Neutral Citation Number: [2024] EWHC 219 (KB)

Case No: KB-2023-002092

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2024

Before:

Alison Morgan KC
(sitting as a Deputy High Court Judge)

- -

Between:

Mariusz Szrek **Teresa Szrek** **Miroslaw Szrek** **Marzena Szrek**	**Claimants**
- and -	
DIV-ING D.O.O. **Euroherc Osiguranje D.D.** **Abyss- Centar Za Ronjenje I Sportove Na Vodi**	**Defendants**

- -
- -

Miss Sarah Prager K.C. (instructed by **Irwin Mitchell LLP**) for the Claimants

Hearing date: 26 January 2024

- -

Approved Judgment

.....

1. This is an application for permission to serve a claim form and associated documents on the defendants out of the jurisdiction, pursuant to Rule 6.36 of the Civil Procedure Rules (CPR).

2. I am also asked to determine an application for an extension of time for service of the claim form on the defendants, pursuant to Rule 7.6 of the CPR.

3. The Claimants in this matter are:
   i. Marius Szrek (the First Claimant)
   ii. Teresa Grazyna Szrek (the Second Claimant, mother of the First Claimant)
   iii. Miroslaw Wieslaw Szrek (the Third Claimant, father of the First Claimant)
   iv. Marzena Magdalena Szrek (the Fourth Claimant, sister of the First Claimant).

4. The First Claimant is Polish but is and was domiciled in England and Wales at all relevant times. The Second, Third and Fourth Claimants are the First Claimant's relatives, they are all Polish and all live in Poland.

5. The Defendants are:
   i. DIV-ING D.O.O. (the First Defendant)
   ii. Euroherc Osiguranje D.D.(the Second Defendant)
   iii. Abyss-Centa Za Ronjenje I Sportove Na Vodi (the Third Defendant).

6. The First and Third Defendants are, and were at all material times, companies registered in Croatia, offering diving and water-based excursions. In particular, one or both of the First and Third Defendants ran a dive centre known as 'Abyss', operating out of the basement of The President Hotel in Dubrovnik. The Claimants have sought to identify the nature of the relationship between the First and Third Defendants through a lawyer acting on their behalf in Croatia, Ms Ana Sihtar. The Third Defendant is understood to be a trading name/entity of the First Defendant.
7. The Second Defendant is the public liability insurer of the First and/or Third Defendant. The Claimants submit that permission should be granted to serve proceedings out of the jurisdiction on the Second Defendant on the basis of Practice Direction 6B 3.1(3)(a) and (b).

8. In short, the First Claimant alleges that he sustained significant injury as a result of the breach of contract and/or negligence on the part of the Defendants, their servants or agents.

The Facts

9. The following summary of the facts is based on the information set out in the Particulars of Claim dated 13 July 2023 and the witness statement of Daniel Matchett, solicitor for the Claimants, dated 21 August 2023.

10. In August 2020, the First Claimant and his family went on holiday to Dubrovnik, Croatia. Whilst on holiday, the First Claimant saw that the First/Third Defendants were offering the opportunity to go on a diving excursion. Although the First/Third Defendants have a website in the English language promoting diving excursions, it is not suggested that the First Claimant saw that website or made a booking with the

First/Third Defendants in consequence of anything on that website or in advance of his holiday to Croatia.

11. The First Claimant had some competence in diving, having gained a Professional Association of Diving Instructors (PADI) open water qualification in 2017 and having completed 32 dives.

12. The First Claimant made enquiries about diving with the First/Third Defendants on 12 August 2020. On 12 August 2020, the First Claimant claims that he entered into a contract with the First/Third Defendant for the provision of: a wetsuit and all necessary equipment; a dive guide; and for all the necessary transportation by boat to and from the location of the dive site. The First Claimant also claims that the First/Third Defendants represented to him that the dive that he would undertake would be suitable for his ability. He contends that the dive that was subsequently undertaken by him was not suitable for his level of expertise.

13. On 13 August 2020, the First Claimant attended the Abyss centre for the dive. The First Claimant claims that the quality of the equipment provided to him was poor, inadequate and unsafe. The First Claimant further claims that the dive was conducted in a negligent manner and to far too great a depth.

14. As a result, the First Claimant lost consciousness and ascended to the surface of the water quickly and without proper decompression taking place. It is claimed that this process caused the First Claimant a serious Type II decompression injury to his spine at Level C5.

