Jurisdiction:

International claims, Brexit, and the pitfalls for professionals

Paul Mitchell QC

Matthew Bradley

February 2019

4 NEW SQUARE
LINCOLN'S INN
LONDON WC2A 3RJ
WWW.4NEWSQUARE.COM

T: +44 (0) 207 822 2000
F: +44 (0) 207 822 2001
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM

Paul Mitchell QC

Call: 1999 Silk: 2016

"A brilliant advocate. Very tenacious but clear thinking… He gives very robust advice and is prepared to think out of the box." – Chambers & Partners

"A very good advocate, who is able to hammer home the strong points of the case" – Legal 500

Paul is a commercial litigator with particular experience in claims involving the liability of professionals, particularly lawyers, accountants, tax advisers, fund managers and surveyors; disputes regarding professional indemnity insurance; claims arising from the economic torts, notably malicious prosecution of earlier claims and conspiracy; and claims arising from and in connection with the conduct of effect generally of earlier litigation (e.g., wasted costs applications, loss of chance claims).

Paul acts in a broad variety of general commercial claims, frequently where there some problem has arisen, either from the facts of the case or the way it is being handled, that needs a creative solution to break a deadlock. He appears regularly before arbitral tribunals and has recently begun to work in investor-state disputes. He speaks fluent Italian, Russian, French, Spanish and Farsi.

Matthew Bradley

Call: 2004

"He is an eloquent advocate and is fierce in cross examination." – Legal 500

"Stands out for his easy-going approach, efficient turnaround of quality work and excellent sense of humour." "He impresses with his enthusiasm and willingness to go the extra mile." – Chambers & Partners

Matthew is a versatile commercial practitioner with rankings in the main legal directories as a leading junior in the fields of commercial litigation, company law, product liability and employment law. His extensive experience as sole trial advocate marks him out from other commercial juniors of his level of call, and he often finds himself against more senior opponents in commercial trials and arbitrations. He has significant experience of conspiracy and economic tort claims and acted for the successful claimant in the widely reported recent decision in *Palmer Birch v Lloyd & Anr* [2018] 4 WLR 164. He speaks French, German and Spanish and is at ease working within a team of lawyers in substantial disputes.

Matthew is experienced in professional liability and negligence claims, most particularly those involving solicitors, independent financial advisors and insurance brokers.

JURISDICTION:

INTERNATIONAL CLAIMS, BREXIT, AND THE PITFALLS FOR PROFESSIONALS

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1. This paper is intended to serve in the first instance as an aide-memoire to supplement the talk, and in particular to summarise the key cases discussed in it. Secondly, it discusses in sketch form some of the potential areas of exposure, for lawyers in particular, in the event of a disorderly Brexit.

A. Intra-UK Decision

2. ***Bateman v Birchall Blackburn LLP*** **[2014] NIQB 112**

Summary Facts:

i. The three Claimants ("**Cs**"), living in Northern Ireland, instructed a firm of solicitors based in Manchester, ("**BB**"), in relation to a prospective purchase of properties in the Philippines. BB's website indicated that they offered their services across the whole of the UK.

ii. BB's retainer letter contained a jurisdiction clause, which indicated that the Preston County Court had jurisdiction to hear any claims in respect of the engagement.

iii. The Cs sued BB in Northern Ireland, alleging that BB had acted negligently by failing to disclose a complication in acquiring title, which meant that the payments they had made on their proposed property purchases were lost.

iv. BB applied for a stay on the N.I. proceedings, relying on the jurisdiction clause.

Summary of Decision:

i. The Judge refused the stay. The matter fell to be determined by reference to Schedule 4 to the Civil Jurisdiction and Judgments Act ("**CJJA**"), which sets out the rules allocating jurisdiction within the UK. The Cs were consumers, individuals acting for purposes outside of their trade or profession within Rule 7(1) of Schedule 4 to the CJJA. Under Rule 8(1), a

consumer enjoys a right to sue either in his/her place of domicile, or in the defendant's domicile, if a defendant has been pursuing or directing commercial activities to the consumer's country of domicile and the contract falls within the scope of such activities. BB's website indicated that it offered its service to the "UK", and so it did direct its activities[1] to Northern Ireland.

ii. The Judge held that, having regard to (i) the consumer's choice as to where to sue (ii) the non-exclusive nature of the jurisdiction clause and (iii) the overall balance of convenience, it was appropriate that the case should proceed in the Northern Irish court.

