



Neutral Citation Number: [2023] EWHC 2606 (Comm)

Case No: CL-2023-000222

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Date: 19/10/2023

Before :

MR JUSTICE FOXTON

Between :

HADI KALO

Claimant

– and –

BANKMED SAL

Defendant

Catherine Gibaud KC and Clarissa Jones (instructed by Dechert LLP) for the Defendant
James Cutress KC and Daniel Carall-Green (instructed by Rosenblatt (a trading name of
RBG Legal Services Limited)) for the Claimant

Hearing dates: 12 October 2023
Draft Judgment Circulated: 13 October 2023

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 19 October 2023 at 10:00am.

The Honourable Mr Justice Foxton:

Introduction

1. This is the hearing of the Defendant's ("**the Bank's**") application for an order declaring that the Court does not have jurisdiction to determine the Claimant's ("**Mr Kalo's**") claim against it. The action is the latest in a series of actions in which claimants who are or claim to be domiciled in this jurisdiction sue Lebanese banks in respect of balances in accounts held with Lebanese branches, against the background of the ongoing Lebanese banking crisis.
2. In the present case, it is common ground that the terms on which Mr Kalo opened the account with the Bank were governed by the law of Lebanon, and were subject to an exclusive jurisdiction agreement in favour of the Lebanese courts. However, Mr Kalo contends that he is entitled to commence proceedings in this jurisdiction because his claim falls within the scope of s.15B of the Civil Jurisdiction and Judgments Act 1982 ("**the 1982 Act**") because he is a consumer domiciled in England, and because his claim relates to a "consumer contract" within the meaning of s.15E(1)(c)(ii), a provision which gives effect in the law of England and Wales to Articles 15 to 17 of the Brussels I Regulation Recast.
3. That argument involves a number of steps. While I understand the Bank to challenge some of them, it has taken its stance on its jurisdictional challenge on whether there is a good arguable case that Mr Kalo's contract with the Bank was a "consumer contract", and specifically whether the contract falls within the scope of commercial or professional activities which the Bank directed to England and Wales. I shall refer to this as the **Directed Activity** and the **Directed Activity Test**.
4. As the parties have not been slow to note, I delivered a judgment addressing a similar issue in a Lebanese banking dispute in *Khalifeh v Blom Bank SAL* [2021] EWHC 3399 (QB). In that case, the issue arose in the context of a dispute as to the law applicable to the account between the customer and the Bank, and in particular as to the application of Article 6(1)(b) of the Rome Convention (EC No 593/2008). That difference in legal context is not the only difference between the *Khalifeh* case and this case. The issue arose for final determination at a trial in *Khalifeh*, after I had heard evidence from employees of the bank and the claimant, and with the benefit of disclosure from the bank. As I noted at [110]:

"I have reached my conclusion in this case on the basis of the materials placed before me, obtained through disclosure and tested in cross-examination and I have reached a final determination on the balance of probabilities."

On that basis, I described the issue as "finely balanced", noting that "both sides have forceful points to make" ([109]), but I ultimately concluded that the Bank had not directed relevant activity to England and Wales ([109]).

5. By contrast, the present decision arises on a jurisdiction challenge, and the issue for me is whether there is a good arguable case that the Directed Activity Test is satisfied. I would note that that test was held to have been satisfied at the jurisdictional stage in *Bilal Khalifeh v Blom Bank SAL* [2020] EWHC 2427 (QB), even though the argument did not succeed at trial.

