Neutral Citation Number: [2023] EWHC 3236 (Comm)

Case No: CC-2023-CDF-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (KBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 19 December 2023

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

MANDY DEBRA MORGAN (as executrix on behalf of the estate of Leslie Smith deceased)	**Claimant**
- and -	
SYDNEY CHARLES FINANCIAL SERVICES LIMITED	**Defendant**

- -
- -

Steven McGarry (instructed by **Wynterhill LLP**) for the **Claimant**
Lucy Colter (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Defendant**

Hearing dates: 7 December 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC:

Introduction

1. By an application notice dated 7 September 2023 the claimant seeks permission to serve the claim form on the defendant in Guernsey, out of the jurisdiction, together with various ancillary orders. A similar application had previously been made on a without-notice basis when the case was proceeding in the London Circuit Commercial Court but, after the transfer of the case to this court and the defendant's intimation that it would challenge jurisdiction, the parties agreed that the claimant's application should be dealt with at an *inter partes* hearing.

2. The application is supported by a witness statement dated 22 August 2023 by Ms Jennifer Hutchinson, the solicitor with conduct of the case on behalf of the claimant. In response, the defendant filed two witness statements dated 29 November 2023: one from Mr Philip Lepp, the chairman and managing director of the defendant; the other from Ms Joanne Rideout, the solicitor with conduct of the case on behalf of the defendant. Those statements elicited a second statement, dated 5 December 2023, from Ms Hutchinson on behalf of the claimant. Ms Hutchinson produced a third statement, dated 6 December 2023, in response to certain questions raised in the skeleton argument on behalf of the defendant.

3. I am grateful to Mr Steven McGarry and Ms Lucy Colter, counsel respectively for the claimant and for the defendant, for their helpful written and oral submissions.

Basic Facts

4. The claimant is the widow and sole executrix and beneficiary of the estate of Mr Leslie Smith ("the deceased"), who died on 30 May 2019. At all material times the claimant and the deceased resided together in England; the claimant still resides there.

5. The defendant is a company incorporated and located in Guernsey and carrying on the business of the provision of financial services, in which it is regulated by the Guernsey Financial Services Commission ("GFSC"). It has no authorisation or permissions from the UK Financial Conduct Authority ("FCA") and is not and never has been regulated by the FCA or subject to the regulatory regime in England and Wales for financial services. The defendant is part of the Sydney Charles Group of entities. The holding entity for the group is a company incorporated in Guernsey. The group includes one entity (Sydney Charles UK LLP) that is authorised and regulated in England and Wales by the FCA; however, the deceased had no dealings with that entity, and the evidence of Mr Lepp is that the defendant has no working relationship with that entity.

6. The deceased first instructed the defendant in mid-2013. He had been referred to the defendant by New Century Consulting Limited ("NCC"), for whom he worked under a consultancy agreement. NCC was registered in St Kitts & Nevis, but its operations were based in Guernsey. Its business involved providing security and intelligence personnel to security agencies in war zones and other high-risk areas of the world. The deceased was one of its consultants, engaged on a series of 12-month contracts that were renewable so long as NCC required his services. (The final such agreement

expired in September 2016.) NCC was a client of the defendant, through whom it provided insurance for its consultants in respect of specific work-related risks, such as kidnap and personal accident in war zones. The cover did not extend to death by natural causes; instead, NCC had asked the defendant to source a specialist policy, which the consultants would be able to buy at their own expense if they wished.

7. The deceased entered into a number of insurance policies with the defendant. This case concerns two Level Term Life Assurance policies arranged by the defendant in 2013 and 2015 respectively. Each Life Assurance Policy was arranged by the defendant through Kiln Life Syndicate at Lloyd's of London on a sum assured of £500,000 for a 12-month term. The claimant's contention is that, on each occasion when he took out the policy, the deceased did not appreciate, because it had not been sufficiently explained to him, that the policy expired after only one year.

8. The term of the 2013 policy expired on 15 December 2014. In September 2015 the deceased asked the defendant why the direct debit for the policy premium had not been collected. He wrote, "Could you check what has happened as I would like the cover to be in place." The defendant responded that the policy had matured on 16 December 2014 and the direct debit had been cancelled, the last payment having been taken on 16 November 2014. The email stated, "If you wish to apply for the same type of cover, I can arrange for Kiln to forward me new terms and the proposal form for you to complete." In due course, the 2015 Life Assurance Policy was arranged by the defendant for a 12-month term expiring on 19 November 2016.

9. In January 2017 the deceased was diagnosed with a terminal illness. In April 2017 the defendant informed him that no cover was in place for death by natural causes. It was, of course, too late for him to take out a new policy in respect of that risk. In January 2018 the deceased made a complaint to the Channel Islands Financial Services Ombudsman concerning the services provided by the defendant[1]. As mentioned above, he died in May 2019. Probate of the deceased's will was granted to the claimant out of the Cardiff District Probate Registry on 14 January 2020.

10. By the claim form, which was issued on 21 August 2023, the claimant alleges that the defendant was retained by the deceased between 2013 and 2017 in relation to the placement of life insurance policies and that, by reason of the defendant's breach of contract and breach of duty in respect of the advice and explanation it gave to the deceased in relation to the policies he took out, there was no policy of life insurance in existence at the date of his death. Damages are claimed for breach of contract and for "breach of duty".