15. It is further claimed that the First/Third Defendants did not provide appropriate information to the first responders and treating doctors thereafter, such as to allow them to identify the urgent need for decompression treatment to take place.

16. In short, the First Claimant argues that the accident on 13 August 2020 was caused or contributed to by breach of contract and/or negligence on the part of the First and Third Defendants, their servants or agents.

17. The Second Defendant is the public liability insurer of the First/Third Defendants. I have seen an insurance policy, translated from Croatian, held in the name of the First Defendant with the Second Defendant from 31 July 2000 to 31 July 2021. This policy provided insurance against general liability and states:

    'Insurance against general liability
    1. Public non-contractual liability of the insured party for damages caused to third parties, up to the insured amount per damage occurrence.'
    The insured amount is stated to be 26,544.56 Euros.

    In Article 4 of the policy ['Exclusions from coverage'] it is further noted: *'Insurer is not liable to compensate third parties: 1. For damages caused intentionally, by gross negligence, fraud by the insured or policy holder…'*

18. The First Claimant is now 41 years old. A report has been prepared by Mr I Siddique, dated 2 July 2023, setting out the nature of the injuries sustained by the First Claimant.

It is contended that the decompression injury to the spine at C5 has led to tetraparesis and that his injury has been life-changing.

19. A preliminary schedule of loss has been provided to the Court.

The history of proceedings

20. I have seen the detailed history relating to the attempts to facilitate formal and informal service of materials on the Defendants, set out in the statement of Mr Matchett. In short:

A. Those acting on behalf of the Claimants sought to obtain further information about the accident in 2021 and the relevant provisions under Croatian law, with the assistance of Ms Sihtar, the lawyer in Croatia.
B. A letter of claim was prepared and sent to the Third Defendant (in English and Croatian) on 5.7.22. A response should have been due within 6 months, so by 5.1.23. No response was received.
C. Further letters were sent to the Third Defendant in 2022 and early 2023. No responses were received.
D. Proceedings were issued on 5 April 2023 in the absence of any substantive response from the Third Defendant. By this time, the identities of the Second and First Defendants had been identified. Service has been by way of airmail and email.
E. Further correspondence has been sent to the Defendants thereafter, by airmail and email, with no response, although confirmation of delivery has been obtained.
F. The First and Third Defendants have not responded to any correspondence to date.
G. The Second Defendant sent a document titled 'Appearance and Defence' dated 19 December 2023. This was provided in English, having been translated from Croatian, together with the insurance policy which had also been translated from Croatian. On behalf of the Second Defendant, it has been submitted:
    i. The 'subject matter and territorial jurisdiction of the London Court for resolving of this legal matter is contested'. It disputes jurisdiction on the basis that: the damage occurred within Croatia; none of the Claimants are UK citizens; that the Second, Third and Fourth Claimants live outside of England and Wales.
    ii. Liability of the Second Defendant for compensation for damages, as the insurer, is contested. It relies upon Article 4 of the insurance policy, suggesting that it is not liable for an occurrence involving gross negligence on the part of the insured party.
    iii. 'Complaint is lodged in respect to reaching of limit (of insured amount) pursuant to insurance policy…'. In other words, it relies upon the limited insured amount set out in the policy.
    iv. The Second Defendant does not dispute that there was in place, at the relevant time, an insurance policy between it and the First Defendant.
    v. The Second Defendant does not accept the factual basis for the claim advanced.

The Legal Framework

21. In relation to the first application for permission to serve a claim form, particulars of claim and associated documents on the Defendants in Croatia, the application is made pursuant to Rule 6.36 of the Civil Procedure Rules:

6.36 *In any proceedings to which rule 6.32 or 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.*

22. Pursuant to Rule 6.37 of the CPR:

6.37

(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.
(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.
(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.
…
(5) Where the court gives permission to serve a claim form out of the jurisdiction –
(a) it will specify the periods within which the defendant may –
(i) file an acknowledgment of service;
(ii) file or serve an admission;
(iii) file a defence; or
(iv) file any other response or document required by a rule in another Part, any other enactment or a practice direction; and
(b) it may give directions about the method of service-
(i) give directions about the method of service; and
(ii) give permission for other documents in the proceedings to be served out of the jurisdiction.
(The periods referred to in paragraphs (5)(a)(i), (ii) and (iii) are those specified in the Table in Practice Direction 6B.)

