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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

2016/42005

BETWEEN:

SEAN LAMBE

Plaintiff

-and-

AIB GROUP (UK) PLC

Defendant

McBRIDE J

[1] This is an appeal against the decision of Master Bell dated 9 February 2018 when he stayed the plaintiff's action on the grounds of forum non-conveniens.

[2] Mr Humphreys QC and Mr Fletcher of counsel appeared on behalf of the plaintiff/appellant ("Mr Lambe"). Mr Colmer of counsel appeared on behalf of the defendant/respondent ("the bank"). I am grateful to all counsel for their detailed and well researched skeleton arguments and oral submissions which were of much assistance to the court. I am particularly grateful to Mr Colmer for his "speaking note" which cross-referenced to the trial bundle all the salient factual background and legal issues.

The application

[3] By summons dated 2 May 2017 the bank sought the following relief:

(i) An order pursuant to Order 12 Rule 8 of the Rules of the Supreme Court (Northern Ireland) 1980*(sic)*, setting aside the writ of summons in the above entitled proceedings and/or setting aside service of said writ of summons and/or declaring ineffective the service of the said writ of summons.

(ii) Further or in the alternative, pursuant to the inherent jurisdiction of the court, an order staying the above entitled proceedings.

(iii) Further or in the alternative, pursuant to the Civil Jurisdiction and Judgments Act 1982 a declaration that the court does not have jurisdiction in respect of the matters which are the subject of these proceedings and an order staying the above entitled proceedings.

(iv) Further or in the alternative pursuant to the inherent jurisdiction of the court, an order staying the above entitled proceedings whether on the grounds of forum non-conveniens or otherwise.

(v) Further or other relief.

[4] The summons was grounded on the affidavit of Jill Annett sworn on 2 May 2017. The other evidence on behalf of the bank consisted of affidavits by Rachel Zunda sworn on 22 September 2017, 8 November 2017 and 18 January 2018 and Tayo Fasanya sworn on 25 September 2017. The evidence on behalf of Mr Lambe consisted of two affidavits filed by him on 4 August 2017 and 30 April 2018 together with affidavits sworn by his solicitor, Simon Chambers on 29 November 2017, 5 January 2018 and 23 January 2018.

Background

[5] By writ dated 11 May 2016 Mr Lambe claimed damages against the bank for loss and damage sustained by him by reason of the breach of contract, breach of statutory duty, negligence and misrepresentation of the bank, its servants and agents in and about the provision of banking and financial services.

[6] As appears from the statement of claim Mr Lambe claims damages in respect of the alleged misselling of an interest rate hedging product (IRHP) known as "cap and collar" and damages in respect of the bank's alleged negligent conduct in and about the IRHP review. The purpose of IRHP is to provide a maximum ("the cap") and a minimum rate of interest ("collar"). Details of loss claimed are set out in paragraph [26] of the statement of claim.

[7] The IRHP was associated with a number of loan agreements entered into between Mr Lambe and the bank. Under these loan agreements Mr Lambe borrowed in or around £2½m from the bank. Loan agreements were comprised in seven facility letters. All but one of these letters were sent to Mr Lambe at an address in England and all were issued by the bank's Watford branch. The facility letters dated 8 March 2006, 7 June 2006, 28 September 2006, 21 December 2006, 22 August 2007, 5 September 2007 and 29 May 2009 were all signed by the bank and by Mr Lambe. The facility letters each stated as follows:

> "AIB Group (UK) Plc ('the bank') has agreed the following overdraft facility with you, subject to the terms and conditions below and in the enclosed General Terms and Conditions."

[8] Clause 10 of the bank's General Terms and Conditions provide, *inter alia*, as follows:

> **"10. Applicable law, Notice and Set Off**
>
> 10.1 The facility letter and the General Terms shall be governed by and construed in accordance with the laws of England and Wales. However, when it considers it appropriate the bank may take proceedings against the borrower in any court of competent jurisdiction (whether concurrently or not with any other proceedings)."

[9] The loans granted to Mr Lambe were secured over a number of residential properties, all of which were situated in England.

