IN THE COUNTY COURT AT BIRKENHEAD CASE No. F52YJ559

BETWEEN

BETTY TATTERSALL

Claimant

AND

(1) SEGUROS CATALANA OCCIDENTE S.A.
(2) EMILY BASQUILLE

Defendants

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

RESERVED JUDGMENT

1. I have before me an application by the second defendant for the court to declare that it has no jurisdiction to try the claim against the second defendant in accordance with CPR 11.1 and strike out the claimant's case against the second defendant. The application is dated 29 January 2020. The claim arises out of personal injury suffered by the claimant whilst she was staying in a holiday home in Spain in April 2018. The claimant is domiciled in England. The second defendant is the owner of the holiday home and is domiciled in Ireland. The first defendant is an insurance company domiciled in Spain. They provided liability insurance to the second defendant in respect of the holiday home. I deliberately put that matter neutrally because it is known that

there is a dispute as between the first and second defendant as to the ambit of the insurance. The claimant claims damages against the first and second defendant for breach of contract and/or negligence.

2. The first defendant has accepted the jurisdiction of the English court to hear the claimants claim against it.

3. The matter first came before me on 11 May 2020. At that stage, the first and second defendants were represented by the same solicitor. The second defendant's application was opposed by the claimant both generally and, in the first instance, on the basis that there should be disclosure of details pertaining to the scope of the indemnity the second defendant provided to the first Defendant under the insurance policy. I ordered that the first defendant respond to part 18 questions posed by the claimant about insurance cover. Accordingly, it was accepted by all that if the financial cap on any insurance was sufficient to cover the claimant's claim and costs, the claimant may not need to pursue the second defendant in any event. Clearly, at that stage, given both defendants were represented by the same solicitor it was not envisaged that there was any issue that insurance cover was in place.

4. As a result of the answers to those questions on 30 July 2020, the first defendant gave notice to the second defendant that they would not indemnify her under policy. Accordingly, the solicitor then acting for both defendants made an application to come off record as acting for the second defendant. I granted that application over the summer. In response, the first defendant applied to strike out the claim against it. Following further directions on 29 September 2020, the issue of the second defendant's application was then relisted to be heard on 7 December 2020 (before any other steps were taken).

5. I am grateful for the submissions of all Counsel together with their skeleton arguments and the extensive authorities. Since the hearing I have had an opportunity of rereading all of those documents.

The second defendant's case

6. The second defendant says that nothing in the claimant's particulars of claim (particularly paragraph 4) found jurisdiction against the second defendant in the courts of England and Wales. There is no factual or legal basis for the English courts jurisdiction pleaded against the second defendant. Reliance, quite properly, is placed upon article 4(1) regulation (EC) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Recast Brussels Regulation") in respect of jurisdiction in relation to the first defendant.

7. The second defendant makes a proper application in time, pursuant to CPR rule 11.1 which is supported by a witness statement of Marion Joseph. That statement makes the point that there is no pleaded basis for the claim in the particulars of claim. The second defendant emphasises the point that the claimant has not sought to make an amendment to those particulars of claim or indeed adduce any evidence as to the factual basis for their argument regarding jurisdiction in respect of the second defendant.

8. The second defendant points out that it became aware that the claimant would rely on articles 17 and 18 and 13 (3) of the Recast Brussels Regulation through correspondence and in a skeleton argument.

9. In terms of domestic law, the second defendant points out that the claimant bears the burden of establishing that the court has a right to hear and determine the claim. The standard of proof is "a much better argument on the material available" following Four Seasons Holdings Incorporated v Brownlie [2017] UKSC 80 at paragraph 7 as follows:

a. The claimant must supply a 'plausible evidential basis' for the application of a relevant jurisdictional gateway.
b. That if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but
c. the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

10. It is accepted by all that jurisdiction in the present case is governed by the recast Brussels regulation. It is also agreed that Brexit will not alter this position.

11. The general rule under the recast Brussels regulation, article 4 (1), is that a defendant may only be sued in the member state in which the defendant is domiciled. It is agreed by all that the general rule in this present case would be that the first defendant would have to be pursued in Spain and the second defendant would have to be pursued in Ireland. The regulations provide some exceptions to the general rule including, as is accepted, article 11 (2) pursuant to which the claimant claims against the first defendant.

