Neutral Citation Number: [2019] EWHC 1793 (Ch)

Case No: BL-2018-000475

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/7/2019

Before:

MASTER CLARK

- -

Between:

PAUL HOLGATE **Claimant**

- and -

ADDLESHAW GODDARD (SCOTLAND) LLP **Defendant**

- -
- -

Stephen Davies QC (instructed by **Knights plc**) for the **Claimant**
Jamie Smith QC (instructed by **Clyde & Co (Scotland) LLP**) for the **Defendant**

Hearing date: 26 October 2018, 8 February 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Master Clark:

Application

1. This is my judgment on the defendant's application dated 13 September 2018 seeking:
   (1) a declaration that the courts of England and Wales have no power under the Civil Jurisdiction and Judgments Act 1982 to determine any of the causes of action or equitable remedies advanced or claimed in this claim; alternatively
   (2) a stay on the grounds of *forum non conveniens*.

Background and the claim

2. The application concerns the allocation of jurisdiction within the UK. The rival forums are England and Scotland. The claim is not time-barred in England, but may, at least in part, be time-barred in Scotland, where the relevant period of prescription (the Scottish equivalent of limitation) is 5 years.

3. The claim is for damages for breach of contract, negligence and/or breach of fiduciary duty in connection with and arising out of the defendant's acceptance and performance (and/or non-performance) of instructions to act as solicitor for and to advise Arthur Holgate & Son Limited (then in administration, now in liquidation) ("the Company") in relation to a dispute between the Company and Barclays Bank PLC ("the Bank") in the period from about 29 February 2012 until about 3 June 2013. The pleaded value of the claim is £10-15 million.

4. The Company was a family company, incorporated on 26 March 1935 in England and Wales as a private company limited by shares. Its directors and shareholders were at all relevant times, the claimant, Paul Holgate, and his parents, Martin and Margaret Holgate (together "the Holgates").

5. The claimant brings the claim as assignee of the Company's cause of action against the defendant under a Deed of Assignment dated 9 February 2018.

6. The defendant is a limited liability partnership registered in Scotland called Gateley (Scotland) LLP at the material times, and now called Addleshaw Goddard (Scotland) LLP.

7. The Company's business was owning and operating caravan holiday and residential parks. It owned 3 parks ("the Parks"): two in England (called Mount Pleasant and Silver Ridge) and one in Scotland (called Brandedleys).

8. In 2007 the Company bought an interest rate hedging product, which, the claimant alleges, was mis-sold by the Bank; and which, following the 2008 financial crisis and plummeting of interest rates, caused the Company to be unable to service the interest and other charges levied by the Bank, leading to its formal insolvency. Mount Pleasant was sold in September 2009 and Silver Ridge in November 2010, both at the Bank's insistence.

9. In December 2010 the Company wrote setting out its mis-selling claims ("the Swaps Claims").

10. On 1 February 2012, the Bank appointed John Charles Reid and William Kenneth Dawson ("the JAs") joint administrators of the Company under the supervision of the High Court of Justice, Chancery Division at the Manchester District Registry. Both JAs were practitioners at Deloitte LLP, a limited liability partnership incorporated in England. Mr Reid was based at and practised from Deloitte's Edinburgh office. Mr Dawson was based at and practised from Deloitte's Manchester office. They were assisted by Peter Mackie, an employee of Deloitte, based at the Edinburgh office, who acted on their behalf.

11. On 29 February 2012, the JAs formally instructed the defendant. The solicitor who advised them, Timothy Cooper, was based at and advised from the defendant's Edinburgh offices. He was, at all relevant times, English-qualified and regulated by the SRA; and was registered in Scotland as a "Foreign Expert".

12. At the forefront of the claim is the allegation that the relationship between the defendant and the Bank was such that the Bank had "Informal Control" over the defendant - para 7 of the Particulars of Claim ("PoC"):

> "At all material times, [the defendant] was a firm appointed to [the Bank]'s panel of preferred solicitor firms ("[the Bank]'s panel") with the result that:
> a. [the defendant] and its respective members/partners and employees were each highly motivated to build and maintain a close relationship with [the Bank];
> b. [the Bank] was able to negotiate lower fees in return for a promise of repeat work;
> c. [the Bank] was able to reward and punish behaviour by offering or withholding repeat business;
> d. consequently, the strong informal control that [the Bank] had over [the defendant], its members/partners and employees allowed [the Bank] effectively to influence the actions and matters which they were instructed ("Informal Control");
> e. the Informal Control was such that [the defendant] would not have been able to pursue a claim against [the Bank] without fear or favour and/or with the requisite independence required and would therefore have had a conflict of interests preventing it from acting for a party pursuing such a claim (as expressly acknowledged in an email sent by [the defendant] to the JAs' agent on 29 February 2012…).

13. The claimant's case as to the scope of the defendant's retainer is set out in para 30 of the PoC:

> "to assess [the Swaps Claims] for the purpose of enabling the JAs to carry out their functions as administrators, including the formulation of their statutory proposals pursuant to paragraph 49 of Sch B1 to the Insolvency Act 1986."

14. This is fleshed out in paras 34 and 35:

> "34. … The scope of [the defendant]'s retainer by or on behalf of [the Company] ('the Retainer') was:
> a. To review, advise and assist in relation to [the Swaps Claims].

b. To liaise with Ellis Jones (or other solicitors acting for the directors and members of [the Company]) to obtain background information and advice given to [the Company] in relation to [the Swaps Claims].
c. To review and advise in light of such material, and any information to be provided by the JAs "as to the financial position of [the Company], the assets available for pursuit of claims, the purposes of administration on [sic] appropriate strategies for dealing with [the Swaps Claims].
d. To liaise with the JAs, Ellis Jones (or other solicitors acting for the directors and members of [the Company]), Pinsents[1], and [the Financial Ombudsman Service] for the purpose of obtaining information and documents as appropriate to enable [the defendant] to advise the JA's as above.
e. Not commence or defend any legal proceedings in relation to [the Swaps Claims] and, in the event of any such proceedings, to obtain further instructions from the JAs.

35. For the avoidance of doubt, it is the claimant's case that the scope of the Retainer included analysing the correlation between the value of [the Swaps Claims] and the purpose and conduct of the administration."

15. As to the breaches alleged, these are said to arise out of the conflict of interest identified in para 7 of the PoC. They are set out at para 83, and can be summarised as:
(1) wrongly accepting instructions to act on the Company's behalf in advising on the Swaps Claims;
(2) wrongly continuing to act where the defendant knew or ought to have known that by reason of its relationship with the Bank there was a significant risk of conflict of interest;
(3) assessing the Swaps Claims in a manner which was superficial and/or uninterested and/or designed to delay pursuit of them to a resolution;
(4) failing to progress or advise the Company (acting by the JAs) to progress the FOS [Financial Ombudsman Service] complaint;
(5) failing to give due consideration to admissions by the Bank of LIBOR manipulation and various other events and announcements which increased the likelihood of the Company obtaining a very substantial compensation
(6) failing to advise the Company as to funding options for the Swaps Claims;
(7) failing to progress the claims with proper diligence and expedition.

16. On 26 February 2013 the JAs agreed to sell Brandedleys, despite opposition to this course by the Holgates, for the sum of £1,075,000, of which £437,451 was paid to the Bank, reducing the Company's liability to it to about £1 million.

