

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

**GEOFFREY BATEMAN and
LORENCE DORCAS BOYES ANNAN and
DAVID GEORGE HULL**

Plaintiffs

v

BIRCHALL BLACKBURN LLP

Defendant

WEATHERUP J

[1] This is the defendant's application for a stay of proceedings on the basis that the Court does not have jurisdiction. Mr Colmer appeared for the defendant and Mr Girvan for the plaintiffs.

[2] The defendant is a firm of English solicitors based in Manchester. In May 2007 the plaintiffs, who are domiciled in Northern Ireland, instructed the defendants to act as their solicitors in respect of the purchase of properties in the Philippines. In August 2007 the defendant sent to each plaintiff an information pack which set out various services that the defendant was prepared to provide to the plaintiff. In September 2007 the defendant sent to each plaintiff a report on title and a purchase contract in respect of the various properties each proposed to purchase in the Phillipines. The plaintiffs entered into preliminary contracts with the vendor. In March 2011 the defendant disclosed to the plaintiffs a complication in acquiring title to the purchased units due to a Presidential Proclamation in 2006. The result was that the payments made by the plaintiffs on the proposed purchases were lost.

[3] The grounding affidavit of Graham Hughes, a solicitor and partner in the defendant firm, indicates that the defendant had not pursued commercial or professional activities in Northern Ireland nor ever directed such activities in Northern Ireland, this being a reference to whether the contract with each plaintiff amounts to a 'consumer contract' for the purposes of the special jurisdiction rules discussed below. In relation to foreign property work the affidavit refers to the defendant's website which makes reference to the United Kingdom and draws attention to the facts that the defendant firm is based in England, the solicitors in the firm are qualified in England and Wales and that the website does not make reference to Northern Ireland.

[4] The defendant refers to the plaintiffs acting through a property agent, a Marie Campbell, based in Northern Ireland.

[5] Letters of engagement were issued by the defendant to the plaintiffs in 2007 from the defendant's base in England. One of the enclosures with the defendant's letters to the plaintiffs entitled "Document No.1" detailed the basis on which the defendant acted for the plaintiffs and section 11 contained a jurisdiction clause which stated –

"The agreement between us shall be governed exclusively by English Law, and shall be deemed to be within the jurisdiction of the Preston County Court. In the event that you are resident outside England or Wales, you must provide us with an address for service in England and Wales and that address shall be deemed your address for service."

[6] The defendant points out that the plaintiffs were not necessarily the parties who had the interests in the properties that were proposed to be purchased. Mr Bateman purchased properties for his three children. Mr Bateman's daughter gave an address in Edinburgh and his other two children gave addresses in England. Ms Annon purchased properties for her nephew in Canada. Mr Hull bought five apartments for rental purposes to third parties.

[7] Mr Hughes concluded that it would be more convenient that all proceedings be dealt with in England. He stated that the purchases were part of a series that were dealt with by the defendant as solicitors and that certain savings were achieved by the plaintiffs because of the number of proposed purchasers.

[8] A replying affidavit from Simon James Chambers, solicitor for the plaintiffs, indicates that the plaintiffs are domiciled in Northern Ireland and acted as 'consumers' in respect of the purchases of the properties and in respect of the legal services provided by the defendant. Mr James takes issue with the defendant's claim that the firm did not market in Northern Ireland, states that the firm was actively marketed by Ms Campbell and that she had intimated to the plaintiffs that instructing the defendant was part of the package for the purchase of the properties.

None of the plaintiffs contacted Mr Hughes or anyone in the defendant firm, rather it was Ms Campbell who sought the plaintiffs' approval to approach Mr Hughes. The defendant firm contacted the plaintiffs by correspondence sent to their Northern Ireland addresses.

[9] The affidavit asserts that the plaintiffs' attention was never drawn to the jurisdiction clause and that in any event the jurisdiction of the Preston County Court was limited to £25,000 and the clause was a void limitation of liability clause and could not apply to the plaintiffs' claims where the value exceeded the court limit.

[10] Mr James also states that the third plaintiff had anticipated using the property for personal use and that his wife was from the Philippines, that the first plaintiff had undertaken the proposed purchase as an exercise in inheritance planning and that the second plaintiff had acquired the properties so that her nephew would have the benefit of the rents.

[11] The plaintiffs' position was stated to be that the convenient forum for the action was Northern Ireland.

[12] The dispute about Ms Campbell's role was taken up by Mr Hughes in a further affidavit and in summary it was said that the defendant did not rely on or engage Ms Campbell and nor did she act as agent for the defendant. Ms Campbell filed an affidavit explaining her role. I am satisfied that she is not to be treated as an agent of the defendant.

