

Neutral Citation Number: [2016] EWHC 2744 (QB)

Case No: HQ14X04213

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 03/11/2016

**Before** :

MR JUSTICE DINGEMANS

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**Between :**

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|  | **Master Harry Roberts (a child and protected party, by his mother and litigation friend Mrs Lauren Roberts)** | Claimant |
|  | **- and -** |  |
|  | 1. **The Soldiers, Sailors, Airmen and Families Association – Forces Help** 2. **The Ministry of Defence**   **And**  **Allgemeines Krankenhaus Viersen Gmbh** | Defendants/  Part 20 Claimants  Third Party |
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**Charles Hollander QC** (instructed by **Government Legal Service**) for the **Defendants and Part 20 Claimants**

**Charles Dougherty QC** (instructed by **DAC Beachcroft LLP**) for the **Third Party**

Hearing dates: 21st October 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Dingemans:**

**Introduction**

1. This is the hearing of an application on the part of the Third Party, Allgemeines Krankenhaus Viersen Gmbh (“Viersen”) for an order that the Court does not have jurisdiction to hear the Part 20 proceedings, and to set aside the Part 20 Claim Form and Part 20 Particulars of Claim. The Part 20 Claimants are the Soldiers, Sailors, Airmen and Families Association – Forces Help (“SSAFA”) and the Ministry of Defence (“MOD”).

**The factual background**

1. The factual matters set out below are taken from the pleadings and the witness statements of: Stephen Turner, a legal director at DAC Beachcroft LLP; Alison Gale a solicitor with the MOD Private Law Team; and Gerold Eckardt, a former Deputy Director and manager of Viersen. It is common ground that I am not in a position to make concluded findings of fact, but I have to assess the relevant factual background to determine whether jurisdiction has been established.

**Arrangements between MOD, SSAFA and Viersen**

1. The MOD is responsible for UK Armed Forces in Germany. Members of the UK Armed Forces and their family members received medical services in the Germany. In the past those services were provided by military hospitals operated by the MOD, but some services were provided at the hospital operated by Viersen.
2. In about 1995 the MOD decided to close military hospitals and increase the amount of care provided at German hospitals, known as Designated Service Providers (“DSP’s”). The MOD introduced a tender process and Guy’s & St Thomas’ Hospital Trust (“GSTT”) was appointed by the MOD to procure services from DSP’s.
3. Mr Eckardt gave evidence that at the end of 1995 there were talks with representatives of GSTT. He said that the MOD tasked GSTT with the implementation of the plans, and that although the negotiations between the MOD and GSTT had not been concluded by the end of 1995, GSTT held talks with Viersen because the conclusion of the MOD and GSTT contract had been considered to be certain. Mr Eckardt reported on two issues which were problematic in the negotiations. These were payment terms and German law and the exclusive competence of the German courts. Viersen’s liability insurer had required agreement that the German courts should have exclusive competence in medical malpractice claims.
4. Mr Eckardt said in his witness statement that the issue about choice of law and jurisdiction were the subject of a series of talks and discussions in which the requirement that the German courts should have exclusive competence in medical malpractice claims was made clear. Mr Eckardt said that he was “in no doubt that that MOD knew the contents of the contracts negotiated” by GSTT, noting that GSTT had always signified that matters had to be agreed with the MOD before they would give sign off on the agreements.
5. Mr Eckardt exhibited the agreement that had been made between Viersen and GSTT dated 29th April 1996. He noted that in 2000 when parties were discussing the continuation of the relationship he had been sent a head of terms document, headed “Principles of party presentation” and which had been signed in September 2000, in which it was noted that the MOD, GSTT and Viersen had “concluded a partnership agreement concerning the supply of high-quality healthcare …”. Mr Eckardt concluded his statement by stating that “from our perspective, in the period relevant to this claim, all matters relating to the provision of our services for UK military personnel and their families were agreed in our contract with Guy’s & St Thomas’ Hospital Trust, who acted on behalf of and with the approval of MOD and SSAFA”.
6. Ms Gale reported in her witness statement that following a tendering process MOD had selected The Health Alliance (“THA”) to provide a package of healthcare services to British forces in Germany, and recording that THA was an umbrella organisation consisting of the Defence medical services, SSAFA and GSTT. In addition the MOD had entered into a contract for SSAFA to provide midwifery services and with GSTT to provide secondary healthcare services from, among others, Viersen.
7. The contract dated 29th April 1996 was signed by GSTT, which was defined as the Trust, and by Viersen which was defined as the DGP. The MOD was defined as the Ministry. The following were provisions of the contract dated 29th April 1996:

“RECITALS: (A) Whereas the Trust intends to enter into an agreement with the British Secretary of State for Defence, one of which is to take charge of comprehensive medical care and treatment … for the members of British armed forces stationed in Germany; (B) Whereas the parties intend for DGP to be hired by the Trust, after entering into the agreement described in clause (A) … to provide such care and treatment …; (C) Whereas the parties intend for such services to be provided by DGP in accordance with the following terms and conditions;

2.1 The effectiveness of this agreement is subject to the condition precedent of DGP’s receipt of confirmation that the agreement has been signed with the Ministry. The Trust shall inform DGP thereof immediately after signing the agreement ….

3.4 … If DGP is of opinion … that a referral would be in the best interests of the DGP Clinical Patient in question, DGP shall arrange for such a referral. DGP undertakes [vis-à-vis the Trust] to obtain the Ministry’s written consent for such a referral …

19.1 Any disputes … shall be settled through mediation between the Trust and DGP. If such mediation fails, the parties shall submit to arbitral proceedings; 19.2 If the dispute is based on a clinical matter … that leads to a decision against DFGP and/or to have an insurance claim by DGP, the German courts shall have jurisdiction …”

**The treatment of Mrs Roberts and Harry’s birth**

1. The main action is brought by Mrs Lauren Roberts on behalf of her son Master Harry Roberts (“Harry”) against SSAFA and the MOD. Harry’s father was serving the UK Armed Forces in Germany. Mrs Roberts became pregnant with Harry. It is alleged that SSAFA and the MOD were responsible for the provision of midwifery and associated services and are vicariously liable for the actions of the midwife in this case. The MOD denied that it had any responsibility for the actions of the midwife and says it has no liability to Harry, although it has agreed to indemnify SSAFA against any judgment obtained by Harry against SSAFA.
2. Mrs Roberts was advised to attend the hospital by a midwife at about 0430 hours on 13 June 2000, and Mrs Roberts was admitted by the hospital at 0520 hours. Midwife Clelland provided care to Mrs Roberts, and a German obstetrician was involved in taking measurements. A decision was taken to induce labour.
3. By the evening Midwife Clelland had come back on duty and was involved again in providing care to Mrs Roberts, and Dr Baysal, a German obstetrician also provided care.
4. Harry was born on 14th June 2000 in the hospital at 0418 hours following a decision made by Dr Baysal for a Ventouse delivery. Harry suffered bilateral dystonic athetoid cerebral palsy during his birth, and will be dependent on care for the rest of his life.
5. The Particulars of Claim make allegations that the care provided by Midwife Clelland was in breach of the duty of care owed. It is alleged that Midwife Clelland should, because of a combination of a number of factors, have summoned assistance from Dr Baysal, which it is alleged would have led to a birth by 0400 hours and that Harry would not have suffered cerebral palsy.
6. The Defence alleges that Mrs Roberts was primarily a patient of Drs Storck, Zajons and Baysal who were employed by Viersen, and that Midwife Clelland, who was an employee of SSAFA, was under the direct management of the hospital and that therefore the hospital and not SSAFA was vicariously liable for any negligence on the part of the midwife. It was denied that there was any negligence on the part of the midwife and it is alleged that it was the hospital and German obstetricians, for whom Viersen is responsible, who failed to identify a number of risk factors and act in accordance with the duties of care owed to Mrs Roberts and Harry.
7. In the Part 20 Particulars of Claim it is pleaded that Viersen’s care and management of Mrs Roberts was negligent, and a number of matters are relied on to support that plea.

