Neutral Citation Number: [2021] EWHC 2787 (QB)

Case No: QB-2021-000430

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2021

Before:

MICHAEL KENT QC
(Sitting as a Deputy High Court Judge)

- -

Between:

MR GEORGE GABRIEL BITAR	**Claimant**
- and -	
BANQUE LIBANO-FRANÇAISE S.A.L.	**Defendant**

- -
- -

James Cutress QC and Daniel Carall-Green (instructed by **RBG Legal Services Ltd**) for the **Claimant**
Rajesh Pillai QC (instructed by **Dechert LLP**) for the **Defendant**

Hearing dates: 21 September 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.

.....

MICHAEL KENT QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 20 October 2021.

Michael Kent QC:

1. Banque Libano-Francaise S.A.L., a Lebanese bank whose headquarters are in Beirut (which I will refer to as the Bank), applies under CPR Part 11 for a declaration that the Courts of England and Wales have no jurisdiction to hear this claim and for consequential orders. These proceedings were commenced by a Claim Form issued on 5 February 2021 and, pursuant to the order of Master Cook on a without notice application giving them permission to do so, the Claim Form and attached Particulars of Claim were served out of the jurisdiction on the Defendant in Beirut, Lebanon by courier and by email. The Bank applied to the Master to set aside the order permitting such service. This the Master refused but he extended time for service of any application to challenge jurisdiction. In accordance with that the Bank issued this application notice which came on for hearing before me on 21 September 2021.

2. The Claimant by his Particulars of Claim seeks payment of the sum of US$4,245,829 said to be the balance standing to his credit under a joint account with the Bank, together with damages for breach of contract in failing to repay this sum on demand, interest and costs. Although not strictly relevant to the issues I have to decide it is explained that the reason he wishes to bring proceedings in this jurisdiction is that the Defendant seeks to repay the Claimant by a special form of banker's cheque issued by the Lebanese Central Bank in view of the banking crisis in the country which started at the end of 2019. This would result in the money becoming effectively trapped in the Lebanese banking system because such cheques are unable to be deposited into an account outside Lebanon. Dollar payments in this form are known colloquially as "*Lollars*", said to be worth only around 40% of a US dollar.

3. The relevant account was opened with the Bank on 17 October 2014 as a joint account together with the Claimant's parents and his brother and at the same time a retail banking services agreement was entered into which included a "multi-package" account agreement. The joint account could be operated under the individual signature of any one of the account holders. These documents were written in French though an original text in Arabic was said to take priority (there was some limited wording in English including conforming to the requirements of the US Foreign Account Tax Compliance Act). It is not in dispute that the relevant banking agreement is stated to be governed by Lebanese law and it contains a jurisdiction clause stating, in translation, that "*[a]ny dispute concerning the application or interpretation of these General Conditions falls within the jurisdiction of the courts of Beirut*".

4. There is an issue as to whether this constitutes an exclusive jurisdiction clause but that is not something I have to resolve because the question before me is simply whether, notwithstanding the terms of the agreement in relation to jurisdiction, the Claimant is entitled to bring proceedings against the Bank in this jurisdiction by virtue of section 15B(2)(b) of the Civil Jurisdiction and Judgments Act 1982. Sections 15A to 15E inclusive of that Act were inserted, with effect from 31 December 2020 (known as IP completion day), by the *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019*). They override any exclusive jurisdiction clause in a contract.

5. These sections essentially reproduce as part of the UK statute what had previously been contained in Articles 17-19 of *Regulation (EU) 1215/2012 of the European Parliament and of the Council* (known as the *Brussels 1 Regulation recast*) which had

been retained in UK law in the transition period between the end of January and the end of December 2020.

6. The provisions of the amended 1982 Act relevant to this application are as follows:

15B.— Jurisdiction in relation to consumer contracts

(1) This section applies in relation to proceedings whose subject-matter is a matter relating to a consumer contract where the consumer is domiciled in the United Kingdom.

(2) The consumer may bring proceedings against the other party to the consumer contract—

…

(b) in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract).

…

(6) Subsections (2) and (3) may be departed from only by an agreement—

(a) which is entered into after the dispute has arisen,

(b) which allows the consumer to bring proceedings in courts other than those indicated in this section, or

(c) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the United Kingdom and in the same part of the United Kingdom, and which confers jurisdiction on the courts of that part of the United Kingdom, provided that such an agreement is not contrary to the law of that part of the United Kingdom.

15D.— Further provision as to jurisdiction

(1) Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of section 15B (6) or 15C (6).

