Neutral Citation Number: [2024] EWHC 1518 (KB)

Case No. KB-2023-LIV-000027

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

Liverpool Civil & Family Court
35 Vernon Street, Liverpool, L2 2BX

Date: 18 June 2024

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

SEAN ABRAM
and 886 others

Claimants

- and -

(1) UNION DES ASSOCIATIONS EUROPÉENNES DE FOOTBALL
(2) UEFA EVENTS SA

Defendants

- -

The Claimants were represented by **Alistair Mackenzie** (instructed by **Leigh Day**)
The Defendants were represented by **Shaheed Fatima KC** and **Tom Cleaver** (instructed by **Herbert Smith Freehills LLP**)

Hearing date: 6 June 2024

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Approved judgment

This judgment was handed down remotely on 18 June 2024 by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. On 28 May 2022, Liverpool played Real Madrid in the Champions League final at the Stade de France in Paris. The match is remembered less for the result than for the chaotic scenes as Liverpool fans with valid tickets struggled to get into the ground through dangerously congested routes and which culminated in the French police deploying tear gas and pepper spray against them. This claim is brought by 887 Liverpool fans against Union des Associations Européennes de Football and UEFA Events SA; companies registered in Switzerland that organised the Champions League tournament and which are simply referred to as UEFA in this judgment. The fans claim that they suffered physical and psychological injury and loss by reason of UEFA's alleged breaches of duty. Some claim to have been particularly vulnerable to injury either because they were children or because they were survivors of the tragic events at Hillsborough in 1989.

2. Events at the Stade de France were investigated by the French government, the French senate and UEFA. In March 2023, UEFA announced a refund scheme pursuant to which it has paid out over €4 million to Liverpool fans. By this claim, the fans allege that UEFA was in breach of duty. Their allegations can be conveniently grouped into eight broad categories.

   2.1 No proper planning for the Liverpool fans arriving from Saint Denis station and no proper assessment of the risks of the traffic route and, in particular, the likely bottlenecks on that route.

   2.2 No proper training of the stewards and the lack of an efficient and safe system of queue management, ticket verification and entry to the ground.

   2.3 A misplaced focus on the risk posed by the fans after the match rather than upon the risks to their safety.

   2.4 No proper joint working with other stakeholders including the Préfecture de Police, the Fédération Française de Football, the Consortium Stade de France, transport networks, local authorities responsible for the fan zones, the participating clubs, their supporter associations and their national football policing authorities.

   2.5 No proper contingency plans to alleviate congestion or effective multi-agency crisis management plan.

   2.6 The lack of effective communication to reassure and advise fans as the congestion built up.

   2.7 The failure to anticipate, prevent or control the use of tear gas and pepper spray or the use of force more generally.

   2.8 The failure to anticipate the activities of local residents and other third parties.

3. UEFA disputes the court's jurisdiction. Alternatively, it argues that the court should not exercise any jurisdiction that it might have. UEFA's principal argument is that the fans' claims will require the English court to make findings as to the lawfulness under French law of acts of the French state. UEFA's jurisdiction application is listed for hearing on 27-28 June 2024.

4. By an application issued on 21 May 2024, UEFA sought directions for a meeting of the parties' respective French law experts, the preparation of a joint statement, and the service of supplemental reports addressing any areas of disagreement between the experts. I heard the application on 6 June 2024 but there was not time that day to give judgment. At the conclusion of the hearing, I announced that the application was dismissed and that the case would remain listed for hearing on 27-28 June. I now give my reasons for dismissing the application.

BACKGROUND

5. Tickets issued by UEFA provided that the terms and conditions of the contracts between UEFA and the individual ticketholders were governed by French law. The fans therefore accept that, pursuant to art. 3(1) of Regulation (EC) 593/2008, such express choice of law clause should be given effect and their claims in contract are governed by French law. Further, they accept that their claims in tort are governed by French law, being the law of the country in which they suffered direct damage: art. 4(1) of Regulation (EC) 864/2007.

6. UEFA's terms also provided that if the ticketholder qualified as a consumer, the courts of his or her place of residence or domicile would have exclusive jurisdiction. Accordingly, the fans assert that the English court has jurisdiction.

