"Come one, come all": the Court of Appeal opens the floodgates and expands the scope of the jurisdictional gateways

Eurasia v Aguad [2018] EWCA Civ 1742

The Court of Appeal ("**CoA**") has held that two of the "general grounds" jurisdictional gateways (as opposed to those gateways which operate only in relation to a specific type of claim) are complementary to each other, such that additional foreign defendants can be brought within English jurisdiction despite the case against those additional defendants having a merely tangential connection to England.

Factual Background

The issues on appeal arose out of an alleged multi-handed Peruvian gambling conspiracy said to involve seven out of eleven Defendants.

The Respondent to the appeal (the Claimant in the underlying trial) is a betting agency incorporated offshore in the Channel Islands. The Respondent's business involves acting as an intermediary, procuring betting accounts with an online gambling exchange (Triplebet Limited aka "Matchbook") for betting customers such as the Defendants. Its banking facilities are in Malta. The Respondent performed administrative activities, relating to the opening of a betting account/allocation of credit, in London – but was the company to whom it was said the Defendants were liable to pay their gambling debts.

The key facts in relation to the appeal were:

- The Defendants (who were at the time all resident in Peru) placed and lost bets to the tune of USD$12.6m in total on Matchbook after the Respondent had arranged for credit to be provided to them on their accounts with Matchbook. The Appellant (D11 in the underlying trial) is alleged to owe USD$2m of this total.

- Also in Peru, D1 and D3 entered into a commission/agency arrangement with the Respondent and introduced D4-10 to the Respondent. While the Appellant entered into a relationship with the Respondent independently of the other Defendants (and prior to the formation of the agency arrangement), the other Defendants were said to be known to the Appellant and it was alleged that the Appellant used the betting sub-account of another Defendant.

- D3 provided the Respondent with a USD$10m cheque by way of security for the sums owed by D1-10. That cheque bounced. Had it not been dishonoured, that cheque would have been paid into the Respondent's bank in Malta. Some of the other Defendants were said to have provided false copies of supposed bank transfers evidencing by way of credit for their anticipated betting.

The Respondent brought claims against the Defendants for breach of contract, fraudulent misrepresentation (including in relation to the cheque and false bank transfers), and conspiracy to defraud (the Appellant did not have the fraudulent misrepresentation claims brought against him).

Procedural Background

As was to be expected, at the date of Claimant's application to serve the claim form out of the jurisdiction all of the Defendants were based outside of England (most in Peru, two in Taiwan) Accordingly, the Claimant needed to apply for permission to serve the claim form out of the jurisdiction (we will use the shorthand "serving out"; CPR 6.36).

As a refresher, the three requirements which need to be satisfied in order to obtain permission to serve out are (*Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 ("***Altimo***") at para. 71; *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 at para.7):

1. Serious issue to be tried: there is a serious issue to be tried in relation to the claims in dispute (here - allegations of breach of contract, and conspiracy to defraud), i.e. the claims are real, as opposed to merely fanciful.

2. Jurisdictional gateway: there is a good arguable case that each allegation fits into one or more of the so-called "jurisdictional gateways" found in CPR PD 6B (here - a good arguable case that the contract was breached in England, the tortious damage was sustained in England, and/or the Appellant is a necessary or proper party to the Respondent's case against one of the other Defendants).

3. Forum: in all the circumstances, England is clearly or distinctly the appropriate forum to try the dispute.

At first instance, permission to serve out was granted; D11 (now the Appellant) appealed against that decision[1].

Issues on appeal

Serious issue to be tried: no loss

One argument made at the appeal stage by the Appellant (but not at first instance: the Appellant's legal representatives had changed between the first instance hearing and appeal) was that:

> "*the loss pleaded as flowing from the conspiracy, namely the sum of the indebtedness accrued by the defendants on their betting accounts which remains due, does not represent a loss in law. Rather, the several debts are assets which, but for the conspiracy, the claimant would not have acquired.*" (para.15 of the judgment).

Being a pure point of law, the Court of Appeal had discretion to grant permission for the "no loss" argument to be deployed on appeal (despite the fact that it had not been raised in the High Court). However, the Court refused to grant permission on the grounds that "*it is entirely possible that evidence could have been adduced below [evidencing a different loss to that claimed] which would have prevented the point from succeeding*" (para.18).

Jurisdictional gateways

The tort gateway: PD 6B, para. 3.1(9)(a)

In order for the conspiracy claim against the Appellant to pass through the tort gateway on its own steam (see further below on this claim being tied to claims against other "anchor" defendants so as to pass through one of the "general grounds" gateways), the Respondent needed to show that:

> "*damage was sustained, or will be sustained, within the jurisdiction…*"

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[1] N.B. While two other Defendants had originally also contested English jurisdiction, by the time the case had reached the Court of Appeal the Appellant was the only Defendant continuing to challenge jurisdiction.

At first instance, it had been held that the conspiracy claim against the Appellant passed through the above tort gateway because the act of allowing the betting to take place (i.e. by arranging for credit to be granted to the Defendants on their Matchbook accounts) happened in London.

The Appellant argued that the first instance judge had erred in law. The act of allowing the betting to take place was not equivalent to the sustaining of damage. The damage alleged appeared to comprise a failure to pay in respect of bets which the Defendants had lost. Where damage is alleged to have been sustained because of a failure to make payment, such damage is suffered in the location/jurisdiction where the money should have been paid. There is a distinction, so the Appellant argued, to be drawn between: a) steps which lead up to the sustaining of damage (here, the Respondent's administrative activities in London), and b) the sustaining of the damage itself (here, the failure to make payment to the Respondent's bank in Malta).

The Court of Appeal agreed, holding that any tortious damage suffered by the Respondent was sustained in Malta because the payments – assuming that they should have been made – should have been made to the Respondent's Maltese bank account.

However, the Appellant's success on this issue did not dispose of the appeal because the Respondent relied on other, general, jurisdictional gateways[2].

The combined effect of the "general grounds" gateways: PD 6B, para.s 3.1(3) and 3.1(4A)

In addition to jurisdictional gateways which operate only in relation to a specific type of claim (e.g. the tort gateway set out above), PD 6B contains a number of "general grounds" gateways which are of broader application. Two of these general gateways were relied on by the Respondent:

a) Paragraph 3.1(3) (the "**NPP Gateway**"): to pass through this gateway, the claimant needs to show that a claim has been/will be served on another defendant, and "*(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.*"

b) Paragraph 3.1(4A) (the "**4A Gateway**"): "*(4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) [the contract gateway] to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts*."

(together, the "**General Gateways**").

The relevance of the two General Gateways is that the first instance judge held that contract claims against D1, 2, 4, 7, 8 (the "**Anchor Defendants**") passed through – in their own right - one of the contract gateways (PD6B, para. 3.1(6)(a)).

The Respondent argued that this produced the following result:

1. The tort claims against those Anchor Defendants would then pass through the 4A Gateway since the tort claims arise out of the "same or closely connected facts" as the contract claims.

2. Because, by virtue of the 4A Gateway, the tort claims against the Anchor Defendants would be heard in England, the tort claims against the Appellant could pass through the other General Gateway – the NPP Gateway - on the basis that the Appellant is a "*proper*" party to the claims against the Anchor Defendants since it is alleged that the Appellant was part of the same conspiracy (and the test is essentially, "*[s]upposing both parties had*

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[2] N.B. The judge at first instance had held that the contract claims against the Appellant did not fall within the contract gateway (however, the contract claims against some of the other Defendants did: see further below).

been within the jurisdiction would they both have been proper parties to the action?": *Altimo* at para. 87 and the cases cited there).

The Court of Appeal (unconvinced by the Appellant's counter-argument that the Respondent's attempt "*to build gateway upon gateway*" involved an unjustified expansion of the scope of PD 6B) agreed with the Respondent, holding that:

> "*The [General Gateways] are complementary in their operation. The necessary or proper party gateway is concerned with adding additional parties to a given action, whereas the 4A gateway is concerned with adding additional claims to a claim against a given party. The common thread is that claims arising out of the same or closely related facts should be tried together, whether by adding defendants to an existing claim or adding claims to an action against an existing defendant. The effect of allowing the necessary or proper party to build on the 4A gateway does not cut across that common purpose. All the claims will remain bound together because they are based on closely related facts*." (para.46).

The Court of Appeal went on to indicate that the proper stage to air any grievances about the excessive width of the General Gateways was when assessing whether England is clearly or distinctly the appropriate forum to try the case.

Appropriate Forum

The Court of Appeal rehearsed the principle that an appellate court should not interfere with a first instance "*judge's evaluation of the issue of appropriate forum unless he is shown to have erred in principle*" (para.51).

The Court declined to disturb the first instance judge's conclusions on appropriate forum for the following reasons:

1. Governing law: the Appellant argued that since the judge had, wrongly, "*approached the case from the premise that damage from the tort occurred in England, his approach to the applicable law factor was skewed*" (para.52). The Court of Appeal held that, since there was no suggestion that there was "*any material difference between the laws of England and Peru on the tort of conspiracy*" (para.55), the governing law question did not have a material influence on the judge's reasoning.

2. Voluntary submission: the Appellant argued that the judge had been wrongly swayed by the fact that, regardless of how the Appellant's appeal turned out, proceedings will continue against the remaining Defendants in any event, given that those proceedings were only continuing because of their voluntary submission to the jurisdiction. The Court of Appeal disagreed, holding that "t*he fact that proceedings are very likely to continue here remains a factor which is entitled to [be given] weight*" (para.57).

Commentary: the floodgates opened?

In *Eurasia v Aguad*, the choice for the Court of Appeal lay between:

a) Principle: heeding the Privy Council's stark warning that, "*[i]t must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction*" (para.37 of the judgment, citing *Altimo*); and

b) Efficiency: adopting the Supreme Court's guidance that, "*[t]he decision [to grant permission to serve out] is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum"* (para.64 of the judgment, citing *Abela v Baadarani* [2013] UKSC 44).

The Court of Appeal chose the latter course. In so doing, the Court of Appeal has signalled a pendulum shift away from principled arguments against subjecting foreign defendants to English jurisdiction as a matter of course towards holding out the efficient conduct of litigation as the gold standard in determining jurisdiction disputes.

Some will regard the Court's holding as an opening of the floodgates. So the argument will go, as a result of this judgment, a foreign defendant will fall within the jurisdiction of the English courts purely because that foreign defendant has some merely tangential link with other "anchor" defendants who may have already submitted to the jurisdiction.

Others will point out that caution should be exercised before invoking the spectre of the floodgates argument, because it is an argument all too often rehearsed by case commentators when the previously understood scope of a rule is expanded by the courts.

The extent to which the floodgates will actually have opened remains to be seen. Watch this space.

The Appellant was represented by Hogan Lovells International LLP and Alexander Gunning QC (the Appellant retained different representatives at first instance)."