English Court Of Appeal Confirms The Width Of The Consumer Contract Jurisdictional Gateway In Financial Services Claims

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Post-Brexit, the jurisdictional landscape is very different for claimants. One reasonably constant feature is the bespoke jurisdictional gateway for consumer contracts, which has recently come to prominence in financial services claims. Its first iteration was in the Brussels Convention 1968, as modified on the accession of the UK. Article 13(3) of the Convention provided:

> "In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this section..., if it is—
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> 1. ...
>
> 2. ...
>
> 3. any other contract for the supply of goods or a contract for the supply of services, and
>
> (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and
>
> (b) the consumer took in that State the steps necessary for the conclusion of the contract....

This was very much a product of its time, pre-internet advertising and trading, and, apparently, principally aimed at cross-border mail order catalogues. It most stringent requirement was that the contract should be "preceded by a specific invitation addressed to him or by advertising" in the consumer's domicile. If the test was satisfied, article 14 permitted the consumer to sue in his or her home jurisdiction. Article 15 precluded jurisdiction agreements, unless entered into post-dispute.

In its second incarnation the Brussels Regulation, and the test was modernised to make it more media-neutral, enhance consumer protection and extend the consumer contract gateway. Article 17(1)(c) of the recast Regulation, states:

> "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 Member States including that Member State, and the contract falls within the scope of such activities."

Post-Brexit it was considered appropriate for the UK to maintain two of the three situations in which the EU measures had created special jurisdiction rules for unequal relationships (insured parties not being seen as sufficiently weak against insurers), and therefore sections 15A to 15E of the heavily amended Civil Jurisdiction and Judgments Act 1982 contain two special jurisdiction regimes for consumer and employment contracts. Article 17 has effectively been replicated in the post-Brexit provisions of sections 15A to 15E, and in particular the definition of "consumer contract" in section 15E (inserted by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479). The consumer contracts test in the 1982 Act was recently considered by the Court of Appeal in ***Soleymani v Nifty Gateway LLC*** [2022] EWCA Civ 1297.

This note focuses on a subsequent decision of the Court of Appeal in ***Dooley v Castle Trust and Management Ltd*** [2022] EWCA Civ 1569 ("***Dooley***"), which may represent something of a curiosity as it is based on the first incarnation of the consumer contracts gateway in the Brussels Convention. The claim was effectively a replay of the previous year's appellate decision in ***Adams v Options SIPP UK LLP*** (***formerly Carey Pensions LLP***) [2021] EWCA Civ 474; [2021] Bus LR 1568 ("***Adams***"), but with a different cross-border twist. In Adams the unregulated intermediary was offshore, apparently operating from Spain. In Dooley the unregulated intermediaries were based on the English South Coast, whereas the pension provider firm was offshore in Gibraltar.

The 62 claimants were domiciled in the UK, 59 of them in England and Wales. The defendant pension provider firm ("Castle") was based in Gibraltar. Gibraltar was unique in being both a British Crown Colony, and also within the EU, for most practical purposes. whilst the UK remained a member state. It is also a not inconsiderable financial centre. Each of the claimants were said to be victims of a pension scam orchestrated by unregulated intermediaries operating in England. The principal intermediary, Montegue Smythe ("MS"), was described by Castle as an "introducer" of business, and Castle paid substantial fees or commissions to MS based on each pension transfer it referred.

As a result of pension transfers the investors went from having valuable UK-based pension rights, to an inappropriate, expensive, offshore pension arrangement with Castle, invested in unregulated collective investment schemes ("UCIS") of little or no value. For example, the first-named claimant, Mrs Dooley, a police officer, gave up gold-plated rights in the police pension scheme, and instead entered into a Qualifying Recognised Overseas Pension Scheme ("QROPS") with Castle. (QROPS are "overseas pension schemes" recognised by HMRC under the UK Finance Act 2004, section 150(7), and the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206.)

Allocation of jurisdiction between the UK and Gibraltar is provided for under the Civil Jurisdiction and Judgments Act 1982, section 39, and an Order-in-Council made under it, the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997, SI 1997/2602, by reference to the 1968 Brussels Convention ("the Convention").

The claim was brought on a number of bases against Castle both personally and on a joint wrongdoing basis with the intermediaries, including claims under the UK Financial Services and Markets Act 2000 ("FSMA"), including unauthorised investment activity by the intermediaries, and breach of contract and other duties by Castle, as an authorised person under FSMA.

