



Neutral Citation Number: [2012] EWCA Civ 1001

Case No: B3/2011/2973

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM QUEEN'S BENCH DIVISION**  
**Sir Christopher Holland sitting as a Deputy Judge**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/07/2012

**Before :**

**LORD JUSTICE MAURICE KAY**  
**Vice President of the Court of Appeal, Civil Division**  
**LORD JUSTICE ETHERTON**  
and  
**DAME JANET SMITH**

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**Between :**

**KATERINA COX**  
**(Widow and Sole Dependant of Major Christopher Cedric Cox, Deceased)**  
**- and -**

**Appellant**

**ERGO VERSICHERUNG AG**  
**(Formerly known as Victoria) ( A company incorporated in accordance with the laws of the Federal Republic of Germany)**

**First Respondent**

**MINISTRY OF DEFENCE**

**Second Respondent**

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**Mr Alexander Layton QC, Ms Marie Louise Kinsler and Henry Morton Jack (instructed by Leigh Day & Co) for the Appellants**

**Mr Hugh Mercer QC and Ms Sarah Crowther (instructed by Fishburns LLP) for the First Respondents**

**Mr Daniel Beard QC (instructed by The Treasury Solicitor) for the Second Respondents**

Hearing dates : Thursday 5th July 2012  
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**Approved Judgment**

**Lord Justice Etherton :**

1. In our judgments handed down on 25 June 2012 we addressed that part of the appeal in this case concerned with the law applicable to determine the scope and amount of damages recoverable by the appellant. We now turn to the remainder of the appeal, which concerns the meaning and effect of a written assignment dated 1 August 2004 (“the Assignment”) signed by the appellant in favour of the United Kingdom, acting by the Ministry of Defence (“the MoD”).

2. The factual background is briefly summarised in paragraph 5 of my earlier judgment. There is no need to repeat it. I shall use in this judgment the same defined expressions as I used in my earlier judgment.

3. The Assignment is as follows, so far as relevant:

“I, the undersigned, hereby assign all my claims arising from the above-mentioned accident, to the United Kingdom of Great Britain and Northern Ireland, represented in turn by the Ministry of Defence, represented in its turn by the Area Claims Officer North West Europe, insofar as such claims are for the cost of

emergency services, medical treatment, repatriation costs and pensions

which costs have become necessary as a result of the said accident.

I note that this Assignment affects only the outlays paid by the Ministry of Defence.

Any personal claim which I may have will remain unaffected by this subrogation.”

4. The issues on the Assignment arise out of the allegation in paragraph 7A of the re-amended Defence that, by the Assignment, the appellant assigned all or part of her claim to the UK government and, to the extent of that assignment, she has no cause of action. That is denied in paragraph 11 of the amended Reply.

5. The Judge described as follows in paragraph [34] of his judgment the events which followed the signing of the Assignment:

“(a) The Ministry (“MOD”) paid repatriation costs and commenced paying an ongoing widow’s pension.

(b) By way of the Area Claims Office the MOD used the signed form to invoke a longstanding, somewhat convoluted German procedure whereby through the good offices of Bundesanstalt für Immobilienaufgaben (Federal Institute for Real Estate Matters) claims are made from time to time for payment by the Defendants as Herr Kretschmer’s insurers of sums appropriate to cover the MOD’s outlay. The essential premise is the liability

pursuant to s.844(2) BGB to pay damages to the Claimant. To the extent that such liability is being met by way of responding to the subrogated claim as advanced by the MOD, the Defendants are in the process of paying such damages.

(c) In the event the procedure is effective (the German Federal Republic stands pro tem as agent of the UK) so that claims amounting to €87,000 have been met and as at May 2010 (the latest available documentation) the Federal Bureau had initiated a further subrogated claim for €112,328.84.

(d) By way of their agreed advice the German experts advise that in response to the Claimant's BGB claim credit would have to be given for such payments as have been made and will be made pursuant to this procedure. Indeed, if the MOD pension is in the event wholly funded by the Defendants then the German law would regard such as deductible ...”

6. The Judge then expressed his view on the disputed Assignment issue as follows:

“35. In the course of the hearing time was expended (with, I hasten to add, the best of intentions) in subjecting the form of the 1<sup>st</sup> August 2004 and the German procedure to close forensic analysis, focusing on the law of the assignment, its meaning and effect. Unhappily I cannot convince myself that any such has more than academic interest. As to this, if the claim could be advanced as a FAA claim, none of this has any materiality. If it can only be regarded as a BGB claim, it is obvious beyond dispute that by way of this procedure the Defendants are paying monies from time to time for which credit has to be given. What remains for further detailed investigation is the following:

- a) the sums paid and payable by way of the MOD pension;
- b) the extent to which such payments are in the event defrayed by the Defendants – any excess by way of pension payment over the Defendants' payment is essentially a collateral benefit; and
- c) the extent to which the full value of the claim is in the event met by the pension – is there an excess calling for separate recompense?