15E.— Interpretation

(1) In sections 15A to 15D and this section—

"consumer", in relation to a consumer contract, means a person who concludes the contract for a purpose which can be regarded as being outside the person's trade or profession;

"consumer contract" means—

(a) a contract for the sale of goods on instalment credit terms,

(b) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or

(c) a contract which has been concluded with a person who—

(i) pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled, or

(ii) by any means, directs such activities to that part or to other parts of the United Kingdom including that part,

and which falls within the scope of such activities,

but it does not include a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation or a contract of insurance,

…

(2) In determining any question as to the meaning or effect of any provision contained in sections 15A to 15D and this section—

(a) regard is to be had to any relevant principles laid down before IP completion day by the European Court in connection with Title II of the 1968 Convention or Chapter 2 of the Regulation and to any relevant decision of that court before IP completion day as to the meaning or effect of any provision of that Title or Chapter, and

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

7. Subject therefore to the possibility of departing from EU case law, it is necessary to look at the authorities concerned with the interpretation and application of Articles 17-19 of the Brussels 1 Regulation recast. There is no dispute before me as to the Claimant's domicile. He is a British national holding joint Syrian nationality who was born in Britain and who has always lived in England. He is currently a medical doctor working in the NHS. His mother is resident in Lebanon. His parents now have Lebanese nationality though they had Syrian origins.

8. Nor is there any dispute that the banking agreement, which is the subject of this claim qualifies as a consumer contract as defined. I have been invited to bear in mind the relatively sophisticated nature of this contract and the Claimant's role in it, together with those of his father and brother, but once it is conceded that this is a consumer contract those aspects of the case cannot have any bearing on the outcome. Though clearly this was legislation designed to protect consumers who may be the more vulnerable party in a transaction ("*to ensure adequate protection for the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the other, commercial, party to the contract*": *Pammer* (infra) at [58]), there is nothing in the legislation which makes any distinction based upon the relative

sophistication of the consumer in question. Indeed, in relation to the matter I am required to consider the state of mind and understanding of this particular consumer is not relevant at all though his actions may provide some indirect evidence bearing on the issues I do have to consider. Equally it is irrelevant that the benefit of any judgment in these proceedings against the Bank will also accrue to joint account holders (the Claimant's parents and brother) who are not domiciled in this jurisdiction, as is the suggestion that the source of the monies is really the father's own business profits.

9. It is agreed that I am deciding a question of fact. The Claimant's case is based upon the second limb of the definition of *"consumer contract"* in section 15E (1) (c) namely one concluded with a person who "*(ii) by any means, directs such activities to that part or to other parts of the United Kingdom including that part, and which falls within the scope of such activities"* ("*such activities*" referring back to the *"commercial or professional activities"* in subsection (1) (c) (i)).

10. The Claimant therefore asserts that the Bank at the relevant time *"directed"* its commercial activities to England and that the banking agreement which he signed with the Defendant fell within the scope of such commercial activities. The expression *"directed to"* is not otherwise defined and without guidance from case law it is not obvious what is intended. The parties agree that the necessary guidance was provided by the CJEU in *Pammer v Reederei Karl Schlüter GmbH & Co KG*; *Hotel Alpenhof GesmbH v Heller* (Joined cases C-585/08 and C-144/09) [2011] 2 All ER (Comm) 888 (*Pammer*), guidance to which, by virtue of section 15E (2) (a), I must have regard though it is no longer strictly binding on English courts. Neither party has however suggested any reason why I should not follow the guidance and the submissions have been concentrated on what can be derived from the judgment of the Grand Chamber in that case and, to some extent, from the observations of the Advocate General and from other cases decided by the Court of Justice as well as to how those principles can be applied to the evidence in this case.

11. I will return to the details but in summary what the Claimant says through Mr Cutress QC and Mr Carall-Green is that the Bank was, as was made clear by statements made on the internet, interested in obtaining customers outside the Lebanon and in particular from the Lebanese diaspora (which I am told consists of some 15 million people, some four times the numbers who currently live in Lebanon) and that this necessarily included significant numbers who live in the United Kingdom. The Claimant also relies upon his own dealings with a subsidiary of the Bank between 2009 and 2014 which he says itself supports the contention that the Bank was directing its business to, amongst other places, the United Kingdom. The Defendant through Mr Pillai QC submits that any statements on the internet are not enough to support such a case and a detailed analysis of what was publicly available shows that the Bank was only interested in customers in certain specified locations outside Lebanon, especially in the Middle East and Africa. It had no branches or representative offices in the United Kingdom and although its websites would have been accessible to those in the United Kingdom, if someone there sought to do business with the Bank that would be entirely incidental to their intended target audience and that is not enough. As far as contact with a subsidiary is concerned Mr Pillai submits that this does not advance the Claimant's case –that was a separate legal entity and although it may have been offering financial products available from the

Bank for the investment and management of the wealth of the Claimant and his family, similar products available through companies and institutions having nothing to do with the Bank were also suggested. There was no agency arrangement and therefore there was never any direct or even indirect contact between the Bank and the Claimant (of whose existence the Bank was unaware) prior to the events leading up to the signing of the banking agreement on 17 October 2014 and that took place in Beirut.

12. It is common ground that the approach to be adopted by this court at this interim stage in deciding whether to accept jurisdiction is as set out by Lord Sumption JSC in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; [2018] 1WLR 3683 at [9]:

> "*For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction. In Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192 , para 7, this court reformulated the effect of that test as follows:*
>
> *'(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.'*
>
> *It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced.*"

13. It is also common ground before me that the burden of persuasion is on the Claimant but this is not strictly a burden of proof. Reliant as I am on the materials that the parties have put before me but, bearing in mind that I am deciding it on the basis of witness statements which have not been tested by cross-examination and as there has been no order for disclosure, such materials may be incomplete. I have to attempt to form a view as to which side has the better argument as to the disputed facts. The effect of the burden being on the claimant is therefore only that in a finely balanced case the default position may be that the defendant's argument is preferred.

