Hilary Term
[2020] UKSC 11
On appeals from: [2017] EWHC 1904 (Comm)
and [2018] EWCA Civ 2590

JUDGMENT

Aspen Underwriting Ltd and others (Appellants) *v* Credit Europe Bank NV (Respondent) Aspen Underwriting Ltd and others (Respondents) *v* Credit Europe Bank NV (Appellant)

before

Lady Hale
Lord Reed
Lord Kerr
Lord Hodge
Lord Lloyd-Jones
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

1 April 2020

Heard on 4 and 5 November 2019

Aspen
Peter MacDonald Eggers QC
Sandra Healy
(Instructed by Kennedys Law LLP (London))

Credit Europe
Steven Berry QC
Adam Board
(Instructed by Campbell Johnston Clark Ltd (London))

LORD HODGE: (with whom Lady Hale, Lord Reed, Lord Kerr, Lord Lloyd-Jones, Lord Kitchin and Lord Sales agree)

1. These appeals are concerned with a dispute over the preliminary question of the jurisdiction of the High Court of England and Wales in proceedings which commenced in December 2016. As I explain more fully below, the underwriters, Aspen Underwriting Ltd and others ("the Insurers"), insured the "Atlantik Confidence" ("the Vessel") under a hull and machinery risks insurance policy ("the Policy") on the Vessel. Credit Europe NV ("the Bank"), a bank which is domiciled in The Netherlands, funded the re-financing of two vessels, including the Vessel, and took mortgages over the Vessel and assignments of the Policy, which identified the Bank as mortgagee, assignee and loss payee. The Policy had an exclusive jurisdiction clause by which each party submitted to the exclusive jurisdiction of the courts of England and Wales.

2. After the Vessel sank, the Insurers entered into a settlement agreement with the owners and managers of the Vessel (the "Owners" and "Managers") and paid out under the Policy. That payment was made to the insurance brokers, Willis Ltd, at the Bank's direction. Thereafter, the Admiralty Court ([2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep 525) held after the trial in a limitation action that the Owners and Managers had procured the scuttling of the Vessel. The Insurers commenced legal proceedings in the High Court against the Owners, the Managers and the Bank to recover the sums paid under the settlement agreement by seeking to avoid the settlement agreement on the grounds of the Owners' and Managers' misrepresentation or the Insurers' mistake, and by seeking damages or restitution. The Bank challenges the jurisdiction of the High Court in respect of the Insurers' claims against it.

3. The appeals raise four issues which concern the interpretation of the Brussels Regulation Recast (Regulation (EU) 1215/2012) ("the Regulation"). The issues are: (i) Does the High Court have jurisdiction pursuant to the exclusive jurisdiction clause contained in the Policy? (ii) Are the Insurers' claims against the Bank "matters relating to insurance" within Chapter II, section 3 of the Regulation? (iii) If the answer to (ii) is yes, is the Bank entitled to rely on section 3 by virtue of it falling within a class of persons who are entitled to the protection afforded by that section? (iv) Are the Insurers' claims for restitution matters relating to tort, delict or quasi-delict under article 7(2) of the Regulation?

4. In this judgment I address the first three issues. For reasons explained below, it is not necessary to address the fourth issue.

The background facts

5. By a loan agreement dated 9 March 2010 (which was subsequently amended) the Bank lent $38.2m to the Owners and to an associated company, Capella Shipping Ltd, the owners of the "Atlantik Glory", to re-finance the purchase of the Vessel and the Atlantik Glory. The loan was secured by a first mortgage on both vessels and by a deed of assignment which included an assignment of the insurances on the vessels. In 2011 the Bank lent a further $3.5m to the Owners which was secured by a second mortgage and a second deed of assignment.

6. *The Policy*: The Policy gives the value of the Vessel as $22m. It contains a choice of law and exclusive jurisdiction clause in these terms:

> "This insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales."

The Policy includes a schedule of owners and mortgagees. A contract endorsement dated 8 February 2013 records that the Vessel was mortgaged in favour of the Bank "… as per Notices of Assignment and Loss Payable Clauses attached".

7. The Notice of Assignment dated 11 February 2013 ("the Notice of Assignment"), provides that the Owners:

> "… GIVE NOTICE that, by assignment in writing dated 11 February 2013, we assigned to … [the Bank] …, a company incorporated under the laws of the Netherlands acting through its Malta branch … all our right, title and interest in and to all insurances effected or to be effected in respect of the Vessel, including the insurances constituted by the policy on which this notice is endorsed, and including all money payable and to become payable thereunder or in connection therewith …"

8. The Loss Payable Clause notes the assignment and provides (as far as relevant):

> "Claims payable under this policy in respect of a total or constructive total or an arranged or agreed or compromised total loss or unrepaired damage and all claims which (in the

> opinion of the Mortgagee) are analogous thereto shall be payable to the Mortgagee up to the Mortgagee's mortgage interest."

9. *The Bank's Letter of Authority*: After the Vessel sank off the coast of Oman on 3 April 2013, discussions took place between the Owners and the Bank about the payment of the Owners' operational costs and other matters. The Owners informed the Bank that the insured value ($22m) rather than the Vessel's then market value would be paid out under the Policy and there was some debate as to how the insurance proceeds would be applied. On 4 April 2013, the Owners asked the Bank for a letter formally authorising the Insurers to pay the proceeds of the insurance claim to the brokers, Willis Ltd. The Bank issued a Letter of Authority dated 5 April 2013 relating to the loss of the Vessel and addressed to "the Underwriters concerned" in these terms:

> "We hereby authorise you to pay to Willis Ltd all claims of whatsoever nature arising from the above mentioned casualty provided that (i) there are no amounts due under the policy and (ii) … [the Bank] is the sole loss payee of the policy.
>
> We agree that settlement of such amounts in account or otherwise with Willis Ltd shall be your absolute discharge in respect of such amounts paid."