7. In support of their submissions on jurisdiction, UEFA sought and obtained permission to rely on an expert report on matters of French law by Dr Alexandre Malan. By application made on 12 April 2024, the fans sought permission to rely on their own expert report on matters of French law by Professor Phillipe Stoffel-Munck. In granting permission to the fans to rely on the professor's report, Dias J rejected UEFA's argument that the ambit of his report should be restricted to those matters dealt with by Dr Malan. The judge observed that UEFA had sought and obtained general permission to rely on its expert evidence and the court had not identified the specific issues of French law on which UEFA could rely on expert evidence. In such circumstances, it was, she ruled, inappropriate to limit the ambit of the fans' expert evidence to those issues that UEFA or their expert had decided were relevant.

8. In correspondence, UEFA also sought directions as to a meeting of the experts and the preparation of a joint report to narrow issues. In refusing to give any such directions, Dias J said:

> "The expert evidence appears on the face of it to address issues arising in the substantive claim and the basis on which the Defendants assert that it is relevant to the Jurisdiction Application has not been adequately made clear as it should have been when their application was first made. Absent clarification on this point, it cannot be said whether or not it will be necessary to resolve any conflict between the experts for the purposes of the Jurisdiction Application. A jurisdiction challenge is not the appropriate forum for resolution of disputes relating to the substantive dispute.

In order that the hearing of the Jurisdiction Application can proceed efficiently and that submissions at the hearing can be appropriately focused, the Defendants should accordingly clarify promptly the grounds on which jurisdiction is challenged so that the court can assess which of those grounds is properly the subject of French law evidence. Further directions can then be given if necessary, including (if appropriate) restricting reliance by either party on evidence of French law to specified grounds of jurisdictional challenge."

9. On 10 May, UEFA's solicitors sought to provide such clarification. They wrote:

> "10. UEFA remains of the view that expert evidence of French law is relevant to, and necessary for, the determination of the Jurisdiction Application for those reasons. Specifically:
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> a. 'Question 1' in Dr Malan's report addresses the principles of French law by reference to which UEFA will submit that the determination of the claims will require the Court to rule on the lawfulness of the acts of third parties (which in this case include organs of the French state); and,
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> b. 'Question 2' in Dr Malan's report addresses the status under French law of various entities or bodies relevant to these claims, for the purpose of establishing that they are organs of the French state, such that the Foreign Act of State Doctrine is engaged where it is necessary to consider the lawfulness of their acts.
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> 11. In addition to the primary basis of the Jurisdiction Application identified above, UEFA also submits that the Court should decline jurisdiction because the claims involve non-justiciable issues concerning the interpretation and application of an international treaty (the Saint Denis Convention) … That is the relevance of 'Question 3' in Dr Malan's expert report, which addresses (very briefly) the approach in French law to the applicability of the Saint Denis Convention in private law proceedings.
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> 12. The purpose of all of that evidence is to assist the Court in determining issues that it is (in UEFA's submission) required to determine in the Jurisdiction Application. None of it is directed at the substance of the underlying claims, except to the extent that the Jurisdiction Application requires the Court to consider what would be involved in determining the substance of those claims."

ARGUMENT

10. While UEFA originally sought directions with a view to keeping the June hearing date, its primary position on 6 June was that the jurisdiction hearing should be adjourned until the Michaelmas term. Shaheed Fatima KC, who appeared with Tom Cleaver for UEFA, argued that there was insufficient time to give effective directions in respect of the expert evidence and that I should direct a meeting of experts by 27 June, the preparation of a joint statement by 8 August, and the exchange of supplemental reports by 19 September. If the court was not minded to

adjourn the June hearing, Ms Fatima argued that the court should direct a meeting of experts by 12 June and a joint statement by 19 June.

11. In his report, Dr Malan addressed three issues. The focus of UEFA's argument was upon his question 1:

> "As a matter of French law, would it be necessary or relevant to consider the lawfulness of acts or omissions of any third parties: (a) in order to decide the nature and scope of the duty in contract or tort alleged in the Particulars of Claim; (b) in order to decide whether the alleged duty in contract or tort has been breached as alleged in paragraph 45 of the Particulars of Claim; and/or (c) in order to decide any wider issues, for example causation?"

12. While Dr Malan considered the impact of third parties separately in respect of these three issues, Ms Fatima argued that Professor Stoffel-Munck elided the issues and that his analysis dealt only with the question of whether third-party acts are relevant in the event that the fans establish a duty, breach of duty, and that such breach contributed to any damage. She argued that the professor's evidence was premised on a particular view of the facts. Further she submitted that his evidence that the organiser would, on such facts, "continue to owe" a duty compounded the problem in that the professor assumed a duty of care and considered the separate question of the effect of another party also being found liable for the same damage.

