Neutral Citation Number: [2022] EWHC 004697 (QB)

Case No: QB-2020-004679

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2022

Before :

MASTER DAVID COOK

- -

Between :

LISA PAL	**Claimant**
- and -	
(1) DR LUC DAMEN **(2) BELGO INTERNATIONAL RESEARCH APPLICATIONS AND DEVELOPMENT NV**	**Defendants**

- -
- -

Matthew Chapman QC (instructed by **Irwin Mitchell**) for the **Claimant**
Henry Morton Jack (instructed by **DWF Law LLP**) for the **1st Defendant**
Lucy Wyles QC (instructed by **Kennedys Law LLP**) for the **2nd Defendant**

Hearing date: 31 March 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MASTER DAVID COOK

MASTER COOK:

1. On 31 March 2022 I heard applications made by each of the Defendants pursuant to CPR 11 disputing the jurisdiction of the court to try this claim. This is my judgment on the applications.

2. The Claimant is a UK national domiciled within the jurisdiction of this Court. On 26 May 2016 she underwent elective cosmetic (breast implant) surgery at a clinic operated by the Second Defendant in Genk, Belgium. The surgery was caried out by the First Defendant, who is a consultant plastic surgeon, domiciled in Belgium. I will refer to the Defendants as the "Clinic" and the "Surgeon".

3. The Claimant's case is that her surgery was performed negligently and that such negligence has caused her to suffer personal injury and loss and expenses. The claim is advanced in both tort and contract. Proceedings were issued on 29 December 2020 and served on the Clinic and the Surgeon in May 2021. The claim was therefore issued prior to the end of the implementation period established by the EU Withdrawal Agreement.

Jurisdiction - the legal background

4. By Article 4 (1)(b) of Regulation EC No 593/2008 [Rome 1] the applicable law to the claim in contract is Belgian law as both the Clinic and the Surgeon have their habitual residence in Belgium.

5. By Article 4(1) of Regulation EC No 846/2007 [Rome 2] the applicable law to the claim in tort is Belgian law as the damage giving rise to the claim occurred in Belgium.

6. The issues of Jurisdiction in this case are governed by Regulation EU No 1215/2012 [Brussels recast]. The general rule set out in Article 4 is that persons domiciled in a Member State shall be sued in the courts of that Member state. This general rule is subject to the exceptions set out in Articles 7 to 26. The claim in tort is governed by Article 7(2) which provides:

> "*A person domiciled in a Member State may be sued in another Member State:*
>
> *..in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*;"

The claim in contract is governed by Article 17(1) which provides that:

> "*In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:*
>
> *…*
>
> *c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means,*

> *directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."*

In the case of consumer contracts Article 18(1) provides that:

> *"A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled."*

7. By the time of the hearing before me it was accepted by Mr Chapman QC that the Claimant was unable to rely on Article 7(2) as both the events giving rise to the damage and the place where the direct and immediate damage occurred was Belgium. It was also accepted by Mr Morton Jack and Ms Wyles QC that the Claimant had entered into a consumer contract. The issue between them was whether their respective clients were parties to the contract.

8. An application made under CPR Part 11 is not a trial and ought usually to proceed on the basis of written evidence and the parties' submissions. In light of the limitations inherent in this interlocutory process, the Court should not express a concluded view as to the merits (particularly where the issues relevant to jurisdiction are issues that may also arise at trial: see, ***Canada Trust Co v Stolzenberg (No 2)*** [1998] 1 WLR 547, 555E – G *per* Waller LJ (CA) and Dicey, Morris & Collins on ***The Conflict of Laws*** (15th ed, 2012), paras 11-146 – 11-147).

