Neutral Citation Number: [2021] EWHC 2682 (Comm)

Case No: PE-2020-BRS-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN BRISTOL
CIRCUIT COMMERCIAL COURT (QBD)

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 13/10/2021

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

JOY IRENE DOOLEY and 61 Others (as listed in the Schedule of Claimants)	**Claimants**
- and -	
CASTLE TRUST & MANAGEMENT SERVICES LIMITED	**Defendant**

- -
- -

Gerard McMeel QC (instructed by **High Street Solicitors**) for the **Claimants/Respondents**
James Hart (instructed by **TSN Law**, Gibraltar) for the **Defendant/Applicant**

Hearing date: 1 October 2021

- -

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.

.....

HH JUDGE RUSSEN QC

This judgment was handed down by the judge remotely by its circulation to the parties' representatives by email and its release to Bailii. The date and time for hand-down is deemed to be 10:00 am on 13 October 2021.

HHJ Russen QC:

Introduction

1. This is my judgment on the Defendant's application dated 18 May 2021 ("**the Application**") following a remote hearing on 1 October 2021, at which Mr James Hart represented the Defendant ("**Castle**") and Mr Gerard McMeel QC represented the claimants.

2. By the Application Castle challenges the court's jurisdiction to entertain the claims issued by the claimants in accordance with CPR rule 11(6). The Application seeks the following relief:

    i) a declaration, pursuant to CPR r.11(6), that the Court has no jurisdiction or will not exercise its jurisdiction;

    ii) a stay of the proceedings generally;

    iii) the setting aside of the Claim Forms and service of the Claim Forms; and

    iv) an order that the claimants, joint and severally, pay Castle's costs of and occasioned by the Application, to be summarily assessed.

The Claim

3. Castle is a company registered in Gibraltar which operates as a professional trustee company. Castle is the trustee of two Qualifying Recognised Overseas Pension Schemes ("**QROPS**") established in Gibraltar: the Equus Scheme, established by a Declaration of Trust dated 10 April 2013, and the Metro Scheme, established by a Declaration of Trust dated 1 August 2013. The respective trust deeds ("**the Deeds**") and the Scheme Rules annexed to and incorporated into and incorporated into each one ("**the Rules**") are in materially identical terms.

4. Each of the claimants (or in the case of the 21st and 61st claimants, the deceased individual whose estate they respectively represent as personal representatives) joined either one or both QROPS as members. In that capacity they each transferred existing UK pension fund interests into the relevant scheme. There are two principal sub-categories of investors according the nature of the investments underlying the QROPS: the "UCIS Claimants" who were advised in respect of a handful of unregulated collective schemes and the "Elysian Claimants" who were advised in respect of a single investment of that name. Some claimants fall into both categories. The QROPS were promoted principally by Montegue Smythe, a Cypriot firm which operated from an English address in Waterlooville but was not authorised by the FCA under FSMA to conduct investment business in the UK.

5. Upon a pension transfer being made, the effect of the Deeds was that Castle as trustee and administrator of the QROPS held the resulting sub-fund upon trust for the member:

see clause 4.1. A member (and his family members and dependants) was a "Beneficiary" within the meaning of the Rules.

6. Save for the 21st, 39th, 48th, 52nd and 61st, each claimant is an individual domiciled in England & Wales. As personal representatives the 21st and 61st claimants represent the estates of individuals who died domiciled in England & Wales. The 39th and 48th claimants are domiciled in Northern Ireland and the 52nd claimant is domiciled in Scotland.

7. The claims made by the claimants against Castle may be summarised by reference to their categorisation in the Particulars of Claim as follows:

   i) The "**Joint Tortfeasorship Claims**", by which it is alleged certain third parties committed the tort of common law negligence or breach of regulatory or statutory rules giving rise to a statutory action pursuant to s.150/138D of Financial Services & Markets Act 2000 ("**FSMA**") and the Defendant "*knew or ought to have known*" the conduct was negligent and/or in breach of regulatory/statutory rules. The claimants allege this amounts to the engagement by Castle in a "*joint venture and/or common design to engage in activities that involved the commission of torts against the Claimants*".

   ii) The "**section 27 Claims**", by which it is alleged there is a statutory cause of action pursuant to s.27 of FSMA on the basis that:

      a) at all material times Castle was (i) an authorised person, for the purposes of FSMA; and, (ii) was engaged in "*offering its services to UK investors of operating pension schemes and arranging deals in investments*";

      b) Montegue Smythe was an unauthorised person and/or not an exempt person who was engaged in regulated activities, under the terms of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) ("**RAO**"), in contravention of the general prohibition under s. 19 of FSMA against any person other than an authorised or exempt person engaging in regulated activities; and

      c) consequently, pursuant to s.27 of FSMA, "*the Claimants and each of them have a statutory restitutionary right to reverse the transfer of their accrued UK benefits to [Castle]*".

   iii) The "**Personal Claims**", by which is meant that the claims are premised upon the primary liability of Castle as opposed to the secondary wrongdoing which underpins the other two claims. These cover various causes of action alleged against Castle: the tort of common law negligence, breach of fiduciary duty, and breach of contract. In particular, it is alleged Castle owed various duties to undertake due diligence by reason of the following: *"[Castle] assumed responsibility at common law and/or equity to the Claimants and each of them, to act honestly, fairly and reasonably in accordance with their best interests. Furthermore, the requirements of its contractual retainer and/or appointing trust deed, together with its internal policies, and the obligation to act honestly, fairly and reasonably in accordance with the best interests of*

their clients [Castle] owed the Claimants and each of them [the duties to undertake due diligence] as pension scheme operator and/or as trustee".

8. The witness statement of Mr Mike Wilson on behalf of the claimants, served in response to the Application, said that no claim is brought under the trust deeds. As Mr Hart pointed out, this is not quite right when the Personal Claims (which he described as a "portmanteau" claim in the light of the alternative legal relationships relied upon in support of the same alleged duties and alleged breaches) rely upon the Deeds and fiduciary duties thereunder as further or alternative sources of duties also said to arise in contract and/or at common law: see above and paragraphs 112 to 114 of the Particulars of Claim.

