed their report.

60. Although there was no statement from the claimant himself as to his current medical problems I accepted the sworn evidence of Mr Rigby as a solicitor of the Supreme Court who had spoken to his client on 26 January 2021 and has reviewed his medical records. Quite apart from the heart attack, the claimant's physical condition has deteriorated in the last two years and he now has less function in his upper and lower limbs than was recorded by Mr Desai in November 2018. He has not received as much therapeutic input as before and has increased spasticity in his hands and arms and his ability to walk has also deteriorated. In August 2020 he had an MRI scan of his cervical spine which showed he had a right-sided disc prolapse at C5-6 but has not received any treatment for this because of the Covid-19 pandemic. The claimant continues to suffer with heart difficulties and was again admitted to hospital overnight from 3-4th December 2020 with heart problems. He has recurring chest pain and low blood pressure. He remains profoundly depressed.

61. Mr Rigby considered that he had 4 months in which to serve the particulars of claim in accordance with the CPR and that he had effectively interrupted the limitation clock when he issued proceedings as per CPR 7.2: "Proceedings are started when the court issues a claim form at the request of the claimant". He did not obtain advice on Scots law as he considered service of proceedings was a procedural matter governed by the *lex fori.*

62. Although Mr Rigby accepted that he had not consulted any textbooks, Mr McDermott QC submitted that Mr Rigby's opinion was not inconsistent with the textbook Doherty on 'Accidents Abroad' (2nd Edition 2017) para 10-034:

> "English Procedural Law still governs the question of when a claim is commenced, which may be important since that will often be the event which stops the ticking of the limitation clock"

and APIL's 'Guide to Accidents Abroad' at p.183 in a chapter by Pierre Janusz edited by Sarah Crowther QC:

> "…It is suggested that the questions of whether (and more importantly for practical purposes) when time has been stopped will be governed by the *lex fori* as a matter of procedure. Accordingly, where the English Court has jurisdiction, issue of a valid claim form will stop time running, even where the relevant limitation rules are of a foreign applicable law"

Mr McParland QC disputed the applicability of either passage to Rome II Regulation cases and considered the extracts to have been taken out of context.

63. Mr Rigby had been the instructing solicitor in the *Wall v Mutuelle* case and had considered the limitation provisions of the Rome II Regulation. He was buoyed in his belief that service of proceedings was a procedural matter governed by the CPR as he had taken leading counsel's advice on exactly the same point in relation to a claim that arose in the Netherlands. Mr Chapman QC (who incidentally was counsel for the claimant in *Pandya)* had given clear advice in conference that service of proceedings was a procedural matter governed by English law. Ms Grahame QC had not mentioned it to him, (although she had not been specifically asked for advice on the matter) and Mr McDermott QC who had been counsel throughout and closely involved in the litigation had not raised or mentioned it either. It was the first Scots law claim that either Mr Rigby or Stewarts had conducted.

64. The judgment in *Pandya* was given in January 2020. Neither Mr Rigby nor Mr McDermott were aware of it until they read of it in Lawtel shortly after judgment was given. Mr McDermott described it as a very significant surprise.

65. There is no prejudice to the defendants occasioned by the proceedings having been served seven weeks outside the limitation (beyond the fact of having to defend the proceedings) and there was no suggestion of any evidential difficulties from the delay beyond the general observation that memories can fade over time. Signed witness statements had been obtained from all relevant witnesses and the extent of the factual dispute on liability was unclear to me.

The law

66. Mr McParland helpfully reminded the court of the role of expert witnesses where foreign law is in issue as set out in *Morgan Grenfell & Co Limited v SACE Istituto Per I Servizi Assicurativi Del Commercio* [2001] EWCA Civ 1932. The starting point is that foreign law must be pleaded and proved as a question of fact to the satisfaction of the judge, although it has been described as a "question of fact of a peculiar kind". The function of an expert witness is:

> "(1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining

> where necessary the foreign court's approach to their construction;
>
> (2) to identify judgements or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) where there is no authority directly in point, to assist the English judge in making a finding as to what the court's ruling would be if the issue was to arise for decision there"

A judge is not bound to accept the evidence of one or other of the witnesses, but in this case to all intents and purposes the expert witnesses agreed with each other and I accepted the evidence of both of them after the minor differences between them had been resolved in the course of cross-examination. Mr McDermott too accepted and relied on Mr Milligan QC's evidence in his closing submissions.

