JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CHAMBERS
LOCATION	**:**	PERTH
CITATION	**:**	BAUER -v- QBE INSURANCE (AUSTRALIA) LTD [2020] WADC 104
CORAM	**:**	PRINCIPAL REGISTRAR MELVILLE
HEARD	**:**	27 FEBRUARY & 31 MARCH 2020
DELIVERED	**:**	28 JULY 2020
FILE NO/S	**:**	CIV 3262 of 2017
BETWEEN	**:**	TANJA BAUER Plaintiff AND QBE INSURANCE (AUSTRALIA) LTD First Defendant AND REAL AUSSIE ADVENTURES PTY LTD Second Defendant THE TRAVEL & MARKETING COMPANY GMBH (HRB 19981 HANDELREIGSTER TRAUNSTEIN GERMANY) Third Defendant

Catchwords:

Private international law - Choice of law - Choice of jurisdiction - Application to set aside writ - Service of writ - To stay the action

Legislation:

Rules of the Supreme Court 1971 (WA), O 10 r 1, O 10 r 21, O 71A r 2

Result:

Application is dismissed

Representation:

Counsel:

Plaintiff	:	Mr J Fiocco & Dr G Janssen
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendant	:	Ms M Georgiou

Solicitors:

Plaintiff	:	Janssen & Maluga Legal Pty Ltd
First Defendant	:	Not applicable
Second Defendant	:	Not applicable
Third Defendant	:	HWL Ebsworth Lawyers (Perth)

Case(s) referred to in decision(s):

Akai Pty Limited v People's Insurance Company Limited [1996] HCA 39
Bombardier Inc v Avwest Aircraft Pty Ltd [2020] WASCA 2
Jones v Dunkel (1959) 101 CLR 298
Owusu v Jackson [2005] QB 801
Taser International Inc v SC Gate 4 Business SRL [2016] QB 887
Voth v Manildra Flour Mills [1990] HCA 55; (1990) 171 CLR 538
Winrow v Hemphill [2014] EWHC 3164 (QB)

PRINCIPAL REGISTRAR MELVILLE:

Background

1 By a generally endorsed writ dated 5 September 2017 the plaintiff commenced proceedings for damages as a result of serious spinal injuries she suffered as a result of alleged breach of contract and alleged negligence.

2 On 1 March 2019 the third defendant (TMC) filed a conditional appearance. On 15 March 2019 TMC filed a summons by which it applied for orders that the concurrent writ of summons be set aside as against TMC, service of the concurrent writ of summons on TMC be set aside, and that the proceedings against TMC be permanently stayed.

3 The first three grounds of the application as articulated in the summons were expressed to be that the District Court of Western Australia has no jurisdiction because by way of a contractual agreement between the plaintiff and TMC:

(a) the parties had submitted to the exclusive jurisdiction of the German courts;

(b) the plaintiff could only commence an action in the jurisdiction in which TMC was domiciled, namely Germany; and

(c) exclusively German law applied to the contract.

4 The fourth ground was that the plaintiff's action against TMC was bound to fail because under German law the concurrent writ of summons is filed out of time.

5 Over a number of appearances in this application, orders were made relating to the filing of affidavits by both TMC and the plaintiff. This resulted in documentation relating to and/or constituting the contract entered into between the plaintiff and TMC and the opinions of two experts in German law, namely Mr M Kobras and Dr A Petrasincu being produced to the court. Mr Kobras was the expert relied upon by TMC and Dr Petrasincu was the expert relied upon by the plaintiff.

6 On 12 November 2019 TMC's application was listed for a special appointment for 27 February 2020. Both Mr Kobras and Dr Petrasincu were ordered to attend for cross-examination on their affidavits and were given leave to appear by video link. The plaintiff was ordered to file and serve a statement of claim and particulars of damage by 13 December 2019.

7 The plaintiff duly filed her statement of claim. In her statement of claim the plaintiff alleges that pursuant to a contract she entered into with TMC, a company incorporated in accordance with the laws of the Federal Republic of Germany, TMC sold and booked the guided tour for her, was to perform the contract itself and through its agents, the first and second defendants, and arranged for the tour to be 'delivered by either the First Defendant or the Second Defendant ...'.

8 At the time of issuing the writ, the first defendant was Aussie Wanderer Tours Pty Ltd (Aussie Wanderer).

9 Aussie Wanderer has since been deregistered. On 19 June 2020 QBE Insurance (Australia) Limited, the insurer of Aussie Wanderer, was joined as a defendant in lieu of Aussie Wanderer.

