Neutral Citation Number: [2024] EWCA Civ 1435

Case No: CA-2023-001590

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTRY COURT AT DARTFORD
His Honour Judge Parker
G11YY494

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2024

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE HOLGATE

- -

Between :

ELYSA ALTON	**Claimant/ Respondent**
- and -	
POWSZECHNY ZAKLAD UBEZPIECZEN	**Defendant/ Appellant**

- -
- -

Michael Nkrumah (instructed by **DAC Beachcroft Claims Ltd**) for the **Appellant**
James Patience (instructed by **Rees Clayton Solicitors Ltd**) for the **Respondent**

Hearing date : 6 November

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 22 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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LORD JUSTICE POPPLEWELL :

Introduction

1. The defendant ('PZU') is a Polish insurance company. It appeals from the Order of His Honour Judge Parker ('the Judge') dated 21 July 2023 whereby he set aside the order of Deputy District Judge Pithouse ('the DDJ') striking out the claimant's claim.

The procedural history

2. On 12 September 2017 the claimant, Ms Alton, was involved in a road traffic accident when driving along the M20 motorway. A lorry with a Polish number plate being driven by Mr Ratajski collided with her vehicle. PZU is the third party liability insurer of Mr Ratajski.

3. On 16 September 2019, solicitors acting for Ms Alton, MJW Law ('MJW'), sent a letter advancing her personal injury claim to InterEurope AG European Law Service ('InterEurope'), and asking, amongst other things, for the name of the insurers. InterEurope responded saying that liability would not be in issue. The name of insurers was not provided.

4. On 12 September 2020 MJW filed Ms Alton's claim form in the County Court. The claim form was issued in order to protect the three year time limit and said that particulars of claim were to follow. InterEurope was named as the defendant.

5. On or about 5 January 2021 Particulars of Claim ('P/C') were served. Paragraph 3 alleged that the defendant (i.e. InterEurope) was the UK insurer of the lorry and that Ms Alton had a direct right of action against it pursuant to the Third Party (Rights Against Insurers) Act 2010 ('the 2010 Act') and the European Communities (Rights Against Insurers) Regulations 2002 ('the 2002 Regulations'). Paragraphs 4 to 7 alleged that the accident had been caused by Mr Ratajski's negligence and relied on InterEurope's admission of liability. Paragraph 8 gave details of the damage suffered and damages claimed. It identified the personal injury suffered, comprising whiplash injuries, a fracture to the right hand and psychological injuries, evidenced by five medical reports which were served with the P/C. Special damages involving various heads of expenditure and loss totalling about £5,000 were itemised. The total damages claimed were limited to £13,500 plus interest and costs.

6. On 2 March 2021 DAC Beachcroft Claims Ltd ('DAC Beachcroft') filed a Defence on behalf of InterEurope. Paragraph 2 identified that InterEurope was not the insurer of Mr Ratajski's vehicle but merely the claims handler in the United Kingdom for PZU as the insurer. For that reason the Court was invited to strike out the claim of its own motion pursuant to rule 3.4 (a) of the Civil Procedure Rules. The Defence went on to allege that in any event no claim against PZU as the insurer arose under the 2002 Regulations because they only applied in respect of vehicles normally based in the United Kingdom, and the territory in which the vehicle is normally based is by regulation 2(a) the territory of the vehicle's registration plate, which in this case was Poland. For this reason too, the Court was invited to strike out the claim of its own motion. The Defence went on to plead to the substance of the claim without prejudice to those contentions. It admitted that the accident had been caused by the negligence Mr Ratajski, but put Ms Alton to proof that she had suffered the alleged injuries and

that they were caused by the accident. Particular points were made as to the various heads of special damages.

7. On 3 March 2021, MJW served on DAC Beachcroft a draft amended claim form and draft amended P/C, seeking to substitute PZU as the defendant. The draft amended P/C continued to allege that the direct cause of action against the insurer arose by reason of the 2010 Act and the 2002 Regulations. DAC Beachcroft declined to consent to the amendments.

8. On 12 April 2021, MJW issued an application seeking to amend the claim form and P/C to substitute PZU as the defendant, in the form of the drafts which had been served on DAC Beachcroft. The amended P/C continued to allege that the claim lay directly against PZU by reason of the 2010 Act and 2002 Regulations. That application came before Deputy District Judge Murphy on paper on 23 April 2021 and was granted. The Order referred to PZU's right to apply to set aside the order and gave permission for it to serve an amended defence.