9. The burden of proof is on the Claimant to establish a jurisdictional gateway. The test is whether the Claimant has "the better of the argument" on the facts going to jurisdiction see, ***Brownlie v Four Seasons Holdings*** [2017] UKSC 80 at para 7, affirmed and reformulated in ***Goldman Sachs v Novo Banco*** [2018] UKSC 34 at para 9)

> *"… (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."*

Evidence

10. The following witness statements of fact were before the court,

    i) For the Claimant: statement of the Claimant dated 8 March 2022 and Cheryl Palmer Hughes dated 9 March 2022.

ii) For the First Defendant the statement of Richard Marshall dated 2 September 2021

iii) For the Second Defendant statement of Maria Spronken dated 14 February 2022, the statement of Sharon Mohamed dated 20 June 2021 and supplemental statement of Maria Spronken dated 16 March 2022.

11. The following expert evidence was before the court,

i) For the Claimant the report of Paul Henry Delvaux dated 8 March 2022.

ii) For the First Defendant the report of Dirk Steyvers dated 14 February 2022 and supplementary report dated 18 March 2022.

iii) For the Second Defendant the report of Stephen Beer dated 15 February 2022 and supplementary report dted22 March 2022.

The contract - relevant factual background

12. The following relevant background can be extracted from the witness statements and does not seem to be the subject of any substantial dispute between the parties.

13. The Claimant's account is that in March 2016 she discovered the web site for the Clinic at www.wellnesskliniek.com whilst researching a place to undergo a breast enlargement procedure. She was impressed by the comparatively good value of the procedures on offer, the before and after photographs on display and the glowing reviews from past patients.

14. On 1st April 2016 the Claimant followed a link from the web site and completed an online reservation form. She was required to give her bank account details to pay a €500 reservation fee. She could not remember seeing any Terms and Conditions and cannot remember having been sent any separately. She recalls that she was not allocated a specific surgeon at this stage.

15. On 4 April 2016 the Claimant received an e-mail response from the Clinic confirming receipt of her deposit and confirming that an appointment had been made with the Surgeon for a consultation on 25 May 2016 and for surgery the following day. A pre-operative questionnaire was also attached.

16. On 25 May 2016 the Claimant travelled to Belgium and attended the clinic for her consultation with the surgeon for which she paid by bank card.

17. On 26 May 2016 the Claimant attended the Clinic for her surgery. She recalls paying the balance of the cost of the surgery and completing documentation which she understood to be a consent form although she has no clear memory of this. Following surgery the Claimant was discharged with a post-operative care information factsheet and returned home to the United Kingdom.

18. Ms Spronken provided detailed background about the Clinic and its procedures. The Clinic was established in 1996 and is a facilitator of supporting services to physicians. The Clinic is not involved in the practice of medicine and does not employ physicians.

19. In this case the Clinic provided the premises comprising waiting rooms, consultation rooms, operating theatres and recovery room known as the Wellness Kliniek which also included the website www.wellnesskliniek.com.

20. Ms Spronken stated that the Claimant would have seen the appointment terms and conditions on the web site and would have had to tick a box to indicate that she had read them when making her request for her consultation. She provided a copy of the terms and conditions which contain the following;

> "- *Medical Error: Physicians are liable for any damages suffered by a patient as a result of the physician's failure to respect his/her obligations stated in the treatment agreement.*
>
> - *Medical Accident: Birand NV and the attending physicians cannot be held liable, under any contractual and/or non-contractual clause whatsoever, for damage resulting from a medical accident that occurs during in the procedure or during in the aftercare period, which is deemed, by the attending physician and the "Wellness Clinic", to be a situation of force majure. Damage resulting from a medical accident is understood to be damage that is not the result of a medical error (including complications, unexpected complications) in accordance with scientific understanding at the tie the damage occurs.*
>
> - *Briand NV: the company that provides the infrastructure where physicians can practice their profession – is not party to the treatment agreement between the physician and the patient.*
>
> - *Patient: if the patient believes that the physician has failed to comply with the treatment agreement, and does not demonstrate this in court, he/she could be held financially liable for the damage that he/she causes to the reputation of the physician and BIRAND ("Wellness Clinic"), including any damage caused by defamation, on the internet or via any media platform*"

21. The Claimant's evidence does not dispute Ms Spronken's account and at its highest amounts to an assertion that she cannot remember seeing, reading or approving the terms and conditions.

