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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 1308 (Comm)



No. CL-2020-000801

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 23 April 2021

Before:

MR JUSTICE BUTCHER

B E T W E E N :

(1) MARC CHRISTOPHER WINSLET
(2) SURGICAL CHAMBERS LIMITED
(3) RESSEGUE LIMITED

Claimants/Respondents

- and -

(1) THE ESTATE OF ANDREAS GISEL

Defendant

- and -

(1) BERT BOLKENSTEIN

Applicant

MR A McCLUSKEY (Counsel) appeared on behalf of the Claimants/Respondents.

MR H. MARTIN (Counsel) appeared on behalf of the Applicant.

J U D G M E N T
(via Microsoft Teams)

MR JUSTICE BUTCHER:

1 This is a jurisdictional application in an action brought by the first claimant, who I will call “Professor Winslet”, and two companies which were controlled by Professor Winslet, which I will call “the Claimant Companies”, against the estate of the late Mr Andreas Gisel, who I will call “Mr Gisel”. At all material times, Professor Winslet was domiciled and habitually resident in England, the Claimant Companies had their registered offices in England, and Mr Gisel was domiciled and habitually resident in France.

The claim

2 By the claim, Professor Winslet seeks to recover a total of £401,000 by way of repayment of principal in respect of a number of loans which Professor Winslet alleges that he made to Mr Gisel on an interest free basis, with no fixed repayment date, between February 2010 and June 2018. I will call them “the Loans”.

3 The Loans were made, Professor Winslet alleges, in order to assist Mr Gisel, who was a friend. It was not contested on this application that Professor Winslet has a good arguable case as to the making of the Loans. I make no decision in relation to whether the Loans were made: it was simply not contested for the purposes of this application.

4 Since Mr Gisel’s death in November 2019, Professor Winslet has sought repayment of the Loans by making requests of a number of individuals who have been involved in administering Mr Gisel’s affairs in France. It appears, however, that no repayment has been forthcoming. As a result, on 10 December 2020, Professor Winslet and the Claimant Companies issued proceedings against the estate of Mr Gisel seeking recovery of the amount of the Loans and interest pursuant to statute.

5 On 22 December 2020, Professor Winslet applied for permission to serve the claim form by an alternative method and, in particular, sought permission to serve each of Mr Bert Bolkenstein (who I will call “Mr Bolkenstein”), Maître Casey and Maître Jerome Bardin via email, as proposed representatives of Mr Gisel’s estate pursuant to CPR 19.8. On 11 January 2021, permission to effect service in the manner sought was granted by Foxton J.

6 On 28 January 2021, Mr Bolkenstein filed an acknowledgment of service indicating that he intended to contest jurisdiction. On 1 March 2021, Mr Bolkenstein issued an application seeking, firstly, a declaration that the English courts do not have jurisdiction to hear the claim and, secondly, an order that the claim form, or service thereof, be set aside.

7 Mr Martin, who appears for Mr Bolkenstein, submits in brief that there is only one proper analysis regarding the question of whether this court has jurisdiction to hear this matter and the result is that it does not. He submits that:

- a Mr Bolkenstein is domiciled in the Netherlands and would have to be sued there;
- b Maître Casey and Maître Bardin are domiciled in France and would have to be sued there;
- c Mr Gisel and his estate, as such, cannot be sued, but, as he was domiciled in France at the time of his death, there is no basis for pursuing any representative of his estate in the English courts; and

- d The special jurisdiction in relation to contracts under the Recast Brussels Regulation confers jurisdiction on the courts of France, not of England.
- 8 By contrast, Mr McCluskey, who appears for Professor Winslet and the Claimant Companies, submits that the domicile of Messrs Bolkenstein, Casey and Bardin is not, in itself, relevant. They are sued as representatives of Mr Gisel’s estate, not as proposed defendants to the claim. Further, he submits, under the Recast Brussels Regulation, the English courts have special jurisdiction to hear this matter.
- 9 As Mr McCluskey noted and Mr Martin accepted, nothing ultimately turns on the point as to the domicile of Messrs Bolkenstein, Casey and Bardin themselves as opposed to that of the Defendant, *viz* the estate. The only basis on which it is contended that the English courts have jurisdiction is that there is special jurisdiction under the Recast Brussels Regulation by reason of the alleged contract(s) under which the Loans were made. If there is not that jurisdiction, then Mr Bolkenstein’s application would succeed. Whether there is such special jurisdiction has, therefore, been the central issue which has been debated before me.

Applicable law on jurisdiction

- 10 The starting point for determining whether the court has jurisdiction to hear a claim relating to a contract against a person domiciled in another member state is Article 7(1) of the Recast Brussels Regulation (Regulation (EU) No 1215/2012). As was common ground, this remains applicable to this matter by virtue of Article 67(1) of the Withdrawal Agreement (2019/C 3841-01), as these proceedings were instituted prior to the end of the transition period at 23:00 on 31 December 2020.
- 11 The test to be applied in resolving this jurisdiction challenge is as to whether it has been shown that there is a good arguable case that the court has jurisdiction over the claim under the Recast Brussels Regulation: *WPP Holdings Italy Srl and others v Benatti* [2007] 1 WLR 2316 at [37]-[44]. Mr McCluskey invited the court to proceed on the basis that the court should consider that such a case was shown if it reached a clear view, having regard to the limitations of the summary and interlocutory nature of a jurisdiction hearing, that, on the material available, the claimant’s argument that the court had jurisdiction was better than the argument that it did not. Mr Martin did not quibble with that as the test.
- 12 Article 7(1) of the Recast Brussels Regulation provides as follows:

“A person domiciled in a Member State may be sued in another Member State:

- (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
- (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
 - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies.”