9. It did neither, for understandable reasons. InterEurope had itself filed an application to strike out the claim and for a wasted costs order on 12 April 2021, the same day as Ms Alton's amendment application, but that application had not been processed by the court office and was not before DDJ Murphy. It was subsequently issued and served on MJW.

10. Meanwhile pursuant to DDJ Murphy's order, Ms Alton filed the amended claim form and amended P/C on 19 May 2021. On 27 May 2021 DAC Beachcroft wrote pointing out that the amended P/C were defective in relation to any cause of action against PZU, for the reasons already set out in the Defence. On 5 January 2022 a second application to strike out the claim was issued by DAC Beachcroft. This was intended to be, and was thereafter treated as being, PZU's application to strike out, although in fact it erroneously still referred to InterEurope as the defendant making the application ('the strike out application').

11. The strike out application came before the DDJ on 10 March 2022 for a hearing with an estimate of half an hour. Both sides were represented by counsel. Mr Rowley, counsel then representing Ms Alton, submitted a skeleton argument prior to the hearing. It recognised that the 2002 Regulations could not support a direct cause of action against the insurer PZU, as the amended P/C alleged; however it argued that a direct cause of action existed and that the pleading could be cured by (re)amendment. Of importance to the present appeal are paragraphs 16 to 18 of the skeleton argument which were in the following terms:

> "16. Where a statement of case is found to be defective, the Court should consider whether that defect might be cured by amendment and, if it might be, the Court should refrain from striking it out without first giving the party concerned an opportunity to amend (see: *In Soo Kim v Youg* [2011] EWHC 1781 (QB)).
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> 17. Given PZU are now the Defendant, the claim is capable of amendment to cure the defect, that is because:
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> a) Pursuant to Article 18 of Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) a direct right of action

> against an insurer defendant is granted if the law applicable to the non-contractual obligation or the law applicable to the relevant contract of insurance so provides. The provisions of Rome II in relation to non-contractual obligations are retained EU Law by virtue of the operation of regulation 6 of The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 as amended by The Law Applicable to Contractual and Non-Contractual Obligations (Amendment etc.)(EU Exit) Regulations 2019. As such Rome II applies to claims brought within the jurisdiction of England & Wales whether the claim was instituted before or after 31st December 2020; and
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> b) Poland is an EU Member State and is bound by the terms of the Sixth Motor Insurance Directive (2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability). Pursuant to Article 18 of the 2009 Directive each Member State is required to permit a direct right of action against an insurer in respect of the civil liability of their insured. The overwhelming likelihood is that the law of Poland permits direct actions against liability insurers in the circumstances of this accident.
>
> 18. C can make, and ought to be permitted to make, whatever further application is necessary/required in order to amend the PoC in order to rectify the issue, given it is capable of rectification. All the 'building blocks' of the case are present, it simply needs to be formulated in an amended way. Strike out would be disproportionate and unjust. If so minded, the Court can order that the making of such an application has to be within a certain period of time, failing which the claim will be automatically struck out. An unless order of that sort would be more appropriate."

12. A one page responsive skeleton argument from counsel then representing PZU was served. It did not address or take issue with the analysis at paragraph 17 of Mr Rowley's skeleton argument but challenged the ability to amend to cure the defect in the following terms:

> "[Ms Alton] is now statute barred by the Limitation Act 1980 from amending her claim. This is because any amendment after limitation must arise from the same or substantially the same facts. Foreign law is a matter of fact. It must be pleaded and proven as such - and when it has not been pleaded then no amendment can arise out of the same or substantially the same facts. [footnote: The Claimant does not even claim to know what the required fact is. The furthest she goes is in the Claimant's skeleton argument at 17 where it is asserted there is an 'overwhelming likelihood']."

The DDJ Judgment

13. The critical parts of the approved transcript of the DDJ's ex tempore judgment, explaining his decision to strike out the claim, are as follows:

> "1. As I was about to say, I am always reluctant to take away the rights of the individuals that feel that they have been in some way in a position where they may well be entitled to some form of compensation.
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> …
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> 8. Obviously, so far as Mr Rowley is concerned, quite properly he sets out his stall and clearly needed to do what he did. I am not criticising him in any way whatsoever, however, the claimants have been aware that there are these issues that appear, on the face of it, to be matters that need to be resolved and we are still in a situation, as I understand it, where the claimant has still not, from what I understand, rectified the issues that are raised before them by the defendant's solicitor.
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> 9. I am told that if there is a need, the need will be an application to amend the particulars of claim and then what one has to do then, no doubt, it will have to consider the question of the Limitation Act 2017, I think it is, and deal with what is required and also deal with whether it is appropriate for leave to amend to be given to the claimant party.
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> 10. I am surprised - and this is no criticism directed at Mr Rowley - that we find ourselves two months after the application to strike out which is before me today in a situation where the claimants are considering whether they ought to apply to the court to amend. Obviously that is another two months that have gone by and if there is to be an application to amend, whether it is successful or not is a matter for the court if such an application is to be heard.
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> 11. This is a matter that needs to be resolved. I am not substituting one pot of gold - if I could describe it as such - for another pot of gold insofar as substituting the possible claim that the claimant may have against their solicitors if the decision today is that the claim be struck out.
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> 12. I am not satisfied that there is sufficient pleading that would enable this matter to overcome the requirements and content of pleading and in those circumstances, with some hesitation, I strike out the claim on the basis for the reasons I have given.
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> 13. The claim is struck out."

14. Ms Alton sought and was granted permission to appeal against the DDJ's strike out order. Whilst it was pending, on 2 November 2022 MJW issued an application to amend her P/C in the form annexed to the notice. The draft reamended P/C identified the basis of the direct cause of action against PZU in exactly the same terms as had been articulated in paragraph 17 of Mr Rowley's skeleton argument before the DDJ, save that the applicable provision of Polish law was now identified as being Article 822(4) of the Polish Civil Code, which provides that a person entitled to compensation for a contingency covered by a civil liability insurance policy may bring a claim directly

against the insurer. Therefore the law applicable to the insurance contract provided the claimant with a right to bring her claim directly against the insurer and she had the right to bring her claim directly against PZU pursuant to Article 18 of Rome II. A witness statement by the legal executive at MJW handling the claim, Mark Winton, confirmed that the cause of action against PZU arose under Rome II as set out in the draft reamended P/C which he exhibited. He explained that it was his error which had led to the cause of action at the time of the first amendment continuing to rely on the 2002 Regulations rather than these provisions, which he described as an oversight.

The Judge's judgment

15. Both sides were represented by different counsel at the hearing of the appeal before the Judge. The Judge gave an impressive and well-reasoned ex tempore judgment explaining his decision to set aside the DDJ's strike out order. He referred at [10] to the statement of Tugendhat J in *Park v Kim* [2011] EWHC 1781 (QB) (the case referred to as *Soo Kim v Youg* in Mr Rowley's skeleton before the DDJ) at [40]:

> "… where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

16. The Judge identified that it had been argued before the DDJ that the defect could be cured in the way set out in paragraph 17 of Mr Rowley's skeleton argument. As to the Limitation Act point, which would depend upon whether the cause of action arose out of the same or substantially the same facts, he accepted that foreign law was a question of fact, but said that he did not need to decide the point because the DDJ had not done so, although he expressed the view, making clear that it was obiter, that it did arise out of substantially the same facts and that the Limitation Act would be no bar to amendment.

17. He said that the DDJ's judgment did not contain any consideration of whether striking out was a proportionate response to the claimant's failings; did not take account of what was said in *Kim v Park* indicating that it would be normal to give a party a chance to put matters right; and that the DDJ did not address the possibility of the court making an unless order.

18. He therefore addressed the factors relevant to the exercise of the discretion for himself. He accepted that the defect had been very clearly flagged up to the claimant in the original defence and that the "deeply unimpressive" conduct of the claimant's legal advisers in failing properly to articulate the basis for the claim had caused delay. In relation to the extent of delay, he also took account of the fact that the first strike out application by InterEurope had not yet been before the court, and that there was only a two month period between the strike out application by PZU (in January 2022) and the hearing before the DDJ at which the proper basis of the claim had been identified (March 2022). He also adverted to the fact that the claimant's advisers had not only failed to address the point until the end of that two months but had not even then appeared before the DDJ with a proposed draft reamended P/C. However the wider context was one in which PZU did not say that there could be no cause of action against it, but merely that the claimant had failed to identify what it was. Given "the status of the defendant" (i.e. that it was a Polish insurer) it would probably have been apparent

to it for some time how the claimant would remedy the defect. The defendant was not prejudiced by any delay since it had already addressed the merits of the claim in the Defence, and it would not need any evidence of its own to meet the claim, save possibly as to Polish law in respect of which any delay would have no effect.

19. The Judge concluded that strike out was a disproportionate response and outside the scope of the DDJ's reasonable discretion.

The grounds

20. Mr Nkrumah, who appeared for PZU before us, but had not appeared before the Judge or DDJ, advanced two grounds of appeal. The first was that the Judge was not entitled to interfere with the DDJ's exercise of discretion, in accordance with the well-known constraints on an appeal court interfering with the exercise of discretion, on an appeal by way of review. The second ground was advanced in the alternative: the Judge's own reasons for exercising the discretion against a strike out, if contrary to ground 1 he was entitled to remake the decision afresh, were flawed.

Ground 1

21. The principles applicable on an appeal by way of review from the exercise of a discretion or an evaluative assessment by the lower court are well-established. Absent some procedural unfairness or irregularity, an appeal court will only interfere where the lower court has made an error of principle, such as taking into account irrelevant matters or failing to take into account relevant matters, or has reached a conclusion which exceeds the generous ambit within which reasonable disagreement is possible: see for example *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992 [2018] 4 WLR 32 at 42(13).

22. Like the judge, I have not found the DDJ's judgment easy to follow, but on the most benevolent construction it seems he took into account the following matters. The claimant had been aware of the need to rectify the defect in the pleading since the Defence was served and had still not formulated a draft pleading doing so (para 8); an application for leave to amend would have to consider a question under the Limitation Act 1980 (which would in fact be whether the new cause of action arose out of the same or substantially the same facts pursuant to s. 35 of the Limitation Act 1980 and CPR 17.4(2) (para 9); the claimant was still considering whether to apply to amend, which was surprising, and involved another two months of delay from when the strike out application had been issued in January (para 10); the application had to be resolved without reference to Ms Alton having a claim in negligence against her solicitor if the claim were struck out because that would not substitute "one pot of gold" for another in the sense of providing an adequate remedy to Ms Alton for failings by her advisers (para 11); the DDJ was not satisfied that a pleading could properly be formulated to advance a claim against PZU (para 12).

23. In my view this reasoning discloses three errors of principle, each of which entitled the Judge to substitute his own evaluative assessment.

    (1) The DDJ was wrong to doubt that a pleading could properly be formulated to advance a claim against PZU.

(2) The DDJ was wrong to treat the claimant as merely considering whether she might or might not apply to amend the pleading ('prevaricating', as Mr Nkrumah put it in argument); and in failing to take account of the possibility of an unless order which was the course the claimant invited.

(3) The DDJ took no account of the balance of prejudice to the parties.

24. I will address each in turn.

Remedying the defect in the pleading

25. The question whether the defect in the pleading could be cured was simply whether a pleading could properly be formulated to advance a claim against PZU which had a real prospect of success. That would not require it to be shown that there was a cause of action which was bound to succeed, but merely one which was arguable in the sense that it had a real, as opposed to fanciful, prospect of success. This is the merits test for striking out a statement of case under CPR 3.4(2)(a), for reverse summary judgment, and on an application to amend: see *Kawasaki Kisen Kaisha Ltd v James Kemball* Ltd. [2021] EWCA Civ 33 [2021] 3 All E.R. 978 at [16]-[18].

26. In fact the position on the material which was before the DDJ was sufficient to show that it was not only arguable by reference to this threshold, but overwhelmingly likely to succeed. That was so not only as a result of it being Poland's obligation to give effect in its domestic law to the Sixth Motor Directive, but also from PZU's conduct in relation to the claim. It is clear that InterEurope was from the time when the claim was first advanced by Ms Alton the authorised agent of PZU in relation to the claim; and InterEurope had said at an early stage that liability would not be in issue, which was only consistent with PZU having a direct liability as the insurer of the lorry. The Defence of InterEurope pleaded full reasons why PZU was not liable under the 2002 Regulations, but did not suggest that PZU was not subject to a direct claim at all. Most tellingly, when Mr Rowley's skeleton argument set out in terms the basis for the direct claim at paragraph 17, it was not met by the suggestion that there was no such claim under Polish law, a matter with which PZU would be immediately familiar as a Polish motor insurer. The DDJ should have drawn what we take to be the obvious inference that there was most unlikely to be an issue about the direct claim existing under Polish law once it was pleaded. That was further supported by the terms of DAC Beachcroft's email of 15 March 2021. In substance, therefore, PZU's stance had never been to suggest that the defect in the pleading could not be cured, but rather simply that it hadn't been.