23. Practice Direction 6B sets out the gateways that permit an application under Rule 6.36. As is set out below, the Claimants do not apply for permission in relation to a claim in relation to contracts. The application is advanced on the basis of the claim in tort. PD 6B 3.1(9) is as follows:

'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.'

24. Of particular relevance to whether or not a claim is made in tort where damage was sustained or will be sustained within the jurisdiction are the principles established in the Supreme Court judgment in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45. The first issue in that appeal was whether the claims in tort passed through the gateway in CPR PD 6B, paragraph 3.1(9), namely whether they satisfied the requirement for suing a defendant who is outside the territorial jurisdiction of the English courts that "damage was sustained ... within the jurisdiction".

25. At §81 of the judgment of Lord Lloyd-Jones (with whom the majority of the Court agreed) he observed: *'...I consider that there is no sound reason to limit "damage" in gateway 9(a) to damage which completes a cause of action....'*

26. Continuing at §83: *'In the present case the claimant makes claims under three heads: (1) a claim for damages for personal injury in her own right...In my view, all three heads of claim should be considered to relate to actionable harm suffered in the jurisdiction as a result of the wrongful acts alleged and therefore to pass through gateway 9(a). In this regard, I can see no reason to distinguish between the different heads of claim. So far as the first head is concerned, the pain, suffering and physical injury were suffered sequentially, first in Egypt and then in England. As Lady Hale observed in Brownlie I (at para 54), if I am seriously injured in a road accident, the pain, suffering and loss of amenity which I suffer are all part of the same injury and in cases of permanent disability will be with me wherever I am. The damage is in a very real sense sustained in the jurisdiction.'*

27. The next issue is then whether a claim satisfies the requirement that it has a reasonable prospect of success. This test has also been formulated in the case law as a "real prospect of success" or a "serious issue to be tried". As noted in §100 of *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45, where the claim form upon which the claimant seeks permission to serve out of the jurisdiction is accompanied by particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the claim asserted has a real prospect of success.

28. The final question is whether the Court is satisfied that, in all the circumstances, England is clearly. or distinctly the appropriate forum (*forum conveniens*). Here, guidance comes from the leading speech of Lord Goff in *Spilianda Maritime Corp v Cansulex Ltd* (The Spilianda) [1987] A.C. 460, HL. The burden is on a claimant to show that England is clearly the appropriate forum for the case. The Court must consider where the case could be most suitably tried for the interests of all parties and for the ends of justice. Whilst this is an exercise of the Court's discretion, the Court is required to reach an evaluative judgment upon whether, in light of the relevant considerations, England is clearly the more appropriate forum (see also *VTB Capital Plc v Nutritek Capital Holdings Ltd* [2013] UKSC 5; [2013] 2 A.C. 337, SC).

29. As noted in §79 of the judgment in *FS Cairo (Nile Plaza) LLC v Brownlie* (supra), the discretionary test of forum non conveniens operates as a mechanism 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 rule 6.37(3)).

30. In relation to the Second Defendant, permission to serve proceedings out of the jurisdiction is sought on the basis of Practice Direction 6B 3.1(3)(a) and (b):

    (3) A claim is made against a person ("the defendant") on whom the claim form has or will be served...and –

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

The hearing on 26 January 2024

31. The matter was listed in the High Court of Justice (King's Bench Division) on 26 January 2024. In advance of the hearing, having filed a Master's Appointment Form explaining the history of these matters, those acting for the Claimants notified the Defendants of the hearing as follows:
    A. By way of letters and emails dated 2 October 2023, 6 October 2023 and 24 October 2023 requesting the information required to complete the Master's Appointment Form;
    B. By way of letter and emails dated 5 December 2023, 4 January 2023, 9 January 2023 and 11 January 2023, the Claimant provided further correspondence to the Defendants, including notifying them of the date of the hearing on 26 January 2024.

32. The Second Defendant has confirmed receipt of the Claimant's Application dated 21 August 2023. As noted above, it provided an 'Appearance and Defence' document dated 19 December 2023 in response.

