Neutral Citation Number: [2019] EWHC 879 (Comm)

Case No: CL-2018-000386

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 12 April 2019

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

RAMONA ANG	**Claimant**
- and -	
RELIANTCO INVESTMENTS LIMITED	**Defendant**

- -
- -

Prof. Jonathan Harris QC (hon.), Zahler Bryan and Greg Callus (instructed by **SCA Ontier LLP**) for the **Claimant**
Matthew Bradley and Ian McDonald (instructed by **Cooke, Young & Keidan LLP**) for the **Defendant**

Hearing dates: 18, 21 February 2019

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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.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. The defendant ('Reliantco') is a company incorporated in Cyprus offering financial products and services through an online trading platform under the 'UFX' trade name. The claimant, Ms Ang, is an individual of substantial means who invested in Bitcoin futures, on a leveraged basis, through the UFX platform. She claims, essentially and primarily, that Reliantco wrongfully blocked and terminated her UFX account and should compensate her for the loss of her open Bitcoin positions, or at a minimum should refund her cash value invested. She also makes claims for relief in respect of what she says have been breaches of data protection obligations owed by Reliantco in connection with her UFX account.

2. This judgment does not concern the merits of Ms Ang's claims but rather an application by Reliantco challenging the jurisdiction of this court to try them. Reliantco contends that Ms Ang is bound by its standard terms and conditions, clause 27.1 of which provides that the courts of Cyprus are to have exclusive jurisdiction over "*all disputes and controversies arising out of or in connection with*" her customer agreement. Reliantco therefore relies on Article 25 of the Brussels Regulation (Recast), i.e. Regulation (EU) No 1215/2012 on jurisdiction and enforcement of judgments in civil and commercial matters ('Brussels (Recast)').

3. Ms Ang says that clause 27.1 is ineffective to require her to bring her claim in Cyprus, either because she is a consumer within Section 4 of Brussels (Recast) or because clause 27.1 was not incorporated into her UFX customer agreement with Reliantco in such a way as to satisfy the requirements of Article 25. It is common ground that if Ms Ang is correct on either of those grounds, Reliantco's challenge to jurisdiction fails. Ms Ang says, in the alternative, that her data protection claims may be brought here notwithstanding Article 25 of Brussels (Recast) even if Article 25 applies to her primary substantive claims.

Background

4. As I have said already, the underlying claim arises from the alleged blocking of Ms Ang's account by Reliantco and its subsequent refusal to allow her to withdraw funds from the UFX platform. I do not say anything more about the claim at this stage, but it is necessary to set out a number of factual matters relevant to the present application. In doing so, I shall be stating how the facts appear on the evidence before the court for the purpose of this application. In the usual way, that does not involve making, or purporting to make, final and binding determinations as to the facts of the case. It does though bear in mind and apply the rule that to establish jurisdiction (that being ultimately Ms Ang's burden, even if this is Reliantco's application) a claimant must satisfy the court that on disputed matters relevant to the issue of jurisdiction she has the better of the argument on the material available at the necessarily preliminary stage at which the issue falls to be determined. (This case does not give rise to the problem of being unable reliably to form a view on the material available that is adverted to in recent restatements at the highest level of the effect of the applicable test: *Brownlie v Four Seasons Holdings Inc.* [2018] 1 WLR 192; *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683; *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10.)

5. Ms Ang is an individual of substantial means. She is married with children. At all times material to her claim, she was not employed or earning a living in any self-employed trade or profession (unless, which is contentious between the parties and considered below, her activity as a customer of Reliantco via the UFX platform is itself to be so classified).

6. Ms Ang does not have any education or training in cryptocurrency investment or trading. She has an undergraduate degree and postgraduate diploma in psychology. When employed, she has predominantly held HR and associated roles. In 1993, when she first graduated from university, Ms Ang worked in money markets for two months as a trainee, observing US$/DM currency swaps. Other than that, she has no professional currency trading or money market experience (again, that is, unless her use of the UFX platform to invest in Bitcoin futures itself counts as such).

7. Ms Ang has been involved in a number of projects and companies with her husband. Between June 2013 and April 2014 she worked for Hotwire as Chief People Officer, managing human resources and recruitment. In an online article about Hotwire, Ms Ang was described as the "Investor Relations Contact", but that only involved being an initial point of contact and liaison for external investors interested in the company. Up until 17 June 2016, Ms Ang acted in various directorships, but none of these concerned businesses involved with Bitcoin or currency trading, and none required or provided trading expertise. She has held and disposed of shares in certain companies, but has not engaged in the trading of stocks and shares or (save again to the extent that her UFX activity counts) trading in derivatives, options or other such assets.

8. When Ms Ang signed up to become a customer of Reliantco using the UFX platform, and during the life of the resulting customer account, her primary occupation was running the family home and bringing up the children. An aspect of that was playing a part in looking after the family's wealth. She also had a role assisting her husband in certain aspects of his professional life. I mean no disrespect to Ms Ang or the role in describing it like this, but it was essentially an *ad hoc* role as unpaid, part-time PA. Indeed, the description Ms Ang gave in her evidence of what the role entailed would be fit to serve as an outline job description for a part-time PA were her husband seeking to recruit one as paid help. It does not involve Bitcoin trading on behalf of her husband or the provision of foreign exchange or other financial services to him or anyone else as any kind of 'client'.

9. Ms Ang's husband, Craig Wright, is a computer scientist with cybersecurity and blockchain expertise who works as Chief Scientist for nChain Ltd, a blockchain technology company with a corporate vision "*to transform how the world conducts all transactions – using the blockchain's distributed, decentralised ledger that chronologically records transactions in an immutable way*". As a researcher, he publishes prolifically and has developed innovations for which patent protection has been sought. He is the same Craig Wright who has identified himself publicly as being 'Satoshi Nakamoto', the online pseudonym associated with the inventor (or a co-inventor) of Bitcoin. I do not need to consider whether that claim is true, and on the evidence for this application I would not be in any position to do so.

10. Mr Wright is or has been a director and/or shareholder in a range of businesses engaged or hoping to engage in developing the use of cryptocurrencies and smart contracts, for example Denariuz Ltd, an English company which had an idea to

become the world's first Bitcoin-based bank but which was dissolved in January 2017, Demorgan Ltd, an Australian company said to be focused on alternative currencies and next generation banking, and Panopticrypt Pty Ltd and subsidiaries including Coin-EXCH Pty Ltd and Ezas Pty Ltd. Coin-EXCH is reported to have been set up to operate as a secure online currency exchange platform and an "*online eWallet solution*" for the (intended) Denariuz Bitcoin bank. Ms Ang is or has been a shareholder or director in a number of these or related businesses, including all of those I have just mentioned by name.

11. Mr Wright is reputed to have amassed a huge Bitcoin cache himself through early involvement in Bitcoin mining. He is the defendant in a claim in the US District Court for the Southern District of Florida concerning that reputed cache brought by the estate of Dave Kleiman, a computer science collaborator of Mr Wright's in Florida who died in 2013.

12. Ms Ang was not dependant on trading or investment for an income or livelihood and had very limited knowledge of trading platforms. Other than her use of the UFX platform as a customer of Reliantco, she has used the eToro and IG platforms, but not extensively. As to eToro, she opened an account in March 2017 with c.US$20,000, and barely used the platform; she was (and it may be still is) a "Bronze" member of eToro (a category of membership for those investing equity of up to US$5,000), with no eToro activity since August 2017. As to IG, she opened an account in June 2016 but did not use it frequently; presently she has just £45 on the IG platform, with only two positions opened since 2 September 2017 and no activity at all since 17 January 2018.

13. Mr Bradley, for Reliantco, submitted that Ms Ang was or may have been selective and less than fully candid in her presentation of documentary records to support what she said about her eToro and IG accounts. In my judgment, however, there is no basis for concluding that her use of eToro and IG was different in kind or character from her use of UFX. If in that use, considered on its own merits, Ms Ang is properly to be characterised as a consumer under Brussels (Recast), there is no reason to suppose that any fuller investigation of her use of eToro and IG might suggest otherwise.

