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# **Court of Appeal declines to express a view on whether a pure legal assignment of a debt is champertous**

*JEB Recoveries LLP v. Judah Elezear Binstock*  
[2016] EWCA Civ 1008

**Article by David Bowden**

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Mr Wilson had assigned to a special purpose vehicle company the debts he claimed were owed by Mr Binstock. The SPV had no assets other than these alleged debts. The SPV was owned in 3 equal shares by Mr Wilson and 2 other businessmen. Mr Binstock denied English courts had jurisdiction over him because he claimed a domicile of choice in Spain. The judge below held that English courts had jurisdiction in relation to 1 of the 4 claims. The Court of Appeal over-ruled Judge Barker on the jurisdiction issue because it said properly applying the Brussels I regulation and the CJEU ruling in *Wood Floor* there was no basis for English courts to have jurisdiction. Mr Binstock lived in Spain, the contract was made in Amsterdam, Mr Wilson lived in Paris, the casino business was in Spain and the attempted business transfer involved 2 offshore companies. None of this had any connection to England. Mr Binstock said there was champerty because the SPV was splitting the fruits of the litigation. Judge Barker had ruled that there was no illegal champerty. As the appeal was allowed on jurisdiction, the court did not need to rule on this. Although the Court of Appeal heard full argument on this point, Lord Justice Kitchin ruled that 'it was not necessary to consider whether Judge Barker was right to find that the claim was not founded upon a champertous assignment and I prefer not to do so'.

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[2016] EWCA Civ 1008                      19 October 2016  
Court of Appeal, Civil Division (Moore-Bick, Tomlinson and Kitchin LJJ)

#### **What are the facts?**

In February 2010 Mr Binstock engaged Mr Wilson to identify and acquire a listed company with no trading history but with cash into which Mr Binstock could transfer his business interests by way of reverse takeover. Work was done from March to October 2010 by Mr Wilson pursuant to the contract but no reverse takeover occurred. Mr Binstock was then 81 and wanted to put his affairs in order. Mr Wilson claims that Mr Binstock owes him £10million and €10,000 per month for his monthly retainer. Mr Wilson assigned Mr Binstock's debts to him for £1 to JEB. JEB accepts that €50,000 and a further €7,000 has already been paid to Mr Wilson.

#### **What is the business model of JEB Recoveries LLP?**

JEB Recoveries LLP ('JEB') is a special purpose vehicle. It has consists of 3 members who each have equal shares namely Peter Wilson (a Bermuda resident), Mark Hardy and Michael Stannard (a resident of Switzerland). HHJ Simon Barker QC noted that Mr Hardy was '*no novice in the courtroom*' and acted in effect as a professional MacKenzie friend in the litigation for Mr Wilson. JEB was incorporated on 21 March 2014. The notes to JEB's abbreviated financial accounts for the year ending 15 September 2016 state that its principal activity is the recovery of unpaid invoices due on invoices rendered to Mr Binstock,

#### **What did the judge below rule on the jurisdiction issue?**

Mr Binstock submitted that the action should be stayed or the claim struck out on the basis that the English courts do not have jurisdiction. Mr Binstock said that his domicile of choice is Spain where he is resident for 5 months a year. He said his business interests are centred in Spain. On 18 March 2015 HHJ Simon Barker QC handed down his judgement on Mr Binstock's application to strike out all claims for want of jurisdiction in England – [2015] EWHC 1168 (Ch). The judge ruled that 1 of the 4 claims were justiciable within the jurisdiction of an English court.

#### **What were the grounds of appeal? What issue(s) were before the court?**

Mr Binstock appealed on the grounds that Judge Barker was wrong on the jurisdiction issue maintaining that his domicile of choice is Spain and that Spanish and not English courts have jurisdiction. JEB sought to put in a Respondent's Notice with draft amended Particulars of Claim. By this they sought to claim that Mr Binstock had voluntarily submitted to the jurisdiction of the English courts in issuing an application for security for costs. JEB also applied to put in further evidence before the Court of Appeal.