13. Ms Fatima therefore submitted that the experts had not addressed the same issues and that the extent of the true agreement and disagreement between them was not clear. Such ambiguity in the evidence on a jurisdiction challenge would, she argued, unfairly benefit the claimant.

14. In support of her submissions, Ms Fatima cited judicial observations about expert evidence in jurisdiction challenges in BB Energy (Gulf) DMCC v. Al Amoudi [2018] EWHC 2595 (Comm) and Gulf International Bank BSC v. Aldwood [2019] EWHC 1666 (QB). In BB, Andrew Baker J said, at [49], that it was a matter of significant regret that neither party had identified the need for case management of the application and neither had permission to rely on expert evidence. The judge added, at [50]:

> "In my view it has been a case … in which the absence of either an agreed or directed-by-the-court review of what expert evidence was required, from what experts, answering what questions, has led to the exchange, through the service and counter-service of evidence of an escalating volume of material not always addressing the same questions or analysing the case for the identification of the questions to be addressed in a consistent fashion and culminating in the late service of a second report by the claimant …"

15. Likewise in Gulf, neither party had permission to rely on expert evidence, all reports failed to comply fully with Part 35 of the Civil Procedure Rules 1998, each report addressed different issues, and each raised new points not considered by the

previous report. Citing BB, John Kimbell QC observed that the position was highly unsatisfactory. The deputy judge added, at [9]:

> "Better case management is clearly needed for challenges to jurisdiction which involve foreign law expert evidence. Permission ought to be sought under r.35.4 to [rely] on foreign law evidence in all cases. It would also assist if there were a list of issues approved by the court for the foreign experts to address at the very latest before the applicant's initial report (usually served with the application to challenge jurisdiction) is responded to. The enforcement of the requirement to obtain permission and the production of a list of issues for foreign law experts would go a long way in preventing the situation which has occurred both in this case and in BB recurring."

16. Alistair Mackenzie, who appeared for the fans, accepted UEFA's primary position that there is not now time for the experts to meet and prepare a joint statement and supplemental reports before the hearing on 27-28 June. Accordingly, he submitted that the application necessarily imperilled the June hearing.

17. He acknowledged that the court might properly case manage the expert evidence on a jurisdiction challenge but argued that neither BB nor Gulf suggested that joint reports should be ordered.

18. Citing Okpabi v. Royal Dutch Shell plc [2021] UKSC 3, [2021] 1 W.L.R. 1294, and Belhaj v. Straw [2017] UKSC 3, [2017] A.C. 964, Mr Mackenzie submitted that the court cannot resolve disputed issues of fact on the jurisdiction challenge and that the June hearing must therefore proceed on the basis that UEFA was the organiser unless that claim was demonstrably untrue.

19. Mr Mackenzie argued that both experts had considered whether third-party actions affected UEFA's liability for its own actions and omissions. He argued that this was not a case of ambiguity but rather a straightforward disagreement as to the relevance of the lawfulness of the acts and omissions of third-party state actors in determining the claim against UEFA.

ANALYSIS

20. Unlike the position in BB and Gulf, both parties in the instant case have permission to rely on expert evidence as to foreign law. Although they realised the need for expert evidence and applied for such permission, neither party sought the court's directions as to the issues that should be addressed by the experts before finalising its own expert evidence. Dias J did not take exception to UEFA's position that any permission should be properly limited to defined issues that arose on this jurisdiction challenge, but to its suggestion that, having itself sought and obtained general permission to rely on Dr Malan's evidence, the court should require Professor Stoffel-Munck to rewrite his report to address the issues identified by UEFA. The lesson from this case is that any case management of the expert evidence should have been sought from the outset. Rather than seek general permission for expert evidence to rely on Dr Malan's report, UEFA could have

formulated the issues of French law upon which it considered expert evidence would assist the court on the jurisdiction challenge and sought an order giving the parties limited permission to call expert evidence on those issues. Such approach would have framed the expert issues before any reports were filed. That ship has, however, sailed.

21. Rule 35.12 provides that the court may, at any stage, direct a discussion between experts of like discipline for the purpose of requiring them to identify and discuss the expert issues; and, where possible, reach an agreed opinion on those issues. Directions for such discussions, the preparation of joint reports identifying the areas of agreement and disagreement together with the reasons for their disagreement, and for supplemental reports are common in litigation. The principal reason for giving such directions is to identify and then narrow areas of dispute between experts with a view to saving time and costs at trial. Such approach, together with a party's right to ask written questions of their opponent's expert under r.35.6, is of particular value in avoiding the need for some experts to give oral evidence at all and in limiting the oral expert evidence that is required in other cases.