14. Ms Ang opened her UFX account with Reliantco in January 2017. I consider the account opening process in more detail below. She opened the account to invest personal funds available to her for investment from the proceeds of the sale of a former home in Australia and the sale of her interest in Demorgan. She used her account to invest in Bitcoin futures through the online UFX platform essentially in two periods. Firstly, she invested between January 2017 and May 2017, before withdrawing the majority of her funds (including accrued gains) to put towards the purchase of a family home. Secondly, she invested between July and August 2017 after the property purchase did not go through and she decided to reinvest.

15. Stated very broadly, the net result of Ms Ang's activity through her UFX account was to turn c.US$200,000 into c.US$700,000 by the date on which Reliantco purported to terminate the account, 10 August 2017. By the end of August 2017, when Ms Ang says she tried to close the account and withdraw her funds (including investment gains), she claims her positions should have returned c.US$1.1m to her. In her primary case as to *quantum*, she extends the claim to an allegation that Reliantco

prevented her from turning that US$1.1m into what would have been (she says) c.US$2.5m by the time she commenced these proceedings and over US$3m today.

16. I do not accept a submission advanced by Reliantco that Ms Ang's UFX activity demonstrated the sophisticated trading strategy of a professional trader. Her activity was that of an individual playing with some of her money, in the hope of making a large investment gain but at the risk of suffering a substantial or total loss. Her investment in Bitcoin futures was, in essence, a leveraged bet that Bitcoin would increase in value, placed in early 2017 and held until Reliantco unilaterally closed her account down in August 2017, save that she withdrew most of the value of the investment (as it then stood) in May 2017, in the event temporarily, as described above.

17. If, as Mr Bradley submitted, that type of activity was by nature not capable of being consumer activity, either generally or for Bitcoin futures in particular, that is one thing. But if it is capable of being consumer activity, there is nothing about Ms Ang's particular (pattern of) investing that turned it into a business.

18. As to the nature and scope of Reliantco's services, its standard terms and conditions provide as follows:

> "3.1 From the date on which your Account is activated we will, as authorized by our Regulator:
>
> (a) Receive and transmit orders for you in Financial Instruments,
>
> (b) Provide foreign currency services provided they are associated with the provision of the Investment Service of Section 3.1(a) herein,
>
> (c) Provide for safekeeping and administration of financial instruments for the account of Clients, including custodianship and related services such as cash/collateral management,
>
> (d) Investment research and financial analysis or other forms of general recommendations relating to transactions in financial instruments.
>
> 3.2 You acknowledge that our Services do not include the provision of investment advice. Any investment information as may be announced by the Company to you does not constitute investment advice but merely aims to assist you in investment decision making. It is also understood and accepted that we shall bear absolutely no responsibility, regardless of the circumstances, for any such investment strategy, transaction, investment or information.
>
> 3.3 We will not advise you about the merits of a particular Transaction and you alone will make trading and other decisions based on your own judgment for which you may wish to seek independent advice before entering into. In asking us to enter into any Transaction, you represent that you have been solely responsible for making your own independent appraisal and investigation into the risks of the Transaction. You represent that you have sufficient knowledge, market sophistication, professional advice and experience to make your own evaluation of the merits and risks of any Transaction. (…)"

19. I return, to set it out in more detail, to the UFX account registration process Ms Ang went through in early January 2017. Ms Danon of Cooke, Young & Keidan LLP, Reliantco's solicitors, gave evidence on instructions as to the registration process. This was criticised by Prof. Harris QC as not being proof that Ms Ang in fact went through the process described. But there is no basis for thinking she did not; no reason to suspect that the description given by Ms Danon is inaccurate or incomplete; and no basis (subject to one specific point I must deal with) that the system and process described either was not working as intended in January 2017 or was capable of resulting in a successful account registration, as achieved by Ms Ang, without her completing the various steps that were described. Indeed, Ms Ang in her Particulars of Claim relies on many of those registration steps, averring that they occurred.

20. The essential features of the account opening process, established by that evidence and followed by Ms Ang, are these:

    i) Firstly, a prospective customer visits Reliantco's website and clicks to sign up. A pop-up appears asking for a name, email, phone number and login password. To proceed, a customer must click a button indicating "*I accept the Terms and Conditions, Risk Disclosure and Privacy Policy of Reliantco Investments Ltd*". There is a hyperlink to Reliantco's standard terms on this page. Registering generates an initial welcome email from Reliantco, in Ms Ang's case received by her on 10 January 2017. This email contains a hyperlink to Reliantco's standard terms at the foot of the main body.

    ii) Secondly, a customer can deposit funds into their account. After making a first deposit, the customer is asked to provide information relating to their financial position, employment status and trading experience. Much of the information is provided by way of selection from dropdown lists. The customer must also tick a box indicating that they have read and understood Reliantco's standard terms, which are again hyperlinked on the page. Ms Ang completed the form and ticked the relevant box. She provided the following information:

        a) She was self-employed and earned more than US$250,000 per annum.

        b) She had work experience in the financial industry.

        c) She had academic experience in the financial services industry.

        d) She was familiar with investment products including: currencies; savings accounts; commodities; indices or diversified investment funds; shares; and "other".

        e) She had been trading for 3 to 12 months and was a frequent trader (75+ trades).

        Ms Ang's evidence is that she did not feel properly able to tailor the information in the form to fit her particular circumstances. She did not select "*unemployed*" for her employment status (although that was, in truth, her status at the time) because she had personal wealth, saw herself as substantially occupied by her role running the 'home office' (as she described it) and was not looking for paid work. As to her income, she chose more than

US$250,000 per annum because she was wealthy and considered that the unrealised capital gains of her investments were in excess of that sum per annum. She overstated her trading knowledge and experience to avoid being hassled by Reliantco employees. Later, in a hard copy "*source of wealth*" form submitted to Reliantco dated 4 August 2017 that gave only a choice between 'Self Employed' and 'Employee', Ms Ang manually added an additional box for her employment status to describe herself as: "*independent wealth*".

iii) Thirdly, after depositing monies for the first time, the customer is required to submit certain "Know Your Client" documents. In Ms Ang's case, these were requested by Ms Constantin of UFX in an email to Ms Ang dated 10 January 2017. The email included a statement that "*As per our terms and conditions you will be requested in the future to provide us with updated documents in case of their expiration*", but did not contain a copy of or hyperlink to the standard terms. Ms Ang sent the required documents to Ms Constantin under cover of two emails dated 11 and 12 January 2017.

iv) On 13 January 2017 Ms Ang was requested by email to sign a declaration and approval of deposits form. Ms Ang signed the form and returned it by email. The form declared: "*I hereby confirm that I have read and accepted the Terms & Conditions, Risk Disclosure and Privacy Policy of Reliantco Investment Limited*". Neither the email nor the form contained a copy of or hyperlink to the standard terms; nor were they attached to the email sending her the form to complete and return.

v) Fourthly, once the relevant documents have been collected by Reliantco, a final welcome email is sent to the customer. This email provides a hyperlink to the standard terms at the foot of the main body. Ms Ang received this final confirmation that her account had been approved on 17 January 2017.

vi) All hyperlinks to the standard terms were coded to direct the user to the same web page, on which Reliantco's standard terms and conditions, risk disclosure notice and privacy policy were available to download and view.

21. The specific point raised by Ms Ang's evidence is whether one or more of the hyperlinks presented to her online or included in emails were 'broken', such that they did not in fact take her to the standard terms page but took her instead to a blank page or error page (or would have done so if she had clicked on them).

22. Upon her registration, Reliantco correctly classified Ms Ang as a retail client for the purposes of the Markets in Financial Instruments Directive ("MiFID"). Although this point was given a degree of prominence on the papers, it was not greatly pressed orally. Mr Bradley submitted, and I agree, that the criteria for retail client classification for MiFID are different to those for being a consumer for Section 4 of Brussels (Recast) and I shall say no more about MiFID here.

Was Ms Ang a Consumer?

