**12 April 2019**

**RAMONA ANG v RELIANTCO INVESTMENTS LIMITED**

**[2019] EWHC 879 (Comm)**

**BEFORE: MR JUSTICE ANDREW BAKER**

**CASE SUMMARY**

***Whether an individual who engages in speculative investment of personal wealth for gain is a 'consumer' under the Brussels (recast) Regulation is a fact-specific enquiry. The central question is whether the individual was acting for a purpose that can be regarded as being outside her trade or profession. In determining that issue, the spread, regularity and value of the investment activity may provide useful indications.***

An individual invests her surplus personal wealth in trading Bitcoin futures through an online platform. Is she a 'consumer' for the purposes of the protective jurisdiction rules under the Brussels (recast) Regulation (Regulation (EU) No 1215/2012 on jurisdiction and enforcement of judgments in civil and commercial matters)? That was the central question before Andrew Baker J in this case.

**Background**

Ms Ang, the claimant, was a woman of substantial means. The defendant ("**Relaintco**") was a Cypriot company offering financial products and services through an online trading platform called 'UFX'. Ms Ang had opened a UFX account in January 2017. By 10 August 2017, when Reliantco terminated her account, she had turned c.US$200,000 into c.US$700,000 through investments in Bitcoin futures.

She commenced proceedings in England alleging that Reliantco had wrongfully terminated her account. Had it not done so, she said, her returns would have been c.US$1.1m. However, clause 27.1 of Reliantco's standard terms and conditions stood in the way of Ms Ang's claim. It provided that Cypriot courts would have exclusive jurisdiction over all disputes arising out of or in connection with the agreement between Reliantco and Ms Ang. Reliantco challenged the English court's jurisdiction on this basis. In response, Ms Ang argued that she was protected by the special jurisdictional rules available to consumers under the Brussels (recast) Regulation. As such, clause 27.1 did not require her to bring her claim in Cyprus.

**Was Ms Ang a 'Consumer'?**

In broad terms, Articles 17 and 18 of the Brussels (recast) Regulation provide that in matters relating to a contract concluded by "*a person, the consumer, for a purpose which can be regarded as being outside his trade or profession*", the consumer may bring proceedings either in the courts of the Member State in which the defendant is domiciled or in the courts of the place where the consumer is domiciled. The key point of contention was whether, in the context of her relationship with Reliantco, Ms Ang was a 'consumer' within the meaning of these provisions. Andrew Baker J concluded that she was.

The point of departure for his reasoning was an analysis of the two formative ECJ decisions on the topic: *Shearson Lehman Hutton Inc* (Case C-89/01) [1993] IL Pr 199 and *Benincasa* (Case C-269/95) [1997] ETMR 447. In *Shearson*, the ECJ had held that the consumer provisions in the Brussels

Convention (as it then was) were only applicable to "*a private final consumer, not engaged in trade or professional activities*" (at [22]). In *Benincasa*, the ECJ described *Shearson* as "*settled case-law*" (at [15]) but added that "*only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption*" were covered by the consumer provision (at [17]).

Andrew Baker J clarified that the decision in *Benincasa* did not have the effect of the narrowing the test in *Shearson.* At [30] he said,

> "*I do not read the reference to an individual's "own needs in terms of private consumption" as refining the notion of 'consumer' to something narrower than "private final consumer, not engaged in trade or professional activities". The sole criterion is that of being a private individual contracting as the end user (of goods and services and not as part of a business (trade or profession)*."

Then, Andrew Baker J considered the tension between Longmore J's reasoning in *Standard Bank London Ltd v Apostolakis* [2012] CLC 939 and the approach adopted by the Greek court in the same litigation (reported as [2003] IL Pr 29). The dispute in *Apostolakis* had arisen from an agreement pursuant to which a couple had invested substantial sums in foreign exchange through a London bank. In that context, Longmore J had concluded that the couple were consumers. As he put it (at 937), they were "*using [their] money in a way which they hoped would be profitable but merely to use money in a way one hopes would be profitable is not enough… to be engaging in trade*". The Greek court had reached the opposite conclusion. It held at [26] that "*to purchase financial products or foreign exchange… for the purpose of selling them at once and speculating on the fluctuation of the international securities or foreign exchange prices*" cannot be regarded as a consumer purpose.

As Andrew Baker J observed at [44] of his judgment, the crux of the disagreement between Longmore J and the Greek court was about whether speculative investment of private wealth for gain is by nature a business activity and, if so, whether individuals who invest personal funds in that way can be regarded as 'consumers' under the Brussels (recast) Regulation.

Although both approaches had attracted adherents, Andrew Baker J preferred Longmore J's analysis. Following the definitional language of Article 17(1), he held that the crucial question was whether the claimant is "*a private individual contracting as such, for their own purposes and not for the purpose of any business (trade or profession)*" (at [61]). The relevant enquiry is one of 'purpose' (at [65]). Accordingly, there is no reason why speculative investment could never be a consumer activity (at [62]). The Court will need to conduct a fact-specific investigation in each case to determine whether the claimant was contracting as a private individual to satisfy a consumer purpose or acting for the purpose of an investment business (at [63]).

