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From *Keefe to Tattersall* and section 3 of Brussels I recast: expansion and contraction in "*matters relating to insurance*"

Introduction

1. Prior to 13 December 2007 an English solicitor seeking compensation for an English client injured elsewhere in the European Union would have advised that client to pick up the 'phone to a personal injury lawyer in France, Spain, Italy, Greece etc. A claim against the tortfeasor domiciled outside England would have run into the jurisdictional sand of Article 2 of Regulation No 44/2001, the special jurisdictional rules for tort/delict claims would not have assisted for a harmful/tortious event outside England and a claim against the tortfeasor's insurer would also have faced an insurmountable jurisdictional obstacle. While attempts had been made to expand the jurisdictional reach of the English Courts (at least as to a claim against a tortfeasor's insurer) in cases like ***Pimblett Kevil v Clelland & Ethinki Insurance SA*** [2005] (QB) and Patterson v Carden [2000] (QB), such attempts had consistently failed. Then (specifically, on 13 December 2007 when judgment was handed down), ***FBTO Schadeverzekeringen NV v Jack Odenbreit*** [2007] Case C 463/06 happened. In certain circumstances, it became possible for an English Claimant to sue a tortfeasor's insurer in the courts of his (the injured party's) domicile: that is, in England. This became possible not because section 3 of Regulation No 44/2001 (now, section 3 of recast Brussels I Regulation No 1215/2012) said so in terms (if that had been the case, then decisions like ***Pimblett Kevil*** would have gone the Claimant's way). Instead, this jurisdictional possibility became a reality because the Court of Justice of the European Union told us so: a "*teleological*" interpretation of the legislation permitted a Claimant-friendly result in which the jurisdictional boundaries of section 3 of the Regulation were expanded. As we shall see, the expanionist approach of the Court of Justice was also adopted by the Court of

Appeal in England before – in a neat piece of chronological symmetry – another December judgment of the Court of Justice slammed shut the jurisdictional door.

"Odenbreit" claims

2. An "***Odenbreit*** claim" is shorthand for an action brought by a Claimant against the wrongdoer/tortfeasor's EU insurer in the Courts of the EU Member State where the Claimant is domiciled. Such actions are to be characterised as claims in tort (see, in this regard, ***Maher v Groupama*** at p 1571E – F *per* Moore Bick LJ) and proceed on the basis that the Claimant is provided by the proper law of the tort with a direct right of action against the insurer. Despite some early doubts about the matter, it is clear that such actions are not only available to Claimants in a road traffic accident context (where the EU Motor Insurance Directives may be relevant to the proper construction of the Brussels I Regulation), but also in a non-motor context.

3. The Claimant in ***Odenbreit*** was a German national domiciled in Germany. He was injured in a road traffic accident in the Netherlands. The tortfeasor driver's insurer was a Dutch-domiciled company. The Claimant commenced proceedings against the Dutch insurer Defendant in the German Courts. There was a challenge to the jurisdiction of the German Courts. The jurisdiction challenge failed. It will be noted that (what is now) Article 11(1)(b) of the recast Regulation provides the "*policyholder, the insured or the beneficiary* [of a policy of insurance]" with the right to sue an EU insurer "*in the courts for the place where the claimant is domiciled*". The question referred by the German Court to the European Court of Justice was whether Article 11(1)(b) provided the same jurisdictional right to the victim of the road traffic accident. On what it described as a "*teleological interpretation*" of section 3 of the Brussels legislation, the Court of Justice answered this question in the affirmative and sought to justify such interpretation on the basis that it provided the Claimant victim – the weaker party in this transaction – with a larger than usual menu of jurisdictional options. The European Court of Justice stated, "*… the injured party may bring an action directly against the insurer before the courts for the place in a Member State where that injured party is domiciled, provided that such a direct action is permitted and the insurer is domiciled in a Member State.*" The Court's decision in this regard is based on the following:

a. Article 13(2) of Recast Brussels I provides, "*Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.*" The Court held that, absent an interpretation of Article 11(1)(b) which extended the same jurisdictional privilege to the accident victim Claimant (as to the policyholder, insured or beneficiary), Article 13(2) of the Recast Brussels I Regulation would have no meaningful effect;

b. An interpretation of this kind was consistent with the rights provided by Recast Brussels I to the accident victim Claimant (the weaker party) and with the rights referred to in what was then the Fourth EU Motor Insurance Directive (later incorporated in the consolidated Directive) which required EU Member States to provide a direct right of action against Motor insurers and which, in its recitals, suggested that such direct right of action was matched by a jurisdictional right for the road traffic accident victim to sue Motor insurers in the Courts of his – the accident victim's – domicile.