14. In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA* [2019] EWCA Civ 10; [2019] 1 WLR 3514 the Court of Appeal considered how the test works in practice and what is meant by *"plausible"* and its relation to a *"good arguable case"* test. In limb (i) the test is plausibility alone: Green LJ at [73]. A plausible case is not one where the claimant has to show it has the better argument but *"it is not significant whether one wraps up the three-limbed test under the heading 'good arguable case'"* [74]. Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it reliably can and *"to use judicial common sense and*

pragmatism"[78]. Limb (iii) is intended to address the case where the court is unable to form a decided conclusion on the evidence before it and is unable to say who has the better argument. The court must ask *"whether the claimant's case had "sufficient strength" to allow the court to take jurisdiction…To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence… [T]his is a more flexible test which is not necessarily conditional upon relative merits."* [80]

Pammer

15. In *Pammer* the Court of Justice was considering two consumer contracts, one relating to a cruise on a freighter the other relating to a hotel holiday. Clearly they were rather far removed from the facts of this case and that needs to be borne in mind when looking at passages in the judgment of the Court of Justice which seek to identify the typical features of a case that would tend to satisfy the requirement that a trader had *"directed to"* a particular territory its commercial or professional activities.

16. As the Advocate General noted, that case was the first time that the Court of Justice had occasion to consider the concept of *"directing"* commercial or professional activities to the consumer's state of domicile. The expression had first appeared in the Brussels 1 regulation of 44/2001 (Article 15 being the equivalent of Article 17 in the recast Regulation). This was introduced at a time when the internet was becoming a significant factor in the marketing of goods and services across borders. It had caused some differences of opinion amongst academic writers as to its meaning and scope and *Pammer* was needed to clarify what that expression meant and what it did not mean. As the Advocate General also said at [2]:

> "*The specific feature of the internet is that consumers are generally able to consult a company's website worldwide and that a very wide interpretation of the term 'directing' of activities would have the effect that the very setting up of a website means that an undertaking is directing its activities to the consumer's state of domicile. When interpreting this term it is therefore necessary to achieve a balance between protection of the consumer, who is entitled to call upon the special rules of jurisdiction under Regulation 44/2001, and the consequences for the undertaking, to which these special rules of jurisdiction can only apply once it has made a conscious decision to direct its activities to the consumer's member state*."

17. In its judgment the Grand Chamber noted that the new rules had removed the requirements that the trader had to have addressed a specific invitation to the consumer and that the contract with the consumer needed to be concluded in his state of domicile, replacing them with conditions applicable to the trader alone (judgment at [60]) but *"[i]t does not follow, however, that the words 'directs such activities to' must be interpreted as relating to a website's merely being accessible in member states other than that in which the trader concerned is established*" ([69]) and the protection is not absolute ([70]). *The "trader must have manifested its intention to establish commercial relations with consumers from one or more other member states, including that of the consumer's domicile"* ([75]).

18. In [76] the Court said:

> "*It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other member states, including the member state of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers*."

19. Mention on a website of the trader's e-mail address or geographical address, or of its telephone number without an international code would not amount to such evidence ([77]) but *"clear expressions of the intention to solicit the custom of that state's consumers*" would ([80]) These include mention that it is offering its services or its goods in one or more member states designated by name or expenditure on an internet referencing service to facilitate access to the trader's website in the consumer's state ([81]) but:

> "*a finding that an activity is 'directed to' other member states does not depend solely on the existence of such patent evidence. In this connection, it should be noted that, by its legislative resolution on the proposal for a regulation that is referred to in para 43 of the present judgment (OJ 2001 C146 p 101), the European Parliament rejected wording stating that the trader had to have 'purposefully directed his activity in a substantial way' to other member states or to several countries, including the member state of the consumer's domicile. Such wording would have resulted in a weakening of consumer protection by requiring proof of an intention on the part of the trader to develop activity of a certain scale with those other member states*" ([82]).

20. In [83] the Court gives a non-exhaustive list of features of the case which alone or in combination might be capable of demonstrating the existence of an activity 'directed to' the member state of the consumer's domicile:

> "*[T]he international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the member state in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other member states to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various member states, in particular by presentation of accounts written by such customers*."

21. In [84] the Court states: *"If... the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other member states."*

22. Returning to the wording of the Article 17 and section 15E (1) (c) (ii), two differences of interpretation arose between the parties: the first was one raised by me which is whether the commercial or professional activities have to be directed to consumers domiciled in the relevant state or part of the United Kingdom. Mr Pillai QC for the Defendant says that they do because the second limb refers back to the first limb and that speaks of *"commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled"*. Consumers domiciled there thus need to be the target towards whom the trader's activities are directed. Mr Cutress QC for the Claimant says that this wording merely provides a geographical requirement identifying the relevant place in which the activities are pursued or to which they are directed.