11. The case is set out in very considerable detail in the 32-page particulars of claim attached to the claim form. Paragraphs 119 to 122 aver that the defendant owed duties under the rules of the Guernsey regulatory scheme. Paragraph 123 avers that it owed duties under the UK ICOBS rules "and the equivalent under Guernsey regulations". Paragraph 124 sets out particulars of the defendant's "breach of duties of reasonable skill and care owed in contract, tort and under the regulatory scheme". Of the thirteen particulars, twelve consist of failures to do something; one is an allegation of making

[1] The complaint was resolved on the basis of the Case Handler Recommendation in July 2018. For the purposes of this judgment it is unnecessary to make more than the barest mention of the nature of the complaint or the basis or terms of the recommendation.

"unclear communications" to the deceased. The essence of the particulars is that the defendant failed to assess the deceased's insurance needs, failed to give him proper advice or to procure for him suitable policies, and failed to give him clear advice and information as to the extent of and limitations on his policies. Whereas paragraph 124 focuses on advisory duties, paragraph 126 is concerned with information duties. It lists fourteen particulars of breach of duty, of which thirteen are allegations of failure (to give adequate explanations or information, or to ensure that the deceased had a sufficient understanding of the policies or the terms of the defendant's retainer or the scope of its services) and one is a repetition of the allegation of making "unclear communications" to the deceased.

12. The defendant has not submitted to jurisdiction and has not filed a defence. In broad terms, its response to the substance of the claim is as follows. It was retained by the deceased on an execution-only basis and was not retained to advise him and owed no duty to do so. It was not and is not now authorised or regulated by the FCA and was not authorised to give regulated financial advice within the UK. If, on the contrary, it committed any breaches of duty, whether on an advisory or a non-advisory basis, those breaches cannot have been causative of any loss. The defendant's position is set out in detail in its pre-action Protocol response in March 2020. That letter said that the applicable law was Guernsey law (it expressed the understanding that the law of tort in Guernsey "largely reflects the law of tort in England and Wales") and the proper forum was Guernsey. With regard to regulatory duties, it said this:

> "62. … Our client is a Guernsey company licensed and regulated by the Guernsey Financial Services Commission. In the context of your client's claim, in relation to which your client appears to accept that our client was acting as an insurance intermediary, the material regulations are contained in the Guernsey Code of Conduct for Authorised Insurance Representatives ('the Guernsey Code') which was effective from 1 January 2015. Whether or not the Guernsey Code mirrors the FCA framework is immaterial.
>
> …
>
> 65. Paragraph 7.1.4 of the Guernsey Code, which was effective from 1 January 2015, states that in circumstances where a policy is sold on an execution only basis the business is required to confirm to the client in writing that the client did not seek any advice from and was not given any advice by the authorised insurance representative. Given that all products were sold on an execution only basis (and could not have been sold on any other basis) this is the material regulatory requirement, from 1 January 2015 onwards, for the purposes of your client's claim. Our client is not aware of an equivalent regulatory requirement prior to 1 January 2015."

The Legal Framework

13. CPR r. 6.36 provides:

> "In any proceedings to which rule 6.32 and 6.33 does not apply, the claimant may serve a 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."

CPR r. 6.37 provides in relevant part:

> "(1) 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.
>
> …
>
> (3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."

14. The jurisdictional gateways for an order for service out are contained in paragraph 3.1 of Practice Direction 6B. The following gateways are relied on by the claimant:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> *General Grounds*
>
> (1A) A claim is made against a person in respect of a dispute arising out of the operations of a branch, agency or other establishment of that person within the jurisdiction, but only if proceedings cannot be served on the branch, agency or establishment.
>
> …
>
> *Claims in relation to contracts*
>
> (6) A claim is made in respect of a contract where the contract –
>
> (a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;

> (b) was made by or through an agent trading or residing within the jurisdiction or
>
> (c) is governed by the law of England and Wales.
>
> (7) A claim is made in respect of a breach of contract committed, or likely to be committed within the jurisdiction.
>
> ...
>
> *Claims in tort*
>
> (9) A claim is made in tort where –
>
> (a) damage was sustained, or will be sustained, within the jurisdiction;
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or
>
> (c) the claim is governed by the law of England and Wales."

15. The general principles to be applied on an application for permission to serve out of the jurisdiction were summarised as follows by Lord Collins of Mapesbury in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804, as follows (citations omitted):

> "71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements … First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success …. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other …. Third, the claimant must satisfy the court that in all the circumstances the [jurisdiction where the case is proceeding] is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

16. The requirement of a "good arguable case" was explained by Waller LJ when delivering the leading judgment in *Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 WLR 547, at 555:

> "'Good arguable case' reflects . . . that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

With reference to this passage, in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192, Lord Sumption said at [7][2]:

> "In my opinion it is a serviceable test, provided that it is correctly understood. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

17. If a question of law goes to the existence of jurisdiction, the court will usually decide the question of law, at least if the facts are sufficiently clear, rather than merely forming a view as to whether there is a good arguable case: the *Altimo Holdings* case, *per* Lord Collins at [81].

