serlespeak
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Jurisdiction and judgments: the treatment of UK domiciliaries in the EU post-Brexit

MUCH HAS BEEN WRITTEN SINCE THE REFERENDUM IN 2016 ABOUT THE PROBABLE EFFECTS ON EU DOMICILIARIES OF THE UNITED KINGDOM DROPPING OUT OF THE JUDGMENTS REGULATION REGIME (EU 1215/2012) IN THE EVENT THAT NO BILATERAL ARRANGEMENTS ARE MADE BETWEEN THE UK AND THE EU FOR THE RELATIONSHIP TO CONTINUE.

There has been less focus on the probable effects on *UK* domiciliaries of a failure to continue the civil jurisdiction and judgments regime with the remaining EU members states as enshrined in the Judgments Regulation. I refer below to certain features of the domestic law of Germany, France and the Netherlands as presently applicable to non-EU domiciliaries that will become applicable to UK domiciliaries after 29 March 2019 in the absence of agreement to the contrary. Consideration of those jurisdictions illustrate the extent of differences between member states and the impact their domestic laws may in future have on UK-domiciled parties in the context of commercial litigation.

The German rules for jurisdiction are found in the *Zivilprozessrecht* ("ZPO"). The general jurisdiction of the German courts is based on the domicile of the defendant or the defendant's registered office. However, the ZPO (para. 23) allows for a ground of exorbitant jurisdiction, with the ZPO permitting a German court to assume jurisdiction over a defendant on the basis of the presence within the jurisdiction of some of that defendant's assets. There need be no connection between the assets and the claim brought and the assets may also be low in value. This amounts to jurisdiction through attachment of assets.

The French rules for jurisdiction are found in the New Code of Civil Procedure ("NCCP") and the Civil Code ("CC"). As with Germany, the general jurisdiction of the French courts is based on the defendant's domicile (NCCP, art. 42). There also exist bases for exorbitant jurisdiction. For example, the French CC makes provision for *"privileged jurisdiction"* rules whereby, absent any other basis for jurisdiction, it is the right of any French national to have his claims heard by a French court and to be sued before a French court: a French court may assume jurisdiction over a dispute under CC Art. 14 on the basis of the plaintiff's French nationality. Art. 14 also applies, *mutatis mutandis,* to EU nationals domiciled in France (by reason of Regulation 1215/2012, art. 6(2)).

The rules for international jurisdiction for the Netherlands are found in the Dutch Code of Civil Procedure ("CCP"), Arts. 1-14, which came into force on 1 January 2002 and which are largely modelled on the Brussels Convention and Regulation 44/2001 and apply to EU and non-EU domiciled defendants. The general jurisdiction of the Dutch courts is based on the domicile of the defendant so that, broadly, if the defendant is domiciled in the Netherlands the Dutch court will have jurisdiction. The Dutch courts do not exercise exorbitant jurisdiction over defendants. So, for United Kingdom domiciliaries, the post-Brexit position in the Netherlands will reflect the pre-Brexit position closely.

It is noteworthy that none of the jurisdictions referred to above recognise a doctrine of *forum non conveniens* so that if the jurisdiction of the court is invoked by a claimant on one of the statutory bases, there is no discretion to stay the proceedings in favour of a clearly more appropriate forum.

The domestic rules of civil jurisdiction of a further twenty-four EU jurisdictions will need to be taken into account after 29 March 2019 when determining the risks of a UK domiciliary being sued in the courts of a member state.

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I am delighted to introduce this new edition of Serlespeak which focusses on topics in commercial litigation. In my lead article I consider the extent to which the courts are prepared to review the exercise of contractual discretions in a commercial context. Taking up the theme of contracts, Adil Mohamedbhai examines the recent decision of the Court of Appeal in *MWB* on anti-oral variation clauses and what counts as good consideration. Eleni Dinenis then ponders the Supreme Court's discussion of the law of unjust enrichment in *HMRC v Investment Trust.* Charlotte Beynon's article follows, reflecting on the extent to which there is room for American-style group litigation in UK courts and tribunals. Finally, Andrew Moran QC highlights aspects of the domestic law of EU member states which will have an impact on UK-domiciled parties in commercial jurisdiction battles if there is a no-deal Brexit. **Rupert Reed QC**

Good faith – when can courts now review a contractual discretion?

COMMERCIAL AGREEMENTS OFTEN REQUIRE PARTIES TO MAKE COMPLEX ASSESSMENTS OF FACTS AND DIFFICULT DECISIONS THAT IMPACT ON THE INTERESTS OF ALL PARTIES.

The courts recognise implied duties of both good faith and rationality in reviewing those assessments and decisions. However, there remain issues as to whether any decision that is a "discretion" is subject to judicial review at all.

The duty of good faith draws much from analogy with the fiduciary power, not least in constraining the freedom of a party to act purely in its own self-interest. By implicit reference to the doctrine of fraud on a power, a discretion *"should not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily": Paragon Finance v Nash* [2002] EWCA Civ 1466 at [32].

That duty, as confirmed by the Court of Appeal in *Socimer International v Standard Bank* [2008] EWCA Civ 116, is less onerous than that binding the donee of a fiduciary power. In exercising a discretion subject to that *Socimer* duty, a party must *"take account of"* the other party's interests, or to have *"due regard to [their] legitimate interests"*: *Mid-Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 at [83]; *Gold Group Properties v BDW Trading* [2010] EWHC 1632 (TCC). But a discretion *may* be exercised by a party in its own commercial interests: *Lehman Brothers International (Europe) v ExxonMobil FS* [2016] EWHC 2699 (Comm).

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Since the Supreme Court's decision in *Braganza v BP Shipping* [2015] UKSC 17, the courts have also emphasised a duty of rationality on *Wednesbury* principles, drawing on an alternative analogy with public law. These require both due process in weighing all and only relevant considerations, and no irrationality in its result. The defendant ultimately has a heavy evidential burden to show the rationality of its decision: *Hills v Niksun* [2016] EWCA Civ 115 at [23]-[27]. However, both in *Braganza* and in later decisions, the courts have emphasised that the duty applies with less *"rigour"* than in public law: *Braganza* at [20]; *Patural v DB Group Services (UK) Ltd* [2015] EWHC 3659 (QB) at [61]; *Lehman* at [284]; *Watson v Watchfinder.co.uk* [2017] EWHC 1275 (Comm) at [103].

Similarly, the courts have used another Supreme Court decision in 2015, *Marks & Spencer v BNP Paribas* [2016] AC 742, to raise the threshold of required necessity for implying terms, and thereby to restrict the circumstances in which *any* duty is implied: *Hockin v RBS* [2016] EWHC 925 (Ch) at [46]; *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) at [248]-[249]; [255].

What remains unclear is the basis for distinguishing uncontrolled or "absolute" discretions from discretions that are controlled or "reviewable".

The starting point is clearly the language, read in context. Since *Marks & Spencer*, it is harder to imply terms into professionally drafted agreements between sophisticated commercial parties: *Monde Petroleum* at [257]; *Property Alliance Group v RBS* [2016] EWHC 3342 (Ch) at [276]. However, where for example, there is reference to a commission as being "earned" or "fair and reasonable", or to funding as being conditional upon "satisfactory review" of documents, this is likely to attract judicial control: *Hills* at [12]-[13]; [28]-[30]; *Novus Aviation v AAIB* [2016] EWHC 1575 (Comm) at [65]-[67].

Initially, after *Yam Seng v International Trade Corp* [2013] EWHC 111 (QB), it was thought that the duty arose in *"relational"* contracts such as joint ventures, in which there were implicit *"expectations of loyalty"*. However, the courts have since insisted that there is no special rule applying to these contracts: *Monde Petroleum* at [250]-[255].

In other cases, it was suggested that a *binary* choice was more likely to be an absolute discretion than *"an assessment or choosing from a range of options, taking into account the interests of both parties"*: *Mid-Essex* at [83]; *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch) at [61]; *Monde Petroleum* at [271]. However, there are many cases of binary choices, including *Braganza* itself and *Watson*, in which the court *has* reviewed a discretion. In *Property Alliance* at [277], Asplin J recently confirmed that the binary nature of any choice was *"not of much assistance"*.

Two principles have, however, emerged in providing useful indicators.

First, the court will seek to control powers in which the donee has a clear conflict of interest, especially where heightened by a significant imbalance of power: *Brogden v Investec Bank* [2014] EWHC 2785 at [100] and *Braganza* at [18]. The court will consider whether the party with power had good commercial reasons for its decision, but will also consider any *"reasonable expectations"* of the party without power: *Patural* at [69]. These may have been generated by specific representations: *Hill* at [10]-[13].

Secondly, applying the "principle in *Lomas*" [2012] EWCA Civ 419, the courts have found that a (binary) power to *terminate* an agreement is likely to be an absolute discretion, given the obvious need for particular certainty: *Monde Petroleum* at [260]-[264]: *Shurbanova v Forex Capital Markets* [2017] EWHC 2133 (QB) at [93]-[95]. There is a fundamental difference between requirements relating to performance and to termination: *Ilkerler Otomotiv Sanayai v Perkins Engines Company* [2017] EWCA Civ 183 at [29].

Where either of these two principles apply, parties who want judicial control of their discretion should therefore make express provision for this: *Mid-Essex* at [105]. They can achieve this by using the language of the statutory restriction on qualified covenants against alienation, in requiring that the discretion should *"not unreasonably"* be exercised. This is likely to engage the intended controls as to both proper purpose and rationality.

The impression given is that the enhancement of judicial review in *Braganza* has caused commercial and chancery judges to step back from implying the requisite duty. *Marks & Spencer* has provided ample grounds for doing so, not least where the relevant power generates any conflict of interest or is to terminate the contract.

RUPERT REED QC has a broad commercial chancery and fraud practice, with a particular focus on property development and finance cases and disputes with a Middle East element.

Contract law on the move

THE COURT OF APPEAL HAS HELPFULLY CLARIFIED THE STATUS OF ANTI-ORAL VARIATION CLAUSES IN CONTRACTS. HOWEVER, IT HAS LEFT UNCERTAIN THE STATUS OF LONG-STANDING AUTHORITY ON WHAT COUNTS AS CONSIDERATION.

In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, the Court of Appeal had to consider whether a contract containing an anti-oral variation clause could be varied other than in accordance with that clause. The Court of Appeal held that it could.

The defendant licensee of some office space had fallen into arrears. The licence contained a fairly standard anti-oral variation clause. Shortly before the claimant served a termination notice, the claimant and the defendant orally negotiated the rescheduling of the licence fee payments. The defendant also made a payment of £3,500 the same day in accordance with the revised payment schedule. When the claimant sued for arrears of licence payments, the defendant argued that an oral agreement had been made to reschedule the payments. The claimant argued *(inter alia)* that the oral agreement relied on by the defendant was precluded by the anti-oral variation clause and that in any event it was unenforceable because it was not supported by consideration.

Until the decision in *MWB,* the effect of an anti-oral variation clause was not entirely clear due to two conflicting decisions of the Court of Appeal (*United Bank Ltd v Asif,* unreported, 11 February 2000, and *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413). The inconsistency was considered in *Globe Motors Inc. v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, in which the Court of Appeal concluded that it was possible to vary a contract orally despite an anti-oral variation clause. *Globe Motors* was an *obiter* decision on this issue, but was followed by the Court of Appeal in *MWB*: see [36] of the judgment of Kitchin LJ, with whom McCombe and Arden LJJ agreed.

On the issue of consideration, the claimant argued, by reference to *Foakes v Beer* (1884) 9 App Cas 605, that the practical benefits it gained from the rescheduled payments via an agreement to pay the debt by instalments to accommodate the defendant could not amount to good consideration. *Foakes v Beer* made it clear that part payment of a debt is not good consideration for the extinguishment of that debt. Kitchin LJ held (at [48]) that the claimant had received a practical benefit that went beyond the advantage of receiving the prompt payment of a part of the arrears and a promise that it would be paid the balance of the arrears in accordance with the new schedule. The defendant's continued occupation of the property was a practical benefit which did amount to good consideration. As a result, the oral variation agreement was binding on the claimant provided that the defendant continued to pay in accordance with the revised schedule. It is unclear what remains of *Foakes v Beer* in the light of the Court of Appeal's decision.

The decision in *MWB* is also instructive in relation to its approach to the defendant's argument that the claimant was estopped from going back on its promise. On an *obiter* basis, the Court of Appeal found that such a claim would not have succeeded because the defendant had not suffered any detriment: it was due to pay the sums in any event and the claimant had notified it promptly that it was insisting on the original terms of the licence [63]. Kitchin LJ did not think that it would be inequitable to go back on the promise simply because the representee made a payment in reliance on a representation.

In January 2017, the Supreme Court allowed an application by the claimant for permission to appeal, so watch this space.

ADIL MOHAMEDBHAI has a broad commercial chancery practice. He regularly advises on issues of contractual interpretation. He is recommended by Legal 500 as one of the top ten juniors under eight years' call in commercial litigation.

> "It is unclear what remains of *Foakes v Beer*"

Narrowing the scope of unjust enrichment

IN THE RECENT CASE OF *HMRC v INVESTMENT TRUST COMPANIES (IN LIQUIDATION)* [2017] UKSC 29, THE SUPREME COURT HAD THE OPPORTUNITY COMPREHENSIVELY TO REVIEW THE MODERN LAW OF UNJUST ENRICHMENT.

That case involved claims by certain investment trust companies against HMRC for VAT they had wrongly paid on the supply of services from investment managers. One of the several issues which arose was whether HMRC had been enriched at the expense of the claimants, as they had not paid any VAT directly to HMRC.

Lord Reed took the opportunity to clarify what was meant by the requirement that a defendant had been enriched *"at the expense of"* a claimant. In his review of the existing authorities on that point he noted that there was uncertainty as to the correct approach. Although a general rule had been adopted that the *"at the expense of"* requirement could only be satisfied by direct transfers from a claimant to a defendant, this rule admitted exceptions. The categories of exceptions had not been precisely defined, and their identification involved considerations such as the need for a *"close causal connection"* between the payment by a claimant and the enrichment of an indirect recipient, whether there was a *"sufficient nexus or link"*, and whether there was a *"sufficient economic connection"*.

Lord Reed considered that these tests were too vague, and that more precise criteria were needed. He emphasised that restitution was not a matter of judicial discretion to meet perceived requirements of fairness in each case, but required the consistent application of ascertainable principles. Given that the underlying purpose of unjust enrichment was to correct defective transfers of value, a direct transfer of value from a claimant to a defendant was required. A "but for" causal link between a claimant's loss and a defendant's gain was not enough, nor were merely incidental benefits to a defendant.

The apparent exceptions to this rule were in fact situations which were legally equivalent to the direct provision of a benefit. These included situations where a series of transactions could be viewed as equivalent to a direct transaction, either because an interposed transaction was a sham, or because the transactions were coordinated and could be seen as a single scheme.

Although Lord Reed did not rule out the possibility of *"genuine"* exceptions to the rule being admitted in the future, his decision represented a significant move away from the broader approach of previous cases to a narrow starting point with the potential for incremental development. His restatement of the law was approved and applied in another Supreme Court decision this year: *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32. Going forward, business people and those advising them should bear in mind that the court will take a stricter approach, and that the focus will be on whether the reality, rather than the formal shape, of a transaction can show that the claimant has conferred a benefit on the defendant, despite the absence of a direct relationship between them.

ELENI DINENIS was Lord Reed's judicial assistant 2016-2017.

The rise of group litigation: a break with the past?

ON 27 OCTOBER 2017, THE HIGH COURT MADE ITS 100TH GROUP LITIGATION ORDER.

Several high-profile cases of recent years, including the RBS rights issue litigation, have been brought under the group litigation procedure, and a number of other prospective multi-claimant claims have recently made national headlines, including claims relating to Volkswagen and Tesco. Supposedly the highest-value damages claim in UK legal history, and the first claim ever to be made on behalf of all relevant consumers on an "opt-out" basis, was launched against MasterCard in 2016.

Given that group litigation appears to be in the ascendancy, is the UK moving towards a system of US-style "class action" litigation, of which UK judges and commentators have historically been wary?

There are obvious dissimilarities between the class action procedure available in the US and its equivalent in England and Wales at least, the group litigation order (or "GLO") under CPR Part 19.

In the US, a claimant can bring a class action on behalf of a defined class. Once the proceedings have been certified by a US court, members of the defined class will be bound by any judgment in the proceedings unless they positively "opt-out".

By contrast, a GLO provides a procedure for managing a collection of individual claims, each of which must be issued by way of a claim form (though it would seem that multiple claims may be issued in a single claim form). A GLO may be made in respect of claims which give rise to *"common or related issues of fact or law"*. A judgment or order on one of the issues specified in the GLO is binding only on those entered in the "group register" established under CPR Part 19.

It offers claimants for whom it would not be cost-effective to litigate their claims the opportunity to bring them and, as a result of being part of the collective, to enjoy a stronger position in the conduct of the proceedings and in the pursuit of any settlement. Such claimants can enter litigation without an exaggerated costs risk, since there is no joint liability for the costs as a whole (each individual claimant is only liable for his or her portion of the "common costs").

The availability of a collective proceedings order (or "CPO") in the Competition Appeal Tribunal (the "CAT") – which has UK-wide jurisdiction – under the Competition Act 1998 (as amended by the Consumer Rights Act 2015) appears to be a more decisive move towards a US-style system of class action litigation in the UK.

Under a CPO, a "representative" brings a claim on behalf of a defined class of claimants. The class can be defined as an opt-in model or, in a first for UK litigation, as an opt-out model, pursuant to which the representative claims on behalf of all those matching a particular description save those who have expressly chosen not to participate. Claims are eligible to proceed by way of collective proceedings only if the CAT considers that they raise the same, similar or related issues of fact or law and are "suitable" to be brought in collective proceedings.

