Ref. H80YX431; H22YY677

IN THE COUNTY COURT AT MAYOR'S AND CITY OF LONDON COURT

Guildhall Buildings
Basinghall Street
London

Before HIS HONOUR JUDGE HELLMAN

IN THE MATTER OF

(1) PAUL MOORE
(2) RADA MOORE (Claimants)

-v-

MACIF (Defendant)

MR HENRY MORTON JACK appeared on behalf of the Claimants
MR HOWARD PALMER KC appeared on behalf of the Defendant

JUDGMENT
25th OCTOBER 2022
(AS APPROVED)

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Central Court, 25 Southampton Buildings, London WC2A 1AL
Tel: 0330 100 5223 | Email: uk.transcripts@escribers.net | uk.escribers.net

HHJ HELLMAN:

1. There are three applications before the court. In the first, the first claimant, Mr Paul Moore, seeks relief from sanctions for failing to endorse the claim form as required by an order granting permission to serve it on the defendant out of the jurisdiction. That application is dated 13 December 2021. The defendant is the French insurance company, MACIF, which is domiciled in France.

2. It is common ground that, properly analysed, the relief sought is for an order under rule 6.15 of the civil procedure rules ("CPR") ratifying steps already taken to bring the claim form to the attention of the defendant. It is not an application for relief from a sanction imposed as a result of non-compliance with the order, but to cure an act rendered invalid by the general law because the order authorising service was not complied with.

3. The second application is brought by the defendant against Mr Moore and is dated 9 December 2021. It seeks a declaration that the defendant was not validly served out of the jurisdiction and is thus the mirror image of Mr Moore's application. Further or alternatively, it seeks an order that proceedings are stayed or dismissed on the ground that England and Wales is not the appropriate forum for determining this claim.

4. The third application is brought by the defendant against the second claimant, Ms Rada Moore. That application is dated 25 February 2022 and seeks an order that England and Wales is not the appropriate forum for her claim.

5. The background to these applications is helpfully summarised in a chronology appended to the skeleton argument prepared by Mr Bernard Doherty of counsel and reissued, adopted, and updated by Mr Howard Palmer KC who has appeared before me today. He has been opposed by Mr Morton Jack for both claimants. I am grateful to both counsel for their assistance in navigating the not altogether straightforward waters of these applications.

6. Mr Moore was born on 19 August 1952 and is aged 70 years and Mrs Moore was born on 23 April 1956 and is aged 66 years. Both their claims stem from a road traffic accident which occurred while they were on holiday and in which they were injured at Mainneville in France. The defendant insured the vehicle with which the claimants' car came into collision.

7. On 8 July 2021, Mr Moore issued a claim form. The form averred that French law was applicable, and that it is applicable is not in doubt, and the claim was limited to £25,000.

8. On 22 June 2021, Mr Moore issued an application seeking permission to issue a claim form endorsed with permission to serve out of the jurisdiction. That application was determined on the papers on 20 July 2021, after the claim form had been issued, by Deputy District Judge Wilson, who gave Mr Moore permission to serve the claim form "endorsed with permission to serve out of the jurisdiction" in France.

9. Counsel have been unable to direct me to any authority or practice direction which says that but for that order it is a requirement of service out of the jurisdiction that a claim form is

thus endorsed. But I accept that it would be good practice and something that is generally done even had the deputy district judge not made that order.

10. On 3 November 2021, Mr Moore applied for an extension of time in which to serve the claim form. On 4 November 2021, the claim form was purportedly served in France on the defendant. However it was not endorsed with a statement that permission to serve out of the jurisdiction had been granted. It was however translated into French and accompanied by, amongst other things, a copy of the order of the deputy district judge, also translated into French, giving permission for service out of the jurisdiction.

11. On 25 November 2021, the defendant acknowledged service but indicated an intention to contest the jurisdiction. Time for service of the claim form was extended on the papers by Deputy District Judge Hatton until 3 January 2022.

12. On 30 November 2021, Deputy District Judge Stewart made an order on the papers approving service out of the jurisdiction of Mrs Moore's claim form. That too was to be endorsed with the fact that permission had been granted to serve the claim form out of the jurisdiction and that claim form was issued on 27 September 2021.

