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We end the year on a jurisdictional theme: a case-note on the Court of Appeal's decision in the recent Lugano Convention case of ***JSC Commercial Bank v Kolomoisky & Anor***. [2019] EWCA Civ 1708.

This decision (which has obvious potential relevance to the recast Brussels I Regulation regime) joins ***Cole & Martin v IVI Madrid SL*** [2019] 9 WLUK 373 (QB) (now the subject of a reference to the CJEU) in shedding some light on the EU jurisdictional rules. However, in the (perhaps unlikely) event that – by next Christmas – recast Brussels I will no longer be available to UK litigants, keen readers will have seen the recent thoughts of Nicol J and Mr Registrar Kay QC on the common law "*tort gateway*" and *forum conveniens* in ***Brownlie Mark II*** [2019] EWHC 2533 (QB) and ***Peacock v Del Seatek & Anor***. [2019] EWHC 2867 (Admlty) respectively – permission to appeal granted in both cases.

This will be the final Newsletter of this year. We wish you happiness and prosperity wherever you choose to litigate in 2020. See you in the New Year.

JSC Commercial Bank v Kolomoisky & Anor. [2019] EWCA Civ 1708

CASE NOTE

The principal interest of this recent CA judgment lies in the approach taken to the co-Defendant ground of European jurisdiction: see, Article 6(1) of the Lugano Convention and Article 8(1) of the recast Brussels I Regulation. In particular, where an English anchor Defendant is sued with the *sole object* of joining a foreign co-Defendant to the English action and thereby removing the latter from his Courts of domicile to the English Court, does this prevent the operation of the co-Defendant ground of jurisdiction? To put the matter more succinctly, is the co-Defendant ground subject to an additional and unexpressed condition that it not be used with this sole object?

The CA described the conflict of principle in cases of this kind in the following terms (at Judgment, #41), "*On the one hand, the primacy of allocating jurisdiction to the state of domicile of the defendant leads to a strict interpretation of the express exceptions. Given that primacy, the commencement of proceedings in one jurisdiction for the sole object of removing a defendant from the jurisdiction of his domicile can be seen as contrary to the scheme of the Lugano Convention and the Regulations. On the other hand, it is a primary aim of the Lugano Convention and the EU instruments to promote certainty and predictability in the allocation of jurisdiction, which is achieved by the express terms of article 6(1) but could be put at risk by the imposition of a sole object test.*" Ultimately, the CA (at least, the CA majority) came down on the side of legal certainty and, correspondingly, a more expansive approach to the co-Defendant ground.

By way of background, this appeal arose out of a claim in respect of a very large-scale alleged fraud: a cause of action in fraudulent misappropriation, to be more precise. A Ukrainian Bank (JSC) commenced proceedings against a number of Defendants located in a variety of jurisdictions: JSC alleged that D1 and D2, who had been majority shareholders in the JSC Bank before it was nationalised and, at the relevant time, were domiciled in Switzerland, had misappropriated $1.91 billion; D3, D4 and D5 were limited companies registered/domiciled in England; and, D6, D7 and D8 were companies incorporated in the British Virgin Islands and were said by JSC to have procured or assisted in the misappropriation. JSC's case was that D1 and D2 had used the other Defendants (companies in England and the BVI) to execute the fraud. JSC was granted a worldwide freezing order against each Defendant; it was accepted that there was a reasonably sustainable claim against all Defendants (the English anchor Defendants included). At the relevant time there were pending defamation proceedings in the Ukraine which raised factual issues that overlapped with the fraud action in England. One might have thought that the presence of