In *Walter High Merricks CBE v MasterCard* [2017] CAT 16, the claimant applied for a CPO to enable the continuation of collective proceedings on an opt-out basis for damages estimated at around £14bn on behalf of a class of some 46.2m people.

The CAT found that claimant had to show that the proceedings were appropriate to go forward under a CPO (which would involve going further than simply showing a good arguable case on the pleadings). The claimant had not satisfied the tribunal that the claims were suitable for an aggregate award of damages, nor that any damages that were recovered would be paid out in a manner commensurate with the applicable principle governing the award of damages (restoration of the claimants to the position they would have been in but for the breach). Accordingly, the CAT did not consider that the claims were suitable to be brought in collective proceedings, and it declined to make a CPO.

The approach taken by the CAT as to whether or not to allow claims to go forward under a group litigation procedure seems to suggest that, even when fitted with the procedural tools to accommodate "opt-out" style group litigation, the UK courts will proceed with caution. At present, CPOs are confined to competition claims. The airing of that procedure in *MasterCard* seems to suggest that the UK is unlikely to roll out "opt-out" style litigation in the near future.

CHARLOTTE BEYNON is developing a busy practice across Chambers' areas of expertise, particularly in the fields of commercial litigation, civil fraud and insolvency. She is currently instructed in *Tatneft PJSC v Bogolyubov & Ors*, a substantial Commercial Court dispute involving claims under Article 1064 of the Russian Civil Code.

Chambers news

People

We are delighted to welcome Gregor Hogan as a tenant following successful completion of pupillage, and we welcome Jamie Randall, Stephanie Thompson and Mark Wraith as pupils for 2017/18. We are also delighted that Sir Michael Briggs, a former member of chambers, was appointed to the Supreme Court as a Justice in October. Gareth Tilley was appointed to the Attorney General's B Panel of Junior Counsel to the Crown and Matthew Morrison is shortly to be named Access to Justice Foundation's first Pro Bono Costs Champion, having secured a pro bono costs order in favour of the Foundation.

Conferences and seminars

We hosted another very successful International Trusts and Commercial Litigation conference in New York in November. The theme of the conference was "States of Mind: Reflections on the consequences of deliberate, reckless, negligent and innocent conduct" and 26 members of chambers were joined by 17 guest speakers from law firms based in the UK, US, Channel Islands, Cayman Islands, BVI and Bermuda.

In October, Rupert Reed QC, Dan McCourt Fritz, James Weale and Amy Proferes gave a series of seminars, and attended meetings, in Dubai and Abu Dhabi, looking at Dana Gas – implications for the Islamic finance markets; Anti-suit injunctions; Arbitration Jurisdiction Challenges: Procedure and Tactics; and Recollection, Reconstruction, and Reliability: The Practicalities and Pitfalls of Witness Evidence.

2 property law seminars took place during the 2nd half of 2017: Andrew Francis, Andrew Bruce and Amy Proferes hosted a seminar in Southampton in July; and Christopher Stoner QC, Rupert Reed QC, Andrew Francis and Andrew Bruce spoke at a London seminar in October.

Serle Court is the hosting sponsor for the Private Client Dining (PCD) Club's inaugural event in the Cayman Islands in January 2018. A reception will take place at the Ritz Carlton, Grand Cayman on 25 January.

Awards and directories

We were named Chancery Set of the Year at this year's Chambers UK Bar Awards, and James Brightwell was nominated as Chancery Junior of the Year. In addition, we were one of only 8 chambers shortlisted for Chambers of the Year at this year's British Legal Awards.

We were delighted when James Mather was named Insolvency Junior of the year in the Legal 500 UK Awards. As a set, we were shortlisted for Chambers of the year in both Insolvency and Private client: Trusts and probate, and Philip Jones QC, Will Henderson, Timothy Collingwood and Ruth den Besten were also shortlisted for individual awards.

The latest editions of the two major legal directories have been released and we continue to be highly recommended. In Chambers & Partners, we are recommended as a set in 11 practice areas, including 4 in band one. In the Legal 500 directory, we are recommended as a leading set in 11 practice areas, including 5 in tier one.

LinkedIn

We have 4 discussion groups on LinkedIn to enable Serle Court members and clients to discuss topical issues in Partnership and LLP Law, Fraud and Asset Tracing, Contentious Trusts and Probate, and Competition Law; please join us.

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