22. While the court undoubtedly has the power under both Part 3 and r.35.12 to direct joint discussions and the filing of a joint statement and supplemental reports at any stage of a case, it is not, however, standard practice for the court to exercise that power in advance of an interim hearing. BB and Gulf are not authorities as to the making of orders directing joint discussions between experts and the filing of a joint statement and supplemental reports. That is not, however, to suggest that such directions might not be appropriate in some jurisdiction challenges.

23. A challenge to the jurisdiction of the court is necessarily heard before the court has made any findings of fact. Such challenges are to be determined on the assumed facts set out in the Particulars of Claim, save in cases where such facts are demonstrably untrue or unsupportable. It is not the court's task to conduct a mini-trial: Okpabi, at [22], [107] and [109]; and Belhaj, at [2].

24. I accept that narrowing disputes between expert witnesses can be helpful at any stage of a case, but the court must consider whether such directions at the interim stage are necessary and proportionate given the fact that the jurisdiction challenge is not, and should not be treated as if it were, a trial. Furthermore, the court must consider whether it is practicable for any such directions to be complied with in the limited period of time before the hearing.

25. While UEFA's fallback position was that it was possible to give compressed directions for the hearing on 27-28 June, its primary position was that it was by then too late to give effective directions and that accordingly the jurisdiction challenge should be adjourned and relisted in the new legal year in October. The fans agreed with UEFA's primary position that it was not practicable to case manage the expert evidence in this jurisdiction challenge just three weeks in advance of the June hearing. I agree with the parties' assessment on this issue and accordingly conclude

that the real question is whether the hearing should proceed as listed or be adjourned until October.

26. Any application for an adjournment must be considered in accordance with the overriding objective of enabling the court to deal with cases justly and at proportionate cost. While an adjournment would allow the court to issue additional case management directions that may assist in clarifying the extent of agreement and disagreement between the experts, it will delay the resolution of this jurisdiction challenge and cause the parties to incur further costs. Here it would mean that the jurisdiction challenge would take the best part of a year to resolve before – if this case were to proceed in the English court – UEFA would be required to file its defence. Further, it is increasingly recognised that late adjournments cause prejudice to other litigants and to the administration of justice. Accordingly, whatever position I might have taken a month or two ago, I should be reluctant now to give case management directions that would inevitably lead to the adjournment of the June hearing unless persuaded that such directions were essential for the just resolution of the jurisdiction challenge.

27. I have considered Professor Stoffel-Munck's evidence as to the effect of third-party actions with care:

27.1 At paragraphs 32-40, the professor considered whether, as a matter of French law, it is necessary for the English court to adjudicate on the lawfulness of acts or omissions of the French executive, beyond merely considering any act or omission for contextual background. He reported at paragraphs 32-36:

> "32. Under French law, the fact that a third party - in this case, the French State - may, through its own actions or omissions, have contributed to the damage suffered by the victim does not, except in cases of force majeure, affect the obligation of the liable party (in this case, the organizer) to compensate the victim in its entirety. The participation of other persons in the damaging process may be considered at a later date in the context of the recourse action that the responsible party may bring against these co-perpetrators, but such participation in no way limits the victim's rights to claim compensation for his or her entire damage from any of the parties responsible for this damage … In French legal writing, a distinction is thus made between reasoning based on 'obligation à la dette' owing to the victim, on the one hand, and reasoning based on 'contribution à la dette' between co-responsible parties, on the other ….
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> 33. It follows that the victim of damage to which several people have contributed may claim full compensation from any one of the co-perpetrators (in this case, the organizer), without the defendant being able to invoke the contributory act of the third party (in this case, the State) to exclude or even reduce its liability.
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> 34. The situation is different only when the third party's act constitutes an event of force majeure apt to entirely account for the occurrence of the damage the reparation of [which] is sought … In such a case, in order to dismiss the liability action against