10. *The negotiation of the Settlement Agreement*: On 18 April 2013, the Bank asked the Owners for the current status of the claim. The Owners replied that they would ask their lawyer for a weekly report but that the correspondence could not be shared because it was private and confidential. The settlement was negotiated between the Owners, the Managers and the Insurers. The Bank was not involved in the negotiations or in the settlement of the insurance claim. Willis Ltd in an email dated 29 July 2013 stated its understanding that the Settlement Agreement would be signed by solicitors on "Owners'/Bank's behalf" but that understanding was mistaken because the Settlement Agreement, dated 6 August 2013, was signed by Clyde & Co LLP "as agents only for and on behalf of the Assureds" (defined as being the Owners and the Managers) and by Norton Rose Fulbright LLP "as agents only for and on behalf of Underwriters."

11. The Settlement Agreement was between the Underwriters on the one hand and Kairos Shipping Ltd of Malta (as the Owners) and Zigana Gemi Isletmeleri AS of Turkey (as the Managers) and their associated companies on the other. In its recitals it narrated the purchase of the Policy, the Bank's status as mortgagee and loss payee under the Policy and the Bank's consent to the payment of the insurance proceeds to Willis Ltd. The recitals also narrated the loss of the Vessel and the wish

of the parties to resolve all claims in relation to the Vessel and the casualty. In the operative clauses, the Underwriters agreed to pay $22m to the Assureds in full and final settlement and the Assureds agreed to discharge and release the Underwriters upon payment of the sum to Willis Ltd. The Assureds warranted that, subject to the interests of the Bank, they were the only parties entitled to the settlement sum. Clause 4 of the Settlement Agreement confirmed that (subject to an irrelevant exception) the parties did not intend to confer any benefit on third parties which could be enforced by third parties under the Contracts (Rights of Third Parties) Act 1999. Clause 5 provided that English law was the governing law of the contract and that the parties submitted to the exclusive jurisdiction of the English High Court in respect of any claims arising in connection with the agreement.

12. The insurance proceeds were paid to Willis Ltd in London on or around 16 August 2013. Thereafter, Willis Ltd paid US$21,970,272.74 to the Bank in Malta. Of that sum US$20,294,143.56 was transferred into an account held by Kairos Shipping Ltd to discharge various debts and US$1,676,129.18 was transferred into the account of Capella Shipping Ltd as part repayment of the debt against the Atlantik Glory.

13. After the Admiralty Court held, in *Kairos Shipping Ltd v Enka & Co LLC ("The Atlantik Confidence")* [2016] 2 Lloyd's Rep 525, a limitation action raised by Kairos Shipping Ltd, that the master and chief engineer of the Vessel had sunk the Vessel at the request of Mr Agaoglu, the alter ego of the Owners, the Insurers raised the legal proceedings to which I now turn.

The legal proceedings

14. The Insurers alleged that, in presenting a claim under the Policy, the Owners and Managers on their own behalf and on behalf of the Bank) made express or implied representations which included that the Vessel had been lost by an insured peril, that the loss was accidental, that the Owners and Managers had not been guilty of misconduct in procuring the loss of the Vessel and that the Owners, Managers and Bank were entitled to an indemnity in respect of that loss. The Insurers also contended that the Bank had independently made such representations or was vicariously liable for the Owners' and Managers' representations. They averred that the representations, which were untrue and material, had induced them to enter into the Settlement Agreement. The Insurers therefore asked the court (i) to avoid or rescind the Settlement Agreement on grounds of misrepresentation or mistake; (ii) because of that avoidance or rescission to order restitution of the sums paid; (iii) to award damages in deceit, for negligent misrepresentation and/or pursuant to sections 2(1) and 2(2) of the Misrepresentation Act 1967; and (iv) to order restitution of the sums paid by mistake.

15. In response the Bank challenged the jurisdiction of the High Court.

16. On 27 July 2017 Teare J in his first judgment ([2018] 1 All ER (Comm) 228; [2017] 2 Lloyd's Rep 295; [2017] EWHC 1904 (Comm)) held that the High Court had jurisdiction in respect of the claims for damages for misrepresentation under article 7(2) of the Regulation but not in respect of the claims for restitution. He also held that the court did not have jurisdiction based on the exclusive jurisdiction clauses in the Settlement Agreement and the Policy.

17. In a second judgment dated 1 December 2017 ([2017] EWHC 3107 (Comm)) Teare J held that the court had jurisdiction in respect of the Insurers' claim for damages for misrepresentation pursuant to the Misrepresentation Act 1967.

18. Both the Insurers and the Bank appealed to the Court of Appeal with Teare J's permission. The Court of Appeal (Gross, Moylan and Coulson LJJ) in a judgment dated 21 November 2018 ([2018] EWCA Civ 2590; [2019] 1 Lloyd's Rep 221) affirmed Teare J's decisions. In the judgment given by Gross LJ, with whom the other Lord Justices agreed, the Court of Appeal held, first, that the Bank was not bound by the exclusive jurisdiction clause in the Settlement Agreement and that the Insurers did not have a good arguable case that the Bank was a party to that agreement. That finding is not in issue in the appeals to this court. Secondly, the Bank was not bound by the exclusive jurisdiction clause in the Policy by asserting its right to payment under the Policy as loss payee and assignee. The Bank would not be so bound unless and until it commenced legal proceedings against the Insurers. In any event the Bank did not assert its rights against the Insurers by issuing the Letter of Authority. Those findings are the subject of issue 1 in these appeals. Thirdly, the Bank was not entitled to rely on section 3 of the Regulation because its business of ship finance involved it in the settlement of insurance claims and was analogous to that of an insurance professional and the Bank fell within a class of persons not deemed to be a "weaker party". These findings are the subject of issues 2 and 3 in these appeals. Fourthly, the Insurers' claims against the Bank for damages for misrepresentation were matters relating to tort, delict or quasi-delict under article 7(2) of the Regulation with the "harmful event" occurring in England. The validity of this finding depends on this court's answers to issues 1, 2 and 3. Finally, the Insurers' claims against the Bank for restitution were not matters relating to tort, delict or quasi-delict within article 7(2) of the Regulation. That is issue 4 in these appeals.

