ASPEN UNDERWRITING LTD

INSURERS, WEAKER PARTIES, AND THE BRUSSELS REGULATION

A Practical Guide from the 2TG Insurance Team **Spring 2020**

Introduction

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On 1 April 2020, the Supreme Court gave a unanimous seven panel judgment in *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] UKSC 11. This decision is important on the interpretation and application of the insurance provisions in the Brussels Regulation Recast (Regulation (EU) 1215/2012) ("the Regulation"). The Supreme Court makes clear that there is no "economic power parity" exception to the Regulation in matters relating to insurance. The Supreme Court's reasoning and conclusions will be of especial interest to insurers and any party that might be involved in litigation with insurers.

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The Appellant Insurers contended that the Courts of England and Wales had jurisdiction over their claims for misrepresentation and restitution owing to mistake against the Respondent and Cross Appellant Bank. Whether or not the Courts of England and Wales did have jurisdiction depended on the provisions of the Regulation. The Supreme Court dismissed the Insurers' appeal and allowed the Bank's cross appeal. The key points to the Supreme Court's decision are (1) the Supreme Court dismissed the Insurers' argument that the Bank was bound by an exclusive jurisdiction clause in favour of the Courts of England and Wales contained within the policy of insurance, (2) the Supreme Court dismissed the Insurers' argument that Section 3 of Chapter II of the Regulation, which governs 'matters relating to insurance', was confined to matters relating to an insurance contract, rather the scope of Section 3 was broad and, (3) the Supreme Court agreed with the Bank that there was no exception to the specific categories listed in article 14 where a member of one of those categories was not in fact a weaker party.

As a result of the Supreme Court's conclusions it was not necessary to determine whether the Courts of England and Wales had jurisdiction under article 7(2) either over the Insurers' claim for misrepresentation or the claim for restitution.

This note will address:

- The facts in *Aspen Underwriting*;
- The Supreme Court's judgment and reasoning;
- The unanswered questions of jurisdiction over claims for misrepresentation and unjust enrichment under the Regulation; and
- Practical points going forward.

The Facts

Aspen Underwriting Ltd and others ("the Insurers") insured a vessel ("the Vessel") under an insurance policy ("the Policy"). The Policy had an exclusive jurisdiction clause in favour of the Courts of England and Wales.

Credit Europe NV ("the Bank"), domiciled in the Netherlands, funded the re-financing of the Vessel. In doing so, the Bank took mortgages over the Vessel and assignments of the Policy. These identified the Bank as mortgagee, assignee and loss payee. Of particular relevance is that the Notice of Assignment provided 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 …"

The Vessel sank; the Insurers settled with the owners and managers of the Vessel ("Owners" and "Managers" respectively). The Bank was not involved in the settlement negotiations or in the settlement of the insurance claim ("the Settlement Agreement"). The Settlement Agreement's recitals recorded the Bank's status as mortgagee and loss payee, as well as the Bank's consent ("the Letter of Authority") of the payment of the insurance proceeds to brokers. The parties to the Settlement Agreement were the Insurers, Owners, and Managers (and their associated companies). Clause 5 of the Settlement Agreement "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" (*Aspen*, [11]).

In subsequent proceedings, *Kairos Shipping Ltd v Enka & Co LLC* [2016] EWHC 2412 ("The Atlantik Confidence"), the Admiralty Court found that the Owners and Managers had in fact procured the Vessel's scuttling. The Insurers commenced legal proceedings in England against the Owners, Managers, and Bank to recover the sums paid out under the Settlement Agreement on the basis of either Owners' and Managers' misrepresentation (made on their own behalf and on behalf of the Bank), the Bank's misrepresentations, or the Insurers' mistake. The Bank challenged the High Court's jurisdiction.

Teare J held across two judgments ([2017] EWHC 1904 (Comm) and [2017] EWHC 3107 (Comm)) that the High Court had jurisdiction over the Insurers'

claim for damages for misrepresentation under article 7(2) of Regulation but not in respect of the claim for restitution (which would have to be pursued in the Netherlands). Teare J held that the High Court did not have jurisdiction as a result of either of the jurisdiction clauses contained in the Settlement Agreement or under the Policy.

The Court of Appeal, in a judgment given by Gross LJ with which Moylan LJ and Coulson LJ agreed ([2018] EWCA Civ 2590), agreed that the Insurers did not have a good arguable case that the Bank was a party to the Settlement Agreement (a finding not appealed to the Supreme Court); that the Bank was not bound by the exclusive jurisdiction clause in the Policy; that the Bank was not entitled to rely on Section 3 of Chapter II of the Regulation as it was not a weaker party entitled to that protection; and that the claim for damages owing to the Bank's alleged misrepresentation was indeed covered by article 7(2) as a matter related to tort, delict or quasi delict with the "harmful event" occurring in England. The Court of Appeal also found that the claim for unjust enrichment was not a matter related to tort, delict or quasi delict under article 7(2) and therefore that claim, if it were to be pursued, would have to be heard in the Netherlands.

