



Neutral Citation Number: [2022] EWCA Civ 1569

Case No: CA-2022-000219

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CIRCUIT COMMERCIAL COURT (KBD)

His Honour Judge Russen KC (sitting as a Judge of the High Court)
[2021] EWHC 2682 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2022

Before :

LADY JUSTICE MACUR
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE CARR

Between :

JOY IRENE DOOLEY & ORS

Claimants/
Appellants

- and -

CASTLE TRUST & MANAGEMENT SERVICES
LIMITED

Defendant/
Respondent

Gerard McMeel KC and Philip Stear (instructed by **High Street Solicitors Limited**) for the
Claimants/Appellants
James Hart (instructed by **TSN Law**) for the **Defendant/Respondent**

Hearing date: 18 October 2022

Approved Judgment

This judgment was handed down remotely at 10am on Wednesday 30 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Carr :

Introduction

1. The Appellants (“the pensioners”) are individual investors predominantly domiciled in England and Wales. They seek to pursue proceedings in this jurisdiction against the Respondent (“Castle”), a professional trustee company registered and domiciled in Gibraltar.
2. The pensioners claim to have been the victims of a classic “pension scam” orchestrated by unregulated intermediaries operating in England and Wales. The principal unregulated intermediary, a Cypriot firm known as Montegue Smyth (“MS”), is said to have been in a commercial relationship with Castle and to have been paid substantial fees or commissions by reference to each pension transfer referred by MS. The pensioners contend that, as a result of the intermediaries’ activities, they went from having valuable UK-based pension rights to being party to inappropriate, expensive, offshore pension arrangements with Castle, invested in unregulated collective investment schemes of little or no value.
3. Proceedings were commenced on 30 September 2020 and served on 19 March 2021. By an application dated 18 May 2021 under CPR Part 11, Castle challenged the court’s jurisdiction. The matter came before HHJ Russen KC (“the Judge”). For reasons set out in his judgment dated 13 October 2021 (“the Judgment”), he acceded to Castle’s application. In summary, he held that the pensioners did not have a good arguable case that the proceedings fell within Article 13(3) of the 1968 Brussels Convention as modified (“the Brussels Convention”). The proceedings fell within Article 2 (or Article 5(6)).
4. The overarching ground of appeal is that the Judge was wrong to hold that the pensioners did not have the better of the argument in establishing jurisdiction under Article 13(3) of the Brussels Convention. There was a plausible evidential basis for holding that the proceedings concerned contracts concluded by consumers for the supply of services by Castle, which contracts were preceded in the State of the pensioners’ domicile by specific invitations addressed to them.

The key facts and documents in summary

5. Castle is the trustee of two Qualifying Recognised Overseas Pension Schemes (“QROPS”) established in Gibraltar: the Equus Scheme, established by a Declaration of Trust dated 10 April 2013, and the Metro Scheme, established by a Declaration of Trust dated 1 August 2013. QROPS are “overseas pension schemes” within the meaning of the UK Finance Act 2004 (s. 150(7)), and the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206, a status accorded by His Majesty’s Revenue and Customs.
6. The respective trust deeds for the two Schemes (“the Deeds”) and the Scheme Rules annexed to and incorporated in the Deeds (“the Rules”) are in materially identical terms. The Rules identified Castle as the “Scheme Administrator”. Clause 4.1 of the Deeds provided that the “Trustees shall hold the Fund under irrevocable trusts and shall administer the Scheme...”. Thus, upon a pension transfer being made, the effect of the

Deeds was that Castle as trustee of the QROPS held the resulting sub-fund upon trust for the member. Clause 8.2 provided for costs, charges and expenses incurred in establishing, administering or managing “the Plan” to be paid out of the trust fund. Clause 12 provided for Castle’s professional fees for time spent “in relation to the trusts hereof or to the administration of the Plan”. Castle’s entitlement to charge fees was “as shall from time to time be published as its normal scale of charges”.

