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Must my case be "relatively" or "absolutely" plausible? English Commercial Court offers guidance on approach to applications for permission to serve out of the jurisdiction

Introduction

The English Commercial Court recently considered the approach to be adopted in assessing whether permission to serve proceedings out of the jurisdiction should be granted and, more specifically, what is required to get within one of the "jurisdictional gateways", particularly in light of recent Court of Appeal and Supreme Court judgments in this area. What tests must the claimants satisfy in order to satisfy the court that it should grant permission to serve out, and what factors will the court consider?

Background

Increasingly, disputes in the banking and financial services sector are not limited solely to litigants domiciled within the United Kingdom. A putative claimant will often wish, or need, to pursue a counterparty based outside of the United Kingdom. If the English courts do not have jurisdiction to hear the claim by reason of the Brussels/Lugano Regime, the Civil Jurisdiction and Judgments Act 1982 or the Hague Convention, and there is no alternative way of serving within the jurisdiction (for example on the overseas principal's agent), serving a defendant outside of the jurisdiction to commence proceedings will require the permission of the court (under CPR 6, Section IV). In order to obtain that permission, the claimant must satisfy the court that:

1. there is a serious issue to be tried on the merits in relation to each alleged cause of action;
2. there is a "good arguable case" that each cause of action falls within one or more of the so-called "jurisdictional gateways"[1]; and
3. in all the circumstances, the court ought to exercise its discretion to permit service out of the jurisdiction, which it will only do if it is satisfied that England is the proper place to bring the claim.[2]

The jurisdictional gateways are in place to enable the court to exercise jurisdiction over "foreign" defendants, provided that the subject matter of the dispute has a sufficient connection with England. The 20 gateways include (amongst others) the following:

1. Where a claim is made for a remedy against a person domiciled within the jurisdiction;
2. Where a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction;
3. Where a claim is made in respect of a contract where the contract (i) was made in the jurisdiction, (ii) was made by or through an agent trading or residing in the jurisdiction; (iii) is governed by English law; or (iv) contains a term to the effect that the parties submit to the jurisdiction of the English courts; or
4. In the case of claims in tort, where damage was sustained, or will be sustained, within the jurisdiction, or damage which has been or will be sustained results from an act committed or likely to be committed within the jurisdiction.

1 Set out in CPR Practice Direction 6B

2 These tests were restated by Lord Collins in the Privy Council in *AK Investments v Kyrgiz Mobil* [2011] UKPC 7, to which Daniel Toledano QC referred in *Brazhanov v Fosman*.

The "good arguable case" test, and its descendant known as the "Canada Trust gloss", has received significant judicial attention, most recently from the Court of Appeal and the Supreme Court in *Brownlie v Four Seasons*[3].

According to the Canada Trust gloss, based on Waller LJ's judgment in *Canada Trust v Stolzenberg (No 2)*[4], the good arguable case test "*reflects in that context that one side has a much better argument on the material available*". In *Brownlie*, the Court of Appeal noted that this "*much better argument*" test in Canada Trust was concerned with "*relative plausibility*", but that there was also an "*absolute standard to be met*", which required the claimant's argument to have "*some substance to it*". In other words, the arguments must not merely be plausible relative to the counter-arguments, they must also be plausible in the absolute sense, standing on their own.

The majority in the Supreme Court, however, very recently (also in *Brownlie*) preferred the view that there should be no "gloss" applied to the good arguable test case, and offered the clarification that the "*much better argument on the material available*" test was not a "*reversion to the civil burden of proof*". In fact, what it means is that (i) the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; and (ii) if there is an issue of fact about whether the gateway applies, the court should take a view on the material available "if it can reasonably do so". If the nature of the issues and the limitations of the material available are such that no reliable assessment can be made, there will be a "*good arguable case*" for the application of the gateway if there is a "plausible" evidential basis for it.