> the defendant, the judge does not have to rule on the wrongfulness of the third party's act. It is sufficient for the judge to find that this act presents the characteristics of force majeure as set out in article 1218 of the Civil Code, and that it was the exclusive cause of the damage. I therefore disagree with Mr. Malan when he states that the lawfulness of the third party's act is taken into consideration to determine its causal character or to assess whether or not it satisfies the test of force majeure (Malan Report at para. 2.3.5 and, by extension at para. 2.9.6).
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> 35. This need for the causal link to be absorbed by the third party's act in order to exonerate the defendant means that a defendant who has committed a fault in causal relationship with the damage can never be exonerated on the grounds of the contributory act of a third party, even if the event is external, unforeseeable and irresistible (i.e. characteristic of force majeure), since, by hypothesis, this act of the third party is not the sole and exclusive cause of the damage for which compensation is sought.
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> 36. In the present case, if it is established that the organizer (i) was bound by an obligation of safety (ii) that he breached this obligation and (iii) that this breach contributed to the damage for which compensation is claimed, it is therefore excluded that he can benefit from an excuse of force majeure with regard to this damage since the act of the third party, in this case the State, is not the exclusive cause of the damage."

27.2 At paragraphs 41-92, the professor considered in detail whether, as a matter of French law, the organiser of an event continues to owe a duty of care in contract and/or tort to consumers attending the event even where there is a subsequent or parallel involvement by other actors, including the French police, the Ministry of the Interior or the French football association. He separately considered the extent of the organiser's contractual duty (paras 41-55); the distinction to be drawn between third parties who acted as service providers to the organiser in performance of the organiser's contractual "mission" or those who acted independently, such as state actors in this case (paras 56-64); French law's indifference to the contributory fault of third parties when considering obligations to the victim or "obligation à la dette" (paras 65-74); the French approach to contribution between co-responsible parties or "contribution à la dette" (para. 75); and the need to prove a causal link between the "event" giving rise to liability and the damage (paras 76-92).

27.3 At paragraph 65, he reported:

> "Assuming that the victim has shown that the organizer has breached his safety obligation and that this breach is causally linked to the damage suffered, the organizer's liability towards that victim is not diminished because third parties have committed faults that have contributed to the damage."

27.4 He added at paragraphs 77-79:

> "77. The organizer's failure to meet his safety obligation presupposes that he has been negligent in the design, organization or implementation of the event. It is also possible to prove a breach

> by demonstrating how his security service led to the situation becoming uncontrollable, to the point where the public authorities had to intervene to re-establish public order.
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> 78. On the other hand, the organizer is not liable for the acts of genuine third parties, such as assaults or thefts suffered by spectators from persons outside the event. However, if the organizer's own negligence in fulfilling his safety obligation has enabled these events to occur, he will once again be liable for the consequential loss if that negligence is considered to have been a cause in the legal sense. This would be the case, for example, if the organizer had failed to carry out a thorough body search at the entrance to the event, or had failed to provide adequate security.
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> 79. The same reasoning applies to damage caused by the actions or omissions of the State in the exercise of its administrative police functions: these acts cannot be attributed to the organizer, unless its negligence caused them to occur. The proof of a causal link, legally speaking, is therefore critical."

28. While the two experts have approached matters in different ways, they have both addressed the issue of the relevance of the actions of third parties, including state actors, in determining UEFA's liability. It will ultimately be a matter for the judge who will have the benefit of hearing the substantive argument on jurisdiction over two days, but I am not presently persuaded that this is really a case of ambiguity rather than one where the experts disagree as to the effect of third-party acts and omissions in French law. In any event, UEFA has not, in my judgment, established a sufficiently strong case for further case management directions to justify the adjournment of the June hearing and the cost of obtaining additional expert evidence.

29. Accordingly, I refuse UEFA's application to adjourn the jurisdiction challenge until the start of the new legal year. Further, I reject its fallback position both because there is insufficient time now to instruct the experts to engage in discussions and to prepare a joint statement before the hearing on 27-28 June and because I am not persuaded that such directions are necessary and proportionate in this case.

POSTSCRIPT

30. Since deciding that this application should be dismissed, there has been a recent and material development in that it has now been identified that there is no judge available to hear the case on 27-28 June. Alternative listing dates were proposed by the court for mid-July but, after taking into account the parties' availability, I understand that the matter is now listed for 29-30 July. That circumstance was not known when this matter was argued and when I decided this application. There has been no application that I should reopen the argument or reconsider my decision in light of these changed circumstances. No such further application is, however, encouraged since, while there are now about six weeks to the revised hearing date, I have not in any event been persuaded that the directions sought are both necessary and proportionate.