10 At par 4 of the statement of claim the plaintiff alleges the second defendant, Real Aussie Adventures Pty Ltd (Aussie Adventures), was the Australian booking agent for TMC and that Aussie Adventures engaged Aussie Wanderer to conduct the guided tour.

11 At par 5 of the statement of claim the plaintiff alleges TMC sold and booked a guided tour for her (the contract) and then provides 'Particulars of the Third Defendant's Contract with the Plaintiff'.

12 At par 6 the plaintiff pleads that whilst on the guided tour on 6 September 2014, she suffered her injuries when she slipped and fell several metres whilst navigating through a slippery narrow pathway in the Karijini National Park.

13 At par 10 of the statement of claim the plaintiff alleges her injuries were caused by the negligence of TMC.

14 At par 11 of the statement of claim the plaintiff pleads that further or in the alternative, her injuries were caused by TMC's breach of the contract pleaded at par 5(b) of the statement of claim.

The law

15 The plaintiff successfully applied for leave to serve the writ outside of the jurisdiction of Western Australia, in this case in Germany. Leave was obtained by satisfying the court that the case came within the *Rules of the Supreme Court 1971* (WA) (RSC) O 10 r 1 which provides that leave may be given if the case falls within one of the categories set out therein. Relevant or potentially relevant categories include:

(a) an action for damages in respect of a breach of contract, being in either case a contract -

(i) made within the jurisdiction; or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) which by its terms or implications is governed by the law of Western Australia;

(f) the action is brought in respect of a breach committed within the jurisdiction of a contract wherever made ...;

(h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; and

(k) the action is founded on a tort committed within the jurisdiction.

16 The order for service on TMC outside of the jurisdiction was obtained in the absence of hearing from TMC. Having being obtained in its absence, TMC may now challenge the making of the order.

17 The High Court of Australia has said that:[1]

> Where a case falls within a category in which the legislature has seen fit to allow service outside the jurisdiction if, but only if, the leave of a court is first obtained, that court should not grant leave unless it is positively persuaded that it should do so. Plainly, it should not be so persuaded unless the plaintiff satisfies it that the case is of the relevant category and that the proceedings would not be subsequently stayed as an abuse of process on forum non conveniens grounds or for some other reason. In such a case the onus should remain on the plaintiff on a subsequent application to set aside the service outside the jurisdiction. Otherwise the ex parte order for service outside the jurisdiction, if onus of proof were to be decisive, would confer an enduring advantage upon a plaintiff notwithstanding that the expanded evidence on a contested application to set aside service indicated that the applicant had not been entitled to that ex parte order.

[1] ***Voth v Manildra Flour Mills*** [1990] HCA 55; (1990) 171 CLR 538.

18 Hence the onus is on the plaintiff to show that the case falls within a category referred to in RSC O 10 r 21 and that the case should not be stayed either on forum non conveniens grounds or for some other reason.

19 The Western Australian Court of Appeal has recently addressed in more detail what this means. In ***Bombardier Inc v Avwest Aircraft Pty Ltd*** [2020] WASCA 2 it said:

> 16 There was no dispute that in order to determine whether a case falls within one of the pigeonholes in O 10 r 1(1) RSC, the plaintiff must demonstrate that there is a 'good arguable case' that the matter falls within a pigeonhole.
>
> 17 The court should not grant leave unless it is positively satisfied that it should do so. It should not be so persuaded unless the plaintiff satisfies it that the case falls within one of the pigeonholes and that the proceedings would not be subsequently stayed as an abuse of process on forum non conveniens (that is, inappropriate forum) grounds or for some other reason (for example, that the proceedings are liable to be struck out summarily).
>
> 18 In relation to the inappropriate forum issue, the question is whether the local court is a clearly inappropriate forum for the determination of the dispute, having regard to all of the circumstances of the case. A court will be a clearly inappropriate forum if the continuation of the proceedings in that court would be oppressive, in the sense of seriously and unfairly burdensome, prejudicial or damaging, or vexatious, in the sense that it would cause serious and unjustified trouble and harassment.
>
> 19 One circumstance which will always be relevant to the application of the clearly inappropriate forum test will be the availability of relief in a foreign court or tribunal. However, the question whether the local court is a clearly inappropriate forum does not turn 'upon an assessment of the comparative procedural or other claims of the foreign forum', or require the formation of subjective views about either the merits of that forum's legal system or the standards and impartiality of those who administer it. The question whether the local court is a clearly inappropriate forum focuses on the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum. That is, a court is not a clearly inappropriate forum merely because another one is more appropriate.