4. What did the European Court of Justice mean when it stated that the condition for the jurisdictional right provided by Articles 11 and 13 of Recast Brussels I was that, "*a direct action is permitted*"? The answer to this is provided in the Court of Appeal judgments in *Keefe v Mapfre Mutualidad* [2015] 1 WLR 905 (CA):

a. *Per* Gloster LJ, at p 927A – C, *"I conclude, that, in the present case, "a direct action" against the Insurer was "permitted" under "the national law" of the lex fori (ie England) for the purposes of article 11(2) because English law would regard the question as to whether the claimant had a direct cause of action against the Insurer as one to be determined by reference to Spanish law pursuant to English law's private international law rules in operation before Rome II. In Maher v Groupama Grand Est [2010] 1 WLR 1564 , para 11, Moore-Bick LJ approached the question as to whether a direct cause of action against the insurer was "permitted" for the purposes of article 11(2) simply by reference to the applicable law of the insurance contract 15 , but, as is apparent from para 80 of his judgment he now concludes that the existence of a direct right of action against the insurer is to be determined by*

reference to the law of the place where the wrongful act of the insured occurred."

b. *Per* Moore-Bick LJ at p 939F – H, *"That makes it necessary to identify the system of law by reference to which the existence of a direct right of action against a liability insurer is to be determined. In Maher v Groupama Grand Est [2010] 1 WLR 1564 (in which the issue did not arise for decision) I suggested in passing that it was the proper law of the contract, but on further reflection I think that may not be correct. There will be no contractual relationship in the ordinary sense between the injured party and the insurer. The right of the injured party to recover directly from the insurer will therefore not arise under the contract of insurance (unless, perhaps, the proper law of the contract recognises some kind of third party right of a contractual nature). Nor does it depend on any breach of duty by the insurer personally. If it exists at all as a substantive right, it is likely to equate to a right to hold the insurer vicariously liable for the tort of his insured. In the present case the answer will be the same in any event, since the proper law of the contract of insurance is Spanish law and the accident occurred in Spain, but, for the reasons which follow, I think the existence of a direct right of action against the insurer will generally fall to be determined by reference to the law of the place where the wrongful act of the insured occurred."*

Article 13(3) of the recast Brussels I Regulation: a claim in the same Court against the insured?

5. In circumstances where an ***Odenbreit*** claim proceeds in the English Court (being, the court of domicile of the Claimant), can the Claimant also bring proceedings in the English Court against the insured?

6. Why does this matter? If the insurance provides only limited financial remedy to the catastrophically injured Claimant and/or if there are underlying doubts about coverage in principle, then the Claimant is likely to want to "*top-up*" or to obtain the security of suing the tortfeasor insured (and to do so in the Court in which the ***Odenbrei***t claim proceeds).

7. In context, the relevant provisions of section 3 of the Recast Brussels I Regulation are as follows:

Recital (14) "*A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised. However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile."*

Recital (18) *"In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."*

Recital (21) *"In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously."*

Article 11(1) *"An insurer domiciled in a Member State may be sued: (a) in the courts of the Member State in which he is domiciled; (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer."*

Article 13 *"1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured. 2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted. 3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."*

8. In ***Maher v Groupama Grand Est*** [2010] 1 WLR 1564 (CA) Moore-Bick LJ observed *obiter (at p 1571D – E), "I think there is a strong argument for holding that the proper administration of justice makes it essential that the claimant should be able to join both insurer and insured in the same action where it is necessary to do so to avoid the*

risk of irreconcilable judgments. In the present case Mr and Mrs Maher were entitled to bring proceedings against Groupama in this country following the Odenbreit case … and, although it is unnecessary finally to decide the matter, I think that they were entitled to join M Kress [tortfeasor] *or his estate as an additional defendant."*