Critique of Decision:

i. The Judge got to the right result, but probably by the wrong route. Having held that the Cs were consumers and that BB directed commercial activities which fell within the scope of their contracts with Cs to their domicile in Northern Ireland, the correct approach was that the Cs' right to choose to sue in their court of domicile was unassailable. It trumped the existence of a jurisdiction clause, and questions as to where the case could be most conveniently tried were also irrelevant.

B. Intra-EU Decision

3. ***Universal Music International Holding v Schilling & Ors*** **[2016] QB 967**

Summary Facts:

i. Universal Music International Holding ("**Universal**") was a Dutch music company. The Defendants were lawyers who worked for a Czech law firm, Burns Schwartz International ("**BSI**").

ii. Universal agreed to purchase a Czech music company, ("**B&M**"), and BSI acted for Universal in drafting the relevant agreements. The first phase of the share purchase was to complete in 1998, the remaining shares were to be purchased by way of an option agreement in 2003.

iii. When Universal came to exercise the option in 2003, it discovered that an error in the drafting of the share purchase agreement entailed that it was obliged to pay a much

[1] See *Oak Leaf Conservatories Ltd v Weir* [2013] EWHC 3197 (TCC) (at para 16), for a similar approach.

higher price than it had anticipated paying. The price should have been c.€314,000. As drafted, the sellers said they were due c.€31m.

iv. The matter went before an arbitration board in the Czech Republic, and a settlement was eventually agreed, under which Universal paid c.€2.6 million for the remaining shares in B&M, to a B&M bank account in the Czech Republic.

v. Universal pursued BSI for the overpayment and costs in the Dutch courts, not those of the Czech Republic.

vi. Their case was that, because the money was paid from a Dutch bank account, the damage (for tort, not contract) had arisen in the Netherlands, not the Czech Republic. Whilst the general rule under the Brussels regime is that a defendant is entitled to be sued in its home court, that rule can be derogated from in a tort claim, where the relevant "harmful event" takes place elsewhere. Universal' argument was that the payment out from a Dutch bank constituted the relevant harmful event.

Summary of Decision:

i. The CJEU dismissed that argument on the following essential basis:

   a. The relevant contract giving rise to the claim was made in the Czech Republic.

   b. The unintended contractual obligation caused by the drafting error came about because of an event (namely, the drafting) which took place in the Czech Republic.

   c. The agreed settlement by which the loss crystallised occurred before an arbitration board in the Czech Republic.

   d. In those circumstances, the damage, or the "*harmful event*", occurred in the Czech Republic.

   e. The fact that the money was routed through a Dutch bank account, which in any event was something of a fortuity, was not determinative. The words "*place where the harmful event occurred*" should not be construed so extensively as to encompass any place where the adverse consequences of an event, which has already caused damage actually arising elsewhere, can be felt.

f. The real events which gave rise to the loss, even if it ultimately eventuated in the Netherlands, happened in the Czech Republic.

C. Extra-EU Decisions

4. *UCP v Nectrus* [2018] 1 WLR 3409

Summary Facts:

i. The Defendant investment management firm ("**Nectrus**") was based in a non-EU member state, namely the Isle of Man. Nectrus was sued in England by an English company, ("**UCP**"), for breach of an investment management agreement between the parties. Nectrus had already started proceedings in the Isle of Man, when UCP started its claim in England.

ii. Nectrus challenged the English Court's jurisdiction, on the basis of common law principles of *non forum conveniens* and *lis alibi pendens*.

iii. UCP said that it was entitled as of right to sue Nectrus, by virtue of a non-exclusive jurisdiction clause in the investment management agreement. On its case, the fact that the clause was "non-exclusive" in effect was of no odds for the purposes of the Brussels Recast Regulation[2], which governed the case in hand. Under Art. 25 of that Regulation, a jurisdiction agreement between commercial parties will be upheld in accordance with its terms, and it is irrelevant whether the clause is drafted as an "exclusive" or "non-exclusive" jurisdiction clause.