Discussion

19. *The Regulation*: Before discussing the issues raised in these appeals it may be helpful to say something about the structure of the Regulation. I discuss the relevant provisions of the Regulation more fully below. In order to promote the free

circulation of judgments within member states, the Regulation seeks to set out rules which are highly predictable and are founded on the principle that jurisdiction is generally based on the defendant's domicile. Thus article 4 provides that:

> "(1) Subject to this Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state."

And article 5(1) provides:

> "Persons domiciled in a member state may be sued in the courts of another member state only by virtue of the rules set out in sections 2 to 7 of this Chapter."

20. It is only in well-defined circumstances that jurisdiction based on domicile is replaced by a different connecting factor based on the subject matter of the dispute or the autonomy of the parties (recital (15)). The Court of Justice of the European Union ("CJEU") has repeatedly held, as I will show below, that articles which provide for the exclusion of jurisdiction based on domicile are to be narrowly interpreted. There are also articles which provide for alternative grounds of jurisdiction in addition to the defendant's domicile. The alternative grounds, which include matters relating to contract and matters relating to tort, delict or quasi-delict (article 7(1) and (2)), are based on a close connection between the court and the action or are in order to facilitate the sound administration of justice. The requirement of the close connection is to promote legal certainty (recital (16)). Subject to certain exclusive grounds of jurisdiction, the Regulation also respects the autonomy of parties to a contract to determine the courts to have jurisdiction but it restricts that autonomy in insurance, consumer and employment contracts (recital (19)). It appears to me that when a court comes to interpret an article in the Regulation it must consider whether on the one hand the rule contained in the article supports the general rule of jurisdiction based on the defendant's domicile or on the other hand purports to exclude or provide an alternative to that general rule.

21. *The relevant test*: Although there was a challenge in the Court of Appeal, there is now no disagreement between the parties that in relation to the preliminary question of the jurisdiction of the English courts it is for the Insurers to show that they have a good arguable case in the sense that they have the better of the argument.

Issue 1: Does the High Court have jurisdiction pursuant to the exclusive English jurisdiction clause contained in the Policy?

22. Mr MacDonald Eggers QC for the Insurers contends in summary that the Bank is bound by the exclusive jurisdiction clause in the Policy because in issuing the Letter of Authority it asserted a claim under the Policy for payment of the insured sums as assignee and loss payee. It was not disputed by the parties that the Bank would be bound by the clause if it had sued the Insurers. But the obligation to submit to the jurisdiction of the English courts went further than the commencement of legal proceedings and covered any assertion of, or indeed reliance on, its rights in relation to the Policy by the Bank. For, on its proper construction, the exclusive jurisdiction clause extends to an obligation on an assignee to submit to the jurisdiction of the English courts if there were a dispute or claim relating to the Policy, as for example if the Bank received the Policy proceeds without any dispute at the time and without having initiated legal proceedings but there was later a dispute about its entitlement to those funds. Further, the Insurers would be entitled to sue the Bank in the English courts for negative declaratory relief and such a claim would be the same cause of action as a claim by the Bank for payment. The Insurers submit that it would be incoherent for the law to apply the exclusive jurisdiction clause only when the assignee initiated a formal legal claim.

23. I am satisfied that these arguments should not be accepted and that Teare J and the Court of Appeal did not err on this issue. I begin by examining EU law in the jurisprudence of the CJEU before turning to domestic law.

24. Under EU law a jurisdiction agreement in a contract will bind a defendant only if there is actual consensus between the parties which is clearly and precisely demonstrated: *Coreck Maritime GmbH v Handelsveem BV* (Case C-387/98) [2000] ECR I-9337, paras 13-15 (a case concerning article 17 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, as amended); *Profit Investment Sim SpA v Ossi* (Case C-366/13) [2016] 1 WLR 3832 (CJEU), para 27 (a case on article 23 of the earlier Brussels Regulation, Regulation (EC) No 44/2001). Thus a jurisdiction agreement in an insurance contract does not bind a third party beneficiary of insurance who is domiciled in a different contracting state and who has not expressly subscribed to the clause: *Société financière et industrielle du Peloux v Axa Belgium* (Case C-112/03) [2006] QB 251, para 43 (a case on article 12 of the 1968 Brussels Convention as amended). Nor does such an agreement bind a victim of insured damage who wishes to bring an action directly against the insurer: *Assens Havn v Navigators Management (UK) Ltd* (Case C-368/16) [2018] QB 463 (CJEU), para 40 (a case on article 13(5) of Regulation No 44/2001).

25. EU law however recognises that a person who is not a party to a jurisdiction agreement may be taken to have consented to it if, under the applicable national law, it became "the successor" to the rights and obligations under the contract: *Partenreederei M/S Tilly Russ v Haven & Vervoerbedrijf Nova NV* (Case 71/83) [1985] QB 931, paras 24-26. That case concerned a bill of lading, which, under the relevant national law, vested in a third party holder all the rights of the shipper under the bill of lading and subjected it to all of the shipper's obligations mentioned in the bill of lading, including the agreement on jurisdiction. Thus, in *Coreck Maritime* (above) the CJEU stated (para 27):

> "… a jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading if he succeeded to the rights and obligations of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements laid down in the first paragraph of article 17 of the Convention."

The first paragraph of article 17 (as article 25 of the Regulation now does) required that an agreement on jurisdiction had to be in writing or evidenced in writing, or in a form which accorded with practices which the parties had established between themselves, or in international trade or commerce in a form which conformed with an established trade usage of which the parties were or ought to have been aware. In this case it is not suggested that there was an agreement in any of those forms. The court must therefore look to national law to determine whether the Bank can be seen in EU law as "the successor" of the Owners and Managers who are subject to the jurisdiction clause.

