Court calls time on pursuit of Scottish claims in the County Court at Carlisle

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Personal Injury analysis: The Court of Appeal has upheld rulings in the lower courts that claims for personal injury which occurred in land or premises in Scotland which was owned by a company with its registered or head office in England must be brought in a court in Scotland. David Bowden, freelance independent consultant, comments on the consequences of Cook v Virgin Media Ltd and McNeil v Tesco plc and talks to Russell Kelsall, partner at Squire Patton Boggs (UK) LLP in Leeds, about what lessons can be learned from this case.

Original news

Cook v Virgin Media Ltd; McNeil v Tesco plc [2015] EWCA Civ 1287, [2015] All ER (D) 127 (Dec)

The Court of Appeal granted permission for a second appeal on the basis that an important point of principle or practice was involved. The Master of the Rolls in giving the judgment of the court upheld the rulings of the two lower courts. These rulings concerned claims for personal injury which occurred in land or premises in Scotland which was owned by a company with its registered or head office in England. The Court of Appeal has confirmed these claims must be brought in a court in Scotland.

What were the facts in these cases?

David Bowden (DB): There were two separate claims. In each the claimants claimed damages for personal injury they alleged they sustained in accidents in Scotland. The claimants alleged these accidents occurred as a result of either negligence or breach of statutory duty by the defendants. The registered office of both defendants was located in England.

In *Cook*, an acknowledgement of service form was lodged indicating an intention to dispute jurisdiction of an English court. However, liability was admitted. A defence was served responding to the claim but asserting that Scottish courts were the correct ones to hear this claim. In *McNeil*, an acknowledgement of service form was lodged indicating an intention to defend the claim. Liability was denied. A defence was served along the same lines as in *Cook*.

What did District Judge Park decide in the County Court?

DB: District Judge Park considered both files on paper and made an order of his own initiative staying each set of proceedings on the basis that Scotland was the most convenient forum for the claim. He ordered claimants to file evidence showing cause why the claims should proceed in England. By separate orders made in May 2014 he struck out each claim on the principal ground that they should have been brought in Scotland.

The claimants then applied for an order setting aside this decision. This was refused by a written judgment dated 30 July 2014 in which District Judge Park said he made his decision principally under the court's case management provisions under CPR 3. He noted that 'we seem to be the county court for Scotland' and said it would not be convenient for witnesses based in Scotland to have to come to Carlisle for trial.

What happened on the first appeal?

DB: The claimants appealed this judgment and it was heard by the designated civil judge for Carlisle. HHJ Peter Hughes QC dismissed the appeal on 11 February 2015. He ruled that the failure of the defendants to raise a jurisdictional challenge under CPR 11 within 14 days of service of the claim, did not prevent a court exercising its case management powers under CPR 3. He also ruled that the principle of forum non conveniens was not precluded by the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982) and relevant case law.

Why was permission granted for this second appeal?

DB: By order dated 31 July 2015, Tomlinson LJ granted a permission for a second appeal under CPR 52.13. The Court of Appeal can only grant permission where an appeal would either raise an important point of principle or practice, or where there is some other compelling reason for the appeal to be heard. Tomlinson LJ granted permission so that the Court of Appeal could decide whether forum non conveniens can apply in a purely domestic context where the competing jurisdictions were England and Scotland.

What were the central issues in this appeal?

DB: The claimant appellants put their appeal on three bases:

- there was no power to strike out or stay proceedings on the ground of forum non conveniens in view of the mandatory effect of articles 2, 24 and 60 of Brussels I (Regulation (EC) 44/2001)
- CJJA 1982, ss 16 and Sch 4 prevent a court striking out or staying proceedings
- if there was a power to strike out or stay, it should only have been exercised under CJJA 1982, s 49 and could not be validly exercised by a court under CPR 3(3) (where the court's case management powers are set out)

What did the court decide on Brussels I?

DB: The court decided that Brussels I only applies to civil and commercial cases where there is an international element but that Brussels I does not apply to cases which are solely internal to an EU Member State.

Article 2 of Brussels I provides that:

> 'Persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

Article 24 provides that:

> 'A court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.'

Article 60 provides:

> 'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat…For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office.'

The Court of Appeal said it was not assisted in determining the Brussels 1 issue by three decisions of the Court of Justice that the appellants relied on. In C-386/05: *Color Drack GmbH v Lexx International Vertriebs GmbH* [2008] 1 All ER (Comm) 168 although the Court of Justice held that the court having jurisdiction was that for the principal place of delivery of the goods, Dyson MR said this case 'shed no light on the question' of whether Brussels 1 'applies in a case which is

solely internal to a member state'. In C-281/02: *Owusu v Jackson (t/a Villa Holidays Bal-Inn Villas)* [2005] 2 All ER (Comm) 577 (which concerned a UK claimant who suffered injuries in a diving accident whilst on a holiday in Jamaica in a villa hired from a UK domiciled defendant), the Court of Justice held Brussels I was mandatory and a Member State could not decline jurisdiction even if the jurisdiction of no other member state was in issue. Dyson MR said *Owusu* did not assist.