18. As for the requirement that the claimant demonstrate that England is the appropriate forum for the litigation (the *forum conveniens*), in the *Altimo Holdings* case, Lord Collins said at [88]:

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[2] None of the other members of the Court disagreed with Lord Sumption on this point. Lord Hughes agreed with Lord Sumption's judgment. Lord Wilson expressed agreement with the judgment of Baroness Hale of Richmond "and therefore with those parts of the judgment of Lord Sumption JSC with which she agrees." Lord Clarke of Stone-cum Ebony said that, insofar as there were issues between Baroness Hale and Lord Wilson on the one hand and Lord Sumption and Lord Hughes on the other, he preferred the reasoning of Baroness Hale and Lord Wilson. Baroness Hale disagreed with Lord Sumption on a different point but not, it appears, on the meaning of "good arguable case". At [33] she said that the correct test was "good arguable case" and that "glosses should be avoided"; but she said that she did not read Lord Sumption's "explication" as glossing the test. Even if glosses are to be avoided, explication is inevitable, because the expression "good arguable case" is not self-explanatory. Strictly, Lord Sumption's remarks were *obiter*, but they are certainly of assistance.

> "The principles governing the exercise of discretion set out by Lord Goff of Chieveley in *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, 475-484, are familiar, and it is only necessary to restate these points: first, in both stay cases and in service out of the jurisdiction cases, the task of the court 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; second, in service out of the jurisdiction cases the burden is on the claimant to persuade the court that England … is clearly the appropriate forum; third, where the claim is time-barred in the foreign jurisdiction and the claimant's claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimant of the benefit of the English proceedings."

19. In the *Spiliada Maritime* case, Lord Goff of Chieveley said at 480 that the question was "at bottom … 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." At 480-481 he proceeded to identify three respects in which the position under "service out" applications by (as they now are) claimants differed from that under applications by defendants for a stay on the grounds of *forum non conveniens*:

> "The first is that … in the [service out] cases the burden of proof rests on the plaintiff, whereas in the forum non conveniens cases that burden rests on the defendant. A second, and more fundamental, point of distinction (from which the first point of distinction in fact flows) is that in the [service out] cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power may be exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be granted 'unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction' …
>
> Third, … the jurisdiction exercised under [the service out provisions] may be 'exorbitant'[3]. This has long been the law. In *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch.D. 239, 242-243, Pearson J. said:

[3] Lord Goff went on to warn of the "unfortunate overtones" of the word "exorbitant" and to explain that it meant that the jurisdiction to permit service out was extraordinary, in the sense that it "should be exercised with circumspection in cases where there exists an alternative forum, viz. the courts of the foreign country where the proposed defendant does carry on business, and whose jurisdiction would be recognised under English conflict rules": *per* Lord Diplock in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* [1984] AC 50, at 65-66.

> 'it becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.'
>
> That statement was subsequently approved on many occasions … The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. …"

At 481-482 Lord Goff observed:

> "In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in *B.P. Exploration Co. (Libya) Ltd. v. Hunt* [1976] 1 W.L.R. 788, where, in my opinion, Kerr J. rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate."

Serious Issue to be Tried on the Merits

20. The first requirement (a serious issue to be tried on the merits) does not arise for consideration in the present case. Although the defendant has stated that it will, if necessary, strongly contest the claimant's allegations, for the purposes of this application it concedes that the relatively low threshold of a real rather than merely fanciful prospect of success on the claim has been crossed.

21. In the course of the hearing, Ms Colter did not seek to resile from the concession, but she did raise a point in connection with it, which it is convenient to mention here.

22. The claimant and the defendant entered into a series of standstill agreements. Within the time limited by the last of those agreements, the claimant commenced these proceedings. She did not commence proceedings in Guernsey and it is conceded on her behalf that she would now be out of time to do so. (I return to this point below.) As I have summarised above, the claimant alleges four causes of action: breach of contract; common law tort (that is, negligence); breach of duty under the UK regulatory scheme; and breach of duty under the Guernsey regulatory scheme. Only the fourth of these is

a claim under the law of Guernsey. The rest are pleaded as claims under the law of England and Wales.

23. Whether or not ICOBS may inform the content of other duties, the claim for breach of duty under the UK regulatory scheme faces (to say the least) considerable difficulties. As for contractual and tortious claims, it has been the defendant's expressed position since at least March 2020 that the applicable law is that of Guernsey, not of England and Wales. Before me, Mr McGarry did not concede the applicability of Guernsey law, but in connection with the jurisdictional gateways he did not seek to argue that the claimant had a "good arguable case" for the applicability of the common law of England and Wales. He did accept that, if the claimant were hereafter to seek to rely on the law of Guernsey in respect of contract or tort, she would need to make an application for permission to amend the claim form and the particulars of claim. See *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45, at [100], [163] and [165].

Jurisdictional Gateways: a "Good Arguable Case"

Ground (1A): branch etc within the jurisdiction

24. In respect of the ground in PD 6B, paragraph 3.1(1A), the claimant relies on the contention that the deceased's direct dealings with the defendant were with a certain Ms Elaine Bossé, who lived at and worked from an address in England. As this contention is also relevant to the claimant's case on another gateway, I shall set out some of the detailed facts here.