#### **What does the Brussels I Regulation in jurisdiction in civil matters say?**

The Brussels I Regulation **44/2001/EC** dated 22 December 2000 deals with jurisdiction, recognition and enforcement of judgments in civil and commercial matters between member states of the EU. Articles 2, 3 and 5 are relevant in establishing if a person domiciled in an EU member state can be sued in a court of another EU member state.

Article 2(1) provides '*Subject to this regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state.*' Article 3(1) says '*Persons domiciled in a member state may be sued in the courts of another member state only by virtue of the rules set out in sections 2 to 7 of this Chapter.*' Article 5 of the Regulation entitled '*Special jurisdiction*' provides:

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*'A person domiciled in a member state may, in another member state, be sued:*

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

*(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

*—in the case of the sale of goods, the place in a member state where, under the contract, the goods were delivered or should have been delivered,*

*—in the case of the provision of services, the place in a member state where, under the contract, the services were provided or should have been provided,*

*(c) if sub-paragraph (b) does not apply then sub-paragraph (a) applies.'*

**What did the CJEU rule on Brussels I in *Wood Floor Solutions*?**

The CJEU considered how Article 5(1)(b) of Brussels I should be applied in *Wood Floor Solutions Andreas Domberger GmbH v. Silva Trade SA Case C-19/09, [2010] 1 WLR 1900*. In its ruling it said these 4 factors had to be considered:

- Where there are several places of delivery of goods, the 'place of performance' must be understood as the place with the 'closest linking factor' which would generally be 'the place of the main provision of services',
- The 'place of the main provision of services' must be deduced 'from the provisions of the contract itself',
- Where the contract is not conclusive, then it is appropriate to 'take into account of the place where he has in fact for most part carried out his activities in the performance of the contract',
- This place of performance must be 'identified by another means which respects the objectives of predictability and proximity' pursued in the Regulation

Finally the CJEU ruled that where services were provided in more than 1 EU member state the court which had jurisdiction to hear and determine claims based on the contract is the 'court within whose jurisdiction the place of the main provision of services is situated'.

**What matters did the Court of Appeal find relevant on its Brussels I enquiry?**

Drawing on the pleadings and witness statements below as well as the written and oral submissions in the Court of Appeal, Lord Justice Kitchin drew out the following about Mr Binstock:

- He was born in London in 1929 and his domicile of origin is England,
- He has not lived in England since the 1970s,
- His main home is now in Marbella, Spain
- When not in Marbella he splits his time living in his flats in Paris and Buenos Aires,
- He also spends time in the Netherlands, Switzerland and Portugal
- With his wife, he co-owns a house in Kent but this 'is in no sense his home',
- His principal business interest is property and the Gran Casino Aljarafe SA, and
- His domicile of choice is now Spain.

Judge Barker QC found on the evidence that '*Mr Binstock was not domiciled in this jurisdiction*' and JEB did not appeal this finding to the Court of Appeal.

**What ruling did the Court of Appeal give on jurisdiction of English courts under the Brussels I Regulation?**

The Court of Appeal overruled the judgement below of Judge Barker QC who had found that for 1 of the 4 claims that JEB had brought, English courts did have jurisdiction under Brussels I. Kitchin LJ drew out the following as being relevant to this finding:

- Although Mr Binstock had his initial meeting with Mr Wilson in London, the subsequent and substantial meeting at which the terms of Mr Wilson's retainer was agreed was in Amsterdam on 7 March 2010,
- KPMG in Amsterdam were to be advisers in concluding the transaction,
- Although BDO LLP in London were also to be advisers, that they were in London was not pivotal or decisive for the Brussels I determination,
- Mr Wilson spent most of his time reorganising Mr Binstock's business interests in Spain,
- Mr Wilson was allowed to live in Mr Binstock's apartment in Paris during the retainer and he issued his invoices to Mr Binstock from Paris,
- A LLP was set up in the Isle of Man which was controlled by a company in Bermuda to attempt to bring about the reverse take-over,
- Mr Wilson's intention was that on completion services would be provided to Mr Binstock through either or both of these 2 offshore companies,