12. The relevant sections of the Brussels recast regulation are articles 17, 18 and 13(3). They are the exceptions upon which the claimant places reliance in order to found jurisdiction against the second defendant.

13. Articles 17 and 18 provide an exception relating to consumer contracts. Article 13 provides an exception relating to insurance.

<u>Articles 17 and 18:</u>

Section 4 – jurisdiction over consumer contracts

Article 17

1. *in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this section, without prejudice to article 6 and .5 of article 7, if:*
    a. *it is a contract for the sale of goods on instalment credit terms;*
    b. *it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*
    c. *in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or, by any means, directs such activities to that member state or to several states including that member state, and the contract falls within the scope of such activities.*

.....

Article 18

1. *A consumer may bring proceedings against the other part to a contract either in the courts of the member state in which that party is domiciled or, regardless of the domicile of the other party in the courts for the place where the consumer is domiciled.*

14. The second Defendant says that this exception would relate only to the contractual claim by the claimant against her. Pursuant to these rules, the second defendant says that the claimant has to prove the following:
    a. that the contract was concluded between the claimant and the second defendant - in accordance with article 17 (1) and the opinion of A G Bobek in Schrems v Facebook Ireland Ltd Case C-498/16 at paragraphs 28 – 32;

b. that the claimant entered into the contract for the purpose which can be regarded as being outside of her trade or profession – Article 17(1);
c. that the second defendant pursues commercial or professional activities in England or that the second defendant directs commercial or professional activities to England – article 17 (1) (c).

15. The second defendant's position is that the claimant has not supplied a plausible evidential basis for any of the above requirements. In fact, the second Defendant says that the claimant has not supplied any evidence at all. The only information comes from the particulars of claim which does not constitute evidence pursuant to CPR 32.2 and Kimathi & Others v The Foreign And Commonwealth Office [2018] EWH 2066 (QB) at paragraphs 33 to 35. Accordingly, the court should find that there is no jurisdiction over the second defendant under this exception.

16. Further, they say that given the Claimant was not the contracting party and/or given that this was not a commercial or Professional activity on behalf of the second Defendant, the test set out in the regulation is not satisfied (addressed further below).

Article 13

Article 13

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

17. The second defendant says that if the English court has jurisdiction pursuant to article 13, this would relate to both the contractual claim and the negligence claim by the claimant against the second defendant.

18. The second defendant considers that the interpretation of article 13(3) is controversial. The claimant argues that the case of Keefe (set out below), a Court of Appeal authority, is binding upon me. The second defendant disagrees.

19. Firstly, the second defendant considers that the article only founds jurisdiction over the claim against the insured where the cause of action against the insured concerns the 'ascertainment of rights and duties arising out of the insurance relationship' as per Kabeg v MMA IARD Case C 340/16 (opinion of AG Bobek delivered 18/05/2017). The case concerned an Austrian cyclist hit by the car of a French driver on a road in Italy. The claim was by the cyclist's Austrian employer in respect of the sickness payments made to him. The conclusion of the court on the questions referred does not assist in this case. However the opinion sets out a paragraph 36:

"I do not think that it would be either necessary or wise to attempt to provide a general and exhaustive definition of what is a 'matter relating to insurance' and, hence, what is 'insurance'. That can be left in the hands of legal scholarship. There is however, one element that emerges from the reviewed case law, naturally tied to the logic of the Brussels Convention/regulations system: for the purpose of international jurisdiction, the basis for ascertaining what is a 'matter relating to insurance' is essentially 'title based'. Is the title for which an action is launched against a specific defendant (in other words, the cause of action) the ascertaining of rights and duties arising out of the insurance relationship? If yes, then the case can be deemed as a matter relating to insurance.

20. The second defendant says that on the basis of this, the claimant's claim against the second defendant would not be covered by article 13(3).

21. Secondly, the interpretation in Kabeg conflicts with the decision in Keefe. The Supreme Court gave permission to appeal that decision but, prior to so doing, they made a preliminary reference to the CJEU. Prior to the reference being answered the case settled. Accordingly, the second defendant says that I should not simply place reliance upon Keefe.