7. The pensioners joined one or both QROPS as members, transferring existing UK pension fund interests into the relevant scheme. The QROPS were promoted principally by MS, a firm which operated from an English address in Waterlooville, but which was not authorised by the Financial Conduct Authority (“FCA”) under the Financial Services and Markets Act 2000 (“FSMA”).
8. With three exceptions, all of the pensioners are individuals domiciled in this jurisdiction (or, in the case of two Appellants, personal representatives of individual investors who died domiciled in England or Wales). Two pensioners are domiciled in Northern Ireland and a third is domiciled in Scotland. No point is taken in relation to these three, whom Castle accepts should be sued here alongside the other pensioners, if jurisdiction in respect of those other pensioners is established.
9. The First Appellant (“Mrs Dooley”), a former police officer, can be taken as an exemplar. She received a Transfer out Request Pack from the administrator of the Police Pension Scheme in March 2014. In August 2014, she signed a declaration confirming that her pension was to be transferred to another registered scheme to be confirmed by way of a declaration made by the receiving scheme. On or about 1 September 2014 Castle received a self-advice letter from Mrs Dooley, requesting Castle to arrange transfer into a QROPS for her benefit at retirement.

The Application Form

10. On 2 September 2014 Mrs Dooley signed an application form to join the Metro Scheme (“the Application Form”). At the end of the document, Mrs Dooley declared that the information provided was accurate to the best of her knowledge and that:

“I ...agree to the Terms & Conditions set out below (Appendix II).”

11. She also agreed to an attached fees schedule, and authorised “the Trustees” to execute the relevant deed(s) to adhere her to the Scheme.
12. The Terms and Conditions were Castle’s standard terms and conditions, set out in a document headed “Appendix II” (“the Terms and Conditions”). They provided as follows:

“These Terms and Conditions set out the terms upon which the Company and/or Firm provides Services to its Clients.

1. Definitions

...Engagement means the Services we provide by the Questionnaire.

Engagement Letter means the questionnaire and any attachments including these Terms and Conditions sent to the Client which sets out the basis of our contract with the Client and which constitutes the agreement between the Company and/or Firm and the Client...

Services means the services to be provided by the Company and/or Firm as specified in the Engagement Letter...

3. Provision of Services

In providing the Services the Company and/or Firm does not hold itself out as having knowledge of the laws or regulations other than those applicable in Gibraltar and does not provide [advice] on matters relating to taxation in any jurisdiction. Castle Trust Group has a zero tolerance to bribery and corruption. We are committed to conducting business in a manner which complies with the UK Bribery Act 2010...

8. Liability

The Company and/or firm will perform the services with reasonable skill and care and acknowledge that the Company and/or Firm will only be liable for any loss or damage caused by its negligence, breach of contract, fraud or wilful default, subject as follows:

The Company and/or Firm will not be liable if such loss is due to the provision of false, misleading or incomplete information or documentation or due to the acts or omissions of any person other than the Company and/or Firm...

15. Jurisdiction

These Terms and Conditions and the provision of Services shall be governed by and construed in accordance with Gibraltar Law and Financial Services of Gibraltar.”

13. At or around the same time, Mrs Dooley also signed a letter agreeing to pay MS fees in the sum of £2,000 inclusive of VAT.

14. Castle received and kept Mrs Dooley’s signed application form in its records under cover of an internal document checklist which contained as its first (duly ticked) entry:

“Signed Application Form with T & Cs and Signed letter/s of Authority”

The Welcome Letter

15. On or about 23 September 2014 Mrs Dooley was admitted as a member of the Equus Scheme by way of Deed of Adherence. She received a welcome letter from Castle dated 9 February 2015 (“the Welcome Letter”) which stated:

“We would like to welcome you as a Member of the ... Scheme administered by [Castle], who also provide the ongoing fiduciary duties as Trustees to the Scheme...

As part of the overall service, you will on each anniversary of your joining the Scheme receive an annual statement detailing a current valuation. This will be provided to you by [Castle] as your Trustee.

Should you have any questions with regard to the Scheme, either now or in the future, please do not hesitate to contact your Introducer, [MS], in the first instance, or [Castle] as your Trustee and scheme administrator.”

The Particulars of Claim

16. The following claims are pleaded in the Particulars of Claim:

- i) The “Joint Tortfeasorship Claims”: various third parties are said to have acted negligently and/or in breach of regulatory or statutory rules giving rise to a statutory cause of action under ss. 150/138D of FSMA. It is said that Castle knew or ought to have known of such negligence and/or breaches, and that Castle engaged in a joint venture and/or common design to engage in activities involving the commission of torts against the pensioners;
- ii) The “s. 27 Claims”: Castle was an authorised person under FSMA and engaged in offering its services to UK investors of operating pension schemes and arranging deals in investments. MS was unauthorised and not exempt for FSMA purposes. It is said to have engaged in regulated activities under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) in contravention of the general prohibition in s. 19 of FSMA. Thus, under s. 27 of FSMA, the pensioners are said to have a statutory restitutionary right to reverse the transfer of their accrued UK benefits to Castle;
- iii) The “Personal Claims”: it is said that Castle owed personal duties to the pensioners – in tort, contract and as a fiduciary – which it breached. Amongst other things, it is alleged that Castle owed duties to the pensioners “pursuant to its contract for services...to act with reasonable care and skill in respect of the [pensioners’] financial and pension arrangements.” It is further alleged that Castle owed duties to undertake due diligence by reason of the following:

“[Castle] assumed responsibility at common law and/or equity to the Claimants and each of them, to act honestly, fairly and reasonably in accordance with their best interests. Furthermore, the requirements of its contractual retainer and/or appointment trust deed, together with its internal policies, and the obligation to act honestly, fairly and reasonably in accordance with the best interests of the clients, [Castle] owed the Claimants and each of them [the duties to undertake due diligence] as pension scheme operator and/or as trustee.”

The relevant jurisdictional framework

17. Jurisdiction issues between Gibraltar and the UK are determined by reference to a modified version of the Brussels Convention (see s. 39 of the Civil Jurisdiction and Judgments Act 1982 and the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997 SI 1997/2602 (“the Gibraltar Order”). Amendments were made to the Gibraltar Order in the light of Brexit (see Regulation 73 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2021, SI 2019/479 and Regulations 1(1) and 5(2)(c)(i) of the Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020, SI 2020/1493).
18. Article 2 of the Gibraltar Order (as amended) provides:
 - “(a) Provision corresponding to that made by the provisions of the 1968 Convention specified in (b) [as they had effect immediately before IP completion day] shall apply, so far as relevant, for the purpose of regulating, as between the United Kingdom and Gibraltar, the jurisdiction of courts and the recognition and enforcement of judgments.
 - (b) Those provisions are –
 - (i) Titles I-V;
 - (ii) Articles 54 and 57; and
 - (iii) Article 65 and the Protocol referred to therein.”
19. By Article 3 of the Gibraltar Order, the UK and Gibraltar are treated as separate Contracting States.
20. Article 4 of the Gibraltar Order (as amended) requires the court to have regard to any relevant principles laid down by the European Court in connection with Title II of the Brussels Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title and the *travaux préparatoires*.
21. The relevant Articles in the Brussels Convention are all to be found in Title II, headed “Jurisdiction”, which contains six sections. In section 1, Article 2 provides:
 - “Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.”
22. The default rule is therefore that defendants are entitled to be sued in their state of domicile. By Article 3, persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6.
23. Section 2 is headed “Special jurisdiction”. The first article in section 2 is Article 5 which provides:
 - “A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question;...

6. as settlor, trustee or beneficiary of a trust created by...a written instrument...in the courts of the Contracting State in which the trust is domiciled;...”

24. Section 4 is headed “Jurisdiction over consumer contracts”. Article 13(3) provides:

“In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called “the consumer”, jurisdiction shall be determined by this section, without prejudice to the provisions of Article 4 and point 5 of Article 5, if it is...

(3) any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer’s domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.”

25. By Article 14, a consumer may bring proceedings against the other party to a contract in either the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled. Article 15 provides that there can be no departure from the provisions of section 4 other than by agreement entered into after the dispute has arisen and in certain specified circumstances.

26. Article 13(3) has now been superseded by Article 17(1)(c) of the (recast) Brussels Regulation, No 1215/2012 (“the Recast Brussels Regulation”) which states:

“(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.”

The Judgment

27. At [67] the Judge reminded himself of the breadth of the wording in Article 5(1) (matters “relating to” a contract) and in Article 13 (proceedings “concerning a” contract). He stated at [68] that:

“Nevertheless, in my judgment it is clear from the evidence before the court that Castle’s obligations to the claimants rested fundamentally upon its trusteeship of the QROPS rather than any separate contract for the provision of financial administration services. There is no plausible evidential basis for saying a

contract was concluded for the supply of services outside those which were identified by the Deeds and the Rules which were incorporated by them.”