23. Normally this would not be a relevant issue but in view of some of the website materials to which I have been referred which arguably focus on Lebanese nationals who may only be temporarily living in other countries (and might not be classed as consumers under the Regulation) there might have been an argument that the target audience was not those domiciled in the United Kingdom or consumers as defined at all. In fact, as Mr Cutress points out, the definition of domicile in section 41 of the 1982 Act does not impose any very high threshold requirement and the default position is that someone living in the United Kingdom for only three months qualifies. Indeed, it would add an unnecessary complication if the provision were to be read as requiring proof of the commercial or professional activities being directed to individuals who happen to be domiciled in the relevant state and there is nothing to say that the commercial and professional activities have to be aimed at consumers as defined at all. I therefore agree with Mr Cutress's submission of this point.

24. A second question is whether it has to be shown that the trader in fact had an intention to direct its business to the consumer's domicile, which it then manifested by its statements or conduct, or whether it is sufficient that there were statements or conduct which manifested such an intention whether or not that was in fact what the trader intended. The Advocate General in *Pammer* said at para 64 of her opinion that the rules ensure that the courts of a particular member state do not have jurisdiction *"unless the undertaking has consciously decided to direct its activities also to the member state concerned or to pursue its activities there"* which suggests a subjective test. The Court in its judgment at [63] said it was unclear from the Article 15 (1) (c) *"whether the words 'directs such activities to' refer to the trader's intention to turn towards one or more other member states or whether they relate simply to an activity turned de facto towards them irrespective of such an intention"*. The Court's conclusion is that an intention is required but this could be reference as much to the trader's apparent intention as to its actual or subjective intention. At [64] the Court says: *"the question which this raises is whether intention on the part of the trader to target one or more other member states is required and, if so, in what form such an intention must manifest itself"* which appears to be focusing on the actual intention of the trader but Mr Cutress relies on the Court's judgment at [82], quoted above, which he says amounted to a rejection of the need to prove an actual purpose on the part of the trader. It seems to me though that the Court there is merely noting that the trader does not have to be seeking to do business in a substantial way or to a certain scale in the relevant member state. *Pammer* therefore it seems to me leaves the point a little unclear.

25. However the point has been considered by the Court of Appeal here in a different context namely in a dispute as to whether contractual arrangements permitting the use of a trademark in certain territories have been breached by its use in the defendant's marketing materials, including websites, social media posts, press releases etc which might come to the attention of people in the forbidden territories: *Merck KGaA v Merck Sharp & Dohme Corp & Or's* [2017] EWCA Civ 1834; [2018] E.T.M.R. 10. This raised the question of whether the defendant was targeting consumers there and Kitchin LJ at [154] noted that *"[t]he principles to be applied in assessing whether use of a sign on the internet constitutes use of a sign in a particular territory in the EU have been considered in a number of decisions of the Court of Justice*" and the first he refers to is *Pammer*. The guidance given in that case was treated as applicable to the question of targeting of consumers by the holder of the trademark and was applied. That gave rise to the question whether the test for *"targeting"* was an objective or a subjective one. Kitchin LJ said at [165]:

> "*One of the issues which arose for consideration in Argos [Argos Ltd v Argos Systems Inc [2017] EWHC 231 (Ch); [2013] E.T.M.R. 19] was the relevance of the subjective intention of an operator of a website in one territory in assessing whether its internet activity is targeted at the consumers in another territory, in particular the UK. The deputy judge held and I agree that if, viewed objectively from the perspective of the average consumer, a foreign trader's internet activity is targeted at consumers in the UK, the fact that, viewed subjectively, the trader did not intend this result will not prevent the impugned use from occurring in the UK. But that is not to say that the actual intention of the website operator is irrelevant. If the foreign trader does intend to target its internet activity at consumers in the UK then it seems to me that this is a matter which the court may properly take into account. After all, a trader may be expected to have some understanding of the market it intends to penetrate and it may not be difficult to infer that this intention has been or is likely to be effective (see, by analogy, Slazenger v Feltham (1886) 6 R.P.C. 531 at p.536, per Lindley LJ*)."

26. The other members of the Court of Appeal agreed with Kitchin LJ. Whether or not that is strictly binding on me in this different context I have no reason to take a different approach. This makes clear that while evidence of *"actual intention"* may assist in resolving the question it is not a necessary ingredient. The test is objective. It is of course well-established in English contract law, for example, that the intention to create legal relations is determined entirely objectively and subjective intentions probably have no role to play at all. There seems to me to be no reason why the question I have to decide, namely whether the Bank directed its relevant activities to the United Kingdom, must depend on my finding as to what it subjectively intended. Indeed, there is every reason in the context of a provision designed to protect and assist consumers who enter into commercial arrangements with traders outside their country to read it in such a way that what matters is what the trader said or did or how it conducted itself which, objectively assessed, can be taken to manifest an intention to direct its relevant activities into the place where the particular consumer is

domiciled. The only qualification I would make is that the materials that make such an intention manifest must in some way be the responsibility of, or endorsed by, the trader: otherwise if a third party without prompting mentions the trader's goods or services in his own marketing materials that would automatically confer jurisdiction on the consumer's state of domicile which could hardly be a fair result. Though a business can direct its activities to a particular jurisdiction through an intermediary, as the Court of Justice in *Pammer* said at [89]: "*The fact that the website is the intermediary company's and not the trader's site does not preclude the trader from being regarded as directing its activity to other member states, including that of the consumer's domicile, since that company was acting for and on behalf of the trader. It is for the relevant national court to ascertain whether* ***the trader was or should have been aware of the international dimension of the intermediary company's activity*** *and how the intermediary company and the trader were linked."* [my emphasis]