The result of the judgments of the High Court and Court of Appeal was that the Courts of England and Wales had jurisdiction over the Insurers' claims for damages for misrepresentation but did not have jurisdiction over the Insurers' claim in unjust enrichment.

The Issues

The Supreme Court gave judgment on three issues:

1. Does the High Court have jurisdiction pursuant to the exclusive jurisdiction clause contained in the Policy?
2. Are the Insurers' claims against the Bank "matters relating to insurance" within Section 3 of Chapter II of the Regulation?
3. 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?

The Judgment

Lord Hodge gave the sole judgment with which Lady Hale, Lord Reed, Lord Kerr, Lord Lloyd-Jones, Lord Kitchin and Lord Sales agreed. Lord Hodge, first, reinforced some general points about the structure of the Regulation:

- Pursuant to article 4 of the Regulation, the default is that persons shall be sued in the member state in which they are domiciled ([19]). It is only in well-defined circumstances that the default position is ousted by virtue of a different connecting factor based on the subject matter of the dispute or the autonomy of the parties and the articles that so oust the default are to be narrowly interpreted ([20]);
- There are articles that provide for alternative grounds of jurisdiction in addition to domicile; these are based on a close connection between the court and the action or are in order to facilitate the efficient administration of justice ([20]);
- Subject to narrow exclusive jurisdiction exceptions, the Regulation respects the autonomy of parties to contract for which

courts have jurisdiction; when a court has to interpret an article it must consider whether the rule contained in the article supports the general rule of jurisdiction based on domicile or purports to exclude or provide an alternative to the general rule ([20]);

Although it had been challenged in the Court of Appeal, there was no disagreement in the Supreme Court that it was for the Insurers to show that they have a good arguable case in the sense that they have the better of the argument ([21]). The challenge in the Court of Appeal had been mounted on the basis that at the time that Teare J gave judgment, *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 had not yet been handed down, and whether Lord Sumption's "explication" of the test in the same, in the context of *forum conveniens*, would have materially affected Teare J's analysis. Gross LJ relied on Lady Hale's judgment in *Brownlie* that the test remained that of "good arguable case" and Lord Sumption's explication had not altered that. Gross LJ concluded that if there was a distinction between the test applied by Teare J and the test in *Brownlie* then it was a distinction without meaningful difference in the context of the case.

Issue (1) – the Exclusive Jurisdiction Clause in the Policy

The Insurers argued that the Bank was bound by the Policy's exclusive jurisdiction clause because, when the Bank issued the Letter of Authority, it asserted a claim under the Policy for payment of the insured sums given it was both an assignee and loss payee. The Insurer, in essence, said that any assertion of or reliance on the Bank's rights in relation to the Policy was covered by the exclusive jurisdiction clause. The clause was, in short, said to extend to an obligation on an assignee to submit to the Courts of England and Wales if there was litigation relating to the Policy.

Lord Hodge disagreed. In summary, pursuant to EU law, jurisdiction agreements only bind a party if there is, in fact, consensus between the parties that is clearly and precisely demonstrated (*Coreck Maritime GmbH v Handelsveem BV* (Case C-387/98) [2000] ECR I-9337, [13] – [15]). As such, a jurisdiction agreement in an insurance contract does not usually bind a third-party beneficiary who has not expressly subscribed to the clause (*Société financière et industrielle du Peloux v Axa Belgium* (Case C-112/03) [2006] QB 251, [43]).

An exception is successor in title cases (*Partenreederei M/S Tilly Russ v Haven & Vervoerbedrijf Nova NV* (Case 71/83) [1985] QB 931, [24] – [26]). Was the Bank a successor in title? No. The bank was an equitable assignee; it was "trite", for Lord Hodge, to say that an assignment transfers rights under a contract but, absent the consent of the party to whom contractual obligations are owed, does not and cannot transfer obligations (*Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660, 668-670). An exception may be cases where the assignee commences proceedings to enforce its rights, but the Bank did no such thing here. The Letter of Authority enabled the Insurers to obtain discharges of their obligations but did not make the Bank a party to the Settlement Agreement. The key point is that the Bank was not party to the Policy; and so is not bound by the Policy to submit to the English courts ([30]).