28. His reasons were first, that the Terms and Conditions did not identify any obligation upon Castle to provide certain services. Secondly, the Welcome Letter necessarily post-dated entry into membership, and in any event the only specific obligation referred to concerned the provision of an annual statement “as...Trustee”. The “overall service” mentioned in the Welcome Letter could only have been that identified in the Deed and the Rules. There was no need for (and there was no evidence of) any prior, separate contract for services outside the Deed and the Rules. Those documents clearly identified Castle’s roles as trustee and administrator of the QROPS.
29. Thus, “any claim against Castle based upon non-performance of services would have to be based upon the Deeds and the Rules incorporated by them. Any such claim would fall within Article 5.6 which would lead to the...Gibraltar court...having jurisdiction as it would under the general rule of Article 2” (see [70]). There was no plausible evidential basis for the existence of a separate contract meeting the requirements of C-27/02 *Engler v James Versand GmbH & Co KG* [2005] ILPr 8 (“*Engler*”) at [34].
30. The Judge went on to say that, even if he was wrong about that, the pensioners had failed to establish that the requirements of Article 13(3)(a) were satisfied. As for advertising, there was no evidence to suggest that the territorial requirement in C-96/00 *Gabriel v Schlank and Shick GmbH* [2002] ILPr 36 (“*Gabriel*”) was satisfied, nor was there any plausible evidential basis for saying that specific invitations were made.

Grounds of appeal

31. In support of the overarching submission that the Judge erred in failing to find that the pensioners had the better of the argument that the requirements of Article 13(3) were met, five grounds of appeal were advanced originally:
 - i) Ground 1: the Judge was wrong to construe the Deeds as the exclusive source of the rights and duties of the parties, and wrong to hold the Terms and Conditions legally ineffective;
 - ii) Ground 2: the Judge was wrong in failing to hold that the pensioners had the better of the argument in establishing that each of them had entered into a consumer contract with Castle preceded by a specific invitation on behalf of Castle, as evidenced in its own documents, which specifically referred to MS as “introducer”. The Judge should have held that Castle was responsible for the acts and omissions of MS as “introducer”, on the basis of joint wrongdoing and/or a principal-agent relationship;
 - iii) Ground 3: the Judge was wrong in failing to hold that the pensioners had the better of the argument in establishing that each of them had entered into a consumer contract as a result of advertising by Castle;
 - iv) Ground 4: the Judge erred in failing to have regard to the statement of principles of interpretation in respect of jurisdiction and consumer contracts in the decisions of the Court of Justice of the European Union (“the CJEU”) in C-

208/18 *Petruchova v FIBO Group Holdings Ltd* (“*Petruchova*”) and C-500/18 *AU v Reliantco Investments Ltd* (“*Reliantco*”). Albeit that those authorities related to the Recast Brussels Regulation, they nevertheless contained relevant guidance as to the scope of, and policy underlying, the consumer contract gateway;

- v) Ground 5: as a result, the Judge failed to find that the causes of action were all indissociably linked to a consumer contract within the meaning of Article 13(3).
32. By the conclusion of the hearing on appeal, the issues had narrowed considerably. In particular, Mr McMeel KC for the pensioners (rightly) accepted that there was no plausible evidential basis for a finding that the pensioners had the better of the argument that the pensioners had entered into a consumer contract as the result of advertising by Castle. So Ground 3 has fallen away. On the other side, Mr Hart for Castle indicated that Castle had no interest in being sued in separate jurisdictions. Thus, if jurisdiction were to be established in relation to any one (or more) of the three heads of claim, Castle accepted that all claims should be heard together here. Accordingly, Ground 5 has fallen away. Ground 4 adds little to the mix, as will be seen from the analysis of the relevant authorities.
33. So the outcome of the appeal ultimately turns on Grounds 1 and 2.

The jurisdictional test to be applied

34. The burden of establishing jurisdiction lay on the pensioners. It was for them to satisfy the court on disputed matters relevant to the issue of jurisdiction that they had the better of the argument on the material available at the necessarily preliminary stage at which the issues fell to be addressed. This is not a reversion to the civil burden of proof. Rather, the pensioners had to demonstrate a plausible evidential basis for the application of a relevant jurisdictional gateway.
35. For the purpose of the evidential analysis, the standard lies between proof on the balance of probabilities and the mere raising of an issue. On contentious factual issues, the court takes a view on the material available if it can reliably do so; if a reliable assessment is not possible, there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. The test is context-specific and flexible, and if there is an issue of fact the court must use judicial common sense and pragmatism, making due allowance for the limitations of the material available at an early point in the proceedings.
36. These principles are now well-established and uncontroversial: see *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 at [7]; *Ang v Reliantco Investments Ltd* [2019] EWCA Civ 879 (Comm); [2020] QB 582 at [4]; *ING Bank NV v Banco Santander SA* [2020] EWHC 3561 (Comm) at [64]; *Flowers v Centro Medico & Berkley España t/a Hospital Clinic Benidorm* [2021] EWHC 2437 (QB) at [6] to [10].