22. The second defendant points to 2 further English cases namely, Cole v IVI Madrid SL (Claim no. E90BM227) and Hutchinson v (1) Mapfre Espana and (2) Ice Mountain [2020] EWHC 178 (QB) which both considered the question of interpretation of article 13 (3). In Cole, the first in time, a preliminary reference was made on the issue. At the time Hutchinson was heard, that reference was outstanding and, therefore, no fresh reference was made. The conclusion of the court was that that issue was stayed to abide the outcome of the reference to the CJEU in Cole. Regrettably, that case settled prior to the answer to the reference being known too.

23. In essence the second defendant says that I am in the same position. It is said I should make the reference now if I do not simply follow Kabeg and allow the second defendant's application.

The Claimant's case

24. The claimant can establish jurisdiction on two independent grounds. Firstly, because this is a 'matter relating to insurance', there is an exemption under article 13(3). Secondly, because the claim relates to a 'consumer contract' under section 4, there is an exemption pursuant to article 18 (1) of the Brussels recast regulation.

25. The claimant accepts that they bear the burden of proving that the English court has jurisdiction to determine the claim against the second defendant. They agree that the relevant test is as set out in Four Seasons Holdings Incorporated v Brownlie as above.

26. The claimant considers that in terms of the material available, the court is both entitled to, and required to, consider the pleaded cases of the parties. This is particularly so they say when those facts are not denied. I am referred to CPR 32.6 (2). In that respect, the claimant sets out the following from paragraph 1 of her particulars of claim.

a. *By a contract evidenced in writing by a confirmation/final invoice sent by email, the second defendant agreed to provide the claimant and her family with seven nights' accommodation at the Villa from the 31 March 2018.*
b. *The contract was entered into online through a website of Home Away UK Ltd, a booking agent.*
c. *The total cost of the holiday was EUR1,377.20 and payment was made via PayPal.*

27. The claimant points out that the second defendant has not filed any specific evidence in support of her application, but refers to the skeleton argument where it says that the property was owned by the second defendant and her husband. It was rented out for a few weeks each year to cover basic running costs. It was otherwise used as a family holiday home.

28. In terms of article 17 and 18 – consumer contracts - the claimant points out that this regulation is underpinned by the need to protect the weaker party to a consumer contract identified within the recital at number 18.

29. The claimant says that the court is entitled to find, on the basis of the material above, that because the contract was concluded online via a UK booking agent (and the Claimant is only put to proof of that fact as opposed to the first Defendant asserting a positive alternative case) the natural and ordinary meaning of the words 'commercial or professional' would encompass a party who advertises her property for rental. Given that it was done through a UK company, on a website with the UK domain, those activities constitute a pursuit or direction of activities to the UK. The fact that the villa was only let out for a few weeks a year to cover its annual running costs is irrelevant as to whether it was for a commercial or professional activity. It was a commercial activity for the contractual period.

30. The second defendant raises issue with the fact that the claimant herself was not the contracting party and therefore should not be a consumer under article 17. The claimant

draws my attention case of Lackey v (1) Mallorca Mega Resorts SL (2) Generali Espana De Seguros Y Reasecuros SA, Master Davidson, 30 April 2019. In Lackey, Master Davidson roundly rejected that argument. Counsel in Lackey relied upon the opinion of AG Bobek, in Schrems v Facebook Ireland Ltd Case C-498/16 and Shearman Lehmann Hutton Inc v TVB [1993] ECR I-139. Master Davidson distinguishes those cases at paragraph 37 and 39:

"The finding of the court [in Shearman] was that the special protections afforded to consumers did not extend to the assignee of a consumer's cause of action. The claimant himself had to be before the court and had to be acting in his capacity as a consumer. A commercial assignee was not entitled to step into the shoes of the consumer. It is difficult to see how that conclusion and the reasoning behind it can be applied to this case. Plainly, the judgment addressed a very different factual situation from that of a group of consumers who had entered into a contract through one of their number. The court made no ruling to the effect that, in that situation, it would only be the 'lead passenger 'who qualified as a consumer. The case is of no assistance on that point. It is true that Advocate General Darman said that the consumer in (the statutory predecessors of) article 17.1 and article 18.1 meant the 'same thing' and that the action could only be brought by the consumer 'in relation to a contract which he himself concluded'. But the statements have to be read in their particular context, i.e. that of a consumer who had assigned his contract to a commercial entity. The Advocate General did not been his opinion to be cited like a statute in a completely different context.....