Notably, this analysis is consistent with the reasoning of the commercial court in *AMT Futures Ltd v Marzillier* [2015] 2 WLR 187. At [58] of that case, Popplewell J had said that:

> "*Wherever the dividing line is to be drawn in the case of investors, the result is likely to be heavily dependent on the circumstances of each individual and the nature and pattern of investment. At one end of the scale may be the retired dentist who makes a single investment for a modest amount by way of pension provision. At the other may be an investment banker or asset manager who plays the markets widely, regularly and for substantial amounts, for his own account. In between there are many factors which might influence the result, including the profile of the investor, the nature and extent of the investment activity, and the tax treatment of any profits or losses. The issue is fact specific*."

Although Andrew Baker J expressed agreement with Popplewell J's analysis (at [65]), he added the amplification that "*the spread, regularity and value of investment activity cannot (I think) determine the issue, as that would replace the test of non-business purpose set by the language of the Brussels (recast) Regulation*" (at [65]) (emphasis in original). In other words, the spread, regularity and value of the investment may suggest that it was being pursued for a business purpose, but that is as far as these factors can go.

Applying the 'purpose' test to the facts before him, Andrew Baker J concluded that Ms Ang's purpose in contracting with Reliantco was to invest her surplus funds as a private individual. Her choice of crypto-currency as the form of investment, the fact that she was knowledgeable about Bitcoins and her substantial personal wealth – none of these meant that she could not be a consumer. These factors are not sufficient to establish that her investment was being pursued for a business purpose either. What is determinative is that "*the purpose of her contract with Reliantco was… outside any business of hers*" (at [68]).

**Two further issues**

Andrew Baker J expressed his conclusions on two further points although, in view of his conclusions on the primary issue, they did not strictly arise for determination.

The jurisdiction clause

The dispute in this part of the case was whether clause 27.1 of Reliantco's standard terms and conditions satisfied the formal requirements under the Brussels (recast) Regulation. Pursuant to Article 25(1)(a) of the Regulation, the relevant requirement is that a jurisdiction clause shall be "*in writing or evidenced in writing*".

The ECJ has considered the issue of 'click-wrapping', i.e. whether it is enough for one party to have clicked online to indicate assent to a jurisdiction clause, in a number of authorities. In particular, Andrew Baker J referred to the guidance provided in *El Majdoub* (Case C-322/14) [2015] 1 WLR 2986. At [40] of that judgment, the ECJ had held that:

> "*…Article 23(2) of the Brussels I Regulation must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.*" (emphasis added)

Ms Ang argued that clause 27.1 of the standard terms did not meet this standard. Her evidence was that she recalled being unable to access Reliantco's standard terms because the link to the terms took her to an "Error 404" page or to a blank page. In response, Reliantco contended that this was not a true 'clip-wrapping' case because Ms Ang had signed her acceptance of the standard terms in hard copy. Alternatively, Reliantco asked the Court to reject Ms Ang's evidence that the online version of the standard terms was inaccessible.

Andrew Baker J accepted Reliantco's submissions on this issue. He concluded that this was not a 'click-wrapping' case. This is because Ms Ang's signed acceptance of the standard terms in hard copy is, in itself, sufficient to satisfy the formality required by Article 25(1)(a) (at [81]). Alternatively, if

this had been a 'click-wrapping' case, the critical question would have been whether the standard terms were reasonably accessible to Ms Ang. On the evidence before him, Andrew Baker J was satisfied that they were.

Data protection claims

Lastly, Andrew Baker J considered Ms Ang's contention that her claim based on Reliantco's breaches of data protection obligations could be brought in England despite clause 27.1.

As a starting point, he recognised that Ms Ang's data protection claims fell into two categories. Her claim for an order for rectification, destruction, erasure or blocking of her personal data was governed by the General Data Protection Regulation ("**GDPR**"). The remainder of her data protection claims predated the GDPR and were, hence, subject to the Data Protection Act 1998.

As far as the GDPR claim was concerned, the English Court had jurisdiction pursuant to Article 79 of the GDPR. Article 79(2) provides that:

> "*Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers*." (emphasis added)

At first blush, this conclusion raises a further question about the conflict between Article 79(2) (which points to England) and Article 25 of the Brussels (recast) Regulation (which leads to Cyprus). However, that seeming conflict is obviated by Article 67 of the Brussels (recast) Regulation (at [84]-[85]) which provides that the Regulation "*shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*".

Unlike the GDPR, Andrew Baker J held that the Data Protection Act 1998 did not contain a comparable jurisdiction provision. Thus, had it not been for his conclusion that Ms Ang was a 'consumer', Andrew Baker J would have held that Ms Ang's claims under the Data Protection Act 1998 could only be brought in Cyprus pursuant to clause 27.1 of Reliantco's standard terms and Article 25 of the Brussels (recast) Regulation (at [87]).

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