The Brussels Convention and relevant European Union case law

37. As they did before the Judge, the parties referred to the following decisions from the CJEU: Case C-189/87 *Kalfelis v Bankhaus Schroder Munchmeyer Hengst and Co*

[1988] ECR 5565 (“*Kalfelis*”); *Gabriel*; *Engler*; C-585/08 and *Pammer v Reederei Karl Schluter GmbH & Co KG* [2012] Bus LR 972 (“*Pammer*”). Reference was also made to the 1978 Report of Professor Dr Peter Schlosser on the Accession Convention (“the Schlosser Report”) and the 1980 Report by Professors Mario Giuliano and Paul Lagarde on the Rome Convention on the law applicable to contractual obligations (“the Giuliano/Lagarde Report”).

38. The special system established by Articles 13 to 15 of the Convention is “inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled” (see the Advocate General’s opinion at [44] and the judgment at [39] in *Gabriel*).
39. It is necessary to address at the outset an issue that arises as to the interrelationship between Articles 5 and 13 of the Brussels Convention.
40. The Judge concluded (at [64 (iii) and (iv)]) that each limb of Article 5 constitutes a *lex specialis* which derogates from the *lex generalis* of Article 2 and the principle that the courts of the state of a defendant’s domicile have jurisdiction. On that basis, the provisions of Article 5 fall to be interpreted strictly (see *Kalfelis* at [19]). He commented that claims relating to matters of contract (Article 5(1)) and claims relating to tort (Article 5(3)) are mutually exclusive (referring to *Kalfelis* at [17]). It followed that claims under Article 5(1) and Article 5(6) (concerning trust-related claims in the courts of the trust’s domicile) were “also mutually exclusive”. A claim arising out of the relationship of beneficiary and trustee, falling within Article 5(6), could not also be within Article 5(1).
41. As to the inter-relationship between Article 5(1) and Article 13, the Judge stated (at [64(viii)]):

“As to the inter-relationship between Article 5.1 and Article 13, the latter is a further *lex specialis* which overrides the more general provision in Article 5.1 for matters relating to a contract. It is first necessary to see whether the action can fall within the scope of Article 5.1: see *Gabriel* at [34] – [36]. If it does not fall within Article 13, it may still fall within Article 5.1 (see *Gabriel* at [49] and *Engler* at [44] – [45]) but it cannot qualify under Article 13 unless it first falls within the scope of the former provision.”
42. This analysis is not correct. The notion that Article 5 is a gateway to Article 13 does not reflect the scheme and structure of the Brussels Convention. It is also based on a misreading of *Gabriel* and *Engler*.
43. As set out above, Article 13 does not appear in the same section of the Brussels Convention. Article 5 is contained in section 2, headed “Special jurisdiction”. Articles 13 to 15 make up an entirely separate and self-contained section: section 4, headed “Jurisdiction over consumer contracts”.

44. In *Gabriel* the CJEU considered whether certain arrangements were contractual in nature in the sense contemplated in Articles 5(1) or 13(3), or related to tort, delict or quasi-delict within the meaning of Article 5(3) (see [32]). At [33] it noted at the outset that the concept of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) covered all actions which sought to establish the liability of a defendant and which were not related to a contract within the meaning of Article 5(1). It went on:

“34. It is thus necessary in the first instance to examine whether an action such as that in the point in the main proceedings is contractual in nature.

35. In that connection it must be observed that Article 5(1) of the Brussels Convention relates to contractual matters in general, whereas Article 13 thereof specifically covers various types of contracts concluded by consumers.

36. As Article 13 of the Brussels Convention thus constitutes a *lex specialis* in relation to Article 5(1) thereof, it is first of all necessary to determine whether an action having the characteristics set out in the question referred for a preliminary ruling, as reformulated, can fall with the scope of the *former of those two provisions.*” (italics added)

These passages were essentially repeated in *Engler* at [31] and [32].