67. I therefore need to do no more than repeat the paragraphs above setting out the agreed position of the experts and make further reference to specific points raised below.

Analysis and Conclusions

68. The legal experts were right to remind the court that the case law stressed the limited value of case law when considering how a court should exercise an unfettered discretion as each case will turn on its facts. But it was also understandable that they then each sought to draw the court's attention to the specific facts of some of the case law. But beyond the general principles set out above however, the cases are no more than illustrations of how a court has approached the exercise of its discretionary powers in particular cases.

69. The starting point is that compliance with the limitation period:

> "should not be seen as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents rather the considered judgement of the legislature that the welfare of society is best served if causes of action are litigated within the specified period, even if in consequence good causes of action may be defeated. The limitation period must accordingly be regarded as the general rule and the extension provision as an exception designed to deal with the justice of individual cases."

(*Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541 per McHugh J

70. In order to consider and weigh the factors fairly and at the risk of a somewhat pedestrian approach it is helpful to list the relevant facts and circumstances in this case in order to make an assessment of whether the claimant has established that the discretion should be exercised, failing which the claim must be dismissed.

71. The prejudice to the claimant in not being granted an extension of time is automatically counter-balanced by the loss of the complete statutory defence of limitation. The potential value of the claim – which appears to be larger than that of any of the Scottish cases cited – is a double edged sword: the stakes are high on both sides. However it is of some relevance that the bulk of the claim is for the claimant's future care needs and treatment needs which are not being met by the NHS. The defendants' recent confirmation that they will not seek to recoup the care costs and interim payments made until August 2018 means that the claimant will not be disadvantaged by having to refund significant amounts of money. However the fact that the defendants have now stopped funding or providing the claimant's current care and treatment needs not covered by the NHS is an important relevant factor in the claimant's favour especially when considering the impact of delay, which is dealt with in more detail below.

72. It weighs in the claimant's favour that the delay will not cause prejudice in the investigation and preparation, as this has already been undertaken by both sides to enable them to have a clear view on the merits of their respective positions concerning both liability and quantum (subject to updating given the claimant's deteriorating health). The work has been done, there are no evidential difficulties and the case is fully advanced. This is not a stale claim and there is no prejudice to the defendants by dint of the claim being served late. Full enquiry had been carried out by both parties within the triennium which, as noted by Lord Cameron in *Donald v Rutherford* is a factor of importance.

73. Although no admissions of liability had been made it also weighs considerably in the claimant's favour that until the claimant's heart attack, agreement on settlement terms had been reached subject only to minor tweaking. The parties were agreed that the court should not be told the full details, but it was common ground that the only outstanding matters were finalisation of an agreed form of periodical payments and provisional damages order. The parties both knew and agreed liability and quantum (prior to the claimant's heart attack), even if the court was not to be told. It is also of significance that the defendants have settled Ms Venables' claim, seemingly without involving the claimant's insurer, albeit without admission of liability.

74. The limitation period was missed by a matter of just a few weeks, which although in the claimant's favours bears little weight per se. The Scottish authorities appear to work on the principle that a miss is as good as a mile (see for example *Fleming v Keiller* [2006] CSOH 163 where the time limit was missed by 1 day and the extension was refused). The point however is that a longer delay would have weighed in favour of the defendants.

75. I do not accept the claimant's submission that the failure to serve within the triennium is a trivial delay. It is apparent from the Scots authorities that service of proceedings is an essential and important aspect (see, for example, the reference in *A v Glasgow City Council* [2018] CSOH 116; 2019 SLT 32 at para 18 when the failure to have the summons called was described by Lord Doherty as "less egregious than many of the reported cases where a solicitor has failed to serve a summons within the triennium"). However it could have been worse and the claim form was issued well within the three-year period and the defendants, although not formally served, knew about it and had been sent the claim form on the day it was issued on 8 April 2019.