[13] An affidavit of Peter Shannon Eastwood, a member of the Bar of England and Wales, deals with the jurisdiction of the Preston County Court. In claims based in contract and tort a claimant may choose to issue proceedings in the County Court or, if the value exceeds £100,000, the High Court. A claim issued in either court may be transferred to the other if it is appropriate to do so in light of certain guidance that has been issued. Proceedings commenced in Preston County Court could be transferred to the High Court of England and Wales. The opinion is expressed that a professional negligence claim for an amount in excess of £100,000 and involving multiple claimants would be suitable for the High Court.

[14] The relevant statutory provision is the Civil Jurisdiction and Judgments Act 1982. Schedule 4 specifies the rules for allocation of jurisdiction within the UK.

Rule 1 states the general rule that persons domiciled in a part of the UK shall be sued in that part.

Rule 3 provides that a person domiciled in a part may be sued in another part in matters relating to contract '*in the place of performance of the obligation in question*' and in matters relating to tort '*in the courts of the place where the harmful event occurred or may occur*'.

Rule 7 provides for jurisdiction over consumer contracts where a consumer, for a purpose which can be regarded as being outside his trade or profession, concludes a contract with a person who pursues commercial or professional activities in the part of the UK where the consumer is domiciled or by any means directs such activities in that part. In such a case rule 8(1) provides that a consumer may bring proceedings against the other party to a contract either *in the courts of the part of the UK in which the party is domiciled or in the courts in the part of the UK in which the consumer is domiciled.*

Rule 12 provides that if the parties have agreed that a court of a part of the UK is to have jurisdiction to settle disputes, that court shall have jurisdiction.

Section 49 of the Act states that nothing in the Act shall prevent any court of the United Kingdom from staying, striking out or dismissing any proceedings before it on the grounds of forum non conveniens or otherwise where to do so would not be inconsistent with the Brussels Convention.

[15] Jurisdiction rests initially with the defendant's domicile, which in this case is England. To this there are certain exceptions. The exceptions for present purposes are first of all where the contract qualifies as a consumer contract, in which case jurisdiction may rest either in the court of the part of the United Kingdom where the consumer is domiciled or in the part of the United Kingdom where the party providing professional services is domiciled. Secondly, in a claim based on the contract between the parties, jurisdiction lies in the place of performance of the service provided and in a claim based on tort, jurisdiction lies in the place where the harmful event occurred. Thirdly, the parties may agree, by a jurisdiction clause in the contract, which jurisdiction shall determine any dispute. Finally the Court may determine the convenient forum for determination of the dispute.

[16] First of all, are the contracts entered into by the plaintiffs and the defendant to be regarded as 'consumer contracts' for the purposes of the 1982 Act? The plaintiffs are consumers acting in relation to matters outside their trade or profession. They may have proposed to purchase the properties for the purpose of renting the properties or to obtain tax advantages but I am satisfied that they were not acting in any professional capacity in the proposals to complete the purchases. Further I am satisfied that the defendant firm was acting in a professional capacity as solicitors providing legal services to the plaintiffs.

[17] The issue becomes whether the defendant firm pursued activities or directed activities in Northern Ireland. The plaintiffs refer to the defendant's UK wide website address. While a national website usage has been found significant in relation to those who have availed of the services provided from outside the national territory, I do not find it to be as significant in relation to a service provider within a UK jurisdiction when those who availed of the services are in another UK jurisdiction.

[18] The defendant's website provides for services to their own clients within the UK, thus not being stated to be limited to England and Wales and suggesting that the services will be provided in Scotland and Northern Ireland. The defendant issued press releases which imply UK wide provision of services. I do not rely on the 2013 press release because it post-dated the activities involving the plaintiffs.

[19] In Pammer v Reederei Karl Schluter GmbH & Co KG [2012] Bus LR 972 the Austrian claimant sued in Austria the German supplier of a voyage by freighter for repayment because the services did not correspond with the description on the trader's German website. The issue before the European Court of Justice concerned the criteria by which a trader's website could be considered to be "directing" the trader's activities to the member state of the consumer's domicile. The ECJ found that it had to be ascertained from the website and the overall activity that the trader was envisaging doing business, in the sense of concluding a contract, with consumers in another member state. When considering advertising, the Court should look for clear expressions of the intention to solicit the custom of the other state's customers. The evidence referred to in the context of activities between European states concerned the use of languages, international telephone codes, internet usage and international clientele, being matters of limited applicability to activities within the different jurisdictions of the UK.

[20] In Oak Leaf Conservatories Ltd v Colin Weir [2013] EWHC 3197 (TCC) the supplier of wood framed buildings based in England brought proceedings in England against a consumer in Scotland. Rule 8(2) requires that proceedings against a consumer be brought in the jurisdiction of the consumer's domicile, in that case Scotland. The issue was whether, under rule 7, the trader pursued or directed activities in Scotland. The trader's websites referred to trading in the UK and there had been previous trading in Scotland. The Court was satisfied of the willingness and ability to work in Scotland and under rule 8(2) the proceedings could only be brought in Scotland.

