Neutral Citation Number: [2018] EWCA Civ 1889

Case No: B3/2016/3172

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM The High Court (Queen's Bench Division)

Mr Justice Dingemans

HQ14PO4837

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 09/08/2018

**Before :**

LORD JUSTICE SIMON

LORD JUSTICE MOYLAN
and

LORD JUSTICE COULSON

- - - - - - - - - - - - - - - - - - - - -

**Between :**

|  |  |  |
| --- | --- | --- |
|  | **Mr Cristiano Committeri** | Appellant/Claimant |
|  | **- and –** |  |
|  | **Club Méditerranée SA (T/A Club Med Business)** | 1st Respondent/ 1st Defendant |
|  | **- and –** |  |
|  | **Generali Assurances IARD SA** | 2nd Respondent/3rd Defendant |

- - - - - - - - - - - - - - - - - - - - -

**Hugh Mercer QC & Alistair Mackenzie** (instructed by **Leigh Day Solicitors**) for the **Appellant**

**Chirag Karia QC** (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

Hearing date: Tuesday 3rd July 2018

- - - - - - - - - - - - - - - - - - - - -

Approved Judgment

**Lord Justice Coulson :**

***Introduction***

1. At all relevant times, Mr Cristiano Committeri (“the appellant”) lived and worked in London. He was injured when climbing an ice wall in Chamonix in France in 2011. He brought proceedings in England against Club Med and their insurers (whom I shall call generically ‘the respondent’), because they had provided the relevant travel and accommodation pursuant to a contract with the appellant’s employers. Although the claim was originally put in a number of different ways, the sole basis of the claim now is pleaded by reference to that contract and Article L211-16 of the *French Code de Tourisme*. The central issue that arose before the judge, and arises again on this appeal, is the proper characterisation of that claim. If it is a contractual claim then, for reasons explained below, English law will apply and it is common ground that it will fail. If it is properly characterised as a non-contractual claim, French law will apply and it is agreed that it will succeed. The answer to the question involves a consideration of a variety of European Regulations and primarily European authorities.

***2. The Factual Background***

1. The judgment of Dingemans J is at ([2016] EWHC 1510 (QB)). It sets out the relevant facts between paragraphs 6 – 11. I summarise them shortly below.
2. The appellant worked for BNP Paribas Bank (“BNP”) in London. On or around 10 December 2010, BNP contracted with the respondent to provide a group of BNP employees, including the appellant, with travel accommodation, ski guides and climbing activities in Chamonix.
3. The contract between BNP and the respondent contained the respondent’s general booking conditions. It is common ground that those booking conditions contained the express provision that they were “governed by English law and both sides shall submit to the jurisdiction of the English Courts”. In addition, the respondent’s brochure (referred to in the booking conditions) also confirmed that “this contract is made on the terms of these booking conditions, which are governed by English law and the jurisdiction of English Courts…”. That is the relevant ‘Choice of Law’ clause relied on by the respondent.
4. When in Chamonix, on 18 February 2011, the appellant was taking part in a climbing activity on the Mer de Glace. He lost his footing, slipped and fell, sustaining an injury to his right foot and fractured bones.
5. On 20 November 2014, the appellant commenced proceedings against the respondent. The Particulars of Claim originally put the case in both contract and tort. However, the principal claim is pleaded in these terms:

“13. The claimant relies on Article L-211-16 of the French Tourisme Code which imposes a ‘*obligation de résultat*’ in organisations within its scope. Under that provision the First and/or Second Defendants are strictly liable to the Claimant for the proper performance of the obligations under the Contract. The Contract in this case included an obligation to ensure that the Claimant was safe at all times.

14. By virtue of the fact that the Claimant was injured whilst taking part in the ice climbing activity, the First and/or Second Defendants breached their obligations under the Contract. Accordingly, the First and/or Second Defendants are, and each of them is, liable to the Claimant pursuant to Article L-211-16 of the French Tourism Code.”

In view of the arguments advanced by the appellant, it is worth emphasising at the outset that the way in which the appellant’s claim is pleaded emphasises “the proper performance [by the respondent] of the obligations under the Contract”; puts the claim as being for breach of those obligations; and concludes that, as a result of the *Code*, the respondent was strictly liable for the breach. I shall refer to this below as “the pleaded strict liability claim”.

1. The agreed translation of Article L-211-16 is as follows:

“Any individual or legal entity involved in the operations mentioned in Article L-211-16 is liable *ipso jure* towards the purchaser for the proper performance of the obligations arising from the contract, whether or not the contract was entered into online or the obligations are to be performed in person or by other service providers, without prejudice to his right of recourse against the latter up to the limit of the damages established by international convention.

However, they may release themselves from all or part of their liability by providing proof that the non-performance or defective performance of the contract is attributable either to the purchaser, or to the unforeseeable and insurmountable action of a third party and connected with the provision of the services provided for in the contract, or to a case of force majeure.”

It is common ground that Article L-211-16 imposes a strict liability for the proper performance of the relevant contract obligations.