> 20 Similarly, whether the substantive law of the forum is applicable in the determination of the dispute which is the subject of the action is a significant factor in the exercise of the discretion to set aside service outside the jurisdiction, but it is not determinative.[24] An Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the law governing the determination of the dispute.[25]
>
> 21 Any legitimate personal or juridical advantage is also a relevant, but not decisive, consideration in determining whether the local court is a clearly inappropriate forum.[26]
>
> 22 The determination of whether the local court is not a clearly inappropriate forum, in the sense of determining whether a trial in the local jurisdiction would not be productive of injustice, involves an evaluative judgment. The role of the primary judge in considering whether the local court is a clearly inappropriate jurisdiction is thus not merely to weigh all the factors, but to make a judgment as to whether a trial in the jurisdiction would be productive of injustice, in the sense described above at [18].
>
> (Footnotes omitted)

20 In determining this issue, which is an interlocutory application, it is not expected that I will conduct a mini trial.[2] This is so, notwithstanding the experts relied upon by the respective parties were cross-examined on their affidavits.

21 A number of considerations are relevant to determining whether this court is a 'clearly inappropriate jurisdiction'. In the event the contract has the effect contended by TMC, namely conferring exclusive jurisdiction on the German courts and making German law the law that governs the contract, that would be a powerful consideration in support of a finding that this court is a clearly inappropriate jurisdiction.[3]

22 Further, according to the plaintiff's schedule of damages filed in this action, the plaintiff has undergone considerable medical treatment in Germany and it is not difficult to see that there is potentially a large number of witnesses that might need to be called to give evidence as to the nature and extent of the plaintiff's treatment, her pain and suffering, residual disabilities and affect those injuries have on her capacity to work both in the past and the future and what she might have earned exercising her earning capacity prior to the accident and what she may be able to earn after the accident.

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[2] ***Bombardier Inc v Avwest Aircraft Pty Ltd*** [136].

[3] ***Akai Pty Limited v People's Insurance Company Limited*** [1996] HCA 39.

23 All of those considerations might, in the absence of other considerations, compel the conclusion that Germany is a more appropriate forum in which this litigation should take place.

24 However, I must be cautious not to allow my focus on the question of whether Germany is a more appropriate forum to distract me from applying the legal test that is to be applied, namely whether Western Australia is a 'clearly inappropriate jurisdiction' in the sense that to require the issue as between the plaintiff and TMC to be tried here would be productive of injustice.

25 TMC places particular emphasis on the propositions that:

1. The contract is governed by German law and German courts have exclusive jurisdiction.

2. The tort is governed by German law and German courts have exclusive jurisdiction.

3. Accordingly, any decision of this court would not be enforceable in Germany.

26 TMC says in light of these propositions this court is clearly the inappropriate forum. The plaintiff must satisfy me that these propositions are incorrect or, if they are correct, they do not result in the conclusions that this court is clearly an inappropriate forum.

Does German law apply to the contractual liability?

27 The evidence as to the formation of the contract upon which the plaintiff both pleads and relies in this action shows that it came about when Ms Kronseder contacted TMC, so starting a chain of emails between TMC and Ms Kronseder, culminating in the purchase of two tickets, one for Ms Kronseder and one for Ms Bauer. It seems clear enough that for there to be a contractual relationship between TMC and the plaintiff, Ms Kronseder must have been authorised by the plaintiff to enter into the contract or, alternatively, the plaintiff must have ratified Ms Kronseder's purported contract on her behalf.

28 Ms Christina Schmalback in her affidavit of 8 July 2019 deposes to having sent to Ms Kronseder by email on 15 July 2014 (annexure B) an offer constituted by the following documents, also annexed to her affidavit, being:

1. Offer 14400 (annexure C).

2. Annexure D.

3. Rule Aussie Adventures terms and conditions.

29 Annexure D is a document described as 'Allemaeine (Reise-) Vemittlungsbedingungen′ which is in German. However, a copy of that document appears at annexure C to the affidavit of Ms Koch-McQuillan and an English translation of that document at annexure D to the affidavit of Ms Koch-McQuillan. Claudia Koch-McQuillan is a linguist conversant with both the German and English languages who is competent to translate from the German language into the English language.

30 It is apparent that annexure D to the affidavit of Ms Christina Schmalback is a document containing the 'General Terms and Conditions for (Travel) Agency Services' (General Terms and Conditions).