It was common ground that each of the investors was a consumer domiciled in the UK. So too it was uncontroversial that the various steps, including advice and arrangements, leading to the pension transfers took place in England and Wales.

As a result most of the requirements of article 13(3) appeared to be satisfied. However HHJ Russen KC sitting as a High Court Judge in the Bristol Circuit Commercial Court ([2021] EWHC 2682 (Comm)) held that there was no jurisdiction for two reasons. First, there was no contract for services: the claims arose out of the pension trust deeds and therefore Castle was entitled to be sued in its domicile either under the general rule in article 2, or under the trust provision in article 5(6). Secondly, there was no plausible basis for specific invitations to the claimants.

Carr LJ set out the principles for establishing jurisdiction which are "now well-established and uncontroversial" at [35-6]:

> "For the purpose of the evidential analysis, the standard lies between proof on the balance of probabilities and the mere raising of an issue. On contentious factual issues, the court takes a view on the material available if it can reliably do so; if a reliable assessment is not possible, there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. The test is context-specific and flexible, and if there is an issue of fact the court must use judicial common sense and pragmatism, making due allowance for the limitations of the material available at an early point in the proceedings."

Carr LJ cited ***Brownlie v Four Seasons Holdings Inc*** [2017] UKSC 80; [2018] 1 WLR 192 at [7]; A***ng v Reliantco Investments Ltd*** [2019] EWCA Civ 879 (Comm); [2020] QB 582 at [4]; ***ING Bank NV v Banco Santander SA*** [2020] EWHC 3561 (Comm) at [64]; ***Flowers v Centro Medico & Berkley España t/a Hospital Clinic Benidorm*** [2021] EWHC 2437 (QB) at [6] to [10].

The appeal ultimately boiled down to two questions. First, was HHJ Russen KC right to find there was no contract for services between the parties? Secondly, was he also wrong to find there was no plausible evidential basis for specific invitations in the jurisdiction? A separate ground based on advertising was abandoned, although it is worth remarking

that Castle's internet advertising, vaunting its approval by HM Revenue and Customs to operate QROPS, would in all probability have sufficed under the more consumer-friendly and internet-savvy provisions of both the Recast Regulation and the new domestic measures in sections 15A to 15E of the 1982 Act. Nevertheless the investors were held by the Court of Appeal to have overcome the more stringent requirements of the Brussels regime.

First, in the polite language of the Court of Appeal, it was "surprising" that HHJ Russen KC had reached the apparent conclusion that there was no contract between the parties (at [58]). At the oral hearing it was effectively conceded that conclusion was not tenable. The investors or pensioners had established:

> "by each application form, Castle made an offer to provide services (by reference to an agreed schedule of costs and on its standard terms and conditions), which each pensioner accepted. The pensioners can point to the contractual language used (for example, "we agree"; "remuneration"; "engagement"); the definition of "client" in the Terms and Conditions; the right to charge fees additional to any entitlement in the Deeds; the limitation of Castle's liability and the express agreement on the part of Castle to exercise reasonable skill and care - an express obligation which is not to be found in the Deeds or Rules. A conclusion that in all the circumstances there was no contract could be said to be surprising, given the wording of its application forms and the requirement for each pensioner to agree to the Terms and Conditions."

Carr LJ prayed in aid the "validation principle" referred to in ***Enka Insaat ve Sanaryi AS v OOO Insurance Company Chubb*** [2020] UKSC 38; [2020] 1 WLR 4117, [95], being the modern Anglicisation of *verba ita sunt intelligenda ut res magis valeat quam pereat*. The investors were probably right the services involved a the bringing about of an effective pension transfer in a specialised activity in a highly regulated environment (at [59]).