22. Ms Spronken produces a copy of the "treatment agreement" between the Claimant and the surgeon. This document also records the Claimant's consent to the procedure. The relevant parts of the document provide:

> "*The patient hereby expressly declares that this consent is given freely and in advance after having been informed in a comprehensible and timely manner about the purpose, nature, urgency, duration, frequency, the contraindications relevant to*

> *the patient, side effects and risks involved with the procedure, aftercare, possible alternatives, and the financial consequences.*
>
> …
>
> *Exoneration*: *The Wellness Clinic (Birand NV) and the attending physicians may under no circumstances whatsoever be held contractually and/or extra contractually liable for any damage resulting from a medical accident that occurs during in the procedure or the period of aftercare, which must always be considered as a situation of force majure with regard to the attending physician and the Wellness Clinic (Birand NV)*
>
> *Loss or damage resulting from a medical event mans any damage not caused by an medical error in accordance with scientific understanding at the time that this loss or damage occurs.*
>
> *Non-indemnification: The Wellness Clinic (Birand NV) shall not be indemnified for damage caused by any medical error for which the attending physician would be held contractually and/or extra contractually liable.*"

23. Ms Spronken also produces a copy of the agreement between the Clinic and the Surgeon. This is a document which would not have been seen by or have been available to the Claimant prior to these proceedings. The relevant provisions of this agreement are as follows;

> "- The physician bears exclusive medical responsibility for the patient. He/she ensures correct treatment, monitoring and full aftercare.
>
> - The physician bears full medical and civil liability for the treatment of his/her patients. He/she will take out any necessary and usual indemnity insurance for this purpose.
>
> - The physician is solely responsible for the medical supervision of the personnel during in the entire period of care, from intake to discharge as well as the aftercare of the patient.
>
> - The physician indemnifies Birand NV against any claims by third parties for damage caused by incorrect or negligent medical actions by the physician or by any incorrect or negligent paramedic actions by the personal of Birand NV if this took place under the medical supervision of the physician. The physician will take out any necessary and usual insurance for this purpose."

24. Lastly, Ms Spronken referred to e-mails sent by the Claimant to the Clinic following her return to the United Kingdom. The effect of this evidence was that all such e-mails

sent by the Claimant were passed directly to the First Defendant for his follow up and advice.

Expert evidence

25. The report of Mr Delvaux complies with the requirements of CPR 35. He concludes, as is common ground, that the Claimant had a contract for her treatment. In his opinion the issue in Belgian law is whether there was "*an all in contract*", where the patient has a contract exclusively with the clinic that makes a commitment to take care of everything or "*two distinct contracts*", one with the clinic that provides the medical care, accommodation and medical infrastructure and the other with the treating doctor which covers the provision of medical services, see §11 of his report.

26. It was Mr Delvaux's opinion that the Claimant entered into an "*all in contract*" with the clinic and that the First Defendant was an "enforcement agent". The basis of this opinion is set out in §12 of his report.

> "*12. It is generally agreed in the case of Belgium case law and literature that there is a contract between the doctor and the patient only if the patient has chosen this doctor freely. However as the Court of Appeal of Liège states:*
>
> > *"If the patient goes to an institution without personally choosing the doctor who will treat him, in such a way that he implicitly puts himself in the hands of the doctors attached to that institution, and he only has a contact with the hospital; this contract concerns both the obligation of safekeeping and the obligation of care. This institution is therefore liable towards its co-contractant for its enforcement agents' faults" and "the hospital institution is liable towards the patent not only for its own fault but also of the persons it has substituted for itself in the performance of its obligation of care"*
>
> *According to PUTZ and FOSSEPREZ, "In this situation, the patient that considers himself a victim of a medical fault could only sue the hospital based on contractual liability"*
>
> *In this case, I would therefore consider that there is an "all in contract" between Mrs Pal and the clinic, since Mrs Pal did not personally choose the doctor who would perform her surgery. The clinic did not give any other option to the patient as to which doctor will undertake her surgery and directly set up the appointment with Dr DAMEN.*"