[10] The sale of IRHP to Mr Lambe was discussed in a series of meetings which took place at the bank's Watford branch. Mr Lambe and his relationship manager Mr Fasanya were both present at these meetings. The sale of IRHP however was not conducted by the relationship manager but rather by the bank's Global Treasury Services Department now called Customer Treasury Services. Mr Seamus Moylan of the bank's Treasury Department, who was based in London, spoke to Mr Lambe by telephone when both Mr Lambe and Mr Fasanya were present at the bank's Watford branch.

[11] By letter dated 12 May 2006 Mr Lambe was sent a Private Customer Agreement and associated documents relating to the IRHP.

[12] On 16 June 2006 Mr Lambe signed the Private Customer Agreement and Derivatives Risk Warning Notice. Clause 27 provided as follows:

> "**Governing Law**
>
> These terms of business shall be governed by and construed in accordance with English law and each party submits to the non-exclusive jurisdiction of the English courts."

[13] On 25 July 2006 Mr Lambe was sent the ISDA Master Agreement for signature.

[14] Mr Lambe signed the ISDA Master Agreement on 25 July 2006. It provided as follows:

> "AIB Group UK Plc and Sean Lambe have entered and/or anticipate entering into one or more transactions (each a 'Transaction') that are or will be governed by this Master Agreement, which includes the schedule (the 'Schedule'), and the documents and other confirming evidence (each a 'Confirmation') exchanged between the parties confirming those Transactions.
>
> …
>
> 1. Interpretation
>
> …
>
> 1(c) *Single agreement*. All transactions are entered into in reliance on the fact that this Master Agreement and all Confirmations form a single agreement between the parties (collectively referred to as this 'Agreement'), and the parties would not otherwise enter into any Transactions."
>
> …
>
> "13. Governing law and jurisdiction (hereinafter called the "jurisdiction clause")
>
> (a) Governing law. This agreement will be governed by and construed in accordance with the law specified in the schedule.
>
> (b) Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement ('Proceedings'), each party irrevocably:-
>
> (i) Submits to the jurisdiction of the English courts, if this agreement is expressed to be governed by English law …
>
> (ii) Waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings,

> that such a court does not have any jurisdiction over such a party.
>
> Nothing in this agreement precludes either party from bringing Proceedings in any other jurisdiction (outside if this Agreement is expressed to be governed by English law the Contracting States, as defined in Section 1(3) of the Civil Jurisdiction and Judgments Act 1982 or any modifications, extension or re-enactment thereof the time being in force) nor will the bringing of proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction."

The schedule at Part IV paragraph (h) provides:

> "Governing law. This agreement will be governed by and construed in accordance with English law."

[15] On 4 September 2006 Mr Lambe signed the "Confirmation of Collar Agreement". This agreement states it was entered into "between AIB Group (UK) Plc and Mr Sean Lambe … subject to ISDA standard terms and conditions".

[16] In or around 2013 by reason of Mr Lambe's non-performance of the loan agreement he was required by the bank to sell a number of his assets.

[17] The Financial Services Authority in June 2012 announced that certain banks, including the bank, were to review the selling of certain products to private customers ("the IRHP review"). In April 2014 the bank informed Mr Lambe of the conclusions of its IRHP review and what compensation it proposed to make to him. Mr Lambe declined to accept the compensation offered and commenced the present proceedings for damages in respect of the alleged original mis-selling and the alleged negligent conduct of the IRHP review by the bank.

The Master's decision

[18] In a detailed and comprehensive judgment the Master held that the jurisdiction clause had not been incorporated into the contract between the bank and Mr Lambe. Nonetheless, he granted the bank's application to stay proceedings on the basis that Northern Ireland was forum non-conveniens.

Notice of appeal

[19] By notice of appeal lodged on 13 February 2018Mr Lambe appeals the Master's decision in its entirety.

Hearing of appeal

[20] Appeals from the Master are dealt with by way of a rehearing of the application which led to the order under appeal. However, as noted by Girvan J in *National & Provincial Building Society v Williamson & Another* [1995] NI 366 at 372:

> "The judge 'will of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it' (see *Evans v Bartlam* [1937] AC 473 at 478 per Lord Atkins). The judge is not fettered by the previous exercise by the master of his discretion."

Issues to be determined

[21] The central issue to be determined is whether the courts in Northern Ireland have jurisdiction to hear the present proceedings and if so whether the proceedings should be stayed on the basis of forum non-conveniens.

[22] Counsel for Mr Lambe and the bank both agreed that in order to determine this central issue, the court had to determine the following questions:-

(a) Was the jurisdiction clause incorporated into the agreement between the bank and Mr Lambe ("the incorporation issue")?

(b) Was the jurisdiction clause an exclusive or non-exclusive jurisdiction clause ("the construction issue")?

(c) Which was the proper forum having regard to the principles of forum conveniens ("the forum issue")?

Incorporation issue

[23] Mr Colmer on behalf of the bank submitted that the jurisdiction clause was incorporated into the agreement entered into between the parties as Mr Lambe signed the bank's General Terms and Conditions, the ISDA Master Agreement and the Confirmation Agreement.

[24] Mr Lambe in his affidavit sworn on 4 August 2017 stated that although he signed all these documents including the ISDA Master Agreement he averred that he did so in ignorance of the existence of the jurisdiction clause. He stated that the jurisdiction clause was not specifically brought to his attention; he was not given any legal advice as to its effect and he was not advised to seek legal advice thereon.

[25] Mr Humphreys QC adopted the Master's overview of the law set out in his judgment at paragraphs [12] to [22] and submitted that the jurisdiction clause was

not brought reasonably and fairly to Mr Lambe's attention and therefore the clause was not incorporated into the contract between the parties.

[26] Counsel for the bank and Mr Lambe both agreed, in accordance with a long line of authority, including *L'Estrange v Graucob Limited* [1974] 2 KB 394, *McBrearty v AIB Group (UK) Plc* [2012] NIQB 12, *Ulster Bank v Taggart* [2011] NI Master 1, *Re GMJ Judicial Review* [2014] NIQB 135 and *Peekay v Australia and New Zealand Banking Group* [2006] EWCA 386, that a signatory to a written contract, in the absence of fraud or misrepresentation, is generally bound by the terms of that contract, even if he has not read the document. Mr Humphreys further conceded that notwithstanding the Master's finding the court would have the "least difficulty" in determining the incorporation issue and accordingly made limited submissions on this question.

Consideration of the Incorporation Issue

[27] It is not disputed that Mr Lambe signed the General Terms and Conditions, the Private Customer Agreement, the ISDA Master Agreement which contained the jurisdiction clause and the Confirmation of Collar Agreement.

[28] Horner J observed in *Re GMJ Judicial Review* at paragraph [22]:

> "(l) Finally, the courts have always taken a strict line about the consequences that flow when someone signs a document which is intended to have legal consequences. 'Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that parties signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of the precise legal effect.": see Chitty on Contracts Volume I 29th Edition and *L'Estrange v Graucob Ltd* [1934] 2 KB 394. A party of full age and understanding is normally bound by his signature on a document, whether he reads it or not. If, however, a party has been misled into executing a deal or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. Such a defence is lost if the party signing it has been careless: see *Saunders v Anglia Building Society* [1971] AC 1004'."

[29] Even though Mr Lambe stated that the jurisdiction clause was not brought to his attention and he did not read it, I find that, in accordance with the long line of authority set out above, in the absence of fraud or misrepresentation, he is bound by

the terms of the jurisdiction clause because he signed a written contract containing the clause. Accordingly I find that the jurisdiction clause was incorporated into the agreement entered into between Mr Lambe and the bank.

[30] Master McCorry held that the jurisdiction clause was not incorporated on the ground the bank did not give Mr Lambe sufficient reasonable notice of the jurisdiction clause. In particular the Master relied upon dicta of Weatherup J in *Quinn Building Products Limited v PSN Civil Works Limited* [2003] NIQB 142.

[31] In my view *Quinn* can be distinguished from the present case on its facts as it was concerned with reliance on a jurisdiction clause by reference to a course of dealing. Secondly I am satisfied that Weatherup J in *Quinn* was not seeking to qualify the orthodox and long accepted principles of the corporation of the terms. Rather I find that he was affirming these principles when he stated at paragraph [14]:

> "Thus the plaintiff must demonstrate clearly and precisely that the defendant agreed to the jurisdiction clause … That agreement may arise from an express jurisdiction clause in the contract entered into by the parties …"

Consequently, I am satisfied that *Quinn* is not authority for the proposition that even if a person signs a written contract he can nonetheless say he is not bound by the terms of this written contract on the basis that he was not given sufficient notice of the clause.

[32] In the present case Mr Lambe signed all the documents comprising the agreement entered into by the parties. These documents included the jurisdiction clause. I am therefore satisfied that this case falls squarely within the rule in *L'Estrange v Graucob* and I am further satisfied that the test set out by Weatherup J in *Quinn* for incorporation is also satisfied.

[33] Accordingly I find that the jurisdiction clause was incorporated into the agreement between the parties.

Issue 2 The construction issue – Is the jurisdiction clause exclusive or non-exclusive?

[34] Mr Humphreys on behalf of Mr Lambe submitted that the jurisdiction clause was non-exclusive on the basis that:

(a) It was not expressed to be exclusive.

(b) It expressly permitted proceedings to be commenced in jurisdictions other than England and therefore by its nature it could only be that of a non-exclusive jurisdiction clause.

[35] He further submitted that upon its proper construction the jurisdiction clause did not relate to the claim in respect of the IRHP review. He submitted that this was because the jurisdiction clause must be interpreted as of the date the contract was formed. At that date he submitted the parties could not have reasonably foreseen that the IRHP review would have been required by the Financial Services Authority. Therefore, Mr Lambe's claim in respect of the IRHP review was not covered by the agreement and is therefore not covered by the jurisdiction clause. Consequently, in line with the Civil Jurisdictions and Judgment Act 1982, as the plaintiff is domiciled in Northern Ireland and as the damage was suffered in Northern Ireland, Northern Ireland is the appropriate jurisdiction.

[36] Mr Colmer submitted that the jurisdiction clause granted exclusive jurisdiction to the English courts. He relied in particular on the case of *Nomura International Plc v Banca Mote Del Paschi Di Siena SpA* [2013] EWHC 3187 in which the English High Court said in respect of the same jurisdiction clause, as follows:

> "It is common ground that this constitutes an exclusive jurisdiction clause in favour of the English courts within the Convention territories (which includes Italy) for the purposes of the Judgments Regulation. …"

[37] A similar construction was given to this jurisdiction clause in a number of other English High Court decisions including *Enasarco v Leeman Brothers Finance SA and Another* [2014] EWHC 34 and *Dexia Crediop SpA v Provinca Di Brescia* [2016] EWHC 3261.

[38] Mr Colmer further submitted that the subject dispute was caught by the jurisdiction clause as alleged misselling of the IRHP and subsequent IRHP review all clearly related to the original agreement entered into between the parties.

Consideration of the Construction Issue

[39] The jurisdiction clause states as follows:

> "…
> (b) Jurisdiction. With respect to any suit, action or proceedings relating to this agreement ('proceedings'), each party irrevocably:
> …"

[40] In relation to the ambit of the jurisdiction clause I am satisfied that it covers both aspects of the plaintiff's claim namely the alleged original mis-selling and the alleged negligent review of the IRHP. I am satisfied that the jurisdiction clause is widely framed to cover "any suit, action or proceedings relating to the agreement".

The parties agreed that the alleged mis-selling was related to the agreement. I am satisfied that the IRHP review related to the alleged mis-selling and is therefore related to the original agreement. It would be completely artificial in some way to separate the two matters.

[41] Although Mr Colmer cited a number of cases which relate to this particular jurisdiction clause none of the cases cited considered the question whether the clause created exclusive or non-exclusive jurisdiction in an intra UK context. Both counsel were unable to find any cases which dealt with the issue whether the clause was exclusive or non-exclusive in respect of an intra UK jurisdictional dispute.

[42] Whilst the jurisdiction clause is somewhat unfortunately worded I am satisfied that when this agreement was drawn up the contracting parties were seeking to regularise jurisdiction in line with international obligations. To this end they were seeking to secure exclusive jurisdiction in favour of the English courts within the Lugano Convention territories. The clause however is silent in relation to intra UK jurisdictional disputes.

[43] The jurisdiction clause states that "nothing in this agreement precludes either party from bringing proceedings in any other jurisdiction (outside …)." I am satisfied that the clause recognises that proceedings can be brought in another jurisdiction. I have no doubt that this covers countries outside the Laguno Convention territories. The clause however does not specifically limit it in this way. It simply says that proceedings can be brought in another jurisdiction. Northern Ireland is a separate jurisdiction. It is also a jurisdiction which is not caught by the exclusivity of the clause regarding Lugano Convention states as this is an intra UK jurisdictional dispute. Accordingly, I am satisfied that the jurisdiction clause is non-exclusive insofar as it applies to Northern Ireland.