9. In his skeleton argument Mr McMeel QC outlined the financial circumstances in which his clients have come to make their claims against Castle in the following way:

> "*The [claimants] have gone from having pension assets in regulated UK schemes (in many cases "gold-plated" defined benefit schemes) to the empty shell of a wholly inappropriate pension vehicle for UK-domiciled investors with the defendant firm based in Gibraltar, namely a Qualifying Recognised Overseas Pension Scheme ("QROPS"), which is designed for ex-patriates. Each empty shell contains between one and five holdings in unregulated collective investment schemes ("UCIS"), which were entirely inappropriate for pension provision, and which are either entirely worthless or of little, contestable value. In many cases the investors' accounts are in debit, eroded by the very high charges of [Castle]*."

10. Mr Wilson described his clients as all being victims of a pension scam.

11. For the purposes of determining the Application it is not necessary to undertake an assessment of the merits of each of the three broad heads of claim. Instead, it is necessary to analyse the nature of them against the relevant provisions of the 1968 Brussels Convention (as modified) addressed below for the purpose of deciding whether this court has jurisdiction to try any of these claims against a defendant domiciled in Gibraltar.

The Claimants' Position on Jurisdiction

12. On 7 February 2020 High Street Solicitors wrote a letter of claim to Castle, on behalf of one of the intended claimants, which addressed the merits of the proposed claims and also the jurisdictional basis for bringing proceedings in England and Wales. The letter said jurisdictional issues between Gibraltar and the UK are "*determined by reference to a modified version of the 1968 Brussels I Convention under the Civil Jurisdiction and Judgments Act 1982*." The letter went on to state that "*the provisions on consumer contracts in the Brussels Convention under articles 13 to 15 are applicable*." For the purposes of this judgment I will refer to Brussels I, as modified, as "**the 1968 Convention**".

13. Proceedings were issued on 30 September 2020. Paragraph 88 of the Particulars of Claim places particular reliance upon Article 13.3 of the 1968 Convention (referring to

the provisions on consumer contracts in Articles 13 to 15 of "*the Modified Convention*").

14. In their Form N510 dated 19 March 2021 (the notice for service outside the jurisdiction) the claimants asserted that:

    i) the proceedings are ones to which CPR r.6.33(3) applies (so that the permission of the court for service out of the jurisdiction was not required);

    ii) "*The claim form is a claim which the Court has the power to determine other than under the 2005 Hague Convention, notwithstanding that-(a) the person against whom the claim is made is not within the jurisdiction; or (b) the facts giving rise to the claim did not occur with the jurisdiction*"; and

    iii) "*This Court has the power to determine this claim under the Civil Jurisdiction and Judgments Act 1982, in particular, section 39 thereof, and the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997, SI 1997/2602. The Claimants are consumers and the Defendant is the other Party to Consumer contracts within the modified form of the Convention applicable to Gibraltar.*"

15. The pre-action letter of 7 February 2020 had also addressed the issue of governing law, asserting by reference to the Rome I Regulation 593/2008 and the Rome II Regulation 864/2007 (in relation to contractual obligations and non-contractual obligations respectively) that English law governed the claims against Castle in both contract and tort. Paragraphs 89 and 90 of the Particulars of Claim are to the same effect. I note that the Rome I Regulation does not apply to the constitution of trusts or the relationship between settlors, trustees and beneficiaries (Article 1(2)(h)) and that (by a clause headed "Proper Law") the Deeds each state that "*[T]his Deed shall be construed and take effect according to the Laws of Gibraltar*."

16. However, whether English law or the law of Gibraltar governs such matters as the interpretation and effect of the trustee exemption clause at clause 16.1 of each deed (to the extent there may be a difference between those laws on that point) is not a matter to be decided on the present application. The application is instead directed to establishing that the court lacks jurisdiction to entertain the claim, regardless of the governing law (or laws) it might otherwise have applied in deciding it.

The Legislation Applicable to the Jurisdiction Challenge

17. Castle's challenge to the jurisdiction starts with reliance upon the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997 (SI 1997/2602) which for convenience I will refer to as "**the Gibraltar Order**".

18. The Gibraltar Order was made pursuant to section 39 of the Civil Jurisdiction and Judgments Act 1982 ("**the CJJA 1982**"). Some of the language of the Gibraltar Order has changed in the light of the UK's withdrawal from the EU. However, the language of Article 3 of the Gibraltar Order has not changed as a consequence. It provides as follows:

"*For the purpose stated in Article 2 above the United Kingdom and Gibraltar shall be treated as if each were a separate Contracting State and the relevant provisions of the 1968 Convention and the 1982 Act shall be construed accordingly*."

19. The 1968 Convention (as defined in section 1(1) of the CJJA 1982 with the various Accession Conventions mentioned below being defined separately) is the Brussels Convention by which the six original members of the European Economic Community reached agreement that year upon the recognition and enforcement of judgments in civil and commercial matters. The 1968 Convention also contained a detailed set of rules for determining when the courts of contracting states might exercise jurisdiction on matters falling within its scope. The Gibraltar Order, made after the accession of the UK to the Convention (in 1978) and its incorporation by the CJJA 1982, has the effect, as between the UK and Gibraltar, of treating Gibraltar as if it was a member state separate from the UK.

20. Mr Owen Smith's first witness statement in support of the challenge to this court's jurisdiction therefore addressed what he described in his second statement as "the Modified Convention". He took that to mean the version of the 1968 Convention as amended by the Accession Convention (by which the UK, the Republic of Ireland and Denmark acceded to it), the 1982 Accession Convention (Greece), the 1989 Accession Convention (Spain and Portugal) and the 1996 Accession Convention (Austria, Finland and Sweden). Some confusion over what was meant by this term "the Modified Convention" arose from Mr McMeel's skeleton argument which said that the reference to it in paragraph 88 of the Particulars of Claim meant the 1968 Convention (or relevant parts of it) as identified and modified by the Gibraltar Order. This was not clear from paragraph 88 of the Particulars of Claim which had used the term without defining it.

21. I mention this point only to record that, until he made his third statement, Mr Smith's second witness statement had suggested a departure from Castle's earlier reliance upon the 1968 Convention as modified (in the way understood by him).