25. Ms Bossé has at all material times worked for the defendant as an administrator. She was formerly physically based in the office in Guernsey, but in 2012 she moved to England with her husband, whose job had been relocated there, and since then she has worked remotely from home. For tax reasons, her employer after 2012 was Sydney Charles UK LLP, but the evidence is that she has not carried out any work in her employer's business and has been solely engaged in work for the defendant. Ms Bossé has never had regulatory permissions or been authorised to act as an advisor or provide regulated services. Her role is that of an administrator, performing administrative duties. Mr Lepp states:

> "15. During her working hours Elaine is logged in to [the defendant's] electronic email and case management systems via [the defendant's] Guernsey-based server and was at the material time. She is also connected to the Guernsey office via a live Skype link during her working day and all of her outgoing emails contain (in the footer) the contact details, including the address, of the Guernsey office and are generally copied to one of the financial advisers based in the Guernsey office, principally for supervision purposes. It is also the case that the telephone and fax numbers on Elaine's emails were Guernsey numbers with the 01481 Guernsey country code, and Mr Smith would have had to telephone the Guernsey office to speak to Elaine. Elaine is, and has always been, very much part of the Guernsey team albeit she has more recently been physically based in England. I have

> never regarded her as, and she is not, a UK branch or UK agent of [the defendant]—she is simply a remote home worker.
>
> 16. In terms of post, all hard copy post was (and is) addressed to and received at the Guernsey office of [the defendant] and all client agreements entered into by [the defendant] constituted agreements with a Guernsey company. No corporate post was ever sent directly to Elaine. Once a week we put all of the hard copy post together and sent it to Elaine as the company administrator. Elaine then sorted the post, scanned it to [the defendant's] case management system via the Guernsey server and sent outgoing post to the relevant client on behalf of the Guernsey office. In addition to being part of Elaine's role as [the defendant's] administrator, on the rare occasions that post was sent to UK addresses, it made sense commercially for Elaine to send the post as it was much less expensive to send post to a UK address from within the UK rather than from Guernsey."

26. On 8 July 2013 the deceased sent by email to Ms Bossé a completed Client Questionnaire and a Client Agreement which he had signed. She acknowledged receipt and said, "I shall keep you informed of the progress of your application, it's at underwriting stage." Ms Bossé forwarded the documents to the defendant's Guernsey office, where the Client Agreement was signed by Ms Bossé's manager, Mr Gettings, who was a director of the defendant and was authorised by the GFSC for the provision of financial services. The same sequence occurred in respect of the execution of two subsequent Client Agreements, in October 2015 and in March 2017. In due course, the 2013 Life Assurance Policy schedule was sent to the deceased under cover of a letter dated 19 February 2014. The letter was on the defendant's headed paper, with its Guernsey address and contact details, and was signed by Ms Bossé, described as "Administrator". The return address written on the back of the envelope was Ms Bossé's home address in England.

27. In respect of the 2015 Life Assurance Policy, Ms Bossé sent an email to the deceased on 26 November 2015:

> "Dear Les
>
> Finally, I received the revised Evidence of Cover and have attached your first instalment invoice.
>
> Please read the terms and conditions carefully and if you agree to the terms, please pay the premium by the 1st December 2015.
>
> Should you have any queries, please do not hesitate to contact me. the original policy schedule will follow shortly in the post."

On 11 December 2015 Ms Bossé confirmed that payment had been received and that the deceased was on risk, and she said that she would post the policy document that day. When the defendant sent to the deceased the signed Execution Letter in respect of his proposal for the 2015 policy, the covering letter dated 16 December 2015 was signed by Ms Bossé and was posted by her in England.

28. Mr McGarry submitted before me that Ms Bossé's residence in England was sufficient, on the facts, to mean that the defendant had an "establishment", or possibly an "agency", there. (In paragraph 30 of his skeleton argument, by contrast, he relied on "branch and/or agency" but not on "establishment".) What was required, he submitted, was an element of permanency in the defendant's presence within the jurisdiction, and Ms Bossé's permanent residence here at all material times sufficed in that regard. I am unpersuaded by this argument. In my judgment, the claimant cannot rely on this gateway.

29. The gateway in paragraph 3.1(1A) was added with effect from 1 October 2022 and was derived from, and deliberately drafted as closely as possible to, Article 7(5) of Regulation (EU) No. 1215/2012 "on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", in the interests of achieving certainty and greater international recognition. The meaning of the words "branch, agency or other establishment" had been considered by the Court of Justice of the European Union. In *Mahamdia v People's Democratic Republic of Algeria* (2012), Case C-154/11, [2013] ICR 1, the Grand Chamber gave a preliminary ruling in the context of an employment claim against Algeria arising out of the operations of the Algerian embassy in Berlin.[4] The question was whether the embassy was an "establishment". At [48] the Court said:

> "In interpreting those concepts of 'branch', 'agency' and 'other establishment' the court has identified two criteria which determine whether an action relating to the operations of one of those categories of establishments is linked to a member state. First, the concept of 'branch', 'agency' or 'other establishment' implies a centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body: see *Blanckaert & Willems PVBA v Trost* (Case 139/80) [1981] ECR 819, para 11. Secondly, the dispute must concern acts relating to the management of those entities or commitments entered into by them on behalf of the parent body, if those commitments are to be performed in the state in which the entities are situated: see *Somafer SA v Saar-Ferngas AG* (Case 33/78) [1978] ECR 2183, para 13."

