Commercial and Insolvency Update October 2017

Article 6 (1) of the Brussels I Regulation (44/2001) (now found in Article 8 (1) of the Brussels I (Recast) Regulation (1215/2012)) is in practice one of the most important provisions of the Brussels Regime. Providing an exception to the general rule that defendants must be sued in the courts of their domicile, it enables claimants in cross-border litigation to bring defendants domiciled abroad (possibly in a number of different jurisdictions) under one jurisdiction so that related claims can be heard together. The practical benefit of this, in particular the avoidance of irreconcilable judgments, is self-evident. However, the exception contained in Article 6 (1) has given rise to concerns of its being deployed tactically by claimants who artificially construct a claim against a defendant in their preferred domicile so as to oust the jurisdiction of the courts in the domicile of the defendant(s) that is/are the real target of their claim. The Court of Appeal in *Sabbagh v Khoury* has given detailed consideration to the relevant principles and jurisprudence in relation to Article 6 (1).

Facts

The Claimant was the daughter of the late Mr Hassib Sabbagh, a prominent Palestinian businessman who co-founded the largest engineering and construction company in the Middle East. After Mr Sabbagh died intestate in 2010, the Claimant, who was entitled under Lebanese law to one third of her

father's estate, brought claims against various family members and companies under their control alleging financial wrongdoing in relation to her father's business. Her claims were essentially twofold: an asset misappropriation claim, in which she accused family members of making improper and unauthorised investments with dividends from her father's business which were not accounted for or applied for the benefit of Mr Sabbagh (and his estate); and a share deprivation claim, where she alleged that the defendants conspired to deprive her of her entitlement to a third of the shareholding in her father's company by unlawfully procuring the transfer of the shares to one of the defendant companies owned and controlled by other defendant family members.

Of the ten defendants, only one was domiciled in England and Wales (who was thus, for jurisdictional purposes, the "anchor" defendant). The others were domiciled in Greece, Switzerland or Lebanon. As against the defendant domiciled in Lebanon, jurisdiction was asserted under English common law private international law, which requires that the claimant establish a sufficiently arguable claim, that is, a claim with prospects of success, against both the defendant against whom jurisdiction is asserted and the anchor defendant. It was common ground that the requirement for a sufficiently arguable claim flowed from the test (set out in paragraph 3.1 of Practice Direction 6BPD) that there is a "real issue" between the claimant and the defendant domiciled abroad over whom jurisdiction is sought.

The position was different, however, as against the defendants domiciled in Switzerland and Greece, against whom jurisdiction had to be asserted pursuant to the Brussels Regime, specifically, Article 6 (1) of the Brussels Regulation. The Brussels Regime is entirely separate from the common law regime, and the question the Court of Appeal set out to determine (albeit *obiter*) was whether Article 6 (1) similarly required the claim against the anchor defendant to have merit in order for jurisdiction to be established over the non-anchor defendants.

The Brussels Regulation

The general principle under the Brussels Regulation, embodied in Article 2 (1), is that actions are to be brought against individuals and companies in the court of their domicile. It was agreed by all three Judges that exceptions to that rule were to be restrictively interpreted.

The exception in Article 6 (1) provides that a person domiciled in a Member State may also be sued "*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*".

Whilst the Commercial Court in England and Wales has often presumed it necessary for the claimant to establish the existence of a good arguable case against the anchor defendant as part of the test for establishing jurisdiction against non-anchor defendants under Article 6 (1), and CJEU jurisprudence has firmly established that Article 6 (1) cannot be used where the claimant has artificially or fraudulently brought a claim against the anchor defendant for the sole purpose of ousting the jurisdiction of the courts where the other (true) defendant(s) is/are domiciled (the "sole purpose" exception), *Sabbagh* was the first time the Court turned its attention to considering whether that provision does indeed require (or even permit) an assessment of the merits of the claim as part of the jurisdictional test.

The majority view

In a majority judgment, Patten LJ and Beatson LJ concluded, accepting the submission made on behalf of the defendants, that consideration of the question whether it was "*expedient*" to hear and determine claims together involved consideration of the merits of the claim against the anchor defendant and whether it raised a serious issue to be tried. In reaching this conclusion, their Lordships gave detailed consideration to CJEU jurisprudence, which, they determined, supported their judgment that consideration of the substantive merits of the claim against the anchor defendant may be necessary. Their Lordships considered in particular the statement in *Freehold plc v Arnoldsson (Case C-98/06)* [2008] QB 634 that it was for the national court "*to take*

account of all the necessary factors of the case file" when determining whether it was expedient to hear claims together so as to avoid a risk of irreconcilable judgments, and held that one of those factors may be the merits of the claim.

