Weighing Anchors Again:
Commercial Court confirms applicability of Merits Test to claims against "anchor defendants" under Article 8(1) of Brussels Recast

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In ***Senior Taxi Aereo & Others v Agusta Westland S.p.A & Others*** [2020] EWHC 1348 (Comm) the Commercial Court has confirmed what had previously only been addressed in obiter judgments, namely that the Court should apply a 'Merits Test' in evaluating a claim against an anchor defendant before exercising its ancillary jurisdiction over defendants domiciled in other EU Member States pursuant to Article 8(1) of Regulation EU 1215/2012 ('the Regulation').

The Rules

The rules, formerly found in Article 6(1) of the original Brussels I Regulation (44/2001) and which are now found in identical terms in Article 8(1) of the Regulation provide that:

"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;"

Within the Brussels jurisdiction regime this rule serves a similar function to the common law's "necessary or proper party" joinder rule that is now found in CPR 6.37 and PD6B para. 3.1(3), but the Regulation's rule is much narrower than the common law. One defendant has to be domiciled in England and Wales (the so-called "anchor defendant") and the exercise of ancillary jurisdiction under the Regulation is subject to the proviso that the claims brought against that anchor defendant and the other EU domiciled defendants 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.

In ***Sabbagh v Khoury*** [2017] EWCA Civ 1120, the Court of Appeal considered whether a merits test should be applied to the claim against the anchor defendant. However, having found that in the ***Sabbagh*** case the claim against the anchor defendant did have merit, the Court's pronouncements on the issue were *obiter*. Moreover, ***Sabbagh*** resulted in a split decision, with the majority (Patten and Beatson LLJ) finding that a merits test did apply, but Gloster LJ, in a fully and closely reasoned dissent, finding that it did not. The ***Sabbagh*** decision, and the 'grab bag' of CJEU case law on the relevant provision which preceded ***Sabbagh***, are discussed in Michael McParland QC's previous 'Weighing Anchors' article, which can be found here.

In ***Sabbagh*** the Court had been agreed that Article 8(1) was subject to a 'sole object' test, namely that it would be an abuse of Article 8(1), and therefore prohibited, if the 'sole object' of invoking the Article was to oust the jurisdiction of domicile of foreign co-defendants. The merits test was relevant, said the majority, because if the claim against the anchor defendant was hopeless, it could be inferred that the sole purpose of bringing the claim against the anchor was indeed to oust such jurisdiction. Gloster LJ, whilst agreeing that the sole object test was relevant, thought that fraudulent abuse of Article 8(1) would need to be shown, rather than a simple evaluation of the merits.

Subsequent to ***Sabbagh***, in ***PJSC Privatbank v Kolomoisky*** [2019] EWCA Civ 1708, in the context of Article 6(1) of the Lugano Convention (in terms identical to Article 8(1) of the Regulation), the Court of Appeal (Flaux, David Richards and Newey LLJ) held in a majority decision (Newey LJ dissenting) that there was no 'sole object' test. In doing so, however, the Court repeatedly referred to a 'sustainable' claim against the anchor defendant – at first instance it had been found that there was a triable issue against the anchor but nonetheless, because the claim had been brought with the sole object of ousting the jurisdiction of domicile of the foreign co-defendants, it was impermissible. The Court found that ousting the jurisdiction of domicile in the ***Kolomoisky*** case was an object, but not the sole object, of the bank bringing proceedings against the anchor defendant, so again the judgments on the applicability of the sole object test are strictly speaking *obiter*, but this left open the question of whether a merits test was of relevance – was there a difference between a claimant bringing a *sustainable* claim (albeit motivated solely by ousting the jurisdiction of domicile) and a claimant bringing a hopeless claim?

Senior v Agusta – the relevant facts

The claim arose out of a fatal helicopter crash off the coast of Brazil in 2011 after the catastrophic in-flight failure of a tail rotor blade. The Claimant owners and operators of the helicopter were Panamanian, US and Brazilian companies. The Defendants were all companies within the Leonardo Group and were accused collectively of being the designers, manufacturers, suppliers etc. of the allegedly defective helicopter and/or rotor blade. The anchor defendant, AgustaWestland Limited ('AWL'), was the sole English entity. Jurisdiction against the non-English entities was claimed solely on the basis of Article 8(1).