27. The other relevant principle that appears from the authorities is that there is no requirement of a causal connection between the consumer's entry into the contract with the trader which is the subject matter of the claim and the marketing materials which manifested the trader's intention to do business in the consumer's place of domicile: *Emrek v Sabranovic* (Case C-218/12) [2014] Bus LR. This is no more than an aspect of the point made in *Pammer* that the court is looking solely at the matter from the point of view of the trader's activities. It is also the reason why it is irrelevant that, if the Bank was targeting Lebanese nationals in the United Kingdom and referring to their *"homeland"* i.e. Lebanon, the Claimant is not himself a Lebanese national and does not regard Lebanon as his homeland. However, if there is such a causal link between the marketing materials and the contract this "*must be regarded as constituting evidence of directed activity in the same way as the establishment of contact at a distance, which gives rise to the consumer being contractually bound at a distance."* (*Emrek* at [29]).

28. In this respect Mr Cutress submits that even a single previous contract in the relevant state is enough. He notes that in *Les Ambassadeurs Club Ltd v Vona* [2018] EWHC 3149 (QB), [2019] ILPr 14 a single customer had been targeted in Italy and in *Oak Leaf Conservatories Ltd v Weir* [2013] EWHC 3197 (TCC) the English based trader had only ever undertaken two projects in Scotland. It seems to me however that the significance of previous contracts is only that they may constitute one type of evidence that can lend support to a case that a trader was indeed directing its business to the consumer's place of domicile rather than that this provides some alternative test. The Advocate General said in *Pammer* at paragraph 80 of her opinion: *"Account should also be taken of transactions that the undertaking has conducted with consumers from other member states in the past."* She did not say that that was decisive.

The Claimant's evidence

29. The parties have been able to show me screen shots taken from a digital archive of web pages accessible from England on the Internet at or around the time with which I am concerned, namely October 2014. Mr Cutress points first to a homepage of the Defendant's website which offers versions in English and French (but not it seems Arabic) which is on a ".com" domain and contains at the top a picture of Rio de Janeiro and the words *"Living between Lebanon and abroad? Check out our expat*

package." A YouTube advertisement could be opened. This video also refers to Paris, New York, Lagos, Abu Dhabi and Montreal.

30. At the foot of the page under *"Products and services"* there is reference among other things to *"Retail banking*" and *"Private banking & wealth management"*. Under "*Network"* it states *"Locations in Lebanon; Locations abroad and subsidiaries; Branches and ATM locations."*

31. By clicking on the link to expatriates there is this: "*As a Lebanese bank Banque Libano-Française feels concerned about the well-being of the Lebanese beyond country borders. Proud of the success achieved by the Lebanese diaspora abroad Banque Libano-Française gives you the opportunity to enjoy many advantages while encouraging more investments and property acquisitions in your homeland."* Clicking on *"Become a client"*, still in the section relating to expatriates, under *"Accounts"* the words *"Current account, saving account and term deposit account"* appear and there is also reference to *"Packages"*. In a page concerned with "*Electronic banking & card services"* something called *"Point Call"* is described as a weekday telephone banking service giving a telephone number which includes the country code for those phoning from outside Lebanon.

32. On a page entitled *"International & Correspondent banking"* there is reference to the Defendant having *"relationships with an extensive network of correspondent banks"* the *"International division"* maintaining credit lines with a large number of international banks which *"allows the Bank to adequately cover the needs of its clients both in terms of availability of confirmation lines and in terms of rates and conditions applied to our international transactions in trade finance, payments, check clearing, brokerage services, product or other transactions"*. The list of places where these correspondent banks are based includes London (where I am told the Bank holds "nostro" accounts).

33. There is a page entitled *"Profile & corporate strategy"* which says that in 2004 *"a more aggressive strategy"* included "*growth and development both at home and abroad through acquisitions Banque Libano-Française acquired Banque SBA (Paris, Cyprus) and its financial company LF Finance Suisse SA (Geneva) in 2006 to gain a foothold in Europe."*

34. The Claimant also draws attention to a "Contact us" page which, in addition to giving the international dialling code for Lebanon, also has a drop-down menu of countries from which an enquiry might come which includes the United Kingdom. Neither side was able to help me as to whether the other countries mentioned as options in the drop-down menu were limited in some way or included all or most countries in the world.