33. The First and Third Defendants have not responded to any of the above correspondence.

34. None of the Defendants attended the hearing.

35. At the start of the hearing, I was provided with a small bundle of material sent by the Second Defendant dated 20 January 2024, translated from Croatian to English on 24 January 2024 and sent to the Claimants' solicitor on the same date. This is described as an 'Appearance and Defence'. I have taken time to consider those submissions and refer to them below. Nothing within those submissions indicates that the Second Defendant had any intention of attending the hearing on 26 January 2024.

36. Nothing has been said or received from the First or Third Defendants at all. I am satisfied, however, that those acting for the Claimants have taken appropriate steps to seek to identify the proper correspondence addresses for the Defendants and provided the Defendants with notice of the hearing.

37. In light of the correspondence showing that all reasonable steps were taken to ensure that the Defendants were made aware of the hearing, I satisfied myself that it was appropriate for the Court to proceed in the absence of the Defendants, pursuant to Rule 23.11(1) CPR.

38. At the hearing, with the assistance of Ms Prager K.C., the following matters were clarified on behalf of the Claimants:

    A. In relation to the application for permission to serve out of the jurisdiction, permission is sought on the basis of Practice Direction 6B 3.1.(9)(a), namely on the basis of a claim in tort against the Defendants. I address this gateway in further detail below.

B. The Court is not being asked to determine the merits of the claim in contract. It is not suggested that the gateway relating to a claim in contract in Practice Direction 6B 3.1 (6) applies. The First Claimant's position is that he has an automatic right to pursue his claim against the First and Third Defendants in the Courts of England and Wales on the basis of what is contended to be a 'consumer contract' between the parties which is said to fall within the meaning of Section 15E of the Civil Jurisdiction and Judgments Act 1982. This is because it is contended that the First/Third Defendants directed commercial or professional activity to the UK as a whole, via an English language website and that the subject matter of the contract between the First Claimant and the Defendants (namely the provision of diving equipment and a supervised dive) fell within the scope of those activities. Whether this contention is correct or not, given that all of the services were to be performed in Croatia, does not require determination in this application.

C. The Second, Third and Fourth Claimants are named as claimants in this action because that is what those acting for the Claimants understand would be required under Croatian law. In Croatia, I am told, it is not possible for the First Claimant to seek damages on behalf of others. Their claim is tethered to the claim in tort. As with the First Claimant, I have not been asked to consider a claim in contract in relation to them. Although I have not considered any evidence which clearly identifies the role that the Second, Third and Fourth Claimants have had in the care of the First Claimant, it has been submitted to me that all three would be entitled to non-pecuniary damages in any event.

D. In relation to the Second Defendant, the Claimants contend that permission should be granted to serve proceedings out of the jurisdiction on the basis of Practice Direction 6B 3.1(3)(a) and (b): there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

E. As to why England is clearly the appropriate forum (*forum conveniens*) for the claim, Ms Prager K.C. relies on the following features (set out at §63 of the statement of Mr Matchett dated 21 August 2023):

a) The First Claimant resides in the jurisdiction.
b) The First Claimant has and will continue to suffer the consequences of the accident within the jurisdiction.
c) International diving standards will apply to the assessment of liability.
d) Quantum evidence will be required from a number of experts in the jurisdiction.
e) Future losses will be incurred in the jurisdiction and so are more appropriately addressed by experts within the jurisdiction.
f) Medical experts being instructed in the jurisdiction will avoid the First Claimant having to travel to Croatia for assessment and will avoid such experts having to attend trial in Croatia.
g) The logistical difficulties for the First Claimant in travelling to Croatia for legal proceedings in light of his injuries.
h) The inconvenience to the Defendants in responding to proceedings in this jurisdiction will be far less than for the First Claimant in Croatia.

Submissions received from the Second Defendant

39. I have considered with care the 'Appearance and Defence' submissions provided by the Second Defendant dated 19 December 2023 and 20 January 2024 and the insurance policy documents provided with the submissions.

Analysis

40. The overall effect of the relevant provisions is that in an application of this type, it is necessary for a claimant to establish:

    (i) that the case falls within at least one of the jurisdictional gateways in CPR 6BPD, para 3.1,

    (ii) that the claimant has a reasonable prospect of success, and

    (iii) that England and Wales is the proper place in which to bring the claim.

    Does the case fall within one of the jurisdictional gateways in PD 6B para 3.1?