Law

23. Section 4 of Brussels (Recast) comprises Articles 17 to 19. In so far as relevant, Article 17(1) provides:

> "In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:
>
> …
>
> (c) … 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. …"

24. Article 18(1) (the 'consumer rule' for jurisdiction) provides:

> "A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled."

25. Article 19 provides:

> "The provisions of this Section may be departed from only by an agreement:
>
> (1) which is entered into after the dispute has arisen;
>
> (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
>
> (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State."

26. It is common ground that Article 17(1)(c) applies in this case if Ms Ang was a 'consumer', and that the concept of 'consumer' has an autonomous meaning under EU law. That concept has been considered a number of times by the ECJ/CJEU.

27. In Case C-89/91, *Shearson Lehman Hutton Inc* [1993] I.L.Pr 199, the ECJ held that a company which claimed as assignee of an individual's rights does not fall within the scope of the consumer rule, reasoning that:

    i) the term 'consumer' had to be given an autonomous meaning independent of national law, [13];

ii) special rules derogating from the general principle of suit in the defendant's domicile must be carefully confined to the cases envisaged by what was then the Brussels Convention, *a fortiori* special rules providing for jurisdiction in the domicile of the plaintiff, [14]-[17];

iii) the consumer rule is inspired by concern "*to protect the consumer as the party to the contract who is deemed to be economically weaker and legally less experienced than the other party*" and must not be "*extended to persons for whom such protection is not justified*", [18]-[19];

iv) the Convention "*defines 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession' ...*", [20] (my emphasis);

v) the consumer rule provisions thus "*refer only to final consumers acting in a private capacity and not in the course of their trade or profession*" who are themselves party to the proceedings in question, [22]-[24].

28. The claimant company in *Shearson Lehman Hutton Inc* was not a consumer so it could not rely on the consumer rule to establish jurisdiction, whether or not its assignor could have done. The assignor was a German judge and his contract with Hutton Inc had been in the nature of an agency through which he could invest in currency, security and commodity futures. It was not suggested that the assignor was not a consumer protected by the consumer rule provisions. The German court referred a series of quite specific questions on the meaning and effect of Article 13 (as it was then), but (as Advocate General Damon explained, [1993] I.L.Pr 199 at 202) "*It seemed to the Court that, in order to reply to these questions – and even to decide whether it should reply – it was necessary to establish ... whether TVB [the corporate claimant] ... could also plead that it was a consumer like the assignor ...*".

29. In Case C-269/95, *Benincasa* [1997] ETMR 447, again decided under the Brussels Convention, the ECJ decided that the consumer rule did not apply in the case of a contract entered into by an individual for the purpose of a trade to be taken up in the future. The contract was a franchising agreement for the purpose of setting up a business selling dental hygiene products under the Dentalkit trade mark. Again, the court reasoned from the starting point that the consumer rule was a derogation favouring the domicile of the plaintiff and, therefore, to be kept within its proper bounds (at [13]-[14]). The court cited *Shearson Lehman Hutton* as 'settled case-law' for the proposition that the consumer rule "*affects only a private final consumer, not engaged in trade or professional activities*" (at [15]). It held (at [18]) that the consumer rule applies "*only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future*".

30. At [17], the court said that "*only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption*" were protected by the consumer rule, which protection "*is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character*". I do not read the reference to an individual's "*own needs in terms of private consumption*" as refining the notion of 'consumer' to something narrower than "*private final consumer, not engaged in trade*

or professional activities". The sole criterion is that of being a private individual contracting as the end user (of goods or services) and not as part of a business (trade or profession).

31. In Case C-464/01, *Gruber v Bay Wa AG* [2006] QB 204, the ECJ considered the problem of a contract with a dual purpose. The contract in question was for the supply of roof tiles to a farmer to renovate a roof covering both the parts of a main farm building used as the farmhouse, i.e. Mr Gruber's home, and parts of that same building used for the commercial purposes of the farm. The court held that where to a non-negligible extent the purpose of a contract was a business purpose, the consumer rule did not apply. It adopted the reasoning in *Shearson Lehman Hutton Inc* and *Benincasa*. It said nothing to gainsay my reading of the reference in *Benincasa* to an individual's 'private consumption' needs.

32. The court was also asked whether for the consumer rule to apply it is necessary for the counterparty to have been aware of the purpose for which the putative consumer entered into the contract. Its answer fashioned a rule under which an individual may fall outside the scope of the consumer rule because she has given the impression of acting for a trade or professional purpose even though she was not in fact doing so. The scope of this 'non-consumer impression' rule was contentious before me, especially as to whether the counterparty must in fact have formed a view that the putative consumer was acting for a business purpose. What the ECJ said, in full, was this:

> "50. If … the objective evidence in the file is not sufficient to demonstrate that the supply in respect to which a contract with a dual purpose was concluded had a non-negligible business purpose, that contract should, in principle, be regarded as having been concluded by a consumer within the meaning of Articles 13 to 15, in order not to deprive those provisions of their effectiveness.
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> 51. However, having regard to the fact that the protective scheme put in place by Articles 13 to 15 of the Brussels Convention represents a derogation, the court seised must in that case also determine whether the other party to the contract could reasonably have been unaware of the private purpose of the supply because the supposed consumer had in fact, by his own conduct with respect to the other party, given the latter the impression that he was acting for business purposes.
>
> 52. That would be the case, for example, where an individual orders, without giving further information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax.
>
> 53. In such a case, the special rules of jurisdiction for matters relating to consumer contracts enshrined in Articles 13 to 15 of the Brussels Convention are not applicable even if the contract does not as such serve a non-negligible business purpose, and the individual must be regarded, in view of the impression he has given to the other party acting in good faith, as having renounced the protection afforded by those provisions."

33. Most recently, in Case C-498/16, *Schrems v Facebook Ireland* [2018] 1 WLR 4343, the CJEU considered the meaning of 'consumer' under what was then Article 15 of

the Brussels Regulation. In particular, it considered whether an individual is a consumer where, having used a Facebook account for private purposes, he opened a Facebook page to report to internet users on: legal proceedings; lectures; panel debates/media appearances; donation campaigns; and book promotions. The court held that those activities did not entail the loss of a private Facebook account user's status as a 'consumer':

> "37. … in accordance with the requirement … to construe strictly the notion of 'consumer' within the meaning of Article 15 of Regulation No 44/2001, it is necessary, in particular, to take into account, as far as concerns services of a digital social network which are intended to be used over a long period of time, subsequent changes in the use which is made of those services.
>
> 38. This interpretation implies, in particular, that a user of such services may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominately professional.
>
> 39. On the other hand, given that the notion of a 'consumer' is defined by contrast to that of an 'economic operator' (see, to that effect, … *Benincasa*, … , paragraph 16, and … *Gruber*, …, paragraph 36) and that it is distinct from the knowledge and information that the person concerned actually possesses (… *Costea*, C‑110/14, EU:C:2015:538, paragraph 21), neither the expertise which that person may acquire in the field covered by those services nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a 'consumer' within the meaning of Article 15 of Regulation No 44/2001."

34. Thus, the ECJ/CJEU has not decided whether contracts entered into by a wealthy private individual for the purpose of investing her wealth, or particular types of such contract, are not (or can never be) consumer contracts within what is now Section 4 of Brussels (Recast). Earlier this year the CJEU heard a reference from the Czech Republic in Case C-208/18, *Petruchova v Fibo Group Holdings Ltd*, asking whether Article 17(1) of Brussels (Recast) is to be interpreted as covering an individual who engages in trade on the international currency exchange market through a third party professionally engaged in that trade. Judgment is awaited, I understand, but I was not asked to defer any decision in this case. Further, a reference has been made to the CJEU in a claim in Romania against Reliantco (Case C-500/18, *AU v Reliantco Investments Ltd*). One of the questions referred is whether the fact that a retail client (within the meaning of MiFID) carries out a high volume of transactions within a relatively short period of time and invests large sums of money in financial instruments is relevant for the purpose of assessing 'consumer' status under Brussels (Recast).