13. On 9 December 2021, the defendant issued an application challenging the court's jurisdiction in Mr Moore's case. On 13 December 2021, Mr Moore applied for relief from sanctions for failing to endorse the claim form correctly. On 16 December 2021, a properly endorsed copy of Mr Moore's claim form was supplied to the defendant's solicitors in England. That did not count as service, as is common ground, because the defendant's acknowledgement of service stated that the defendant was participating in these proceedings only in order to challenge the court's jurisdiction.

14. On 1 February 2022, Mrs Moore's claim form was served on the defendant in France and no point is taken about the validity of that service. On 15 February 2022, the defendant served an acknowledgement of service of Mrs Moore's claim form stating their intention to challenge jurisdiction. On 28 February 2022, the defendant issued an application disputing jurisdiction in Mrs Moore's claim.

15. I turn to Mr Moore's application for relief from sanctions. I shall treat this as an application under CPR 6.15, which provides in material part:

> "*(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
>
> *(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.*"

16. The commentary at para 6.15.7 to the 2022 edition of Volume 1 of the White Book states:

> "*… This omission has raised the question whether the court has power to order service by an alternative method where a claim form or other document is to be served out of the jurisdiction.*
>
> *Any doubt has been resolved by the Supreme Court in Abela v Baadarani [2013] UKSC 44, where the concession that r.6.37(5)(b)(i), which gives the court power to 'give directions about the method of service', authorises the court to make an order for alternative service prospectively or retrospectively under r.6.15(1) and (2) was expressly approved by Lord Clarke at [20] of his judgment. …*"

17. Although this is not an application for relief from sanctions, it is helpful to apply CPR rule 3.9 by analogy to organise the various factors which I take into account in determining the application under CPR rule 6.15.

18. I am satisfied that this was a serious and significant breach of the order of the deputy district judge. Correct service of originating process is important because it is a precondition of the court invoking jurisdiction over the party to be served.

19. The explanation for the failure to endorse the claim form is that it was an administrative oversight which occurred during the handover of the file from one solicitor to another during the covid pandemic. Whereas that explains why the failure to endorse the claim form occurred, I am not satisfied that that is a good explanation.

20. Evaluating all the circumstances of the case, the claim form was served with a copy of the order authorising service out of the jurisdiction, both translated into French. A perfected copy of the claim form was supplied to the defendant's English solicitors. The parties were corresponding prior to the service of the claim form, as a result of which the defendant knew that Mr Moore intended to issue proceedings. Were I to allow this application, it would have the effect of depriving the defendant of the benefit of an accrued limitation period, thereby compelling Mr Moore to bring the claim in France if he wished to pursue it. On the other hand, Mr Moore submits that such a result would be a windfall for the defendant.

21. When considering what amounts to a good reason to authorise, I was again referred to the decision of the Supreme Court in *Abela and Baadarani*, which is helpfully digested at paragraph 6.15.3 of the commentary to Volume 1 of the 2022 edition of the White Book:

> "*The Supreme Court in Abela v Baadarani [2013] UKSC 44 has held: (1) That whether there is good reason to treat a matter of service not permitted by Pt 6 as good service under r.6.15(1) and (2) is essentially a matter of fact. (2) The contrast with r.6.16 under which the court can only dispense with service of the claim form 'in exceptional circumstances' shows that it is not right to add a gloss to the test by holding that there will only be good reason in exceptional circumstances. (3) That in these cases it should not be necessary for the court to spend undue time analysing decisions of judges in previous cases which have depended on their own facts. (4) The mere fact that the defendant has learned, by the method used, of the existence and content of the claim form cannot without more*

> *constitute a good reason to make an order under r.6.15(2), but the wording of the rule shows that it is a critical factor. (5) In this context the most important purpose of service is to ensure that the content of the document is communicated to the defendant. The latter statement is one of importance. Lord Clarke at [37] and [38] of his judgment laid stress on this consideration.*"

22. I am satisfied on the facts of the present case that Mr Moore did sufficient to bring the claim, and the fact that he was authorised to serve it outside the jurisdiction, to the defendant's attention such that there is a good reason for the court to order that steps already taken to bring the claim form to the defendant's attention, namely purported service of the unendorsed claim form, count as good service.