26. The Bank's entitlement to receive the proceeds of the Policy in the event that there was an insured casualty rests on its status as an equitable assignee. It is trite law that an assignment transfers rights under a contract but, absent the consent of the party to whom contractual obligations are owed, cannot transfer those obligations: *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660, 668-670 per Collins MR. An assignment of contractual rights does not make the assignee a party to the contract. It is nonetheless well established that a contractual right may be conditional or qualified. If so, its assignment does not allow the assignee to exercise the right without being subject to the conditions or qualifications in question. As Sir Robert Megarry V-C stated in *Tito v Waddell (No 2)* [1977] Ch 106, 290, "you take the right as it stands, and you cannot pick out the good and reject the bad". This concept, which has often been described as "conditional benefit", is to the effect that an assignee cannot assert its claim under a contract in a way which is inconsistent with the terms of the contract. Several examples of its application or consideration were cited to the court. See, for

example, *Montedipe SpA v JTP-RO Jugotanker ("The Jordan Nicolov")* [1990] 2 Lloyd's Rep 11, 15-16 per Hobhouse J; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd ("The Trident Beauty")* [1994] 1 WLR 161, 171 per Lord Woolf; *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH ("The Jay Bola")* [1997] 2 Lloyd's Rep 279, 286 per Hobhouse LJ; *Youell v Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Rep 102, paras 58-62 per Aikens LJ; *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS ("The Yusuf Cepnioglu")* [2016] 1 Lloyd's Rep 641; [2016] Bus LR 755, paras 23-25 per Longmore LJ; and *Aline Tramp SA v Jordan International Insurance Co ("The Flag Evi")* [2017] 1 Lloyd's Rep 467, para 40 per Sara Cockerill QC, sitting as a Deputy High Court Judge.

27. In my view, the formulation of the principle by Hobhouse LJ in *"The Jay Bola"*, which the Court of Appeal approved in *"The Yusuf Cepnioglu"*, is the best encapsulation. In *"The Jay Bola"* the insurers of cargo for the voyage charterer asserted rights, which had been assigned to them by the voyage charterer by subrogation under foreign law, by raising court proceedings in Brazil against the owners and the time charterer. On the application of the time charterers, Morison J granted an anti-suit injunction against the insurers because the arbitration clause in the voyage charter regulated the means by which the transferred right could be enforced. The Court of Appeal upheld his order. Hobhouse LJ stated ([1997] 2 Lloyd's Rep 279, p 286):

> "… the insurance company is not entitled to assert its claim inconsistently with the terms of the contract. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. The insurance company is not entitled to enforce its right without also recognizing the obligation to arbitrate."

This formulation emphasises the constraint on the assertion of a right as being the requirement to avoid inconsistency and, whether the clause is an arbitration clause, as in *"The Jay Bola"*, or an exclusive jurisdiction clause, as in *Youell* (above), it is the assertion of the right through legal proceedings which is in conflict with the contractual provision that gives rise to the inconsistency.

28. In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455, para 55, the Singapore Court of Appeal, commenting on *"The Jay Bola"* and the proposition that an assignee does not become a party to the contract but would not be entitled to enforce its rights against the other party without also recognising the obligation to arbitrate, stated:

> "This approach of entitlement rather than obligation may be more easily reconcilable with the consensual nature of arbitration. This is because the assignee is only taken to submit to arbitration at the point it elects to exercise its assigned right."

29. In the present case the Bank did not commence legal proceedings to enforce its claim. Indeed, it did not even assert its claim but left it to the Owners and the Managers to agree with the Insurers the arrangements for the release of the proceeds of the insurance policy by entering into the Settlement Agreement. It is not disputed that the Bank was not a party to the Settlement Agreement and the Bank derived no rights from that agreement. The Letter of Authority, which the Bank produced at the request of the Owners and the Managers, enabled both the Insurers and Willis Ltd to obtain discharges of their obligations and to that end it was attached to the Settlement Agreement. The Letter of Authority facilitated the settlement between the Insurers and the Owners and provided the Owners/Managers with a mechanism by which the Bank as mortgagee, assignee and loss payee could receive its entitlement. At the time of payment of the proceeds of the Policy there was no dispute as to the Bank's entitlement and no need for legal proceedings. There was therefore no inconsistency between the Bank's actions and the exclusive jurisdiction clause. The Bank therefore is not bound by an agreement as to jurisdiction under article 15 or article 25 of the Regulation.

30. The Insurers argue that, if they had refused to pay the proceeds of the Policy to the Bank and had commenced proceedings against the Bank in England seeking negative declaratory relief, the Bank would have been bound by the exclusive jurisdiction clause. They submit that it makes no sense to distinguish a claim for negative declaratory relief from the Bank's claim. This is because the Bank's right to sue for an indemnity under the Policy and the Insurers' right to sue for a declaration that it is not liable to the Bank are the same cause of action: *Gubisch Maschinenfabrik KG v Palumbo* (Case 144/86) [1987] ECR 4861, paras 15-19. This incoherence, it is submitted, militates against the Bank's analysis. I disagree. The Bank is not a party to the contract contained in the Policy. The Bank is not bound by that contract to submit to the jurisdiction of the English courts if the Insurers raise an action in England. If the Insurers' claims fall within section 3 of the Regulation, the Insurers may bring proceedings against the Bank only in the courts of the member state of the Bank's domicile, that is The Netherlands. I turn then to that question.

Issues 2 and 3: Are the Insurers' claims against the Bank matters relating to insurance within section 3 of the Regulation and if so, is the Bank entitled to rely on that section?

31. Section 3 of chapter II of the Regulation is entitled "Jurisdiction in matters relating to insurance". The section sets out rules which govern jurisdiction in matters relating to insurance. The relevant article in this appeal is article 14(1) which provides (so far as relevant):

> "… an insurer may bring proceedings only in the courts of the member state in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary." (Emphasis added)

It is noteworthy that the article, unlike many articles in the Regulation, is not creating an alternative ground of jurisdiction in addition to domicile of the defendant nor is it purporting to exclude the domicile of the defendant as an available ground. On the contrary, it makes that ground of jurisdiction, which is the same as the principal ground of jurisdiction under article 4, the exclusive ground in those circumstances in which article 14 applies.