27. Mr Delvaux considered the possibility that that there might be two distinct contracts, one with the Clinic and one with the Surgeon at §13 of his report. In particular and in agreement with Mr Steyvers he formed the view that the declaration of informed consent, referred to by Ms Spronken as the "treatment agreement" could not be considered a contract. His final position was that it was only arguable there could be a contract with the Surgeon,

28. The reports of Mr Steyvers are not in CPR 35 form. Mr Steyvers is the Surgeon's retained lawyer in Belgium. His conclusion set out at §14 of his report is that the Claimant entered into a contract with the Second Defendant. His basic reasoning mirrors that of Mr Delvaux. In relation to the treatment agreement at §16 of his report he states:

> *"… However, it is very clear that this document is not a contract at all. It is a standard document, designed by the clinic, that has to be filled in by the performing doctor during in his pre-operative consultation with the patient. As such the consent form's legal status is nothing more than a declaration of the fact that the patient has been made aware of the possible risks of the surgery. This is no contract at all. It simply records that the patient has been appropriately informed of the risks*"

29. Mr Steyvers concludes that as the Claimant went to the Clinic's web site and made her payments direct to them paid them her contract was with the Clinic.

30. In his supplemental report Mr Steyvers criticises Mr Beer's report. At §1.3 of his report he states;

> " *The report of Mr BEER (a witness from the second defendant) contains a lot of mistakes and incorrect information..*
>
> *Mr BEER says on page 4 of his report that there always has to be a written agreement for cosmetic surgical procedures and refers to article 18 §3 of the Belgium Act of 23 May 2013 regulating the qualifications required to perform non-surgical cosmetic medicine and cosmetic surgical procedures.*
>
> *This article does not at all state that there must be a written agreement or contract. This article is nothing more that the obligation to inform the patient. §3 states that there must always be made a written report of the information that has been given to the patient (= the declaration of informed consent). This is **no** contract, only an obligation to inform the patient.*
>
> *Mr DELVAUX also agrees with me on this point (p 13 of his report):*
>
> > *"I agree with Mr STEYVERS that the Declaration of informed consent cannot be considered as a contract. This Declaration of informed consent is the only the proof that the patient has been duly informed on the surgery, as legally prescribed by Section 18 of the Belgium Act of 23 May 2013 regulating the qualifications required to perform non surgical cosmetic medicine and cosmetic surgical procedures."*
>
> *Because Mr BEER starts by making a completely wrong assumption, the rest of his report is not correct either.*

> *There is no contract intuitu personae.*
>
> *Intuitu personae is a Belgium legal term which means that the contract is closed between two parties because himself/the personal qualities of the counterparty. When someone contracts with you because of your capabilities.*
>
> *This is not the case at all. Ms PAL never had the choice as to which doctor she wanted to perform her surgery.*
>
> *It is not possible at all to first close an all-in agreement with the clinic and afterwards (after paying making the reservation etc retrospectively turn it into a doctor out agreement. This of course is against the law.* "

31. Mr Beer's report and supplementary report are CPR 35 compliant. Mr Beer starts by considering the contractual position. In common with Mr Delvaux he agrees that that there are two possibilities. Firstly, a "doctor out" agreement, under which the clinic undertakes to provide and supervise medical care, provide accommodation and make medical and other infrastructure available, with the patient then concluding a separate medical treatment agreement with the doctor, which covers medical services only. Secondly an "all in" agreement under which the clinic provides not only the nursing care, accommodation and medical infrastructure but also the medical services of the surgeon.