17. On 7 June 2013, the Holgates placed the Company into creditors' voluntary liquidation and secured the appointment of liquidators who were not on the Bank's panel. The liquidators issued proceedings in respect of the Swaps Claims within a

[1] alleged (in para 5) to be the solicitors who, pre-administration, advised the Bank as to its strategy for realising the assets of the Company by placing it into administration

month of their appointment. Those claims were pursued, and following a mediation on 12 May 2016, settled. The Company is now formally solvent, but has no business as result of the sale of its three properties.

18. The claim was issued on 26 February 2018, shortly before the end of the 6 year period from the date when the defendant was first instructed.

19. On 22 February 2018, the claimant (in his capacity as a shareholder of the Company) issued an application (claim no. CR-2018-001546) in the Insolvency and Companies List for permission to make an application under para 75(2), schedule B1 of the Insolvency Act 1986 against the JAs. This paragraph provides, so far as relevant:

> "**Misfeasance**
> 75
> (1) The court may examine the conduct of a person who—
> …
> (b) has been or has purported to be the administrator of a company.
>
> (2) An examination under this paragraph may be held only on the application of—
> …
> (e) a contributory of the company.
>
> (3) An application under sub-paragraph (2) must allege that the administrator—
> (a) has misapplied or retained money or other property of the company,
> (b) has become accountable for money or other property of the company,
> (c) has breached a fiduciary or other duty in relation to the company, or
> (d) has been guilty of misfeasance.
> (4) On an examination under this paragraph into a person's conduct the court may order him—
> (a) to repay, restore or account for money or property;
> (b) to pay interest;
> (c) to contribute a sum to the company's property by way of compensation for breach of duty or misfeasance.
> …
> (6) An application under sub-paragraph (2) may be made in respect of an administrator who has been discharged under paragraph 98 only with the permission of the court."

I refer therefore to this application as the misfeasance claim. It is common ground that the English court has exclusive jurisdiction in that claim.

20. Permission was granted by a consent order dated 3 July 2018; and the misfeasance claim (an application in the same proceedings) was issued on 8 July 2018.

21. This claim was served out of the jurisdiction, in Scotland, accompanied by a form N510 Notice stating that the Court had the power to determine the claim under the Civil Jurisdiction and Judgments Act 1982 ("the Act"). It was common ground at the hearing that the claimant was entitled to serve out of the jurisdiction without permission: see CPR 6.32, which is satisfied in this case, because the defendant is domiciled in the United Kingdom.

Legal principles

22. The rules governing intra-UK jurisdiction are found in the Act. Section 16 provides, so far as relevant:

> "**16.— Allocation within U.K. of jurisdiction in certain civil proceedings**
>
> (1) The provisions set out in Schedule 4 (which contains a modified version of Chapter II of the Regulation) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—
>
> (a) the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings); and
>
> …
>
> (4) The provisions of this section and Schedule 4 shall have effect subject to the Regulation, Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011, the 1968 Convention, the Lugano Convention and the 2005 Hague Convention and to the provisions of section 17.

"The Regulation" is defined (in section 1) as

> "Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) as amended from time to time and as applied by virtue of the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ No L 299, 16.11.2005, p62; OJ No L79, 21.3.2013, p4)"

I refer to it as the recast Judgments Regulation, reflecting the fact it replaced (and recast with different numbering) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Judgments Regulation").

23. Article 1 of the recast Judgments Regulation provides, so far as relevant:

> "1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. …

2. This Regulation shall not apply to:

…

(b) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."

24. Section 17 of the Act provides, so far as relevant:

"**17.— Exclusion of certain proceedings from Schedule 4**

(1) Schedule 4 shall not apply to proceedings of any description listed in Schedule 5 … "

25. Schedule 5 provides, so far as relevant:

"**PROCEEDINGS EXCLUDED FROM SCHEDULE 4**

Proceedings under the Companies Acts

1. Proceedings for the winding up of a company under the Insolvency Act 1986 or the Companies Act (Northern Ireland) 1960, or proceedings relating to a company as respects which jurisdiction is conferred on the court having winding up jurisdiction under either of those Acts."

26. The relevant parts of Schedule 4 are:

"1. Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.

2. Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of rules 3 to 13 of this Schedule.

3. A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued—

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

…

(c) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…

5. A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, also be sued—

(a) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

Issues

27. By its application, the defendant raises two broad issues:
    (1) *Jurisdiction*: do the Courts of England and Wales have the power under the Act to decide the claim? If not, the defendant seeks the striking out of the claim.
    (2) *Forum conveniens*: if the answer to the jurisdictional question is yes, should the Court nonetheless stay the claim on the footing that Scotland is the more convenient forum for it to be heard?

Common ground

28. Subject to the question of whether the claim is within the Act at all, the parties were agreed that:
    (1) the defendant is domiciled in Scotland;
    (2) Schedule 4 of the Act therefore requires the claim to be brought in Scotland, unless
        (i) the claim falls within rule 1 of Schedule 5 (and is therefore excluded from Schedule 4); or
        (ii) the claim falls within one of the exceptions (those relevant being set out above) in Schedule 4 itself;
    (3) the burden of proof is on the claimant to show that the claim is either excluded from Schedule 4 or within one of the exceptions in it;
    (4) the *forum conveniens* issue only arises if the claimant establishes one of jurisdictional gateways;
    (5) the burden of proof is on the defendant to show that Scotland is clearly the more convenient forum.

29. This application does not turn on the standard of proof to be met by the claimant; and it is sufficient to refer to the 3-limbed test for "good arguable case" set out in *Kaefer Aislamientos SA de CV v (1) Ams Drilling Mexico SA de CV* [2019] EWCA Civ 10, which is satisfied in this case.

Jurisdictional issues

30. The jurisdictional issues can therefore be divided into the following sub-issues:
    (1) whether the claim falls within rule 1 of Sch 5 of the Act by reason of being "proceedings relating to a company as respects which jurisdiction is conferred on the court having winding up jurisdiction under either of those Acts"; and therefore, falls outside Sch 4 ("the UK Exclusion");
    (2) If Sch 4 applies, then whether (in descending order of the claimant's preference)
        (i) the claim falls within rule 5(a) of Sch 4 by reason of the misfeasance proceedings; or
        (ii) the claim falls within rule 3(a), because England was the place of performance of the relevant obligations; or
        (iii) the claim falls within rule 3(c) because England is the place where the harmful event occurred in respect of the breach of equitable obligations.

31. The claimant raised an additional issue, namely whether the claim is within the Act at all; or whether it falls outside s. 16 of the Act because it falls within Art 1(2)(b) of the recast Judgments Regulation ("the EU Exclusion").

Whether the Act applies to the claim – the EU Exclusion

32. Both sides were agreed that the applicable legal test is the "*Gourdain*[2] formulation", set out *Polymer Vision v Van Dooren* [2011] EWHC 2951 (Comm); [2012] I.L. Pr. 14 at [47]:

> ""[I]t is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the [Brussels] Convention, that they must derive directly from the bankruptcy or winding-up, and be closely connected with the proceedings for the *liquidation des biens* or the *règlement judicire* ." (at [4]).

33. As noted in *Polymer Vision*, this wording is very similar to that of recital (6) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceeding ("the Insolvency Regulation"), which provides:

> "(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings …"

> and to Art 25(1) of the Insolvency Regulation, which provides for recognition of judgments of courts having jurisdiction under the Regulation, and

> > "judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court."