The good arguable case test

6. Neither party suggested that the approach to be taken to the application of the special regimes now enshrined in sections 15A to 15E of the 1982 Act differed from the principles generally applied when determining whether a claim satisfies one of the recognised heads of jurisdiction (or “gateways”). This involves applying the three-part test summarised by Green LJ in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2019] EWCA Civ 10, [73]-[80]:
- a. Limb (i) of the *Kaefer* formulation requires the court to ask if there is an evidential basis showing that the claimant has the better argument as to the application of the gateway, the burden of proof lying on the claimant as the party seeking to invoke the court’s jurisdiction. However the test is “context-specific and ‘flexible’”.
 - b. Limb (ii) explains how the court is to approach that task, in a context in which evidence may well be incomplete, there has been no disclosure, and witness evidence has not been tested by cross-examination. Those forensic limitations do not of themselves prevent the court reaching a view on the relative merits. The judge is required to approach the task pragmatically and by applying common sense – for example an evidential dispute may not affect the conclusion, however decided, and it will often be possible to reach a view on the basis of the documentary record, even if there is conflicting evidence.
 - c. Limb (iii) addresses the position where “the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument”, in which context it suffices that there is a “plausible (albeit contested) evidential basis” for the application of the gateway.
7. There was some debate between the parties as to the point at which limb (iii) cut in, the Bank, in particular, being keen to depict it as very much an option of last resort. On the face of things, the idea of the court being “unable to form a decided conclusion” on who has the better case on the evidence appears an improbable one – indeed, both sets of legal advisers are likely to have done exactly that. However, the evidence in some cases will be such that reaching a judicial decision on relative merit will be incompatible with the nature of the hearing, and the injunction not to conduct a mini trial. Further, the limitations of the material may be such that any decision on relative merit will lack the robustness which a judicial decision of this significance requires. Green LJ referred in his discussion of limb (iii) to Teare J’s decision in *Antoni Gramsci Shipping Corp v Reoletos Ltd & Ors* [2012] EWHC 1887 (Comm), [39] and [45], in which he referred to cases where there is “a conflict of evidence which cannot be resolved without appearing to conduct a pre-trial,” instancing “a

stark dispute between opposing witnesses” in a case where “to seek to judge who has the better of the argument on such evidence risks a pre-trial at the interlocutory stage.” Earlier in his judgment, Green LJ had cited Lord Sumption in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, where he described limb (iii) as applying where “no reliable assessment” can be made of relative merit.

The Directed Activity Test

8. There was broad agreement on the principles to be applied in determining whether the Directed Activity Test is satisfied, derived from decisions of the Court of Justice of the European Union (“**Court of Justice**”) as to the meaning of Article 15(3) of the Brussels Regulation Recast, and of courts from this jurisdiction:
 - a. “[T]he trader must have manifested its intention to establish commercial relations with consumers from one or more other member states, including that of the consumer’s domicile” (*Pammer v Reederei Karl Schluter GmbH & Co AG; Hotel Alpenhof GesmbH v Heller* Joined cases C-585/08 and C-144/09 [2011] 2 All ER (Comm) 888, [75]).
 - b. It must be “determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other member states, including the member state of that consumer’s domicile, in the sense that it was minded to conclude a contract with those consumers” (*Pammer*, [75]-[76] and [92]).
 - c. There is no requirement for the trader to undertake Directed Activity towards England and Wales “in a substantial way” (*Pammer*, [82]).
 - d. Clear expressions of such an intention on the part of the trader included (i) mentioning that it is offering its services or its goods in one or more member states designated by name and (ii) disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader’s site by consumers domiciled in various member states (*Pammer*, [81]) but a finding of Directed Activity was not dependent on such “patent” activity ([82]). Other evidence capable of establishing such an intention – “possibly in combination with one another” - included (i) the international nature of the activity at issue; (ii) mention of telephone numbers with the international code; (iii) use of a top-level domain name other than that of the member state in which the trader is established; and (iv) mention of an international clientele composed of customers domiciled in various member states, while in some (but not all) cases, the use of particular languages or currency could also constitute a relevant factor (*Pammer*, [82]-[84], [93]-[94]).
 - e. There is no requirement for a direct causal link to be shown between the Directed Activity and the particular contract with the consumer (Case C-218/12 *Emrek v*

Sabranovic [2014] I.L.Pr. 571), provided the contract falls in a more general sense within the scope of relevant activities of the professional of which those undertaken in the consumer's home country form part. However, the fact of causation will constitute evidence of Directed Activity: [32].