45. The error into which Castle successfully invited the Judge to fall was to treat the reference in [36] of *Gabriel* to “the former of those two provisions” as a reference to Article 5(1); in fact, that reference was a reference to Article 13, being the first of the two provisions referred to in the paragraph in question. So much is clear from both the Advocate General’s opinion and the judgment in *Gabriel*. At [37] the Advocate General stated:

“The Court has given some guidance as to what constitutes a contract for the purpose of Article 5(1)...Such guidance may be of assistance in determining what is meant by a contract concluded by a consumer within the meaning of Article 13 (*although where Article 13 applies it is clear from the scheme of the Convention and the terms of Articles 13 to 15 that Article 14 alone will determine jurisdiction, to the exclusion of Article 5(1).*)” (italics added)

46. In its judgment at [59] the CJEU stated:

“An action such as that which Mr Gabriel proposes to bring before the competent national court therefore falls within the scope of Article 13(3) of the Brussels Convention, *and it is for that reason unnecessary to examine whether it is covered by Article 5(1) thereof.*” (italics added)

47. Equally, the CJEU in *Engler* stated at [44]:

“Since Article 13, first paragraph, point 3, of the Brussels Convention is *not applicable*, therefore, in a case with the characteristics set out in the question., it is *therefore necessary* to consider whether an action such as that at issue in the main proceedings may be regarded as being contractual in nature for the purposes of Article 5(1)...” (italics added)

48. Jurisdiction under Article 13 is thus a self-standing *lex specialis* and derogation from the general rule in Article 2. If jurisdiction is not established under Article 13, it may nevertheless arise under Article 5(1). But it is not necessary to establish jurisdiction under Article 5(1) in order to make it out under Article 13. A proposition to the contrary would run entirely counter to the scheme of the Brussels Convention which, as set out above, is intended to carve out a discrete and independent jurisdictional exception designed to protect consumers. Provided that the requirements of Article 13 are met, consumers, as the weaker party, are able to sue in their home jurisdiction.
49. The Judge’s error on this issue was material, in the light of his conclusion that any claim against Castle would fall within Article 5(6) (and so could not fall within Article 5(1)).
50. Beyond this, and focussing on the law and material relevant to Grounds 1 and 2:
 - i) As a derogation from Article 2, Article 13 falls to be interpreted strictly, albeit that a technical or literal interpretation of the concept of a consumer contract is not appropriate if it runs counter to the objective of protecting the weaker party (see *Kalfelis* at [19]; *Gabriel* at [45] and *Engler* at [43]);
 - ii) The concept of “proceedings concerning a contract” is not to be interpreted unduly narrowly (by analogy with the approach adopted to “matters relating to a contract” in the context of Article 5(1) (see for example *Engler* at [48]));
 - iii) Article 13(3) is only applicable where “...first the claimant is a private final consumer not engaged in trade or professional activities, secondly, the legal proceedings relate to a contract between that consumer and the professional vendor for the sale of goods or services which has given rise to reciprocal and interdependent obligations between the two parties and, third, that the two conditions specifically set out in Art. 13, first paragraph, point 3(a) and (b) are fulfilled” (see *Engler* at [34]);
 - iv) The purpose of the requirements of Article 13(3)(a) and (b) is to ensure a sufficiently strong connection between the contract and the country of domicile of the consumer (see the Schlosser report at [158] and, for example, the Advocate General’s opinion at [31] and the judgment at [45] in *Gabriel*);
 - v) These provisions are “intended to cover situations in which the trader has taken steps to market his goods or services in the country where the consumer resides and, inter alia, situations of mail-order and doorstep selling”. The concepts of “advertising” and “specific invitation addressed” cover “all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example, by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in

person, in particular by an agent or door-to-door salesman” (see *Gabriel* at [44] and [45] reflecting the Giuliano/Lagarde Report at Article 5.3). In the Giuliano/Lagarde report, to which the Schlosser Report (at [158]) cross-refers, the authors also state that the trader “must have made business proposals individually through a middleman or by canvassing”.

51. The decisions in *Petruchova* and *Reliantco* do not materially advance the debate on Grounds 1 and 2, not least since they address the (different) wording of the Recast Brussels Regulation. They do, however, confirm the existence of the “consumer contract” gateway as a separate and distinct ground for jurisdiction.