39. Schrems does no more than restate the principles set out in Shearson Lehman Hutton. To the extent that it adds anything at all, such addition is found in paragraphs 78 to 80 of Advocate General Bobek's opinion. I will not set out those paragraphs. Essentially he rejected the argument put forward by the claimant that the consumer bringing the claim did not need to be the same consumer who was a the consumer

contract and that 'a consumer' within the meaning of article 18.1 did not have to be the same person as 'the consumer' in article 17.1. This, it was submitted by Mrs Deal QC, dealt a heavy blow to the argument of Miss Prager set out in paragraph 34 above. I disagree. Plainly, the consumer bringing the claim must be a beneficiary of the consumer contract or at least within its ambit. That does not mean that she personally must have concluded it. To borrow again from the judgement of Gloucester LJ in Keefe, there would be no linguistic or purposes give justification for such a restrictive interpretation."

31. Accordingly, the claimant says that she is a consumer and therefore may bring proceedings against the other party to the contract in the court of her domicile. In other words, they say that the exception for consumers applies to this case.

32. In terms of the insurance exception, the claimant places heavy reliance on the case of Keefe. I am reminded again that the recital 18 to Brussels recast sets out that the jurisdictional rules are to protect weaker parties. The claimant specifically adopts the reasoning set out in the judgment of the Court of Appeal in Keefe in which Gloucester LJ held, in relation to the precursor to article 13 Brussels 1 recast:

"..... it is clear.... That the judgments regulation has to be construed purposes actively with due regard to the objectives set out in the recitals to the preamble..... The regulation aims to guarantee more favourable protection to the weaker party than the general rules jurisdiction provided for. Given that aim, there is no possible justification, whether linguistic or purposive, for construing the words of article 8 'in

matters relating to insurance', or any of the respective provisions of article 11 (1), article 11 (2) or article 11 (3), as subject to some sort of implied restriction that the insurer may only be joined under article 11 (1) or article 11 (2), or likewise the insured/alleged tortfeasor may only be joined under article 11 (3), in circumstances where there is a policy dispute.... One of the objectives of the judgements regulation is that jurisdiction 'must be predictable' and ascertainable by a claimant time before proceedings are issued and jurisdiction established..... In many situations (such as the present case), the need to bring proceedings against the insured/alleged tortfeasor - for example because of the insolvency of the insurer, a coverage dispute or a limitation in respect of the sum insured under the policy - might well not be known at the time proceedings are issued against the insurer. If the requirement for a policy to dispute determinative, it could produce the logical result of the being no jurisdiction if the party injured attempted to join the insured/alleged tortfeasor as a defendant to the original proceedings (because no policy dispute was evidence at the time of issue) but the being jurisdiction if the insured/alleged tortfeasor was joined subsequently once the dispute became apparent...

The whole point of article 11 was to enable direct actions against liability insurance to be brought in the courts of the injured party's domicile (irrespective of whether there was any dispute in relation to the policy of insurance.) Once that is taken as a given, there is no logical reason for restricting joinder of the insured/alleged tortfeasor under article 11 (3) to situations where there is a policy dispute, even taking into account the well-recognised principle that article 11 (3) was an exception to the general rule on jurisdiction prescribe article 2, (viz.that a defendant should be sued in the court of the member state where he is domiciled), and therefore should be narrowly considered

construed... I see no reason why the second defendant should be entitled to assert some sort of legitimate expectation on grounds of certainty and predictability that that it was entitled to sued in Spain as the place where 'it knew it would be answerable for its tortious conduct'. In my view, given that it is running a hotel intended to attract tourists from throughout the EU, the second defendant had no basis for an assumption that it was somehow immune from the joinder provisions of article 11 (3) just because the foreign tourists staying at the defendants hotel might have a variety of domiciles. The principle is certain, irrespective of the fact that guests make might have come from many different member states...