34. As also noted in *Polymer Vision*, although the Insolvency Regulation does not itself confer exclusive jurisdiction on the member state where the main proceedings have been opened, the two sets of provisions are intended to dovetail completely with each other.

35. It is also clear from *Polymer Vision* that:
    (1) the fact that a claim factually depends on (in this case) an administration is not sufficient to bring it within the EU Exclusion [55];
    (2) a claim based on pre-administration rights, but enforced during the administration, does not derive directly from the administration and is not sufficiently close to it – these are rights which could have been enforced even if the company had not gone into administration [55], [56].

Claimant's submissions

36. The claimant's counsel submitted that this claim falls outside the Act because it falls within the EU Exclusion.

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[2] Case C-133/78 *Gourdain (Liquidator of Soc. Fromme France Manutention) v Nadler* [1979] ECR 733 – a decision of the ECJ (as it then was)

37. He submitted that, as set out in *Polymer Vision*, the *Gourdain* formulation (and Art 25(1) of the Insolvency Regulation) operate to apply the EU Exclusion to a variety of situations, namely, if the proceedings in question:
    (1) relate to "the internal management of the insolvency process or the conduct of the insolvency office-holder" [59];
    (2) although "not juridically directly derived from the insolvency proceedings", are "closely linked" [66];
    (3) concern the insolvency process/procedures [67]; and/or
    (4) concern the way in which the insolvency office-holder exercised his powers under the insolvency law [71].

38. He submitted that, on the facts of this particular case, the close connection of these proceedings to the administration of the Company meant that the EU Exclusion applies. He particularly relied upon the fact that the claim pleads that the defendant's advice went beyond the merits of the claim against the Bank, and included advice as to all the main aspects of the administration (paragraph numbers are references to the PoC) :
    (1) the content of the JAs' statutory proposals (para 37);
    (2) defending the propriety and accuracy of the statutory proposals as published (para 38);
    (3) advising the JAs whether to hold a creditors' meeting "to allow creditors to ask about the proposals and the claims against the bank" (advising that a private meeting be held with the Holgates "as a means of diverting away from the creditors meeting") (para 40);
    (4) the holding of monies held in escrow in respect of the Holgates' employment claims (para 117 of the witness statement of Mark Dennis dated 17 October 2018);
    (5) the process for exiting the administration (para 117)); and
    (6) whether the Company and the Bank should agree a standstill (para 117).

39. He submitted that the claim relates to (and only to) the process of the administration and the conduct of the insolvency professionals. It mirrors, he said, the allegations in the misfeasance claim, which exclusively concerns such matters:
    (1) The JAs and the defendant were each on the Bank's insolvency panel and subject to the Bank's Informal Control[3], such that neither could properly act for the insolvent estate.[4]
    (2) An objective evaluation of the Swaps Claims was critical to determining the statutory purpose of the administration (i.e. whether para 3(1)(a), (b) or (c) of Sch B).[5]
    (3) Neither the JAs nor the defendant pursued the Swaps Claims because each of them was disabled by the same conflict of duty to creditors and interest in favouring the Bank.[6]
    (4) As a result, during and as part of the process of administration, the Company suffered loss and damage, namely the loss of its business and assets[7].

[3] As defined in paras 7(a)-(d) and 31 of the PoC; paras 14 and 32 of the misfeasance claim PoC.
[4] referring to paras 7(e) and 83(a)-(b) of the PoC; paras 55(a)-(b) of the misfeasance claim PoC.
[5] referring to paras 35 and 87 of the PoC; para 58 of the misfeasance claim PoC.
[6] referring to paras 83-84 of the PoC; paras 26, 29, 34 and 56 of the misfeasance claim PoC.
[7] referring to paras 85-92 of the PoC; paras 57-60 of the misfeasance claim PoC.

40. This close connection was, he submitted, sufficient to satisfy the *Gourdain* test.

Defendant's submissions

41. The defendant's counsel submitted that the *Gourdain* formulation necessitates the satisfaction of two conjunctive requirements as regards the claim:
    (1) it *"must derive directly"* from the Company's administration; and,
    (2) it must be closely connected with the administration process.

42. He submitted that the claim did not derive directly from the administration, but only arose in the factual context of it. The defendant was not an office holder in the administration, nor subject to the supervision of the court in the performance of its professional advisory duties. The claim is not, he submitted, to enforce rights directly derived from the administration; and is not otherwise closely connected to it.

43. The defendant also submitted that, as a minimum, the *Gourdain* test requires the Court to satisfy itself that the claim fulfils the criteria in *SCT Industri AB (in liquidation) v Alpenblume AB* (C-111/08), Bus LR 559 (2009) (as discussed in *Polymer* at [64]-[66]). These were, he submitted:
    (1) are the issues in the claim the *"direct and indissociable consequence of the exercise by* [the JAs] *of their powers in that capacity"*; and,
    (2) do those issues relate *"specifically and exclusively to the extent of the powers of the* [JAs]".

44. The issues arising in the claim were not, he submitted, the direct and indissociable consequence of the exercise of the JAs' powers in the administration, in particular, in selling Brandedleys. The thrust of the claim was the conduct of solicitors advising on a piece of litigation. The subject matter of the claim does not therefore, he said, relate specifically and exclusively to the extent of the powers of the JAs.

Discussion

45. I reject the defendant's submission that the *Gourdain* test requires the court to be satisfied as to the two matters set out at para 43 above. Those were the particular relevant factors identified in the *SCT* case; and are not, in my judgment, to be substituted for the *Gourdain* test itself.

46. I accept of course that the factual situation in which the claim arises was the administration of the Company; and that the *Gourdain* test does not require direct juridical derivation from the administration, only that the claim is "closely linked".

47. As the claimant impliedly accepted, the advice pleaded as having been given by the defendant falls into two categories. The first category concerns the merits and the pursuit of the Swaps Claims themselves. Those claims pre-dated the administration and could have been brought by the Company itself if it had not entered administration. They plainly fall outside the *Gourdain* test.

48. The second category is that set out in para 39 above, being advice as to the way in which the Swaps Claims were dealt with in the administration. I accept that the claim includes an allegation that the defendant's retainer included advising as to the

conduct of the administration to that extent. However, in my judgment, this is not sufficient to satisfy the *Gourdain* test.

49. The defendant was not the decision making entity in the internal management of the administration: as a solicitor, its role was limited to advising the JAs and acting in accordance with their instructions. The JAs were not obliged to follow its advice and, indeed, could have dispensed with its services at any point.

50. In my judgment, therefore, the claim does not relate to the internal management, of the administration or the conduct of the JAs: the defendant's purely advisory role meant it was not responsible for either of these. This is, in my judgment insufficient for the claim to be "closely linked" to the administration.

51. The fact that the misfeasance claim mirrors this claim does not, in my judgment, help the claimant; because the claimant's submissions gloss over the fundamentally different role of the two professionals in relation to the administration. This is illustrated by the claimant's counsel's reference to the defendant "failing to pursue" the Swaps Claims: when the true position is that the defendant had no active role (in its capacity as solicitor) in the pursuit of the Swaps Claims, because the only person who could pursue that claim was the Company (acting by the JAs).