Which limb of Article 7(1) of the Recast Brussels Regulation applies?

- 13 The first question to address is which limb of the test set out above applies in the context of this claim.
- 14 Mr McCluskey submits that the Loans were contracts for the provision of services and, as such, the question of jurisdiction falls to be determined pursuant to Article 7(1)(b) of the Recast Brussels Regulation. He submits that the service rendered was the provision of the principal under the Loans and that it was provided in England, by payments from Professor Winslet into Mr Gisel’s English bank account with Coutts & Co.
- 15 I am not persuaded by this submission. I accept that a commercial loan agreement entered into between a financial institution and a customer will, in all likelihood, be one involving the provision of services. This is indicated in the case of *Kareda v Benko* [2018] QB 445, both in the opinion of the Advocate General at [38] and in the decision of the ECJ at [37]. However, I do not consider that that means that the Loans in this case were contracts for the provision of services.
- 16 In my judgment, the simple provision of money to a friend, which is not undertaken as part of a business of lending money, probably does not qualify as the provision of a service. As Mr Martin pointed out, the European Court of Justice stated in *Falco Privatstiftung v Weller-Lindhorst* [2010] Bus LR at [29] that: “The concept of services implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration.”
- 17 I doubt that the simple provision of money to a friend constitutes the carrying out of an “activity” of the sort referred to, and I think that, in context, the expression “an activity” has the connotation of something more continuous or of more duration than the simple advancing of money when this is not done as part of a business.
- 18 In any event, Professor Winslet and the Claimant Companies did not stipulate for and had no expectation of remuneration. The Loans were provided on an interest free basis with no specified repayment date.
- 19 In answer to this, Mr McCluskey points to the opinion of the Advocate General in *Corman-Collins SA v La Maison du Whisky SA* [2014] QB 431 at [55], suggesting that the term “remuneration” should not be construed strictly and, in some instances, it may be absent and a contract may still relate to the provision of services, such as when a lawyer provides legal advice on a *pro bono* basis. Mr Martin retorts that this element of the opinion of the Advocate General in that case was simply his opinion, it was not adopted by the ECJ in its decision and is wrong. Whether it is correct or not, it appears to me to be referring to a significantly different case from that at issue here. In that example, the lawyer is a professional service provider who would usually be expected to be remunerated for her services, but exceptionally offers these on a *pro bono* basis. Here, however, there is no suggestion that either Professor Winslet or the Claimant Companies were in the business of providing loans in return for remuneration; nor is there a suggestion that either provided anything in the way of service to Mr Gisel other than simply advancing him the money.
- 20 For these reasons, I do not consider that the Loans constitute contracts for the provision of services. One must, therefore, look to Article 7(1)(a) of the Recast Brussels Regulation to

determine jurisdiction. That stipulates that the courts of the “place of performance of the obligation in question” would have jurisdiction over a dispute relating to the contract.

Determining the place of performance of the obligation in question

- 21 As to the question of what is the obligation in question in the claim, I proceed on the basis that the term “obligation in question” in this context refers to the “contractual obligations forming the basis of the legal proceedings”, as stated in *De Bloos Sprl v Bouyer SA* [1976] 1 CMLR 60 at [10]. Professor Winslet and the Claimant Companies, in suing for a debt, base their claim on Mr Gisel’s obligation to repay the monies lent. On that basis, the obligation in question is the obligation to repay.
- 22 The question then arises as to what is the place of performance of the obligation to repay. Where was Mr Gisel required to render repayment? The answer to that is to be determined in accordance with the governing law of the Loans: *Industrie Tessili Italiana Como v Dunlop AG* [1977] 1 CMLR 26. It is agreed between the parties that the governing law of the Loans falls to be determined by reference to Article 4 of the Rome I (Regulation (EC) No 598/2008), as contracts for which no choice of governing law was made. Once again, it was common ground that, notwithstanding the United Kingdom’s withdrawal from the European Union, this remained the relevant test by virtue of Article 66(a) of the Withdrawal Agreement as the Loans were concluded prior to the end of the transition period.
- 23 Article 4(1) of Rome I sets down various rules which, in the absence of any choice of governing law, dictate how the governing law for certain specified types of contract should be determined. For the reasons I have explained above, I do not consider that the Loans constitute contracts for the provision of services, as Mr McCluskey submitted. Nor do the Loans fall within any of the other specified types of contract for which provision is made in Article 4(1) of Rome I. As such, the governing law of the Loans will fall to be determined by reference to Article 4(2) of Rome I, which provides as follows:
- “Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.”
- 24 It is to be observed that there is a distinction between the concept of the “obligation in question” in respect of proceedings referred to in Article 7 of the Recast Brussels Regulation and the concept of the “characteristic performance of the contract” under Rome I. The “obligation in question” is defined by the nature of the claims pursued in the relevant proceedings. On the other hand, what constitutes the characteristic performance of a contract is determined by the nature of the contract itself.
- 25 What is involved in the concept of the characteristic performance of a contract is the subject of discussion in the Giuliano-Lagarde Report on the Convention on the law applicable to contractual obligations. That report states as follows in respect of Article 4(2):
- “Identifying the characteristic performance of a contract obviously presents no difficulty in the case of unilateral contracts. By contrast, in bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter-performance by one of the parties in a modern economy usually takes the form of money. This is not, of