Issues 2 and 3 – Section 3 of Chapter II of the Regulation

Section 3 of Chapter II of the Regulation is entitled "Jurisdiction in matters relating to insurance". Article 14(1) states:

> "... 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".

When article 14 applies, Lord Hodge held, then domicile becomes "the exclusive ground" of jurisdiction (*Aspen*, [31]). The Insurers argued that a claim can only be a matter relating to insurance if the claim is for a breach of an obligation required to be performed by virtue of the insurance contract, and so does not apply in the present case. Lord Hodge disagreed, noting that the title to section 3 is "Jurisdiction in matters relating to insurance", which is wider than other titles in the Regulation (e.g. section 5 of Chapter II "Jurisdiction over individual contracts of employment"). Likewise, the general expectation that articles other than article 4 will be interpreted narrowly does not apply to article 14 because other "articles derogate from the general rule of jurisdiction ...article 14 ... reinforces article 4" (*Aspen*, [38]). As such, *a priori*, the Bank was entitled to be sued in the Netherlands, as the dispute involved matters relating to insurance.

The Supreme Court turned to 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". Both the High Court and Court of Appeal had found that the Bank could not benefit from article 14 because recital 18, in effect, provided that the protection in article 14 was only available to a weaker party in circumstances of economic imbalance, which did not exist between the Insurers and the Bank.

The Supreme Court disagreed; recital 18 was not to be seen as a "weaker party" exception that removes a defendant from the protections of article 14. Lord Hodge gave six reasons for this, which are summarised at [43]. In short:

- Article 14 provides protection to a policyholder, an insured or a beneficiary because they are usually the weaker party (*Gerling Konzern Speziale Kreditversicherungs-AG v Amministrazione del Tesoro dello Stato* (Case 201/82) [1983] ECR 2503, [15] – [17]).

- While recital 18 explains the policy behind Section 3 of Chapter II and may be a useful tool in interpreting the operative provisions of the Regulation, it is the articles themselves that have legal effect; to this extent, one can distinguish between the principle underlying a ground of jurisdiction and the ground of jurisdiction itself (*AMT Futures Ltd v Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* [2017] UKSC 13; [2018] AC 439, [14] and [29]).

- Any derogations from jurisdictional rules must be interpreted narrowly (*Société financière et industrielle du Peloux v Axa Belgium* (Case C-112/03) [2006] QB 251, [31]).

- Legal certainty is important in conflicts of laws; the CJEU has set itself against case by

case analysis (*Landeskrankenanstalten-Betriebsgesellschaft - KABEG v Mutuelles du Mans Assurances - MMA IARD SA* (Case C-340/16) [2017] IL Pr 31, [34]).

- When the CJEU has had regard to recital 18 it is not to decide whether a particular policyholder, insured or beneficiary falls outside of section 3's protections but to reach a decision on whether, by analogy, those protections are extendable to persons who do not fall within the list of protected persons in section 3 (*Aspen*, [50] – [55]).

- The policy underlying the jurisprudence of the CJEU, when it is deciding whether to extend section 3's protections, seeks to uphold the general rule that defendants should be sued where they are domiciled. The CJEU allows extensions to section 3 only where such an extension is consistent with the policy of protecting the weaker party.

As such, Lord Hodge found that this was a matter relating to insurance, meaning the Bank was entitled to be sued where it was domiciled, and recital 18 provided no exception to that rule of jurisdiction. Given the same, the Supreme Court declared that the High Court had no jurisdiction over the Insurers' claims against the Bank.

Claims for Misrepresentation and Restitution

As the Supreme Court concluded that because the Bank was a beneficiary under the Policy, and they were entitled to be sued in their domicile pursuant to article 14, it was not necessary to consider whether the Courts of England and Wales had jurisdiction over the Insurers' claims in restitution and misrepresentation pursuant to article 7. Effectively, the fact that article 14 applied in *Aspen* meant that article 7, no matter how one characterised the claims, would not ground jurisdiction. As summarised above, the Court of Appeal and the High Court had come to the view that the Courts of England and Wales had jurisdiction over the claims in misrepresentation, but not the claim in restitution. This position had been described as "unsatisfactory" on case management grounds by Teare J. Given the importance placed on avoiding irreconcilable judgments under the Regulation it is also incompatible with that aim to have half a claim litigated in England and Wales and the other half in the Netherlands, in which both Courts will scrutinise the same facts. Despite the Supreme Court not having to consider these points, this note examines the arguments and the lower courts' reasoning.

The Insurers' Claim in Misrepresentation

Article 7(2) of the Regulation provides an alternative ground of jurisdiction permitting parties to bring claims "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur".