The policy objectives of the judgments regulation, as well as practical and cost considerations, clearly points to the action being heard in one place against the defendants..."

33. In that case, the insurer defended the claim on the basis that liability to the claimant was capped at a particular financial level but there was no active dispute between the insurer and the insured. The right to join the insured only when there was a policy dispute was rejected as an argument. However, in this case the claimant points out that it appears that is a policy dispute given the separate representation of the defendants and the answers to the Part 18 Requests.

34. The claimant points out that if the claim against insurers were to be made in England and the claim against the second defendant in Ireland there would not only be a duplication of proceedings with the additional cost delay and uncertainty that brings,

but a real danger irreconcilable judgments being handed down by the Irish and English courts respectively. That runs contrary to recital 21 of the Brussels recast regulation which reads, *"in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgements will not given in member states....."*

35. Accordingly, the claimants say that the second defendant's challenge in this case is even weaker than that in in Keefe and, for this reason, and placing reliance upon Keefe the court should dismiss the application. In addition, when viewing Lackey and the reasons Master Davidson considered himself bound by Keefe, in accordance with that decision I should dismiss the application.

My Conclusion

Consumer exception

36. In accordance with Four Seasons Holdings, the Claimant must supply a 'plausible evidential basis' for the application of a relevant jurisdictional gateway. If there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so but the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for

the application of the gateway if there is a plausible, albeit contested, evidential basis for it.

37. The only information that I have is that set out at paragraph 1 of the particulars of claim, namely that by a contract evidenced in writing by a confirmation/final invoice sent by email the second defendant agreed to provide the claimant and her family with accommodation at Villa. The contract was entered on online through the website of home away UK Ltd and the total cost of the holiday was EUR 1377.20.

38. The first defendant makes no admissions to these assertions.

39. In addition to the particulars of claim, there would appear to be an acceptance in the written submissions of the claimant that the claimant was not the person herself who concluded the contract. In the absence of seeing the contractual documentation, that is the weakest interpretation of the factual position advanced by the Claimant.

40. In terms of whether the claimant needs to be the contracting party, on the authorities, it seems to me that there is not a clear answer. The analysis that Master Davidson uses in Lackey, is, in my view, to be preferred and one that is open to me. I have had the benefit of reading the decisions in Schrems and Shearman. They are plainly authority for the idea that assigning the contract cannot mean the assignee steps into the shoes of the contracting party and becomes a consumer such that they can rely upon the exception. However, that is not this case. It seems to me that the concept of a consumer is broader than the concept of the contracting party. It is a person who benefits from the contact as a consumer it seems to me. Master Davidson relies on Keefe in that regard and points

out that there could be a perverse result if only the contracting parties were able to proceed with an action when, for example, the rest of his family had also been injured in accident. I think on balance, I respectfully agree. I prefer the interpretation that consumer is broader than simply the person who concludes the contract but can encompass somebody in the travelling party. I do not read Schrems or Shearman as authority to preclude me reaching such an interpretation. To that end, I think the first hurdle of the test is satisfied – the claimant was a consumer. Obviously, if the claimant was the contracting party, the point does not arise.

41. As to the other relevant limb of the test, namely, whether the second defendant pursues commercial or professional activities in England or directs commercial or professional activities to England, the claimant has filed no additional evidence. This troubles me greatly given that it would have been a very straightforward matter for documentary evidence in the form of emails and/or screenshots of webpages to be annexed to a witness statement in response to the application. It seems to me that I am entitled to look at pleadings in the case but they are of limited value. I do not think Kimathi assists in this regard; this is an interlocutory hearing.

42. It seems to me that the assertion that because the house was only rented out for a few weeks a year to make a nominal amount of money it was not a commercial activity, fails as an argument. It was on any view a commercial activity on behalf the second defendant for the period of time which she contracted with consumers for them to use the premises for reward. Further, if it is right that the website cited was used, i.e. a UK based site, then one can quite see how this part of the test would be satisfied. This, to me, would indicate that the commercial activity was directed to England. All I have,

however, is an assertion in the Particulars of Claim, to which the Claimant is put to proof, as to how the booking was made. This is a plausible pleaded case. Is it a plausible evidential basis?