31 At clause 10 of the General Terms and Conditions it is provided:

> The (travel) agency contract and the legal relationship between the customer and the (travel) agent are exclusively subject to German law …

32 There is no evidence filed by the plaintiff contradicting the testimony of Ms Schmalback that this document was provided to Ms Kronseder. As such it seems clear that the General Terms and Conditions were therefore provided to the plaintiff via her agent Ms Kronseder.

33 In any event, even if it should be considered that the plaintiff never agreed to the General Terms and Conditions, for the purpose of determining whether Western Australia is a clearly inappropriate forum, the following considerations need to be taken into account. In this regard it is to be observed that the plaintiff and TMC were resident in Germany and in my view for the reasons that follow, for the purposes of German law, the plaintiff was likely habitually resident at the relevant time with the result that German law exclusively applied to the contractual relationship. The plaintiff concedes she is ordinarily resident in Germany (which I accept is not the same as conceding she was habitually resident there at the time of the events).[4]

[4] ts 13.

34 Further, Germany, being part of the European Union, is subject to the regulations of the European Parliament, and those regulations effectively become German law.

35 By Reg (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) in Chapter II it is provided:

> Article 4
>
> 1 to the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
>
> (a) …
>
> (b) A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence
>
> Article 6
>
> 1. without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence …

36 Several cases were cited dealing with the question of what is meant by the term 'habitual residence'. In ***Winrow v Hemphill***[5] the court was required to consider the meaning of 'habitual residence' albeit in the context of determining the law applicable to non-contractual obligations under Rome II. The court took into account a number of considerations including the length of time the plaintiff had been living and working in Germany, where her family was, and what they were doing. The court appears to have accepted the view that that the question of habitual residence is not a matter of intention alone, accepting what was said in ***Re LC (Children)*** [2014] UKSC 1; [2014] AC 1038:

> 59 … that one does not acquire a habitual residence merely by intending to do so …

and that it was better

[5] ***Winrow v Hemphill*** [2014] EWHC 3164 (QB).

> 61 … to think in terms of the reasons why a person is in a particular place and his or her perception of the situation while there - their state of mind …

37 There is no affidavit from the plaintiff on this issue. The evidence on this issue is poor. However, the evidence shows that the plaintiff is a German resident who is ordinarily resident in Germany,[6] she has given in the writ of summons issued 5 September 2017 her geographical address as Germany (a person's geographical address is defined in the RSC O 71A r 2 as being the place where the person usually lives or if there is no such address, where the person usually works), and according to her schedule of damages, born in 1992, completed her training in Munich in 2010, completed evening school from 2010 to 2014 whilst working full-time at Munich RE, and returned to Germany where she had further medical treatment at least from 3 October 2014, some four weeks after the accident. I have regard to these particulars in her schedule of damages on the basis they constituted admissions against interest in this issue.

38 In my view an inference is open that at the time her habitual residence was Germany. In particular, I regard the fact she returned to Germany for what appears to be significant and prolonged treatment after the accident rather going elsewhere in the world and after only apparently having left her employment in Munich in 2014, is highly indicative of the fact the plaintiff's state of mind was such that she saw Germany as her home and the place to return to when things get tough, a place to go to by force of habit. The absence of any evidence from the plaintiff makes this inference easier to draw,[7] and I do draw it.

39 Accordingly, it firstly appears the parties have agreed that the contract and legal relationship is exclusively governed by German law and secondly, that for the purposes of German law, the law that would govern the contract would be German law.

40 The experts seem to agree that if there is a contract between the plaintiff and TMC, then the contract is governed by German law, but are in disagreement on the other issues. A conclusion German law applies may be relevant to the question of whether German courts have, by reason of any agreement between the parties, exclusive jurisdiction and relevant to the question, would a decision of this court be enforceable in Germany.

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[6] ts 13.

[7] ***Jones v Dunkel*** (1959) 101 CLR 298.

Can German law apply to the tort liability?

41 Pursuant to the *German Code of Civil Procedure* s 32, it is provided that 'For complaints arising from tort, the court in the jurisdiction of which the tortious act was committed shall have jurisdiction'.

42 The *Introductory Act to the Civil Code* at Article 40(1) provides that tort claims are governed by the law of the country in which the liable party has acted and goes on to provide that the injured party can demand that instead of this law, the law of the country which the injury occurred is to be applied.