In C-478/12: *Maletic v lastminute.com Gmbh* [2014] 1 All ER (Comm) 745 (which concerned a holiday booked in Egypt by an Austrian couple from a German travel business) the Court of Justice ruled that the interpretation provided by the courts in is also valid for Brussels I whenever the provisions of those instruments may be regarded as equivalent. Dyson MR said a second contractual relationship in *Maletic* could not be regarded as 'purely domestic' since it was inseparably linked to a first one. Dyson MR said the effect of *Maletic* was that:

> 'If the second contractual relationship had not been made or linked with a person domiciled in another member state, it would have been purely domestic and the [Brussels 1] Regulation would not have applied.'

In the end the court decided this issue based on a report on Brussels I and from a leading textbook. The Jenard report on the 1968 Brussels Convention OJ 1979 C59 clearly stated that 'for the jurisdiction rules of the Brussels Convention to apply at all the existence of an international element is required'. Professor Adrian Briggs in 'Civil Jurisdiction and Judgements' (2015, 5th edition) put this more clearly saying:

> 'The result is that if a matter is demonstrably wholly internal to the United Kingdom, so that the only jurisdictional question which may arise is as to the part of or a place within the United Kingdom which has jurisdiction, it is not one in which the Regulation is designed to have any role.'

On this basis the Court of Appeal ruled that Brussels I does not apply to proceedings which were issued in England against companies domiciled in the UK arising from accidents that took place in a different part of the UK, namely Scotland. These proceedings are purely domestic.

What did the court decide on CJJA 1982?

DB: The court decided that CJJA 1982 did not assist the appellants but rather it made it clear that for purely domestic cases, proceedings should be brought where the accident took place.

CJJA 1982, Sch 4 has a general provision which states that 'persons domiciled in a part of the United Kingdom shall be sued in the courts of that part'. It contains special provisions including those relating to torts such as personal injuries. These provide that a UK domiciled person may be sued in another part of the UK 'in the courts for the place where the harmful event occurred'.

The appellants submitted that where Brussels I has no application a parallel regime is imported by CJJA 1982, Sch 4 for the purpose of jurisdiction within the UK. This was roundly rejected by the Court of Appeal. It said the rules in CJJA 1982, Sch 4 were not a mirror image of Brussels I and had been tailored to make them appropriate to UK law. Dyson MR said the appellants' insuperable stumbling block was CJJA 1982, s 49. This provides:

'Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention.'

In C-346/93: *Kleinwort Benson Ltd v Glasgow City Council* [1995] All ER (EC) 514 the Court of Justice said CJJA 1982 'provides for the allocation of civil jurisdictions within the United Kingdom (England & Wales, Scotland, Northern Ireland)'. On this basis the Court of Appeal ruled that CJJA 1982, s 49 provided a complete answer to the claimants' case under CJJA 1982.

What did the court decide on CPR 3?

DB: There is a mandatory provision in CPR 11 that a defendant wishing to dispute jurisdiction must do so by making an application supported by evidence within 14 days of filing an acknowledgment of service. Neither defendant did this. In the end, District Judge Park struck the cases out using the expanded case management provisions under CPR 3 that were inserted in April 2013 when the Jackson reforms were implemented.

Dyson MR had also given the judgment in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2007] All ER (D) 321 (Nov). This was a case decided pre-Jackson. There the Court of Appeal had ruled that if a defendant does not make an application under CPR 11(1)(b) 'he will be treated as having accepted that the court has and should exercise its jurisdiction to try the claim'.

However, the Court of Appeal accepted that the position was now different post April 2013 and that District Judge Park was correct to exercise his case management powers under CPR 3 as he did. The only sting in the tail is that Dyson MR said that in *Cook* (where liability had been admitted) then it was undesirable to strike out such a claim on jurisdictional grounds and that 'the better course in both cases would have been to stay the proceedings under rule 3.1(2)(f)'. However, there was no appeal as such against this aspect of District Judge Park's decision.

How does this decision clarify the issue of jurisdiction in such claims?

DB: This decision could not be any clearer. Where a company with a registered office in England & Wales, is sued for personal injuries by a claimant resident in Scotland in relation to an accident that happened at the company's premises in Scotland, then the English courts are not the appropriate courts. Instead, the case should be stayed on the basis of forum non conveniens and proceedings can only be brought in Scotland.

