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For this final Newsletter of the year we return to private international law and the issue of jurisdiction. Powerful obiter from the Court of Appeal suggests that the use of anchor Defendants (Article 8(1) of recast Brussels I) needs to be considered rather more carefully than it has been in the past.

More importantly, thank you all for reading in 2017. A very happy Christmas and all best wishes for the New Year!

Sabbagh v Wael Said Khoury & Others [2017] EWCA Civ 1120 (Court of Appeal judgment date: 28 July 2017) was an appeal arising out of a family dispute. The Appellant's father was the founder of an engineering business. The father had suffered a stroke and died intestate. The Claimant sought to pursue claims against various family members and their corporate interests alleging that there had been financial wrongdoing in the period during and after her father's incapacity and subsequent death. The First Respondent was domiciled in England. The remaining Respondents were domiciled in Greece or in Switzerland (most of them were in Greece). The corporate Respondents were incorporated in Lebanon.

The Appellant commenced proceedings against the Respondents in the English Court (serving overseas). The First Respondent was treated (by her) as "*anchor*" Defendant for the purposes of: (a) (for the Greek domiciled Respondents) Article 6(1) of the Brussels I Regulation (No 44/2001) which, as the regular readers of this Newsletter will know, is now Article 8(1) of the recast Brussels I Regulation (No 1215/2012); (b) (for the Swiss domiciled Respondent) Article 6(1) of the Lugano Convention; and, (c) (for the Lebanese Respondents) CPR Part 6, PD 6B, paragraph 3.1(3). The operative provisions of Article 6(1) of Brussels I and Lugano provided, "*A person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*." CPR Part 6, PD 6B, paragraph 3.1(3) provided, "*3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where …. (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and – a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.*"

It will be apparent that the anchor Defendant was, to mix metaphors, the vehicle by which all foreign Defendants were to be dragged – kicking and screaming – before the English Court. The "*non-anchor*" Defendants were not happy about this. There was a jurisdictional contest. The non-anchor Defendants applied to the Commercial Court to set aside the service on them of the Claim Form on the ground that the Appellant could not establish a good arguable case against the anchor defendant or, alternatively, against them. Carr J decided that the Appellant had, for jurisdictional purposes, established a good arguable case in conspiracy against each of the Defendants, including the anchor Defendant. However, she determined that the Appellant's case had not been made out

against the anchor Defendant in relation to the most valuable portion of the Appellant's claim and she struck this out. The Judge concluded that she should, accordingly, conclude that she had no jurisdiction against the non-anchor Defendants for this most valuable part of the claim. The Appellant appealed and argued that the valuable portion of the claim did have a real prospect of success against the anchor Defendant, but in any case it was unnecessary to consider the merits of the claim against the anchor Defendant for the purpose of establishing jurisdiction under Article 6(1).

On appeal, the Court of Appeal concluded that what I have termed the valuable portion of the claim did have real prospect of success. This need not concern us further, save that it meant that what the Court went on to say about jurisdiction (and any need for consideration of the merits of the claim against the anchor Defendant was *obiter*). However, (on a 2:1 split, Gloster LJ dissenting) the Court went on to reject the notion (advanced on behalf of the Appellant) that it was unnecessary to consider the merits of the claim against the anchor Defendant when considering jurisdiction (for the purposes of a challenge by the non-anchor Defendants): the majority observed that the European Court of Justice jurisprudence did not preclude consideration of the merits of the claims brought against an anchor Defendant, ***Reisch Montage AG v Kiesel Baumaschinen Handels GmbH*** (C-103/05) EU:C:2006:471, ***Freeport Plc v Arnoldsson*** (C-98/06) EU:C:2007:595, ***Kolassa v Barclays Bank Plc*** (C-375/13) EU:C:2015:37, ***Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV*** (C-352/13) EU:C:2015:335. If a claim that was hopeless or had no serious issue to be tried was brought against an anchor defendant, it could be inferred that it had been brought in order to remove the non-anchor Defendants from the jurisdictions of their states of domicile. Although jurisdiction was not affected if the claim against the anchor Defendant was later struck out, the emphasis was on whether there was a serious claim against the anchor Defendant. That could be assessed as at the date proceedings were instituted, even if the claim was only later struck out. The majority of the Court (Patten and Beatson LJJ) held, "… *we consider that there is a significant distinction between the anchor defendant and the foreign co-defendants. The claim against the anchor defendant is fundamental to establishing jurisdiction over claims against the foreign co-defendants in the jurisdiction in which the proceedings have been issued and away from the courts of the state(s) in which they are domiciled. If the claims against one or more foreign co-defendants fall away, there would be no effect upon the claim against the anchor defendant or the claims against other foreign co-defendants. In contrast, without a legitimate claim against the anchor defendant, there is no reason for the foreign co-defendants to be ousted from their jurisdiction of domicile. … in*

such a case, the risk of irreconcilable judgments is unlikely to arise. Accordingly, how can it be expedient to determine a claim against an anchor defendant that is not seriously arguable together with a claim against a foreign co-defendant over whom there would be no jurisdiction under Article 6 apart from the link to the anchor defendant?" They continued thus, "*In our judgment, it would be a misuse of Article 6(1) to allow hopeless claims to oust the jurisdiction of domicile of foreign co-defendants. To allow the claim to proceed in the present appeal would undermine the principle that a defendant may be sued only before the courts for the place where he is domiciled. It is said that the merit of an approach which eschews any examination of the merits of the claim absent evidence of abuse or fraudulent intention to artificially fulfil the requirement of connection under Article 6(1) is that it avoids the risk of irreconcilable judgments and protracted disputes about the substance of a claim at the jurisdiction stage. But it does so by a bright line binary rule which does not address the fact that derogations from the general principle that civil actions are to be bought against defendants in the courts of the place where they are domiciled must be restrictively interpreted. It is open to question whether this is justified or whether this is the true import of the decisions of the CJEU which have not directly addressed the question that is before us. It is also said that defendants may, subsequently, if they wish, attempt to strike out the claims. That, however, would simply shift to strike out and summary judgment applications what is said to be undesirable and impermissible in the context of jurisdiction*." Dissenting, Gloster LJ's interpretation of the CJEU jurisprudence differed from that of her colleagues.

We are accustomed to making use of "*anchor Defendants*" in personal injury litigation in this jurisdiction. Typically, the claim against such anchor Defendant will have obvious merit and, if such merit is more questionable, the Claimant may confidently feel that, absent any application to strike out, the Court is unlikely – in the event of jurisdictional contest by non-anchor Defendants – to enquire too closely into the merits. Is such confidence now misplaced? The conventional approach to CPR Part 11 contests has been that they are or ought to be capable of swift disposal either on the papers or after a relatively brief hearing. A Part 11 hearing is not a trial and will usually proceed on the basis of written evidence and the parties' submissions. In the light of the limitations inherent in this interlocutory process, the Court should not usually express a concluded view as to the merits (particularly where the issues relevant to jurisdiction are issues that will 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). What is to

happen now? Where an anchor Defendant is used, do we have to assume that there will be a mini-trial on jurisdiction before we reach the trial proper?

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