22. By that second witness statement Mr Smith pointed out that amendments to the CJJA 1982 effected by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479), which came into force on 31 December 2020, meant that the text of the 1968 Convention which was at Schedule 1 of the CJJA 1982 is now omitted and that section 1(2)(a) of the Act was omitted. That latter subsection had provided that "*in this Act, unless the context otherwise require- references to, or to any provision of, the 1968 Convention or the 1971 Protocol are references to that Convention, Protocol or provision as amended by the Accession Convention and the 1982 Accession Convention, the 1989 Accession Convention and the 1996 Accession Convention*". As it was those words which had supported his description "the Modified Convention", Mr Smith's revised understanding was that, following "IP completion day" of 31 December 2020, the reference to "*the 1968 Convention*" in Article 2 of the Gibraltar Order should be taken to mean the 1968 Convention in its original form. Mr Smith described this in his second statement as "the Original Convention". He then explained in his witness statement how the terms of Article 13 of the Original Convention (relating to the sale of goods in instalment terms and loans to finance goods repayable in instalments) were significantly narrower in scope than Article 13 of the 1968 Convention upon which the claimants rely.

23. The Claim against Castle was issued on 30 September 2020, though there is another version of the Claim Form which bears a seal of that date and also a later one 12 November 2020. Both dates were before the date of 31 December 2020 when the implementation period for the UK's departure from the EU was completed in accordance with the European Union (Withdrawal Agreement) Act 2020. Initially, and despite the fact the proceedings were only served upon Castle in 2021, it was not clear to me how a change in the law taking effect on 31 December 2020 might properly bear upon the court's decision upon its jurisdiction to hear a claim which was issued before IP Completion Day. In saying that I recognise that the present application is procedural in nature and that the claimants' Form N510 referred to one procedural rule (rule 6.33) whose language has changed during the short life of the present proceedings in the light of the UK's departure from the EU. However, the development identified by Mr Smith was one which, on his analysis, initially appeared to me to involve a change in the substantive law as to the scope of the court's jurisdiction in relation to Article 13 matters, rather than a procedural matter such as whether the service of the proceedings out of the jurisdiction (presumed for these purposes to be a properly grounded jurisdiction as a matter of private intentional law) without the court's permission was valid service at the time it came to be effected. Quite apart from the general rule that a change in legislation does not have retrospective effect, the 2019 Regulations which effected the change in the law identified by Mr Smith were expressly prospective rather than retrospective in their effect.

24. However, when I raised a similar point with Mr Hart about which version of the Gibraltar Order was applicable to the present application – that which applied before IP Completion Day or that which applied after – he corrected my understanding by pointing out that the issue was not whether or not the court had jurisdiction over *the proceedings* (the existence of which, of course, enables me to determine the Application) but whether the court had jurisdiction over *the defendant*, Castle. On this basis, it was appropriate to look at the Gibraltar Order as it was by the time of service upon Castle in reliance upon the Form N510. Although Mr Hart did not immediately have to hand authority which supported his response, I was content to accept it not least because Mr Hart pointed out that the proper interpretation of the revised terms of the Gibraltar Order (applicable after IP Completion Day) expressly preserved the effect of the 1968 Convention (i.e. as modified) by referring to its terms "*as they had effect immediately before IP completion day*." I also note that a new Article 4(2) provides that the requirement in the first sub-paragraph "*applies only in relation to principles laid down, or decisions made, by the European Court before IP completion*."

25. The revised Gibraltar Order therefore makes it clear that the 2019 Regulations had no impact upon the provisions of the 1968 Convention to be considered by me. Indeed, by his third witness statement Mr Smith confirmed that Castle did not intend to advance any argument grounded upon the applicability of "the Original Convention".

26. Article 2 of the Gibraltar Order in its revised form provides as follows:

> "*2. (a) Provision corresponding to that made by the provisions of the 1968 Convention specified in paragraph (b) as they had effect immediately before IP completion date shall apply, so far as relevant, for the purpose of regulating, as between the United Kingdom and Gibraltar, the jurisdiction of courts and recognition and enforcement of judgments.*

(b) Those provisions are-

(i) Titles I-V

(ii) Articles 54 and 57; and

(iii) Article 65 and the Protocol referred to therein."

27. It is Title II of the Modified Convention (headed "Jurisdiction") which contains Articles 2, 5 and 13.

28. Article 4 of the Gibraltar Order provides:

"4. (1) In determining any question as to the meaning or effect of the provision (or any part of the provision) made by Article 2 above—

(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title; and,

(b) without prejudice to the generality of paragraph (a), the expert reports relating to the 1968 Convention referred to in section 50 of the 1982 Act may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.

(2) The requirement in paragraph (1)(a) above applies only in relation to principles laid down, or decisions made the European Court before IP completion day."

29. Mr Hart relied upon certain decisions of the CJEU upon the meaning and effect of the 1968 Convention and he mentioned the Schlosser Report (one of the expert reports identified in section 50 of the CJJA 1982) briefly in his submissions in reply. He also relied upon one decision of the CJEU on the Brussels I Regulation (Regulation No. 44/2001) ("**the Brussels I Regulation**") for its observations upon how certain restrictive conditions in Article 13.3 of the 1968 Convention had been removed in that later Regulation. Mr McMeel QC cited two CJEU decisions upon certain provisions of the Brussels Regulation (Recast) (Regulation No. 1215/2012) ("**Brussels (Recast)**", which repealed the Brussels I Regulation) and which were therefore outside the scope of Article 4(1)(a) of the Gibraltar Order. I address these authorities below.

30. Article 13.3 of the 1968 Convention, upon which the claimants rely, provides:

"13. In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this section, without prejudice to the provisions of Article 4 and point 5 of Article 5, if it is

1. ……

2. ……..

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and

(b) the consumer took in that State the steps necessary for the conclusion of the contract."

31. Article 14 of the 1968 Convention *inter alia* provides: "*a consumer may bring proceedings against the other party to a contract in either the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled*."