52. For these reasons, I consider that the EU Exclusion does not apply to the claim.

The UK Exclusion

53. The issue arising here is whether the claim is "proceedings relating to a company as respects which jurisdiction is conferred on the court having winding up jurisdiction under [the Insolvency Act 1986]". If so, then the claim falls entirely outside the Act.

Claimant's submissions

54. The claimant's counsel submitted that rule 1, Sch 5 of the Act created a blanket exclusion for all proceedings relating to companies subject to corporate insolvency procedures, including administrations.

55. The claim in this case was proceedings relating to a company which was in administration; and falls therefore falls within the UK Exclusion. No closer connection was, he said, required because the same statutory and legal regime for corporate insolvency applies to England and Scotland.

Defendant's submissions

56. The defendant's counsel submitted that it would give extraordinary and unprincipled width to the exception in rule 1, Sch 5 of the Act if the claimant's submissions were correct. There was, he said, no sensible rationale for disapplying the whole of Sch 4 of the Act – leaving a vacuum of jurisdictional rules (presumably to be filled by the common law) – merely because the proceedings 'relate to' a company in, say, administration. There was, by contrast, everything to be said for a disapplication of Sch 4 of the Act where a discrete jurisdictional regime exists under the 'Companies Acts' – which, it was common ground, as originally enacted in 1982, referred to "the Companies Acts 1948 or the Companies

Act (Northern Ireland) 1960"; and was amended to "the [Insolvency Act 1986] or the [Insolvency (Northern Ireland) Order 1989]".

Discussion

57. I reject the claimant's submissions as to the width of meaning of the UK Exclusion. In my judgment, the expression "as respects which …" refers back to "proceedings", so that the relevant proceedings are those in respect of which the Insolvency and Companies List (formerly the Companies Court) has jurisdiction. It is not therefore sufficient that the claim relates to a company subject to insolvency procedures. The claim must be one which can be brought in the Insolvency and Companies List.

58. The claimant's counsel did not refer me to any authority in support of his construction of the UK Exclusion. However, companies in liquidation or administration are frequently claimants (less frequently, defendants) in a wide range of claims in the Business and Property Courts. The suggestion that all of these claims are required to be brought in the Insolvency and Companies List merely because one of the parties is subject to insolvency proceedings is, in my judgment, unsustainable.

Jurisdiction based on "anchor proceedings": rule 5(a) of Sch 4 to the Act

59. Under this provision, the defendant may be sued in England if it is

> "one of a number of defendants [and England is] the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".
> ("the anchor provisions")

Common ground

60. It is common ground that:
    (1) the defendant could not have been added to the misfeasance claim when issued or subsequently;
    (2) For the purposes of the anchor provisions, the "claims" may be in different proceedings: *Masri v. Consolidated International (UK) Ltd* [2005] EWCA Civ 1436; [2006] 1 WLR 830 (CA);
    (3) If the misfeasance claim had been issued when this claim was issued, the court would have jurisdiction in this claim.

61. In addition, the defendant did not seek to argue that there was insufficient overlap in the two claims to mean that there was no risk of irreconcilable judgments. In view of the substantial overlap in the factual and legal issues arising in the two claims, there is, in my judgment, plainly such a risk.

Claimant's submissions

62. The claimant's counsel submitted that the claimant's inability to join the defendant to the misfeasance claim was a "procedural quirk" arising from the fact that it was required to be brought under para 75(2) of Sch B1 to the Insolvency Act 1986 (set out above); so that it would be merely a procedural irregularity to join third parties to such an application.

63. As to *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1, relied upon by the defendant (see paras 73 to 75 below), he submitted that it was irrelevant to construing the anchor provisions for 3 reasons.

64. First, he submitted that, whilst it is essential under EU law to establish with certainty the appropriate date for determining a person's domicile (referring to Lord Hoffmann at 8F-G and 11F-G), there is no EU issue in this claim, and no issue as to domicile.

65. Secondly, he submitted that the position of the contesting defendants in *Canada Trust* was devoid of merit, because they were seeking to contest jurisdiction in reliance on the anchor defendant having gone to ground between issue and service of the proceedings.

66. Thirdly and, he submitted, most importantly, *Canada Trust* is not authority for the proposition that, in a case where there is no issue that the anchor defendant is domiciled in England, proceedings must first be issued against that defendant before the others for the anchor provisions to have any application.

67. He referred me to *Cook v Virgin Media* [2015] EWCA Civ 1287, [2016] 1 WLR 1672. This was a case in which the claimants, who were domiciled in Scotland, brought claims in England against defendants with registered offices in England for personal injuries sustained in Scotland. The issue in *Cook* was whether the principle of *forum non conveniens* applied to cases within the domestic framework for establishing intra-UK jurisdiction. It was held it did. The claimant's counsel relied upon [31] of the judgment of Lord Dyson:

> "In the *Kleinwort Benson* case, the court said that it did not have jurisdiction to give a preliminary ruling on the interpretation of article 5(1)(3) of the Brussels Convention where the issue was the true interpretation of the 1982 Act in an intra-UK jurisdiction case to which the Convention did not apply. The 1982 Act did not require the UK courts to decide disputes before them "by applying absolutely and unconditionally the interpretation of the Convention provided to them by the [ECJ]": para 20. In a case where the Convention did not apply, the court of the member state in question was "free to decide whether the interpretation given by the ECJ was equally valid for the purposes of the application of the national law based on the Convention": para 22."

68. In reliance on this, he submitted that the jurisprudence as to identically worded provisions in the recast Judgments Regulation and the Lugano Convention had no application to the domestic intra-UK regime established by the Act. The absence of the international element meant, he said, that there was no need for concerns about the "special and esoteric rules" that apply to the recast Judgments Regulation.

69. He submitted, therefore, that there was nothing in the anchor provisions that required the anchor claim to have been commenced at the date of issue of the main claim. He invited me to apply it on its face. The provisions were, he said, about pragmatism, efficient case management and avoiding the risk of irreconcilable

proceedings, and were tailor made for this situation. He submitted that, although to have joined the defendant to the misfeasance claim would have been a procedural irregularity, CPR 3.10 provides that such an irregularity can be cured, and that the anchor provisions should be construed to permit this course by a different route.

70. Alternatively, he submitted, the permission proceedings for the misfeasance claim were the relevant claim, and relied on the fact that they were issued before this claim.

Defendant's submissions

71. The defendant's counsel submitted that the anchor provisions were not concerned with procedure or case management; but were substantive rules of law governing whether someone outside England can be sued.

72. The defendant raised two main objections to the application of the anchor provisions:
    (1) They are not engaged because, when this claim was issued, the misfeasance proceedings had not been formally commenced, so that there was no existing claim against an "anchor defendant" from which jurisdiction could be derived.
    (2) The claimant is not entitled to rely on the provisions because he sues in a different capacity in each of the claims.

<u>No existing claim at date of issue</u>

73. The defendant's counsel submitted that the critical date was the date of issue. The anchor provisions are only engaged, he said, when at the time of issue of the claim against the non-domiciled defendant, the "other proceedings" in England involving at least one "anchor" defendant have been commenced. This, he said, was not arbitrary, but scientific and what one would expect from a jurisdictional regime.

74. The consequence of this was that the jurisdictional rules were engaged and predictable as at the date of issue of the claim. He submitted that this avoided the mischief which could result from a foreign defendant being made susceptible to this jurisdiction by reason of subsequent events; for example, by being deprived of a limitation defence. The desirability of certainty in jurisdictional matters was achieved by making the issue date the referral date.

