Should I stay or should I go?

Stephen Atherton QC and Malcolm Jarvis review a decision on a novel point under the Lugano Convention

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'It will only be in exceptional circumstances that case management considerations will be permitted to prevail over the English court's lack of jurisdiction in respect of a co-defendant once the claim against the anchor defendant has been dismissed.'

In what circumstances may a court stay determination of a co-defendant's jurisdiction challenge once the claim against an anchor defendant has been dismissed? That question was addressed, for the first time, in *Shulman v Kolomoisky* [2018].

Background

The claimant purported to serve proceedings on the second defendant (the anchor defendant) in England on the basis that he was domiciled there. The claimant then served the proceedings on the first defendant (the co-defendant), who was domiciled in Switzerland, under Art 6(1) of the Lugano Convention on the basis that the claim against him was so closely connected to the claim against the anchor defendant that it was expedient to determine them together to avoid the risk of irreconcilable judgments.

Both defendants challenged the English court's jurisdiction. The anchor defendant's challenge, which was determined first, succeeded because Barling J held that he was not domiciled in England when the claim form was issued ([2018] EWHC 160 (Ch)). The claim against the anchor defendant was accordingly dismissed for want of jurisdiction.

The claimant then applied to the Court of Appeal for permission to appeal against Barling J's order and also applied for a stay of the co-defendant's jurisdiction challenge pending determination of that permission to appeal application and, if permission was granted, determination of the appeal.

Chief Master Marsh granted the latter stay on case management grounds despite the fact that it was not disputed by the claimant that the co-defendant's jurisdiction challenge had to succeed following the dismissal of the claim against the anchor defendant. The Chief Master held that a stay was simpler and less artificial than granting the co-defendant's application to dismiss the proceedings against him for want of jurisdiction and then having a further, protective, appeal process embarked upon by the claimant (with the necessary incurring of attendant costs) to take account of the possibility that the claimant's application for permission to appeal in respect of Barling J's order or any actual appeal in respect of the same proved successful.

The judgment

The High Court (Fancourt J) allowed the co-defendant's appeal. Although Fancourt J concluded that the Chief Master had been right to treat the issue as one of case management, he had exceeded the wide margin of appreciation given to a tribunal undertaking a case management function. That is because the Chief Master failed to take into account what was, 'by some way', the most important factor in exercising his discretion, namely that it was common ground that the court in fact had no jurisdiction to hear and determine the claim as against the co-defendant (see paras 25 and 28 of the judgment). Since that was common ground, it was difficult to see, except possibly in a truly exceptional case, how case management considerations could outweigh the absence of jurisdiction (see para 26 of the judgment).

Fancourt J identified the following considerations as relevant to the exercise of the discretion:

- The fact that the co-defendant was, in principle, entitled to an order dismissing the claim against him for want of jurisdiction made it 'rather artificial' to delay the substantive hearing of his application rather than simply dismissing the claim against him (see para 19 of the judgment).

- The fact that there was a close analogy with a stay pending an appeal, since the purpose of the stay sought by the claimant was to prevent the inevitable consequences of Barling J's order from taking effect pending determination of his application for permission to appeal (see para 20 of the judgment). That close analogy meant that more weight had to be given to the question of whether the claimant might be prejudiced if no stay were granted.

- If there is no jurisdiction against the anchor defendant, case-managing the co-defendant's application had to play a very subsidiary role, if indeed it had any role to play at all (see para 21 of the judgment).

- Had the co-defendant's application been determined at the same time as the anchor defendant's application, the co-defendant's application would inevitably have succeeded. It would, therefore, be odd if case management considerations were allowed to intervene into the consideration of the co-defendant's application such as would produce a different result (see para 23 of the judgment).

- There is necessarily some prejudice to a defendant who is not subject to the court's jurisdiction in remaining subject to extant proceedings, and there may well be serious prejudice in any given case (see para 24 of the judgment).

The judge held that the following were not relevant circumstances:

- the loss of a collateral benefit to the claimant in being able to make discovery applications in other jurisdictions based on the extant proceedings in England (see para 31 of the judgment); and

- the relatively modest cost and inconvenience to the claimant in having to file a further, protective, appeal to cater for the eventuality that the claimant's application for permission to appeal or any actual appeal against Barling J's order might succeed (see para 34 of the judgment).

Ultimately, the judge concluded that it was not appropriate to keep the claim against the co-defendant 'artificially alive' for what might have been a year or more, when the English court had no jurisdiction over him (see para 32 of the judgment).

Comment

This case raises a short but important point of principle on whether and when case management considerations can take precedence over a co-defendant's unchallenged entitlement to have the claim against him dismissed for want of jurisdiction.

It is surprising that this question does not appear to have arisen in earlier cases, particularly since Art 6(1) of the Lugano Convention (and the identical provision in Art 8(1) of the Brussels I Regulation Recast) is frequently used to bring co-defendants before the English courts.

The closest analogy is probably with cases in which a point of law arises that is subject to a pending appeal in other proceedings (see eg *Green v Skandia Life Assurance Co Ltd* [2006] at paras 67-68). There too, the court has a discretion to stay determination of the point of law pending judgment on the appeal.

The judge concluded that it was not appropriate to keep the claim against the co-defendant 'artificially alive' for what might have been a year or more, when the English court had no jurisdiction over him.

But as the judge held in the present case, fundamentally different considerations apply in the jurisdiction context. This judgment makes it clear that it will only be in exceptional circumstances that case management considerations will be permitted to prevail over the English court's lack of jurisdiction in respect of a co-defendant once the claim against the anchor defendant has been dismissed.

As to what may constitute exceptional circumstances, the judge cited two examples, namely where:

- judgment on the appeal against the dismissal of the claim against the anchor defendant was known to be imminent; or

- the decision to dismiss the claim against the anchor defendant was 'wholly irrational'.

Other than in such cases, the guidance provided by Fancourt J is clear and welcome: where there is a want of jurisdiction on the part of the court to try a claim, it would be wrong for the court to proceed as if it nevertheless possessed such jurisdiction. ■

Green v Skandia Life Assurance Co Ltd [2006] EWHC 1626 (Ch)
Shulman v Kolomoisky & anor [2018] EWHC 160 (Ch); [2018] EWHC 3182 (Ch)