Carr LJ's judgment contains a very valuable analysis of the independent and autonomous function of the consumer contract gateway, relevant not just to the older provisions of the Brussels Convention, but also to the modern iteration of the test in both the Recast Regulation and sections 15A to 15E of the 1982 Act. Her Ladyship's judgment analyses the leading cases in the Court of Justice of the European Union ("the CJEU"), and identifies the errors into which the Judge fell, including his erroneous view that a party must first successfully pass through the general contract gateway (in article 5(1) of the Brussels Convention) before reaching the consumer contract test. This analysis was grounded on a careful reading of ***Kalfelis v Bankhaus Schroder Munchmeyer Hengst and Co*** [1988] ECR 5565 ("***Kalfelis***"), C-96/00 ***Gabriel v Schlank and Shick GmbH*** [2002] ILPr 36 ("***Gabriel***"), C-27/02 ***Engler v James Versand GmbH & Co KG*** [2005] ILPr 8 ("***Engler***"), C-585/08 ***Pammer v Reederei Karl Schluter GmbH & Co KG*** [2012] Bus LR 972 ("***Pammer***"). In the circumstances Carr LJ did not think it necessary to consider subsequent CJEU judgments on the newer test under the Regulation and Recast Regulation, such as C-208/18 ***Petruchova v FIBO Group Holdings Ltd*** ("***Petruchova***") and C-500/18 ***AU v Reliantco Investments Ltd*** ("***Reliantco***"), although they confirmed "the existence of the "consumer contract" gateway as a separate and distinct ground for jurisdiction" (at [51]).

Secondly, the Judge's brisk rejection of any "specific invitation" did not sit comfortably with his acceptance that the QROPS had been promoted by MS, the unregulated intermediary. Carr LJ was not convinced on the language of the test that it was necessary to show that any specific invitation was "on behalf of" Castle (at [63]), but in any event there was a plausible evidential basis that it their activities were on behalf of Castle as "middleman".

Carr LJ quoted the 1978 Report of Professor Dr Peter Schlosser on the Accession Convention ("the Schlosser Report") and its cross-reference to the 1980 Report by Professors Mario Giuliano and Paul Lagarde on the Rome Convention on the law applicable to contractual obligations ("the Giuliano/Lagarde Report") on the consumer contract test. Carr LJ concluded (at [66]):

> "there is a plausible evidential basis for the proposition that there was some sufficient connection between MS and Castle, including the possibility that MS was acting for Castle as a "middleman" of the type envisaged in the Schlosser Report (by cross-reference to the Giuliano/Lagarde Report). It is, for example, not in dispute that MS obtained Castle's application forms and provided them to the pensioners. It appears that MS procured or facilitated production of all the complex documentation and declarations as required by Castle from the pensioners in the build-up to the application forms and transfers themselves."

The final and important practical point is the breadth of the consumer contract once it is opened. Where special jurisdiction is established in matter relating to a contract, the jurisdiction is established for contractual claims. But where the consumer contract gateway is opened it extends to causes of action embracing all of the difficulties which arise from the relationship between the contracting parties, including, in the CJEU cases, unjust enrichment (***Petruchova***) and civil law claims for *culpa in contrahendo* (***Reliantco***). In ***Dooley*** jurisdiction extended to the investors statutory restitutionary claims under section 27 of the Financial Services and Markets Act 2000, based on ***Adams***, and their personal claims against Castle, including for breach of contract. Carr LJ was less sure about claims advanced on the basis of joint tortfeasorship between Castle and MS, but it was conceded that if there was jurisdiction in respect of one or more bases of claim then Castle would submit to the jurisdiction in respect of all claims advanced (at [74]). Overall ***Dooley*** is an important case confirming the independence of the consumer contract gateway, and its width once opened, an important feature of the post-Brexit jurisdictional landscape, with especial relevance to claims by UK investors against offshore financial services firms, and platforms dealing in derivatives and cryptoassets.

Gerard McMeel KC acted for the Appellants.

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"He is an expert in this field and very good on his feet." (Chambers & Partners: Professional Negligence)

Gerard McMeel is a leading commercial, banking and financial services lawyer, both as an academic and a practitioner, with over two decades experience of trial work, appellate advocacy, urgent commercial applications, arbitration, ADR and advisory work. He was appointed Queen's Counsel in March 2020. Gerard practises in all areas of commercial dispute resolution, with a particular focus on banking and financial services litigation. Gerard's commercial practice regularly includes advising on the meaning and effect of contractual provisions and boilerplate clauses, where he is the author of a leading text. He has expertise in commercial fraud, and a particular interest in unjust enrichment and restitution. His financial services practice includes: investor claims; commercial disputes involving financial firms and intermediaries; collective investment schemes; judicial review of the statutory bodies; and authorisation, regulatory and disciplinary matters under the Financial Services and Markets Act 2000.

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