36. In the overall result, I see this aspect of the case as essentially one of fact: with a procedure started by the signing of the form the Defendants are making payments that serve to offset their BGB obligations – and doing so without raising any issue. I cannot usefully say more under this head.”

7. The appellant contends that the Judge ought to have held that the Assignment was ineffective to transfer to the MoD any part of her right to damages for loss of

maintenance under section 844, and in particular the Agreement did not transfer to the MoD any rights in respect of army pension payments she has received since her husband's death.

8. In view of the appellant's challenge to the effectiveness of the Assignment, the MoD ought to have been made a party to the proceedings at the outset or, at the least, asked if it wished to be joined. We so indicated at the conclusion of the hearing of the first part of the appeal. On 28 June 2012 the MoD was ordered to be joined as the second Defendant on the application of the appellant. It is the second respondent to the appeal. In the very short time available it has filed and served a witness statement of John Hawkins, who is a claims officer within the Area Claims Office North West Europe, Headquarters British Forces Germany. At the resumed hearing of the appeal, the MoD, which opposes the appeal on the Assignment issue, was represented by Daniel Beard QC. We are grateful to the MoD, the Treasury Solicitor and Mr Beard for the urgent steps they have taken in such a short time to enable the MoD to participate at very short notice on the resumed hearing of the appeal.
9. The MoD, not being a party to the proceedings until 7 days before the resumed hearing of the appeal, did not attend the trial and has had no opportunity to cross examine the expert witnesses for the appellant or the first respondent or to obtain its own expert evidence. It has adduced on this appeal a helpful witness statement of Mr Hawkins, but, unsurprisingly, Mr Beard has said that the MoD might well have benefited from a wider factual investigation if time had permitted. In the event, I have reached a clear decision on the appeal without the need to take into account the constraints on the MoD due to lack of time.
10. I would dismiss the appeal on the Assignment issue for reasons which I can explain quite briefly.
11. Mr Layton QC, for the appellant, argued that the meaning of the Assignment is governed by English law. I do not agree. It is governed by German law. The point turns on the application of the Rome Convention ("the Convention"), which is given legal effect in the United Kingdom by the Contracts (Applicable) Law Act 1990. Articles 3 and 4 of the Convention, which apply to the Assignment by virtue of Article 12(1), are as follows, so far as relevant:

"Article 3

*Freedom of choice*

1. A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. ...

## Article 4

### *Applicable law in the absence of choice*

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence ...

.....

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.”

12. The Assignment contains no express choice of law. I do not agree with all the arguments of Mr Mercer QC, for the first respondent, on the choice of law under Article 3, particularly in his reliance on matters of German law and procedure of which the appellant may have been wholly unaware. I agree, nevertheless, with Mr Mercer that, insofar as there was any implicit choice of law for the purposes of Article 3(1), it was German law. I reach that conclusion for the following reasons. The Assignment related to the appellant’s claims, which were governed by German law, in respect of an accident in Germany, where she and her husband were living and she was still living at the date of the Assignment. The Assignment was intended to enable the MoD to recoup from the tortfeasor, who was a German national or his German insurer, the cost of outlays by the MoD arising out of that accident and those claims governed by German law. Those factors clearly outweigh the factors linking the Assignment to England and English law.
13. If there was no implicit choice of law under Article 3(1), then the Assignment is governed by German law under Article 4 because Germany is the country with which the Assignment is most closely associated. That is the presumption under Article 4(2) because the appellant was habitually resident in Germany at the date of the Assignment. That presumption is not displaced under Article 4(5). For the same reasons I have given in paragraph 12 above the circumstances as a whole do not show that the Assignment is more closely connected with England than Germany. They show the contrary.
14. The meaning of the Assignment is, therefore, to be determined by the Court, but applying German principles of interpretation of contracts as established by the expert evidence: Dicey, Morris and Collins, *The Conflict of Laws* (14<sup>th</sup> ed), paras. 9-019

and 32-192. There was no significant difference between the German law experts on this aspect. The starting point is the words used. If their literal meaning is clear, then they will bear that meaning. If, however, the literal meaning is not clear, then evidence of the background is admissible to establish the intention of the parties.