1. Prior to the trial on liability before Dingemans J, both parties obtained expert evidence on French law. The reports of M.Ricard for the appellant, and M.Charpentier for the respondent, dealt with a variety of legal issues raised by the appellant’s original pleading. However, by the time of the trial, following the abandonment of everything but the pleaded strict liability claim, most of their reports were no longer relevant. Unhappily, however, the experts did not meet; they did not produce a statement of matters on which they agreed and disagreed; and they were not asked to give oral evidence. As noted below, on the critical issue, they were apparently agreed. Despite all this, the judge was requested by the appellant to look at various French authorities and to form his own view about French law. This was not a proper way for the appellant to proceed.
2. As noted, the principal issue at the trial was whether or not the pleaded claim was properly characterised as a contractual or non-contractual claim. Although that is ultimately an autonomous European Law concept, its characterisation in French law was at least of some relevance[[1]](#footnote-1). However, it was and remains very difficult to see that the experts disagreed on this topic. In particular:
3. M.Ricard, the appellant’s expert, referred to the respondent’s potential liability under the Code and concluded that, in a case like this, “the professional and the client are in a contractual relationship so that Article L-211-16 of the *French Code de Tourisme* provides for a specific course of action based on contractual liability.”
4. M.Charpentier, the respondent’s expert, concluded that Article L-211-16 “relates to contractual liability; in my opinion the ROME II Law does not therefore permit the invocation of the provisions of Article L-211-16 of the Tourism Code.”

Accordingly, on the face of their reports, the experts were agreed that a claim by reference to Article L-211-16, in the circumstances of this case, was characterised in French law as a claim based upon and/or relating to contractual liability.

***3. The Judgment***

1. The issue as to whether the pleaded claim was properly characterised as a contractual or a non-contractual claim was identified by Dingemans J as the critical issue in paragraph [1] of his judgment. He explained why:

“This is the hearing of liability only in relation to a claim made by Mr Cristiano Committeri (“Mr Committeri”) against Club Mediterranee SA (“Club Med”) and Generali Assurances Iard SA (“Generali”) which arises out of an accident which occurred on 18th February 2011 when Mr Committeri who was climbing an ice wall on the Mer de Glace, Chamonix, France slipped and fell causing injuries to his foot and ankle. The success of this claim depends on whether French law applies under which it is common ground that Mr Committeri will obtain judgment for damages to be assessed, or English law applied under which it is common ground that Mr Committeri’s claim will fail. The application of English law or French law will mainly depend on whether Mr Committeri’s claim is contractual in nature and governed by Regulation (EC) No 593/2008 (“Rome I”) or non-contractual in nature and governed by regulation (EC) No 864/2007 (“Rome II”).”

1. Having identified the relevant facts, at [12] onwards, the judge set out the next section of his judgment under the heading ‘Relevant provisions of French law’. This identified particular extracts from the reports of M.Ricard and M.Charpentier. It then referred to a number of the French authorities dealing with similar claims. The judge’s conclusions as to French law were set out at paragraphs [23] – [24] as follows:

“The obligation to avoid injury under the Code was termed by Mr Charpentier as “*an obligation of results*”. However that phrase does not of itself help me to decide whether the obligation to obtain the result imposed by the Code is contractual (such as in English law a term implied into a contract by statute) or non-contractual (such as in English law a claim for breach of statutory duty). Mr Richard said “*the obligation to perform the contract in full security is a commitment to the actual result*” which suggests that the obligation might be contractual because he is referring to the nature of the contractual obligation.

Finally both experts considered that the obligation in article L211-16 was a contractual one. Mr Charpentier said “*article L211-16 relates to contractual liability*” and Mr Ricard said that “*article L211-16 of the French Code de Tourisme provides for a specific cause of action based on contractual liability*”. Ms Kinsler pointed out that the issue of whether the obligation is contractual or non-contractual is an autonomous European law concept for the purposes of Rome I and Rome II, and that the fact that the expert French lawyers considered that the obligation was contractual showed only the French law analysis.”

1. The judge then dealt with the Package Travel Directive, the Package Travel Regulations in the UK, and the relevant provisions of Rome I and Rome II. He then identified some of the European authorities concerned with contractual and non-contractual obligations. Then, at [49] – [53], the judge set out his conclusion as to why the pleaded claim was contractual for the purposes of Rome I and Rome II. It is necessary to set out his conclusions in full:

“49. I have come to the clear conclusion that the claim made under article L211-16 of the Code is contractual for the purposes of Rome I and Rome II (and the Brussels I Recast). This is because the BNP Club Med contract, made between BNP and Club Med, conferred benefits on Mr Committeri by providing him with team building activities in Chamonix. Mr Committeri was, under the Code, enforcing "*the proper performance of the obligations arising from the contract*".

50. The wording of the Code, derived from the Package Travel Directive (and mirrored in the Package Travel Regulations in England and Wales) relates to contractual obligations. French law has considered that "proper performance of the contract" in a package holiday setting requires the absolute safety of the consumer, so that (unless the exceptions in the Code apply) when there is an injury on a package holiday the organiser will be liable. This most clearly appears from the judgment of the Cour de Cassation dated 17th November 2011 referred to in paragraph 18 above. The French Courts are inquiring into what is "the proper performance of the contract" which suggests, see paragraph 25 of *Brogsitter*, that the obligation is contractual. The judgment in *Ergo* supports this conclusion because the obligation to compensate Mr Committeri under the Code derived from the legal obligation freely consented to by the parties when Club Med agreed to provide travel, accommodation and activities for BNP and its employees including Mr Committeri. The obligation to compensate did not arise out of tort/delict, unjust enrichment, "negotiorum gestio' or `culpa in contrahendo'.

51. I note that my conclusion on whether the obligation is contractual in nature is consistent with the conclusions of Mr Ricard and Mr Charpentier that the action is contractual in nature. However their conclusions related to French law, and the issue of whether the obligation is contractual is an autonomous European law concept. I also note that in English law the equivalent provision of the Package Travel Regulations has also been analysed by the Court of Appeal in *Hone* in contractual terms (albeit coming to a different conclusion on the content of the contractual obligation). The fact that both French law and English law have analysed the obligation in contractual terms provides some support for the conclusion that the obligation is contractual in nature.”

1. These are the conclusions put in issue on this appeal. Although Dingemans J went on to make other findings about the choice of law clause, they are not the subject of this appeal.

***4. The Central Issue***

1. The central issue in this appeal is therefore the same as that before Dingemans J: is the pleaded claim properly characterised as contractual or non-contractual in nature? If it is contractual, then Rome I applies. Because the contract as noted at paragraph 4 above contained a choice of law clause, and the choice of law was English law, then it is common ground that the claim will fail, there being no allegation of breach of a contractual obligation to take reasonable care.
2. On the other hand, if the pleaded claim is properly characterised as non-contractual in nature, then it is common ground that Rome II would apply. In that event, there would be no choice of law clause and French law would apply because it was where the accident occurred. On that basis, because of the strict liability imposed by the Code, the respondent would be liable to the appellant.
3. Thus, it is (now) common ground that the issue as to whether the pleaded strict liability claim is contractual or non-contractual in nature is dispositive of the whole case. In addition, it is common ground that, for these purposes, notions of contractual and non-contractual claims are autonomous European law concepts, and so must be decided primarily by the decisions of the European Court.

***5. The Relevant European Regulations and Directives***

***5.1 Rome I (Regulation No 593/2008)***

1. Amongst the Recitals, Recital 23 states:

“As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-laws rules that are more favourable to their interests than the general rules.”

1. Article 1 is concerned with material scope. It states:

“This Regulation shall apply to situations involving a conflict of laws, to contractual obligations in civil and commercial matters.”

Article 2 sets out a series of specific exceptions. It is not suggested that any of those arise in this case.

1. Article 3, under the heading ‘Freedom of Choice’, states:

“1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of the contract.”

1. Thus, if the appellant’s claim falls under Rome I, the choice of law was English law and, as already explained, that would mean that the claim will fail.

***5.2 Rome II (Regulation No 864/2007)***

1. Amongst the Recitals to which we were taken there were the following:

“11. The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law set out in this Regulation should also cover non-contractual obligations arising out of strict liability….

31. To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to the a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intention of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.”

1. Article 2, under the heading ‘Non-Contractual Obligations’ states as follows:

“1. For the purposes of this Regulation damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.”

The parties helpfully agreed that the two Latin phrases were properly translated as respectively, ‘management of business’ (referring to obligations created by a person acting spontaneously on another’s behalf without the latter’s authority) and ‘fault in conclusion of a contract’ (referring to a form of pre-contractual liability, established by fault in the negotiation of a contract, such as a failure to negotiate in good faith).

1. Chapter II of the Regulation deals with Tort/Delict. The general rule is stated in Article 4 as follows:

“1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arises out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”

1. Chapter IV is entitled ‘Freedom of Choice’. Article 14 states:

“1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after their event giving rise to the damage occurred; or

(b) where all the parties are pursuing a commercial activity also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and should not prejudice the rights of third parties.”

1. Since in the present case there was no agreement under Article 14, it means that, if the appellant’s claim falls under Rome II, Article 4 will apply, the applicable law will be French and the claim will succeed.

***5.3 The Package Travel Directive***

1. The Council Directive of 13 June 1990 (90/314/EEC) is concerned with package travel and package holidays. Article 1 states that the purpose of the Directive was “to approximate the laws, regulations and administrative provisions of the Member State relating to packages sold or offered for sale in the territory of the Community”. Article 2 defined the ‘consumer’ as:

“…the person who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’).”

1. Article 5 of the Directive stated:

“1. Member States shall take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services.

2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organiser and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:

- the failures which occur in the performance of the contracts are attributable to the consumer,

- such failures are attributable to a third party connected with the provision of the services contracted for and unenforceable or unavoidable,

- such failures are due to a case of force majeure …”

1. In the UK, the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI1992 Number 3288) put this Directive into effect. Pursuant to those Regulations, it is necessary for a claimant to demonstrate either a failure to perform or the improper performance of the contract i.e. fault. The *Code de Tourisme*, noted at paragraph 7 above, is the French equivalent. The principal difference, of course, is that under the *Code de Tourisme*, liability under the relevant contract can be established without fault.

***6. The Authorities***

***6.1 The European Authorities***

1. We were referred to a number of European authorities, and I have considered them all in preparation for this Judgment. However, for what I hope will be regarded as proper reasons of economy, I have concentrated on the four which took up the bulk of the oral submissions. They are dealt with in paragraphs 30 - 41 below.
2. The starting point for any consideration of the question of whether the obligations in this case were contractual or non-contractual is first to ask whether the obligation was contractual in nature. This is because *Henkel* [2003] All ER (Comm) 606 is authority for the proposition that a non-contractual obligation is anything which is not characterised as contractual (see also paragraph 32 below).
3. The first of the four European cases on which I focus is *Brogsitter v Fabrication de Montres Normandes* *EURL* [2014] QB 753. A claimant domiciled in Germany contracted with the defendants to develop two watch movements for luxury watches. The claimant brought claims in Germany against the defendants because they were also working for others and the defendants contested jurisdiction. The German court referred to the Court of Justice of the European Union for a preliminary ruling as to the question whether a civil liability claim, made in tort under national law, nonetheless had to be regarded as concerning “matters relating to a contract” for the purposes of Article 5. The court concluded that, even though the claims were made in tort, it was relevant that the conduct complained of might be considered a breach of the terms of the contract, and that that would *a priori* be the case where the interpretation of the contract which linked the parties was indispensable to establish the lawfulness of the conduct complained of.
4. Although the Court of Appeal has subsequently observed that the *Brogsitter* judgment has to be considered as a whole (see paragraph 44 below), the most important parts of the judgment are paragraphs 21 – 27:

“21 In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature: see Verein für Konsumenteninformation v Henkel (Case C-167/00) [2002] ECR I-8111; [2003] All ER (Comm) 606, para 37.

22 It is apparent from the order for reference that the parties to the main proceedings are bound by a contract.

23 However, the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim concerns “matters relating to a contract” within the meaning of article 5(1)(a) of Regulation No 44/2001.

24 That is the case only where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract.

25 That will a priori be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.

26 It is therefore for the referring court to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.

27 If that is the case, those claims concern “matters relating to a contract” within the meaning of article 5(1)(a) of Regulation No 44/2001. Otherwise, they must be considered as falling under “matters relating to tort, delict or quasi-delict” within the meaning of article 5(3) of Regulation No 44/2001.”

1. In *Ergo Insurance SE v IF P&C Insurance AS* [2016] I.L. Pr 20, the accident involved a tractor and a trailer that were insured by different insurers. One insurer sought an indemnity against another. The issue of whether that claim came under Rome I or Rome II was not straightforward, there being contracts as between insurer and insured, but not as between the insurers. Another difficulty with the decision is that, although there was, in the usual way, an Advocate General’s Opinion, it is not entirely clear the extent to which that Opinion was accepted by the Court.
2. The general approach was set out in paragraphs 44 and 45 of the judgment of the Court as follows:

“44 It is clear from the case-law of the Court on the Brussels I Regulation that only a legal obligation freely consented to by one person towards another and on which the claimant's action is based is a 'matter relating to contract' within the meaning of Article 5(1) thereof (see judgment in *Kolassa*, C-375/13, EU:C:2015:37, paragraph 39). By analogy, and in accordance with the aim of consistency mentioned in paragraph 43 of the present judgment, it must be held that the concept of 'contractual obligation' within the meaning of Article 1 of the Rome I Regulation designates a legal obligation freely consented to by one person towards another.

45 As regards the concept of 'non-contractual obligation', within the meaning of Article 1 of the Rome II Regulation, it must be recalled that the concept of 'matters relating to tort, delict and quasi-delict', within the meaning of Article 5(3) of the Brussels I Regulation, includes all actions which seek to establish the liability of a defendant and are not related to a 'contract' within the meaning of Article 5(1) thereof (judgment in *ÖFAB*, C-147/12, EU:C:2013:490, paragraph 32 and the case-law cited). Furthermore, it must be observed, as appears from Article 2 of the Rome II Regulation, that that regulation applies to obligations ensuring from damage, that is to say, any consequence arising out of tort/delict, unjust enrichment, '*negotiorum gestio*' or '*culpa in contrahendo*'.”

1. As to the claims as between insurers, the court said:

“50 First, the very existence of the right of the insurer of a tractor unit, the driver of which caused an accident, to bring an action for indemnity against the insurer of a trailer, once the victim has been compensated, cannot be inferred from the insurance contract, but is based on the premise that the owner of the trailer will concomitantly incur liability in tort, delict or quasi-delict in relation to the same victim.

51 In that connection, it must be observed that such an obligation to pay compensation by the owner of the trailer must, therefore, be regarded as a 'non-contractual' obligation, within the meaning of Article 1 of the Rome II Regulation. Therefore, it is in the light of the provisions of that regulation that the law applicable to the obligation must be determined…

54 Second, it must be recalled that the obligation for an insurer to compensate the damage caused to a victim arises not from the damage caused to the latter but from the contract between it and the insured party who is liable. Such compensation is therefore based on a contractual obligation, since the law applicable to such an obligation must be determined in accordance with the provisions of the Rome I Regulation.

55 Therefore, it must be examined, in the light of the law applicable to the contract of insurance of the tractor units, such as those at issue in the main proceedings, and to that of the trailers coupled to them, respectively, whether the insurers of those two kinds of vehicle were in fact bound, in accordance with those contracts, to compensate the victims of an accident caused by those vehicles.

56 Third, regarding the issue whether the insurer of a tractor unit who has compensated a victim has, in some circumstances, a right to bring an action in subrogation against the insurer of the trailer, it must be observed that Article 19 of the Rome II Regulation distinguishes between matters subject to the tort/delict regime and those subject to the contractual regime. That provision applies in particular to the situation in which a third party, namely an insurer, has compensated the victim of an accident, the creditor of an obligation in tort/delict of damages owed by the driver or owner of a motor vehicle, in order to discharge the duty to satisfy that obligation.”

1. The court’s conclusion was at paragraph 60 – 62 as follows:

“60 In particular, it must be held that, if, according to the law applicable by virtue of those provisions of the Rome II Regulation, the victim of a road traffic accident caused by a tractor unit coupled with a trailer has rights against both the owner of the trailer and its insurer, the insurer of the tractor unit, after compensating the victim, has a right of action against the insurer of the trailer since the law applicable, in accordance with Article 7 of the Rome I Regulation, to the insurance contract provides for subrogation of the insurer to the victim's rights.

61 Therefore, it is for the referring courts to establish, first of all, how the damages to be paid to the victim are to be divided between the driver and the owner of the tractor unit, on the one hand, and the owner of the trailer, on the other, in accordance with the rules of national law applicable by virtue of the Rome II Regulation.

62 Second, in accordance with Article 7 of the Rome I Regulation, the law applicable to the insurance contract concluded between the insurers which are the applicants in the main proceedings and the respective insured parties must be determined, in order to ascertain whether and, if so, to what extent those insurers may, by subrogation, exercise the victim's rights against the insurer of the trailer.”

The result was that the law applicable to the indemnity action between insurers was to be determined in accordance with Rome I “if the rules of liability in tort, delict and quasi-delict applicable to that accident by virtue of Article 4 [of the Rome II Regulation] provide for an apportionment of the obligation to compensate for the damage”. I agree with Mr Mercer QC that, as he put it, “the court looked at each individual obligation”. Whether that was regarded by the court a matter of principle to be followed in every case, or whether it was simply dictated by the complexities of the factual situation in *Ergo*, is not clear.

1. In *Verein Fur Konsumenteninformation v Amazon EU SARL* [2017] QB 252 the dispute concerned personal data. The Advocate General’s Opinion (which on this occasion was clearly endorsed by the court) contained the following paragraph:

“48 Having made this clear, I consider that the concept of contractual obligation does not depend on the identity of the parties to the dispute. The classification of an obligation for the purposes of applying the rules on conflict of laws depends on the (contractual or non-contractual) source of that obligation. The identity of the parties to the dispute cannot therefore change the nature of the obligation: opinion of Advocate General Sharpston \*265 in ERGO Insurance SE v If P&C Insurance AS (Joined Cases C-359/14 and C-475/14) EU:C:2015:630, point 62.”

1. The relevant paragraphs of the Court’s judgment were as follows:

“39 However, regarding the classification of such an action (also brought by the association) for the purposes of determining jurisdiction, the court held in Henkel's case, para 40, that it is not a “matter relating to a contract” within the meaning of the rule of special jurisdiction laid down in the instrument which preceded Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ( OJ 2001 L12 , p 1) (“the Brussels I Regulation”). It justified that conclusion by the absence of a contractual relationship between the seller and the consumer protection association, which was acting on the basis of a right conferred by statute for the purpose of prohibiting the use of unlawful terms by the professional. According to the court, that applies regardless of whether the action is purely preventive in nature or whether it is subsequent to contracts already concluded with certain consumers: Henkel's case [2002] ECR I-8111, paras 38 and 39…

50 However, although the concept of contractual obligation is not limited to the obligations linking the parties to the proceedings, it implies at the very least an *actual and existing* commitment—which is absent in this case…

58 On the other hand, such an action seeks to establish liability on the part of the professional on the basis of his non-contractual obligation to refrain from using unfair terms in his relations with consumers. It therefore aims to prevent damage in the form of harm to the collective interests of consumers caused by infringement of that obligation. Accordingly, it relates to a non-contractual obligation within the meaning of the Rome II Regulation, and concerns, as is clear from Henkel's case, para 50 a matter relating to tort, delict or quasi-delict within the meaning of the Brussels I Regulation.”

1. Finally, in *flightright GmbH v Air Nostrum Lineas Aereas del Mediterraneo SA* (C-274/16, C-447/16 and C-448/16 19 October 2017 and 7 March 2018), the court was concerned with flight delays where the flights themselves were sold by the contractual air carrier (‘CAC’) to the passengers. However, they only operated the second leg of the journey. The first leg was performed by an operating air carrier (‘OAC’) and it was this first leg which was delayed, causing the passengers to miss the connecting flight. The court was concerned with the nature of the claim brought by passengers against the OAC for a delay on the first leg of the journey, in circumstances there was no contract between them and the OAC.
2. The Advocate General’s Opinion was again expressly accepted by the Court. Paragraph 54 was in the following terms:

“Thus, in my understanding the jurisdictional rule in Article 5(1)(a) of Regulation 44/2001 and in Article 7(1)(a) of Regulation 1215/2012 is based on the *cause* of action not the *identity* of the parties. What matters is whether the underlying, original source of the rights and obligations which are being disputed and the reason that claim is being brought against a specific defendant follow from a contract. If they do, the ensuing action aiming at their enforcement is a ‘matter relating to a contract’, even if, as is often the case with legal provisions protecting consumers, the rights and obligations that are being concretely enforced in the individual case had been ‘inscribed’ namely rendered applicable without the possibility of derogation into the contract by the operation of mandatory statutory rules.”

The Advocate General therefore concluded that Rome I applied.

1. The Court agreed. The relevant passages are paragraphs 59 – 64 of the judgment:

“59 In that regard, the Court has also held that in the case where non-performance of a contract is relied upon to support a claimant's action, all obligations arising under that contract must be considered to come within the concept of matters relating to a contract (judgment of 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, paragraph 30 and the case-law cited)…

61 It follows, as the Advocate General stated in point 54 of his Opinion, that the rule of special jurisdiction in matters relating to a contract provided for in Article 5(1)(a) of Regulation No 44/2001 and in Article 7(1)(a) of Regulation No 1215/2012 is based on the cause of action, not the identity of the parties (see, to that effect, judgment of 15 June 2017, *Kareda*, C-249/16, EU:C:2017:472, paragraphs 31 and 33).

62 In that regard, the second sentence of Article 3(5) of Regulation No 261/2004 states that, where an operating air carrier which has no contract with the passenger performs obligations under this regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger.

63 Therefore, that carrier must be regarded as fulfilling the freely consented obligations vis-à-vis the contracting partner of the passengers concerned. Those obligations arise under the contract for carriage by air.

64 Consequently, in circumstances such as those at issue in the cases in the main proceedings, an application for compensation for the long delay of a flight carried out by an operating air carrier such as Air Nostrum, with which the passengers concerned do not have contractual relations, must be considered to have been introduced in respect of contracts for carriage by air concluded between those passengers and Air Berlin and Iberia respectively.”

***6.2 English Authorities***

1. It is only necessary to refer to two English authorities on the issue of whether Rome I or Rome II applies in this case. In *XL Insurance Company SE v Axa Corporate Solutions Assurance* [2015] EWHC 3431 (Comm), HHJ Waksman QC sitting as a judge of the High Court, the judge said [19] that for Rome I to apply, the defendant had to have an obligation founded in contract to render a performance of some kind to the claimant, and the claimant had to be seeking that performance or compensation for the lack of it. The case was concerned with claims between insurers, and anticipated elements of the decision in *Ergo*.
2. The judge concluded that the claims between insurers were not claims founded on a contractual obligation. The heart of the judgment is at paragraph 26 onwards:

“26 AXA seeks to avoid this problem by arguing that AXA did have a contractual obligation to indemnify its insured which it failed to discharge. Quite so, but XL is not suing on that obligation. Indeed, if it were all it could achieve would be an order that AXA make payment to Connex or the Fund, which is no use to it now and anyway is not being claimed. Nor does the fact that the contractual liabilities of XL and AXA to their insured are pre-requisites to XL's claim for a contribution turn it into a contractual claim for the purposes of Article 7 (1).

27 The difficulty with AXA's reliance on the contract of insurance as the relevant one for the purpose of Article 7 (1) is illustrated by the fact that if the obligation under that contract, which is to indemnify the insured, is the obligation in question (as AXA contends) then (obviously) the place of performance of that obligation will have no relevance to XL at all since it will be the place where the insured is to be indemnified either in France or in California. It makes no sense for the Court to decide the place of performance of an obligation which is not the obligation that the claimant seeks to enforce. It is the latter obligation which is central – see for example Shenavai v Kreischer [1987] ECR 239 at paras. 18 and 19.

28 It is therefore not enough for Article 7 (1) purposes to show that there is a contract with freely assumed obligations which is somewhere in the background, or even one which is a stepping stone to the ultimate liability of the defendant. It must be the basis for the obligation actually relied upon by the claimant as against the defendant. This is borne out by the ECJ decision in Verein für Konsumenteninformation v Henkel [2003] I.L.Pr. 1 where the claimant was a consumer organisation which sought an injunction against the defendant trader to prohibit him from using unfair contract terms in his contracts with his customers. Unquestionably the contracts concerned lay at the heart of the action. But nonetheless, the claimant association was not in any kind of contractual relationship with the defendant. Accordingly the Court held that the claim was not within Article 7 (1).”

It is also noteworthy that Judge Waksman disagreed with the Advocate General’s Opinion in *Ergo*, a futher reason why I have not referred to it.

1. The most recent consideration of the *Brogsitter* line of authorities by the Court of Appeal can be found in *Bosworth and Another v Arcadia Petroleum Limited and Others* [2016] EWCA Civ 818. There the Court of Appeal dismissed the appeal from the decision of Burton J, who had decided that the allegations of conspiracy to defraud against former employees were not matters relating to their contracts of employment. As a matter of principle, Gross LJ summarised the position as follows:

“66 Fourthly, the ECJ authorities do not require the adoption of the mechanistic test. With respect to Mr Foxton's argument to the contrary, I am unable to accept that the *ratio* of Brogsitter is to be found (in effect) solely in paragraphs [24] and [29]. There is more to it than that, as appears from the discussion in Holterman, set out above, especially the reference by the Court in Holterman to paragraphs [24] – [27] of Brogsitter. To my mind, the true *ratio* of Brogsitter appears from the entirety of the passage at [24] – [27]; there can be no good reason to look at paragraphs [24] and [29] in isolation. It may be remarked that the point is even clearer if regard is had to the German language text but I do not rest my conclusion on that consideration. Accordingly, it does not suffice to pose the – literal – question as to whether the conduct complained of “may be considered a breach of contract”. Instead, the requirement that the legal basis of the claim “can reasonably be regarded” as a breach of contract, assists in directing the focus of the inquiry to the substance of the matter, with the result that it is “indispensable” to consider the contract in order to resolve the matter in dispute. This is a test and an approach indistinguishable to my mind from that adopted in Alfa Laval, so that (in Davis LJ's words) there will be a material nexus between the conduct complained of and the individual contract of employment.”

1. As a matter of reality and substance, Gross LJ concluded that the conspiracy claims did not relate to the appellants’ individual contracts of employment. This view was summarised at paragraph 69 of his judgment:

“69 Secondly, while it cannot be gainsaid that the conspiracy allegations could be pleaded as breaches of the Appellants' implied duties of fidelity and loyalty under their contracts of employment, as a matter of substance those contracts simply form part of the history and thus a very small part of the picture. They provided the opportunity for the Appellants' allegedly nefarious activities but no more than that; these claims are instead about the alleged dishonesty of a number of alleged conspirators acting in combination. In these circumstances, such nexus as there was between the conspiracy claims and the Appellants' individual contracts of employment was tenuous and, in my judgment, not material. Put another way, those contracts do not feature at all, let alone are indispensable, in the resolution of these claims.”