9. Jurisdiction over the Claimant's claim against the insured was at the heart of the decision of the Court of Appeal in ***Keefe v Mapfre Mutualidad***. In this case, it was held that:

a. Spanish law permits a direct action against the Defendant insurer and, in such circumstances, also permits joinder of the insured;

b. Following the decision of the Court of Justice in ***Odenbreit***, there would be no justification for a restrictive interpretation of Article 13 of the Recast Brussels I Regulation either so that the insurer only may be joined as Defendant party or so that the insured may only be joined where there was an insurance dispute between insurer and insured;

c. Further, *per* Gloster LJ at p 929D - E, *"… the whole point of article [13] …was to enable direct actions against liability insurers to be brought in the courts of the injured party's domicile (irrespective of whether there was any dispute in relation to the policy of insurance). Once that is taken as a given, there is no logical reason for restricting joinder of the insured/alleged tortfeasor under article* [13(3)] *… to situations where there is a policy dispute, even taking into account the well-recognised principle that article* [13(3)] *… was an exception to the general rule on jurisdiction prescribed by article* [4] *… , (viz that a defendant should be sued in the court of the member state where he is domiciled), and therefore should be narrowly construed."*

d. As to the argument that the insured might have a legitimate expectation to be sued in the Courts of his/her domicile, the Court of Appeal rejected this in trenchant terms (see, p 930A – C), as it did also the question as to whether there needed to be "*some sort of threshold requirement that there is a risk of irreconcilable judgments*" before the accident victim Claimant could invoke Article 13(3) in an action against the insured (see, p 930G – H);

e. It was further held by the Court of Appeal (at p 932C – F *per* Gloster LJ) that, "*… if a claimant seeks to invoke a court's jurisdiction under article [13(3)] … to join an alleged tortfeasor/insured as a party to a direct claim against an insurer, then, irrespective of whether the national state's procedural rule is discretionary (as it is in the case of CPR r 19(2)), the national court is bound to accept that jurisdiction. My reasons for this conclusion are: (i) article* [13(3)] *… contains no objective proviso of the type to be found in article* [8] *…(1)(2) which requires the court to be satisfied respectively either that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings" (article* [8] *…(1)); or that the proceedings were not "instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case". (ii) On the contrary, the use of the words in article* [13(3)] *… "the same court shall have jurisdiction over them" (my emphasis) suggests that the court is obliged to accept jurisdiction. (iii) Such an interpretation gives effect to the policy objectives expressed in recitals … of predictability, certainty, the protection of the weaker party in contracts of insurance, the harmonious administration of justice and the avoidance of risk of irreconcilable judgments etc. (iv)… the selection of the court in which to bring a claim was a matter for a claimant. I agree that if the Judgments Regulation confers jurisdiction, it is a matter of no relevance that a defendant might have preferred another jurisdiction, or even might have expected another jurisdiction: see per Advocate General Mengozzi, at para 52 of his opinion in Freeport plc v Arnoldsson (Case C-98/06) [2008] QB 634."* The Court went on to hold, in the alternative, that if there were a discretion to exercise jurisdiction in the Claimant's action against the insured, then it should be exercised (it was a matter of common sense that the relevant actions – against insurer and insured – should proceed in the same Courts).

10. In ***Keefe*** the Defendant insured was granted permission to appeal to the Supreme Court where the jurisdictional question was referred to the Court of Justice in Luxembourg before the claim was compromised on confidential terms (without an Advocate-General's Opinion and without a judgment from the Court, albeit not before the EU Commission had weighed in with some submissions on the matter).

11. In ***KABEG v MMA IARD*** Case C-340/16 the Luxembourg Court's analysis of section 3 of the Regulation was focussed on identifying the (economically) weaker party to the dispute (*per* ***Odenbreit***), but the Advocate-General's Opinion which preceded the judgment analysed section 3 of the Regulation in the following terms (paras 36 – 37), " *I do not think that it would be either necessary or wise to attempt to provide a general and exhaustive definition of what is a 'matter relating to insurance' and, hence, what is 'insurance'. That can be left in the hands of legal scholarship. There is, however, one element that emerges from the reviewed case-law, naturally tied to the logic of the Brussels Convention/regulations system: for the purpose of international jurisdiction, the basis for ascertaining what is a 'matter relating to insurance' is essentially 'title-based'. Is the title for which an action is launched against a specific defendant (in other words, the cause of that action) the ascertaining of rights and duties arising out of the insurance relationship? If yes, then the case can be deemed as a matter relating to insurance. In the context of Section 3 of Chapter II of Regulation No 44/2001, a 'matter relating to insurance' then simply concerns the ascertaining of rights and duties of any of the parties referred to in Article 9(1)(b) and Article 11(2) to the extent that these rights and duties are said to arise out of an insurance relationship." While these pronouncements were thought by some to point in a certain direction, they did not directly answer the* ***Keefe*** *jurisdictional question.*

12. ***Keefe v Mapfre Mutualidad*** was directly applied in the English Court in ***Lackey v Mallorca Mega Resorts SL & Another*** [2019] EWHC 1028 (QB): another Spanish law jurisdictional battle in a non-motor claims context. In this case, Master Davison declined the Defendant's invitation to refer (the same questions referred in ***Keefe v Mapfre Mutualidad***) to the Court of Justice (see, paragraph 27 per Master Davison). Master Davison was wholly unpersuaded that the EU authorities (and ***KABEG v MMA IARD*** Case C-340/16 in particular) gave him any assistance at all.