35. *Standard Bank London Ltd v Apostolakis* [2002] CLC 933 concerned a wealthy Greek couple, a civil engineer and a lawyer, who invested substantial sums in foreign exchange. The couple entered into an agreement with a London-based bank under which the bank was to make forward purchases of European Currency Units, the final precursor to the Euro, on their behalf. As can be seen from the later judgment of Steel J in the same matter (*Standard Bank London Ltd v Apostolakis (no 2)* [2002] CLC 939), the bank acted as intermediary recommending investments, giving advice and

presenting a business plan. Following the devaluation of the drachma it was alleged that the bank unilaterally closed the couple's positions causing them to suffer loss. The couple commenced proceedings in Greece and the bank sought an anti-suit injunction and summary judgment in the English courts.

36. Longmore J (as he was then) considered as a preliminary issue whether the contracts concluded with the bank were consumer contracts under the Brussels Convention. The judge found that they were, reasoning (at 936-937) that: Mr and Mrs Apostolakis did not conclude their contract with the bank for the purpose of their respective businesses as civil engineer and lawyer; they were simply "*disposing of income which they had available. They were using [their] money in a way which they hoped would be profitable but merely to use money in a way one hopes would be profitable is not enough … to be engaging in trade*"; the reference to an 'individual's own needs in terms of private consumption' in *Benincasa* was not a substitute for the words of the Convention, but in any event a private individual choosing a use for their (surplus) income is a 'private consumption' need – "*Consumption cannot be taken as literally consumed so as to be destroyed but rather consumed in the sense that a consumer consumes, viz. he uses or enjoys the relevant product*" (or, I would add, service).

37. As I shall mention below, the Greek courts in the same litigation, *Standard Bank v Apostolakis*, disagreed with Longmore J and refused to accept Mr and Mrs Apostolakis as consumers for present purposes; and that contrary view was taken again by a Greek court in *Ghandour v Arab Bank*. In *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), at [208]-[209], Andrew Smith J noted the difference of view between the English and Greek decisions in *Apostolakis* and said that for his part he doubted the correctness of the conclusion reached by Longmore J, but the point did not fall to be decided.

38. In *Turner & Co (GB) Ltd v Abi* [2010] EWHC 2078 (QB), Richard Salter QC, sitting as a High Court judge, cited paragraph [17] of *Benincasa*. The judge adopted the observations of Longmore J in *Standard Bank v Apostolakis* to the effect that *Benincasa* did not introduce a new or different test for a 'consumer' or replace the definition in the Directive.

39. In *Overy v Paypal Europe Ltd* [2012] EWHC 2659 (QB), HHJ Hegarty QC, sitting as a High Court judge, cited Longmore J's judgment in *Standard Bank v Apostolakis* and discussed the criticisms levelled at it. He appears to me to take it as correctly decided on its facts (see [155]-[156]). At [169] he set out a summary of the principles he drew from the authorities that is likely to be a useful recap for future cases but does not take the specific decision required in the present case any further.

40. Most recently, in *AMT Futures Limited v Marzillier* [2015] 2 WLR 187, Popplewell J recognised the controversy over treating investment contracts as consumer contracts, citing *Standard Bank* and *Maple Leaf Macro*. On appeal in *AMT v Marzillier* to the Court of Appeal and Supreme Court, the consumer issue did not arise. Popplewell J said at [58] that:

> "Wherever the dividing line is to be drawn in the case of investors, the result is likely to be heavily dependent on the circumstances of each individual and the nature and pattern of investment. At one end of the scale may be the retired dentist who makes a single investment for a modest amount by way of pension

provision. At the other may be an investment banker or asset manager who plays the markets widely, regularly and for substantial amounts, for his own account. In between there are many factors which might influence the result, including the profile of the investor, the nature and extent of the investment activity, and the tax treatment of any profits or losses. The issue is fact specific."

41. The Greek court decision in *Apostolakis*, disagreeing with Longmore J, is reported as *Standard Bank of London v. Apostolakis* [2003] I L Pr 29. In its reasoning, to my mind the Greek court, with respect, fell into a number or errors:-

i) At [16], the court introduced the concept of a 'quasi-professional' who "*does not correspond to the consumer profile that the legislator had in mind*" because of the extent of her involvement in the investment sector in question. But on the language of Brussels (Recast) (as it now is, the Brussels Convention as it was for the Greek court), the question is not the knowledge, experience, skill or expertise of the putative consumer, but the purpose of the contract. An investor's knowledge, experience, skill or expertise in a particular investment market might be relevant in considering whether she was running some relevant business and, if so, whether the contract in question was entered into for the purpose of that business. But as I read its judgment, the Greek court went rather further than that, and I think that was erroneous.

ii) Also at [16], the Greek court seems to have thought that Article 281 of the Greek Civil Code had some relevant operation, contrary to the clear authority of *Shearson Lehman Hutton Inc* that 'consumer' here has an autonomous meaning, independent of rules of national law.

iii) At [17], from the premise that the aim of the consumer rule was to protect weaker parties, the Greek court appears to have formulated a rule requiring the financial means or sophistication of the putative consumer to be examined "*to determine whether the contracting party in question … is indeed in need of protection*". To my mind there is no warrant in the language of the Brussels (Recast) for that approach.

iv) At [18]-[19], it was concluded, informed by those errors of approach, that Mr and Mrs Apostolakis could not be consumers because they did not "*follow the paradigm of the average saver*" but were "*adept at investment contracts*" and therefore "*not in need of the protection afforded to inexperienced and ignorant consumers*".

v) At [24], the Greek court elevated the reference to private consumption needs in *Benincasa* to a separate requirement, not satisfied (in the view of the court) because Mr and Mrs Apostolakis were not buying and selling foreign currency to use it in their private lives (e.g. as spending money for foreign holidays). In my judgment, as I have already made clear, that is a misreading of *Benincasa*.

42. However, it would not be right to dismiss the Greek court's decision in *Apostolakis* because of those errors of analysis. It also relied on a separate line of reasoning, independently sufficient to prevent Mr and Mrs Apostolakis from being consumers, if correct. At [20]-[23], the court reasoned that "*the purchase of moveable property for the purpose of resale for profit and its subsequent actual resale (or presale)*" was

intrinsically commercial so that engaging in such trading was necessarily a business activity and not a consumer activity. Prof. Harris QC rightly criticised the Greek court's reliance (at [20] and [23]) on domestic legislation and case-law relating to concepts of Greek national law. But the court's logic is sound (if at all) irrespective of that influence and is not the subject of authoritative ruling either way by the ECJ/CJEU.

43. At [27], the Greek court disagreed with Longmore J in robust terms, labelling his decision 'manifestly incorrect' and suggesting (wrongly, as it seems to me) that Longmore J disputed the decision in *Benincasa*. I shall not lengthen this judgment by a detailed review, but to my mind the Greek court's criticisms of Longmore J lack substance except if and then to the extent that the logic I summarised in the preceding paragraph is correct.

44. Looking past the unfortunate tone of the Greek court's criticisms, therefore, the disagreement between the English and Greek decisions in *Apostolakis* turns upon and is constituted by a difference of view as to whether investing private wealth for gain, if it takes the form of buying and selling foreign currency, is by nature a business activity so that an individual investing their wealth in that way cannot when doing so be a 'consumer' under Brussels (Recast). Longmore J thought there was no such proposition of law; the Greek court took the contrary view.

45. The issue arose again in Greece in *R Ghandour v Arab Bank (Switzerland)* [2008] I L Pr 35, where it was held that an individual who entered into loan contracts with a bank for the purpose of investing in bonds, shares and other financial products was not a consumer for the purposes of the equivalent provisions of the Lugano Convention. The loan contracts contained exclusive jurisdiction clauses in favour of the courts in Zurich. Accordingly, the Greek court refused jurisdiction.

46. The court reasoned that the purpose of the loans was central. Thus, at [25] for example: "*… the trader, who borrows funds from a bank in order to finance his imports, is not a consumer of the funds he borrowed even though he is the final user of the banking services, because he uses the funds as a means to carry out his trade. The same applies to the professional, who borrows in order to promote his business interests and activities. Any link between the product or the service to the business activity is adequate to negate the status of 'consumer' in the meaning that was given above.*" The meaning the court had given to 'consumer' (at [23]), to my mind the correct meaning, was that "*it concerns solely the final consumer as a private individual, who is not involved in commercial or professional activities*".