The Bazhanov v Fosman case

It was in the context of the recent Court of Appeal decision in *Brownlie* that Daniel Toledano QC, sitting as a Deputy High Court Judge, handed down his decision in *Bazhanov v Fosman*[5] (the Supreme Court's judgment in *Brownlie* was handed down as he was preparing his judgment). One of the issues before the court in *Bazhanov* was whether the claimants had satisfied the requisite test of having a good arguable case that the causes of action fell within one or more of the jurisdictional gateways such that permission to serve the defendants out of the jurisdiction should be granted.

The case concerned the Russian businessman and politician, Alexeh Bazhanov, who had fled Russia, and whose business had been placed into an insolvency process. Mr Bazhanov had sought to acquire the assets of the business from the insolvency through his friend, Arkadiy Fosman. The proposal had been discussed at a number of meetings between Messrs Bazhanov and Fosman, the first two of which had taken place in London, and the third of which had taken place in Moscow. Mr Bazhanov claimed that he and Mr Fosman had agreed various aspects of the arrangement at the three meetings, as follows:

1. They had orally agreed the financial aspects of the deal, their respective shares, and that English law and jurisdiction should govern the arrangement, at the first meeting in London.
2. At the second meeting, also in London, Mr Fosman had agreed to buy out Mr Bazhanov's shares for a consideration of approximately US$10 – 15 million, to be calculated on the basis of an "approximate formula". The day after the second meeting, they had signed a 10-clause document setting out the "agreed" terms.
3. Finally, they had agreed at the third meeting, this time in Russia, that Mr Fosman would not in fact buy out Mr Bazhanov's interest. The terms of the discussion were typed up and signed by both Mr Fosman and Mr Bazhanov.

3 *Brownlie v Four Seasons Holdings Incorporated* [2015] EWCA Civ 665 and *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80, [2017] All ER (D) 102 (Dec)

4 *Canada Trust Co v Stolzenberg* (No 2) [1998] 1 WLR 547

5 *Alexhey Bazhanov and Morrins Commercial Inc v Arkadiy Fosman, Olga Fosman and Akvilon LLC* [2017] EWHC 3404 (Comm)

Mr Fosman denied that he and Mr Bazhanov had concluded any agreement as to (or indeed that there had been any discussion regarding) jurisdiction or governing law, or indeed that any of the three alleged agreements constituted contracts. Was there, then, a good arguable case as to the existence of the contract or contracts in question, and the purported jurisdictional agreement in question?

Having considered the evidence of both Mr Bazhanov (whose case, the court noted, had "*evolved to a significant extent*" throughout the life of the litigation) and Mr Fosman (in whose evidence the court found "*errors that were significant and difficult to explain away*"), the court held that the claimants were unable to show a good arguable case in respect of any of the three alleged agreements, even if the Canada Trust gloss did not apply; the claimants were "*unable to satisfy even the absolute standard to be met, let alone any relative plausibility test*". It was, said the court, "*inherently implausible*" that any oral contract was concluded at the first meeting, given that no significant terms appeared to have been agreed. With regard to the second meeting, the document setting out the terms purportedly agreed at that meeting was incomprehensible in parts and lacked certainty, even with regard to the amount to be paid. The note of the third meeting in Russia was similarly uncertain and, in the court's view, expressed mere intent.

Having regard to this lack of plausibility, the court held that the claimants had not satisfied the good arguable test case that the contractual claims fell within a jurisdictional gateway, and permission to serve out of the jurisdiction was therefore denied. In any event, the court found that England was not the proper place for the dispute to be heard.

Key points to note

Bazhanov is an early example of the application of the "good arguable test" case in the light of recent Court of Appeal and Supreme Court decisions in that area. In light of *Brownlie*, this means that there must be a "*plausible evidential basis*" on the basis of the (usually limited) material available at the interlocutory stage. This is known as the "absolute plausibility test". Interestingly, the court in *Bazhanov* suggested that this constitutes a lower bar than the "relative plausibility" test which it replaces.

For parties seeking permission to serve proceedings out of the jurisdiction, *Bazhanov* provides useful guidance as to how the court will analyse plausibility and probability, particularly in the context of alleged contract formation. Perhaps unsurprisingly, where significant contractual terms are left "up in the air"; where negotiations were clearly continuing; and where there was no written record of agreement, the court was unpersuaded that there was a good arguable case that contracts had been made.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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