"HOME IS WHERE THE HEART IS". DOMICILE, JURISDICTION AND ANCHOR DEFENDANTS

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With its widely used legal system and highly respected judiciary, England is a very popular jurisdiction for resolving disputes. This is particularly so where parties are seeking to enforce rights against individuals and companies based in less reputable or more uncertain jurisdictions, or to avoid a mismatch between the jurisdiction hearing the dispute and the law governing it.

However, in the absence of a valid and applicable jurisdiction agreement in favour of the English courts it can be difficult to bring such defendants within the jurisdiction. Further, in our increasingly globalised society identifying the appropriate jurisdiction in which to bring proceedings can be difficult when pursuing individuals with a foot in many countries.

Given this, issues surrounding jurisdiction are common and complex. Fortunately, the courts have recently given useful guidance on this area in *Bestolov v Povarenkin* (1). *Bestolov* addressed the question of when a defendant can be considered to be domiciled in England and therefore subject to its courts' jurisdiction. The High Court's decision made clear that this issue is not a mere "numbers game", and suggests that a more expansive approach is being adopted in determining whether English domicile and jurisdiction apply.

Further, the dissenting judgment by Gloster LJ in the Court of Appeal's recent decision in *Sabbagh v Khoury & others (2)* suggests an increasing judicial willingness to assert English jurisdiction. Although, as a dissenting decision, Gloster LJ's judgment has no legal effect, it sets out clear and compelling arguments and provides a potential basis for the Supreme Court or a future Court of Appeal to lower the threshold for claims brought against defendants domiciled in the EU Member States or Lugano Convention signatories via "anchor" defendants.

It therefore seems that the English courts continue to be willing to accept jurisdiction over individuals and companies domiciled outside of England and Wales in the absence of express jurisdiction agreements in the English courts' favour and are developing the law to this end.

BESTOLOV V POVARENKIN

In *Bestolov*, the High Court was asked to determine whether it had jurisdiction to hear a claim against Mr Povarenkin, a Russian national who was primarily domiciled in Russia.

A number of issues were raised, but the key question was whether Mr Povarenkin was *also* domiciled in England for the purposes of the Recast Brussels Regulation, which sets out the rules that determine which EU Member State's court should have jurisdiction of any particular dispute. Mr Povarenkin accepted that if he was domiciled in England then, in accordance with *Owusu v Jackson (3)*, the English court would have no discretion as to whether or not to accept jurisdiction and would be obliged to do so.

The basic principle under the Recast Brussels Regulation is that where a defendant is domiciled in an EU Member State they must be sued in the courts of that Member State (4). The Regulation provides that the question of whether a defendant is domiciled in a Member State is a question of the domestic law of the relevant Member State, in this case English law. Under English law, the test for domicile is set out in the Civil Jurisdiction and Judgments Order 2001 (the "CJJO")(5). In summary, the test is whether the defendant:

1. is "resident" in the UK; and
2. has a "substantial connection" to the UK.

In his decision, Simon Berry QC (sitting as a Deputy High Court Judge) set out the following English law principles for determining whether an individual is resident in the UK for the purposes of the first limb of this test:

1. It is possible to be "resident" in multiple jurisdictions at the same time
2. It is possible to be "resident" in England for the purposes of jurisdiction even if it is not your *principal* place of residence
3. A person will be "resident" in England if it is "a settled or usual place of abode", meaning a place in relation to which they have "*s*ome degree of permanence or continuity".
4. . Residence is not to be judged as a "numbers game", but rather by reference to the quality and nature of the individual's visits to the jurisdiction.
5. It is a question of "fact and degree" as to whether a property is a residence for these purposes.
6. The court should take in to account any "settled pattern of the defendant's life" in relation to their presence in the jurisdiction.
7. If an individual visits a property in England for not inconsiderable periods of time in order to visit their spouse and children, who are themselves resident in that property, it is liable to be treated as their family home or their home when in England. This will support a conclusion that England is a "settled or usual place of abode", and therefore that they are resident in England for the purposes of jurisdiction.

In this case, it was held that Mr Povarenkin was resident in England despite spending the vast majority of his time in Russia (his principal place of residence and work) and other jurisdictions, having no business interests in England, and it being unclear as to whether he held any assets or property in his own name in England.

Simon Berry QC reached this conclusion primarily on the basis that Mr Povarenkin's wife and children were resident in England for the majority of the time, that Mr Povarenkin regularly visited England solely in order to visit and spend time with his wife and children, and that therefore the property in England in Mrs Povarenkin's name was "the or a family home". The judge further declined to overrule the CJJO presumption that a person who has been resident in England for the purposes of the first limb of the test for the past three months has a substantial connection to the UK for the purposes of the second limb of the test.