13. In the circumstances, and in summary, there was a time when the English Court's answer to the question posed above (ie. where an ***Odenbreit*** claim proceeds in the English Court, can the Claimant also bring proceedings in the English Court against the insured?) was a clear affirmative :

a. There were *obiter* observations in support of this jurisdictional option in the Court of Appeal in ***Maher v Groupama Grand Est*** (CA) (the Court of Appeal expressing the view – in that case – that it suited the interests of convenience for the claim against the insurer and the insured to proceed in the same Court and at the same time);

b. There was clear authority (following comprehensive argument) in support of this proposition (***Keefe v Mapfre Mutualidad*** in the Court of Appeal) – noting, however, that the Defendant insured in ***Keefe*** was granted permission to appeal to the Supreme Court which referred the issue to the Court of Justice before the case was compromised;

c. There was application of the ***Keefe*** principle (without reference to Luxembourg) in ***Lackey v Mallorca Mega Resorts & Another*** [2019] EWHC 1028 (QB) (albeit, in a case decided by a QB Master).

Subsequent developments in the English Courts

14. The confidence displayed by the Court of Appeal in ***Keefe*** and by Master Davison in ***Lackey*** swiftly evaporated.

15. In ***AB v IVI Madrid*** SL [2019] 9 WLUK 373 (QB) HHJ Rawlings (sitting as a Judge of the High Court) declined to follow ***Keefe*** (CA) and instead referred the jurisdictional question to the Court of Justice, saying this (para 41):

"I have come to the conclusion that it is appropriate to refer to the CJEU the question of whether it is a requirement of Article 13 (3) that, for the injured person to make a parasitic claim against the insured, the claim against the insured must involve 'a matter relating to insurance' (I consider that it would also be appropriate to seek guidance from the CJEU as to what the meaning of the phrase 'a matter relating to insurance' is, given that Lady Justice Gloster and the Supreme Court appear to have considered that it means that there must be a question about the validity and effect of an insurance contract, whereas Attorney General Bobek [in ***KABEG****] appears to consider that the claim only needs to concern the rights and duties arising out of an insurance relationship)."*

16. Pending the outcome of the reference in ***IVI Madrid SL***, the tort/delict claim in which the same jurisdictional question arose was stayed in ***Hutchinson v Mapfre*** [2020] EWHC 178 (QB). However, as in ***Keefe***, the claim in ***IVI Madrid SL*** was compromised on confidential terms (after submissions had been filed with the Court of Justice, but before the reference had been made the subject of any opinion and before a Luxembourg judgment).

17. In the meantime (and at a high level of generality with respect to the jurisdictional issue with which this paper is concerned), the Supreme Court offered the following thoughts on section 3 of the Regulation in ***Aspen Underwriting Ltd v Credit Europe*** [2021] AC 493 (per Lord Hodge DPSC):

a. The title of section 3 was "*Matters relating to* insurance" and should, therefore, be contrasted with and was broader than, "*Matters relating to an insurance contract*";

b. It was evident in the case law of the CJEU that section 3 was concerned not only with the *parties* to the insurance contract, but to other persons (the beneficiaries and injured persons);

c. All persons falling within the categories of policyholder, beneficiary and (*per* ***Odenbreit***) injured persons were to be treated as weaker parties for the purposes of jurisdiction.

18. ***Aspen*** hinted at a possible approach to the jurisdictional conundrum presented by the Claimant's tort/delict against the ***Odenbreit***-claim insurer's insured without providing a definitive answer. It took a District Judge in the Birkenhead County Court to achieve what the High Court, Court of Appeal and Supreme Court had not: the answer.