32. Articles 13 and 14 are therefore a derogation from the general rule in Article 2 of the Convention that "*persons domiciled in a Contracting Stage shall, whatever their nationality, be sued in the courts of that State*." Article 15 (the last of those mentioned in the letter of claim and paragraph 88 of the Particulars of Claim) provides that Articles 13 and 14 may only be departed from by certain specified types of agreement, and is not suggested by Castle to be of any relevance if they otherwise apply.

33. Article 5 (one limb of which of which is expressed to remain unprejudiced by the operation of Article 13) provides for further derogations from the general rule that the domicile of the defendant should determine where he or it is sued. So far as the present claim is concerned, Article 5.1 states that in matters relating to contract a person domiciled in one contracting state may be sued in the courts of another contracting state where that is the place of performance of the contract. Article 5.3 says that in matters relating to tort a person domiciled in another state may be sued in the courts of state where the harmful event occurred.

The Central Issue on the Application

34. There is no dispute that the domicile of Castle is Gibraltar. The company is incorporated there. The essential question on the present application is whether that place of domicile means that the English court has no jurisdiction because the proceedings ought to have been commenced in Gibraltar in accordance with Article 2 or, instead, that the court does have jurisdiction because the proceedings here are justified by one or more exceptions to that general rule.

35. Castle's challenge to the jurisdiction of the English Court is based upon the following points:

(1) Article 2 (the *lex generalis*) of the 1968 Convention applies such that the proper jurisdiction for these claims is Gibraltar, the domicile of Castle;

(2) Article 13.3 of the 1968 Convention does not apply for the following reasons:

(a) neither the Joint Tortfeasorship Claims nor the section 27 Claims concern a contract for services;

(b) the Personal Claims do not predominately concern a contract at all; and

(c) even where they do, the Personal Claims do not fall within the scope of Article 5.1 as, in each case, the claims are advanced by beneficiaries against a trustee and concern the relevant trust deed. Accordingly, application of Article 5.1 is precluded, either because it would be overridden by the *lex specialis* for such claims, namely Article 5.6, or because, as CJEU case law shows to be the case with Articles 5.1 and 5.3, Articles 5.1 and 5.6 are mutually exclusive. Accordingly, the Court never reaches the stage of considering Article 13.

36. As a fall-back argument Castle contends that even if Article 13.3 is prima facie engaged, on the basis that the claim concerns a consumer contract for services, the claimants have not shown that the conclusion of the contract was preceded in the consumer's domicile by a specific invitation addressed to them or by advertising. If the court is otherwise against it on the claims falling within Article 13.3 then Castle does not dispute that each of the claimants is a "consumer"; and neither does it suggest that the requirement of Article 13.3(b) – that steps to conclude the contract were taken in the UK – were not satisfied. As already noted, no point is taken under Article 15.

37. Mr Hart did point out that, even if it applied, Article 13 would not avail the 39th and 48th claimants who are domiciled in Northern Ireland and the 52nd Claimant who is domiciled in Scotland. He observed that no ground had been identified which could arguably confer jurisdiction of the courts of England and Wales in respect of those claimants. It was not enough for the Claimants to point to the Gibraltar Order regulating the position as between the UK and Gibraltar when, for intra-UK jurisdictional purposes, those particular claimants were domiciled outside England and Wales. That said, Mr Hart indicated (without making any formal concession on behalf of his client) that if the court decided the Article 13 point against Castle in relation to the other claimants then it was quite likely that Castle would wish all claims, including these three, to be decided in one set of proceedings.

38. In resisting the Application the claimants say the Particulars of Claim advance a number of causes of action which are both contractual and non-contractual but that all three heads of claim plainly stem from a contract between Castle and each of the claimants by which Castle agreed to provide them with financial services. They say that nature of the contract is such that (of the two derogations from the general rule in Article 2) it is Article 13.3 and not Article 5.1 that applies.

39. In support of their case that the requirement of Article 13.3(b) was satisfied the claimants had pleaded in their Particulars of Claim an extract from Castle's website which was said to be an act of advertising in the UK. By his skeleton argument Mr McMeel QC also said that a "*specific invitation for the purposes of the first limb of article 13.3(a) was addressed to each claimant through the agency of Montegue Smythe, or one or other of the various entities and individuals which promoted and arranged the QROPS and underlying investments*." Mr Hart urged me to place no reliance upon this new line of argument when there had been no prior mention of it, it had not been addressed in evidence (even though each claimant ought to have the necessary information about any such personally addressed invitation) and the argument was expressed in very vague terms.

40. Although also raised for the first time by Mr McMeel's skeleton argument, and not relied upon in either the Form N510 or Particulars of Claim, the claimants also suggested that their tortious claims support the English court's jurisdiction under Article 5.3. This was on the basis that the transfers of the previous pension rights to the QROPS were such flawed transactions that the harmful event occurred in the UK upon the act of transfer, rather than it being the case (as was my instinctive reaction which I raised with Mr McMeel) that the monies had perhaps subsequently become lost to the Schemes in Gibraltar.

41. However, I asked Mr McMeel during his closing submissions whether or not he was pursuing the argument based upon Article 5.3 in the light of Mr Hart's reliance upon CJEU authority (addressed below) that the provisions of Article 5.1 and 5.3 are mutually exclusive, with the result that analysing some of the claims as tortious ones might undermine the case for saying that those same claims related to a contract for Article 13 purposes. Mr McMeel confirmed that he did not press the argument under Article 5.3 too hard. He did say it might avail the claimants domiciled in Scotland or Northern Ireland on the basis of the understanding that all the ceding pension schemes were English based.

The Applicable Test on Jurisdiction

42. The parties were agreed that, although the question has been prompted by the Application made by Castle, the burden is upon the claimants to establish this court has jurisdiction. They were also agreed that the burden involves them showing they have "*the better of the argument*" on that issue.

43. Both counsel cited the decision of the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, at [7], for Lord Sumption's elucidation of the test requiring the claimant to show a good arguable case on jurisdiction by establishing it has the better of the argument on the point:

> "*What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."*

44. The second and third limbs of that test are directed to the situation where there is an element of doubt about the claimant's position on jurisdiction, either because it is clouded by a contested issue of fact or by some other factor. Where such uncertainty is compounded by the court's recognition at the interlocutory stage that the evidence on the issue is incomplete, disputed or untested, so that it feels inhibited from reaching even a provisional conclusion that the claimant does or does not have the better of the argument on jurisdiction, then the claimant will still establish a good arguable case on jurisdiction by establishing a plausible evidential basis for it. It was on this basis that Lord Sumption expressed the view that requiring the claimant to establish that he had

much the better of the argument was to suggest some higher standard of conviction that was *"both uncertain and unwarranted".*

45. In this regard Mr McMeel QC cited the decision of Cockerill J in *ING Bank NV v Banco Santander* [2020] EWHC 3561 (Comm) SA for her observations upon the court's approach to the three-limb test. The judge said, at [64]:

> *"In summary:*
>
> i) *The onus is on ING to establish that they have a "good arguable case" that the English court has jurisdiction. ii) The burden is on them to show that it has the "better argument on the material available" (making due allowance for the limitations of the material available at an early stage of the case).*
>
> *ii) The standard is, for the purposes of the evidential analysis, between proof on the balance of probabilities (which is not the test) and the mere raising of an issue (which is not the test either).*
>
> *iii) The test is context specific and flexible and, if there is an issue of fact, the court must use judicial common sense and pragmatism, not least because the exercise is to be conducted with due despatch."*

46. By her second proposition Cockerill J was therefore confirming that a good arguable case in support of the court having jurisdiction is now firmly recognised to be one which is more than merely arguable even though the claimant does not have to establish it is likely to succeed.

47. A significant part of Mr McMeel's written and oral submissions was directed to establishing that the claimants' case against Castle was a strong one on the merits. In particular, he said the Section 27 Claims appeared to be compelling. He referred to the letter dated 2 June 2020 sent by TSN Law, Castle's lawyers, in response to the letter of claim. That letter had referred to the then first instance decision of the English High Court in *Adams v Options SIPP* [2020] EWHC 1229 (Ch), without prejudice to the contention that English decisions are not binding on the Gibraltar courts and that English law and jurisdiction were not applicable to the proposed claim, and said the dismissal of the s. 27 claim by the judge in that case "*provides much needed clarity for execution only SIPP providers in determining the limits of the duties and obligations they owe to clients, likewise for execution only QROPS providers such as [Castle]*." Mr McMeel therefore pointed to the reversal of that decision by the Court of Appeal – [2021] EWCA Civ 474 – to say that the involvement of third parties such as Montegue Smythe in the establishment of the QROPS meant the Section 27 Claims were unanswerable. This on the assumption that the English court can give extra-territorial reach under section 27 to cover a party such as Castle.

48. There is an incongruity between such assertions about the underlying merits of the claims and the focus required under the test to be satisfied on the present application. That the claims against Castle might even be regarded as compelling by the English court will count for nothing if they do not first carry with them the conclusion that the claimants have a good arguable case for saying it has jurisdiction to entertain them. Likewise, Mr McMeel's observation that the Gibraltar court would not be able to

entertain the Section 27 Claims, because it is only the English court which is "the Court" empowered by s. 28 of FSMA to grant relief against the consequences of s. 27, overlooks this point. The English court does not exercise jurisdiction over a foreign defendant *faute de mieux*, by reasoning which suggests it would be preferable for its own laws to govern the dispute, if that well-established test is not first satisfied.

The Rival Arguments on the Documents

49. I have summarised the parties' respective positions in paragraphs 35 to 41 above.

50. The issue between them is essentially whether or not this is an Article 13.3 case (per the claimants) justifying the present proceedings or an Article 2 case, or alternatively Article 5.6 case, supporting the jurisdiction of the Gibraltar court (per Castle).

51. Mr McMeel QC pointed to some sample documentation (in the main relating to the first claimant Mrs Dooley) which explained how an existing pension interest came to be transferred to the QROPS. These included forms such a "Declaration for Self-Certified Sophisticated Investors" which were completed by the claimants and the terms of which, he said, were such as to indicate the irregular and suspect nature of the investment activity. For instance, he said that particular form had been witnessed (or in one case "re-witnessed" on a date after the relevant claimant's signature) in the case of each claimant investment by the same "tame accountant". He also highlighted the terms of a "suitability letter" provided by a Mr MacLennan, an IFA and approved person under FSMA, which in large part appeared to be in standard form (it bears the footer "Issue 14/10") and which Mr Wilson said in his witness statement were letters invariably dated after the actual transfer of the pension funds. That said, I note the letter from Mr MacLennan to Mrs Dooley was dated 31 October 2014 which was after her transfer of £120,465 to the QROPS but before its investment in the 4 underlying investments upon which he is recorded as having given advice.

52. So far as the evidence in support of meeting the jurisdiction test was concerned, Mr McMeel focussed upon the following:

    i) The "Personal Details Forms" prepared by Castle for completion by the investor. By the signed declaration at the end of these forms the investor confirmed that he or she (a) agreed to the Terms and Conditions set out in an Appendix II; (b) agreed to the fees stated in an attached Fee Schedule; and (c) authorised "*the Trustees to execute the relevant deed(s) to adhere the Member to the Scheme*.".

    ii) The Terms and Conditions forming the said Appendix II ("**the T&C's**") were said to be the terms upon which Castle (referred to as "the Company" and, together with its officers and employees, as "the Firm") "*provides Services to its Clients*."

    iii) A letter described in argument as "the Welcome Letter" by which Castle welcomed the investor as a new member of the relevant QROPS. The letter also enclosed "*a statement detailing all transactions to date*".

53. Mr McMeel submitted that these documents showed that Castle was providing services as administrator of the QROPS Schemes and charging fees for those services. He pointed to the definitions section of the T&C's and in particular the provision that:

> "***Engagement*** *means the Services we provide by the Questionnaire*."
>
> and
>
> "***Engagement Letter*** *means the questionnaire and any attachments including these Terms and Conditions sent to the Client which sets out the basis of our contract with the Client and constitutes the agreement between the Company and/or Firm and the Client*."
>
> and
>
> "***Services*** *means the services to be provided by the Company and/or Firm as specified in the Engagement Letter*."

54. Given that the Personal Details Forms contained questions of the proposed member and the T&C's were attached, it seems likely that the reference to "the questionnaire" was a reference to those forms. The Personal Details Forms for Mrs Dooley did not in fact specify any "Services" to be provided by Castle. Mr Hart observed that the only operative part of them which contained an implicit obligation upon Castle was the declaration of authority for the execution by Castle of a deed of adherence to the QROPS Scheme. Nor did the T&C's specify such Services. They did say that Castle was committed to conducting business in a manner that complied with the UK Bribery Act 2010 (applicable to Gibraltar), that it would exercise due diligence in anti-money laundering matters, and would be entitled to charge fees in respect of which it "*reserve[d] the right to deduct such fees and expenses from any of the Client's funds of the Trust*." Clause 8 of the T&C's provided that the presumed Services would be performed with reasonable skill and care and contained a qualified provision that Castle would only be liable for loss or damage caused by its negligence, breach of contract, fraud or wilful default (though clause 9 suggests that the client should indemnify Castle in cases not involving fraud, wilful misconduct or gross negligence).

55. Mr Hart said that the T&C's constituted a circular and meaningless document so far as identifying any contractual obligation upon Castle to provide services was concerned. His submission was essentially that the only documents providing for reciprocal rights and obligations between Castle and the claimants were the Deeds and the Rules. He said it was only those documents which, either expressly or impliedly, provided the basis for the due diligence obligations relied upon in support of the Personal Claims.

56. Against that, Mr McMeel QC said the T&C's evidenced a contract for the provision of financial services as the basis of the relationship between Castle and each claimant. He said it was striking and concerning that Castle had chosen not to exhibit the T&C's in its evidence in support of the Application and had not addressed them in any of Mr Smith's witness statements. He said it was wrong to view Castle simply as the trustee of the QROPS and that Mr Hart was also wrong to describe the distinction between Castle providing investment administration services and Castle as trustee as a false dichotomy. Mr McMeel referred to the terms of the Welcome Letter which twice drew

a distinction between Castle as administrator of the relevant QROP and Castle as trustee.

57. So far as the requirements of Article 13.3(a) are concerned, Mr McMeel QC referred to the passage in the website of the corporate group of which Castle was a member. As quoted in the letter of claim and Particulars of Claim this read as follows:

> *"The Castle Trust Group was formed over 20 years ago and has represented a range of clients including banks, quoted companies, wealthy individuals and pension funds. Its main emphasis is to ensure compliance in all jurisdictions is maintained to the highest standard. It has been at the forefront of ensuring Gibraltar has been acknowledged as a highly reputable jurisdiction from which UK pensions may be transferred with full agreement of HMRC."*

58. Mr McMeel said that, although QROPS were not expressly identified, the last sentence was clearly an advertisement by Castle of its QROPS administration services to UK consumers. He did not suggest that the website would have been hosted in the UK but he said it was directed to persons in the UK.

59. In support of the new argument based upon the claimants' respective investments having been preceded by specific invitations Mr McMeel referred to TSN Law's letter of response dated 2 June 2020. He submitted that this letter constituted clear evidence that Montegue Smythe had made specific invitations to UK investors on behalf of Castle.

CJEU Principles

60. Article 4 of the Gibraltar Order requires the court to have regard to any principles laid down by the CJEU in relation to the meaning and effect of Articles 2, 5 and 13 of the 1968 Convention**.**

61. Mr Hart cited four decisions of the CJEU (as now named): (1) *Kalfelis v Bankhaus Schroder Munchmeyer Hengst And Co* [1988] ECR 5565 ("***Kalfelis***"); (2) *Gabriel v Schlank And Schick GmbH* (C9600) [2002] I.L.Pr. 36 ("***Gabriel***"); (3) *Engler v Janus Versand GmbH* (C27/02) [2005] ILPr 8 ("***Engler***"); and (4) *Pammer v Reederei Karl Schluter GmbH & Co KG* (C-585/08) [2012] Bus LR 972 ("***Pammer***"). *Pammer* is in fact a decision under the Brussels I Regulation but the CJEU made observations about earlier decisions upon the interpretation of Article 13.3 of the 1968 Convention (including the judgment in *Engler*) and how the conditions in Article 13.3(a) had been removed by the Regulation under consideration.

62. Mr Hart also referred in passing to the *Schlosser Report* (a step justified by Article 4(1)(b of the Gibraltar Order) to show the purpose behind the two conditions of Article 13.3 was that of establishing there are close connections between the contract in question and the member state in which the consumer is domiciled. Encouraged by Mr Hart to do so, I have since noted what was said about the need for a "*sufficiently strong connection*" between the two in the *Schlosser Report* at para. 158.

63. Mr McMeel cited the decisions of the *CJEU in Petruchova v FIBO Group Holdings* Ltd (C-208/18) ("***Petruchova***") and *AU v Reliantco Investments Ltd* (C-500/18) ("***Reliantco***"). These decisions in October 2019 and April 2020 respectively were decisions under Brussels (Recast) and other EC Directives. Mr McMeel cited these decisions with a view to establishing the policy of consumer protection under EU law (which Mr Hart did not dispute for cases where the policy is properly invoked) and also that the Joint Tortfeasorship Claims and Section 27 Claims were inextricably or "indissociably" linked to the contractual basis for the Personal Claims (with which Mr Hart did take issue).