32. Teare J held that the nature of the Insurers' claim against the Bank was so closely connected with the question of the Insurers' liability to indemnify for the loss of the Vessel under the Policy that the subject matter of the claim can fairly be said to relate to insurance. The Court of Appeal, agreeing with Teare J, stated ([2019] 1 Lloyd's Rep 221, para 78):

> "[A]s a matter of reality and substance, the foundation of the Underwriters' claims lies in the Policy. … The crucial (if not the only) question is whether the Vessel was lost by reason of a peril insured against under the Policy or whether the loss arose by reason of wilful misconduct on the part of the Owners. On this footing, there is the most material nexus between the Underwriters' claims and the Policy."

But in spite of this success the Bank did not obtain the protection of article 14 of the Regulation because (although their reasoning diverged) both Teare J and the Court of Appeal held that that protection was available only to the weaker party in circumstances of economic imbalance between the claimant insurer and the defendant. Mr Steven Berry QC for the Bank appeals against the finding that article 14 did not apply to the claim because of the absence of economic imbalance between the Insurers and the Bank. Mr MacDonald Eggers argues against the finding that the

subject matter of the claim relates to insurance and defends the exclusion of article 14 on the ground that the Bank was not the weaker party.

33. On issue 2 Mr MacDonald Eggers submits that a claim can be regarded as a matter relating to insurance only if the subject matter of the claim is, at least in substance, a breach of an obligation contained in, and required to be performed by, an insurance contract. He submits that this proposition is supported by the CJEU case of *Brogsitter v Fabrication de Montes Normandes EURL* (Case C-548/12) [2014] QB 753 ("*Brogsitter*"), which is a case concerning "matters relating to a contract" under article 7(1) of the Regulation. The heading of section 3, "Matters relating to insurance" should be read as "matters relating to insurance contracts" and he refers to recitals (18) and (19) and articles 15(5), 26(2), 31(4) and 45(1)(e)(i) in support of that contention. Secondly, there is no logical reason for the test for the link between the contract and the claim to be wider for the particular contracts covered by sections 3 (insurance), 4 (consumer contracts) and 5 (employment contracts) of the Regulation than it is for general contracts under article 7(1). Thirdly, the application of "the *Brogsitter* test" to the meaning of the title of section 3 promotes legal certainty and predictability. Fourthly, "the *Brogsitter* test" has been applied by courts outside the context of article 7(1). He refers to *Bosworth v Arcadia Petroleum Ltd* [2016] EWCA Civ 818; [2016] 2 CLC 387, para 66, *Granarolo SpA v Ambrosi Emmi France SA* (Case C-196/15) [2016] IL Pr 32, paras 21-22, and *Committeri v Club Méditerranée SA* [2018] EWCA Civ 1889; [2019] IL Pr 19, para 52. Fifthly, he submits that there is support for the Insurers' approach in the Court of Appeal's judgment in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer") (No 2)* [2000] 1 WLR 603; [2000] 1 Lloyd's Rep 129.

34. While Mr MacDonald Eggers presented these submissions clearly and attractively, I am not persuaded that Teare J or the Court of Appeal erred in their approach. I have reached this view for the following reasons.

35. First, it is to my mind important to note that the title to section 3 "Jurisdiction in matters relating to insurance" is broader than the words of article 7(1) "matters relating to a contract" (emphasis added). Similarly, it is wider than the titles of section 4 "Jurisdiction over consumer contracts" and section 5 "Jurisdiction over individual contracts of employment". The difference in wording is significant as it would require to be glossed if it were to be read as "Matters relating to an insurance contract". Such a gloss would not be consistent with the requirement of a high level of predictability of which recital (15) speaks.

36. Secondly, the scheme of section 3 is concerned with the rights not only of parties to an insurance contract, who are the insurer and the policyholder, but also

beneficiaries of insurance and, in the context of liability insurance, the injured party, who will generally not be parties to the insurance contract.

37. Thirdly, the recitals on which the Insurers found do not carry their case any distance. Recital (18), to which I will return below, sets out a policy of protecting the weaker party to certain contracts including insurance contracts. Recital (19) which calls for respect for the autonomy of parties to certain contracts to select the jurisdiction in which to settle their claims does not assist. Neither does article 15(5), which provides that in contracts of insurance which cover the risks set out in article 16 (such as damage to sea-going ships and aircraft) the parties may agree to contract out of section 3. The references to "the policyholder", "the insured," and "the beneficiary of the insurance contract" in the other recitals to which the court was referred cast no light on the meaning of the title to section 3.

38. Fourthly, as I will show below (para 57) the CJEU has often held that articles, such as article 7(1), which derogate from the general rule of jurisdiction under article 4 should be interpreted strictly. Article 14 by contrast reinforces article 4.

39. *"The Ikarian Reefer" (No 2)* also does not assist the Insurers. The dispute in that case involved an action by the owners of the vessel against her hull and machinery underwriters which were represented by Prudential, and the Court of Appeal held that the vessel had been deliberately run aground and deliberately set on fire on the authority of her owners. Prudential recovered much of their costs from the owners and then applied under section 51 of the Supreme Court Act 1981 to recover the balance of their costs from a non-party, Mr Comninos, who was the principal behind the owners, and who it was said had directed and financed the litigation. The Court of Appeal held that, if the claim for costs constituted proceedings, those proceedings were not proceedings relating to insurance matters. If the claims were ancillary to the action by the owners against the underwriters that action related to insurance matters and had properly been raised in England. The underwriters were not seeking to raise claims relating to insurance matters against Mr Comninos. Rather they were seeking to recover unpaid costs incurred in a litigation relating to insurance matters in which they had been successful.