30. The approach of the CJEU confirms what I should have thought obvious in the very different context of the present case. Mere permanency is not the touchstone. What is required is "a centre of operations which has the appearance of permanency, such as the extension of a parent body." One thinks, for example, of the regional branch of a bank or the regional office of a company with its centre elsewhere. The present case is nothing like that. Like most people who work remotely, Ms Bossé was working from home. The location of her home was a matter of almost complete irrelevance. Her home was not a centre of operations; it had no management structure; it was not a place from which the defendant carried on business apart from the Guernsey office. It was

[4] The Court was concerned with the interpretation of the same wording in an earlier regulation, Council Regulation (EC) No. 44/2001, Articles 18(2) and 21. The corresponding provisions are in Articles 20 and 23 of Regulation (EU) No. 1215/2012.

simply the place from which she, for convenience, performed her administrative duties, as she might have performed them at a desk in the Guernsey office or elsewhere if she had moved house regularly within or outside England and Wales. To suppose that her home constituted some kind of branch office, agency or establishment of the defendant is unrealistic.

Ground 3.1(6): contract formation

31. In respect of the gateway in PD 6B, paragraph 3.1(6) the claimant relies only on sub-paragraph (b): that the claim concerns a contract that "was made by or through an agent [namely, Ms Bossé] … residing within the jurisdiction". Mr McGarry did not seek to rely on sub-paragraph (a), because the evidence shows that the two Client Agreements, signed by the deceased, were returned by him to the defendant at an email server in either Guernsey or Jersey and were signed on behalf of the defendant outside the jurisdiction. Mr McGarry did not seek to rely on sub-paragraph (c), because he accepted that the claimant's case for the applicability of the law of England and Wales was not sufficiently compelling to constitute a good arguable case (see paragraph 23 above).

32. The facts that mean that the contracts in respect of which the claim is brought were not made within the jurisdiction also show that the contracts were not made by an agent residing within the jurisdiction (i.e. Ms Bossé). The claimant must therefore rely, and does rely, on the contention that the contracts were made "through" Ms Bossé as an agent of the defendant.

33. In *National Mortgage & Agency Company of New Zealand Ltd v Gosselin* (1922) 12 Ll.L.Rep. 318 the Court of Appeal held that service out had been rightly permitted, where the Belgian defendants' London agent, Mr Middleton, had no authority to bind them by a contract but had authority only to receive offers and to transmit those offers to the defendants for their approval and acceptance. Warrington LJ said:

> "The question is whether in the circumstances this is the case of a contract made through an agent. A contract through an agent seems to me to be a contract the terms of which are negotiated and ascertained by the mediation of an agent. That was in the present case plainly done through Mr Middleton. He submitted prices, he obtained offers at these prices, and he transmitted to his principals for their acceptance the offers so obtained."

Atkin LJ, agreeing, said at 319:

> "It seems to be quite clear that the whole of the terms of the contracts were in fact negotiated by the agent of the defendants in this country, and it is also, to my mind, reasonably clear that the agent had no authority to complete the contracts by accepting them, but had referred them to his foreign principals, who had the sole right to accept or refuse the terms so negotiated here by the agent."

34. In my view, the present case is quite different from the *Gosselin* case and does not fall within paragraph 3.1(6)(a). Neither the Client Agreements between the deceased and

the defendant nor the Level Term Life Assurance policies were made "through" Ms Bossé in any relevant sense. She was, effectively, merely the conduit through which the arrangements for the contracts passed. She did not negotiate them. Her role was indeed purely administrative.

Ground 3.1(7): breach of contract

35. In respect of the gateway in PD 6B, paragraph 3.1(7) the claimant contends that her claim is "in respect of a breach of contract committed … within the jurisdiction." Mr McGarry submitted that the deceased's communications with the defendant were directly with Ms Bossé and that, so far as appears on the evidence, the actual performance of the defendant's services—providing the quotations, arranging the insurance through the broker and underwriter in London, sending out the insurance—were all carried out by her within the jurisdiction without being "re-routed" back to Guernsey. In that context, the omissions that constitute the preponderant ground of complaint against the defendant are to be regarded as omissions within the jurisdiction.

36. All of the alleged breaches of contract are breaches of the implied contractual obligation to exercise reasonable skill and care. Only one of the particulars of breach is alleged in terms of commission rather than omission. This is the allegation in paragraph 124(12) and paragraph 126(14) that the defendant

> "Made unclear communications to [the deceased] which gave the wrong impression that his policies covered death by natural causes when that was not the case."

Owing, perhaps, to the lack of specificity in this particular and the lengthy and discursive nature of the particulars of claim, it is unclear (at least, to me) what this allegation is referring to. The Level Term Life Assurance policies *did* cover death by natural causes; the problem with them was that they were each for a term of only one year. The deceased's complaint to the Channel Islands Financial Services Ombudsman in 2018 was indeed put on the basis that the defendant had wrongly informed him in early 2017 that he was covered for natural causes, but that has nothing directly to do with the present claim. (The Case Handler recommended a small payment of compensation for the distress that had been caused by the incorrect information.) I cannot identify an allegation of fact to which the one particular of a positive act of breach of contract relates.