- f. Ultimately, the court must make “an overall assessment of the circumstances in which the consumer contract ... was concluded”: *Emrek*, [31].
9. The Court of Justice in *Pammer* suggested that it was unclear whether Article 15(1)(c) of the Brussels Regulation Recast requires the trader subjectively to intend to direct its business to the consumer's domicile ([63]). The prevailing view is that it is not necessary to show a subjective intent on the part of the trader to direct its activities to the consumer's place of domicile where that is the objective effect of its activities (see *Bitar v Banque Libano-Française SAL* [2021] EWHC 2787 (QB), [24]-[26] applying *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834, [165] and *Khalifeh*, [98]). However, as Kitchen LJ noted in *Merck*:

“But that is not to say that the actual intention of the website operator is irrelevant. If the foreign trader does intend to target its internet activity at consumers in the UK then it seems to me that this is a matter which the court may properly take into account. After all, a trader may be expected to have some understanding of the market it intends to penetrate and it may not be difficult to infer that this intention has been or is likely to be effective (see, by analogy, *Slazenger v Feltham* (1886) 6 RPC 531 at page 536, per Lindley LJ).”

10. There was some debate between the parties as to whether it was necessary to show that, to the extent that the Bank was engaged in international Directed Activity generally, the Bank was specifically targeting consumers in the United Kingdom as part of that activity. The application of that distinction to Directed Activity on a website which can be accessed internationally is not straightforward. However, and while the issue is not determinative of that application, if the relevant activity objectively manifests a willingness to contract with those who live in several states, including England and Wales, this should suffice for s.15E(1)(c)(ii) purposes.
11. Finally, I was referred to numerous further authorities in which the significance or importance, or lack thereof, of particular features of the facts in those cases was discussed, which it is not necessary to summarise.

Mr Kalo's case on the evidence

12. As is frequently the case in disputes of this kind, the matters relied upon ranged far and wide, as did the material deployed responsively. Some of that material was very much at the margins of what is helpful. However, Mr Kalo's core case can fairly be summarised as follows:

- a. At the relevant time, the Bank offered banking facilities to non-residents, and it had operated a Non-Resident Banking Center from 2008.
- b. The Bank's (English language) website home page had a "CONSUMER" button, which took you to a page with buttons for "SAVE", "BORROW", "CARDS" and "REACH".
- c. Through the "SAVE" button you were taken to a page with information about current accounts, and an "APPLY" button. The evidence was that pressing that button initiated a process to open an account (even if, as the Bank says, the conclusion of the contract could only take place at the Bank's offices in Lebanon).
- d. The "CONSUMER" page also had a "NON-RESIDENT BANKING CENTER" button. Clicking on the "SAVE" button on this page led to a page referring to the Non-Resident Banking Center stating "now you are able to interact with our experienced staff at the Non-Resident Banking Center" and, against the entry "Save: MedExpat – Lebanese Banking Expertise At your Service Worldwide", a button headed "APPLY."
- e. While there was no evidence specifically as to what happened if that button was pressed, the obvious inference was that it led to the initiation of a process for the non-resident to open an account (even if, as the Bank says, the conclusion of the contract required the non-resident to attend at the Bank's premises in Lebanon).
- f. Mr Kalo and his father, Mr Marwan Kalo, state in their evidence that Mr Kalo read and relied upon the Bank's website when deciding to open an account with the Bank in Lebanon.
- g. The Bank placed one or more advertisements in "Cedar Wings", the magazine for Middle East Airlines (the Lebanese national carrier), including for "MEDEXPAT non-resident banking." The advert stated, "Lebanese banking expertise at your service worldwide: Non-Resident Banking Services" and stated "benefit from the expatriate package offered to you with a wide range of products and services. It is designed to make your day-to-day banking easier and more convenient", with a Lebanese telephone number and a reference to the website. The magazine was available on flights between Lebanon and London for at least some period up to 2017.
- h. Mr Kalo says that he has a recollection of seeing the Bank's advertisements in "Cedar Wings".
- i. A LinkedIn page records that from July 2019 to July 2022, Najib Abou Merhi was "Head of International Retail" at the Bank. The same entry records that there were over 1,500 retail accounts held by expatriates with a total value of approximately US\$500m. Mr Merhi's responsibilities included "managing international business development to seek and attract potential new clients to meet a set target of 50MUSD yearly" and "directing an operational team of 20 to ensure that set target are met with

