

Jurisdiction in consumer contracts—directing activities to the UK (*Bitar v Banque Libano-Française*)

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Commercial analysis: In relation to a bank account with a Lebanese bank, the High Court held that it had jurisdiction in a claim to recover money standing to the credit of the claimant on the basis that, on an objective test although not a subjective one which was not relevant, the bank manifested an intention to do its business in England. The case is relevant to all situations where a UK consumer claims jurisdiction in UK courts under a contract with a non-UK business. It is also an illustration of how an English court deals with EU law post-Brexit. Written by Fred Philpott, barrister at Gough Square Chambers.

Bitar v Banque Libano-Française SAL [\[2021\] EWHC 2787 \(QB\)](#)

What are the practical implications of this case?

In practical terms, the implications of this case are that it will be relatively easy for a consumer in the UK to show, on an arguable case basis, that a trader, by any means, directed commercial or professional activities to the UK within [section 15E\(1\)](#) of the Civil Jurisdiction and Judgments Act 1982 ([CJJA 1982](#)).

In particular, if a website can be accessed in England and this would give the impression to a fair-minded observer that the overseas trader was interested in obtaining customers from outside its own country including from England, even if that was not the subjective intention of the trader, this will suffice to give the English courts jurisdiction.

It also provides an important reminder that [CJJA 1982, s 15A–15E](#) (which were inserted by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, [SI 2019/479](#)) override any exclusive jurisdiction clause and that the test when determining an issue about jurisdiction is whether the claimant had the better of the argument on the facts relating to jurisdiction on a plausible evidential basis.

It also gives a practical example of a court having regard to a Court of Justice of the European Union case and Advocate General's opinion (in this instance the case of *Pammer v Reederei Karl Schlüter GmbH & Co KG*, Joined Cases [C-585/08](#) and [C-144/09](#), [\[2011\] 2 All ER \(Comm\) 888](#)). This case dealt with a cruise and a hotel holiday. The court had regard to the case although not strictly binding on English courts.

The case is also of relevance to the question of the proper law of a consumer contract (see [Article 6](#) of Regulation (EC) 593/2008 (OJ L 177/6), Rome I but also the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, [SI 2019/834](#) and [Retained Regulation \(EC\) 593/2008](#), Retained Rome I).

What was the background?

The claimant held joint British and Syrian nationality. He was a doctor working for the NHS who had always lived in England. The claim related to a sum in excess of US\$4m. This was said to be a credit balance under a joint account. The bank attempted to pay the credit by means of a Lebanese central bankers' cheque. Because of the financial crisis, this resulted in the money effectively being trapped in the Lebanese banking system because it could not be deposited to an account outside Lebanon.

The defendant applied under [CPR Part 11](#) to strike out the claim on the basis that the English High Court had no jurisdiction. [Section 15B](#) of the CJJA 1982 applies in relation to proceedings whose subject-matter relates to a consumer contract where the consumer is domiciled in the UK. Under [CJJA 1982, s 15B\(2\)](#) it is provided that the consumer may bring proceedings against the other party

to the consumer contract in the courts of the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract).

Under [CJJA 1982, s 15A](#) a 'consumer contract' means, among other things, a contract which has been concluded with a person who pursues commercial or professional activities in the part of the UK in which the consumer is domiciled or by any means, directs such activities to that part or to other parts of the UK including that part and which falls within the scope of such activities.

The crucial question in this case was the meaning of the words 'directed to'. The claimant asserted that the bank was, as was made clear by statements made on the internet, interested in obtaining customers outside Lebanon and in particular from the Lebanese diaspora (the judge was told it consisted of some 15 million people some four times the number who currently live in Lebanon). It was said this would necessarily include significant numbers who live in the UK.

What did the court decide?

The court held in favour of the claimant making the following decisions.

The sophistication of the consumer

It was held that this was not relevant; the only question was whether the claimant was a consumer.

The jurisdiction test

In following the case of *Brownlie v Four Seasons Holdings Inc* [\[2019\] 1 WLR 192](#) (recently revisited at [\[2021\] UKSC 45](#)), the judge relied on the reformulated effect of the traditional test (which was whether the claimant had 'the better of the argument' on the facts going to jurisdiction) that the claimant must supply a plausible evidential base for the application of a relevant jurisdictional gateway and on an issue of fact the Court must take a view on the material available if it can reliably do so, but the nature of the issue and limitations of the material available at the interlocutory stage may be that no reliable assessment can be made in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

Burden of persuasion

It was held that although it was not strictly a burden of proof, there was burden of persuasion on the claimant. It was held that the effect of the burden being on the claimant is therefore only that in a finely balanced case, the default position may be that the defendant's argument is preferred.

The intention of the trader

The judge relied, in particular, on the Court of Appeal decision in *Merck KGaA v Merck Sharp* [\[2017\] EWCA Civ 1834](#). In that case Lord Justice Kitchin said at para [165] that if, viewed objectively from the perspective of the average consumer, a foreign trader's internet activity is targeted at consumers in the UK, the fact that the trader did not intend this result will not prevent the impugned use from occurring in the UK.

However, that was not to say that the actual intention of the website operator is irrelevant. If the foreign trader does intend to target its internet activity at consumers in the UK then that matter can properly be taken into account.

What 'directed to' means

On the basis of what a fair-minded observer would gain from that which was visible on the website, the bank was interested in obtaining customers from the ex-patriot Lebanese community in whichever part of the world. That material alone satisfied the test of a manifestation of intention, objectively assessed, on the part of the bank to direct its business to England.

Conclusion

The application by the defendant was therefore dismissed on the basis that the claimant had supplied a plausible evidential basis for the application of a relevant jurisdictional gateway taking a view on the material available and applying a test combining a good arguable case with plausibility of evidence.

Case details:

- Court: Queen's Bench Division
- Judge: Michael Kent QC (sitting as a deputy judge of the High Court)
- Date of judgment: 20 October 2021

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