35. The Claimant relies upon dealings he had with or through LF Finance (Suisse) SA (LFF) in the five years or so up to October 2014. The Bank's website on its homepage also mentions a number of entities apparently connected to the Bank including "*Banque SBA*", "*Libano-Française Finance*" and "*LF Finance (Suisse)*" and they all use the same red or maroon logo, a capital L partly covering a capital F. I have already referred to the strategy statement that the purpose of the Defendant's acquisition of SBA and LFF in 2006 was *"to gain a foothold in Europe*". Clicking on

"Products and services" then *"Private banking & wealth management"* brings one to a page which includes the following:

> "*The Private banking activities are carried out through Libano-Française Finance 'LFF', following the Bank's decision to reorganise the activities of Treasury, Capital Markets and Private Banking. Therefore, a Wealth Management Department was created within the bank and covers brokerage and advisory services. The Wealth Management department is composed of a team of relationship managers whose mission is to explore, identify and attract high net-worth individuals in order to offer personalized advice, professional guidance and tailor-made investment solutions. backed by product specialists….A complete array of products and services offered through Libano-Française Finance, a fully-owned subsidiary*."

36. A Homepage of LFF's own website (on a *.com* domain) explains that it is wholly owned by SBA and *"is part of the Banque Libano-Française SAL Group since 2006 and acts as its wealth management arm in Europe."*

37. The Claimant in his own witness statement says that he has had a relationship with the Bank and "*the Banque Libano-Française group*" since at least 2010 when he with his father and brother opened a joint account with LFF in Geneva. He said he was very involved in managing this account and had regular communications with LFF and he mentions the names of those with whom he dealt including Ms Huser and Mr El Hage (the latter has provided a statement for the Bank which I mention below). LFF marketed the concept of holding fiduciary/custody deposits with the Bank in Lebanon knowing that he lived in England and he believed they were acting on behalf of the Bank in doing so. He was twice sent documents headed *"marketing communication"* which said that the team in LFF had been *"managing the proprietary trading at*" the Bank for many years. He described them in his communications as the *"LF branch"* and he exhibits emails which refer to his instruction to LFF *"for placing deposits with"* the Bank and recommendations from Mr El Hage in an Investment Proposal document for a fiduciary deposit with the Bank of some 10% of the family money to be invested, quoting the rates on offer (though also referring to a fiduciary commission rate that they would charge— the Claimant questioned this in an email where he said *"the funds are being deposited in LF Beirut i.e. the same bank, and this does not make sense"*). In later emails Mr El Hage advertised the Bank's interest rates to him and my attention was drawn to exchanges which it is said show he was able to negotiate interest rates on offer on the Bank's behalf.

38. At the end of the Investment Proposal document there is a disclaimer which seeks to limit liability for misstatements not only of LFF but also of the Bank. Indeed in this disclaimer the Bank is mentioned several times alongside LFF in connection with, for example, a statement that they are not giving *"legal, tax or accounting advice to its clients"*.

39. In the Bank's 2014 annual report there is reference to its residential mortgage business with private banking clients in Paris and London. It also included a map which appeared to show London as part of the Bank's reach.

The Bank's evidence

40. I have a statement from Mr Chadarevian, group legal counsel of the Bank, who says that, while Arabic is the official language of Lebanon, English and French are widely used and English is commonly adopted as a common language between non-native speakers.

41. He says that in late 2014 the Bank did not have any policy to market or advertise its services to attract customers from the UK and it did not carry out any marketing or advertising for that purpose. He also says that he does not think there would have been any indirect or inadvertent solicitation of business in the UK either, because it was not something the Bank was pursuing at the time. Its interest in generating business from outside Lebanon was focused on limited jurisdictions outside Lebanon. It did not pay to feature at the top of search engines and a recent search by the Defendant's solicitor on Google in the United Kingdom for "Lebanese banks" features the Bank only on the 11th page.

42. The Bank's core business was in the Lebanon where 89.4% of its customers were resident in 2014. It had 54 branches there and only one branch elsewhere namely in Baghdad, Iraq. It also had two representative offices: one in Abu Dhabi, UAE and one in Lagos, Nigeria. In these countries English is used as a second language. They are countries seen as having the strongest cultural links to Lebanon together with a commercial connection, due to a high representation of Lebanese expatriates there.

43. The focus on the Middle East and Africa can be seen in a list of marketing trips in 2014. Of 24 such trips, 13 were to countries in the Middle East, 5 were to Africa, two to each of the USA and continental Europe and one each to Turkey and the UK. The trip to the UK was to participate in the Spring meetings of the International Institute of Finance and to meet correspondent banks. He says that this was not aimed at getting customers in the UK. Indeed he says the Bank did not gain any new UK-resident customers in 2014 through the website and only 0.12% of the Bank's new customers in 2014 were UK residents, all introduced through family members or employees of Bank or subsidiaries or existing clients. One was approached by a Bank employee in Africa.

44. The Bank's relationships outside Lebanon with various correspondent banks in London enables it to provide cross-border banking services including cash management, cheque clearing, foreign exchange and international securities brokerage for its customers, as any credible bank would wherever its customers were based and this has nothing to do with marketing its services to individuals in the UK.