75. He particularly relied upon *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1, a decision concerning Art 6(1) of the Lugano Convention, which then provided:

> "A person domiciled in a contracting state may also be sued:
> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"

In *Canada Trust*, the anchor defendant was domiciled in England at the date of issue of the claim; but not demonstrably so at the date of service on the Swiss defendants to the claim, who challenged jurisdiction on the basis that the relevant date was the date of service. The House of Lords held that the relevant date for

establishing jurisdiction under Art 6(1) was the date of issue of the claim, not the date of service: Lord Steyn at pp 8E-H, 9A, 12E-F.

76. In support of his submissions, the defendant's counsel also referred me to *Civil Jurisdiction and Judgments* (6th edn), Briggs ("*Briggs*") at 2.226, discussing Art 8(1) of the recast Judgments Regulation (which is effectively identical to Art 6(1) of the Lugano Convention and the anchor provisions) and the effect of *Masri*:

> "It was held [in *Masri*] that what is now Article 8(1) allowed jurisdiction to be taken over a defendant in another Member State, if separate proceedings were instituted against a defendant in England, and an application made to consolidate the proceedings. This looks rather odd if it means that proceedings over which the court did not have jurisdiction are retrospectively[1315] brought within its special jurisdiction by a procedural application for consolidation; but it looks eminently sensible if the alternative of applying to amend the proceedings against the English defendant, by adding a new claim against the co-defendant, would have brought the case within Article 8(1) in any event.

Footnote 1315 to "retrospectively" adds:

> "this may be a significant point, because the Court has said, in other contexts, that jurisdiction is meant to be determined at the outset of proceedings, and not altered in the light of subsequent events, such as the filing of a defence."

77. As to *Cook*, he submitted that the basis of the decision was the express provision in s.49 of the Act preserving the principle of *forum non conveniens*. He also submitted that the analysis of the House of Lords in looking at identical wording should be given weighty respect; and that there was no proper basis for distinguishing between the intra-UK and the EU position.

<u>Claim brought in different capacities</u>

78. The defendant's counsel also submitted that the claimant could not rely on the anchor provisions when the 2 relevant claims were brought in different capacities:
    (1) this professional negligence claim is brought as assignee of the Company;
    (2) the misfeasance claim is brought as a contributory of the Company.
    He relied upon *Madoff Securities International Ltd v. Raven [2011] EWHC 3102 (Comm); [2012] ILPr 15* at paras 59-60 per Flaux J.

Discussion

79. *Canada Trust* was concerned with the meaning of "sued" for the purposes of determining whether the domicile requirement of Art 6 of the Lugano Convention was satisfied at that point. I accept that this court is not bound, when considering the intra-UK regime, to apply European jurisprudence, but as the passage in *Cook* makes clear, the court is free to decide whether to do so.

80. I also accept that the analysis in *Canada Trust* should be given weighty respect. I reject the claimant's submission that the situation in *Canada Trust* could not arise in an intra-UK context. The "merits" of the contesting defendants in *Canada Trust* are irrelevant to the issue I have to decide.

81. In my judgment, therefore, there is no basis for departing from the conclusion in *Canada Trust* that "sued" refers to the issue of the claim. It follows that if at the date of issue of the claim, no anchor claim is in existence, then the court will not have jurisdiction at that point.

82. However, *Canada Trust* was not directly concerned with the point which arises in this case, namely whether jurisdiction can retrospectively be conferred on a claim by the anchor claim being issued subsequently.

83. Determining this point involves resolving the tension between two conflicting objectives established in the authorities to which I have been referred: the desirability of jurisdiction being established as at the date of issue of the claim; and the desirability of avoiding irreconcilable judgments; the latter issue not arising in *Canada Trust.*

84. I consider this in the following context. I accept that the bar to the misfeasance claim including a claim against the defendants in this claim is a purely procedural one, the court having jurisdiction in both claims being the High Court: the Companies and Insolvency List (Chancery Division), and the Business List (Chancery Division), both lists in the Business and Property Courts ("B&PCs"). It is important to note that these Lists are not separate courts or specialists lists engaging CPR 30.5(2) – they are administrative labels intended to facilitate the listing of cases before Judges with the appropriate expertise: see *Mezvinsky v Associated Newspapers* [2018] EWHC 1261 (Ch), [2018] FSR 28. The requirement that claims in the Companies and Insolvency List are brought by application in that List is not a jurisdictional requirement; nor is the requirement that a claim for professional negligence must be brought by Part 7 claim form. In the absence of this procedural bar, the claimant could have joined the defendant to the misfeasance claim at the outset.

85. If the claimant had included a claim against the defendant in the misfeasance claim, then I accept that this would have been a procedural error capable of remedy under CPR 3.10: rule 12.1 of the Insolvency (England and Wales) Rules 2016 providing that the CPR applies to insolvency proceedings except insofar as disapplied or inconsistent with those rules.

86. Taking these considerations into account, and the desirability of avoiding irreconcilable judgments, in my judgment, an anchor claim issued after the relevant claim is capable of conferring jurisdiction, provided the other requirements of the anchor provisions are satisfied.

87. If I am wrong about that, I accept the claimant's submission that the anchor claim was commenced when on 22 February 2018, the application for permission was issued. That application commenced a claim (with claim no. CR-2018-001546) to which the JAs were parties at the outset. The misfeasance claim itself was made as an application in the same proceedings, with the same claim number; and indeed, the order granting permission made directions in the misfeasance claim. All this leads, in my judgment, to the conclusion that there was one claim and it was commenced on 22 February 2018.

88. As for the defendant's submission that the anchor provisions do not apply when the two claims are brought in different capacities, in my judgment, the *Madoff* case does not deal with that issue; but with whether art 6(1) of the Judgments Regulation applies where the claimant seeking to invoke it does not have a claim against the English domiciled defendants, but another claimant with a similar claim is suing all the relevant defendants (including both the English domiciled defendants and the defendant challenging jurisdiction). The defendant's counsel did not refer to any other authorities. Such a requirement would go beyond the wording of the anchor provisions themselves; and I reject in the absence of an express authority requiring it.

Jurisdiction based on England being "the place of performance of the obligation in question": rule 3(a) of Sch 4 to the Act

Claimant's submissions

89. The claimant's counsel submitted that his primary pleaded case against the defendant (and the JAs) was not based in contract (or negligence), but in breach of fiduciary duty, in accepting the engagement to act, when they should have declined or ceased to act shortly thereafter.

90. He also does not accept that the defendant contracted with the JAs/Company on the terms of the draft engagement letter relied upon by them.

91. However, insofar as his claim is based in contract, the claimant's submissions can be summarised as follows:
    (1) The words, "matters relating to a contract", should not be given an 'autonomous' meaning, but instead should be interpreted as concerning only causes of action in contract;
    (2) The relevant contract was between the defendant and the English insolvent estate (represented by the JAs);
    (3) The services were delivered to that estate in England.

<u>Meaning of "matters relating to a contract"</u>

92. In support of his submission that rule 3(a) should be interpreted in accordance with English law, and not in accordance with the case law under the recast Judgments Regulation, the claimant relied upon *IHP Ltd v Fleming* [2009] 7 WLUK 279 (10 July 2009), a decision of Master Fontaine.