**The application and issues**

1. This application disputing jurisdiction made on behalf of Viersen was dated 12th May 2016. Under paragraph 3 of the application notice in answer to “what order are you asking the court to make and why?” it had been said that Viersen “*seeks this Order on the basis that, having regard to the contract governing its performance of services alleged to be relevant to the Part 20 Proceedings, all disputes between the parties are to be referred to Arbitration, save that clinical negligence claims are to be subject to the exclusive jurisdiction of the German courts*”.
2. It became clear, on the exchange of Skeleton arguments, that although the application notice referred only to a ground relating to a jurisdiction clause, Viersen were making the application to dispute jurisdiction on two grounds being: (1) a contention that the Courts did not have jurisdiction pursuant to article 8(2) of the Brussels Recast Regulation (EU 1215/2015) (“the Brussels Recast”); and (2) the jurisdiction clause, relying on the provisions of article 25 of the Brussels Recast. As to ground (1), SSAFA and the MOD contended that the argument in relation to article 8(2) was not available to Viersen, because it had not been identified in the application notice, and no evidence had been directed to that point.
3. In these circumstances it appears that the following matters are in issue: (1) whether Viersen should be entitled to rely on the article 8(2) Brussels Recast issue; (2) if so, whether the Court has jurisdiction pursuant to article 8(2) of the Brussels Recast; and (3) if so, whether SSAFA and the MOD are bound by the jurisdiction clause in the contract dated 29th April 1996.

**Relevant provisions of Brussels Recast**

1. Recital 15 emphasises that the rules of jurisdiction should be highly predictable and founded generally on the principle of the Defendant’s domicile “*save in a few well-defined situations*”. Recital 16 noted the alternative ground of jurisdiction based on a close connection or in order to facilitate the sound administration of justice, noting that the possibility that a defendant should be sued in a court that he could not reasonably foresee should be avoided. Recital 19 emphasised that the autonomy of parties to a contract should be respected and recital 21 noted that it was important to ensure that irreconcilable judgments should not be given in member states.
2. So far as is material article 8 provides: “*A person domiciled in a member state may also be sued … (2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him the jurisdiction of the court which would be competent in his case*”.
3. So far as is material article 25 provides: *“(1) If the parties, regardless of their domicile have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction … Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be … (a) in writing or evidenced in writing …*”.

**Viersen entitled to rely on article 8(2) of Brussels Recast**

1. It is common ground that if Viersen wanted to raise an issue under the article 8(2) it should have included the issue as a ground in the application notice disputing jurisdiction. It is also common ground that Viersen was, in effect, making an application to amend the application notice to raise this distinct point at the hearing, having raised the point in its Skeleton Argument.
2. SSAFA and the MOD did not identify any evidence on the article 8(2) issue which they would have wanted to adduce. Viersen accepted that it was unable to call any evidence on the article 8(2) issue, and that I would therefore have to assume that the relevant German law mirrored the law applicable in England and Wales. It therefore became common ground that the article 8(2) issue would be an issue of law alone. It was also common ground that SSAFA and the MOD had relied on article 8(2) to certify that the Courts of England and Wales had jurisdiction to hear the claim. It was also common ground that the length of the hearing would not be affected by the article 8(2) issue.
3. Although it is established that parties seeking a very late amendment face a heavy burden to persuade the Court to permit the amendment, in this case it seems to me that Viersen ought to be permitted to raise the article 8(2) Brussels Recast issue. This is because, as it is formulated and argued before me, it raises an issue of law alone. This is an issue of law which SSAFA and the MOD considered for the purposes of issuing the Part 20 proceedings. Both SSAFA and the MOD on the one hand, and Viersen on the other hand, were prepared and able to argue the point before me. The length of the proceedings would not be increased. I therefore permit Viersen to rely on the article 8(2) point.