What are the practical implications of this decision?

Russell Kelsall (RK): There appropriate court for consumer disputes is an important topic. In contractual claims, the Competition and Markets Authority (CMA) takes the view that consumers 'should not normally be prevented from starting legal proceedings in their local courts' (see, for example, paragraph 5.29.7 of the CMA's unfair contract terms guidance). If there is a term which tries to stop the consumer from doing so, it is normally considered unfair under the Consumer Rights Act 2015. However, this litigation involved individuals choosing to bring proceedings outside of their local courts. This is likely to raise practical issues for consumers on where to bring claims about, for example, defective goods and services (to avoid their claim being struck-out).

It will also require companies which do business in one part of the UK, but only have a head office in another part, to carefully consider the impact of this decision. For example, if a Scottish consumer buys a watch from an English company but from a Scottish shop (which turns out to be defective), should (or must) the consumer's claim be brought in Scotland (which is probably easier for the consumer until he gets to enforcing any judgment) or England (where the company may prefer)? It seems, following these decisions, the consumer must bring a claim in Scotland even if the English company would prefer it in England.

DB: The solicitors acting for the appellants are a Manchester-based firm called Express Solicitors Limited who specialise in personal injury claims. In England and Wales, solicitors are permitted to act on a 'no win, no fee' basis and solicitors can enter into a conditional fee agreement (CFA) with clients. These funding arrangements are not valid between a firm of solicitors in Scotland and a client in Scotland. Similarly, CFAs are not permitted in Northern Ireland.

For retainers entered into before the provisions in section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) came into force in April 2013, solicitors acting for clients could claim a success fee of up to 100% where they acted on a CFA. They could also recover 'after the event' (ATE) premiums on successful claims. LASPO 2012 has changed this so that neither success fees nor ATE premiums that claimants may be liable for under a CFA can no longer be recovered from an unsuccessful defendant. There have been market changes in relation to both the product structure and pricing of ATE since LASPO 2012 came into effect. While this has squeezed margins in personal injury firms, it is still viable to represent clients on CFAs. Further, for clinical negligence cases, the pre LASPO 2012 regime is preserved.

This decision will mean solicitors in England & Wales acting for claimants in Scotland will need to re-think how they do business. As CFAs are not recognised as valid in Scotland, then this could mean that solicitors cannot recover profit costs.

For purely domestic UK cases, the five or so pages of 'special jurisdiction' provisions set out in CJJA 1982, Sch 4 repay careful reading. These have now been replaced by Schedule 2 of the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929.

Are there any unresolved issues in this area of law?

RK: The unresolved issue seems to be what happens if both parties agree (and wish) to bring their claim in one jurisdiction. In this decision, both defendants raised issues on jurisdiction. By doing so, the court was aware of the jurisdiction issue (and it seems District Judge Park is more than alive to it anyway). However, what if the court was not aware of this issue? Should it automatically consider striking-out the claim even if the parties are happy to litigate in (say) England?

DB: The judgment does not consider the position where there is more than one potential or actual defendant, and one of those defendants is domiciled in England and the other in Scotland. Similarly it does not consider counterclaims made in an English case against a Scottish claimant or where Part 20 proceedings are contemplated or made where there is diversity of domicile.

Dyson MR is clear that this appeal was decided purely on forum non conveniens and that there had not been an appeal as such in relation to whether claim should have been struck out under the CPR.

What action should lawyers take in light of this decision?

RK: Lawyers will seriously need to consider this decision where there is any domestic jurisdiction issue. This is even more the case if there are issues on limitation. For example, generally the Limitation Act 1980 provides a six-year limitation period for simple contract claims in England & Wales but the corresponding period in Scotland under the Prescription and Limitation (Scotland) Act 1973 is five years. If a claim is struck-out because it is in the wrong jurisdiction, it is likely to open up the firm to a complaint or even a claim unless the consumer was clearly advised of the risks.

DB: There will potentially be more work for solicitors based in Scotland who will now have to act for claimants in Scotland. Those acting for or advising companies who have live claims against them from Scottish claimants should apply to stay those claims (rather than applying to strike them out). It will depend on the stage those proceedings have reached as to whether an application will be granted. For new claims, those advising defendants should act promptly and within the 14-day window after acknowledging the claim to make the CPR 11 application to apply to stay a Scottish claim with evidence in support. In view of the amount at stake, no doubt those advising the claimants are considering applying for permission for a final appeal to the Supreme Court. As the Court of Appeal structured its decision so heavily around a number of decisions from the Court of Justice, then if the Supreme Court were to take this case then it is possible that a reference could be sought.

Interviewed by David Bowden.

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