27. Mr Nkrumah argued that nevertheless the critical feature before the DDJ was that Ms Alton had failed to identify the specific provision of Polish law relied on and to support it with expert evidence. In the course of his argument he very frankly described these defects in the prospective amended pleading as "technical", but argued that they were nevertheless of critical importance. I am unable to accept that either was a critical feature which cast doubt on whether the existing pleading could be cured by an amendment.

28. As to identification of the particular provision of Polish law, the overwhelming inference from the matters I have described was that such a provision existed, although it had not been identified. That is sufficient to establish that there was a real prospect

of the defect in the pleading being cured by amendment notwithstanding the lack of identification at that stage of the relevant provision of Polish law itself. Moreover, under CPR 1.3 the parties are required to help the court to further the Overriding Objective, which in cases of this kind includes as an important element dealing with the case in a way which is proportionate to the amount at stake and the financial position of the parties. Whilst there is no general duty on one party to provide information to remedy defects in its opponent's case, the circumstances which had arisen before the DDJ made it incumbent on PZU to make clear whether it challenged what was said in paragraph 17 of Mr Rowley's skeleton about what Polish law must provide, and to admit it if it was not challenged, a matter which PZU as a Polish motor insurer would have known without having to undertake any inquiries. To require Ms Alton to go to the expense of taking advice on Polish law in order to set the provision out in a pleading would not have been proportionate if it were not going to be in issue. In those circumstances, having failed to challenge what Mr Rowley said at para 17 of the skeleton as to what Polish law provided, and having admitted liability in pre-action correspondence, PZU could not properly be heard to say that the failure to identify the specific provision of Polish law was such as to cast doubt on whether a direct cause of action could properly be advanced, still less a critical factor.

29. Mr Nkrumah argued that without identification of the specific provision of Polish law the court could not be satisfied that an amendment would have a real prospect of success. I disagree. On the material before the DJ he could and should have been satisfied that there was a real prospect, at the very lowest, that there was a provision of Polish law which had the effect contended for, albeit unidentified. Indeed that was overwhelmingly likely, as Mr Rowley had submitted.

30. As to expert evidence, that is a matter of proof, not pleading, and although foreign law is a question of fact, which, subject to a number of exceptions, has to be proved by evidence, it is by no means necessary in every case for a party to adduce such expert evidence when applying to amend a pleading. Only if there is likely to be an issue as to whether the party seeking to rely on foreign law can surmount the threshold of arguability necessary to support an amendment will it be appropriate to embark upon an evidential inquiry with foreign expert reports at that stage. This was obviously not such a case.

31. There remains the question whether an amendment would fall foul of s. 35 of the Limitation Act 1980 or whether the new cause of action arises out of the same or substantially the same facts, which we have to address by reference to the procedural position which has arisen. The Judge held that the DDJ had not decided that question, and there is no appeal from that aspect of his decision. It was treated, therefore, by the DDJ and the Judge, as an arguable point of law which did not fall for decision on the strike out application, although as I have said, the Judge went on to express his view that the new cause of action did arise out of the same or substantially the same facts so that the Limitation Act would form no hindrance to the amendment. If so treated as an arguable point of law, it does nothing to undermine the conclusion that the DDJ ought to have held that the defect could be cured by a pleading with a real prospect of success.

32. My provisional view is that the Judge's obiter conclusion is correct and that the amended claim arises out of the same or substantially the same facts. It is well established that a claim can arise out of the same or substantially the same facts even if it depends upon a new fact: *Mulalley v Martlet Homes Ltd* [2022] EWCA Civ 32.

Although foreign law is a question of fact, it has been treated as a special kind of question of fact, and one on which findings are to be treated differently from other findings of fact: see for example *Bumper Development Corporation v Commissioner of Police for the Metropolis* [1991] 1 W.L.R. 1362 at 1370 per Purchas LJ. It is, in substance, part of the identification of the legal, rather than factual, basis for a claim. A change in the legal basis of a claim can be made without offending against either the letter or the spirit of what is precluded by s. 35 of the Act and CPR part 17.4(2), the main purpose of which is to avoid placing a defendant in the position where if the amendment is allowed it will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which it could reasonably be assumed to have investigated for the purpose of defending the unamended claim: *Goode v Martin* [2001] 3 All ER 562. In this case no new investigation would be required of PZU at all, since it can be taken to be familiar with the relevant position in Polish law. Moreover, if it should be confirmed at the amendment hearing that there is no issue about it (on which PZU will have to make its position clear), so that the (foreign) legal basis of the claim were undisputed, it would be quite contrary to the purpose of s. 35 of the Act and CPR 17.4(2) if the introduction of that undisputed "fact" alone were sufficient to require the claim to be treated as arising out of facts which were substantially different.