93. In *IHP* the claimants (in England) supplied chickens to the defendants (domiciled and resident in Scotland) under a contract; and their claim was for sums due under that contract. The primary issue was whether the place of performance of the obligation in question under the contract was England or Scotland.

94. In determining this question, the Master had to decide whether to apply the normal English rule (in the absence of agreement) as to the place of performance of the payment obligation (being the place where the creditor is) or, as the defendants submitted, to apply European jurisprudence.

95. Art 5(1)(a) of the Judgments Regulation (which was in force at the date of *IHP* – now Art 7(1)(a) of the recast Judgments Regulation) is in identical terms to rule

3(a) of Sch 4 to the 1995 Act. Art 5(1)(b) of the Judgments Regulation is in the following terms:

> "(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
>
> - in the case of the sale of goods, the place in a Member State, where, under the contract, the goods were delivered or should have been delivered,
>
> - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided."

Article 5(1)(b) is not reflected in rule 3 of Schedule 4 of the Act.

96. The defendants in *IHP* relied upon s.16(3) of the Act, which provides:

> "(3) In determining any question as to the meaning or effect of any provision contained in Schedule 4 –
> (a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1998 Convention [or Chapter II of the Regulation] and to any relevant decision of that court as to the meaning or effect of any provision of that Title [or that Chapter]: and
> (b) without prejudice to the generality of paragraph (a), the reports mentioned in section 3(3) may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances."

According, they submitted that Scotland was the place of performance of the relevant contract.

97. The Master rejected that submission for reasons which are set out at para 24:

> "i) Rule 3 of Schedule 4 does not include any of the provisions of Article 5.1(b) of the Judgments Regulation, and given that the amendments to Schedule 4 were made so that the jurisdiction regime as between countries within the United Kingdom could mirror, so far as possible, the jurisdiction regime between EU member states as set out in the Judgments Regulation, my view is that this omission must have been deliberate. I consider that if it had been intended by the legislature to provide for a different place of performance than that which would be the case under English law rules, then that would have been specified. Although the decision is not binding upon me, I note that the Advocate General came to the same view in respect of Schedule 4 in *Kleinwort Benson*.
>
> ii) Section 16 of the 1982 Act does not provide that the English court must have regard to the provisions of the Judgments Regulation in

determining any question as to meaning or effect of any provision in Schedule 4, but rather to "any relevant principles laid down by the European Court in connection with ….the Regulation", and further section 16(3)(b) gives the English court the discretion to give such weight as is appropriate to such principles in such interpretation. The only case to which I have been referred (*Kleinwort Benson*) determined that the interpretation of the relevant provisions of Schedule 4 is a matter for the English court and declined to set out any principles.

iii) It is clear, in my view, from the wording of section 47 and section 16(1) of the 1982 Act that Schedule 4 was not intended to be a replica of Article 5 of the Judgments Regulation, but to be a modified version of it. Thus, where modifications have been made, my view is that these were intended by the legislature and that it was therefore not intended to replicate Article 5.1(b) of the Regulation.

iv) Accordingly, Schedule 4 rule 3(a) should be interpreted in accordance with English law."

98. The claimant's counsel also submitted that in so far as the court can have regard to European jurisprudence, it should adopt the concept of the "centre of gravity" of the obligation in question, referring me to *Briggs* at para 2.180:

> "The jurisprudence of the Court suggests that a national court should try to find a single place as the place for provision of the service by looking at the contract and the manner in which the services have been provided. It should generally look for the centre of gravity of the obligation in question, but if that does not yield a solution, and alternative place – or even places - of provision may be found. It may be thought at this point that the ends are being allowed to justify the means, but that may be no bad thing if the end is rational and the means are comprehensible.
>
> In *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA*[8], the contract called for the provision of services in several Member States; the question was how this affected or determined the place of performance of the obligation in question for the purpose of Article 7(1)(b). the Court indicated that the general need was to identify a single place which could exercise special jurisdiction over the entire contract for the provision of services. The general position was that it was necessary to find the place of main provision of the services. The first thing was to read the contract; if that did not help, the court should look at where the services had been provided in the past; and, if that did not help, another place of single reference would be found in the place where the service-provider was domiciled."

<u>The relevant contract</u>

99. The claimant's counsel submitted where (as the claimant alleges) there was no engagement letter, it was inappropriate to find "an implied retainer" where a solicitor was engaged by an administrator. He relied upon the fact the wording used

[8] C-19/09, [2010] ER I-212

in the insolvency legislation for the engagement of such a solicitor has always been "employed" referring me to rules 7.35(1) and 2.67(1)(g) of the Insolvency Rules 1986 which provide:

> "7.35(1) Before making a detailed assessment of the costs of any person employed in insolvency proceedings by a responsible insolvency practitioner, the costs officer shall require a certificate of employment, which shall be endorsed on the bill and signed by the insolvency practitioner"
> (as in force at the relevant time)
>
> "2.67(1) The expenses of the administration are payable in the following order of priority-
> ...
> (g) the remuneration or emoluments of any person who has been employed by the administrator to perform any services for the company, as required or authorised under the Act or the Rules."

100. He also relied upon the discussions of the relationship by Vaughan Williams J in *Re London Metallurgical Co* [1897] 2 Ch 262 (at 269)*:*

> "I want to say in passing that in practice, both in bankruptcy and in the winding-up of companies, there is a tendency to talk of solicitors as being "solicitors to the trustees," or "solicitors to the liquidators," but really there is no such office. In such cases there should be an authority to "employ a solicitor." The authority ought to name the solicitor who is to be employed, and it is right and proper, upon the occasion of any such specific authority to employ a solicitor in a particular matter being given, that a limit should be placed on the costs to be incurred."

and by Templeman J in *In re Nation Life Insurance Co.* [1978] 1 WLR 45 (at 47F-G):

> "In law however there is no such thing as solicitors to the liquidator: see *Re London Metallurgical Co* [1897] 2 Ch 262 at 269. The solicitor has no claim against the liquidator personally for any costs: *Re Anglo-Moravian Hungarian Junction Railway Co*. The solicitor can only look to the assets of the company for payment. By r 195(1) of the Companies (Winding-up) Rules 1949 the assets of the company are liable to pay, inter alia, the costs of any person properly employed by the liquidator."

and again, at 50A-C:

> "The solicitor has no client. His costs are payable out of a fund, namely the assets of the company. Rule 188 of the 1949 rules requires the taxing master to assume that a liquidation bill arises out of proceedings. The solicitor is in the position of a party claiming costs out of a fund claimed by creditors and others. If there are actual proceedings and the court makes an order, then the taxing master will apply the basis of taxation ordered by the court. If there are no proceedings, r188 of the 1949 rules requires proceedings to be presumed

and the taxing master naturally and, in my judgment, properly applies the basis of common fund taxation as if the taxing master were the court."

101. On this basis, the claimant's counsel submitted that the JAs acted as agents of the Company in employing the defendant; and their costs were expenses over which the Chancery Division of High Court (Insolvency and Companies List) had supervision. The defendant's obligations were, therefore, he said, owed to the insolvent estate, which he identified as the Company subject to insolvency procedures under the supervision of the court. Thus, he said, the JAs were not liable under the contract, nor could they be sued on it. The defendant was employed as an expense of the insolvent estate providing services to that estate.