32. At §2 para 3 of his report Mr Beer discusses the treatment agreement;

> "*In the standard situation, as discussed above, the treatment agreement with the doctor and the and the hospital agreement are usually oral.*
>
> *The medical treatment agreement is a consensual agreement, in principal: it comes into being through the mere concurrence of the parties' expressions of will. This concurrence of expressions will usually happen orally, tacitly or explicitly. But there are exceptions to the consensual nature of medical treatment.*
>
> *Specific legislation some times requires the patient's explicit written consent.*
>
> *A written agreement is required for cosmetic surgical procedures.*
>
> *In this regard, reference can be made to Article 18 §3 of the Belgium Act of 23 May 2013 regulating the qualifications required to perform non surgical cosmetic medicine and cosmetic surgical procedures (Belgium Official Journal of 2 July 2013)*

> *To be able to consent in this system, a treatment agreement must be concluded between the patient and the doctor. This is an agreement intuit personae.*
>
> *…*
>
> *This treatment agreement is strictly persona;. It may not be transferred to agents/auxiliary persons*."

33. Mr Beer then considers the argument that the Surgeon was acting as an agent of the Clinic for the medical treatment he performed on the Claimant. He observes that situation is governed by a system of interconnecting agreements between; the patient and the hospital, the patient and the doctor and the hospital and the doctor. He concludes, on the facts of this case, that there are two separate agreements that cannot be regarded as a "main agreement" and "sub agreement" but as two independent coexisting agreements, the hospital agreement (doctor out agreement) and the medical treatment agreement between the Claimant and the Surgeon.

34. Lastly, Mr Beer conducts an analysis of the relevant documents. Firstly, he notes that the agreement between the Clinic and the surgeon provides that the surgeon bears full medical and civil liability responsibility for the treatment of his patients. Secondly, he refers to the treatment agreement, whilst this document is headed "declaration of informed consent" it contains details of the procedure, the cost of the procedure and more importantly contains the express non-indemnification clause set out at paragraph 22 above. Thirdly he refers to the standard terms and conditions set out at paragraph 20 above. He concludes that if the Surgeon made a medical error or had been negligent during his treatment of the Claimant the Surgeon would be contractually liable.

35. In his supplemental report Mr Beer addresses the points made by Mr Delvaux and Mr Steyvers.

36. At §2.2 of his supplementary report Mr Beer addresses the Court of Appeal of Liège case referred to by Mr Delvaux at § 12 of his report. He points out that the facts of this case are very different. In the Court of Appeal case the patient was admitted to hospital as an emergency without any direct communication with the emergency doctor to whom she was then referred. In this case he points out that the Claimant had an individual pre-operative consultation with the Surgeon and was free to refuse treatment or seek a second opinion. He also noted that both Mr Devaux and Mr Steyvers appear to acknowledge that the Claimant read the general terms and conditions published on the clinic's web site and pointed out that in order to make a booking the Claimant would have to have ticked a box accepting them.

37. At §2.1 of his supplemental report Mr Beer takes issue with Mr Steyvers' view of the "informed consent document". In Mr Beer's opinion the document is more than a statement by the Claimant that she has been informed of the risks of the operation as it also contains the treatment agreement referred to in the Clinic's general terms and conditions.

The parties submissions

38. On behalf of the Claimant Mr Chapman QC made the following observations concerning Belgian law and the contracting parties:

    i) The issue is to be determined by reference to the governing law of the contract (here, Belgian law) (see, Article 10.1 of the Rome I Regulation No 593/2008), "*The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid*.");

    ii) Mr Delvaux (the Belgian law expert instructed by the Claimant) concludes (as is common ground) that the Claimant had a contract and goes on to consider whether there was an "*all-in*" contract with the Clinic or "*distinct*" contracts between the Claimant and the Clinic and also between the Claimant and the Surgeon;

    iii) Mr Delvaux' conclusion is that there was probably a contract between the Claimant and the Clinic and that this was a consumer contract. He also concludes that, in any event, the Surgeon owed the Claimant a like duty of care in tort/delict, quite apart from the contractual position;