23. It has not escaped my attention that CPR rule 6.15 refers to service by an alternative method. Interpreting service an alternative method to include service of an unendorsed claim form outside the jurisdiction is a bit of a stretch. Nonetheless, I am happy to do so because it seems to me to fit better what I have been asked to do than to approach the matter as an application for relief from sanction.

24. Had I approached it on the latter basis, I would have been satisfied that, evaluating all the circumstances, I should have granted relief from sanction, this being on the assumption that the negative effects of non-compliance with a court order could be interpreted as a sanction resulting from non-compliance with that order. However, for the reasons given earlier in this judgment, I believe that analysing the application as falling under CPR part 6.15 is legally a more sound way to proceed.

25. I turn to the two applications by the defendant, which ask the court to find that England and Wales is not the convenient forum for the resolution of this dispute. That question is governed by CPR rule 6.36 and 6.37. Rule 6.36 says:

> "*In any proceedings to which rule 6.32 or 6.33 does not apply,"*
> *and it is not suggested that either rule applies to the present case,*
> *"the claimant may serve the claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.*"

26. It is common ground that paragraph 3.1(9)(a) of Practice Direction 6B applies.

> "*The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –*
> . . . . .
> *(9) A claim is made in tort where –*
>
> *(a) damage was sustained, or will be sustained, within the jurisdiction*".

27. Before turning to the commentary, I should deal with rule 6.37 which provides,

> "*An application for permission under rule 6.36 must set out –*

(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;
(b) that the claimant believes that the claim has a reasonable prospect of success; and
(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found."

28. There is no suggestion that that requirement has not been complied with. However, CPR rule 6.37(3) provides:

> "*The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.*"

29. As to whether England and Wales is the proper place, the commentary at paragraph 6.37.16 of Volume 1 of the 2022 edition of the White Book is helpful. It refers to the leading speech in *Spiliada Maritime Corporation v Cansulex Ltd (Spiliada)* [1987] AC 460 HL given by Lord Goff, who concluded that the court has to identify in which forum the case could most suitably be tried for the interests of all of the parties and for the ends of justice.

30. The commentary goes on to say:

> "*The guidance given by Lord Goff as to the determination of the appropriate forum in 'service out' cases' such as the present 'is at 478E to 482A of his speech. … Some important points to bear in mind are as follows:*
>
> 1. *The burden is on the claimant, not merely to persuade the court that England is the appropriate forum, but 'to show that this is clearly so' … alternatively, to adopt the words of r.6.37(3), 'the court has to be satisfied by the claimant that England is the proper place in which to bring the claim' …*
>
> 2. *The 'fundamental principle' (applicable to both 'service out' and 'service in' cases alike) is that the court 'has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice' …*
>
> 3. *The determination of the appropriate forum in a given case requires the proper application of relevant private international law rules on the doctrine of forum conveniens as derived from extensive case law. It is not a simple 'exercise of discretion' (though frequently couched in those terms). The court is required to reach an evaluative judgment upon whether, in the light of the relevant considerations, England is clearly the more appropriate forum …*
>
> 4. *Each case depends on its own particular facts. Reported decisions of first instance judges in deciding whether or not to permit a foreign defendant to be served outside of the jurisdiction are illustrations of circumstances in which a discretion has been exercised, and are not binding authority on how that discretion is to be exercised …".*
>
> [Citations deleted.]

31. I was referred by both counsel to the recent decision of the Supreme Court in *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45. The case is concerned, amongst other things, with the tension between satisfying the gateway at paragraph 9A of the Practice Direction and controlling access to the courts of England and Wales through that gateway by applying the principle of forum non conveniens. I was referred to a number of passages. I do not propose to deal with them all.