[44] Further support for the view that the jurisdiction clause is non-exclusive in respect of intra UK jurisdictional dispute is provided by paragraph 12 of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982. Dicey Morris and Collins, *The Conflict of Laws,* 15th Edition, Sweet and Maxwell says of this provision as follows at paragraph 12.144:

> "… The clause confers jurisdiction as opposed to exclusive jurisdiction on the chosen court."

[45] In *Gracey v Royal Sun Alliance* [2009] NI Master 70, *Walker Trading as The Country Garage v BMW* [1990] 6 NIJB 1 and *Smith and Smith Trading as Adair Smith Motors v Nissa* (unreported 19 May 1993), the court in each case held that where the parties are resident in different parts of the United Kingdom, an exclusive jurisdiction clause may be overridden in certain circumstances and the action stayed on the ground of forum non-conveniens. Therefore, it is clear from this jurisprudence that in the intra UK context no jurisdiction clause can give exclusivity

and therefore even in the teeth of an exclusive English jurisdiction clause the courts in Northern Ireland still can have jurisdiction.

[46] I am therefore satisfied on the basis of the construction of the jurisdiction clause itself and in light of the statutory scheme set out in Schedule 4 of the Civil Jurisdiction and Judgments Act that the jurisdiction clause is a non-exclusive jurisdiction clause.

The effect of the jurisdiction clause being exclusive or non-exclusive

[47] Mr Humphreys submitted that the burden of proof depended on whether the jurisdiction clause was exclusive or non-exclusive. He submitted that if the clause was exclusive the burden was on Mr Lambe to establish that Northern Ireland was the forum conveniens. If however the clause was non-exclusive he submitted that the bank bore the burden of showing that Northern Ireland was forum non-conveniens.

[48] Mr Colmer agreed that if the clause was non-exclusive the court had to consider the question of forum conveniens but submitted that in these circumstances the burden of proof was on Mr Lambe to establish that Northern Ireland was the forum conveniens.

Consideration

[49] Dicey Morris and Collins at paragraph 12.106 states:

> "Where the court finds that the agreement confers non-exclusive jurisdiction on the designated court … an application for a stay of proceedings in favour of that foreign court (Northern Ireland) will be determined on the basis of *Spiliada Maritime Co-operation v Cansulex Limited* [1987] AC 460. But the fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum and that in principle at least, it is not open to either party to object to the exercise of its jurisdiction at least on grounds which should have been foreseeable when the agreement was made."

[50] The House of Lords in *The Sennar* [1985] 2 LER 204 confirmed that:

> "(1) Where plaintiffs sue in (Northern Ireland) in breach of an agreement to refer disputes to an 'English' 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."

[51] The House of Lords then set out the following principles in respect of how the discretion should be exercised:

"…

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

(3) The burden of proving such strong cause is on the plaintiff.

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

(5) In particular, and without prejudice to (4), 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 and the relative convenience and expense of trial as between the English and the foreign courts.

(b) Whether the law of the foreign court applies, and if so, whether it differs from English 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 with a time bar not applicable in England; or
>
> (iv) For political, racial, religious or other reasons be unlikely to get a fair trial."

[52] The principles set out in *The Sennar*, which is a House of Lords' decision is binding on this court. Accordingly, I am satisfied that this court has a discretion whether to grant a stay or not. That discretion however should be exercised by granting a stay unless strong cause for not doing so is shown by Mr Lambe. In exercising its discretion the court intends to take into account all the circumstances of the case and in particular the matters set out in paragraph [5] of *The Sennar*.

[53] In the exercise of its discretion the Court also considers that the following observations of Gloster J in *Antec International Limited v Biosafety* [2006] EWHC 47 are relevant to its consideration of the questions of the burden and standard of proof:

> "(i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdictions of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive …
>
> (ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; …
>
> (iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard *Spiliada* balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or

> a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain …"

The Forum Issue

[54] Mr Colmer adopted the reasoning of the Master as set out at paragraphs [25] and [26] of his judgment. He submitted that Northern Ireland was forum non-conveniens because: the borrowing was arranged through the defendant's Watford branch; discussions with respect to the sale of the IRHP took place between the plaintiff and the defendant at its Watford branch; the properties in respect of which the loans were taken out are all, save one, located in England; at the material time Mr Lambe was spending 10 days a month in Watford and carrying on his relevant business from that address and all the bank's witnesses are likely to be located in England and none is based in Northern Ireland.