1. In this already overlong review of the law, I have not found it necessary to set out in detail the cases dealing with the Package Travel Regulations in force in the UK. As the decision in *Hone v Going Places Leisure Travel Limited* [2001] EWCA Civ 947 makes plain, questions of improper performance can only be determined by reference to the terms of the contract. However, in giving the judgment of the court, Longmore LJ said this:

“15. Regulation 15(2) provides for the other party to the contract to be liable for any damage caused to the consumer by failure to perform the contract or by the improper performance of the contract. The present case is not a case of failure to perform. It can only be a case of improper performance. It is only possible to determine whether it is a case of improper performance by reference to the terms of the contract which is being performed. To my mind, regulation 15(2) does not give the answer to the question, “What is improper performance?” Rather it is a requirement of the application of regulation 15(2) that there should be improper performance. That can only be determined by reference to the terms of the contract. There may be absolute obligations, eg as to the existence of a swimming-pool or any other matter, but, in the absence of the assumption of an absolute obligation, the implication will be that reasonable skill and care will be used in the rendering of the relevant service. There will thus be no improper performance of the air carriage unless there is an absence of reasonable skill and care in the provision of that service. If, as here, it is the claimant who seeks to rely on regulation 15(2), then he has to show that there has been improper performance.”

1. This may be of some relevance. The judge’s approach was to note that proper performance was a question to be gauged by reference to the contract obligations. As he said, some of those obligations might be absolute; some would be on the basis of a reasonable skill and care.

***7. Ground 1 of the Appeal: Was the Judge wrong to find that the pleaded strict liability claim was contractual in accordance with Rome I?***

1. I am in no doubt that this is the critical question. I emphasise that because, when the appellant was seeking permission to appeal, Ground 2 (which related solely to French law) was elevated into the appellant’s primary argument and permission to appeal was granted on that basis. In my view, that issue is and always was secondary to the issue of whether or not the pleaded strict liability claim in this case was properly characterised as contractual. If it was not, it would be non-contractual and Rome II would apply.
2. I start with reality and substance, as Gross LJ did in *Bosworth*. In this case, the appellant was on the ice wall at Chamonix because of a contract entered into between his employer, BNP (on his behalf), and the respondent. The respondent was obliged to provide various activities, including the climbing activity on the ice wall. The pleaded strict liability claim is therefore based on the existence of obligations owed by the respondent to the appellant under that contract. It is a claim for damages for breach of those obligations. The contract is therefore “indispensable” to the claim for breach[[2]](#footnote-2).
3. Article L-211-16 provides that the respondent’s contractual obligations will be construed so as to give rise to a strict liability. But that does not affect or alter the contractual basis of the claim. All it means is that, in an action for breach of contract, the respondent will be *prima facie* liable, unless it can show that the accident was the responsibility of the appellant. Article L-211-16 is therefore an enhancement of a pre-existing right, which is founded upon the contract. It is not a different right which is unconnected to the contract: indeed, in my view, Mr Karia QC was right to observe that the Article itself imposes no obligation *at all*. Nor does the claim only operate with the contract in the background: on the contrary, the contract is central to the claim.
4. In my view, this common sense analysis is in accordance with the EU authorities to which I have referred. First, in answer to Mr Mercer QC’s submissions to the contrary the contract was freely entered into by BNP on behalf of the appellant. As the Directive makes plain, the consumer for the purposes of these regulations includes, not only the principal contractor, but those on whose behalf the principal contractor enters into the contract (see paragraph 26 above). That would include the appellant. In any event, Rome I can apply, whether or not the appellant was an actual party to the contract (see paragraphs 37 and 40 above).
5. Secondly, applying *Brogsitter, Ergo,* and *Amazon*, the contract between BNP and the respondent was not simply part of the background to the claim (as it was found to be in *Bosworth*); it is the basis for the obligations of which the respondent is said to be in breach. Although it is unwise to be over-definitive as to the precise test to be derived from the European authorities, I derive the following from these three cases:

(a) The mere fact that a contracting party brings a civil liability claim against the other party does not by itself mean that the claim concerns “matters relating to a contract” but it will be sufficient if the conduct complained of may be considered a breach of contract (*Brogsitter* [24]) or if the purpose of the claim is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract (*Brogsitter* [26]).

(b) Only an obligation freely consented to by one person towards another and on which the claimant’s action is based is a ‘matter relating to contract’ (*Ergo* [44]).

(c) The classification of an obligation for the purposes of Rome I or Rome II depends on the (contractual or non-contractual) source of that obligation (*Amazon,* AG’s opinion [48]). A contractual obligation implies at the very least an actual and existing commitment (*Amazon* [50]).