40. Fifthly, and in any event, as Mr Berry submits, if "the *Brogsitter* test" is as Mr MacDonald Eggers characterises it and is applicable in relation to section 3, that test is met in the circumstances of this case. The Insurers' claim is that there has been an insurance fraud by the Owners and the Managers for which the Bank is vicariously liable. Such a fraud would inevitably entail a breach of the insurance contract as the obligation of utmost good faith applies not only in the making of the contract but in the course of its performance: *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG ("The DC Merwestone")* [2016] UKSC 45; [2017] AC

1, para 8 per Lord Sumption. It is therefore not necessary for this Court to analyse the proper application of the jurisprudence in *Brogsitter*.

41. I therefore conclude that, subject to issue 3, which concerns the recitals and case law which refer to the protection of the weaker party, the Insurers' claims against the Bank are matters relating to insurance within section 3 of the Regulation.

42. Teare J ([2017] EWHC 1904 (Comm)), in holding that the Bank could not take the benefit of article 14, relied on recital (18) of the Regulation, which provides:

> "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."

Teare J also referred to the judgment of the CJEU in *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* (Case C-347/08) [2009] ECR I-8661; [2010] Lloyd's Rep IR 77 ("*Vorarlberge*r"), paras 40-45 in support of the proposition that the section 3 protections should not be extended to persons for whom that protection was not justified. In the Court of Appeal, Gross LJ ([2019] 1 Lloyd's Rep 221, paras 81-123) elaborated on the judge's reasoning, referred to several cases, which post-dated the judgment at first instance and which I discuss below, and upheld the judge's decision on this issue.

43. I respectfully disagree with that conclusion. There is no "weaker party" exception which removes a policyholder, an insured or a beneficiary from the protection of article 14. I have come to this view for the following six reasons, which I will vouch when I discuss the case law below. First, the reason why article 14 protects the policyholder, the insured and the beneficiary of an insurance policy is because they are generally the weaker party in a commercial negotiation with an insurance company and are as a matter of course presented with a standard form contract. Secondly, while recital (18) explains the policy behind, among others, section 3 of the Regulation, it is the words of the relevant articles which have legal effect and the recitals are simply an aid to interpretation of those articles. Thirdly, derogations from the jurisdictional rules in matters of insurance must be interpreted strictly. Fourthly, the CJEU in its jurisprudence has set its face against a case by case analysis of the relative strength or weakness of contracting parties as that would militate against legal certainty. Instead, it has treated everyone within the categories of the policyholder, the insured or the beneficiary as protected unless the Regulation explicitly provides otherwise. Fifthly, the CJEU looks to recital (18) not to decide whether a particular policyholder, insured or beneficiary is to be protected by section 3 but in the context of reaching a decision whether by analogy those protections are to be extended to other persons who do not fall within the list of expressly protected persons. Sixthly, the policy which underlies the jurisprudence of the CJEU when it

decides whether to extend the protection to persons not expressly mentioned in section 3 is that the court seeks to uphold the general rule in article 4 that defendants should be sued in the courts of the member state of their domicile and allows extensions to the protection of section 3 only where such an extension is consistent with the policy of protecting the weaker party.

44. The CJEU's justification for the protection conferred on the policyholder, the insured and the beneficiary is to be seen in *Gerling Konzern Speziale Kreditversicherungs-AG v Amministrazione del Tesoro dello Stato* (Case 201/82) [1983] ECR 2503 ("*Gerling*"), which concerned the validity of a jurisdiction clause under the predecessor of article 25 of the Regulation. The CJEU stated:

> "15. … the insurer, if his original consent has been made clear in the provisions of the contract, cannot object to such an exclusion of jurisdiction on the sole ground that the party benefiting from the requirement imposed on others, not being a party to the contract, has not himself satisfied the requirement of writing prescribed by article 17 of the Convention.
>
> 16. Consideration of the provisions of section 3 of the Convention relating to jurisdiction in matters relating to insurance confirms this view.
>
> 17. It is apparent from a consideration of the provisions of that section in the light of the documents leading to their enactment that in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer <u>their purpose was to protect the insured who is most frequently faced with a predetermined contract the clauses of which are no longer negotiable and who is in a weaker economic position</u>." (Emphasis added)

This is consistent with the statement by Advocate General Mancini in *Gerling* that the policyholder, the insured and the beneficiary were given protection because they were "the persons regarded as weaker".

45. Turning to the second reason which I have set out in para 43 above, it is clear that the recitals of the Regulation are a useful tool in interpreting the operative provisions contained in the articles of the Regulation. But a distinction falls to be made between the justification or rationale of a ground of jurisdiction and the ground itself. See the judgment of the CJEU in *Folien Fischer AG v Ritrama SpA* (Case C-

133/11) [2013] QB 523, paras 30-40 and the judgment of this court in *AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* [2017] UKSC 13; [2018] AC 439, paras 14 and 29. It is noteworthy that article 14 of the Regulation speaks of the policyholder, the insured and the beneficiary without further qualification.

46. Thirdly, in *Société financière et industrielle du Peloux v Axa Belgium* (Case C-112/03) [2006] QB 251 ("*Peloux*"), a case which concerned what are now articles 15 and 23 of the Regulation and the ability of a party by agreement to depart from the provisions of what is now section 3 of the Regulation, the CJEU treated the Convention (now the Regulation) as establishing "a system in which derogations from the jurisdictional rules in matters of insurance must be interpreted strictly" (para 31). The existence of an unexpressed exception to the protection given to the policyholder, the insured and the beneficiary is scarcely consistent with this approach.