43 Article 40(2) provides:

> If, at the time of the occurrence of the event underlying the liability, the liable party and the injured party both had their habitual residence in the same country, the law of that country shall apply. …

44 However, by Reg (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) in Chapter II Article 4 it is provided:

> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising 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.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with the country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

45 Clearly if Article 4(1) applied, the law governing the tort would be Australian. However, Article 4(1) is subject to Article 4(2). As it appears both parties were habitually resident in Germany at the time the damage occurred, German law would apply unless Article 4(3) applies.

46 Article 4(3) provides by way of example that a manifestly closer connection might be based in particular on a pre-existing relationship between the parties such as a contract that is closely connected with the tort/delict in question.

47 In this case there would appear to be a pre-existing relationship between the parties being a contractual relationship involving a contract that in my view is closely connected with the tort. It is closely connected with the tort in that the pre-existing contractual relationship between the parties is relevant to determining whether a duty of care is owed to the plaintiff by TMC, the nature and extent of that duty of care and therefore whether the duty of care was breached such that it can be said TMC was negligent and liable in tort. Other factors which point to a close connection with Germany are the fact that the plaintiff underwent considerable treatment including operative treatment in Germany and that there are witnesses there, or who might reasonably be expected to be there, that could give evidence relevant to economic loss and the effect of the injuries on the plaintiff's quality and enjoyment of life.

48 On the other hand, in this case, the plaintiff appears to have been in Australia at the time the contract was formed, she was in Australia at the time the damage occurred, the accident is inextricably connected with the geographical features of the Australian landscape, two other defendants who are resident in Australia are involved as a result of TMC engaging either one or both of them to assist in or facilitate the conduct of the tour, most if not all of the relevant witnesses on the question of liability would appear to be in Australia and considerable medical treatment intervention and expense together with medical witnesses are based in Australia.

49 I am inclined to the view that the tort is more closely connected to Australia. However, it is a marginal decision and a decision on which reasonable minds might reasonably differ. Given my reservations I am unable to say the tort is 'manifestly' more closely connected to Australia. Accordingly, it seems to me it is likely for the purposes of German law, having regard to Rome II Article 4(3) the law of Germany would apply to the tort even though the accident occurred in Australia.

50 In short, and to this point, it appears that the courts of Germany would, on the basis TMC and the plaintiff are habitually resident in Germany, have jurisdiction to deal with both the contractual and tortious claim and in so doing would apply German law.

51 However, arrival at this point begs the question, what is the German law? As observed, Article 40 of the German *Introductory Act to the Civil Code* provides that the injured party can demand that the law of the country in which the injury occurred is to be applied. This suggests German law is that Australian law would apply in these circumstances.

52 I find the evidence on this, and the expert opinion surrounding this, difficult to follow.

53 However, as made clear in ***Bombardier***, even if German law applies it does not of itself mean this court is a 'clearly inappropriate forum'.

Exclusive jurisdiction

54 The General Terms and Conditions at clause 11.1 provide that 'the (travel) agents place of jurisdiction is Großarolinenfeld'. TML submits this constitutes an agreement that the relevant court in Germany has exclusive jurisdiction.

55 However, the *German Code of Civil Procedure* at s 38(3) provides:

> In all other regards, a choice-of-court agreement shall be admissible only where it was concluded, expressly and in writing;
>
> after the dispute has arisen …

56 In this case, no such agreement was concluded after the dispute had arisen and there is no disagreement about that. Dr Petrasincu deposes to his opinion that insofar as clause 11 constitutes a choice of forum clause, it does not constitute a valid and enforceable agreement.[8] Mr Kobras expresses the opinion that if the matter were a purely domestic matter, the clause would not constitute a valid and enforceable agreement as a venue/forum.[9]

[8] Affidavit of Dr Petrasincu dated 26 November 2019, par 35.
[9] Affidavit of Mr Kobras dated 7 November 2019, par 53.

57 However, Mr Kobras then refers to Reg (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 (Brussels 1) Section 7 - Prorogation of Jurisdiction Article 25 and concludes the operation of Brussels 1 prevails over s 38 of the *German Code of Civil Procedure* and accordingly s 38 of the *German Code of Civil Procedure* would not void clause 11.[10]

58 With respect, that is not the way I read Article 25.

59 Article 25 states:

> 1 If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with any particular relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise …

60 In my view, s 38 of the *German Code of Civil Procedure* renders any agreement as to jurisdiction as set out in clause 11 null and void as to its substantive validity. This is my view, the view of Dr Petrasincu and the view of Mr Kobras as set out in par 53 of his affidavit.