Patten and Beatson LJJ recognised that the CJEU in *Reisch Montage v Kiesel Baumaschinen Handels GmbH (Case C-103/05)* [2006] ECR 1-6827 had held that Article 6 (1) might be deployed where the claim against the anchor defendant was inadmissible because of a procedural bar in the jurisdiction in question. However, they held that there was a distinction between there being a procedural bar and a lack of merits, on the basis that, where the former arose, there was a risk of irreconcilable judgments since the bar may not apply in another jurisdiction, but in a case where a claim was unarguable on the merits, the risk of irreconcilability was unlikely to arise.

The majority view further held that the "sole purpose" exception established in CJEU case law, which is a high test of fraudulent abuse, did not preclude the threshold being lowered to an assessment of the general merits of the claim. It was held that to allow meritless claims to oust the jurisdiction of the courts of foreign-domiciled defendants would amount to a misuse of Article 6 (1) and so should fall within the "sole purpose" exception. Further, and importantly, to allow such a claim to proceed would undermine the principle that a defendant should only be sued before the courts of his domicile.

The dissenting judgment

Gloster LJ gave a detailed and well-reasoned dissenting judgment in which she reached opposite conclusions regarding the import of CJEU jurisprudence. In particular, she found that the CJEU had clearly established that Article 6 (1) could be used to establish jurisdiction against foreign-domiciled co-defendants, even where the claim against the anchor defendant does not actually proceed, unless there has been fraudulent abuse of Article 6 (1) by the claimant. She did not consider that a meritless claim could amount to fraudulent abuse within the meaning of the "sole purpose" exception, and found (correctly, it is respectfully submitted) that there was no distinction between a claim against the anchor defendant which was procedurally barred and a claim which was meritless and bound to fail: both scenarios gave rise to a risk of irreconcilable judgments, which the CJEU was concerned to eliminate, rather than merely reduce.

Gloster LJ did not consider that the reference to "*all the necessary factors*" in *Freeport* could include a merits assessment, holding that "*Statements in Freeport* […] *that it was permissible for the national courts to use all available information to verify that there was a close connection do not alter the content of the requirement of a close connection. Therefore, whilst English courts may apply a common sense approach in evaluating (for example) whether claims arise from the same facts, they may not, in my judgment, introduce a new,*

additional condition that the claim against the anchor defendant is arguable. That would not be consistent with the wording of Article 6 (1)."

Finally, her Ladyship held that, in line with CJEU authority, the focus should be on the question whether there is a close connection between the claims, which is to be assessed at the time proceedings are instituted, rather than the factual likelihood of the claims prevailing or not and whether there is then a risk of irreconcilable judgments.

Conclusion

The soundness of the reasoning in Gloster LJ's dissenting judgment is striking and, it is respectfully submitted, incorporates a more plausible interpretation of CJEU authority on the subject than that in the majority judgment. Further, her Ladyship's conclusion is clearly consistent with the Court of Appeal's finding in *Joint Stock Co 'Aeroflot-Russian Airlines' v Berezovsky* [2013] EWCA Civ 784 that "*The whole approach of the ECJ seems* […] *to be consistent with the principle that the Judgments Regulation is only concerned with the basis for establishing jurisdiction and has nothing to do with assessing the merits of the claims against the various defendants.*" However, it is difficult to resist the practical rationale behind the majority decision, which appears to have been driven by concerns both that the general principle that defendants should be sued only before the courts where they are domiciled should not be undermined and that the exception in Article 6 (1) should not be misused. By

holding that the merits of the claim against the anchor defendant is a relevant factor in determining whether the jurisdictional test under Article 6 (1) is satisfied, the Court has usefully attempted to insert an objective control into that test so as to bolster the Courts' on-going efforts to prevent artificial use of the provision.

Chloe Shuffrey

Post scriptum

Practitioners should note that claims brought after 10 January 2015 will be subject to the Brussels I (Recast) Regulation (1215/2012), not the Brussels I Regulation (44/2001) (which was the applicable Regulation in *Sabbagh v Khoury*, the claim having been brought before 10 January 2015). However, Article 8 (1) of the Brussels Regulation (recast) is identical in its terms to Article 6 (1) of the Brussels Regulation, and so the reasoning in *Sabbagh* will be applicable.