"The obligation in question"

102. The claimant's counsel submitted that principal obligation in this claim was not the contractual/tortious one to assess and advise upon the merits of the Swaps Claim; but was not to have accepted instructions to act, alternatively, to have ceased to act immediately upon being instructed. It is, he said, the antithesis of a claim in contract. He described the heart of the case as being "the core prophylactic duty" in equity not to place oneself as a fiduciary in the position of conflict, including accepting appointment as a fiduciary in circumstances where it is clear there are conflicts.

Place of performance of the contract

103. The claimant's counsel submitted that the place of performance of the contract was England.

104. First, he relied on the analysis set out at paras 99 and 100 above. In those circumstances, the defendant could, he said, only be paid in London; and any dispute under the contract or as to the obligation to pay the defendant could only be determined in London.

105. Secondly, applying the "centre of gravity" test considered above, he relied upon the facts that the defendant was advising English administrators on English causes of action, and that its duties were owed under English law to the insolvent estate. The Scottish courts, he submitted, had no connection to those obligations. Furthermore, he submitted, Mr Cooper's time sheets show that the critical work related to events occurring in England or was correspondence with people or entities in England.

106. He submitted, therefore, that the "obligation in question" was to assist in the beneficial administration of an English insolvent estate. The "place of performance of that obligation" was also England. The fact that Mr Cooper was based in Scotland and sent emails from there was, he said, incidental.

Defendant's submissions

107. The defendant's submissions can be summarised as follows:
    (1) The words *"matters relating to a contract"* have an autonomous meaning and embrace each of the causes of action that the claimant advances against the defendant (as assignee of the Company's claims).

(2) The *"obligation in question"* is the principal contractual obligation the claimant invokes in his claim against the defendant: *Dicey & Morris* at paras 11-274 and 11-275.
(3) The Court must then identify where that obligation is performed. In this task, the Court (a) should strive to find a single place for the provision of a service and (b) is entitled to have regard to where the services were *in the result* provided: *Briggs* at para 2.180 and *Dicey & Morris* at para 11-281 (pp 479-480).
(4) The contract was concluded between the Company, acting by the JAs as statutory agents, and the defendant.
(5) Applying these principles to the facts, the defendant performed the relevant obligation in Scotland.

108. The defendant also contends that, if the court accedes to this contention, Rule 3(c) does not apply at all.

109. The defendant does not seek to rely on the non-exclusive jurisdiction clause in the engagement letter referred to above as having relevance to jurisdictional issues.

Meaning of "matters relating to a contract"

110. The defendant's counsel submitted that the words *"matters relating to a contract"* have an autonomous meaning, and embrace each of the following causes of action that the claimant advances against the defendant:
(1) the claim in contract;
(2) the claim in tort: where this is presented on the classic *Henderson v. Merrett* footing of a co-existent common law duty of care; and,
(3) the claim for breach of fiduciary duty: where the sting of the allegation is that, by reason of the alleged *"Informal Control"* that the Bank exercised over the defendant, the defendant's breach of fiduciary arose as soon as it accepted the JAs' engagement, on behalf of the Company.

111. In support of this submission, he referred me to *Dicey & Morris* at para 11-285; *Briggs* at paras 2.171, 2.194 and 2.196; and *Source Ltd v TUV Rheinland Holding AG [1998] QB 54* (CA), headnote. It is not necessary to consider these in detail, because the claimant did not, as I understand it, contest the autonomous meaning found in the European jurisprudence, only whether it should be applied in this case.

112. As to whether this broad autonomous meaning applied to claims under the modified Regulation, the defendant referred me to *Briggs*, para 2.315, in which there is no suggestion that there is a divergence between UK law and EU law as to the meaning of "matters relating to a contract".

113. He also submitted that the primary mischief complained of in this claim was taking on a contract that the defendant should not have taken on; and the breach of fiduciary duty said to arise was itself dependent on taking on the contract, and thereby fell within the expression.

"The obligation in question"

114. The defendant's counsel submitted that this issue should be approached strictly on the basis of the relevant wording. This did not, he said, require the court to consider

whether to whom the obligation was owed, or whether it was owed to them as principal or agent. The court's tasks were the straightforward ones of

(1) identifying the obligation in question; and
(2) identifying the place of performance of that obligation.

115. As to the first task, he submitted that the Court should analyse the claim as pleaded and identify the principal obligation that C invokes in support of his claim; referring me to Dicey & Morris at paras 11-274 and 11-275.

116. As to this analysis, he submitted that the gravamen of the pleaded claim is that:
(1) the defendant accepted the engagement to assess the merits of the Swaps Claims, when it should not have done by reason of a conflict due to the Bank's "Informal Control": paras 30, 83(a), 83(b) and 86 of the PoC;
(2) the defendant performed its obligation to assess the merits of the Swaps Claims "in a manner which was superficial and/or uninterested and/or designed to delay pursuit of the [Swaps Claims] to a resolution": para 83(c) of the PoC.

117. These twin pillars may, he submitted, be encapsulated in a single, primary obligation on the defendant's part, namely, to assess the Swaps Claims in an independent and competent manner. This, the defendant submitted, is the "obligation in question" for the purposes of rule 3(a). He particularly relied upon the fact that the engagement is described, at para 30 of the PoC, in the following terms:

> "On 29.02.12 … the JAs formally instructed [D] to assess [the Swaps Claims] for the purpose of enabling the JAs to carry out their functions as administrators".

118. In support of this, the defendant's counsel referred to the PoC, and submitted that it shows the duty to advise is incidental to the primary obligation of assessing the merits of the Swaps Claim.

119. It was, he said, quite deliberate on the claimant's part to plead that the defendant was engaged to perform an assessment of the Swaps Claims (as set out above), rather than to advise. It was equally deliberate, he said, for the claimant to focus on the alleged substandard assessment of the Swaps Claims in the opening section of the PoC setting out the particulars of breach. Only after the allegation of substandard assessment does the claimant complain of a failure to advise – see the step between paras 83(c) and 83(d) of the PoC. The claimant's approach was, he said, entirely logical: the obligation to advise is subsidiary to and arises out of the primary obligation to assess the merit of the Swaps Claims.

120. He also relied upon the *TUV Rheinland* case. In that case, the claimants were importers of toys made in the Far East. They employed the German defendant companies to carry out quality control inspections of the toys in the Far East. The reports prepared of those inspections were then sent to the claimants, who, in reliance on them, instructed the defendants to issue the suppliers with certificates of quality, thereby enabling them to obtain payment. The claim was for breach of contract and breach of duty of care in failing to exercise reasonable care and skill in

preparation of the reports. The defendants applied to set aside service of the claim on the grounds including that Art 5(1) of the Judgments Regulation (now Art 7(1) of the recast Judgments Regulation) did not apply.

121. The Judge dealt shortly with the issue of the principal obligation and held it was the inspection of the toys.

122. The defendant's counsel submitted that in this case, before advising the defendant had to carry out a complete assessment of the merits, and, as in *TUV Rheinland*¸ the advisory obligation was ancillary to that obligation.

Place of performance of the obligation

123. The defendant's counsel (rightly) accepted that English law governs this issue; and that the Court is not bound to give an EU wide interpretation to this expression. In particular, he relied upon *IHP* as authority for the proposition that Art 7(1)(b) of the recast Judgments Regulation is not to be imported when interpreting the expression.

124. He submitted that the evidence is clear that the defendant was engaged in Scotland; and Mr Cooper carried out his assessment of the merits of the Swaps Claims in Scotland.