61 That being the case there is no agreement, at least for the purposes of German law, that the German courts have jurisdiction and therefore the exclusivity of that jurisdiction as provided by Article 25 does not arise.

62 TMC submits that the case law supports the conclusion that in these circumstances German courts have exclusive jurisdiction. In this regard several cases were tendered by TMC, the first being ***Owusu v Jackson***[11] and the second being ***Taser International Inc v SC Gate 4 Business SRL***,[12] the Higher Court of Cassation and Justice, Romania.

63 In my view neither of these cases support the submission. In ***Owusu v Jackson*** the plaintiff was habitually resident in the United Kingdom, as was the first defendant. The plaintiff was injured in an accident in Jamaica and brought proceedings in the United Kingdom against the first defendant and several Jamaican defendants. Several questions were referred for answer by the Court of

[10] Affidavit of Mr Kobras dated 7 November 2019, par 55.
[11] ***Owusu v Jackson*** [2005] QB 801.
[12] ***Taser International Inc v SC Gate 4 Business SRL*** [2016] QB 887.

Appeal (England and Wales) Civil Division (United Kingdom) one of which was whether the English court could refuse to exercise jurisdiction conferred on it pursuant to the Brussels Convention notwithstanding that the more convenient forum was or might be Jamaica.

64 It was held that the courts of a Contracting State could not refuse to exercise their jurisdiction on the ground that a court of a Non-Contracting State would be a more appropriate forum for the trial of the action.[13]

65 In my view the effect of this decision is that had this action been commenced in Germany the courts in Germany could not have refused to exercise their jurisdiction to deal with it.

66 It is my further view the court did not decide the question of whether the court of a Contracting State had exclusive jurisdiction.[14]

67 In the case of ***Taser International Inc***, the plaintiff sued SG Gate 4 Business SRL in Romania notwithstanding the contract provided that the courts in the United States of America had jurisdiction. The defendant entered an appearance which was regarded to be tacit acceptance of the jurisdiction of the Romanian court. ***Owusu*** was referred to as an analagous case and it was held the fact that the contract conferred jurisdiction on the courts of the third country did not preclude the court exercising jurisdiction.[15]

68 In my view none of this amounts to a declaration that the courts had 'exclusive jurisdiction'.

69 In my view that by reason of the law of Germany constituted by s 38 of the *German Code of Civil Procedure* there is no valid agreement between TMC and the plaintiff that the German courts would have exclusive jurisdiction and it does not appear to me to be the law of Germany that the courts of Germany nevertheless have exclusive jurisdiction.

Would a judgment of this court be enforceable in Germany?

70 Section 328 of the *German Code of Civil Procedure* deals with the circumstances in which a German court will recognise the judgment of

[13] ***Owusu*** [46].
[14] ***Owusu*** [47] - [48].
[15] ***Taser International Inc*** [31].

a foreign court. It provides that among other things, recognition of a judgment handed down by a foreign court shall be ruled out if:

> The courts of the state to which the foreign court belongs to do not have jurisdiction according to German law.

71 In my view nothing has been produced to suggest that this court does not have jurisdiction according to German law. In my view the German law is that there is no valid agreement by the parties that the German courts would have exclusive jurisdiction and whilst the Brussels Convention might preclude German courts from refusing to exercise any jurisdiction conferred upon them by the Brussels Convention, nothing has been shown to me, including in the cases referred to, that suggest this results in the conclusion that if German courts have jurisdiction therefore foreign courts do not.

Conclusion

72 I am of the view in this interlocutory application that the plaintiff and TMC have agreed the law governing their contract is German law. On the application of German law, there is no agreement that the German courts would have exclusive jurisdiction. Any purported agreement to this effect is null and void to that extent.

73 Whilst Germany would be an appropriate forum for the plaintiff and TMC, it does not necessarily follow that Western Australia is a clearly inappropriate forum. Apart from the connection the alleged tort has with this State as referred to above, there is a real concern as to the dangers of conflicting decisions if the action was split such that the plaintiff's action against TMC was heard in Germany whilst her action against QBE and Aussie Adventures, which clearly would be determined by Australian law, was heard in Australia.

74 Further considerations include the cost of two trials and duplication of witnesses if one action proceeds in Germany and one in Western Australia, and the cost and inconvenience to the other defendants if the whole case was to be heard in Germany.

75 On balance it is my view that a trial of the plaintiff's case against TMC in Western Australia would not be productive of injustice as described in ***Bombardier*** at par 19.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

AC
Court Officer

24 JULY 2020