47. The question, therefore, was whether Mrs Ghandour's investment activity, for which she was borrowing from the bank, was a business of hers. As to that, the court expressed itself in part rather generally, for example:

    i) at [19], a person who buys foreign currency "*not for the purpose of saving it or for spending it abroad so as to satisfy [a person's] living needs but for the purpose of immediately selling it and speculating on the fluctuation of international currency prices cannot be regarded as consumer … . The same applies <u>mutatis mutandis</u> as regards the buying of stock market products.*";

ii) at [25], immediately before the passage I quoted in the preceding paragraph, "*The criterion of profit anticipation cannot take away the status of consumer. … However, it is a different situation when the final user of the service or of the product does not enjoy the outcome of the banking transaction as a private individual but uses the same in order to fulfil his need for speculation.*"; and

iii) at [26], "*… to purchase financial products or foreign exchange not for the purpose of depositing or disposing the same in order to satisfy living needs but for the purpose of selling them at once and speculating on the fluctuation of the international securities' or foreign exchange prices*" cannot be regarded as a consumer purpose.

48. However, the Greek court was plainly influenced, on the facts of that case, by the nature and scale of Mrs Ghandour's investment activity. Thus (at [34]), she was investing "*not in the context of her usual living needs but for speculative activities in a systematic fashion. Judging from the number of the transactions carried out, the length of time that the appellant was active, the amounts involved, and the systematic nature of the whole operation, the conclusion to be reached is that the appellant acted as a professional (as an "entrepreneur" to use the correct term) as regards these specific transactions and that the contracts under consideration were concluded for serving this professional activity.*"; and then at [35], "*[Mrs Ghandour] did not use the borrowed funds to cover her own needs but used them as a means of systematic speculation in the international money markets and indeed without using her own capital but funds that came from borrowing from the respondent. Thus, the increase of her wealth by taking huge risks and without investing her own capital cannot constitute "consumer needs", since it does not aim at fulfilling a physical or mental human need.*"

49. In *Cross-Border Consumer Contracts*, OUP (2008), at [3.70]-[3.80], the view is taken that in terms of policy and authority the Greek court's position in *Apostolakis* is difficult to support. The fact that the subject-matter of a contract is a valuable, luxury item, or that the buyer has certain experience, is not a relevant consideration. It is suggested that though the Greek Court's approach should not be accepted, that does not mean the case was necessarily wrongly decided on the facts, because the question would remain whether in fact the couple's investment activities constituted a secondary trade so that the foreign exchange transactions were not for a consumer purpose.

50. *Civil Jurisdiction and Judgments*, 6th Ed, 2015, suggests at [2.101] that both approaches (of Longmore J and the Greek court) have something to be said for them, but expresses on balance a preference for that of the Greek court (and that tentative view, in a previous edition, was referred to by Andrew Smith J in *Maple Leaf Macro*, *supra*). The conclusion is stated in these terms:

> "The view tentatively preferred here is that the approach of the Greek court accorded more closely with the purpose of the Regulation, and that if a contract is made by which an investor seeks to make financial gain which may or may not be used to make other contracts for the satisfaction of private needs, it is mercantile in nature, and is not itself a consumer contract. It is, in this sense, similar to the case of Mr Benincasa: the contract is entered into as a small or medium-sized business venture."

51. I was also referred to two judgments of the German courts considering the meaning of "consumer" under the Lugano Convention. In *Re an Asset Management Contract Case VI ZR 159/09* [2011] ILPr 35 and *Re Jurisdiction in a Consumer Claim for Damages for Breach of an Investment Contract Case VI ZR 154/10* [2012] ILPr 17, the German courts held that asset management agreements were consumer contracts. In both cases, the relevant individuals entered into agreements with intermediaries who handled investments on their behalf and the consumer contracts were the contracts with the intermediaries, not investment contracts entered into by the intermediaries or upon their advice.

Arguments

52. Reliantco argued that, applying the legal principles that emerge from the cases, Ms Ang did not contract as a consumer for the purposes of Brussels (Recast), but acted as an 'economic operator'. In essence, Reliantco submitted that:

    i) A contract to trade Bitcoin futures on an online platform can never amount to a consumer contract. Currency trading relies on a trader's knowledge and skill and is inherently a non-consumer activity not serving private consumption needs.

    ii) In any event, as a matter of fact Ms Ang's trading activity amounted to the conduct of a business, trade or profession in the field of Bitcoin futures trading (whether or not she had another business, trade or profession).

    iii) *Standard Bank v Apostolakis* was wrongly decided by Longmore J, in that he failed to give effect to *Benincasa* and *Gruber*. Alternatively, this case can be distinguished from *Standard Bank v Apostolakis* on the ground that Ms Ang invested directly on a trading platform without an intermediary advisor or asset manager. Reliantco argued that this position is consistent with *Ghandour v Arab Bank* and the two German judgments referred to in paragraph 51 above.

53. Reliantco relied on the fact that the trades undertaken by Ms Ang were, so it suggested, trades in specialized and esoteric products. It characterized Ms Ang as operating a profitable, high volume/high risk trading approach involving sophisticated investment strategies. Reliantco relied on Ms Ang's evidence that she was familiar with at least some some online trading platforms other than UFX, and that her husband is also a "*keen investor in bitcoin*" (and may even be the inventor, or one of the inventors, of Bitcoin).

54. In the alternative, Reliantco submitted that when entering into her contract to trade on the UFX platform Ms Ang gave the impression that she was acting for a trade or professional purpose, so that (pursuant to *Gruber*) she took herself outside the scope of the consumer rule. Reliantco drew attention to the financial, employment and trade experience information provided by Ms Ang when she opened her UFX account. It maintained that this information gave an objective impression that Ms Ang was contracting as a professional trader.

55. Ms Ang argued that she was at all times acting as a consumer. In summary:

i) The consumer test under Brussels (Recast) is purposive. The question is simply whether an individual enters into a contract for a private purpose or a business (trade or professional) purpose.

ii) The decisions of the Greek courts in *Apostolakis* and *Ghandour* are flawed in so far as they suggest that in referring to private consumption needs the CJEU was adding a separate requirement or narrowing the concept of consumer. In particular, Prof. Harris QC criticised the references by the Greek courts to criteria that might be important under Greek national law but which are irrelevant under Brussels (Recast).

iii) Ms Ang did not carry out a trade or profession trading in Bitcoin or any other currency. Therefore, she could not have contracted for such a purpose. Whether Ms Ang's home office (unpaid PA) role amounts to a profession does not matter. On any view the contract with Reliantco was not for the purpose of any business (trade or profession) of hers.

iv) The arguments made by Reliantco in relation to Ms Ang's husband are irrelevant, as they have no bearing on the question of whether Ms Ang was acting as a consumer. In any event, Ms Ang's husband is a scientist, and does not trade in Bitcoin as his profession (even if as part of his profession he is, as he has claimed to be, an individual behind the block-chain technology by which Bitcoin was created and through which it exists, something on which I am not in a position to express any conclusion).

56. Ms Ang disputed that the financial and employment information she provided as part of the account opening process generated an impression that she was not signing up as a consumer. Although Ms Ang indicated she was self-employed, there was nothing in the forms to suggest that she was self-employed as a Bitcoin trader (or more generally as a currency trader), rather than in some different capacity. The forms did not ask Ms Ang what that self-employment was, and so her answers were at most neutral. The questions and answers ultimately conveyed no more than that Ms Ang was a wealthy individual with experience of her personal wealth being invested in a wide range of investments. If (which is the real issue in the case) such an investor is or can be a consumer when investing her personal wealth in Bitcoin futures, nothing in the information Ms Ang gave about herself indicated that she was not contracting with Reliantco as such a consumer investor.

57. Finally, Ms Ang argued that since Reliantco has not adduced evidence that it formed any view that she was not a consumer, the non-consumer impression rule could not avail it anyway.