43. I have to look at this issue extremely carefully. It boils down to the fact that I could have had a copy of the email and a screenshot of the website. I asked myself this, had I had those 2 documents would they have advanced my knowledge in any way shape or form? Are they essential or is it sufficient to look at the bold, unsupported, assertions in the pleadings? If the claimant cannot prove that she had a contract at all at trial there will be no basis for a claim whatsoever. Why should the matter be let to run to trial to test that out? Jurisdiction has, quite properly, been put in issue by the second Defendant. The Claimant bears the burden of proving this. Why should I now 'assume' anything to bolster her case that could readily have been bolstered? This is not a situation where there is a paucity of evidence because we are at an interlocutory stage and no reliable assessment can be made. There is no lack of evidence for want of disclosure. It would not have been costly to present what can be no more than a couple of sheets of paper.

44. Further, looking at CPR 16PD.7.3, where the Claim is based on a written agreement, a copy of that contract ought to be annexed to the Particulars of Claim. It is not.

45. It seems to me that if that is the situation, it is a question of evidential weight and whether that which I have reaches the hurdle of a 'plausible evidential case'. For the reasons I have given, I do not think that it does. It is want of available evidence. Accordingly, and perhaps narrowly, I conclude that there is no jurisdiction under article

17 and 18 of the Brussels recast regulations for the claimant to pursue a case against the second defendant in contract alone.

Insurance exception

46. With regard to Brussels recast regulation article 13 (3), the insurance exception, it seems to me that this is a more vexed issue. Very plainly, reading Keefe and Kabeg, the two authorities conflict. Further, the Supreme Court clearly thought it correct to make a reference to the CJEU prior to considering an appeal. Regrettably, given the matter settled before that reference was answered, we do not have the benefit of it. The same issue has been considered twice further in Cole and Hutchinson whereby a reference was thought necessary on both occasions (although only being made in Cole given that, at the time of Hutchinson, the reference was extant) and yet there is still no answer due to the cases, once again, settling.

47. There is a further question mark in the instant case given that it is known that there is a dispute between the first and second defendants as to the insurance policy and its ambit. It is correct that the fact that a dispute exists distinguishes this case from the one under consideration in Keefe. It is said by the claimant that this makes the second defendant's position in this case weaker. In response the second defendant says that it matters not what the dispute between the first and second defendant is, the claimant's claim has always been and will always be in tort and contract and is not, nor could ever be, a 'matter relating to insurance'. They point out that the lack of insurance available to the second defendant is simply a defence. As yet it is not a pleaded Part 20 claim as between

Defendants (although it could be) but that will do nothing to alter the status of the claimant's case against the either defendant. It seems to me that is the very nub of the question that has yet to be answered by the CJEU. The phrase in the title to the section is 'matters relating to insurance'. Article 10 reads, 'in matters relating to insurance, jurisdiction shall be determined by this section, without prejudice to article 6.5 about 7.' It is that phrase that is open to interpretation. Is that wide enough to encompass the claimants claim in contract and Tort against an insured party and their insurance company or is the definition in Kabeg to be preferred that the claimant's claim has to be one concerning duties arising out of an insurance relationship?

48. I find myself in the same position as that in Cole and Hutchinson and consider that I cannot simply decide the second Defendant's application before a preliminary reference is made. I particularly their in mind that which was said in paragraph 55 of Cole, namely that any failure now to refer questions to the CJEU would be likely to deprive any appeal court of the opportunity to do so given that any reference needs to be made by the 31 December 2020 (a date that was agreed by all parties at the last hearing).

49. As also agreed the last hearing, the terms of that reference should be the subject of further debate between the parties in the first instance, and the court at the handing down of this judgment on 22 December 2020 at 11 AM. The parties are reminded that the hearing will take place by way of telephone and they are to arrange the conference call in the same way as for the last hearing.

DJ HENNESSY

21 December 2020