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- Mr Wilson's main focus had been in relation to irregularities he uncovered at the Gran Casino Aljarafe in Spain

Kitchin LJ ruled that Judge Barker had fallen into error in his Brussels I enquiry for 2 reasons. Firstly, the burden of proof of showing that English courts did have jurisdiction over Mr Binstock lay on JEB which it had failed to discharge. Secondly and more importantly, in examining where all the services were to be provided, Kitchin LJ observed:

*'I do not believe it is possible, on the materials before the court, to say that, based upon the place where the services have for the most part been carried out, JEB has a good arguable case that the place of the main provision of Mr Wilson's services was England. .... no detail is given as to the extent of that work or how often Mr Wilson travelled to London to carry it out. Nor is any detail provided as to the extent or duration of the work Mr Wilson carried out in Spain.'*

**What ruling did the Court of Appeal give on JEB's Respondent's Notice and fresh evidence application?**

Lord Justice Kitchin gave this short shrift. Applying the classic *Ladd v. Marshall [1954] 1 WLR 1489* principles, he ruled that the evidence JEB sought to put before the Court of Appeal could have been obtained and put before Judge Barker. He therefore refused to admit it saying *'this application...has fallen at the first hurdle'*. Similarly, no ruling favourable to JEB was given on its Respondent's Notice with Kitchin LJ merely stating that *'JEB may therefore pursue this application before a judge of the High Court if it succeeds in establishing that Mr Binstock has by his conduct submitted to the jurisdiction'*.

**What ruling was given below on champerty?**

Judge Barker ruled **[2015] EWHC 1063 (Ch)** the arrangement that Mr Wilson entered into with JEB was not void as being champertous noting:

- It was not champertous for Mr Wilson to assign his cause of action to JEP,
- It was not champertous for JEP to pursue Mr Binstock, and
- As JEP was a SPV, Mr Binstock could apply for security for costs order against JEP if he remained concerned that his legal costs (if he were successful) would not be paid.

**What did the Court of Appeal say about the champerty claims?**

As Mr Binstock's appeal on jurisdiction under Brussels I was allowed by Kitchin LJ, he was not required to rule on this issue. However the Court of Appeal heard full argument on it at the hearing on 22 June 2016 and this was dealt with at length in both sides' skeleton arguments. Relevant materials were also in the bundle of authorities for the hearing. Judge Barker had granted permission to appeal because the case *'raises a point of law of some importance'*. Although it would have been open to Kitchin LJ to make a ruling on champerty in the end he declined to do so, tersely noting:

*'Champerty*

*64. In these circumstance it is not necessary to consider whether Judge Barker was right to find that the claim was not founded upon a champertous assignment and I prefer not to do so.'*

**What is the significance of this case for litigation funders and debt purchasing businesses?**

Kitchin LJ's view of this case was no doubt coloured by the conduct of JEB. He was not impressed by JEB's belated and unsuccessful attempt to argue voluntary assent to jurisdiction because of Mr Binstock's security for costs application. It is difficult to tell what to read into Kitchin LJ's ruling that he preferred 'not to do so' on the champertous assignment claim. Even if Kitchin LJ would have ruled against JEB on this point it is not clear what his reasons would have been or how wide its scope.

Debt purchasers rely on Law of Property Act section 136 and usually give the debtors in a purchased portfolio legal notice of assignment that their debts have been bought shortly after completion. Debt purchasers require authorisation from the FCA to collect these debts. The established view had been that this was far removed from trafficking in litigation to be regarded as champertous. However following this case, it is not guaranteed that this is the case and appropriate warranties should be sought.

**21 October 2016**

David Bowden is a solicitor-advocate and runs [David Bowden Law](http://DavidBowdenLaw.com) which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at [info@DavidBowdenLaw.com](mailto:info@DavidBowdenLaw.com) or by telephone on (01462) 431444.