client satisfaction”. This evidence, which was not answered by the Bank, is supportive of a policy by the Bank to acquire expatriate retail clients, the operation of a significant department to manage such customers, and a target to increase their number.

- j. Mr Mohamad El Sardar, a former employee of the Bank between 2010 and 2020, and who worked in Lebanon and Iraq, gave evidence that the Bank undertook multiple marketing campaigns worldwide with a view to attracting overseas customers, including from the UK, particularly those of high net worth, by offering high interest rates. He also stated that he was occasionally approached by colleagues asking if he knew anyone outside Lebanon who could be approached to open an account.
 - k. Another UK resident of Lebanese heritage, Mr Yassin, has given evidence that he was “cold called” by the Bank on several occasions from 2018, and asked if he was interested in depositing funds with the Bank in Lebanon given the generous interest rates on offer.
 - l. Mr Marwan Kalo (Mr Kalo’s father) states in his evidence that he was called by a relative who worked for the Bank as Head of its Corporate Banking Division, Mr Zein, on his UK mobile telephone in late 2018, and encouraged to deposit sums with one of the Bank’s Lebanese branches given the high interest rates on offer, that they had several discussions on this subject, and that Mr Zein intimated he would receive some form of bonus if Mr Marwan Kalo deposited funds with the Bank in Lebanon. As evidence of Mr Zein making the initial contact, Mr Marwan Kalo exhibits a “WhatsApp” message he sent Mr Zein on 17 December 2018, stating “Tried to call you, no answer, Marwan Kalo”, which it is said is redolent of Mr Marwan Kalo returning a call made to him. Mr Marwan Kalo says that it is as a result of the approach made by Mr Zein to him that he and Mr Kalo were persuaded to deposit funds with the Bank.
 - m. It is Mr Kalo’s evidence that his father reported the conversations he had with Mr Zein to him, and that these reports influenced his decision to open an account with the Bank.
 - n. It is also Mr Kalo’s evidence that in 2019, he was in contact with a family friend, Mr Barrage, who held a senior position in the Bank, who told him that “the Bank had a team of people working on attracting international personal depositors”.
13. In response to that material in particular, the Bank relies upon the following:
- a. It relies on evidence of Mr Flaihan, Group Head of Retail and formerly Head of Retail Banking, who states that the Bank has no strategy to attract customers domiciled in the UK, but that its focus was in Lebanon, relying in this regard on statistics as to the small number (in both absolute and relative terms) of UK domiciled account holders, and the lack of any UK branch, as well as statements in the Group’s annual reports. Mr

Flaihan does not address the work of the “International Retail” division at the Bank, nor the target referred to in Mr Merhi’s LinkedIn profile.