English Defendants (the limited companies registered/domiciled here) might "*anchor*" the claim (against the other, foreign Defendants) in the English Court. However, at first instance, it was held that this was not so: Fancourt J stayed the proceedings brought against D1 and D2 – the Swiss domiciled Defendants – pursuant to Article 6(1) of the Lugano Convention (cf. the equivalent provision in Article 8(1) of recast Brussels I No 1215/2012). This provides, "*A person domiciled in a State bound by this Convention 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*." Fancourt J held that Article 6(1) is subject to an implied condition that it not be used where the *sole object* of its deployment is to remove a Defendant from the jurisdiction where he is domiciled or another competent Court: "*the sole object condition*." The pending Ukrainian defamation action also resulted in a stay of the English proceedings against the BVI-domiciled Defendants pursuant to Article 28 of the Lugano Convention which provides (under the heading *Lis pendens*), "*1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. 3. For the purposes of this Article, actions are deemed to be related where they 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*." For good measure, Fancourt J stayed the proceedings against the English-domiciled Defendants on grounds of *forum non conveniens.* JSC appealed.

On appeal, it was held by a majority in the Court of Appeal (*per* David Richards and Flaux LJJ. Newey LJ dissenting) that a Claimant with a sustainable claim against an English anchor Defendant which it intended to pursue to judgment in proceedings to which a foreign Defendant was joined as a co-defendant, was entitled to rely on the co-Defendant ground of jurisdiction contained in Article 6(1) of the Lugano Convention, notwithstanding the fact that the Claimant's sole object in issuing the proceedings against the English Defendant was to join the foreign Defendant to the same action. The CA's reasons for reaching this conclusion can be summarised as follows: (1) as a matter of construction, Article 6(1) (which did not contain any express sole object condition) should be contrasted with Article 6(2) (which did contain

a sole object condition). Instead, Article 6(1) contained a "*close connection*" requirement on which there was CJEU authority: see, ***Freeport Plc v Arnoldsson*** (C-98/06) cf. ***Reisch Montage v Kiesel Baumanschinen*** (C103-05); (2) the close connection condition had been included in Regulation 44/2001 (the forerunner of the recast Brussels I Regulation) in response to the CJEU's decision in ***Reunion Europeenne SA v Spliethoff's Bevrachtingskantoor BV*** (C-51/97) among other cases; (3) the question of allocation of jurisdiction required certainty and predictability and the addition of a sole object condition (based on the Claimant's intentions) would instead result in uncertainty; (4) ***Freeport Plc v Arnoldsson*** suggested that Article 6(1) was not subject to a sole object test; (5) subjecting Article 6(1) to an abuse of process test (rather than an unexpressed sole object condition) would be consistent with analysis (*obiter*) by Lord Briggs in ***Vedanta Resources Plc v Lungowe*** [2019] UKSC 20.

Accordingly, JSC was entitled to rely on Article 6(1) even if its sole object in commencing the proceedings against the English anchor Defendants was to remove D1 and D2 from the Courts of their domicile: Switzerland. The CA majority went on to hold that even if a sole object test did apply, the claim against D1 and D2 in England had not been the sole object of JSC in any event.

As to the stay of proceedings against other Defendants, Article 28 of the Lugano Convention did not strictly apply, but could nevertheless be applied reflexively, or by analogy, in order to avoid the risk of inconsistent judgments. On appeal, it was held that Fancourt J had correctly concluded that the English proceedings and the defamation proceedings in Ukraine were "*related*" actions for the purposes of Article 28(3) even if they could not be consolidated. In considering whether it was expedient to hear and determine the actions together, "*expedient*" was more akin to "*desirable*" than to "*practicable*" or "*possible*". It was further held, however, that Fancourt J had fallen into error in exercising his discretion to grant a stay because he had erroneously failed to consider that unavailability of consolidation of the proceedings would usually be a compelling reason to refuse a stay. Furthermore, it would be inappropriate to stay an English fraud claim in favour of Ukrainian defamation claims in circumstances where the fraud claim involved a good arguable case of fraud and money laundering on the alleged (very) large scale. Finally, the Defendants domiciled in the British Virgin Islands were necessary parties to the claim. It was held that the appeal should be allowed and the claim permitted to proceed in England against all Defendants English and foreign.

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