

Telemark Heroes: A Lugano Case Study

William Audland QC

James Beeton



Exam question facts

- ▶ **Background:** Catastrophic skiing accident
- ▶ **Location:** Norway
- ▶ **Claimant:** English resident
- ▶ **Defendant:** Danish resident
- ▶ **Defendant's insurer:** Danish-domiciled company

Claim in Denmark?

- ▶ Brussels Recast general rule: defendant's domicile (if a Member State)
- ▶ Denmark originally opted out of Brussels regime ...
 - (so wouldn't be a Brussels Member State) -
- ▶ ... but then opted back in under special treaties
- ▶ Denmark treated as Member State
- ❖ **Starting point: D can be sued in Denmark**

Claim in Norway?

- ▶ Brussels Recast special rule: Member State where harmful event occurred
- ▶ But Norway ≠ Member State
- ▶ Norway is subject to Lugano Convention
- ▶ England and Denmark: also Lugano States
- ▶ Lugano Convention also has “place of harmful event” rule
- ❖ **Alternative: D can be sued in Norway**

Claim in England?

- ▶ No jurisdiction to sue D **alone** in England
- ▶ Direct Odenbreit claim against Insurer?
- ▶ Must be allowed under the “national law”
- ▶ Rome II, art. 18:
 - ▶ law of accident location
 - ▶ law of insurance contract
- ▶ Direct action available in Norwegian law (accident location)
- ❖ **Conclusion: Insurer can be sued in England**

A spanner in the works

- ▶ C prepares to issue against Insurer
- ▶ Asks Insurer to nominate English solicitors for service
- ▶ Insurer immediately attempts to gazump C by issuing its **own** claim first:
 - ▶ Brought in Norwegian courts
 - ▶ In Insurer's name against C
 - ▶ For a negative declaration of liability
- ▶ Purpose is to oust jurisdiction of English courts

Any problems with Insurer's
Norwegian claim?

C's response in Norway

- ▶ C's English and Norwegian legal teams put heads together
- ▶ Problem with Insurer's claim: brought in Insurer's **own** name
- ▶ Therefore a "matter relating to insurance"
- ▶ Special Lugano rules about where insurers can sue
 - (Similar to Brussels Recast) -
- ▶ Can only sue in defendant's (C's) place of domicile: England
- ▶ **Norwegian team instructed to contest jurisdiction**

Anything Insurer can do to fix Norwegian claim?

Crystal ball gazing

- ▶ Options for Insurer:
 - ▶ Convince D to bring his own Norwegian claim
 - ▶ Add D as a claimant in Insurer's Norwegian claim
- ▶ C wants to make sure English court is seised before this
- ▶ **C quickly issues and serves English claim against Insurer**

Should C have issued against
both Insurer **and** D?

Why not add D?

- ▶ Possible: Keefe v Hoteles Pinero CA decision still binding
- ▶ But controversial given compromise after SC reference to CJEU
(Keefe question now going back to CJEU: Tattersall v Seguros Catalana)
- ▶ C confident sufficient identity of interest between D and Insurer
- ▶ C's claim against Insurer either "the same" as a claim by D or at the very least "related"

Norwegian claim encounters problems

- ▶ Norwegian court holds it has no jurisdiction to hear Insurer's claim
- ▶ Accepts C's position that it is a "matter relating to insurance"
- ▶ Could only therefore have been brought in England
- ▶ Allowing claim would undermine objective of protecting weaker party
- ▶ Insurer appeals **and** applies to add D as a claimant to the Norwegian claim

No luck on appeal

- ▶ C says first instance court was right – Insurer's claim is doomed
- ▶ What about the new Norwegian claim by D? C says:
 - ▶ English court now seised of claim against Insurer
 - ▶ Lis pendens governed by Lugano Convention
 - ▶ C's claim against insurer is the "same as" or "related to" D's claim against C
 - ▶ Norwegian court must decline jurisdiction against D
- ▶ Norwegian Court of Appeal agrees: dismisses appeal and rejects application to add D

Another tricky problem

- ▶ Before the appeal, Insurer challenges service of C's English claim
- ▶ For service without permission, solicitor must fill out N510 form
- ▶ Tick-boxes mirror service grounds in CPR r. 6.33
- ▶ C's solicitor had ticked box saying:
 - ▶ Court has jurisdiction under Lugano Convention
 - ▶ No proceedings concerning same claim pending in courts of any **Lugano State**
- ▶ Insurer: **wrong**, there were proceedings between the parties pending in Norway

C response

- ▶ Solicitor had ticked wrong box
- ▶ England and Denmark both Brussels Recast Member States
- ▶ They're also Lugano States – but Lugano generally defers to Brussels Recast
- ▶ Jurisdiction was therefore based on Brussels Recast insurance provisions
- ▶ Solicitor should have ticked box saying
 - ▶ Court has jurisdiction under Brussels Recast
 - ▶ No proceedings pending in courts of any **Brussels Member State**

Gap in the CPR?

- ▶ Lugano Convention generally defers to Brussels Recast where both apply
- ▶ Specific exception: related proceedings underway in a pure Lugano State
- ▶ English court bound by Lugano lis pendens rules in relation to Norwegian claim
- ▶ Gap in CPR r. 6.33 (and Form N510)
- ▶ No box to tick where English jurisdiction based on Brussels but proceedings ongoing in pure Lugano State

Backup position

- ▶ If solicitor did originally tick the right box, he was correct to say “no proceedings pending **concerning same claim** in any Lugano State”
- ▶ No pending claim by D himself (yet)
- ▶ Norwegian claim by the insurer was not “the same” as C’s claim
- ▶ Insurer’s claim was a claim relating to a contract (the insurance contract)
- ▶ Not based on same cause of action as C’s claim (tort)

What happened?

- ▶ Insurer appealed to Norwegian Supreme Court
- ▶ Invited settlement proposals before hearing
- ▶ All claims in Norway and England settled on a full liability basis

Lessons and tips

- ▶ For Cs: Issue first and then ask for English solicitor nomination?
- ▶ For Ds: Convince insured to get involved in the first place?
- ▶ For both: Close contact and good relationships with foreign legal team crucial

- ▶ Were we right? Wright v Granath [2021] EWCA Civ 28



**AND THE
WINNER IS...**