33. However, this appeal is not about limitation, and we received no argument on the point, which will be for the County Court to determine if necessary, taking into account not only the points to which I have referred but all the arguments which PZU and Ms Alton choose to advance. I have only expressed my provisional view because it may help the parties to avoid wasting further costs where, subject to this point, liability is unlikely to be in issue, the personal injuries are evidenced by medical reports, and the amount claimed is modest in comparison to the costs which may be incurred in further procedural disputes. My conclusion about the DDJ's first error, is not, however, dependent on these provisional views about limitation.

34. Against that background, the Judge's criticism of the DDJ's failure to take into account what Tugendhat J said at [40] of *Kim v Park*, namely that it is normal to permit a claimant an opportunity to cure a defective pleading, is well-founded. The dictum is not a freestanding principle, but merely a reflection of what will in many cases fulfil the Overriding Objective. Mr. Nkrumah's argument as to why it should not be applied in this case focussed on the proviso in the passage ("provided that there is reason to believe that he will be in a position to put the defect right"); and was dependent on the argument, which I have rejected, that there was no reason to suppose in this case that the defect could be cured by amendment.

Prevarication and an unless order

35. There is no transcript available of what was said during the hearing before the DDJ but it seems reasonable to proceed on the footing that the argument advanced orally by Mr Rowley followed that in his skeleton argument. The Judge did not treat what was said at paragraphs 17 and 18 of the skeleton as indicating any prevarication, and I agree. It was accepted by Mr Rowley that the current pleading identified an erroneous legal basis for a direct claim against PZU, and he identified the alternative proper basis for it. That can only reasonably be interpreted as indicating an intention to amend to advance the new basis.

36. In any event, had there been any prevarication it would properly have been dealt with by an unless order, providing that the claim be struck out unless an application to amend be made within a limited time. That was Mr Rowley's suggestion.

Balance of prejudice

37. The DDJ did not advert to, or take account of, the balance of prejudice to Ms Alton of being deprived of her claim if it were struck out, and the prejudice to PZU in having to meet it if it were not struck out. These were not the only factors to be taken into account but they were important ones. The generic reference to rights in paragraph 1 of his judgment and the reference to the pot of gold in paragraph 11 show that he was of course cognisant of the fact that a strike out would deprive Ms Alton of her claim, as he could not have failed to be. But there is no evaluation of the strength of that claim or of the (lack of) prejudice to PZU if it were not struck out.

38. The balance of prejudice militated strongly in favour of dismissing the strikeout application. If struck out, Ms Alton would lose a claim for which liability was unlikely to be in issue, to put it at its lowest, and the quantum of which was to a large extent simply not admitted rather than denied. By contrast, PZU would suffer no prejudice by reason of the defective pleading being cured by amendment, and would have the opportunity to resist such amendment on limitation grounds when the application to amend were heard. Any costs prejudice could be addressed by way of a costs order.

Conclusion on Ground 1

39. For each of these three reasons, the Judge was entitled to interfere with the DDJ's decision and reach his own conclusion afresh.

Ground 2

40. In my view the Judge was clearly entitled to reach the conclusion that the claim should not be struck out. His reasoning discloses no error of principle and was not outside the generous ambit of his discretion; indeed I would have reached the same conclusion myself. In the end Mr Nkrumah's principal challenge to the reasoning rested on his twin arguments that the Judge could not be satisfied that the defect could be cured by amendment, and that he failed to take sufficient account of the prevarication about making an amendment, both of which are unsound for the reasons I have identified. Indeed the point about the lack of particularisation of the relevant provision of Polish law was even less meritorious by the time the appeal was heard by the Judge, because by then article 822(4) of the Polish Civil Code had had been identified in the draft reamended P/C attached to Ms Alton's amendment application of 2 November 2022. Mr Nkrumah's only additional argument was that the Judge did not give sufficient weight to the fact that the defect in the pleading could have been addressed on the first application to amend which was determined by DDJ Murphy, having already been identified in the Defence. However the Judge did take that into account as is apparent from his judgment, and the weight to be attached to it was a matter for him in his evaluative assessment of all the relevant factors.

Conclusion

41. For these reasons I would dismiss the appeal.

LORD JUSTICE HOLGATE :

42. I agree.

LORD JUSTICE PETER JACKSON :

43. I also agree.