76. Both sides solicitors have behaved well in a constructive and co-operative manner. It is in the claimant's favour that information and evidence has been promptly shared but also in the defendants' favour that they too have willingly engaged and worked collaboratively with the claimant.

77. A considerable part of the hearing was spent examining the strength of the potential claim the claimant might have against his solicitors in negligence since it is now common ground that the existence of an alternative remedy is a highly relevant factor to be considered. Mr McDermott QC argued that *Pandya* came as a complete shock against the conventional wisdom whilst Mr McParland QC asserted that the weakness of the claimant's argument was demonstrated by the reliance on just two textbooks, both of which had been quoted out of context as they did not apply to Rome II Regulation cases, which posited merely a suggestion that service of a claim might be a procedural matter for the *lex fori*, whilst the more authoritative and leading tomes such as Dicey, Morris and Collins, in the Conflict of Laws, 15edn at p2166 set out above make clear how narrowly the exclusion of matters of 'evidence and procedure' is to be interpreted, although Mr McDermott QC pointed other passages within Dicey that he suggested supported his argument.

78. I accept that the alternative claim would be more complex than missing a domestic time limit in a domestic claim and there are arguments to be had as to the clarity of the position pre-*Pandya.* But if Mr Rigby had checked with a Scots lawyer, or even open source material from the internet, he would have learnt that the proceedings needed to be served within the triennium under Scots law and it could be argued that exercising reasonable skill and care with the prudence and caution one might expect he would have taken no risks and just served the proceedings before 15 June 2019 which he could have done, even if it meant some aspects of the schedule of special damage were *TBA.*

79. If he had conducted further research and enquiries he would have appreciated that he would be taking a risk (at best) by not serving within the triennium in reliance on the argument that service of proceedings would be governed by *lex fori*. But he did not address his mind to it specifically and made assumptions which, with the benefit of hindsight and *Pandya,* were incorrect. In a claim valued at over £9 million I tend to agree more with Mr McParland QC's submissions. I find it hard to accept Mr McDermott QC's submission and Mr Rigby's statement that the settled and long standing understanding of the law was that the law of the forum would apply to service of proceedings: post 2009 and s.8 of the 1984 Act and pre *Pandya* it was a grey area. I work on the premise that whilst not a cast iron case, it is likely that the claimant will have a reasonable alternative claim against his solicitors. It is therefore an important point in favour of the defendants' contention that an extension should not be granted. Mr McParland QC relied on the authorities to reinforce his submission such as Lady Smith in *Hill v McAlpine* 2004 SLT 736 and her observation when granting an extension of time:

> "I do so recognising that it is unusual for the court to allow an action to proceed out of time when the lateness of the raising of the action can be attributed to negligence on the part of the pursuer's advisers"

80. The fact of having an alternative claim is not however a complete answer to the question. One must be alive to the practical and logistical difficulties in pursuing satellite litigation. The claimant is significantly disabled from his incomplete tetraplegia

from the accident and has significant heart problems together with long-standing and entrenched depression. Even for those in the best of physical and mental health it requires considerable effort and tenacity to embark on litigation, especially against your solicitors who have been advising and supporting you and with whom you worked closely sharing personal and intimate information for three years. It is relevant and noteworthy that the claimant has at times struggled to progress his claim, perhaps for obvious reasons given his health condition. It is also noteworthy that his clinical depression has affected his motivation and self-esteem and he finds everything an effort. It is easy for those of us who work in the law to underestimate the stress and strain of litigation and the level of administrative efficiency and capability, as well as resilience required to be a litigant, especially as a claimant.