Decision

58. I stated my findings, on the evidence, as to the nature, extent and purpose of Ms Ang's use of the UFX account she opened in paragraphs 14 to 17 above. I agree with the argument for Ms Ang about the impression her account registration information creates (paragraph 56 above). That information did over-state the extent of Ms Ang's prior experience of 'trading' (and Reliantco could not reasonably have known that what the information stated in that regard was an overstatement). But that does not mean the impression created was that she was opening an account for a business

purpose rather than as a consumer if speculative investment through a platform like the UFX platform can be a consumer activity at all. It is not necessary therefore to consider Ms Ang's further submission on the non-consumer impression rule that Reliantco had to show that it had in fact formed a view that she was not a consumer upon the basis of the account registration information (and that, if so, the same could not be inferred but had to be proved by affirmative evidence).

59. That means this case does turn on the question on which there was a sharp difference of view between this court and the Greek court in *Apostolakis*. I have identified steps in the reasoning of the Greek court that seem to me, with respect, to have been erroneous. But I also said that it would be wrong to discount the Greek court's decision because of that, because it is justified by the view (if correct) expressed by the Greek court in *Apostolakis* itself, and again in *Ghandour*, that speculative investment with a view to financial gain is inherently a business activity to which the consumer rule cannot apply.

60. I do not agree with that view, however. To the contrary, I respectfully agree with the approach taken by Longmore J. The reference to private consumption needs in *Benincasa* served to confirm and emphasise that there are 'end user' and 'private individual' elements inherent in the notion of 'consumer'. Therefore, although the contract in that case related, ultimately, to consumer goods (dental hygiene products), and although it was concluded by Mr Benincasa personally and not by a separate business vehicle of his (e.g. a limited company), his purpose in concluding the contract was a business purpose, *viz.* to trade as a supplier of those goods. He was not buying as an end user of dental hygiene products and so he was not contracting as a consumer.

61. I do not accept Mr Bradley's contention, for Reliantco, that the ECJ/CJEU has glossed the definition of 'consumer' by emphasising, as it has, that: (1) it applies only to a 'private final consumer' not engaged in trade or professional activities; (2) a 'consumer' is an individual who is to be distinguished from an 'economic operator'; (3) the contract in question must be for the purpose of satisfying the individual's own needs in terms of private consumption. None of those, to my mind, glosses or refines the definitional language of Article 17(1), treated as such in and since (at least) *Shearson Lehman Hutton Inc*, by which a 'consumer' is a private individual contracting as such, for their own purposes and not for the purpose of any business (trade or profession).

62. The question is whether a private individual committing capital to speculative currency transactions in the hope of making investment gains is, or can be, a 'consumer' in that definition. Wealthy consumers are consumers nonetheless and the amounts involved in this case do not mean Ms Ang was not a consumer. For example, in Case C-585/08, *Pammer v Reederei Karl Schluter GmbH* and Case C-177/09, *Hotel Alpenhof GesmbH v Heller* [2010] ECR I-12527, contracts for an ocean cruise and an alpine holiday were held to be consumer contracts. Of course, going on a family holiday, even if it is a very expensive holiday, could not sensibly be thought of as a business venture. But I reject any notion that speculative investment, putting capital at risk in the hope of achieving an investment gain, must necessarily be a business activity, i.e. cannot ever be a consumer activity.

63. In my judgment, the investment by a private individual of her personal surplus wealth (i.e. surplus to her immediate needs), in the hope of generating good returns (whether in the form of income on capital, capital growth, or a mix of the two), is not a business activity, generally speaking. It is a private consumption need, in the sense I believe intended by the ECJ in *Benincasa*, to invest such wealth with such an aim, i.e. that is an 'end user' purpose for a private individual and is not exclusively a business activity. That means, as was also Popplewell J's conclusion in *AMT v Marzillier*, that it will be a fact-specific issue in any given case whether a particular individual was indeed contracting as a private individual to satisfy that need, i.e. as a consumer, or was doing so for the purpose of an investment business of hers (existing or planned).

64. The question is where, if at all, to draw the line. Take private equity investment made with a view to generating a return on capital (venture capitalism). I should have thought the making of such investments would be regarded, generally, as by nature a business activity; and no less so if for the venture capitalist in question that activity was not her primary occupation but a side-line through which to invest some or all of her wealth generated in some other way (e.g. out of earnings, inheritance or gifts). On the other hand, an individual shopping around the retail market for a better interest rate on a large lump sum she is happy to lock away for a year or two, because it is surplus to any shorter-term need for access to capital, or choosing with a view to a better return to invest in a FTSE 100 tracker fund instead, would surely be regarded as a consumer, applying faithfully all that the ECJ/CJEU has said on the point.

65. I therefore agree, in general, with the observation of Popplewell J in *AMT v Marzillier* at [58], quoted at paragraph 40 above, although I would add this amplification, namely that the spread, regularity and value of investment activity cannot (I think) *determine* the issue, as that would replace the test of non-business purpose set by the language of the Brussels (Recast) (as it now is). It may be, on the facts of any given case, that widespread, regular and high-value trading will encourage a conclusion that the putative consumer was engaged in investing as a business, so that the contract in question had a business purpose. But that question of purpose is the question to be asked, and it must be considered upon all of the evidence available to the court and not by reference to any one part of that evidence in isolation.

66. On the evidence available to the court in this case, taken as a whole, I find that Ms Ang's purpose in contracting with Reliantco was to enable her to invest some of her surplus funds for growth, as one element of what she chose to do, as a private individual, with her surplus wealth, enjoying the possibility of very substantial growth, even in the shorter term (and, it may be, hoping to see such growth), but accepting in return the speculative and risky nature of that type of investment and the exposure, therefore, to a substantial risk of losing some or all of her investment.

67. Ms Ang's keenness on (the price of) Bitcoin as an index value against which to invest may be a by-product of her husband's; that keenness in turn may well be a by-product of a view he has, or both of them have, that cryptocurrencies (and Bitcoin in particular) are the future; and that may explain the choice of cryptocurrencies (and Bitcoin in particular) as an investment asset (as opposed to a share index, perhaps, or the price of precious metals or commodities). Less knowledgeable individuals, out of fear of the unknown, or individuals with a lack of capacity or appetite for the risk, might not choose to expose any part of their wealth to cryptocurrencies as an investment class. Equally knowledgeable individuals, with a similar capacity and

appetite for risk, might take a different view as to whether cryptocurrencies are an investment for them. But that does not mean that a wealthy individual, able and willing to run the risks involved and/or more knowledgeable about cryptocurrencies than the average person, cannot be a consumer when investing (or deciding not to invest).

68. Such considerations do not in this case change Ms Ang's purpose in investing in her chosen investment asset, or therefore her purpose in entering into her contract with Reliantco. It does not make her investment in Bitcoin a business of hers; the purpose of her contract with Reliantco therefore was outside any business of hers.

69. I also reject Mr Bradley's attempt to distinguish *Apostolakis* on the basis that Ms Ang's contract with Reliantco gave her an account through which she could make and manage her investment directly, whereas Mr and Mrs Apostolakis' contract was with the bank as investment intermediary or adviser. In my judgment, it is neither necessary nor sufficient, for the individual to be contracting as consumer, that they not be investing by trading for their own account. Consumer investors may choose to handle their own investments and investment choices; many investment businesses routinely engage intermediaries or advisers. How any individual deals with the investment of her private wealth is an intensely personal matter. The use, or not, of intermediaries or advisers, as an aspect of the personal investment choices and arrangements of any given individual, should rightly be taken into account, but only as part of considering that individual's particular case on the whole of the available evidence, not under any presumption that the use of intermediaries or advisers makes an investor (more likely to be) a consumer or that their absence makes her (more likely to be) an investment business.

70. It is therefore my conclusion that Ms Ang's contract with Reliantco fell within Article 17 of Brussels (Recast). It is agreed that, on that basis, Reliantco's challenge to jurisdiction fails entirely, so it must be dismissed.

Was there an effective jurisdiction clause?

71. I shall take this relatively shortly, since Reliantco's challenge to jurisdiction fails because of Section 4 of Brussels (Recast) whether or not the jurisdiction clause would have been effective otherwise.