45. As for the "ex-pat" packages these were not directed at the UK but at those living in parts of Africa and the Middle East referred to. The packages offered accounts in Lebanese pounds, Euros and US dollars but not in pounds sterling. The only contact details in its brochure were a number in Lebanon and a number in Abu Dhabi. He notes that in targeting international travellers there is mention of loyalty cards held with KLM (the Dutch airline) and Air France but not any airline connected with the UK.

46. Mr Chadarevian refers to the circumstances leading up to the opening of the joint account in October 2014 and says that this followed a meeting that the Claimant's

father had at SBA's premises in Paris where the Claimant and his family held an account at the time. SBA does not have any branches or representative offices in the United Kingdom. At that meeting the Claimant's father without prompting mentioned the possibility of opening a deposit account with the Bank to take advantage of interest rates being offered. Mr Letayf of SBA introduced him to Mr Gebrane of the Bank and following that meeting the Claimant's father made an appointment for himself and his family including the Claimant to attend the Bank's Achrafieh, Beirut branch where the joint account was opened.

47. I have a witness statement from Mr Gebrane the manager of the Achrafieh, Beirut branch who describes this meeting when the Claimant's father explained he wanted to transfer in funds from other accounts. Mr Gebrane's contact thereafter was with the Claimant's father and his brother, and only intermittently with the Claimant who was not involved in placing instructions for payments or other transactions until after the start of the banking crisis in Lebanon. It was only in October 2019 that the Claimant also requested a credit card. The Bank had no dealings with the Claimant before October 2014 and was not aware of any earlier dealings he had had with LFF or SBA.

48. There is a witness statement from Mr El Hage in which he explains that LFF and the Bank are separate legal entities and there is no agency arrangement between them. LFF's employees did not have any commercial incentive for recommending products from the Bank over products from other third party companies and that is why LFF charged commission to the Claimant and his family in respect of investments which included those placed on fiduciary deposit with the Bank. This was a method of investing a cash sum in a fixed interest-bearing account through a Swiss financial institution with the advantages of confidentiality of Swiss banking law, LFF placing the funds on deposit with the relevant third party bank in an account held in LFF's name. The recipient bank does not know whose cash is invested or have any of the investor's details. The advantage to the investor is that interest earned on cash invested in this way is not taxable at the usual 30% rate. LFF provided information to the Bitar family about a range of investment products from third party companies in different sectors and information about a fiduciary deposit product offered by the Bank was only part of this range of suggestions. LFF was not acting as the Bank's agent or representative in providing any of this information. It was understood that, while the Claimant was the point of contact, he was really a conduit for receiving information on behalf of his family and, in particular, the Claimant's father who directed the financial matters relating to the account.

49. The fact that the Claimant and his family decided to invest some US$3 million of the family's wealth through LFF in 2010 did not create a relationship between the Claimant and the Bank. Later, in 2013, LFF provided information that included details of an "*LF Total Return Bond Fund*" – a Luxembourg fund managed by LFF, to which the Bank was the investment advisor. LFF provided information about a number of products to the Claimant so that he could make investment decisions to reflect his (and his family's) needs. An Investment Proposal document made a variety of investment suggestions only one of which was a fiduciary deposit through LFF with the Bank and the suggestion related to some 10% of the funds to be invested. Again, LFF was not acting as the Bank's agent or representative in providing any of this information. The separate roles of the Bank and LFF were clear from the context and from the documents. Had an investment been made, that would not have been

with the Bank. Nor was LFF acting as a marketing agent or representative for any of the other companies whose products it described in the relevant information packs.

50. In 2014 the Claimant had emailed Mr El Hage asking for further information on interest rates for deposits with "*a series of western banks like Societe General, UBS, HSBC among others*" as well as with "*SBA and also with LF in Beirut*".

The parties' submissions

51. Mr Cutress's primary case is that the contents of the Bank's website reconstructed from 2014 are enough to provide a strong manifestation of an intention to market the Bank's services outside the Lebanon without any limit, save that they were focusing on the expatriate community. His points about the website are, firstly, that it is written in English which suggests that even if it is aimed only at Lebanese expatriates it must be expecting those in English-speaking countries to respond, secondly that it refers to London in connection with its correspondent banks (and a contact form contemplates enquiries from the United Kingdom), thirdly that nowhere is there any indication that the Bank is targeting Lebanese expatriates only in certain locations, fourthly that it was targeting customers in Europe and that needs to be read against the background fact that significant numbers of those with connections to Lebanon live in the UK.

52. Mr Cutress also relies upon references in the Bank's 2014 annual report to residential mortgage business with private banking clients in Paris and London.