81. Mr McParland QC submitted that there was insufficient information to conclude that the personal circumstances of the claimant would impede his ability to pursue an alternative claim. True it is that I did not have a witness statement from the claimant addressing all these matters directly, but I am satisfied from the medical evidence which was not disputed and the evidence of Mr Rigby, who has spoken to his client, that it will be difficult and challenging for the claimant to avail himself of the opportunity of proceeding against his solicitors. There will be significant impediments given the claimant's deteriorating physical health and fragile mental state in pursuing an alternative claim. His despair and sense of hopelessness will make it hard for him, especially as he has no family support behind him to encourage him and he fears his relationship with Ms Venables is precarious. It is relevant to note the severe effects on the claimant and the despondency caused by the withdrawal of the defendant's settlement offer on 18 March 2019. Litigation is a source of pressure and requires considerable energy and someone with low self-esteem is likely to consider that they are not worth it. I have enough evidence before me from which to draw inferences and make common sense conclusions.

82. I also take judicial note of the difficulties in finding capable and willing solicitors with the capacity to take on claims of professional negligence of this type. Lord Doherty described it well in *A v Glasgow City Council:*

> "if the pursuers have to proceed against their solicitors they will have to find and instruct new representation in whom they have trust and confidence, and who would be prepared to accept instructions on funding basis which is satisfactory to both solicitors and clients"

83. Furthermore, I find that there would be material and significant prejudice to the claimant by the inevitable delays that would be incurred if he had to rely on bringing a claim against his solicitors. The rehabilitation code funding and interim payments initially provided by the defendants which he is no longer receiving enabled the claimant to receive some of the care and treatment that he needed then, and still needs now. Mr Desai's report stresses the importance of the care and rehabilitation needs not covered by public funding for both his physical and mental health. Further delays will be detrimental to the claimant and significant, lengthy further delays will be inevitable if he has to fall back on an alternative claim. If he has the motivation to pursue an alternative claim it will take time to find and instruct solicitors. It will take time for them to be in a position to formulate and make a claim for professional negligence.

Stewarts LLP and their insurers will need time to consider their position and so it goes on.

84. Time has not proved to be the great healer in the claimant's case. If he was physically and mentally robust enough to pursue a claim against his lawyers, it would not be straightforward for the myriad reasons Mr McDermott QC sought to advance, even if it would ultimately be successful and it is impossible to predict whether or when interim payments or rehabilitation code funding would be resumed in the interim. It therefore inevitably follows that there would be delays and difficulties along the way requiring commitment and determination on the claimant's part. There is no indication that liability would be quickly admitted.

85. In considering therefore whether it is equitable for the claimant "to escape from the grip of the statute and for the reclaimer [defendant] to be called upon to continue a contest for which the law had relieved him" (*Donald v Rutherford* at para 77) I find that the claimant has discharged his burden and has established that he would suffer real and material prejudice if his claim was not permitted to proceed such that it is equitable to allow him to bring the action notwithstanding the limitation period set by Parliament. The claim was all but settled, but proving the maxim many a slip twixt cup and lip, the claimant's heart attack changed all that.

86. The claimant has established cogent factors to merit depriving the defendants of what would have been a complete defence to the claim. The defendants were unable to point to any significant prejudice beyond having to defend the claim. The strongest point in the defendants' favour was the prospect of the claimant having an alternative claim. But given the claimant's physical and mental health and disabilities from the accident and as discussed above, I conclude that as in the case of *A v Glasgow City Council*, the possibility of claiming against his own solicitors is not the trump card it was portrayed as by Mr McParland QC. But in reaching my decision I have paid careful attention to Mr McParland QC's submission to consider all the cases referred to me, and not focus on *A v Glasgow* to the exclusion of all the other cases weighing all factors in the balance and noting that whilst parliament has provided a time limit it has also provided an exception to enable the courts to deal with the justice in an individual case. I find that the balance of justice in this case lies with the claimant who has proved that it would be equitable for the court to grant the short extension necessary to validate the late served claim.

Costs

87. The parties had helpfully agreed that in the event of the claimant's success there should be an order for costs in the case, and that the defendants would seek no order for costs in the event of the claimant being unsuccessful. In light of my conclusions above I therefore make an order for costs in the case.