- b. It relies on the evidence of Mr Flaihan that the “Non-Resident Banking Center” is intended to support non-resident customers when they visit Lebanon, and was aimed at non-residents living in countries which did not include England and Wales, and mainly aimed at existing customers. That may prove to be the case. However, the description of Non-Resident Banking on the website, and the terms in which it is described in the “Cedar Wings” advertisement, do not suggest it is aimed at providing banking services during visits by expatriates to Lebanon, or principally aimed at existing account holders (if that is relevant). The “APPLY” button on the “Non-Resident Banking Services” website, and the LinkedIn profile, both lend support to the contention that the Bank was looking to obtain new customers for its “Non-Resident Banking” offering.
- c. So far as the website is concerned, it relies on the local domain name (“bankmed.com.lb”), and the absence of any indicia that the website was directed to potential customers in England and Wales in particular, but the weight which those facts can bear when considering those parts of the website dealing with “Non-Resident Banking” is necessarily limited. I address the absence of any specific reference to England and Wales below.
- d. It relies on the evidence from Mr Flaihan that marketing visits were not made to the UK.
- e. It says that there is no evidence of the targets referred to in the LinkedIn entry applying to potential customers in the UK.
- f. It says that the “Cedar Wings” advertisements did not appear after 2017, that MEA was principally used by Lebanese nationals and that flights were mainly made to London as a “hub” for onwards travel.
- g. It challenges the accuracy of Mr Yassin and Mr El Sardar’s evidence, and the hearsay evidence from Mr Barrage, and submits that the evidence of Mr El Sardar and attributed to Mr Barrage does not support Directed Activity by the Bank towards England and Wales in any event.
- h. Through a statement from Mr Zein, it challenges the accuracy of Mr Marwan Kalo’s evidence as to their interaction, it being Mr Zein’s evidence that Mr Marwan Kalo contacted him (albeit he does not expressly deny that Mr Zein received some form of commission after Mr Kalo opened his account with the Bank, and he accepts a discussion about Mr Marwan Kalo opening an account with the Bank in Lebanon took place).

14. There are three broad themes to the Bank’s challenge to Mr Kalo’s case:

- a. The assertion that materials such as the website, the advertisement and the operation of the Non-Resident Banking Center were aimed at Lebanese residents, those visiting Lebanon and/or existing customers. It will be apparent from the summary I have given that, at least at first impression, this is not how the website and advertisement read, nor is this interpretation easy to reconcile with the LinkedIn profile on the limited materials available.
 - b. It says (with more force) that there is nothing in this material which specifically points to potential clients in the UK as targets. However, if the Bank was seeking to attract deposits from expatriates, there is no obvious reason why this would not extend to expatriates living in England and Wales. While the number of residents of Lebanese origin living in the UK at 20,000 is only a fraction of that in Brazil, it is not insignificant, and is the second largest European diaspora. If Mr Merhi's team of 20 were working to attract expatriate depositors, it is not easy to identify a reason why UK-based expatriates should not have been in their sights. Further, through the evidence of Mr Yassin, Mr El Sardar and the Kalos themselves, there is evidence of expatriates living in England and Wales being approached, albeit that evidence is disputed.
 - c. It says that the evidence of Mr Yassin, Mr El Sardar and the Kalos is unreliable and not corroborated by documents. However, the submissions made here were essentially "cross-examination" type points of varying force, and the exercise of deciding which witness evidence was the more credible would have had all of the hallmarks of a "mini-trial". I do not feel able to reach a reliable determination as to which of the competing versions is the more plausible at this stage.
15. It follows that I am satisfied Mr Kalo has the better of the argument that the Bank undertook relevant Directed Activity to the UK. Accordingly, the jurisdiction challenge fails.

Postscript

1. In the course of its submissions, the Bank submitted that "the Court should be wary of ... tenuous evidence, particularly given the consequences of jurisdiction being established". When I asked Ms Gibaud KC what this was a reference to, she explained that she was referring to the fact that the court might take jurisdiction in the face of the parties' agreement to exclusive Lebanese jurisdiction, when, on a full trial, it might have proved to be the case that there was no relevant Directed Activity. I should simply note that this judgment has not addressed what rights, if any, the Bank might have under the exclusive jurisdiction agreement if, on a full investigation of the facts, the requirements of s.15E were not satisfied. That question would raise some difficult issues which it has not been necessary to consider.