1. On an application of all or any of those principles, it is clear that the pleaded strict liability claim can only be characterised as a contractual claim. It is a claim for damages for breach of the obligations set out in the contract, freely entered into by both sides. That contract is the source of the relevant obligations and imposed the necessary commitments. To put it another way, to use Judge Waksman’s words in *AXA* (paragraph 43 above), the contract was not “a stepping stone to the ultimate liability of [the respondent but] the basis for the obligation actually relied upon…”.
2. This conclusion is also consistent with the result in those three cases, none of which involved a situation where the claiming party was relying on the direct terms of a contract between itself and the defendant in order to claim damages for breach. In *Brogsitter*, the claim was considered contractual, because the conduct complained of could be considered a breach of the terms of the contract, despite the fact that the claimant’s claims were tortious under German law. The direct claims in *Ergo* (and *XL*) were obviously under Rome I; the difficulties that arose concerned the claims as between the different insurers where there was never any contract between them. It is therefore unsurprising that those gave rise to potentially different considerations to those which arise here (although even then, the answer was principally Rome I, with the qualification noted at paragraph 36 above). Rome II was relevant in *Amazon* because there was a wider claim relating to the protection of consumers’ interests with respect to the use of unfair terms in general terms and conditions. Broader considerations (beyond the terms of a particular contract) were again relevant.
3. Thirdly, I have derived considerable assistance from paragraph 54 of the Advocate General’s Opinion in *flightright* (paragraph 40 above), the most recent European authority on this point. He said that what mattered was “whether the underlying original source of the rights and obligations which are being disputed and the reason that claim is being brought against the specific defendant follow from a contract”. I consider that this neatly differentiates between the case where there may be a contract, but where that is a matter of background fact, of tangential relevance to the claim actually being brought; and the case where the contract itself is the underlying source of the rights and obligations being disputed. To put the same point by reference to paragraph 59 of the Court’s judgment in *flightright* (paragraph 41 above), because non-performance of a contract is relied upon for the pleaded strict liability claim, the relevant “obligations arising under that Contract must be considered to come within the concept of matters relating to a contract”.
4. In this case, there can be no doubt that the contract between BNP and the respondent is the underlying original source of the rights and obligations being disputed. That is the express basis of the pleaded strict liability claim: see paragraph 6 above. Although the claim naturally seeks to take advantage of the strict liability imposed upon the contractual obligations by the *Code*, that does not detract from the fact that, in my view, it is a claim based fairly and squarely on the contract.
5. For these reasons, I consider that, as a matter of autonomous EU law, the pleaded strict liability claim, despite the reliance on the Code, is and remains a claim that was contractual in nature, and therefore one to which the Rome I Regulation applied.
6. Finally I note that this would be the characterisation of the claim in English law (see paragraphs 46 and 47 above, and the recent decision of this court in *X v Kuoni Travel* Ltd [2018] EWCA Civ 938). It is also how the experts characterised the claim in French law (see paragraph 9 above and paragraphs 60-66 below). As Mr Karia QC observed, it would indeed be curious if EU law produced a completely different answer to that produced by both English and French law. In my view, it does not.
7. Accordingly, I reject Ground 1 of the appeal.

***8. Ground 2: Was the Judge wrong to find that, as a matter of French law, the claim under the Code was contractual in nature?***

1. In the light of my conclusions on Ground 1, it may well be that any consideration of Ground 2 is academic. That said, in deference to the arguments that we heard, it is appropriate to express my views about it.
2. I have already explained the unsatisfactory position that was adopted in relation to the evidence as to French law. On the one hand, the experts appeared to reach such a high degree of agreement (that the claim under the Code was a claim based on or related to a contractual liability as opposed to a non-contractual liability) that they were never asked to meet and were not produced for cross-examination. On the other hand, it appears that the appellant then sought at trial to argue that, notwithstanding the content of the two reports, the claim under the *Code* in French law should be characterised as a non-contractual claim.
3. I am in no doubt that this course was not open to the appellant. First, his own expert, M.Ricard, had stated that a claim made by reference to the Code was a cause of action based on contractual liability. At no point did he suggest that, notwithstanding this opinion, the Code somehow gave rise to a free-standing obligation which was non-contractual in nature (the appellant’s case now). Secondly, not only did M.Charpentier say in terms that Article L-211-16 related to contractual liability (and he emphasised that by underlining the word contractual), he also went on to say that in consequence, Rome II did not apply (paragraph 9 above). If the claimant had wished to challenge that part of his report, then M.Charpentier had to be cross-examined about it. He was not. The respondent, and the judge, were therefore entitled to assume that there was no dispute on this issue.
4. In those circumstances, the judge was entitled to proceed – as he did – on the basis that the experts were agreed that, under French law, the claim in these proceedings was contractual in nature. In those circumstances, of course, the complaints about the judge’s comments about French law fall away all together. To put the matter the other way round, the appellant’s suggestion on appeal that the *Code* provided a freestanding obligation finds no support in either of the experts’ reports.
5. In any event, I consider that the criticisms of the judge are misplaced. He was asked, on behalf of the appellant, to look at the French cases. He did so, and made various observations upon them which were in accordance with the agreement apparently reached by the two experts. There can therefore be no proper criticism of the judge for undertaking that exercise, (which was only done because the appellant requested it) nor of his conclusions (which were entirely in line with the expert evidence).
6. The particular comments that the judge made about the French cases were unexceptionable. In particular, in relation to the judgment of the Cour de Cassation dated 17 November 2011, involving the same respondent, the very brief explanation (five lines) of the rejection of the grounds of appeal in that case stated that “any person involved in operations…is liable *ipso jure* for the proper performance of the obligations arising from the contract and can only release himself from all or part of his liability by providing proof that the non-performance or the defective performance”. The judge said that the Cour de Cassation “seems to have considered that the occurrence of any accident proves improper performance of the contract, effectively implying a contractual obligation to keep the consumer safe”. I consider that that observation was a proper summary of the decision in that case.
7. Accordingly, I consider that Ground 2 should never have been raised, let alone to have been allowed to assume the importance that it did in the original application for permission to appeal. It was not a point which the appellant was entitled to take in view of the content and state of the expert evidence, and the conduct of the trial; it was only ever going to be of tangential relevance to the principal question in the case; and it was a wholly unfair criticism in any event.
8. For these reasons, I also reject Ground 2 of the appeal.

***9. Conclusions***

1. For the reasons which I have explained, if my Lords agree, I propose that this appeal be dismissed.

**Lord Justice Moylan :**

1. I agree.

**Lord Justice Simon :**

1. I also agree.
1. For the reasons explained by Carr J in *Pan Oceanic Chartering Inc v Unipec UK Co Ltd and another* [2016] EWHC 2774 (Comm). [↑](#footnote-ref-1)
2. The word used by Gross LJ in Bosworth (see paragraph 44 above). [↑](#footnote-ref-2)