47. Fourthly, it is clear that the CJEU does not enquire into relative strengths and weaknesses of particular parties in applying the provisions of section 3 of the Regulation. Such an exercise would risk giving rise to legal uncertainty and would prevent the rules of jurisdiction from being highly predictable. Instead the Regulation defines those who are entitled to protection. Thus, in *Landeskrankenanstalten-Betriebsgesellschaft - KABEG v Mutuelles du Mans Assurances - MMA IARD SA* (Case C-340/16) [2017] IL Pr 31 ("*KABEG*"), Advocate General Bobek (para AG47) stated:

> "… in contrast to matters relating to employees and consumers, the notion of the 'weaker party' in insurance-related matters is defined rather broadly. It includes four categories of persons: the policyholder, the insured, the beneficiary and the injured party. As a matter of fact, these parties may be economically and legally rather strong entities. That flows from the broad language of the insurance-related provisions of Regulation No 44/2001 as well as from the types of insurance described therein." (Emphasis added)

The reference to the injured party is a reference to the provision relating to liability insurance which is now article 11 of the Regulation. The breadth of the protection given in section 3 was acknowledged by the CJEU in its judgment in *KABEG* in which the court stated (para 32):

> "As the Advocate General observed in [AG47] of his Opinion, the notion of the 'weaker party' has a wider acceptance in

> matters relating to insurance than those relating to consumer contracts or individual employment contracts."

The CJEU went on to state (para 34):

> "… a case-by-case assessment of the question whether an employer which continues to pay the salary may be regarded as the economically weaker party in order to be covered by the definition of 'injured party' within the meaning of article 11(2) of Regulation No 44/2001 [now article 13(2) of the Regulation], would give rise to the risk of legal uncertainty and would be contrary to the objective of that Regulation, laid down in recital (11) thereof [now recital (15) of the Regulation], according to which the rules of jurisdiction must be highly predictable."

48. In *Peloux* (para 46 above) the CJEU observed (para 31) that what is now article 15 of the Regulation lists exhaustively the cases in which the parties may derogate by agreement from the rules laid down in section 3. It is article 15(5) which is relevant in this case as it provides that the provisions of section 3 may be departed from by an agreement which relates to a contract of insurance in so far as it covers one or more of the risks set out in article 16. Those risks include perils covered by marine insurance and by the insurance of aircraft and offshore installations. The exceptions which articles 15(5) and 16 establish are the result of a request by the United Kingdom on its accession to the Brussels Convention in 1968 that the protections given to policyholders in articles 7-12 of that Convention be restricted to exclude among other things the insurance of large risks. The solution which was adopted in line with the recommendations of the Report on the Convention by Professor Dr Peter Schlosser (OJEC, 5 March 1979) was to introduce the list of certain types of policy in what are now articles 15(5) and 16 of the Regulation.

49. The Schlosser Report explains the thinking behind those provisions. It states (para 140):

> "… The problem was one of finding a suitable demarcation line. Discussions on the second Directive on insurance had already revealed the impossibility of taking as criteria abstract, general factors like company capital or turnover. The only solution was to examine which types of insurance contracts were in general concluded only by policyholders who did not require social protection."

It is in my view clear that the protections afforded to the policyholder, the insured and the beneficiary are given because such classes of person generally are the weaker party and that the Regulation has identified specific types of insurance contracts and allowed the parties to those types of insurance contract to exclude by agreement the protections which otherwise would be in place.

50. Fifthly, the case law of the CJEU, to which the Court of Appeal referred for support of the view that the Bank should be excluded from the protection of article 14 of the Regulation because there was not an economic imbalance between it and the Insurers, does not support that conclusion. Instead it shows that the CJEU has regard to recital (18) and the concept of the party in the weaker economic position when it is asked to extend the protection of section 3 beyond the policyholder, the insured, the beneficiary and the injured party.

51. In *Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA* (Case C-412/98) [2001] QB 68 ("*Group Josi*") the CJEU had to consider whether the rules on jurisdiction specific to matters relating to insurance were to be applied to a dispute between a reinsured and a reinsurer under an insurance contract. The court held that a reinsurance contract could not be equated with an insurance contract and the protections afforded to policyholders could not be extended to a reinsured. The CJEU stated (para 65):

> "The role of protecting the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract which is fulfilled by [the provisions of section 3] implies, however, that the application of the rules of special jurisdiction laid down to that end … should not be extended to persons for whom that protection is not justified …" (Emphasis added)

It is of note that the CJEU interpreted section 3 as deeming the named parties, the policyholder, the insured, the beneficiary and (under liability insurance) the injured party to be economically weaker and applied the economic weakness criterion to prevent an extension of the protection from those persons to a reinsured.

52. The CJEU adopted the same approach in *Groupement d'intérêt économique (GIE) Réunion Européenne v Zurich España Société Pyrenéenene de Transit d'Automobiles* (Case C-77/04) [2005] ECR I-4509; [2006] Lloyd's Law Rep 215 ("*GIE*") which concerned an attempt by an insurer, which had been sued by its insured, to bring Zurich España into the action as a third party on the basis that it also had covered the loss as the insurer of the claimant which had sued the insured. The dispute was as to whether Zurich could invoke the protection of what is now article 14 of the Regulation requiring it to be sued in the courts of its domicile or

whether the insurer could invoke the third-party jurisdiction in what is now article 8(2) of the Regulation. The CJEU repeated the formula in para 65 of *Group Josi*, which I have quoted above, and (para 22) spoke of the authors of the Convention having taken as their premise that the provisions of section 3 applied only to "relations characterised by an imbalance between the parties". It referred to the express exclusion by what are now articles 15(5) and 16 of the Regulation of the insurance contracts specified therein (see para 48 above) which was justified because the insured in those types of insurance contracts enjoyed considerable economic power. It concluded that it was consistent with the letter, spirit and purpose of the provisions in section 3 to hold that they were not applicable to relations between insurers in the context of third-party proceedings (para 23). Thus again, the CJEU invoked the policy of protecting the weaker party not to look behind the categories of persons expressly protected by section 3 but to ascertain whether that protection should be extended by analogy to persons who were not expressly protected.