Analysis

52. As Castle emphasises, this appeal proceeds by way of review, not re-hearing. In so far as there is a challenge to the Judge’s evaluative assessment, this court will only interfere if it considers the decision to be wrong by reason of some identifiable flaw in his treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion (see for example *Re Sprintroom Ltd* [2019] EWCA Civ 932; [2019] BCC 1031 at [76]).
53. It was and remains common ground:
- i) That the pensioners, domiciled in England and Wales, were consumers for the purpose of Article 13;
 - ii) That the various steps, including advice and arrangements leading to the pension transfers “necessary for the conclusion of the contract”, took place in England and Wales. Thus, the requirement in Article 13(3)(b) was satisfied.
54. The contentious issue is whether the Judge was wrong to conclude that the pensioners did not have the better of the argument for the purpose of Article 13:
- i) that the proceedings were “proceedings concerning” contracts between the pensioners and Castle for the supply of services; and, if so,
 - ii) that in England and Wales the conclusion of the contracts was preceded by specific invitations addressed to the pensioners.
55. I start by considering the question of whether or not there was a contract between Castle and each pensioner at all. The Judge appears to have concluded that there was none, by reference to the lack of clarity as to the services to be provided. Beyond the contents of the Welcome Letter (which post-dated membership entry), this lack of definition was the only matter relied upon.
56. However, Mr Hart accepted on appeal that a contract for services did exist between each pensioner and Castle. His more nuanced position was that the services to be provided by Castle under each contract were limited to the technical execution of the relevant Deed of Adherence in each case. Thus, the proceedings, which made no complaint about the technical execution of the Deeds, were not “proceedings concerning a contract”.

57. In my judgement it is clear that the pensioners have the better of the argument that they each entered into a contract with Castle, as is indeed now conceded. This was a situation where each pensioner was not only a beneficiary but also a settlor of the trust in question. As the pensioners point out, the existence of a trustee-beneficiary relationship does not preclude the co-existence of a contract between the same parties.
58. There is a good arguable case that, by each application form, Castle made an offer to provide services (by reference to an agreed schedule of costs and on its standard terms and conditions), which each pensioner accepted. The pensioners can point to the contractual language used (for example, “we agree”; “remuneration”; “engagement”); the definition of “client” in the Terms and Conditions; the right to charge fees additional to any entitlement in the Deeds; the limitation of Castle’s liability and the express agreement on the part of Castle to exercise reasonable skill and care - an express obligation which is not to be found in the Deeds or Rules. A conclusion that in all the circumstances there was no contract could be said to be surprising, given the wording of its application forms and the requirement for each pensioner to agree to the Terms and Conditions. The “validation principle” referred to in *Enka Insaat ve Sanaryi AS v OOO Insurance Company Chubb* [2020] UKSC 38; [2020] 1 WLR 4117 at [95] is on point.
59. Further, the pensioners have the better of the argument that the scope of the contractual services to be provided by Castle went beyond the mere mechanical exercise of the execution of a Deed in place of the pensioner. Such an argument can be founded by reference to the following matters: the fees schedule; the references in the Terms and Conditions to the provision of services, the exercise of reasonable skill and care and limitations of liability. Albeit sent following entry in the Scheme, it is also legitimate for present purposes to take into account the references in the Welcome Letter to the fact that Castle would be administering the scheme and “also” providing ongoing fiduciary duties as trustees to the scheme. The Welcome Letter described Castle not only as the member’s “trustee” but also as their “scheme administrator”. Further, there is force in the submission for the pensioners that the bringing about of an effective transfer in each case was not a question of mere mechanics, but rather a specialised activity in a highly regulated environment.
60. Broad support for these conclusions can be found in *Adams v Options SIPP UK LLP (formerly Carey Pensions LLP)* [2021] EWCA Civ 474; [2021] Bus LR 1568. There, on not wholly dissimilar facts, Newey LJ concluded (at [64]) that the relationship involved a mixture of trust and contractual elements.
61. The further requirements of Article 13, so far as they remain contentious, then need to be considered. The live issues are whether the pensioners have the better of the argument that there was a specific invitation addressed to each pensioner and, if so, whether that invitation was sufficiently connected to Castle.
62. There is a good arguable case that each pensioner received (in the State of their domicile) a specific invitation addressed to them, such invitation crystallising at the moment that MS sent or handed them an application form.
63. It could be said that such an invitation would be sufficient for Article 13(3) purposes without more. Mr McMeel, however, conceded that there was a further requirement, namely that the invitation had to be made on behalf of the trader, here Castle. I am not

convinced that the concession is necessarily correct. Article 13 does not contain any express requirement for a connection between the invitation and the trader. As set out above, the focus is on the existence of a sufficiently strong connection between the contract and the country of domicile of the consumer.