This decision clearly demonstrates that individuals cannot avoid being treated as resident in England, and therefore subject to its jurisdiction, by limiting the amount of assets which they own and the time that they spend in the jurisdiction. Rather, the courts will look at the nature of their relationship and connection with England when determining residency and, by extension, jurisdiction.

This suggests that it will be difficult for defendants to avoid being sued in England simply by limiting their financial and physical presence in the jurisdiction. If they truly wish to avoid such an occurrence, if there is a contract in question, they would instead be advised to include appropriate provision in such contract.

SABBAGH V KHOURY & OTHERS

Meanwhile, in *Sabbagh*, the claimant sought to assert English court jurisdiction over eight individual and corporate defendants domiciled in EU and Lugano Convention states (specifically Greece and Switzerland) under Article 6(1) of the 2001 Brussels Regulation, now Article 8(1) of the Recast Brussels Regulation (collectively, the "Brussels Regulations"),(6) and the Lugano Convention(7).

As set out above, the usual position under the Brussel Regulations and Lugano Convention is that a defendant must be sued in the jurisdiction in which they are domiciled. However, the abovementioned Articles vary this position so that a defendant may be sued in the courts of a place other than their country of domicile if:

1. they are "one of a number of defendants";
2. one or more of the other defendants is domiciled in the alternative jurisdiction; and
3. "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".

This means that defendants domiciled outside of the English courts' jurisdiction can be brought within it if the claims against them are sufficiently closely related to claims against an "anchor" defendant that is domiciled in England and Wales.

There is a similar principle in English law in relation to defendants domiciled in jurisdictions outside of the EU or Lugano Convention. However, it is long-settled that in such cases the English courts will not allow defendants to be brought in to the jurisdiction if the claim against the "anchor" defendant is without merit.

In *Sabbagh*, the Court of Appeal considered whether a similar "merits test" also applies to decisions on jurisdiction under the Brussels Regulations and Lugano Convention. Ultimately, the majority decision was that it does, although their decision on this point did not affect the outcome of the appeal. However, Gloster LJ gave a detailed and compelling dissenting judgment against such a "merits test".

In Gloster LJ's view, European case law makes clear that the merits of the claim against the "anchor" defendant are of no relevance. The only restriction is that the courts' jurisdiction "could not be invoked where the sole purpose of bringing a claim against the anchor defendant was to remove the non-anchor defendants from the courts of their member state(s) of domicile". Gloster LJ termed this "fraudulent abuse" of the provisions in Articles 6(1).

In other words, provided the claim against the anchor defendant is brought in good faith, it should not matter that there is no legal merit to it. This would be a significant change of position, as it would allow claims to be brought against defendants outside of the English jurisdiction even where the claim against the "anchor" defendant is so weak as to be struck out. This would substantially increase the possibility of bringing claims against EU and Lugano state-domiciled defendants within the English jurisdiction.

While everything the Court of Appeal said on this point, including Gloster LJ's judgment, was merely *obiter* commentary, and has no legal effect, if the case is appealed, the Supreme Court may choose to adopt her approach. Alternatively, her reasoning may give future claimants ammunition for seeking to have the matter reconsidered by the English courts. In any event, it suggests a possibility that the English courts could further open the door to claims against defendants who would otherwise be outside of their jurisdiction.

CONCLUSION

Taken in combination, these cases, along with decisions such as *Owusu v Jackson*, show that it is becoming increasingly difficult for individuals to avoid or challenge the jurisdiction of the English courts if there is real connection between them, or those related to them, and the claims against them, to the jurisdiction.

The law is still developing in this area, and in particular it remains to be seen whether the Supreme Court will have the opportunity to consider the decision in *Sabbagh,* and Gloster LJ's comments in it, further. It is also highly fact-dependant, and subtle differences in circumstances may significantly affect the legal position.

However, prospective litigants who wish to make use of the English courts to resolve disputes with parties connected to England can be optimistic about their prospects of being able to do so, even in the face of efforts by defendants to remove or insulate themselves from the English jurisdiction.

This article was written by Andrew Savage, former Head of litigation and Nick Payne, a former associate. Both have left the firm.

1 [2017] EWHC 1968 (Comm).

2 [2017] EWCA Civ 1120.

3 [2005] QB 801.

4 This is also the position under the Lugano Convention. As is discussed below, this principle is subject to some exceptions. However, no such exceptions applied in this case.

5 SI 2001/3929.

6 The Recast Brussels Regulation determines the jurisdiction of the courts of EU Member States in relation to defendants domiciled in other Member States.

7 The Lugano Convention determines the jurisdiction of the courts of the signatory states in relation to defendants domiciled in other signatory states. In relation to the English courts, the Lugano Convention governs their jurisdiction, as the courts of an EU Member State, in relation to defendants domiciled in Switzerland, Iceland, and Norway.