**The Court has jurisdiction pursuant to article 8(2) of Brussels Recast**

1. It was common ground that the Part 20 (or third party) proceedings brought by SSAFA and the MOD against Viersen were permitted to be brought pursuant to the provisions of the Civil Procedure Rules, Part 20(6) and 20(9). However the issue of whether jurisdiction is established is governed by the Brussels Recast, and whether jurisdiction is established is assessed, at least in part, by reference to autonomous principles of European law. In *Sovag v If* (Case C-521/14); [2016] QB 780 the CJEU considered article 6(2) of the Judgements Regulation, which is the forerunner of article 8(2) of the Brussels Recast and concluded, in paragraph 47, that the provision “*must be interpreted to the effect that its scope includes an action brought by a third party, in accordance with national law, against the defendant in the original proceedings, and closely linked to those proceedings ….*”. The close linking, or close connection, is an essential feature to establish jurisdiction pursuant to article 8(2) of the Brussels Recast.
2. I was also referred to a number of domestic authorities which had considered article 8(2) (or its predecessor article 6(2) in the Judgments Regulation). Although at one stage it seemed that Mr Dougherty QC was arguing that it was necessary to show a risk of irreconcilable judgments, and that judgments would not be irreconcilable unless they involved the same issue of law and the same parties, he clarified that his submissions did not extend so far. In my judgment the relevant material principles can be established from article 8(2) and the authorities. First it is necessary to satisfy the provisions of the CPR to bring third party proceedings, but satisfying those provisions may not necessarily be enough. A close connection is required between the original and third party proceedings. A close connection may occur where it is necessary to avoid the risk of irreconcilable judgments, but the connection must be such that it is rational, and that the harmonious and efficacious administration of justice requires the Court to hear both claim and third party proceedings in the same action, see *Barton v Golden Sun Holidays* [2007] 151 SJLB 1128 and *Shetty v Al-Rushaid* [2011] EWHC 1460 (Ch). It is for the national Court to assess the existence of the close connection.
3. I am satisfied that jurisdiction under the provisions of article 8(2) of the Brussels Recast is established in this case. The CPR permits the bringing of the third party proceedings by SSAFA and the MOD against Viersen. There is a close connection between the original proceedings brought by Mrs Roberts on behalf of Harry against SSAFA and the MOD, and the proceedings brought by SSAFA and the MOD against Viersen. This is because the proceedings involve a critical evaluation of the treatment of Mrs Roberts and the circumstances which led to Harry’s cerebral palsy. There is a risk of irreconcilable judgments because a Court in England might conclude that negligence or fault was shared by the midwife and obstetricians, but a court in Germany might conclude that the negligence or fault lay with either midwife or obstetricians alone. The Courts in England and Germany might come to different conclusions about legal responsibility for the actions of the midwife. The Courts in England and Germany might come to different conclusions on the issues of causation. In all these circumstances the connection between the proceedings means that it is rational for, and that the harmonious and efficacious administration of justice requires, the Court to hear both claim and third party proceedings in the same action,