125. In addition, he submitted that acts such as conducting a telephone call with a solicitor in Brighton are merely incidental to the principal obligation of assessing the merits of the Swaps Claims, and, as such irrelevant.

126. Secondly, he submitted that the "Englishness" of Mr Cooper's work in the sense that he was advising on a claim by one English corporation (the Company) against another (the Bank) and where that claim concerned events in England and would be governed by English law) is irrelevant to the *place of performance* of Mr Cooper's principal obligation.

127. In the alternative, he submitted that, if contrary to his primary submission the advisory obligation was paramount, then that obligation was performed in Scotland and not in England for the following reasons:

    (1) The Company was the client and had its seat in England, but in no real sense did Mr Cooper ever advise a natural person in England.

    (2) Instead, from the outset of the defendant's engagement, this was a special situation where Mr Cooper was to advise the JAs. Whilst the JAs were undoubtedly acting as agents for the Company, in all real respects they were the recipients of the advice. During the currency of the administration and subject to Court supervision, the JAs had complete control over the Company. The Claimant recognises this, and it forms the basis of the plea at para 30 of the PoC.

    (3) So, who was Mr Cooper to provide his advice to? He submitted the answer is Mr Reid and Mr Mackie in Scotland and not Mr Dawson. This was because, whilst Mr Dawson was one of the two JAs, Mr Reid took the lead role. Legally, the Court (a) should strive to find a single place for the provision of a service

and (b) is entitled to have regard to where the services were *in the result* provided: referring to *Briggs* at para 2.180 and *Dicey & Morris* at para 11-281 (pp 479-480).

(4) In sum, the centre of gravity of the advisory obligation is Scotland. From a factual perspective, it is not relevant (in any event not determinative) that the JAs were under appointment by the English Court.

128. For these reasons, the defendant's counsel submitted that the place of the performance of the relevant obligation was Scotland.

Discussion

Meaning of "matters relating to a contract"

129. As discussed above, the effect of *IHP* is that the court is not bound to interpret the modified Regulation in accordance with the case law under the recast Judgments Regulation. In *IHP* itself, the court declined to do because of the omission from the modified Regulation of the provisions in (what is now) Art 7(1)(b), which, as is set out above, it concluded was a deliberate omission by the legislature.

130. However, it does not follow from that that the UK court is bound to depart from European jurisprudence, even less so where, as here, the relevant provision is identical. The claimant's counsel did not put forward any reasons why the court should do so; or refer me to any decisions where it has done so where the provisions are identical.

131. In my judgment, I should apply, therefore, the "autonomous meaning" contended for by the defendant.

"The obligation in question"

132. It was common ground that the determination of the principal obligation is carried out by analysing the PoC. This renders other decisions, such as *TUV Rheinland*, of very limited assistance.

133. As noted, a key element of the claim is the allegation that the relationship between the defendant and the Bank was such that the Bank had "Informal Control" over the defendant, and that this gave rise to conflicts of interest on the part of the defendant: between its duty to the Company as a claimant against the Bank and its interest in retaining the custom of the Bank.

134. The scope of the retainer of the defendant is then set out in paras 34 and 35 (set out at para 13 above). The breaches alleged (in para 83) are that in its performance of the retainer, the defendant acted in breach of its contractual, tortious and/or fiduciary duties. These are then amplified.

135. Whilst some of the breaches alleged relate to assessment of the merits of the Swaps Claims, they are not in my judgment breaches of the principal obligation. I have difficulties with the concept of a fiduciary obligation being owed before the relevant fiduciary relationship (solicitor-client) comes into existence. However, the primary complaint in this case is in my judgment that the defendant continued to act and to advise the Company, when it ought to have advised it that it could not

properly do so because of the Informal Control and the conflict of interest it gave rise to. In addition, the complaints as to the advice given do not all relate to the merits of the Swaps Claims. They include:

(1) failing to advise the Company to progress its complaint to the FOS;
(2) failing to advise as to funding options;
(3) knowing the merits of the Swaps Claims, failing to advise the Company to progress them.

There is also a complaint of only making token efforts to progress the Swaps Claims (in England).

136. In my judgment, the Company's complaints flow from the primary complaint that the defendant was in breach of its fiduciary duty by continuing to advise and act for the Company (and not advising it that it could not properly do so), thereby putting the Bank's interests (and its interests) before those of the Company.

Place of performance

137. As noted, it was common ground that there was no contractual stipulation as to the place of performance of the defendant's obligations.

138. In considering the place of performance of the relevant obligation, it is, in my judgment necessary (contrary to the defendant's submissions) to identify to whom the obligations were owed in order to ascertain where they were fulfilled.

139. As to the defendant's submissions as to where the advisory obligation was performed, I accept that the natural persons whom the defendant advised were predominantly in Scotland. However, for the purposes of rule 3(a), they are not in my judgment the relevant persons. The JAs and their employees received the advice as agents for the Company, which was in England; and, in my judgment, therefore, that obligation was performed in England.

140. Furthermore, the claimant's complaint that the defendant did not progress the Swaps Claims also relates to performance of an obligation in England, since those claims arose out of English causes of action, which should have been pursued in England.

141. In my judgment, therefore the conditions for the application of rule 3(a) are satisfied.

Jurisdiction based on England being "the place where the harmful event occurred or may occur": rule 3(c) of Sch 4 to the Act

142. In the light of my decision as to the scope of rule 3(a), it is not necessary to consider this ground.

Forum non conveniens

143. There was insufficient time for the parties to make oral submissions on this issue, which I have considered on the basis of their skeleton arguments.

Defendant's submissions

144. The defendant submitted that the proper law of the claim would be Scots law. This would lead to a profoundly different regime applying on prescription, the Scots law

equivalent of limitation. This was he said, a powerful factor indicating that Scotland is a more convenient forum.

145. He based this submission on two grounds:

(1) the engagement letter including the conditions of business; alternatively, the conditions of business;
(2) the proper law of the contract (under the Rome I Regulation); and the proper law applying in tort and for breach of fiduciary duty (under the Rome II Regulation).

Claimant's submissions

146. The claimant submitted that England was the only appropriate forum taking into account the closely related misfeasance claim, the overlapping legal and practical issues involved in each, the availability of the same witnesses for each claim and their evidence, and the expense of running 2 cases, one in England and one in Scotland.

Discussion

147. The principles relevant to this enquiry are set out in *Spiliada Maritime Corporation v Consulex Ltd (The Spiliada)* [1987] A.C. 460, HL. In that decision, Lord Goff stated that the "fundamental principle" in such cases is that the court:

> "… has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice."

148. The principles applicable to cases in which the claim has been validly served and the defendant is applying for a stay are summarised at para 6.37.26 of the 2019 White Book and I do not set them out.

149. It is not necessary to consider in detail the defendant's counsel's submissions as to whether Scots law is the law applicable to the claim. Even if it were, the overwhelming factor in favour of the claim remaining in England is in my judgment, the misfeasance claim. The very substantial overlap between the legal and factual issues in the two claims, to the extent, as I have held, of giving rise to the possibility of irreconcilable judgments is a compelling reason to retain this claim in England; and, indeed, for it to be case managed and tried with misfeasance claim. The consequent savings of costs and time will benefit both parties.

Conclusion

150. For the reasons, set out above, therefore, I dismiss the application.