Summary of Decision:

i. Cockerill J dismissed the challenge on the following essential bases:

a. The Brussels Recast Regulation governed the allocation of jurisdiction, where an English claimant sought to sue a non-EU defendant.

b. The effect of Art. 25 of the Brussels Recast Regulation is that a jurisdiction agreement between parties who are not consumers will be upheld on its terms. The drafting of

[2] EC Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

the clause as an "exclusive" or "non-exclusive" jurisdiction clause has no bearing on the analysis.

c. Even if the court did retain a discretion to reject jurisdiction on *forum non conviens* grounds, the existence of the non-exclusive jurisdiction clause conferring jurisdiction on England weighed powerfully in favour of the argument that England was the most appropriate forum in any event.

5. ***Hamilton-Smith v CMS Cameron McKenna*** **[2016] EWHC 1115**

Summary Facts:

i. The claimants were two English licensed Insolvency Practitioners ("**the Cs**"). The Defendant was an English law firm ("**CMS**").

ii. The Cs were appointed as joint "Receiver-Managers" of Stanford International Bank Limited, a bank incorporated in Antigua ("**the Bank**"). Shortly afterwards, the Cs were then appointed as joint liquidators of the Bank. The Bank had been used to effect a large-scale Ponzi fraud on investors.

iii. The Cs were eventually removed as the Bank's liquidators. The Bank then brought a claim against them in the Antiguan High Court against them in relation to their conduct of its affairs.

iv. The Cs denied wrongdoing and contended that they had relied on CMS's advice throughout. The Cs brought claims in both the English and the Antiguan High Court, seeking an indemnity from CMS. They did so out of caution and to avoid any limitation arguments, but their primary case before the English High Court was that the Antiguan High Court was the most appropriate forum for their claim for an indemnity.

v. CMS sought an anti-suit injunction, seeking to prevent the claim for an indemnity from continuing in the Antiguan court. The basis for bringing the anti-suit injunction was an exclusive jurisdiction clause, in favour of the English court.

vi. There was a dispute as to whether the relevant jurisdiction clause applied. That dispute turned on the capacity in which the Cs had contracted with CMS.

vii. The Cs submitted that there were effectively two retainers, one for the period when they were Receiver-Managers, the second for the period when they were liquidators. A retainer letter only existed for the first appointment, as Receiver-Managers. That was the only document which incorporated general terms and conditions, which themselves contained the relevant exclusive jurisdiction clause in favour of the courts of England and Wales.

viii. On the Cs' case, the absence of any similar retainer letter for their appointment as liquidators meant that there was no exclusive jurisdiction clause governing the services provided by CMS for that aspect of the Cs' appointment.

Summary of Decision:

i. Nugee J agreed that there were two separate retainers and that the only existing retainer letter was addressed to the Cs' appointment as Receiver-Managers and to the work to be done for them in that capacity.

ii. However, he still did not accept the Cs' argument that the exclusive jurisdiction clause did not extend to the second retainer, concerning their second appointment as liquidators. He granted the anti-suit injunction. His decision rested on two essential matters:

   a. First, both the retainer letter and the general terms and conditions expressly contemplated that there could be future engagements with CMS on separate matters. Having done so, they made clear that, in the event of such future engagements, the general terms and conditions (containing the exclusive jurisdiction clause) would apply. For example, a clause in the terms and conditions providd that they would apply to: *"the services which we provide to you as our client in relation to any matter on which you retain us, unless otherwise agreed.*

   b. Second, the references in the retainer letter to "You" meant, on a natural reading of that word, a reference to the two individual claimants as natural persons. It was not confined to a narrow reference to them as persons acting in the capacity of receiver-managers.