53. In *Vorarlberger* (para 42 above) a social security institution had provided benefits for the victim of a road traffic accident while she was unfit for work and, using its statutory rights of assignment of the victim's claim, sought indemnification from the liability insurers of the driver who was allegedly responsible for the accident. The social security institution sought to invoke what are now articles 11(1)(b) and 13(2) of the Regulation to raise legal proceedings in the courts of its own domicile as assignee of the injured party against the insurers of the alleged wrongdoer. The CJEU rejected this attempt to extend the rules on jurisdiction derogating from the general principle that jurisdiction is generally based on the defendant's domicile beyond the situations expressly envisaged in the Regulation ([2009] ECR I-8661, paras 36-39). It invoked the weaker party rationale of the section 3 protections as a reason for not extending the protections to persons who did not need to be protected, recognising that the heirs of an injured party ought to be able to benefit from the section 3 rules but holding that a social security institution could not (paras 40-44).

54. In *KABEG* (para 47 above) an Austrian public law establishment (KABEG), which ran private hospitals, paid the salary of an employee while he was off work as a result of injuries incurred in a road traffic accident. Under Austrian law the employee's compensation claim passed to his employers. Relying on what are now articles 11(1)(b) and 13(2) of the Regulation, KABEG raised legal proceedings in Austria, the member state of its domicile, against the French insurers of the driver of the car involved in the accident. KABEG in substance argued that it was the "injured party" which, under article 13(2), was allowed to raise proceedings in the courts of the member state of its domicile against a liability insurer. The defendants argued that the Austrian court did not have jurisdiction because section 3 did not apply to the employers which were not the weaker party. Again, it is clear that the claimant was seeking an extension of the protections of section 3 of the Regulation by including the employer, with a claim for reimbursement of the salary paid to the

injured party, within the concept of "injured party". That claim succeeded. Having rejected a case-by-case assessment (as I have shown), the CJEU held that pursuant to article 13(2) of the Regulation (para 35),

> "employers to which the rights of their employees to compensation have passed may, as persons which have suffered damage and whatever their size and legal form, rely on the rules of special jurisdiction laid down in articles [10-12] of that Regulation."

55. Finally, in *Hofsoe v LVM Landwirtschaftlicher Versicherungsverein Münster AG* (Case C-106/17) [2018] IL Pr 184 ("*Hofsoe*") Mr Hofsoe, whose professional activity inter alia consisted in recovering claims for damages from insurers and who took assignments of the claims of victims of road traffic accidents, sought unsuccessfully to extend the concept of "injured party" so as to invoke the jurisdiction of injured party's domicile under articles 11(1)(b) and 13(2) of the Regulation. In paras 37-42 the CJEU referred among others to *KABEG*, *Vorarlberger*, *Group Josi* and *GIE*, and acknowledged that the jurisdiction of the forum actoris had been extended under articles 11(1)(b) and 13(2) to include the heirs of an injured party and also the employer who continues to pay the salary of the injured party while he was on sick leave. But reasserting that the derogations from the principle of the defendant's domicile must be exceptional in nature and be interpreted strictly, the CJEU held that the special rules of jurisdiction should not be extended to persons for whom the protection is not justified, such as professionals in the insurance sector. The CJEU (para 45) attached no significance to the fact that Mr Hofsoe carried on business on a small scale and reaffirmed its rejection of a case-by-case assessment because that risked legal uncertainty.

56. In none of these cases where the CJEU has relied on the "weaker party" criterion to rule on applications to extend the scope of the section 3 protections beyond those parties who were clearly the policyholder, the insured, the beneficiary or the injured party, did the court call into question the entitlement of those expressly-named persons to that protection by reason of their economic power. On the contrary, the CJEU has treated the exceptions to the entitlement of those persons as confined to the exceptions expressly stated in articles 15(5) and 16 of the Regulation.

57. As I have said, the CJEU has repeatedly stated that derogations from the principle of the jurisdiction of the defendant's domicile must be exceptional in nature and be interpreted strictly: *Group Josi*, paras 36, 49-50; *Vorarlberger* paras 36-39; *Hofsoe*, para 40. The jurisdiction of the forum actoris, which articles 11(1)(b) and 13(2) of the Regulation confer, is a derogation from the general principle of the jurisdiction of the defendant's domicile. Article 14, which requires the insurer to

bring proceedings only in the courts of the member state of the domicile of the insured, involves no such derogation but on the contrary supports the general principle.

58. It is correct, as Gross LJ observed in para 111 of his judgment ([2019] 1 Lloyd's Rep 221), that the present case concerns a marine insurance risk, and that the policyholder and the Insurers would have been able to enter into a jurisdiction agreement under articles 15(5) and 16. But that does not exclude the protections of section 3 in the absence of such an agreement which is binding on the policyholder, the insured or the beneficiary. It is important to recall the opening words of article 15: "The provisions of this section may be departed from only by an agreement". The clear implication is that in the absence of such an agreement, the policyholder, insured or beneficiary of an insurance contract falling within article 16 would come within the section 3 protections unless it contracted out of those provisions. There is no such agreement binding on the Bank in this case.

59. In my view under the test laid down in *CILFIT Srl v Ministero della Sanita* (Case 283/81) [1982] ECR 3415, para 21, it is acte clair that a person which is correctly categorised as a policyholder, insured or beneficiary is entitled to the protection of section 3 of the Regulation, whatever its economic power relative to the insurer. It is not necessary to refer a question to the CJEU on this issue.

60. The Bank as the named loss payee under the Policy is the "beneficiary" of the Policy. It is entitled to benefit from the protections of section 3, including the requirement under article 14 that it must be sued in the courts of the member state of its domicile. It follows that the Insurers cannot assert jurisdiction under article 7(2) of the Regulation in respect of the claims for misrepresentation. Further, issue 4, the question whether claims in unjust enrichment fall within article 7(2) does not arise.

61. As a result, the Insurers fail in their appeal and the Bank succeeds in its appeal because the courts of England and Wales have no jurisdiction in respect of the Insurers' claims against the Bank.

Conclusion

62. I would dismiss the Insurers' appeal, allow the Bank's appeal and declare that the High Court does not have jurisdiction over the Insurers' claims against the Bank.