    iv) Mr Delvaux' conclusion in this regard is substantially based on the absence of any direct communication between the Claimant and the surgeon prior to booking (the direct contact between the Claimant and the surgeon occurred later and, arguably, after the contractual arrangements were made). While Ms Spronken, the Chair of the Second Defendant, states (in her supplemental statement, dated 16 March 2022), that a patient can choose their own surgeon, the evidence here is that this Claimant did not. Instead, the Surgeon was selected for the Claimant by the Clinic;

    v) Mr Steyvers, the Belgian law expert instructed by the Surgeon, agrees (with added emphasis) with Mr Delvaux;

    vi) Mr Beer, the Belgian law expert instructed by the Clinic, disagrees and asserts (and has recently reasserted in a supplemental report) that the Claimant did not contract with the Clinic and that, instead, her contract was with the surgeon (see, report, dated 15 February 2022, and supplementary report, dated 22 March 2022). The Clinic also relies in this regard on a witness statement, dated 14 February 2022, from Ms Spronken, together with a supplemental statement from Ms Spronken, dated 16 March 2022.

39. Mr Chapman QC referred to the evidence in the Claimant's witness statement to the effect that she was not given a choice of surgeons in the booking process and submitted that there was a plausible basis, to conclude that the Claimant had contracted with the Clinic.

40. Mr Chapman QC noted the alternative opinion of Mr Beer and submitted that if it was difficult for the Court to reach a concluded view on these apparently plausible (albeit, contested) Belgian law matters in the context of this interlocutory process it would be appropriate for the Court to conclude that there is a plausible evidential basis for jurisdiction (on the consumer contract ground) against the surgeon (as advanced in the opinion of Mr Beer) and to allow these issues to be tried on the merits (as between) the

Defendants with the benefit of all of the evidence and live Belgian law expert evidence at trial.

41. On behalf of the surgeon Mr Morton Jack notes that the Claimant does not set out the details of a specific contract in her particulars of claim other than the bare assertion that one exists. He points out that the Claimant's expert Mr Delvaux concluded there was an "all in" contract with the Clinic and had specifically disavowed the existence of a separate contract between the Claimant and the Surgeon.

42. Mr Morton Jack referred to the fact that M Delvaux is also in agreement with the Surgeon's expert Mr Steyvers that the Declaration of Informed Consent, which is relied upon by the Clinic to demonstrate the existence of a contract between the Claimant and the Surgeon, "*cannot be considered as a contract… [It] is only the proof that the patient has been duly informed on the surgery…*" He suggested that this opinion is reinforced by M Steyvers, who stated that "There is no contractual relationship between [the First Defendant] and [the Claimant]". He also relied upon Mr Steyvers concurring with Mr Delvaux regarding the status of the Declaration of Informed Consent, stating that "*It is very clear that this is no contract at all… The consent form's legal status is nothing more than a declaration of the fact that the patient has been made aware of the possible risks of the surgery. This is no contract at all...*"

43. Mr Morton Jack submitted that Mr Beer's other views had been explicitly rejected by Mr Steyvers. Firstly, the Claimant did not choose the Surgeon. There can, in the circumstances, be no contract intuitu personae of the sort described by Mr Beer. (Mr Beer's Supplementary Report contains the 'qualifying' observation that Dr Damen 'can be viewed' on the Birand's website, but this has no bearing on the existence of an alleged contract intuitu personae because the Claimant's own evidence is that 'At no point in the booking process was I given a choice as to plastic surgeons' – see her statement at [18]. Secondly, Mr Beer's reliance on the Act of 23rd May 2013 is misplaced because, contrary to Mr Beer's assertion, the Act in question does not mandate the existence of a contract between surgeons and patients. It merely obliges doctors to obtain informed consent from their patients.