Tattersall

19. The final chapter in this saga came in the very late Article 267 reference to the Court of Justice in ***Tattersall v Seguros Catalana Occidente*** [2021] Case C-708/20 (9 December 2021). Not only was this (unusually) a reference to the Court by a District Judge sitting in the County Court in Birkenhead, it was also among the final tranche of UK cases referred to Luxembourg. The background facts of ***Tattersall*** were typical of cross-border personal injury claims. The Claimant, domiciled in England, was holidaying in Spain in 2018 when she fell over on the patio of her holiday rental accommodation. It was the Claimant's case that she had tripped over a step which ought to have been marked or for which there ought to have been a handrail or warning sign. The Claimant suffered injury as a result of the fall. The owner of the accommodation (EB) was a private individual domiciled in the Republic of Ireland. Occidente, a Spanish-registered insurance company, was EB's civil liability insurer for the property. The Claimant brought proceedings in England for her injury/losses and relied on causes of action in tort/delict and in contract. Spanish law permitted a direct right of action against the insurance company (Occidente) and the ***Odenbreit*** claim was jurisdictionally secure. EB challenged jurisdiction in the English Court. Occidente did not contest jurisdiction and, instead, entered a Defence. Occidente's position – apparently identified in the context of EB's jurisdictional challenge – was that coverage under the insurance policy was limited so as to exclude indemnity to EB in her use of the property for paying third parties like the Claimant. Occidente's application for a summary determination in this regard was stayed by the County Court pending resolution of the reference to the Court of Justice in Luxembourg. In the circumstances, ***Tattersall*** was a case where there was an underlying and unresolved issue as to the extent of the insurance coverage provided by Occidente to EB. It was also, of course, the reason why the Claimant was pursuing EB in addition to Occidente (cf. ***Keefe*** *et al* where concerns about the extent of coverage and limits on the available indemnity had also driven the joinder of the alleged tortfeasor Defendant in addition to the insurer).

20. As to jurisdiction, the Claimant's case against EB was based on conventional ***Keefe*** *et al* grounds: as summarised in the judgment of the Court of Justice, "*… a claimant may bring an action against an insurer domiciled abroad under Article 13(3) of that regulation. In her [the Claimant's] view, the existence of a 'dispute' between the insurer and the insured regarding the validity or effect of the insurance policy is not necessary in that regard. The only requirement under Article 13(3) is that such an action against the insured is provided for by the law governing direct actions against the insurer, in this case Spanish law.*" By contrast, the position of EB was

summarised as follows by the Court, "*… the provision* [viz. Article 13(3)] *only applies to insurance claims. According to EB …* [the Claimant's] *claim is a claim for compensation for consequential loss and damage arising from alleged negligence in the provision of holiday accommodation. It is not an insurance claim and cannot become one merely because it was brought in the same action as the direct action against the insurer."* The Court's breezy summary of the parties' arguments did not do justice to the sophistication of the parties' arguments or their citation of authority to support their positions. It is also striking that the Court chose to give judgment (over just four pages) without first obtaining an Opinion from the Advocate-General. To the extent that English Courts of authority have regarded the issue as difficult and as requiring careful analysis, citation of authority and – on multiple occasions – reference to Luxembourg, the Court of Justice singularly chose not to adopt the same approach.

21. The Birkenhead Court referred the following questions to the Luxembourg Court:

"(1) Is it a requirement of Article 13(3) of [Regulation No 1215/2012] that the cause of the action on which the injured person relies in asserting a claim against the policyholder/insured involves a matter relating to insurance?

(2) If the answer to [question 1] is in the affirmative, is the fact that the claim which the injured person seeks to bring against the policyholder/insured arises out of the same facts as, and is being brought in the same action as the direct claim brought against the insurer sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance even though the cause of action between the injured person and the policyholder/insured is unrelated to insurance?

(3) Further and alternatively, if the answer to [question 1] is in the affirmative, is the fact that there is a dispute between the insurer and injured person concerning the validity or effect of the insurance policy sufficient to justify a conclusion that the injured person's claim is a matter relating to insurance?

(4) If the answer to [question 1] is in the negative, is it sufficient that the joining of the policyholder/insured to the direct action against the insurer is permitted by the law governing the direct action against the insurer?"