37. The remaining allegations of breach of contractual or other duties are framed in terms of omissions. The position where the alleged breach takes the form of a failure to perform a contractual obligation was considered by the Court of Appeal in *Cuban Atlantic Sugar Sales Corporation v Compania de Vapores San Elefterio Limitada* [1960] 1 QB 187, which concerned the failure of shipowners to deliver the load at a port. The Court held that a breach by simple failure to perform is committed within the jurisdiction only if the contractual performance was required to be within the jurisdiction. See *per* Hodson LJ at 193-194 and Ormerod LJ at 196-197. I do not think that it can be said that the defendant was contractually obliged to render performance within the jurisdiction.

38. However, it seems to me that the manner in which a breach is formulated is capable of being misleading in this respect. A simple failure to perform occasions no difficulty.

Thus, in the *Cuban Atlantic Sugar Sales* case the shipowners were obliged to deliver the load but did not do so, because the vessel sank during the voyage. (The case turned on the fact that no port for delivery had ever been nominated, and it could in principle have been in Scotland or Northern Ireland, both outside the jurisdiction.) However, an allegation of a failure to perform the contract with reasonable skill and care may relate to acts or omissions, even if the particulars are framed in terms of failures. Thus, a surgeon who operates without reasonable care and skill is performing an act but doing so badly; and particulars of negligence against a motorist who drives into collision with a person or vehicle may be framed entirely in negative terms (failing to stop, or slow down, or take evasive action, or keep a proper lookout, etc).

39. In the present case, the allegations of breach of contract are, in my view, to be read and interpreted in the context of the lengthy factual narrative that precedes them and, as a matter of substance, they are capable of encompassing the complaints that the enquiries made of the deceased and the explanations given to him within the jurisdiction were inadequate and that the policies obtained for him within the jurisdiction were unsuitable. I agree with Ms Colter that the gravamen of the case concerns not anything that happened within the jurisdiction but the conduct of the retainer by those at the Guernsey office, in particular Mr Gettings. I also agree that, insofar as any breaches of contract were committed within the jurisdiction, they do not suffice to indicate that England and Wales is the *forum conveniens*. (In these respects I note the balanced submission in paragraph 12 of Ms Colter's skeleton argument.) However, the claimant does not have to show that all of the alleged breaches of contract were committed within the jurisdiction; it suffices that some of them were. In my judgment, this gateway is made out.

Ground 3.1(9): tort—damage, act and proper law

40. In respect of the gateway in PD 6B, paragraph 3.1(9), the claimant's primary reliance was on sub-paragraph (a): that there is a claim in tort and that "damage was sustained … within the jurisdiction". Mr McGarry also relied on sub-paragraph (b) (that the damage "results from an act committed … within the jurisdiction"); this corresponds to the argument regarding breach of contract. As with the contractual claim, sub-paragraph (c) is not relied on (see paragraph 31 above).

41. The argument in respect of sub-paragraph (a) is simply that the deceased, resident within the jurisdiction, sustained damage by the fact that he did not obtain a policy to cover him in respect of the relevant risk, namely death from natural causes.

42. The meaning of "damage" in paragraph 3.1(9)(a) was considered by the Supreme Court in *FS Cairo (Nile Plaza) LLC v Brownlie.* In a judgment with which all the other Justices agreed, Lord Lloyd-Jones referred to the view, expressed by Lord Sumption in *Brownlie v Four Seasons Holdings Inc*, that "damage" meant direct damage, in the sense of such damage to a non-pecuniary interest protected by law (such as bodily integrity, physical property and reputation) as would complete a cause of action of which damage was a constituent component, and did not refer to any pecuniary or consequential loss that evidenced the financial value of damage *stricto sensu*. At [49]-[51] Lord Lloyd-Jones gave his reasons for rejecting that approach as "unduly restrictive". He concluded at [51]:

> "In my view, therefore, there is no reason to read 'damage' in paragraph 3.1(9)(a) as limited to the damage which violates the claimant's right and which completes the cause of action. On the contrary, the word in its ordinary and natural meaning and when considered in the light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link a tort to the jurisdiction where such damage is suffered. Moreover, this reading is supported by the omission of the definite article in the current article of the rule, an amendment which was intended to reflect the decision in *Metall und Rohstoff* [*Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc* [1990] 1 QB 391] that it is sufficient that some significant damage has been sustained in the jurisdiction. (See *Brownlie I* per Lord Wilson at para 64, per Lord Clarke at para 68.)"

43. Ms Colter did not concede that this gateway was satisfied but she made her submissions with realism and candour. Her argument was that, in circumstances where the deceased's work took him for extended periods to distant parts of the world and where the evidence did not establish where he was at any relevant given time, the court could not be satisfied where the deceased was when he suffered the financial damage caused by the alleged wrongdoing.

44. In my judgment, the claimant has a good arguable case under paragraph 3.1(9)(a). The evidence is that the deceased and the defendant had their home in England throughout the period of the deceased's engagement of the defendant. In my view, as the deceased was resident in England, it makes no difference for the purposes of paragraph 3.1(9)(a) whether at any particular time he happened to be in Afghanistan or Iraq or somewhere else. (It is also said that any insurance policy would have been likely to be taken out in England, and that any moneys received under the policy would have been received into a bank account in England. These matters do not appear to me to be directly relevant to the question where the deceased sustained damage, though the latter point may have indirect relevance to the identification of his place of residence.)