15. Mr Layton submitted that the meaning of the Assignment is clear. He says that it is an assignment of the appellant's claims insofar as they are for certain costs of hers, namely for emergency services, medical treatment, repatriation costs and pensions, but which in the event have been met by the MoD; and that interpretation is supported by the reference to subrogation. So far as concerns the cost of pensions, Mr Layton submitted that, on its clear literal meaning, the Assignment could only be referring to any costs of keeping up a private pension plan taken out by the appellant or her late husband. Mr Layton emphasised that the Assignment made perfectly clear that any "personal claim" of the appellant was to remain unaffected by the Assignment, and her claim for maintenance was such a claim. The appellant also relies on the expert evidence of Professor Dannemann as showing that, if the word "pensions" in the Assignment is derived from the German word "Geldrente", it means monthly sums and cannot be seen as including a lump sum to compensate for loss of maintenance.
16. I do not agree with Mr Layton that, if the words of the Assignment are read literally, they carry the clear meaning for which the appellant contends. The Assignment is manifestly poorly drafted and cannot sensibly be read in a narrow literal way. As Mr Layton rightly observed the first part of the Assignment is drafted as an assignment of the appellant's claim. The assignment is expressly limited, however to "claims ... for the cost of emergency services, medical treatment, repatriation costs and pensions". The last line of the Assignment makes clear, however, as is obvious in any event, that the object of the Assignment is to enable the MoD to recover its costs. That immediately throws up a doubt as to whether "the costs of emergency services, medical treatment, repatriation costs and pensions" are those incurred by the appellant or by the MoD for her benefit.
17. If the Assignment is read in its factual context, it is clear that the costs specified are the costs incurred by the MoD and that the words "insofar as such claims are for the costs of ..." must be read as "insofar as such claims are for matters in respect of which the MoD has incurred costs on ...". That is manifestly so in respect of pensions. It is intuitively difficult to see why the MoD should ever pay the cost of keeping up private pension arrangements made by a deceased member of the armed services or their surviving spouse. What is clear, however, and was known to both the appellant and the MoD at the time of the Assignment is that there are pension arrangements for the benefit of service personnel and their surviving spouses. At the date of the Assignment the appellant was already receiving pension payments under those arrangements. There is no evidence whatever that the appellant was making payments, or wished to make payments, in respect of a private pension contract made by Major Cox or herself. Mr Layton sought to make a point about the Assignment being a standard form, but the fact is that there were pension arrangements, of which the appellant was aware at the date of the Assignment, which involved cost to the MoD, and which formed one of the MoD's outlays for the appellant's benefit. With all due credit to Mr Layton's advocacy, it seems obvious that the Assignment was intended to catch such payments.

18. That conclusion is not at all undermined by the statement in the Assignment that any personal claim of the appellant would remain unaffected. Whatever may be the meaning of “personal claim” the Assignment did not leave the appellant any worse off. Insofar as the first respondent’s liabilities for the appellant’s maintenance under section 844 exceed the amount of the pension payments made to her, the first respondent remains liable for the excess.
19. Although, as I have said, the interpretation of the Assignment, as distinct from the principles of interpretation in German law, is a matter for the court, it is noteworthy that both German experts were in agreement that the appellant’s claim under section 844 has been validly assigned to the MoD to the extent that the MoD is paying a pension to the appellant. It was apparently only during the re-examination of Herr Riedmeyer that Mr Layton sought to go behind the joint statement of the experts to that effect. The Assignment is an essential first step in a long established procedure, which is described by Mr Hawkins in his witness statement and has apparently been in existence for at least a quarter of a century, enabling the MoD to recover from third parties sums paid out by the MoD to forces personnel or their spouses following accidents abroad. I can see no proper basis for questioning its validity and effectiveness in the present case.
20. Article 12(2) of the Convention provides that the law governing the right to which the assignment relates shall determine its assignability. That is German law since the right to which the Assignment relates is the appellant’s right to compensation under section 844. As I have said, both German experts agreed that the Assignment was effective to assign that claim to the MoD to the extent that the MoD was paying a pension to the appellant.
21. There was some debate and disagreement between Mr Layton and Mr Mercer as to precisely what the Judge did or did not decide regarding the meaning and effect of the Assignment. It seems to me, on balance, that, although the Judge said in paragraph [35] of his judgment that he thought those were only matters of academic interest, he did implicitly find in paragraph [34] that the Assignment was effective to assign to the MoD the right to recover from the first respondent the amount of pension payments made by the MoD to the appellant. I would, therefore, dismiss the appeal on this point. For the avoidance of doubt, however, I would also declare, on the first respondent’s Notice, that the Assignment was effective to assign to the MoD the appellant’s claim under section 844 to the extent necessary to recover pension payments made by the MoD to the appellant.

**Dame Janet Smith**

22. I agree.

**Lord Justice Maurice-Kay**

23. I also agree.