[21] In the present case the defendant's website refers to activity in the UK and not merely within England and Wales. The jurisdiction clause anticipated clients with addresses outside England and Wales. In the event there was a willingness and ability to provide services in Northern Ireland. I am satisfied that this is a consumer contract and that rule 7 of Schedule 4 to the 1982 Act applies so that under rule 8(1) jurisdiction lies in either the domicile of the consumer, Northern Ireland, or the domicile of the professional service provider, England and Wales.

[22] Secondly, in relation to the contract between the parties, the place of performance of the services provided by the defendant will found jurisdiction. Where there are a number of obligations it is the place of performance of the principal obligation that may establish jurisdiction. The principal obligation is the provision of legal services, to advise on the proposed transaction and to provide good title to the property. The work was undertaken from offices in England and the services were delivered in Northern Ireland. While the immediate beneficiaries

of the work were based in Northern Ireland they in turn were providing the services for relatives based in Scotland, England and Canada as well as in Northern Ireland. The service provided related to property in the Philippines and indeed the defendant contends for the Philippines as the place of performance of the obligation. The place of performance of the principal obligation to advise on the proposed transaction and to provide good title to the property was the place where the defendant carried out the activities in the performance of the contract which is England where the services were undertaken and the work was done.

[23] There was debate about whether reliance could be placed on the tort provision, namely the place where the harmful event occurred. The defendant contended that, where the relationship between the parties was essentially a matter of contract, reliance should not be placed on the jurisdiction rule applicable to tort. The place where the harmful event occurred is the place where the damage was sustained, namely the loss of the payments, and that was in Northern Ireland. However, primarily this is a contract case and the jurisdiction provision that prevails is the place of performance of the contract, which I have found was in England.

[24] Thirdly, the jurisdiction clause which provided for disputes to be determined in Preston County Court. The contracts were signed by the plaintiffs and included the jurisdiction clause. By the terms of the jurisdiction clause a claim is deemed to be within the jurisdiction of the County Court. A case may be commenced in that court and may be transferred to the High Court. Counsel's opinion is that such transfer to the High Court would be appropriate in the present case.

[25] Jurisdiction clauses may be exclusive or non-exclusive. Matters that might point to a clause being non-exclusive include whether the clause appears on a printed form issued by one party, as in the present case. Exclusivity will in practice impose an obligation falling substantially on the party to whom the form was issued, which is not the present case. Non exclusivity may be indicated where the clause has a commercial or legal significance even if construed as only declaratory, which is the present case. I am satisfied that this is a non-exclusive jurisdiction clause which places jurisdiction to determine disputes in England and Wales.

[26] I turn to forum conveniens. There is jurisdiction in Northern Ireland as this is a consumer contract and rule 8(1) applies. There is jurisdiction in England and Wales under the contract provisions in rule 3 and the jurisdiction clause under rule 12. The issue of forum conveniens was considered by Campbell J in Walker v BMW GB Ltd [1990] 6 NIJB 1 and by Carswell J in Smith v Nissan Motor GB Limited unreported 19 May 1993 where the principles were set out as follows -

- (i) Where plaintiffs sue in [Northern Ireland] in breach of an agreement to refer disputes to a foreign court and the defendants apply for a stay, the [Northern Ireland] Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(ii) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(iii) The burden of proving such strong cause is on the plaintiffs.

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(iv) In exercising its discretion the Court should take into account all the circumstances of the particular case.

(v) In particular, but without prejudice to (iv), the following matters, where they arise, may properly be regarded:

(a) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trials between [Northern Ireland] and foreign courts;

(b) whether the law of the foreign court applies, and if so whether it differs from [Northern Ireland] law in any material respects;

(c) with what country either party is connected and how closely;

(d) whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages;

(e) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced by a time bar not applicable in [Northern Ireland];

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

[27] There are three plaintiffs who are all based in Northern Ireland and the defendant is based in England and all parties are closely connected with their respective countries. The legal principles applicable to the claims in contract and tort are the same in Northern Ireland and England. Any expert witnesses engaged by the plaintiffs are likely to be based in Northern Ireland and any engaged by the defendant are likely to be based in England. I am satisfied that the defendant does not seek trial in England out of any desire for tactical advantage. I am satisfied that the plaintiffs would not suffer prejudice of the nature referred to above. The relative

overall convenience and expense of holding trials involving three plaintiffs against the defendant in Northern Ireland or in England clearly points to Northern Ireland being the preferred venue. I am satisfied that the plaintiffs have discharged the burden of establishing a strong cause for trial in Northern Ireland. Accordingly I refuse the defendant's application for a stay of proceedings.