45. Accordingly, in my judgment, the claimant has established a good arguable case that the tort claim falls within the gateway in paragraph 3.1(9)(a).

46. I also consider that the reasoning set out above in respect of breach of contract indicates that the claimant has established the gateway in paragraph 3.1(9)(b).

Conclusion on the jurisdictional gateways

47. The requirement of r. 6.36 is satisfied if "any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply". In the circumstances, I hold that the requirement is satisfied.

Appropriate forum (*forum conveniens*)

48. In summary, the claimant's contention that England and Wales is the appropriate forum rests on the following matters. The deceased and the claimant resided in England at all material times, and the claimant still does. Further, she has muscular dystrophy and has recently undergone reconstructive surgery on her foot, so that travelling to Guernsey for litigation would be difficult for her. The defendant, though based in Guernsey, provided services to clients residing in England and is part of a group of entities that includes an English LLP that provides financial and insurance services in England. The deceased's direct communications with the defendant were with Ms Bossé. The Life Assurance Policies were arranged via a broker in England and were placed with Lloyd's of London underwriters. The relevant damage was sustained in England. Both parties' legal representatives are based in England. Most if not all of the relevant witnesses are based in England. Any expert witnesses on the availability of suitable insurance cover will probably be based in England (the claimant has already instructed such an expert, who is based in England). Insofar as the law of England and Wales is applicable, this is clearly the convenient jurisdiction. Insofar as the law of Guernsey is applicable, it is similar to the law of England and Wales in material respects, at least as regards the common law, and this jurisdiction is able to consider such differences as may exist and to apply the Guernsey regulatory scheme.

49. The matters that I have just summarised fall far short, in my judgment, of establishing that England and Wales is clearly the appropriate jurisdiction in which this dispute ought to be determined. The deceased's residence within the jurisdiction carries little weight. His involvement with the defendant came about solely through his engagement by NCC, whose centre of operations was in Guernsey. (Indeed, the consultancy agreements between the deceased and NCC were expressly governed by the law of Guernsey and subject to the jurisdiction of the courts of Guernsey.) The claimant's residence in England is by itself of only little relevance, in my view, and does not affect the "overall centre of gravity of this dispute"[5]. The claimant's health might be relevant in principle, but the evidence that it would make it difficult for her to attend court in Guernsey at any time when a trial would be likely to take place is thin and, anyway, she might attend remotely. (Ms Colter adds the reasonable observation that these proceedings were commenced in London and that the claimant has not demonstrated that her health makes Guernsey any more inconvenient or inaccessible than London.) Importantly, the defendant is an entity registered, based and regulated in Guernsey. I do not consider that the existence of an English LLP within the same group is of any relevance. Even though that entity was formally the employer of Ms Bossé, she was not carrying out any relevant functions on its behalf, the deceased had no direct or indirect dealings with it, its business operations have nothing to do with the dispute, and it is not a party to the claim. The question of the applicable law seems to me to be neutral in this case: the applicability of the law of England and Wales does not suffice to indicate that this is the appropriate forum (cf. *Lekoil Limited v Akinyanmi* [2022] EWHC 282 (Ch), *per* HHJ Hodge QC at [36]); and, in addition to the regulatory claims under Guernsey law, it seems reasonably likely that the claimant will seek to raise alternative claims on the basis of Guernsey contract and tort law. The fact that services were provided to the deceased and other clients within this jurisdiction is relevant but, in my judgment, it is insufficient to move the "centre of gravity" from Guernsey to

[5] Cf. *per* HHJ Hodge QC in *Lekoil Limited v Akinyanmi*, at [37].

England and Wales. Ms Bossé's involvement has to be seen in proper context, where she was working at a Guernsey office, albeit remotely, and was performing an administrative as distinct from a professional role. As for the location of the broker and the underwriter in England, the claim is not against them and involves no enquiry into the adequacy of their conduct. Nothing turns on the fact that English lawyers have been instructed; indeed, as the proceedings have been brought in this jurisdiction, the fact is hardly remarkable. The location of factual witnesses seems to me to be neutral. Whatever may be the position regarding the identity of any expert witnesses, I should not regard the nature of the issues regarding insurance as making this jurisdiction any more appropriate than Guernsey. On the basis of all these matters, without more, I should be of the view that the claimant had not shown that this jurisdiction was clearly the appropriate forum. Indeed, I should consider that Guernsey was the more appropriate forum.

50. However, an additional matter is raised in the second and third witness statements of Jennifer Hutchinson. In summary, what is said is this. The claimant approached eight After The Event ("ATE") insurance providers with a view to funding litigation against the defendant. Only one of those providers was prepared to offer cover; however, the offered cover would not extend to court proceedings in Guernsey. Further, Guernsey's professional conduct rules do not permit legal representatives to enter Conditional Fee Agreements in Guernsey. The claimant is pursuing these proceedings in England and Wales with the benefit of ATE insurance from the one provider who offered it and a Conditional Fee Agreement with her counsel and solicitors. She was unable to afford to pursue litigation in Guernsey; it was for that reason that proceedings were not commenced there within the applicable prescriptive periods.

51. As Lord Goff observed in the *Spiliada Maritime* case (cf. paragraph 19, above), the court's fundamental task 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." Lord Collins' observations in the *Altimo Holdings* case, at [88], (paragraph 18, above), make clear that the existence of a time bar in Guernsey is capable of making England and Wales the appropriate forum, in the interests of doing practical justice, provided that "the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in [Guernsey]".