**Viersen cannot rely on article 25 of the Brussels Recast against SSAFA or the MOD**

1. It is common ground that even if jurisdiction were to be established pursuant to article 8(2) of the Brussels Recast, if Viersen can establish that there was a jurisdiction clause binding SSAFA and the MOD and falling within the provisions of article 25 of the Brussels Recast, then the Courts in England and Wales would not have jurisdiction over the third party proceedings.
2. As appears from the matters set out above Viersen entered into the contract dated 29th April 1996 with GSTT. SSAFA and the MOD therefore take the short point that neither SSAFA nor the MOD is bound by the jurisdiction clause. Viersen rely on agency, and in particular the doctrine of ostensible authority as explained in Bowstead on Agency, 20th edition at 8-10 and following, to show that GSTT acted as an agent of SSAFA and MOD in entering into the jurisdiction provision of the contract, meaning that SSAFA and MOD are bound by the clause. In response SSAFA and MOD raise an issue about whether agency by ostensible authority is an agreement “*in writing or evidenced in writing*” for the purposes of article 25(1)(a).
3. It is common ground that the first matter to consider is whether either SSAFA or the MOD have “by words or conduct” permitted it to be represented that GSTT had authority to bind them to clause 19.2 of the contract. In my judgment there is nothing in the materials before me to show that any such words or conduct occurred before 29th April 1996 (and I note that the “Principles of party representation” exhibited by Mr Eckardt post-dates the contract in 1996). There is the fact that Mr Eckardt understood that Viersen would not be sued for medical malpractice in England but, accepting that was his subjective understanding, there is nothing to show that either SSAFA or the MOD made any representation by words or conduct that GSTT was negotiating not only for itself but also for SSAFA and the MOD. The fact that GSTT went to check payment terms and jurisdiction clauses between GSTT and Viersen with the MOD is entirely consistent with a contractual chain of independent contractors. I note the complete absence of any reference back to SSAFA. There is nothing in the evidence to show that Mr Eckardt had thought distinctly about the problems posed by third party proceedings. Indeed, as Mr Hollander QC pointed out, the terms of the contract were inconsistent with the fact that either SSAFA or MOD made any representation by words or conduct that GSTT might bind them. This is because recital A made it plain that GSTT was contracting separately with the MOD, and recital C made it plain that the parties wanted their relationship to be governed by the terms and conditions in the contract, and not by external factors such as ostensible authority and agency. This position was made clear by clause 2.1 which made GSTT’s sub-contracting status clear, because the agreement only became operative on GSTT concluding an agreement with the MOD. The sub-contracting status of GSTT was emphasised by clause 3.4, whereby Viersen undertook to get the MOD’s separate agreement to tertiary referrals for medical purposes.
4. Mr Dougherty sought to meet these points on the contract by suggesting that although SSAFA and the MOD might not have been parties to the main contract, they were parties to the jurisdiction clause. It is common ground that it is possible for a jurisdiction clause in a contract to be considered separately from the main agreement and, for example, to have a different governing law for a jurisdiction clause from the governing law for the main contract. However there is nothing to suggest that the Recitals do not apply to the proper understanding and construction of clause 19.2, or that this jurisdiction clause is to be severed from the main agreement. This is quite apart from the absence of relevant words or conduct on the part of either SSAFA or the MOD to the effect that GSTT was contracting on their behalf.
5. In these circumstances SSAFA and MOD have the “better of the argument” that they are not bound by the provisions of clause 19.2 because GSTT did not have ostensible authority to act on their behalf, and I find that this Court does have jurisdiction over the third party proceedings.
6. This conclusion means that it is not necessary to address the separate and distinct argument raised by SSAFA and MOD to the effect that if they were parties to the contract dated 29th April 1996 by permitting representations to be made on their behalf, the agreement to be bound was not “*in writing or evidenced in writing*” for the purposes of article 25(1)(a) of Brussels Recast. As it is not necessary to decide this last point I have not attempted to do so, and leave it to be considered when it is necessary to do so.

**Conclusion**

1. For the detailed reasons given above: (1) Viersen may rely on the article 8(2) Brussels Recast ground in making their application; (2) there is jurisdiction to bring the third party proceedings under article 8(2) of the Brussels Recast; and (3) neither SSAFA nor MOD are bound by the provisions of clause 19.2 of the contract dated 29th April 1996. I am very grateful to Mr Dougherty and Mr Hollander for their written and oral submissions.