D. Disorderly Brexit: Lawyer Exposure to New Risks

6. As a general point, it is a fair observation that lawyers are used to making certain assumptions about matters that are fundamental; but in relation to which the treaties establishing the EU in fact play a relevant role. A prime example follows.

    a. Limited liability companies. A company is a *persona ficta* – it exists only as a convenient way of describing compendiously the effect of legal rules which limit the liability of the owners and officers of a particular business.

    b. The Treaty on the Functioning of the European Union (= Treaty of Rome, revised in 2007), Art 54:

        > *"Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. "*

    c. On the face of it, absent this article, companies or firms incorporated in the UK are not entitled to be treated as natural persons, i.e., once the UK is no longer party to the Treaty of Rome, the obligation to recognise UK company law is removed.

    d. Far-fetched? Not according to the European Commission's notice to "stakeholders" regarding Brexit and company law dated 21 November 2017.

7. Commercial lawyers

    a. The Brussels Recast Regulation gives certainty about jurisdiction and enforcement of judgments.

    b. As to <u>jurisdiction</u> in the event of no deal: the "*first in time*" rules go and we return to the former practice of the English and continental courts, applying principles regarding *forum non conveniens* and *lis alibi pendens*.

    c. As to <u>enforcement</u> in the event of no deal: query whether a judgment that has been certified by the English court pursuant to the procedure contained in the Brussels Recast Regulation would remain acceptable in another Member state after Brexit.

The European Commission suggests not: see its notice to stakeholders dated 18 January 2019.

d. The Commission further suggests that enforcement proceedings already on foot on exit day will in any event collapse. Yikes.

8. Family lawyers:

a. Where the individuals in a divorcing couple come from two member states, the current position, in summary, is that:

i. Jurisdiction regarding divorce proceedings and children issues is allocated by Brussels IIa (Reg 2201/ 2003) (a recast version is expected in 2019, and the UK is currently signed up to accept it when it comes into force);

ii. Jurisdiction regarding maintenance obligations is established by the Maintenance Regulation (Reg 4/2009).

b. If there is no deal, then there are fallback options under the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children; and the 2007 Hague Convention on Maintenance (as yet not ratified by the UK, save via ratification by the EU).

c. But in the event of no deal, even with the 1996 and 2007 Hague Conventions, the "first in time" rules provided by the Regulations would go; leading to the recreation of the previous system whereby, if proceedings are issued in England and elsewhere, the English court will assess which is the more convenient forum. That is a far more fact-sensitive and correspondingly expensive exercise.

9. Potential areas of negligence of lawyers in this environment:

a. Failing to advise a commercial client that inserting an English jurisdiction clause into a contract with an EU counterparty may result in far more expensive dispute resolution and enforcement.

b. Failing to proceed with despatch to start any proceedings involving an EU counterparty, whether commercial or family.

c. Failing to proceed with despatch to enforce judgments already obtained.

10. It may be wondered how, if MPs do not know whether they are coming or going on Brexit, lawyers can be expected to do so. The limits of that defence may soon be tested.

Paul Mitchell QC and Matthew Bradley

4 New Square Chambers

Disclaimer: *this handout is not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.*

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Intra-UK Claims – Civil Jurisdiction & Judgments Act 1982

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Belfast

Philippines

EU Claims – Brussels Regime

EU Claims – Brussels Regime

Pammer v Reederei Karl Schluter [2012] All ER (EC) 34

- Was the activity *directed to* the consumer's domicile?
  - The international nature of the activity
  - Use of a language or a currency other than the language or currency generally used in member state in which trader was established
  - Telephone numbers with an international code
  - Expenditure on internet referencing service to facilitate access to professional service providers' site or that of its intermediary by consumers domiciled in other states
  - Use of a top-level domain name other than that of the member state in which the trader was established
  - Mention of an international clientele composed of customers domiciled in various member states

EU Claims – Brussels Regime

EU Claims – Brussels Regime

Non-EU Claims

Non-Eu Claims

Brexit

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4 NEW SQUARE LINCOLN'S INN
LONDON WC2A 3RJ

WWW.4NEWSQUARE.COM

T: +44 20 7822 2000
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM