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JURISDICTION DISPUTES: THE COURT OF APPEAL GOES BACK TO BASICS

When considering whether England is the appropriate forum to try a dispute, the court should take a practical approach, and not attach too much importance to technical considerations. This involves standing back and identifying where the fundamental focus of the litigation is to be found. That is the key message from a recent Court of Appeal decision[1]. Parties involved in jurisdiction disputes should bear this in mind so as to avoid the time and cost involved in bringing proceedings in the wrong country.

The case also provides important guidance on the use of "anchor defendants" in jurisdiction disputes.

BACKGROUND FACTS

The claimant (the bank) claimed that the eight Russian defendants had engineered and manipulated the insolvency in Russia of the first two defendants (D1 and D2) in order to ensure that D1 and D2 would be unable to pay sums due to the bank under a loan agreement and guarantee.

The bank obtained permission to serve proceedings out of the jurisdiction on the defendants. At first instance, Flaux J dismissed an application to set that permission aside. Two of the defendants (D3 and D5) appealed.

APPROPRIATE FORUM

Jurisdiction disputes often turn on the question of whether England is "*clearly or distinctly the appropriate forum*" to hear the dispute. The Court of Appeal recognised that this was the "*predominant issue*" in this case.

At first instance the claimant argued that England was the appropriate forum to hear the dispute because it would not receive a fair trial in Russia. Similar arguments have succeeded in earlier cases but, in this case, the judge rejected the argument on the basis that there was no cogent evidence of a real risk that the bank would not receive justice in the Russian courts.

[1] Erste Group Bank A.G. v JSC "VMZ Red October" and others [2015] EWCA Civ 379. Macfarlanes acted for the successful third defendant/respondent

The bank did not appeal against that finding. Instead, it relied on a number of technical arguments which had been successful at first instance.

The Court of Appeal said that this was the wrong approach. The correct approach was to stand back and ask the practical question where the fundamental focus of the litigation was to be found. In this case, that was Russia. The key events had taken place in Russia; dealing with the bank's attack on the insolvency procedures governing D1 and D2 would require a detailed understanding of Russian insolvency law and court procedure and all the important documents and witnesses were situated in Russia. In the Court of Appeal's words, the conspiracy (if there was one) was "*as Russian…as it is possible to imagine*".

ANCHOR DEFENDANTS

The loan agreement and guarantee contained jurisdiction clauses, which entitled the bank to sue D1 and D2 in England. The bank argued that the other defendants should be joined as "necessary and proper" parties to those proceedings. It is a common tactic to use "anchor defendants" in this way so as to found jurisdiction against the real targets of a claim.

However the tactic was unsuccessful in this case. The Court of Appeal held that the rules not only require a claimant to show that it has an arguable claim against an "anchor defendant" but also that it is reasonable for the English court to try that claim. The bank could not satisfy the second part of that test, broadly because the English proceedings would not add anything to the Russian insolvency proceedings (which the bank had participated in) and it was clear that D1 and D2 would play no part in the English litigation.

CONTACT DETAILS

If you would like further information or specific advice please contact:

SIMON NURNEY
PARTNER
LITIGATION AND DISPUTE RESOLUTION
DD: +44 (0)20 7849 2405
simon.nurney@macfarlanes.com

GAVIN GRAY
SENIOR SOLICITOR
LITIGATION AND DISPUTE RESOLUTION
DD: +44 (0)20 7849 2461
gavin.gray@macfarlanes.com

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MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com