course, the characteristic performance of the contract. It is the performance for which the payment is due, i.e. depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, security, etc., which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.”

- 26 In the context of banking services, it is, at least ordinarily, the lender that renders characteristic performance of a loan agreement in providing the principal sum to the borrower. That is reflected in *Kareda v Benko* (mentioned above) in the Advocate General’s opinion at [44]-[45] and in the ECJ’s decision at [41].
- 27 The question of which party renders the characteristic performance of a loan agreement outside the sphere of financial services has been viewed as rather less clear cut. It is an issue which was addressed with impressive thoroughness and clarity by Lord Brodie in his *obiter* consideration at [37]-[53] in *Atlantic Telecom GmbH, Noter* [2004] SLT 1031 where he concluded that, had he been called on to decide the matter, he would have found that, in a contract of loan outside the banking sphere, it is the lender who renders characteristic performance in advancing the principal. I agree with that analysis for the reasons discussed by Lord Brodie.
- 28 The argument which was made by Mr Martin, however, was that the Loans in the present case were unilateral contracts with the only relevant obligation being repayment by Mr Gisel, and that Mr Gisel must, therefore, be the person who would have rendered characteristic performance. He said that, had there been a prior undertaking by Professor Winslet to loan money which could have been enforced, then the position would have been different, but here the only obligation was the obligation to repay. He said that this meant that there was only one party required to effect any performance for the purposes of Article 4(2) of Rome I and that for the purpose of the Giuliano-Lagarde Report, in the passage that I have referred to above, the contract was a unilateral one.
- 29 The suggestion that what constitutes characteristic performance of the contract (and thus the governing law of the contract) depends on whether there was an agreement in advance to make a loan, as opposed to advancing the money without a pre-existing commitment to do so, is not an attractive one.
- 30 I do not consider that Mr Martin is correct to say that the use of the term “required” in Article 4(2), means that, for performance to be characteristic of a contract, a counterparty must have had a contractual right to compel that performance before it was rendered voluntarily. Rather, I accept Mr McCluskey’s submission that it is referring to the party who, as and when a contract comes into existence, makes or is to make the characteristic performance. So, in a case such as the present, until the loan is made, there is no contract. But, when the loan is advanced, there is a contract and the lender is the one who, under it, is making the characteristic performance.
- 31 Nor do I consider that Mr Martin’s case is supported by the Giuliano-Lagarde Report when fairly read. In the passage quoted, it is not spelt out as to what category of contracts were regarded as unilateral contracts, and I bear in mind that what is there referred to may not be what an English lawyer would describe as a unilateral contract.
- 32 I do not consider that the Loans can be characterised as unilateral contracts for the purposes of the dichotomy referred to in the Giuliano-Lagarde Report. Specifically, pursuant to the

contracts of loan which are in issue, Professor Winslet and the Claimant Companies loaned money in return for a promise to repay. Under those contracts, there was, as it seems to me, performance on the one side and a promise of repayment on the other. That, in my view, is, for the purposes of the dichotomy presented in the Giuliano-Lagarde Report, a bilateral contract under which the parties undertook mutual reciprocal performance. This conclusion seems, to me, to be consistent with the examples given in the same paragraph of the Giuliano-Lagarde Report, which indicate that the provision of goods or grant of rights in return for payment is regarded as falling into the category of bilateral contracts for these purposes.

- 33 For these reasons, I consider that it was Professor Winslet and the Claimant Companies which rendered characteristic performance under the Loans. As a result, the Loans are governed by English law, as England is the place where each claimant has his or its habitual residence.
- 34 It is common ground between the parties that the Loans did not specify a place for performance of Mr Gisel's repayment obligations. As such, following the general rule under English law, which is summarised in **Chitty on Contracts, 33rd Edition**, at paragraph 21-056 (and which, at least on the material before me, seems to be different from the position under French law), Mr Gisel would have been required to repay the sum owed at his creditor's place of residence or business. Professor Winslet's home and the Claimant Companies' registered offices are each in England. It follows, therefore, that the place of performance of the obligation in question is, on the basis of the arguments and material before me, England.
- 35 On that basis, I am satisfied that Professor Winslet and the Claimant Companies have a good arguable case that the English courts have jurisdiction to hear the claim under Article 7(1)(a) of the Recast Brussels Regulation and, for that reason, Mr Bolkenstein's application is dismissed.
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CERTIFICATE

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