

Going out on a limb

Andrew Wanambwa assesses guidance on jurisdiction from the Court of Appeal



Andrew Wanambwa is a partner in the dispute resolution team at Lewis Silkin LLP

'The facts of *Kaefer* were complex but the key issue in the case was whether there was a "good arguable case" that two of the defendants, AT1 and Ezion, were parties to a contract and therefore bound by the jurisdiction agreement contained in it.'

When a dispute involves a foreign party or events that took place in another jurisdiction, questions often arise as to where the dispute should be determined. The forum in which the dispute is determined can make a great deal of difference. It is therefore important for potential litigants to know where they can commence proceedings and whether they can resist claims brought against them in the 'wrong' jurisdiction. In a recent case the Court of Appeal considered the test that will apply when deciding whether to permit a claimant to sue a 'foreign' defendant in this jurisdiction.

Background

The case is *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019], and is important because it considers the meaning of one of the three requirements that a claimant must satisfy in order to obtain permission to serve English proceedings on a foreign defendant outside the jurisdiction, namely the 'good arguable case' test. Claimants wishing to sue foreign defendants must show that they have a good arguable case that one or more of certain defined jurisdictional gateways has been satisfied, eg the claim is made in respect of a contract that contains an English jurisdiction clause.

The facts of *Kaefer* were complex but the key issue in the case was whether there was a 'good arguable case' that two of the defendants, AT1 and Ezion, were parties to a contract and therefore bound by the jurisdiction agreement contained in it.

The Commercial Court

At first instance, the Commercial Court applied a two-fold test of whether the claimant had established that:

- it had a good arguable case; and
- it had much the better argument in respect of the relevant jurisdictional gateway.

The Commercial Court held that the English courts did not have jurisdiction over *Kaefer's* claim against either Ezion or AT1.

Kaefer appealed.

Court of Appeal

On appeal, *Kaefer* sought to argue that the two-fold test involving an enquiry into who had the 'much better' argument (as applied by the first instance court) was wrong. *Kaefer* argued that the threshold for jurisdiction was a single test of plausibility.

The Court of Appeal noted that the decision at first instance had been handed down prior to two Supreme Court decisions which had since determined that the two-fold test no longer applied (*Four Seasons Holdings Incorporated v Brownlie* [2017], endorsed by *Goldman Sachs International v Novo Banco SA* [2018]).

Following these Supreme Court decisions, the 'good arguable case' test is now a three-limb test, in respect of which the Court of Appeal in *Kaefer* gave the following guidance:

Four Seasons Holdings Incorporated v Brownlie
[2017] UKSC 80

Goldman Sachs International v Novo Banco SA
[2018] UKSC 34

Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV & ors
[2019] EWCA Civ 10

Limb (i)

The claimant must supply a ‘plausible evidential basis’ for the application of a relevant jurisdictional gateway. The Court of Appeal confirmed the applicability of a relative test. It was found that the reference to ‘a plausible evidential basis’ in limb (i) is a reference to an evidential basis showing that the claimant has the better argument. It was also held that:

- the test under limb (i) is not a balance of probabilities;
- the test is context specific and ‘flexible’;
- in expressing a view on jurisdiction, the court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits; and
- the adjunct ‘much’ must be laid to rest. There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to proceed upwards and onwards and show that it has ‘much’ the better case. A plausible case is not one where the claimant has to show it has ‘much’ the better argument.

Limb (ii)

If there is some reason for doubting whether the jurisdictional gateway applies, the court must ‘take a view’ on the material available if it can reliably do so.

Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it ‘reliably’ can. The reality is that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. Limb (ii)

therefore involves the use of judicial common sense and pragmatism when faced with incomplete evidence, not least because the exercise is intended to be one conducted with ‘due despatch and without hearing oral evidence’.

Limb (iii)

If no reliable assessment can be made of whether the jurisdictional gateway applies, then there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

Where the court is simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument, then it must apply limb (iii) and find that there is a good arguable case for the application of the relevant gateway if there is a plausible (albeit contested) evidential basis for it. This was said to be a more flexible test which is not necessarily conditional upon relative merits.

Result

Applying the above guidance, the Court of Appeal dismissed the appeal and confirmed that AT1 and Ezion were not bound by the exclusive jurisdiction clause in the relevant contract.

The claimant must supply a ‘plausible evidential basis’ for the application of a relevant jurisdictional gateway.

The Court of Appeal confirmed that the first instance judge had been incorrect to apply a two-fold test. Ultimately, however, the Court of Appeal found that the judge had arrived at the correct outcome (in declining jurisdiction over AT1 and Ezion) albeit through an incorrect formulation of the law.

Conclusion

The *Kaefer* decision is important because it sheds further light on the crucial issue of when overseas defendants can be sued in the English courts. The case confirms and explains the new three-limb test claimants must meet when seeking to sue an overseas defendant here and is therefore essential reading for those involved in jurisdictional disputes.

At a practical level, the case underlines the importance for claimants of convincing the court that they have a plausible argument that the relevant jurisdictional gateway is satisfied. ■

FAMILY LAW JOURNAL

Clear and concise articles in plain English, tackling real and relevant issues in family law

For a **FREE** sample copy, call us on 020 7396 9313