Law

72. Article 25(1) of Brussels (Recast) is in these terms:

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing;

> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

73. The question whether the formal requirements of Article 25(1)(a)-(c) have been satisfied in respect of the standard terms and conditions of one party to a contract, including the specific problem of 'click-wrapping' (i.e. whether it is enough in an online context that the other party has clicked to indicate assent to the same) has been considered a number of times: see, e.g., Case C-24/76, *Estasis Salotti di Colzani Aimo e Gianmario Colzani v RUWA Polstereimaschinen GmbH* [1976] ECR 1831; *Credit Suisse Financial Products v Société Generale d'Enterprises* [1997] CLC 168; *7E Communcations Ltd v Vertex Antennentechnik GmbH* [2007] 1 WLR 2175; *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB); Case C-322/14, *El Majdoub v Cars On the Web.Deutschland GmbH* [2015] 1 WLR 2986.

74. In particular, in the last of those cases, the CJEU at [40] concluded that:

> "40. … Article 23(2) of the Brussels I Regulation must be interpreted as meaning that the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract."

Arguments

75. Ms Ang contended that she was not able to access the standard terms web page at the time she opened her account, and therefore clause 27.1 did not comply with Article 25 of Brussels (Recast):

    i) She claimed in her witness statement to recall attempting to click the link to access the standard terms on multiple occasions without success, because doing so took her either to an "Error 404" message or to a blank page.

    ii) She relied on evidence from a portal called Web Archive, claiming that it demonstrates that the standard terms web page was not available on the UFX website as at various relevant dates.

76. Reliantco argued that Ms Ang's claimed recollection in that regard is ultimately irrelevant, as this is not a true 'click-wrapping' case. Ms Ang signed in hard copy her acceptance of the standard terms and there is no suggestion, or reason to think, that she would not have been sent a copy if she had asked before signing. Therefore, Reliantco said, it does not need her indications of assent via the online parts of her account opening process to satisfy Article 25.

77. In any event, Reliantco contended, Ms Ang's claimed recollection is highly implausible and is not supported (in fact, is contradicted) by the documentary record. Reliantco maintained that at all material times, the standard terms web page was accessible, visible, and fully compliant with Article 25.

Decision

78. I agree with Reliantco about Ms Ang's claimed recollection. In my judgment, it is demonstrably unreliable and cannot be trusted:-

i) Reliantco's evidence in response demonstrated comprehensively that the Web Archive material relied on by Ms Ang does not show what she says it shows. The Web Archive portal does not provide an accurate representation of how the standard terms web page will have appeared (or appears now) because it does not faithfully reproduce JavaScript content. Nor does the Web Archive claim otherwise. As its own FAQs explain, "*When a dynamic page contains forms, JavaScript, or other elements that require interaction with the originating host, the archive will not contain the original site's functionality*". Further, although some interrogation of the Web Archive material is required to reveal this, the Web Archive nonetheless does capture the source code of the standard terms web page, evidencing in fact that the standard terms were reproduced on the page as it would have appeared when Ms Ang clicked through to it (if she did).

ii) The fact that the Web Archive material does not show what Ms Ang claimed it to show is again demonstrated by the fact that, on Ms Ang's case, it shows the standard terms web page to be inaccessible not only in January 2017, when Ms Ang wants it to have been inaccessible, but also in September 2017 when Ms Ang (must have) obtained the copy of the standard terms she enclosed with her letter before claim.

iii) The standard terms were updated during the relevant period, which required interaction with the standard terms web page. It is not credible that those updating the terms would have failed to notice they were missing from the website.

iv) A signed letter by Complaudit (Reliantco's internal auditors) confirms that the standard terms were visible and publicly available on the standard terms web page during the inspection periods of 24-25 January 2017 and 9-10 January 2018.

v) A report by Google Analytics, showing the traffic to the standard terms web page between 3 and 17 January 2017 shows that the average amount of time spent by users on the relevant page was 1 minute 53 seconds, and that there were 3,346 unique page views (i.e. disregarding repeat views by the same viewer during the same session) during this period, which strongly suggests that there was meaningful content to read, not just a blank page or an "Error 404" message.

vi) A message from a prospective customer to Reliantco dated 17 January 2017, opening with "*I have been reading your terms*", suggests that the standard terms web page was accessible on that date.

vii) Ms Ang's evidence is also that, after opening the account, she received emails and telephone calls from Reliantco over a period of months advising on trades and asking for further funds to be deposited, in sufficient volume that after a time she blocked them. The obvious point is that if Ms Ang was keen to read the standard terms, and had tried but failed to access them, as she now claims, she was repeatedly presented with the opportunity to mention the problem and ask for a copy but did not do so.

viii) When Ms Ang was informed by Reliantco that her UFX account had been terminated, by email of 10 August 2017, she was referred to a number of clauses in the standard terms. She responded to the substance of Reliantco's email without asking for a copy of the standard terms or suggesting she had previously tried but failed to access them.

ix) In her detailed letter before claim dated 17 April 2018, Ms Ang addressed clause 27 of the standard terms in anticipation of reliance on it by Reliantco. She set out her position that as a consumer she was entitled to assert her claims in the English court under Articles 17 to 19 of Brussels (Recast). But as to the factual position, her case was this: "*Ms Ang does not recall being provided with, or asked to confirm her agreement to, detailed terms upon opening her account.*" I find that plausible, but it is not what would have been said if Ms Ang had a recollection of trying but failing to access the standard terms, more than once, during the account opening process, as she now claims (unless, perhaps, she only remembered about that after sending the letter before claim, but she has given no evidence to that effect).

x) Lastly, Ms Ang's subsequent account (of trying but failing to access the standard terms) changed over time. In her Particulars of Claim, she only said she encountered a "*404 Error*"; but by the time she provided her witness statement resisting this jurisdiction application the problem was said to have manifested itself as "*an "Error 404" message or simply a blank page*". That seemingly subtle shift is in fact significant, because by the time of her witness statement Ms Ang had obtained the Web Archive material, and in that statement she made her claim that it supported her recollection. But if it might support any claim, the Web Archive material could only support a claim of encountering blank pages, not a claim to have encountered an Error 404 message. Thus, her evidence appears to have been tailored to (try to) fit later-acquired material. (In fact, as I have said, the Web Archive does not support <u>any</u> claim that the standard terms web page was inaccessible or broken at any material time, so there is a 'double whammy' for the credibility of Ms Ang's factual account about the standard terms.)

79. It was submitted for Ms Ang that it is unrealistic to expect her to have chased Reliantco's representatives for the standard terms. I would not disagree with a submission, in the abstract, that said it was reasonable to suppose that Ms Ang would not think to ask for the standard terms when speaking to Reliantco by telephone. But that does not answer the point that her claim to have been anxious to review the

standard terms, and to have tried but failed to do so, and yet nothing was said about that, is implausible. It was also submitted on her behalf that the primary focus of the letter before claim was on the substantive claims rather than jurisdiction. But jurisdiction – in particular, the impact of the standard terms – was nonetheless addressed in terms, yet there was no mention of the case now advanced. Rather an inconsistent case was advanced that (so far as Ms Ang could recall) the account opening process had not involved her in being asked to indicate consent to the standard terms. Finally, it was submitted for Ms Ang that the change of articulation of her recollection about the failure to access the standard terms is not a significant shift. I disagree.

80. I therefore agree with Mr Bradley that, if this is treated as a 'click-wrapping' case, so that under *El Majdoub* the critical question is whether the standard terms were reasonably accessible to Ms Ang, if she wanted to check them, before she registered her agreement to them, then the standard terms were indeed so accessible.

81. I also agree with Mr Bradley in any event that this is not, or not just, a 'click-wrapping' case, and Ms Ang's hard copy signed acceptance of the standard terms amply satisfies Article 25 on its own.

82. Thus, had Ms Ang not been contracting as a consumer, Reliantco's challenge to jurisdiction would have succeeded, in general, by reference to Article 25 of Brussels (Recast). The remaining question would have been whether that held true for all of Ms Ang's claims or whether her data protection claims could still be brought here despite Article 25.