41. The application against the First/Third Defendants is made on the basis that the case falls within PD6 3.1.(9): *'...A claim is made in tort where ... (a) damage was sustained or will be sustained within the jurisdiction.'*

42. I have considered the expert report of Mr Siddique and the Preliminary Schedule of Loss. On the basis of these documents, it is clear that the First Claimant has suffered, and continues to suffer, damages within the jurisdiction, applying the approach set out in *FS Cairo (Nile Plaza) LLC v Brownlie* (supra).

43. The claim relates to actionable harm suffered in the jurisdiction as a result of the wrongful acts alleged and therefore, in my opinion, passes through gateway 9(a). The pain, suffering and physical injury were suffered sequentially, first in Croatia and then in England. The damage is sustained in the jurisdiction.

44. In relation to the Second Defendant, who admits to being provider of third party insurance for the First/Third Defendants at the relevant time and in respect of harm caused to third parties for the type of activities undertaken by the First Claimant, I consider that the Second Defendant is a necessary and proper party to the claim, pursuant to PD 6B 3.1 (3)(a) and (b). Whilst I note what has been argued about the limit of the insured amount and the exclusion from coverage for acts of 'gross negligence' by the insured party, those are issues which require further examination in due course as to the proper extent of the Second Defendant's liability.

    Does the claim have a reasonable prospect of success?

45. I have considered whether the claim brought by all of the Claimants has a "real prospect of success" or a "serious issue to be tried". As noted above, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the claim asserted has a real prospect of success.

46. In my opinion, based on the facts set out in the particulars of claim, the claim brought by the First Claimant does have a reasonable prospect of success. Having reached that conclusion, I am also of the view that a claim made on behalf of the Second, Third and Fourth Claimants for non-pecuniary damages also has a reasonable prospect of success.

Is England and Wales the proper place in which to bring the claim?

47. The Second Defendant has indicated that it disputes the jurisdiction of the Court.

48. The discretionary test of forum non conveniens operates as a mechanism to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England. In this case, despite the challenge to jurisdiction that may be made on behalf of the defendants, in my view it cannot be suggested that the links between the claim and this jurisdiction are merely casual or adventitious. The particulars of claim in this case set out a number of practical and procedural reasons why the claim is more properly advanced in England. Of greatest significance in my view is that to a significant extent, the claimant's losses have been experienced in England. In addition, I note that the claim is likely to be assessed by reference to international standards of diving and the very considerable practical advantages of the matter being determined in England and Wales.

Conclusions

49. For all of the above reasons, permission to serve the claim form and associated documents on the defendants out of the jurisdiction, pursuant to Rule 6.36 of the Civil Procedure Rules (CPR), is granted.

50. I am also asked to determine an application for an extension of time for service of the claim form on the defendants, pursuant to Rule 7.6 of the CPR.

51. The application for an extension of time for service of the claim form was made on 21 August 2023, before the expiry date of 5 October 2023 (that being the date six months from the date of issue, pursuant to Rule 7.5(2) of the CPR).

52. The Claimants apply to extend the period of compliance under Rule 7.5(2). I have been provided with a statement from Mr Matchett, on behalf of the Claimants, setting out the attempts to ensure engagement by the Defendants within the original timeframe for service. I consider that the chronology setting out the failure of the Defendants to engage in these proceedings and to respond to the correspondence provided by the Claimants provides a good reason for granting an extension of time for service of the claim form.

53. Informal service on the Defendants of the particulars of claim and associated documents has been undertaken by the Claimants. In my view, all reasonable steps have been taken on behalf of the Claimants to deal with this matter expeditiously thereafter, including filing a Master's Appointment Form providing the Claimant's availability for a hearing of this application on 28 September 2023, before the expiry date of 5 October 2023.

54. I grant the application for an extension of time for service of the claim form. I am asked to extend the period of time for service for 8 months. The reasons given for this are

based on correspondence that those acting for the Claimants have had with the Foreign Process Section.

55. By email of 5 January 2024, the Foreign Process Section has indicated that the length of service of civil proceedings on companies in Croatia can take up to 5 months. That period will start once the documents arrive in Croatia.

56. All the relevant documents will need to be translated before they arrive in Croatia. Taking this period of time for translation work to be done and for service to take place, I consider that the requested extension period of 8 months is appropriate.

57. For all of the reasons set set out above, I grant both of the applications.