44. Mr Morton Jack submitted that the Claimant has provided no indication that she does not intend to rely upon her own expert evidence and that it would be odd if she did not wish to rely upon it given that it was obtained for the sole purpose of resisting the Defendants' applications to challenge jurisdiction.

45. Mr Morton Jack submitted, the Claimant's own expert evidence accords with that of the surgeon and that in the circumstances where the Defendants' experts disagree the court should prefer the evidence of Mr Steyvers. Accordingly the Court could be satisfied that the contract was made between the Claimant and the Clinic or alternatively there was a plausible case that it was.

46. On behalf of Briand Ms Wyles QC pointed out that the Claimant's case centred on her medical treatment at the clinic and that it was the Clinic's case that contract for medical or treatment services was between the Claimant and the Surgeon while the contract between the Claimant and the second Defendant was in respect of facilitating the treatment, known under Belgium law as a doctor out agreement.

47. Ms Wyles QC submitted that this case was supported by the witness evidence of Ms Spronken which was in turn entirely supported by and consistent with:

    i) the Clinic's Reservation Terms and Conditions which state that Birand, the company that supplies the infrastructure where the doctors can practice their profession, is not party to the treatment agreement between the doctor and the patient;

    ii) the Cooperation Agreement between the Surgeon and the Clinic states that the surgeon is working as an independent Doctor, that the Clinic is prepared to make its infrastructure and personnel available to the surgeon and that the surgeon bears exclusive medical responsibility for the patient and is required to have his own professional indemnity insurance in place;

    iii) the Declaration of Informed Consent signed by the Claimant and the Surgeon, under which, following consultation, the Claimant agreed to the proposed treatment. This was the treatment agreement, and is referred to as such in the clinic's terms and conditions;

    iv) the expert Belgian law evidence of Mr Stephan Beer, including that the legislation governing cosmetic surgery requires a treatment agreement to be concluded in writing between the doctor and the patient.

48. On the basis of this evidence Ms Wyles QC submitted the court could reliably take a view on the contractual position on the basis of the evidence adduced by the Clinic and further the Claimant cannot establish her pleaded case that there is a treatment agreement between her and both Defendants as there is simply no evidence to support the contention.

49. Ms Wyles QC submitted that the First Defendant's contention that there was only one "all in" contract between the Claimant and the Surgeon can be rejected for the following reasons;

    i) there is no witness statement from the Surgeon to this effect;

    ii) the position is inconsistent with the documentary evidence;

    iii) the only source for the Surgeon's case identified by Mr William Marshall in his statement is the evidence of Mr Dirk Steyvers, a Belgian lawyer retained by the Surgeon;

    iv) the instruction of Mr Steyvers by the surgeon as an expert is clearly problematic where he is the Surgeon's retained lawyer, and this may explain why his report does not comply with CPR 35;

    v) Mr Steyvers' legal analysis relies upon the assumption that the Claimant did not choose the surgeon to treat her and that the Clinic did not give her any other option. However, as set out in the supplementary statement of Ms Spronken, in the Clinic's Reservation Terms and Conditions and in the Declaration of Informed Consent, the Claimant had the right to freely choose a surgeon or, not to go ahead with the procedure with the Surgeon after the first consultation, and

> to ask for a second opinion from another surgeon. These circumstances are entirely different from the case (in the Liege Court of Appeal) concerning a patient brought in as an emergency to a hospital emergency department (see further the supplemental report of Mr Beer). Mr Steyvers' analysis is therefore undermined.

50. In the circumstances Ms Wyles QC submits the Claimant cannot show a good arguable case, or that she has the better of the argument, that there was a contract between her and both Defendants in respect of the medical treatment, which is her pleaded case. Nor can she show that there was an all-in contract with the Clinic, as opposed to 2 separate contracts i.e. a doctor-out agreement between the Claimant and the Clinic in respect of facilitating the treatment (administrative services, infrastructure etc) and between the Claimant and the Surgeon in respect of the medical treatment. In those circumstances, the Claimant cannot establish a jurisdictional basis for her claim in contract against the Clinic.