32. Lord Lloyd Jones gave the judgment of the plurality. At paragraphs 78 – 79 he stated:

> "*78. In Brownlie I Lord Sumption JSC suggested (at para 31) that the main determining factor in the exercise of discretion on forum non conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation. While it is correct that practical issues can feature large in the exercise of the discretion, the discretion is not so limited. … In applying the principle, the ultimate objective is 'to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice' (per Lord Goff at p 480G).*
>
> *79. The discretionary test of forum non conveniens, well established in our law, is an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England. Where a claim passes through a qualifying gateway, there remains a burden on the claimant to persuade the court that England and Wales is the proper place in which to bring the claim. Unless that is established, permission to serve out of the jurisdiction will be refused (CPR r 6.37(3)). In addition—and this is a point to which I attach particular importance—the forum non conveniens principle is not a mere general discretion, the application of which may vary according to the differing subjective views of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structured discretion, the details of which have been refined in the decided cases, in a readily predictable manner.*"

33. Brownlie was the only decided case on facts similar to the present to which I have been referred. The judge's findings at first instance were addressed by Lord Lloyd-Jones at paragraph 80 of his judgment:

> "*In the present case it cannot be suggested that the links between the claim and this jurisdiction are merely casual or adventitious. Nicol J, in considering whether England is the proper forum for the litigation of the claimant's claims, while also considering procedural advantages and disadvantages of the competing jurisdictions, gave weight to the fact that to a significant extent the claimant's losses had been experienced in England: [2019] EWHC 2533 (QB) at [139 (viii)]. There has been no appeal against his conclusion that England is the proper place in which to bring the claim, permission to appeal having been refused by the judge and the Court of Appeal.*"

34. There is no suggestion by Lord Lloyd-Jones in that passage that had permission to appeal been granted the Supreme Court would have been minded to come to a different conclusion than that of the trial judge, albeit that question was not before the Supreme Court.

35. The tension between the gateway at paragraph 9(a) of the Practice Direction and the control mechanism of the forum non conveniens doctrine is set out at paragraphs 81 and 82 of Lord Lloyd-Jones's judgment.

> "*81. … I can see no reason to apply within English domestic rules the distinction between direct and indirect damage which has now developed in the Brussels system. To my mind, the word "damage" in para 3.1(9)(a) of PD 6B simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged. This reading reflects the ordinary and natural meaning of the word and is in accordance with the purpose of the provision and with principle. …*
>
> *82. The wider reading of damage within the meaning of the tort gateway, which I favour, does not confer on all claimants in personal injury cases a right to bring proceedings in the jurisdiction of their residence. The courts will be astute in ascertaining whether the dispute has its closest connection with this jurisdiction and the principle of forum non conveniens will provide a robust and effective mechanism for ensuring that claims which do not have their closest connection with this jurisdiction will not be accepted here.*"

36. On the one hand then, the fact that a claimant passes through gateway 9A of the practice direction does not establish that England and Wales is the appropriate forum. On the other hand, the fact that damage is sustained to a significant extent in England and Wales will be a material factor when considering the appropriate forum but not a determinative one.

37. Another material factor will be the governing law of the claim. *Dicey and Morris*, 16th Edition, states in the commentary to rule 41 at paragraph 12-034.

> "*If the legal issues are straightforward, or if the competing fora have domestic laws that are substantially similar,124 the identity of the governing law will be a factor of rather little significance. But if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more reliably than does a foreign court will help to point to the more appropriate forum, whether English or foreign.*"

38. To similar effect is the commentary at paragraph 6.37.19 of volume 1 of the 2022 edition of The White Book. Referring to *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337, the commentary states:

> "*Lord Mance said that the factor of English law being the governing law is important because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. That factor is of particular force if (as was not the case here) issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum …*"

39. Turning to the facts of the present case, I accept that both claimants sustained significant damage in England and Wales. By that I mean that the personal injuries which they have sustained as a result of the accident, which in both cases involved post traumatic stress disorder and orthopaedic injuries, were more than merely negligible and that for the majority of their duration they have been experienced by both claimants in this jurisdiction. This is where both claimants have their home.

40. I should note that Mr Moore's claim is limited to £25,000 and Mrs Moore's claim is limited to the range of 50,000 to £100,000. I have read the medical reports prepared for both defendants in this litigation during 2019 through to 2021. Both claimants were continuing to experience symptoms of their injuries as of the dates of those reports.

41. It is submitted by Mr Morton Jack that to ensure predictability this factor should carry significant weight as it did in Brownlie at first instance. It is submitted it would be easier for the defendant, a large insurance company with handling agents in England and Wales and which has already instructed solicitors in this jurisdiction in relation to the claim, to litigate in England and Wales than for the claimants to litigate in France and be involved to whatever extent they wished with the trial process there.