22. The Court chose to answer the first three questions together, distilling the "essence" of these questions to the following, "*… whether Article 13(3) of Regulation No 1215/2012 is to be interpreted as meaning that, in the event of a direct action brought by the injured person against an insurer, in accordance with Article 13(3) thereof, the court of the Member State in which that person is domiciled may also assume jurisdiction, on the basis of that Article 13(3), to rule on the claim for compensation brought at the same time by that person against the policyholder or the insured who is domiciled in another Member State and who has not been challenged by the insurer*." The Court's answer can be summarised as follows:

a. The Court first directed itself that a provision (such as Article 13(3)) "*must … take account not only of the terms thereof, but also of its context and the objectives pursued by the legislation of which it forms part*": in other words, teleology – rather than the letter of the law – was the key to interpretation (as *per* ***Odenbreit***);

b. In any event, so the Court held, the literal wording of Article 13 did not answer the question posed;

c. The Court held that the "*general scheme*" of the Regulation was an important interpretative tool, together with the title of section 3 – "*Jurisdiction in matters relating to insurance*" – both of which established an "*autonomous system for the allocation of jurisdiction in insurance matters*";

d. The *autonomous* nature of the system instituted by section 3 (and emphasised by Article 10 of the Regulation) meant that a meaningful distinction could and should be drawn between insurance matters and "*the special Jurisdiction established by Section 2* [of the Regulation] *in relation to matters of contract or tort*";

e. In order to fall within section 3 *"the action before the court must necessarily raise a question relating to rights and obligations arising out of an insurance relationship between the parties to that question* [emphasis added]" (a proposition extracted directly from the Opinion of Advocate-General Bobek in ***KABEG***). The Court added that a claim against the insured/policyholder did not relate (in the requisite

sense) to the insurance relationship simply because it arose out of the same facts or in the same action as the direct claim against the insurer. Equally, the existence of a dispute between insurer and injured party as to the meaning or extent of coverage did not mean that the action related to the rights and obligations of the parties to the insurance contract. In a sense, this might provide a complete answer to the question before the Court and it clearly has little to do with teleology or context. It might instead be characterised as a rather reductive black letter approach to the legislation (of precisely the kind which the Court had declined to adopt in Odenbreit);

f. However, the Court went on to deal with teleology and, in this regard, held, *"… it is apparent from recital 18 … that actions in insurance matters are characterised by a certain imbalance between the parties, which the provisions of Section 3 … are intended to correct by giving the weaker party the benefit of rules of jurisdiction more favourable to his or her interests* [viz. the right to sue in the Courts of their own domicile] *than the general rules. … This imbalance is generally absent where an action does not concern the insurer, in relation to whom both the insured and the injured person are considered to be weaker."*

g. The purpose of Article 13(3) was, the Court held (citing a passage in the *Jenard* report), to grant the insurer the right to bring a third party claim against the insured in respect of its (the insurer's) liability to the injured party. It followed (so the Court stated in something of a *non sequitur*) that, "*… when an action for damages has been brought by the injured person directly against an insurer and the latter has not brought such an action against the insured concerned, the court seised cannot rely on that provision to take jurisdiction over the latter*." The Court acknowledged that its approach to section 3 might well mean that there would be parallel proceedings in different jurisdictions against insurer and insured (contrary to recital 16 of the Regulation and "*the proper administration of justice*" which had concerned the Court of Appeal in ***Maher v Groupama Grand Est***), but this concern did not justify circumvention of the special rules of jurisdiction contained in section 2 (which, the Court held, would follow from an approach to section 3 which accorded with the Claimant's arguments);

h. Given the Court's emphatic answer to the first three questions, it declined to answer the fourth question referred to it.

23. In the circumstances, the ***Keefe*** conundrum has been answered and the jurisdictional door has been closed – at least for now. The teleological approach to section 3 expanded the Claimant's range of jurisdictional options in ***Odenbreit*** whereas a more literal construction was adopted in ***Tattersall*** and resulted in a contraction. Readers may be forgiven for regarding the Luxembourg Court's approach in both cases as somewhat reminiscent of Humpty Dumpty's famous answer to Alice: "'*When I use a word,' … 'it means just what I choose it to mean — neither more nor less*.'" Given that the English Courts had shown the greatest enthusiasm for picking over the meaning of section 3 (and Article 13(3) in particular) of the Regulation we might have to wait until the EU permits entry to Lugano before these issues are revisited. In the meantime, most doors to jurisdiction in England in respect of EU-domiciled Defendants will remain firmly shut.

ABOUT THE AUTHOR

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Matthew Chapman QC was called in 1994 and took silk in 2017. Widely regarded as one of the best travel lawyers of his generation, he has been involved in almost all of the leading cases in the field of cross-border litigation in the last two decades. Together with his colleagues at 1 Chancery Lane, he co-authors the leading legal textbook in the area, and is described in the legal directories as being 'the go-to barrister for complex issues of jurisdiction and applicable law'.