[55] In relation to Mr Lambe's health he submitted that this was not an exceptional factor as Mr Lambe could instruct lawyers and give evidence by electronic means including Skype, video link and telephone conferencing, in the event that he was unable to travel to England. He therefore submitted that the balance was in favour of the bank.

[56] In contrast Mr Humphreys submitted that the Northern Ireland was the appropriate forum, in light of the following factors:-

(a) The bank is domiciled in Northern Ireland and as defendants "play at home" there would be no prejudice to the bank in proceedings continuing in Northern Ireland.

(b) The legal costs are substantially higher in London.

(c) The law is the same in England and Northern Ireland.

(d) At least one of the bank's witnesses lives outside England namely in Cork.

(e) Technology would not be satisfactory in overcoming the difficulty that Mr Lambe would face in not being able to travel. This is because Mr Lambe is not just a witness in a trial but the plaintiff in a very complex multi-million pound suit. It would therefore be difficult for him to follow the proceedings by video link and difficult for him to give instructions during the trial and to receive advices. He submitted that in reality Mr Lambe's real participation in the proceedings could only be achieved by him being physically present with his lawyers and

physically present in court. As he was unable to travel Mr Humphreys submitted that this was an exceptional case and therefore Northern Ireland was the more convenient forum.

Consideration of the Forum Issue

[57] In the exercise of its discretion I have found that the court should follow the approach set out by the House of Lords in *Sennar*. Consequently it is necessary to take into account all the circumstances of the case including the factors set out at sub-paragraph 5 of that judgment. Applying these factors seriatim I find as follows:

(a) Most of the witnesses save Mr Lambe and Mr Fasanya reside in England. Therefore in terms of convenience the balance would tip in favour of England. In my view however this factor is of modest weight because the practical difficulties which exist in terms of travel between Northern Ireland and England are negligible. Many business people travel between these jurisdictions as a routine matter and therefore the inconvenience caused by travel is relatively small.

Against this the court must look at the question of delay and cost. This is a multi-million pound commercial action and the court is aware through its experience in dealing with commercial cases that the costs of litigation in London are extremely expensive compared to the costs of similar litigation in this jurisdiction. I consider that the costs of proceedings in London would be more detrimental to Mr Lambe than the bank and in addition the bank would benefit from lower costs in Northern Ireland. I therefore consider that the factors of expense and delay favour Northern Ireland being a more appropriate forum.

(b) The law in Northern Ireland and English is similar and therefore this is a neutral factor.

(c) I find that the bank is closely connected to this jurisdiction. It has its registered office here and is therefore domiciled here. In addition I find that Mr Lambe has more connection with this jurisdiction than England. I accept that he has an address in England and that he purchased properties in England. There is however no evidence that this was his principal home. His uncontroverted evidence is that he primarily lived in Newry at the time of the relevant transactions.

(d) Having regard to the costs implications for Mr Lambe and the fact that the bank is domiciled in this jurisdiction I consider that the bank is seeking a tactical advantage in desiring a trial in England. The bank is a large company with banks throughout the United Kingdom. It is unclear what inconvenience, save witnesses travelling to this

jurisdiction it would suffer if the matter proceeded and was heard in this jurisdiction.

(e) These factors do not arise.

[58] I have read the medical reports of Dr Salib, consultant radiation oncologist in his report dated 20 December 2017 and note that he states Mr Lambe has been attending his service in Dublin following his diagnosis with high risk adenocarcinoma prostate. Mr Lambe received a course of post-operative radiotherapy from 24 November 2015 to 13 January 2016. Thereafter he suffered from post-radio insufficiency pelvic bone fractures. Mr Salib opines that Mr Lambe is not fit to travel for long journeys in view of his on-going cancer treatment. I have also read the report of Dr Martin Deane dated 8 May 2008 which confirms that Mr Lambe's treatment is on-going and he opines that "it would not be medically advisable for him on health grounds to undertake a lengthy journey". Although Ms Zunda avers that Mr Lambe was able to travel to England in October 2015 and again on 1 February 2016 I note that she does not challenge the medical evidence. I am satisfied that in light of his on-going treatment and the consequent bone disease that Mr Lambe is not presently able to travel to London.