64. In the light of counsel's argument upon these authorities I have reached the following conclusions upon the principles of interpretation of the 1968 Convention for the purposes of determining the Application:

i) The decisions in *Petruchova* and *Reliantco* do not assist in my decision upon the interpretation and potential application of Articles 2, 5 and 13 of the 1968 Convention. Neither is a decision within the scope of Article 4(1)(a) of the Gibraltar Order. That neither of them bears upon the argument over Article 13 is obvious from the difference in language between Article 13.3(a) of the 1968 Convention and Article 17(1)(c) of Brussels (Recast) – with its language of commercial or professional activities "*directed to*" the member state of the consumer's domicile – which was considered by the CJEU in *Petruchova* at [39] and in *Reliantco* at [45]. Likewise, the decision upon the fourth question in *Reliantco*, at [58]-[73], upon which Mr McMeel relied in saying the tortious claims against Castle were (to use the language of the CJEU) "*indissociably linked*" with the contractual ones was clearly directed to the scope of provisions of Article 17 of Brussels Recast: see paragraphs [59] and [73]. In saying that I recognise the CJEU relied in part upon the decision in *Gabriel*, at [56]-[57] in addressing that fourth question.

ii) The observations in *Gabriel* at [56]-[57] (upon which the CJEU later relied in *Reliantco*) were directed to the situation where the claims were ones arising "*in respect of one and the same contract*". In that case the condition attached to the promise by the contracting counterparty to pay the consumer a prize was such as to create an indissociable relationship between that promise and the Article 13 contract for the supply of goods. In *Gabriel* nothing was said about Article 13 founding jurisdiction for a tortious claim connected to the Article 13 contract. So far as the 1968 Convention (as opposed to Brussels (Recast)) is concerned, it is *Kalfelis* (not *Reliantco*) which confirms there is a clear distinction between claims in tort and claims in contract.

iii) The decision in *Kalfelis*, at [17], confirms that, under the provisions of the 1968 Convention, claims relating to matters of contract (Art. 5.1) and claims relating to tort (Art. 5.3) are mutually exclusive. The decision also confirmed that this meant that if the court had jurisdiction under Article 5.3 but the other claims fell within Article 5.1, and pointed to jurisdiction in the courts of another member state, then it would not have jurisdiction over those contractual claims. The CJEU remarked that the resulting inconvenience in such situations could always be overcome by the claimant deciding to bring all of the claims in the court of the defendant's domicile in accordance with

Article 2 (or possibly by relying upon the *lis pendens* provisions of Article 22): see *Kalfelis* at [19]-[20]. Although *Kalfelis* addressed only the mutual exclusivity of Articles 5.1 and 5.3, as Mr Hart recognised, it must in my judgment follow that Articles 5.1 and Article 5.6 (concerning trust-related claims in the courts of the trust's domicile) are also mutually exclusive. In *Kalfelis* the court was concerned only to address an action based on liability in tort, contract and unjust enrichment. The court's observation, at [17], that the concept of matters relating to tort "*covers any action which raises an issue of a defendant's liability and does not concern 'matters relating to a contract' within the meaning of article 5(1)*" must be read in that light. I say that because the court plainly cannot by this have intended to treat as irrelevant the other specific categories of claim, including those within Art. 5.6, where a defendant may be sued in a court other than those in the state of his domicile. Article 5 plainly provides for specific categories of claim beyond the contractual and tortious. A claim arising out of the relationship of beneficiary and trustee, falling within Article 5.6, cannot also be within Article 5.1 so that there is the potential for the courts of some other member state to have jurisdiction under Article 5.1 (as opposed to the *lex generalis* of Article 2).

iv) Each limb of Article 5 constitutes a *lex specialis* which constitutes a derogation from the *lex generalis* of Article 2 and the principle that the courts of the state of the defendant's domicile have jurisdiction. On that basis, the provisions of Article 5 fall to be interpreted strictly: see *Kalfelis* at [19] and *Engler* at [43]. In preparing this judgment I have noted that Andrew Baker J in *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm) – a case cited by Mr McMeel QC on the meaning of "consumer" under Brussels (Recast) – referred, at [27], to other CJEU authority to the effect that the provisions of Article 5 of the 1968 Convention must be "*carefully confined to the cases envisaged*".

v) Whether or not an action is governed by a *lex specialis* in Article 5 does not turn simply upon the domestic court's legal taxonomy and categorisation of the claim. The concepts identified both in that article and in Article 13 must be interpreted independently, by reference principally to the systems and objects of the Convention so as to achieve a uniform approach across member states: see *Kalfelis* at [14]-[17] and *Engler* at [33].

vi) In *Engler*, at [34], the CJEU confirmed that Article 13.3 is only applicable where: "…. *first, the claimant is a private final consumer not engaged in trade or professional activities, secondly, the legal proceedings relate to a contract between that consumer and the professional vendor for the sale of goods or services which has given rise to reciprocal and interdependent obligations between the two parties and, third, that the two conditions specifically set out in Art. 13, first paragraph, point 3(a) and (b) are fulfilled*."

vii) I have already noted above that the *Schlosser Report* noted that the purpose behind the requirements of Article 13.3(a) was one of establishing a sufficiently strong connection between the contract and the consumer's member state. This was recognised in the judgment in *Gabriel* at [41]. In

that case, at [44], the CJEU confirmed that it is indeed intended to "*cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled*". That this territorial limitation under the 1968 Convention as to the place of advertising or invitation perhaps failed to anticipate the modern world of the internet, and other means of communication beyond the types contemplated in *Gabriel*, was expressly recognised by the CJEU in *Pammer*, at [56] to [60], when it noted the change effected by the Brussels I Regulation (Art. 15(1)(c)) and its focus upon commercial activities "*directed to*" member states. In *Gabriel*, at [44], the court referred to a "specific invitation" being "*addressed directly*" to the consumer.

viii) As to the inter-relationship between Article 5.1 and Article 13, the latter is a further *lex specialis* which overrides the more general provision in Article 5.1 for matters relating to a contract. It is first necessary to see whether the action can fall within the scope of Article 5.1: see *Gabriel* at [34]-[36]. If it does not fall within Article 13, it may still fall within Article 5.1 (see *Gabriel* at [49] and *Engler* at [44]-45]) but it cannot qualify under Article 13 unless it first falls within the scope of the former provision.

Analysis and Conclusions

65. I should note at the outset that I do not regard the task of analysing the evidence for the purpose of determining the Application as being in any sense hindered by some evidential deficiency. This is not in my judgment the type of case envisaged in *Brownlie v Four Seasons* and *ING Bank v Banco Santander* (paragraphs 43 to 45 above) where a firm assessment of the evidence against the test of a good arguable case is displaced by the need to make an allowance in favour of the claimants so that their position on the evidence currently available is judged by the concept of plausibility, appropriately conditioned by (presumed) judicial common sense and pragmatism.