52. Ms Colter submitted that the claimant's evidence on this point was unsatisfactory. First, as a ground for establishing *forum conveniens* the funding difficulties were advanced very late. Second, the evidence relating to a highly fact-sensitive ground was lacking in detail: there was no information concerning the steps taken to investigate possible methods of funding litigation in Guernsey; there was no evidence as to what the ATE insurance providers were told concerning the status of the Guernsey claims, in circumstances where (it was said) a question might have arisen as to whether the Standstill Agreements were apt to extend to them; there was no detailed information as to the claimant's means (a point only alluded to in argument). In the circumstances, she submitted, the claimant could not discharge the burden upon her to demonstrate that England and Wales is clearly the appropriate forum, because she could not show that she had acted reasonably in allowing the claim in Guernsey to become time-barred.

53. In this regard, Ms Colter referred to the decision of the Privy Council in *The Pioneer Container* [1994] 2 AC 324. The plaintiffs sued the defendant shipowners in Hong Kong, although the bills of lading contained an exclusive jurisdiction clause that

required disputes to be determined in Taiwan. The judge, Sears J, refused the defendants' application for a stay, because the plaintiffs' claims in Taiwan had become time barred. The Court of Appeal of Hong Kong reversed that decision, on the grounds that the plaintiffs had acted unreasonably in failing to commence proceedings in Taiwan. The Privy Council dismissed an appeal from that latter decision, holding that the Court of Appeal had been fully entitled to take the view it did. The reasoning appears clearly in this passage from their Lordships' judgment (delivered by Lord Goff of Chieveley) at 348-349:

> "Sears J. concluded that the plaintiffs had not acted unreasonably in allowing the time bar to elapse in Taiwan. In so holding, he appears to have been influenced in particular by two factors, viz., that the plaintiffs would have had to put up a percentage of their claim (either 1 per cent. or 3 per cent.) as advance costs, and that, if an arrest had been made, counter security for the full amount of the claim would have had to be provided. However, as Cons V.-P. pointed out in the Court of Appeal, the truth of the matter was (as was indeed conceded before the Court of Appeal) that the plaintiffs had deliberately and advisedly allowed the time limit to expire in Taiwan; and the Court of Appeal did not see that the two matters relied upon by Sears J. provided sufficient justification for so doing. The amount of costs required to be put up in advance (about H.K.$1m.) was by no means large in the context of modern commercial litigation. As to security, there was no evidence that the defendants would not be able to satisfy any judgment given against them in Taiwan. In these circumstances, Godfrey J. described the position as follows:
>
> > 'If you find yourself bound to litigate in a forum which is more expensive than the one you would prefer, deliberately to choose the latter rather than the former seems to me (although the judge thought otherwise) to be forum shopping in one of its purest and most undesirable forms. And if in pursuance of your deliberate decision to litigate here instead, you let time run out in the jurisdiction in which you are bound to litigate, without taking the trouble (because of the expense) even to issue a protective writ there, you are not, as I think, acting reasonably at all; you are gambling on the chance of a stay being refused here and you cannot complain if you then lose that gamble. That may seem to you at the time a justifiable commercial risk to take. But that, in the context of the litigation, does not make your decision a reasonable one.'
>
> Accordingly, the Court of Appeal concluded that Sears J. had erred in the exercise of his discretion. Their Lordships cannot fault that conclusion."

54. More helpful than this particular illustration of the principle, I think, is the statement of principle itself, expressly relied on by the Privy Council in *The Pioneer Container*, in Lord Goff's speech in the *Spiliada Maritime* case at 483-484:

> "But the underlying principle requires that regard must be had to the interests of all the parties and the ends of justice; and these considerations may lead to a different conclusion in other cases. … Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country."

55. Although I accept that Ms Colter's criticism of the claimant's case on this point is not wholly lacking in force, in my judgment the evidence before me sufficiently indicates that the claimant did not act unreasonably in commencing proceedings in this jurisdiction and allowing her Guernsey claims to become time barred. This is not a case like *The Pioneer Container,* involving a commercial decision to engage in forum shopping to avoid an affordable expense. To pursue professional negligence litigation is a risky matter and, for an individual, a potentially very costly and even ruinous one. The deceased was not quite 60 years old when he died and had intended to continue working until the age of 65 years. The grant of probate shows the net value of his estate as nil. Presumably the claimant received what there was by survivorship. The Client Questionnaire that he completed records that he had £200,000 of investments in the form of stocks and shares: a not insignificant amount, but easily consumed by litigation. Whatever may be the rights and wrongs of the claims made in this case, it is clear that

the deceased sought life insurance in order to make adequate provision for the claimant in the event of his death and that he failed to achieve his aim. It is, in my view, entirely reasonable of the claimant to be unwilling to venture what remains to her on litigation against the defendant. The evidence persuades me that she would be unable to afford to litigate in Guernsey but, with the assistance of a CFA and ATE insurance, is able to do so in this jurisdiction. Practical justice requires that she be permitted to proceed here, so that her claim may be heard.

Conclusion

56. For the reasons set out above, I allow the claimant's application for permission to serve the claim form on the defendant in Guernsey.