42. Moreover, it is submitted that although the claim in England and Wales has not progressed very far, substantial preparatory work has already been carried out. For example, obtaining the medical reports to which I have just referred, which would be wasted if the claim were to be tried in France.

43. The defendant's position is set out in two witness statements by their English solicitors. Belinda Normandale made a statement dated 9 December 2021 in which she set out various reasons why the defendant contends that France is the appropriate forum. The more weighty reasons were as follows.

44. First, the accident occurred in France and France is therefore prima facie the appropriate forum for the claim. See the VTB Capital plc v Nutritek International Corporation case at paragraph 51.

45. Second, pursuant to Article 4(1) of Regulation EC number 864/2007 French law applies to liability and quantum. That is not disputed. The assessment of damages will be undertaken by reference to the Dintilhac Tables, the use of which is commonplace in the French courts but obviously less so in the English courts. The French courts are better placed to examine concepts such as consolidation and future deterioration within the meaning of those tables.

46. Third, if the matter proceeds in England, then in order to assess damages pursuant to French law the parties will need to obtain evidence from French law experts with the assistance of French Medico-Legal experts. It is likely there will be a French Medico-Legal expert for each party and a French law expert for each party. That is four experts in total. That would not be necessary if the matter proceeded in France.

47. I note from the claimants' evidence that they have already obtained evidence from a French Medico-Legal expert. The expert's first language is French. They might need an interpreter if they were to attend a final hearing in England. However, they would not have to travel to England for any final hearing as they could attend that hearing remotely.

48. Fourth, the defendant is domiciled in France. The defendant's insured is domiciled in France. Ms Normandale asserts that it is reasonable for the defendants to presume that they will be sued in their own courts. That rather depends on the view which the court takes as to the convenient forum and I note that the defendant's domicile makes little practical difference to the conduct of the claim whatever the jurisdiction.

49. The second witness statement is by Maude LePez. She notes that at paragraph 15 of a witness statement addressing the forum conveniens claim, Mr Moore states:

> "*Asking for this case to be heard in France will further exacerbate my anxiety, anger and resentment if I am asked to return there.*"

And at paragraph 21 of her statement dated 3 May 2022, Mrs Moore states that:

> "*If I were to have to go back to France for these proceedings it would put me at serious risk because my defence mechanism is to cope by not talking about the accident and injuries.*"

50. Ms LePez goes on to state:

> "*As a lawyer practicing in France as well as in England and Wales I confirm that the claimants would not have to attend trial in the French proceedings.*"

It may be that based on those extracts from their witness statements neither of them, and in particular Mrs Moore, would have wanted to. But the main point I take from this is not whether they would or they would not, but that their participation would be unnecessary for the resolution of proceedings in France.

51. Weighing these factors, I am not satisfied that England and Wales is clearly the appropriate forum. On the contrary, the balance comes down in favour of France being clearly the appropriate forum. The French court is best placed to apply French law and procedure, although I do not doubt that the English court could do so as English courts are familiar with applying foreign law. However, such law and procedure is very different from that in England and Wales. French law applies because the accident took place in France. The claimants will not be required to attend proceedings in France.

52. The English proceedings are not far advanced and there is no evidence before the court that instructing a French avocat will present real difficulties. I would anticipate, for example, this could be done through solicitors in England and Wales rather than the claimants having to approach lawyers in France directly. Although counsel cannot give evidence, I am comforted in my anticipation by what Mr Palmer has told the court in that respect.

53. The claimants place great reliance on the fact that most of the damage has been sustained, in the sense of experienced, in England and Wales. Mr Morton Jack relies upon the weight put upon that factor by Nicols J in Brownlie. But that was one of a number of factors before that judge in a factually complex case and will not bear the weight which the claimants seek to put upon it in the present case.

54. Having found that the appropriate forum is France, not England and Wales, the defendant's applications are allowed. I shall hear from the parties as to how my allowing them should be reflected in the orders that I must now make, and I shall also hear from the parties as to costs, although, as it is now 5.25 pm, not necessarily this afternoon. That concludes this ruling.

This transcript has been approved by the Judge