66. The claimants have had full opportunity to explain and provide evidential support for what they say is the justiciable basis of their relationship with Castle. Mr McMeel QC did say (for the purpose of his new line argument under Article 13.3(a)) that the court did not have before it any contractual terms evidencing the relationship between Castle and Montegue Smythe. However, not only do the claimants first have to establish a good argument that Article 13.3 is otherwise triggered (so far as the nature of the concluded contract is concerned) but I have already noted Mr Hart's well-founded response that one would have expected the claimants to have produced in evidence at least an example of a specific invitation made to one of them.

67. At first sight the Joint Tortfeasorship Claim (a claim in tort) and the Section 27 Claim (based upon a statutory ground of relief regulated by that section and the following one) do not appear to be promising candidates for categorisation as claims which are contractual in nature. However, I remind myself that Article 5.1 of the 1968 Convention refers to proceedings "*relating to*" a contract and Article 13 to proceedings "*concerning*" a concluded contract.

68. Nevertheless, in my judgment it is clear from the evidence before the court that Castle's obligations to the claimants rested fundamentally upon its trusteeship of the QROPS rather than any separate contract for the provision of financial administration services. There is no plausible evidential basis for saying a contract was concluded for the supply of services outside those which were identified by the Deeds and the Rules which were incorporated by them.

69. I say this for the following reasons:

    i) As noted above, the T&C's did not identify any obligation upon Castle to provide certain services.

    ii) The Welcome Letter necessarily post-dated the claimant's entry into membership of the QROP. In Mrs Dooley's case the letter was dated some 6 months after she gave Castle authority to execute the deed of adherence by which she became a member. As Mr Hart highlighted, the only specific obligation upon Castle to which the letter adverted (and which is to be compared with "the valuation duty" forming part of a suite of due diligence obligations pleaded in paragraph 112 of the Particulars of Claim in support of the Personal Claims) was that concerning the provision of an annual statement detailing the valuation of the member's sub-fund. The letter said "[*t]his will be provided to you by Castle Trust & Management Services Limited <u>as your Trustee</u>*." (my emphasis by underlining)

    iii) The "*overall service*" mentioned in the Welcome Letter can only have been that identified in the Deed and the Rules. In the case of Mrs Dooley, the Instrument of Adherence to these documents was executed on 23 September 2014 which was some 3 weeks after she gave Castle authority for that step to be taken. There was no need for and there is no evidence of any prior, separate contract for services outside the Deed and the Rules. Those documents clearly identified Castle's roles as trustee and administrator of the QROPS. The Rules identified Castle as "*the Scheme Administrator*". The introductory words of clause 4.1 of the Deeds was that "*[t]he Trustees shall hold the Fund under irrevocable trusts and shall administer the Scheme …."*. Clause 8.2 provided for costs, charges and expenses incurred in establishing, administering or managing the "the Plan" (apparently undefined) to be paid out of the trust fund. Clause 12 provided for Castle's professional fees for time spent "*in relation to the trusts hereof or to the administration of the Plan*". The clause referred to Castle's entitlement to charge fees for its trustee services "*as shall from time to time be published as its normal scale of charges*." This can only be a reference to the Fee Schedule to which a member expressed agreement by the declaration in the Personal Details Forms. In the evidence on the Application there was a Fee Schedule for the Equus and Metro Schemes published by Castle in October 2015.

70. It is therefore clear in my judgment that any claim against Castle based upon non-performance of services would have to be based upon the Deeds and the Rules incorporated by them. Any such claim would fall within Article 5.6 which would lead to the same court – the Gibraltar court – having jurisdiction as it would under the general rule of Article 2.

71. The claimants eschew the idea that their claims are under the Deeds and Rules. That does not avail them when in my judgment there is no plausible evidential basis for the existence of a separate contract which meets the requirements identified in *Engler* at [34]. The claimants do not have a good arguable case that this is an Article 13.3 rather than an Article 2 (or Article 5.6) case.

72. Even if I am wrong about that, in my judgment the claimants have failed to establish that the requirements of Article 13.3(a) are satisfied. Even on the assumption that a particular claimant read the extract on the website before investing in the QROPS, the fact is that there is no evidence to suggest that the territorial requirement identified in *Gabriel* (see para. 64(vii) above) was satisfied). As to Mr McMeel's alternate reliance upon Castle having made specific invitations to one or more claimants, I agree with Mr Hart that TSN Law's letter dated 2 June 2020 falls way short of evidencing that such invitations were made and does not amount to a plausible evidential basis for saying they were.

73. As for the new point that the English court has jurisdiction over the tortious claims, I have already mentioned that this was not pressed by Mr McMeel QC in his oral submissions. In any event, reference to the statement attached to the Welcome Letter sent to Mrs Dooley, as exhibited by Mr Wilson, suggests a particular claimant might have difficulty in establishing the harmful event (for Art. 5.3 purposes) occurred otherwise than in Gibraltar. Mrs Dooley's monies were invested in the 4 funds, upon which Mr MacLennan had provided advice, approximately 6 to 8 weeks after she became a QROPS member. Although it might be said her monies were lost the moment she signed away their transfer in the UK, paragraph 79 of the Particulars of Claim (in relation to the subsequent failure of these investments) does not at first sight support that analysis.

74. Mr Hart had submitted that the court should not entertain the argument based upon Article 5.3 when it had not been raised before Mr McMeel's skeleton argument. Had it been pressed at the hearing I would likely have ordered that it be addressed in further evidence before the final determination of the Application.

75. For the reasons set out above I conclude that the claimants have not established a good arguable case that this court has jurisdiction over their claims against Castle.

Disposal

76. Castle therefore succeeds on the Application and I propose to grant the relief in substantially the same terms as the draft Order attached to it, declaring that this court has no jurisdiction and setting aside the Claim Form and the service of it.

77. I indicated to the parties that I would hand down this judgment in their absence and that it would be appropriate for them to address any consequential costs issues briefly in writing. Once the issue of costs has been determined by me (in the absence of agreement) I will invite counsel to lodge a minute of order for approval.