Discussion and reasons

51. As I observe above the burden is upon the Claimant to establish a jurisdictional gateway and the only issue I have to decide is whether, in accordance with Belgian law, there was a contract with either Defendant or both of them.

52. The Claimant does not particularise the terms of the alleged contract in her particulars of the claim other than to assert she had a contract with the Surgeon and the Clinic. I accept the submission of Ms Wyles QC that as the Claimant is criticising the failure to obtain her informed consent and/or the standard of surgery she must base her case upon the existence of a contract for medical treatment and /or medical services.

53. The Claimant's evidence does not take issue with Ms Spronken's account of the role of the Clinic or the manner in which her booking was made through the Clinic's website. As far as the Surgeon is concerned, he has adduced no evidence to counter Ms Spronken's account. In the circumstances the Court can safely conclude that the contractual position was as described by Ms Spronken and that the Claimant would have had to have accepted the Clinic's general terms and conditions before making her booking.

54. On the basis of the expert evidence I have no hesitation in concluding that there is a good arguable case that the Claimant entered into a contract with the Surgeon. I find the analysis of Mr Beer persuasive on this issue. He was the only expert who properly considered the factual background and contractual documentation in a balanced and logical manner. I agree with his opinion that there is only one logical result on the basis of the contractual documentation.

55. I conclude that I can place no weight upon the evidence of Mr Steyvers. The requirements of an expert's report are set out in PD 35 §3.2:

> "An expert's report must:
>
> (1) give details of the expert's qualifications;

> (2) give details of any literature or other material which has been relied on in making the report;
>
> (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;
>
> (4) make clear which of the facts stated in the report are within the expert's own knowledge;
>
> (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
>
> (6) where there is a range of opinion on the matters dealt with in the report –
>
> (a) summarise the range of opinions; and
>
> (b) give reasons for the expert's own opinion;
>
> (7) contain a summary of the conclusions reached;
>
> (8) if the expert is not able to give an opinion without qualification, state the qualification; and
>
> (9) contain a statement that the expert –
>
> (a) understands their duty to the court, and has complied with that duty; and
>
> (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014."

56. Mr Steyvers' report failed to comply with practically every requirement. It appeared to me that he was acting as an advocate on behalf of his client's position which is perhaps not surprising as he acts for the Surgeon in Belgium. He did not give any proper consideration to the evidence of Ms Spronken and did not fully consider the available documentary evidence with the inevitable result that he did not provide a balanced opinion covering the range of possible opinions. The most obvious illustration of this tendency was his abrupt observation that Mr Beer's report "*contains a lot of mistakes and incorrect information".*

57. Mr Delvaux's report was presented in a manner which complied with CPR 35 however, there are parts of his reasoning which do not withstand logical analysis, in particular his reference to the Court of Appeal of Liège case at §12 of his report. In my view and in agreement with Mr Beer the facts of this case are to be distinguished for reasons given by him in his supplemental report; on the basis of Ms Spronken's uncontested evidence the Claimant did in fact have a choice of whether to proceed with the Surgeon

and freely chose to do so. It was this issue which was the basis of Mr Delvaux's opinion that there was an "all in" contract with the clinic.

58. In the circumstances and substantially for the reasons submitted by Ms Wyles QC I cannot conclude there is a good arguable case that there was a contract for medical treatment and /or medical services with the Clinic.

59. In conclusion, the Claimant has established a good arguable case for the existence of a contract for medical treatment and /or medical services between her and the Surgeon and accordingly this Court has jurisdiction over that claim. The Claimant has failed to establish a good arguable case for the existence of a contract for medical treatment and /or medical services against the Clinic and accordingly the Court does not have jurisdiction over that claim.

60. I would be grateful of counsel could agree the appropriate consequential orders. If agreement cannot be reached any outstanding issues will be addressed on the handing down of this judgment.