The concept of "matters relating to tort, delict or quasi delict" is an independent concept distinct from national law, to be interpreted "principally by reference to the system and objectives of the Convention in order to ensure its full effect" (*Kalfelis v Bankhaus Schroder Munchmeyer Hengst & Co.* (Case 189/87), [16]). The CJEU in *Kalfelis* further held that "In order to ensure uniformity in all Member States, it must be recognised that the concept of 'matters relating to tort, delict or quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article [7(1)]".

In *Bier v SA Mines de Potasse d' Alsace* (Case 21/76) [1978] QB 708, the CJEU considered the place where a harmful event occurred or may occur under what is now article 7(2) permitted a claimant to bring proceedings either in the place where the damage occurred or the place giving rise to it.

The Insurers brought claims for misrepresentation both at common law and under the Misrepresentation Act 1967. It had been argued by the Bank that the misrepresentation claims brought by the Insurers were not properly matters relating to tort but rather matters relating to contract. For instance, a claim under section 2(1) of the Misrepresentation Act 1967 depends on a contract being entered into after a misrepresentation. In general, it could also be said that the focus of the Insurers' complaint was that they had been induced to enter into a Settlement Agreement by the misrepresentations.

The Court of Appeal affirmed Teare J's reasoning that the claims brought were not matters relating to a contract and thus fell within article 7(2). Teare J distinguished a case where owing to misrepresentations made by a contracting party it is alleged that the contract should be rescinded, where it could properly be said that the subject matter of the claim was indeed the contract. Rather, in *Aspen*, the Insurers were suing a party (the Bank) who it is alleged made misrepresentations to induce the Insurers to enter into a contract with the Owners (i.e. the Settlement Agreement). As to the claim under the Misrepresentation Act 1967, Teare J held that though the claim depended on proof of a contract it was properly a matter falling within the scope of article 7(2).

Teare J relied on a decision of Rokison QC in *Alfred Dunhill Ltd v Diffusion Internationale* [2002] 1 All ER (Comm) 950). The Court of Appeal described their view as being "fortified" by the decision of Rokison QC in *Dunhill*, adding "in a nutshell, the legal basis for these claims in damages does not hinge on a breach or breaches of contract".

Rokison QC had, in turn, relied on the decision of the House of Lords in *Kleinwort Benson Ltd v Glasgow City Council (No2)* [1999] 1 AC 153, a case concerned with a claim of unjust enrichment in respect of sums paid under a void contract, to the effect that what is now article 7(1) (i.e. matters relating to contract), was confined to claims that sought to enforce a contractual obligation. Rokison QC, further relied on the reasoning of Lord Hope in *Agnew v Lansforsakringsbolagens AB* [2000] 2 WLR 497, who had considered that a claim alleging a party had been induced into a contract by misrepresentation and thus wanted to claim damages would be founded in tort, however a claim in the same circumstances to rescind the contract would be a matter relating to contract (Lord Hope's remarks were *obiter*, and in a dissenting judgment although not on the point in issue). In *Agnew* the House of Lords had held that a claim to avoid reinsurance contracts on the grounds that they had been entered into consequent on material misrepresentations would fall within what is now article 7(1) on the basis that the provision was wide enough to encompass "pre-contractual obligations" including the obligation to make "fair presentation of risk".

In *Aspen*, the Court of Appeal's reasoning on this point is brief. Indeed, only [136] is devoted to discussions and conclusions on the characterisation of the misrepresentation claim. Further, in Teare J's two judgments, only [75] – [77] ([2017] EWHC 1904

(Comm)) in relation to the claim at common law and, only [3] and [5] ([2017] EWHC 3107 (Comm)) in relation to the section 2(1) claim, are devoted to the characterisation of the claim. Both judgments appear to rely on judicial instinct.

The Insurers had sought both rescission of the Settlement Agreement and damages ([24] of the Court of Appeal's judgment). It is at least arguable, following *Dunhill* and *Agnew*, that an action to rescind a contract will be within the scope of article 7(1). However, both the Court of Appeal and Teare J seemed to have been persuaded that an action to rescind owing to a misrepresentation will not necessarily be within article 7(1) where the action is against a non-party. Another important point arising from *Agnew* is where it can be said a party is bound either by express or implied contractual obligations to not make a misrepresentation. Where that is alleged, it is at least arguable that those proceedings would be within the scope of article 7(1) (see *Barclay-Watt v Alpha Panareti Public Ltd* [2012] 11 WLUK 702, [51]).

