

Conspiracy & proper pleading; Rome II and place of damage (MX1 Ltd & Anr v Farahzad)

14/05/2018

Dispute Resolution analysis: Mr Justice Marcus Smith (in the Chancery Division) struck out claims for lawful and unlawful means conspiracy by reason of their defective pleading and dismissed part of the application dependent on Rome II, Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. As to conspiracy, he held that fundamental components of the causes of action in both lawful and unlawful means conspiracy were either deficiently pleaded, or not pleaded at all. As to Rome II, he found that the applicable law under Rome II, Regulation (EC) 864/2007, Article 4(1) does not have to be that of the place where the damage ‘predominantly’ occurs. Instead, when damage has occurred across several jurisdictions, there will be severable applicable laws. Written by Matthew Bradley, barrister at 4 New Square Chambers.

MX1 Ltd (a company incorporated in Israel) and another v Farahzad [\[2018\] EWHC 1041 \(Ch\)](#)

What are the practical implications of this case?

Conspiracy

This judgment is the latest in a recent line highlighting the importance of careful drafting when pleading claims in conspiracy. Keen attention must be given to ensuring that a claimant’s statement of case pleads out all relevant and distinctive elements of the causes of action in lawful and unlawful means conspiracy—expressly, clearly and cleanly. The decision sits next to those of (the then) Mr Justice Leggatt in *Tchenguiz & Ors v Grant Thornton LLP & Ors* [\[2015\] EWHC 405 \(Comm\)](#), [\[2015\] 1 All ER \(Comm\) 961](#) and of HHJ Waksman QC in *Elite Property Holdings Ltd v Barclays Bank Plc* [\[2017\] EWHC 2030 \(QB\)](#) as providing salutary guidance in this area.

- lawful means conspiracy: a claimant must properly plead out that (i) the sole or predominant purpose of the conspiracy was to cause damage to the defendants (ii) that such intention reflected the subjective state of mind of the alleged conspirators and (iii) that all alleged conspirators shared in this intention
- unlawful means conspiracy: where the conspiracy alleged hinges on the breach of an obligation (here, breach of confidence), particulars need to be given as to how the relevant obligation is said to have been breached. Absent that much, the pleading will not even get off the ground

Rome II

In its application to Rome II, [Regulation \(EC\) 864/2007, Article 4\(1\)](#), the decision grapples directly with a question tangentially addressed (but left unresolved) in *Hillside (New Media) Ltd v Baasland* [\[2010\] EWHC 3336 \(Comm\)](#). Namely, for English law to apply, must a claimant do more than demonstrate that some irreversible damage occurred in England and Wales, and go further by showing that England and Wales is where all damage flowing from the wrongful event ‘predominantly occurred’? The judge answered that question in the negative, both as a matter of construction of Rome II, [Regulation \(EC\) 864/2007, Article 4\(1\)](#) and by reference to the Explanatory Memorandum. It suffices to show that some damage occurred in England for English law to apply to the claim for that particular damage. The flipside of this finding is that, where damage may have occurred across several jurisdictions, there may be severable applicable laws relevant to the various claims for damage.

What was the background?

The claimants were companies in the same group. MX1 is in business in content management delivery and digital media services, the second claimant is a communications satellite owner and operator.

Between 13 January 2017 and 13 March 2018 some 57 tweets were published by a Twitter account under the name ‘@MX1 Leaker’ making various allegations of bribery and corruption against MX1.

Mr Farahzad, a journalist by profession who had no apparent prior relationship with the claimant companies, admitted being the owner and operator of the ‘@MX1 Leaker’ Twitter account.

The claimants sought to sue him in conspiracy, both lawful and unlawful. They alleged that he could not, in publishing the information contained in the Tweets, have acted alone—not least because various of the Tweets contained allegedly

confidential information. They inferred that he must have acted in combination with others. They identified three former employees, with whom MX1 was already engaged in litigation, as the likely co-conspirators.

MX1 initially sought Norwich Pharmacal orders against Mr Farahzad. That application was met with a strike out/summary judgment application by Mr Farahzad. In the event, MX1 did not pursue its Norwich Pharmacal application. However, Mr Farahzad pursued his application to the end. That application was advanced on two essential bases:

- that the claimants' claims in conspiracy were defectively pleaded, and
- that, to the extent that the claimants or either of them had suffered loss or damage as a result of the conspiracy.

The place of that loss or damage was not England, such that English law was not the applicable law under Rome II. Instead, it was Israeli law, which did not recognise lawful means conspiracy as a cause of action

This second argument, as it survived, proceeded on the essential basis that, while MX1 could show that it had suffered losses investigating Mr Farahzad's alleged wrongdoing to the tune of £100k in England, the bulk of the loss which it was likely to have suffered lay elsewhere (eg in Israel).

What did the court decide?

Conspiracy

The court largely upheld the strike out application, insofar as it relied on the defective nature of MX1's pleading. It allowed MX1 one further opportunity to improve on its pleading of lawful means conspiracy, by way of a last chance to make an amendment. It allowed no such opportunity in respect of the unlawful means conspiracy claim, in respect of which MX1 effectively conceded the strike out application.

Key features of a lawful means conspiracy claim are that: (i) the sole or predominant purpose of the con-spiracy must be to cause damage to the defendants, (ii) that purpose must characterise the subjective state of mind of the alleged conspirators, and (iii) all alleged conspirators must share in this intention. All of those matters need to be clearly and distinctly pleaded. MX1's Particulars of Claim failed to achieve those ends and, as they stood at the date of the application, they were susceptible to being struck out.

The breed of unlawfulness relied upon in the unlawful means conspiracy claim was breach confidence. The necessary starting point for that claim was therefore to assert that the information contained in the Tweets was confidential in nature and that, by sharing the information through the Tweets, that confidence had been breached. These aspects of the pleading were manifestly deficient. How the obligation of confidence was said to arise went entirely unparticularised. For this basic reason, the claim had to be struck out.

Rome II

As to Mr Farahzad's reliance on Rome II, the court explored at some length whether or not the £100k loss suffered in England met the necessary requirement of being 'irreversible'. Having concluded against Mr Farahzad that it did (at para [40]), Mr Justice Marcus Smith then turned to the question of whether or not, having demonstrated some irreversible loss in England, MX1 further had to demonstrate that this loss was the 'predominant' loss suffered by it as a result of Mr Farahzad's alleged wrongdoing. While recognising that Mr Farahzad enjoyed a strong argument for saying that the £100k was not MX1's predominant loss, the court nonetheless held that MX1 was under no obligation to show that it was.

In words likely to be of broad application, the court held:

'44. In my judgment, the applicable law pursuant to Article 4(1) is not the place where the damage predominantly occurs. That is not what the Article says. Article 4(1) refers to "the law of the country in which the damage occurs". The natural reading is that where damage occurs across several jurisdictions, there will be several applicable laws. This is, of course, also consistent with the Explanatory Memorandum.

45. What is more, this construction of Article 4(1) is the same as the construction of the similar (jurisdictional) rule in the Brussels regime: see paragraph 40(4) above. If the "place where the damage occurred" is relied upon as the jurisdictional base for a claim, then the court's jurisdiction is limited in respect of the damage actually suffered in that territory. In short, precisely the same fragmentation occurs.'

Case details

- Court: High Court, Chancery Division
- Judge: Mr Justice Marcus Smith
- Date of judgment: 8 May 2018

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