64. But assuming for a moment that the concession is made correctly, there can be much debate as to the capacity in which MS was acting when it invited each pensioner to sign up - as joint venturer with or agent of Castle, for example, or entirely independently of Castle. It is not possible on the state of the evidence at this stage to make any reliable assessment of the precise nature of the relationship between MS and Castle. There are points to be made on both sides.
65. Thus, for the pensioners it is said that the evidence of a common design with MS, and Castle's acts in furtherance of that design, is "both substantial and compelling". It is said that the relationship was commercial and that there is clear evidence of "the sharing of the spoils". It is said that Castle has received fees of well in excess of £500,000 to date. Reliance is placed on emails said to show evidence of specific invitations being made by MS on behalf of Castle to more than one pensioner; evidence of MS's activities as "introducer" or "promoter" of the QROPS, including assistance in the completion of applications forms, the undertaking of money-laundering checks on behalf of Castle and the payment of fees or commissions – all consistent with a principal/agent relationship. On the other hand, Castle takes issue with any suggestion of a joint venture or principal/agent relationship with MS. There is no document evidencing such a relationship. If anything, Castle was the agent of MS: MS "hired" Castle to be the pension fund trustee.
66. But what can be said is that there is a plausible evidential basis for the proposition that there was some sufficient connection between MS and Castle, including the possibility that MS was acting for Castle as a "middleman" of the type envisaged in the Schlosser Report (by cross-reference to the Giuliano/Lagarde Report). It is, for example, not in dispute that MS obtained Castle's application forms and provided them to the pensioners. It appears that MS procured or facilitated production of all the complex documentation and declarations as required by Castle from the pensioners in the build-up to the application forms and transfers themselves.
67. Castle has yet to provide a full response or particulars of its relationship with MS. But, as the Judge stated in [4], the QROPS were "promoted" by MS. The Welcome Letter is significant on this point: there Castle described MS as the pensioner's "introducer", and Castle copied the Welcome Letter in each case to MS.
68. Moving on from the conclusion that the pensioners have the better of the argument that the requirements of Article 13(3) are met, I turn to the question of whether the pensioners have the better of the argument that the proceedings are "proceedings concerning" the contracts in question. The Judge concluded not, but that decision was clouded by what I have found to be his erroneous conclusion on the question of the existence (or scope) of the contracts.
69. As a general point, it can be noted that the proceedings are not about mismanagement of the trusts once established, but rather that the pensioners should never have entered the Schemes in the first place. The claims made concern Castle's alleged conduct in encouraging and permitting the pension transfers at all. It is said that the trusts are

essentially a “property-holding device,...a wrapper for worthless investments.” This points away from a conclusion that the pensioners’ claims are based mainly, let alone exclusively, on the Deeds and the Rules.

70. I consider first the Personal Claims. The pensioners have the better of the argument that the Personal Claims are “proceedings concerning a contract”. It is difficult to conclude otherwise, especially given the direct allegations made at [111] and [115] of the Particulars of Claim. The claims for relief also include a claim for damages for breach of contract.
71. It is of course right, as Castle submits, to look to substance and not form. Castle suggested that the contractual claims being pursued were a mere “figleaf”. I cannot accept that, not least in the light of my findings on Article 13(3) as set out above. Breaches of contracts of services, alongside other breaches of duty, are clearly pleaded, drafted by leading counsel, and verified with a statement of truth.
72. Likewise, the pensioners have the better of the argument that the s. 27 claims are “proceedings concerning a contract”, not least since s. 27 claim can only bite on “an agreement” and the relief sought is the reversals of the transfers.
73. Thus, the pensioners have the better of the argument that each pensioner entered into a consumer contract for the supply of services and that at least the Personal Claims (and also the s. 27 claims) are proceedings concerning such contracts for the purpose of Article 13.
74. The question of whether the joint tortfeasorship claims are “proceedings concerning a contract” is less clear. But the fact that the pensioners can establish jurisdiction in relation to at least one category of claim is sufficient for their purposes, given the pragmatic position adopted by Castle in this eventuality.

Conclusion

75. For these reasons, I would allow the appeal. I emphasise that this would simply mean that the proceedings could proceed in this jurisdiction. Nothing in this judgment determines any of the substantive issues of law or fact in what will no doubt be hotly contested litigation.

Lady Justice Nicola Davies :

76. I agree.

Lady Justice Macur :

77. I also agree.