Insurers' Claim in Restitution

Teare J had held that the Insurers' claim against the Bank for restitution was on the grounds of mistake. As a result, it did not require, nor did it presuppose the existence of a "harmful event" under article 7(2). The case as put by the Insurers under restitution did not allege a harmful event. The Court of Appeal declined to interfere with Teare J's classification.

The Court of Appeal considered that the decision in *Kleinwort Benson Ltd* was squarely on point in deciding that it was impossible to reconcile the wording of what is now article 7(2) and the essence of an action for restitution owing to a mistake; the former requires a harmful event and the latter does not.

The Insurers had argued that article 7(1) and article 7(2) were intended to be a complete categorisation: if a claim was not a matter relating to contract then it should fall within article 7(2). The Court of Appeal disagreed. The very case that had opined that the premise of article 7(2) was that it should catch those claims not within article 7(1), namely *Kalfelis*, had been cited to the House of Lords in *Kleinwort Benson*. Importantly, article 7(1) and article 7(2) provided narrowly construed alternative grounds to the general rule in article 4 i.e. to sue in a defendant's domicile, so where a claim did not fall within article 7(1) or article 7(2) the claim was simply covered only by article 4.

Whilst the Court of Appeal may consider that the House of Lord's view on *Kalfelis* in *Kleinwort Benson* was dispositive of the argument that article 7(1) and article 7(2) are complete categories, that view has, at least arguably, remained a strong part of CJEU case law, see *Brogsitter v Fabrication de Montres Normandes EURL* C-548/12, [27]. That said, there has been some recent scrutiny on the role of article 7(2) as a residual category in relation to unjust enrichment. In particular, in AG Wahl's opinion in *Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich* (C-102/15), it is considered that the notion of "damage" in article 7(2) equates with a notion of a claimant's loss and is incompatible with the focus in restitution on a defendant's gain, and further, similar to *Kleinwort*, that article 7(2) presupposes the existence of a wrong. The arguments in favour of unjust enrichment not based on a wrong being outside article 7(2) are, at the least, highly arguable and will do no doubt form the basis of future disputes.

However, there is more to restitution than those actions based on mistake. It has been held, albeit in the context of the CPR PD 6B gateways for service out of jurisdiction, that a claim for restitution of sums overpaid to a defendant, where it is alleged that there was a mistake that the monies were due and owing under a contract, was a claim in respect of a contract (Lightman J in *Albon v Naza Motor Trading* [2007] EWHC 9 (Ch)). Perhaps, therefore, much depends on the nature of the basis of restitution and its connection with a contract or a harmful event in each particular case.

Practical Points

It may appear an obvious conclusion, but it is vital whenever considering the drafting of an exclusive jurisdiction agreement that parties have at the forefront of their minds that the clause, and the parties to the clause, will be interpreted strictly. The courts will not readily find that parties to litigation, who are not party to the contract containing the exclusive jurisdiction clause, are in fact bound by the same. All care should be taken to make sure that consensus can be clearly and precisely demonstrated that each and every potential party to litigation relating to the broader contract is captured by the exclusive jurisdiction clause.

The conclusion that where a party is a policyholder, insured or beneficiary they are entitled to be sued by an insurer exclusively in their domicile under article 14, regardless of their economic strength, adds certainty to the law. Where the questions arguably remain following *Aspen* is, first, in the extension of the weaker party analysis to "injured party" under article 13(2) and, second, in what circumstances a "weaker party" may be entitled to the section 3 protections, without being one of the categories of party explicitly protected by section 3 itself (see [50] of Lord Hodge's judgment). Finally, where a claim is presented either in misrepresentation or restitution, to determine the likely jurisdictional result one must look carefully at the nature of the claim brought and the remedy sought.

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Ben practises across the full range of chambers' core areas with a particular emphasis on private international law, commercial and employment litigation.

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Ben has particular interest in dealing with questions of jurisdiction and applicable law. He is currently instructed (led by Marie Louise Kinsler QC) in a challenge to jurisdiction considering the impact of the Supreme Court's decision in Brownlie v Four Seasons, recent developments in the principles governing the granting of extensions of time for service of the Claim Form and obligations of full and frank disclosure. He is also assisting Marie Louise Kinsler QC and Alistair McKenzie in the appeal to the Court of Appeal in *Brownlie No2*.

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Tom has worked on a number of high value and complex matters across a range of Chambers' disciplines and has appeared as sole counsel in the High Court. Of particular interest, Tom has advised on the prospects of a French-domiciled insurer successfully contesting jurisdiction and has worked on a matter concerning the application of Third Party Debt Orders, made by the High Court in England, to a bank domiciled in Scotland.

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