[59] The question arises whether this prejudice can be mitigated by the use of various technologies. Mr Lambe is the plaintiff in a complex multi-million pound writ action. Whilst he can instruct lawyers by telephone and communicate by conference calls with his legal advisers including counsel, I consider that this is a poor substitute for "face to face meetings". Further I consider that there are limitations in giving evidence by video link or SKYPE. As noted in *Stylianou v Toyoshima* [2015] All ER 36 at paragraph [12]:

> "I do not consider electronic evidence or taking of the evidence by examiner or on commission would be an adequate substitute or solve the inherent problem involved in a claimant being unable to be at trial."

In my view giving evidence by video link does not represent best evidence. In addition if Mr Lambe was not physically present at the hearing I consider that he would be prejudiced in following the proceedings and prejudiced in giving and taking advices from his lawyers.

[60] In the past Mr Lambe has always conducted his business through face to face meetings and travelled to England to do so. I therefore consider that this particular plaintiff would require face to face meetings to properly instruct his lawyers and to prosecute his case. Accordingly if he was required to conduct proceedings in England he would suffer prejudice in prosecuting his case.

[61] In carrying out the balancing exercise I am mindful of the requirement that Mr Lambe must show strong cause why the court should not exercise its discretion

by granting a stay. In accordance with the dictum in *Antec* the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are very strong reasons for departing from this rule. Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time the contract was entered into. Mr Lambe has to point to some other factor which the parties could not have foreseen at the time the contract was concluded. Alternatively he must point to some other factor which indicates that in the interests of justice the court should refuse to exercise its discretion to grant a stay.

[62] Having regard to all the circumstances of this case I note that there are many factors which indicate that England appears to be the more appropriate forum. In particular all the transactions took place in England; Mr Lambe had an address in England to which all the correspondence was sent from the bank's Watford branch; the properties securing the loan were all situated in England and the parties freely negotiated a contract which provided for the non-exclusive jurisdiction of the English courts.

[63] On the other side of the balance there are a number of factors which indicate that Northern Ireland is a more convenient forum. In particular both parties have strong connections with this jurisdiction; there would be delay and increased legal costs if the matter were to be stayed and proceedings commenced in London and there is some evidence to suggest that the bank is seeking a stay on the basis of a tactical advantage.

[64] This however is a case where the parties freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law. In these circumstances, in accordance with *Antec,* Mr Lambe must show strong reasons for departing from the parties' contractual choice of forum. Such strong case does not include factors of convenience which were known about when the contract was entered into. Accordingly all the factors set out in paragraph 63 above are not relevant, as these were known about when the jurisdiction clause was entered into. Hence to show strong case Mr Lambe must point to some factor which was not foreseen at the time of the contract or must point to some other reason which means that it is in the interests of justice for the matter to be dealt with in Northern Ireland.

[65] Mr Lambe has provided medical evidence which indicates that he is unable to travel to England. This medical evidence has not been controverted by the bank. This factor was clearly not known to the parties at the date of the contract. For the reasons set out below I consider that this is an exceptional circumstance which requires that the case should be dealt with in Northern Ireland.

[66] In particular I am satisfied that, as a result of his medical condition he is unable to travel and in these circumstances the interests of justice would be adversely affected if the case were not dealt with in Northern Ireland. This is because I consider that he would be unable to prosecute his case properly if it were to be heard in England. I consider that instructing lawyers by way of Skype or telephone

conferencing is not suitable for Mr Lambe who in the past always conducted his business by way of face to face meetings. Further, I consider that giving evidence by video link would not be sufficient as Mr Lambe is the plaintiff in complex proceedings. Unless he was physically present I consider that it would be very difficult for him to follow the proceedings and very difficult for him to engage with his lawyers, for the purposes of giving instructions and taking advices. I therefore consider that it is in the interests of justice that the case proceeds in this jurisdiction.

Conclusion

[67] I grant the appeal and dismiss the bank's application to set aside the writ and to otherwise stay the proceedings. I will hear the parties in respect of costs.