Data Protection Claims

83. I shall likewise deal with the data protection claims relatively briefly, since the challenge to jurisdiction fails come what may because of the consumer rule. This may not do full justice to the range and detail of the arguments deployed on both sides. When time did not allow Prof. Harris QC to deal with this aspect at the hearing, those arguments expanded rather extraordinarily. This aspect of the case occupied 4 paragraphs (of 72) in Prof. Harris QC's skeleton argument, and none in Mr Bradley's. I was then treated, after the hearing, to 19 pages of written submissions from Prof. Harris QC, drafted principally (I infer) by Mr Callus, a second junior who had played no prior part and was not at the hearing, supported by some 42 additional authorities, generating 15 pages of written submissions in response from Mr Bradley. It is an impossible notion that Prof. Harris QC's 19-page effort and supporting mass of authorities represents merely the reduction into writing of the submissions he ran out of time to deploy on the day. Yet that alone is what I granted him indulgence to provide.

84. With one exception, Ms Ang's data protection claims do not arise under and are not governed by the GDPR. Rather they predate it, so as to be governed by the Data Protection Act 1998. In relation to any damages claim, the Particulars of Claim expressly do not allege any breaches of the GDPR, they merely purport to reserve a right to plead such breaches in the future, but there is no such right and, in any event, there is therefore presently no such claim. The only argument put forward in Prof. Harris QC's skeleton argument, for jurisdiction in respect of Ms Ang's data protection claims if the consumer rule did not allow her to get past Article 25 of Brussels

(Recast), was that Article 79 of the GDPR did that trick (thanks to Article 67 of Brussels (Recast) – see below). That argument could only save the exceptional claim, i.e. the one pleaded claim that is (now) governed by the GDPR, namely Ms Ang's claim for an order for rectification, destruction, erasure or blocking of her personal data still held by Reliantco pursuant to Articles 16-17 of the GDPR.

85. I agree with the logic that underlay Prof. Harris QC's original approach: Ms Ang's data protection claims fall within the scope of Brussels (Recast) – they are civil or commercial matters not excluded by Article 1(2); they also fall within the scope of the jurisdiction clause – they arise out of and are connected with Ms Ang's customer agreement with Reliantco; however, under Article 79 of the GDPR, Ms Ang is entitled to bring proceedings here against Reliantco as data controller or processer, to enforce her rights under the GDPR, because she is habitually resident here, and that is so notwithstanding Article 25 of Brussels (Recast) thanks to Article 67 thereof.

86. Mr Bradley attempted to free Reliantco from Article 79 of the GDPR even in respect of the one claim to which it applies, by referring to Recital (147) to the GDPR. In my view, the attempt fails:-

i) Article 79 of the GDPR is unqualified, on its terms, by reference to any possible question of a jurisdiction agreement (or other 'prorogation of jurisdiction' governed by Section 7 of Brussels (Recast) of which Article 25 forms part).

ii) Article 67 of Brussels (Recast) provides that Brussels (Recast) "*shall not prejudice the application of provisions governing jurisdiction … in specific matters which are contained in instruments of the Union …*".

iii) Article 79 of the GDPR is a jurisdiction provision within Article 67 of Brussels (Recast). Therefore, by Article 67 of Brussels (Recast), Article 79 of the GDPR, if it applies on its own terms, cannot be 'trumped' by, in fact is wholly unaffected by, Article 25 of Brussels (Recast).

iv) Recital (147) to the GDPR says that rules on jurisdiction in the GDPR (such as Article 79) should not be prejudiced by "*general jurisdiction rules such as those of [Brussels (Recast)]*". In my judgment, that does not draw a distinction between Section 1 of Brussels (Recast) ('General provisions') and Sections 2 to 7, as Mr Bradley argued. Rather, as I read it, Recital (147) to the GDPR identifies Brussels (Recast), in its entirety, as the exemplar of a set of "*general jurisdiction rules*" that are not to prejudice the jurisdiction provisions of the GDPR; and that reading fits exactly with Article 67 of Brussels (Recast).

v) Mr Bradley's argument fails on its own terms anyway. On the reading of Recital (147) for which he contended, the effect is only that it does not say that the jurisdiction rules in Sections 2 to 7 of Brussels (Recast) are not to prejudice Article 79 of the GDPR. That does not mean they do so as that will still depend on their own terms and, when reading Brussels (Recast), Article 25 cannot properly be read without reference to Article 67. Thus, for the purpose of the present case, in respect of the one (very limited) claim pleaded that is governed by the GDPR, the special rule of jurisdiction under Article 25 (read properly with Article 67) is that the courts of a Member State chosen by

> a jurisdiction agreement satisfying Article 25 have jurisdiction, which jurisdiction is exclusive unless the parties have agreed otherwise or such jurisdiction would prejudice Article 79 of the GDPR. The chosen jurisdiction here is Cyprus; but treating that as exclusive would prejudice Article 79 of the GDPR, since it gives Ms Ang a right to sue here.

87. Prof. Harris QC, on the other hand, attempted to free Ms Ang's pre-GDPR data protection claims from Article 25 of Brussels (Recast), upon the Article 67 logic I have just applied and an argument raised for the first time in his post-hearing written submissions that the Data Protection Act 1998 contains a jurisdiction provision to which Article 67 applies. But it does not (likewise Directive 95/46/EC that the 1998 Act sought to implement). In that regard, Prof. Harris QC's argument confused provisions creating a power to grant relief (conferring 'jurisdiction' in that substantive sense) with provisions as to jurisdiction in the sense governed by Brussels (Recast) and falling within Article 67.

88. The argument for Ms Ang on that point was said to be supported by the Northern Irish case of *CG v Facebook Ireland Ltd* [2017] EMLR 12. But that was not a judgment about jurisdiction (in the relevant sense) at all. It was an appeal after a final trial on the merits of *inter alia* data protection claims under the 1998 Act. In Case C-498/16, *Schrems v Facebook Ireland Ltd* [2018] 1 WLR 4343, and in *Sabados v Facebook Ireland Ltd* [2018] EWHC 2369 (QB), it does not appear to have occurred to anybody that jurisdiction in respect of claims under the 1995 Directive/1998 Act might somehow be founded upon the Directive/Act itself; rather, the cases proceeded on the basis that since the defendant was domiciled in Ireland, jurisdiction had to be founded upon (respectively) the original Brussels Regulation and Brussels (Recast). That gives me some comfort that the view I have taken is correct, but since the point was not taken neither case is authority on it.

89. Mr Bradley's written submissions on the data protection claims also devoted considerable effort to persuading me that they lack substance or are brought only as makeweights. Whether that is so or not has nothing to do with where Ms Ang may or may not bring them under the jurisdiction rules that are engaged in this case. It would be a matter for a summary judgment or strike-out application, if the challenge to jurisdiction were to fail, Reliantco then chose to defend on the merits, and it contended as a first line of defence on the merits that the claims were so weak as to warrant summary disposal.

90. Thus, had it mattered, i.e. had Reliantco's challenge to jurisdiction been well-founded otherwise, I would have held that this court had jurisdiction only in respect of Ms Ang's claim under the GDPR, that is to say her claim for an order for rectification, destruction, erasure or blocking of her personal data pursuant to Articles 16-17 of the GDPR. Since the entire claim would not then have been set aside, I suppose a question might have arisen whether Ms Ang wished to pursue that one GDPR claim on its own and/or to seek to amend the Particulars of Claim now to plead a damages claim under the GDPR as well. As it is, however, the jurisdiction challenge fails entirely without reference to the particular issues raised by the data protection claims, and any question of whether data protection claims are to be pursued (with or without seeking to amend (if so advised)) can be dealt with as part of the ordinary case management of the claim going forward.

Conclusion

91. For the reasons given above, Ms Ang having contracted with Reliantco as a consumer within Article 17 of Brussels (Recast), and it being common ground that Reliantco has no basis, in that case, for challenging jurisdiction over any of the claims Ms Ang has pleaded, this application fails and is dismissed.