In response to the claim, AWL applied to strike out the claim against it as incoherent, alternatively for summary judgment under CPR Part 24, on the basis that it was not and never had been involved in any of the relevant roles in relation to the accident helicopter or the accident helicopter type. There were ancillary challenges to the claim based on limitation and lack of legal basis. The foreign co-defendants challenged jurisdiction on the basis that the claim against the anchor was baseless and therefore Article 8(1) was not properly engaged. The two applications were heard together, it being conceded by the foreign co-defendants that, if it was found that there was a sustainable claim against AWL, the jurisdiction challenge would fall away.

The Judgment

Waksman J did not consider that the claim against AWL was suitable for strike out (although had it proceeded he would have required it to be further particularised), nor did he find that the bringing of the claim against the anchor defendant was deliberately abusive as opposed to "perhaps...unwise". He did, however, find that there was no factual basis for asserting that AWL had any relevant role in relation to the accident helicopter or its design, dismissing the totality of the Claimants' evidence in that regard as 'speculative'. He additionally found that in any event the Claimants' statutory claim (under the Consumer Protection Act 1987) failed because *inter alia* it was excluded by s.5(3) of the Act, and that the claim in negligence was time barred.

After a chronological review of the CJEU and English authorities on Article 8(1) and its predecessor, he carefully considered the competing judgments in ***Sabbagh*** and in ***Kolomoisky*** and concluded based on those, and other prior authorities, that a merits test should indeed be applied to the claim against the anchor defendant. He considered that there was a limitation on the operation of Article 8(1) which was "at the very least" what he termed the "Artificial Fulfilment Prohibition" *ie* that if the claim against the anchor defendant amounts to an artificial fulfilment of the criteria of Article 8(1) (eg by suing a fictitious anchor defendant) then it should not be countenanced by the Court.

He regarded the use of the expression "sustainable claim" by the Court of Appeal in ***Kolomoisky*** as indicating that the Court in that case was proceeding "on the assumption that apart from anything else, the claimant does need a sustainable claim against the anchor defendant before being able to invoke [the article]" Essentially he concluded that if there is no arguable claim against the anchor defendant "there is, in truth, no "close" connection because there is no connection" (para.[67]). He differed from Gloster LJ about the reality of the risk of irreconcilable judgments (a major driver of her dissent) where the claim against the anchor was hopeless, finding it to be "low or non-existent" (para.[69]).

Importantly, he found that the merits test was not subject to a further gloss requiring a finding of abuse, bad faith or anything of that nature (echoing a sentiment expressed by the majority in Sabbagh at [71]), and further found that the merits test was something separate from the Artificial Fulfilment Test or the Sole Object Test (para.[78]).

Undoubtedly this result will chime with common law lawyers who are used to the express requirement of a "real issue... which it is reasonable for the Court to try" under the non-Regulation jurisdictional gateway enshrined in CPR6.37 and 6BPD para.3.1 and confirms the preponderance of *obiter* decisions on the issue.

Tim Marland, instructed by Nick Hughes and Lorraine Wilson at HFW, acted for the Agusta Defendants. Matthew Reeve, instructed by Tim Brymer and Simon Amos at Knights plc, acted for the Claimants.

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Tim is ranked as 'Star Individual' for Aviation in Chambers & Partners 2019 and is consistently recommended as a leading junior by Chambers & Partners and the Legal 500 legal directories. Tim is one of only seven members of the Bar listed in Who's Who Legal Global Guide 2019 under Aviation – Contentious and is currently the only member of the Bar with the top ranking Global Elite Thought Leader in that category. Tim has particular expertise in insurance, travel regulation and aviation, including aviation-related finance. Prior to joining Chambers, Tim worked for a number of years at Lloyd's, specialising in contentious insurance and reinsurance matters, predominantly in the field of aviation.

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"An extremely clever and able barrister who thinks deeply and laterally about strategy and the legal opportunities available within the litigation process." (Chambers & Partners UK, 2020)

Matthew is a highly experienced barrister with a wide-ranging commercial practice. He appears as the front-line advocate at all levels of the senior courts, especially the Commercial Court, the Court of Appeal and the House of Lords, as well as in international commercial arbitrations (in which he also receives appointments as an arbitrator).

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