Permission to serve out, good arguable case within gateways (Bazhanov v Fosman)

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Dispute Resolution analysis: In finding that the claimants had no good arguable case that its claims fell within a CPR PD 6B jurisdictional gateway, the court considered the Supreme Court's recent decision in Brownlie v Four Seasons. It acknowledged both the majority's view that glosses of the good arguable case test should be avoided, and its acceptance that Lord Sumption's 'explication' of the Canada Trust gloss was not such a gloss. The court considered whether there was a 'plausible evidential basis' for the application of the relevant gateways on the material available. The court held that the relative plausibility test was not satisfied and the claimants could not bring its contractual and related claims within any gateway. In any event, the claimants could not show that England was the proper place for resolving the dispute.

Written by Rupert Reed QC of Serle Court Chambers.

Bazhanov v Fosman [2017] EWHC 3404 (Comm)

What are the practical implications of this case?

In terms of the requirement of a 'good arguable case' that a claim falls within a jurisdictional gateway, the court has followed the Supreme Court's rejection in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 of the old 'Canada Trust gloss', by which the claimant had to show a 'much better argument on the material available'. That test of relative plausibility has been replaced by the test of absolute plausibility articulated by Lord Sumption in requiring a 'plausible evidential basis' on the material available at an interlocutory stage. The majority of the Supreme Court preferred to avoid all glosses, but agreed that Lord Sumption's explanation of the test did not have the effect of glossing it in the sense of adding to it.

The case shows how the court will analyse inherent plausibility and probability, in particular, as to the alleged formation of a contract and agreement as to governing law and jurisdiction. In relation to one alleged agreement, the court noted the implausibility of the parties deciding contractual terms at their initial meeting, where significant terms were 'up in the air', the parties continued negotiating, there was no written record or agreement, and the claimant had only recently alleged such a contract.

The judge proceeded on the assumption that the absolute plausibility test presented a lower bar than the relative plausibility test. However, his application of the new test in considering the probability of an oral contract and the certainty of written contracts was surprisingly rigorous, and suggests that the bar may in fact be rising.

In considering whether England was the proper place for resolution of the dispute, the court considered not only the connecting factors but also the risk of substantial injustice to the claimant in Russia. However, the court emphasised the exceptional nature of the circumstances in *Cherney v Deripaska* [2008] EWHC 1530 (Comm) as identified by the court in *Erste Group Bank AG v. JSC 'Red October'* [2013] EWHC 2926 (Comm) at [201].

What was the background?

The first claimant, Mr Bazhanov, a Russian businessman and politician, had fled Russia and his business had been placed into an insolvency process. He was keen to salvage its value by acquiring the assets from the insolvency through a friend, the first defendant, Mr Fosman. This was discussed at three relevant meetings, the first in a Russian spa in London, the second at a restaurant in London, and the third, involving Mr Bazhanov's wife, in Moscow.

Mr Bazhanov claimed that:

- at the first meeting, they had orally agreed the financial aspects of the deal, their respective shares and the governance of English law and jurisdiction
- at the second meeting, Mr Fosman had agreed to buy out Mr Bazhanov's shares on the basis that the price of approximately $10-15m would be 'defined' by the application of an 'approximate formula'. They both signed a 10-clause document the following day at a Heathrow café
- at the third meeting, Mr Fosman decided, by way of amendment of the existing agreement, that he would not buy out Mr Bazhanov's interest. The discussion was then typed up in 12 lines and signed by Mr Fosman and for Mr Bazhanov

Mr Fosman denied there had been any concluded agreement or any discussion of jurisdiction or governing law at any of the meetings.

The court had difficulties with each side's case. The claimants' case had changed significantly, and there were obvious errors in the first defendant's evidence.

What did the Court decide?

In order to grant permission to serve out of the jurisdiction, the court had to consider whether there was a 'good arguable case' that each cause of action fell within a CPR PD 6B, para 3.1 jurisdictional gateway.

The court considered the indications from the Court of Appeal in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665 that there was, in any event, an 'absolute standard to be met' in showing that the claimant's case had 'some substance to it'. It further noted that, in the Supreme Court, the majority, while preferring to avoid 'glosses', had not disagreed with Lord Sumption's requirement of a 'plausible evidential basis' for the application of a relevant jurisdictional gateway on the material by then available [40]–[43].

The court found that the claimants were unable to show a good arguable case in respect of any of the three alleged agreements, even on the 'absolute standard' of a 'plausible evidential basis'. It was inherently implausible that any oral contract was made at the first meeting, given the failure to agree significant terms. The note of the second meeting was incomprehensible in parts and lacked certainty, even as to the sum to be paid. Similarly, the note of the third meeting was uncertain and expressed mere intent.

A good arguable case on the claims in unjust enrichment would have required the application of English law, but there was no substantial evidence of any such agreement. The remaining claims fell with the contract and unjust enrichment claims. In any event, the claimants failed to show that England was the proper place for the claim.

Case details

- Court: High Court, Queen's Bench Division (Commercial Court)
- Judge: Daniel Toledano QC
- Date of judgment: 17 January 2018

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