53. To the suggestion on behalf of the Defendant that at most they were targeting Lebanese *nationals* (of which the Claimant is not one, though he clearly has close links with Lebanon not least because his parents have acquired Lebanese nationality) he makes the point that if the target is limited to the *"Lebanese diaspora"* this would not necessarily be confined to those who have or ever have had Lebanese nationality. In any event, even if these marketing materials were to be read in that limited sense, that would not assist the Bank's argument as long as they were targeting Lebanese nationals in England because the test I have to apply does not require that the Claimant himself is a consumer of the particular type that was being targeted, only that he is domiciled in the place to which the Defendant was directing its commercial activities (and that the contract which is the subject of the claim was within the scope of such activities). The Claimant also relies on the Bank's own evidence that in 2014 10% of its customers were resident outside Lebanon and 384 of its customers were resident in the UK. In addition, the evidence shows that there were some 90,000 Lebanese nationals or those of Lebanese origin living in the United Kingdom and that was the second largest concentration of Lebanese in Europe after France (some 250,000).

54. Mr Cutress submits that even if the Bank was particularly focusing its international activities on those living in certain parts of the Middle East and Africa where it had branches and representative offices, that is not the same as saying that it did not envisage doing business with consumers elsewhere, particularly where significant numbers of those with connections to Lebanon live.

55. Mr Cutress's secondary argument is that, if these marketing materials are not enough in themselves, when one adds the previous contacts between the Claimant and LFF

the *Pammer* test is amply satisfied. The Claimant plainly thought LFF and the Bank were in effect the same entity (his questioning why he was being charged commission for putting funds with the Bank illustrates this) and the Bank in its marketing material had made it clear that LFF were part of its strategy for getting business in Europe. That is itself evidence on which I can rely to demonstrate the manifestation of an intention to target UK residents.

56. Mr Pillai QC for the Bank argues that the references in its 2014 web pages are insufficient to provide evidence of a manifested intention to direct its commercial activities to this country. There is no express reference to the United Kingdom (apart from its appearance in a drop-down menu, amongst options, of countries from which someone might be sending a query) and the material at most can be read as encouraging business from Lebanese expatriates. The Claimant's argument seeks to introduce a different test: it would in effect require the Bank to have expressly stated in its marketing material that it was *not* interested in doing business with those resident in the UK. That is the reverse of the test which is laid down in the Regulation, now in section 15E (1) (c) (ii).

57. Mr Pillai also submits that no significance should be attached to the use of the English language in marketing materials. He relies on the evidence that although the primary languages of the Lebanon and therefore presumably of most of the Lebanese diaspora are Arabic and French, English is so entrenched as an international language that there is no significance to be attached to its use in material aimed at an international audience—it provides the obvious alternative in case anyone reading this material does not speak Arabic or French and carries with it no implication that the trader is looking for business from people resident in English-speaking countries generally or in England in particular. Mention of the international dialling code for Lebanon is of no significance because the website was undoubtedly aimed at those outside the country. It provides no assistance as to where this target international audience was based. Mr Pillai also notes the absence to any reference in these materials to deposits being made in pounds sterling in contrast with deposits in Lebanese pounds, US dollars and Euros. There is therefore no reason to reject the evidence that the Bank was not in fact seeking business in the United Kingdom and the materials relied upon by the Claimant are entirely consistent with that evidence.

58. The references to correspondent banks in many cities around the world including London carry no significance: this merely provides information about the ability of the Bank to carry out international transactions for the benefit of their customers wherever these customers are living. London as a major international financial centre is an obvious place where one would expect the Bank to have relationships with other banks for such a purpose as much for the customers who live in the Lebanon as for those who live elsewhere.

59. Mr Pillai contrasts this case with the evidence in the *Oak Leaf Conservatories* case of express mention in marketing materials of the need for customers in Scotland to check on applicable planning laws there. In *Les Ambassadeurs* the club employed an agent in Italy to drum up business for them there. It was those features, rather than the fact that contracts had in fact been made in the past with those domiciled in those jurisdictions, which mattered. Here at most there was a website accessible in England which might have encouraged someone to contact the Bank but that is not enough. The only previous contracts relied upon here which it is argued on behalf the

Claimant have relevance under the point made by the Advocate General in *Pammer* ("*Account should also be taken of transactions that the undertaking has conducted with consumers from other member states in the past"*) and might demonstrate an actual causal connection (as referred to in *Emrek*) are the arrangements with LFF but there is no evidence that they themselves were connected in any way with the Claimant's sight of the Bank's marketing materials.

60. As for the secondary case relying on these dealings with LFF as itself providing evidence of the Bank targeting potential customers in United Kingdom Mr Pillai argues that it is disingenuous for the Claimant to suggest that he thought he was in effect being sold financial products on behalf of the Bank or that he was somehow directly in contact with the Bank. LFF was clearly a separate legal entity offering financial products from many sources and indeed charging commission for placing funds with the Bank. Indeed the communication from the Claimant in 2013 quoted in para 50 above shows that he treated LFF as a source of investment information across the market and not as an agent of the Bank as well as demonstrating that he understood that LFF, SBA and the Bank were separate entities.

61. No significance should be attached to the ability of Mr El Hage to respond quickly to questions about interest rates that the Bank could offer. Nor should any significance be attached to the disclaimer which comes right at the end of a lengthy investment proposal document simply because it happens to mention the Bank as well as LFF in this connection.

62. Mr Pillai also argues that the Bank's financial products that LFF were putting forward, namely placing funds on fiduciary deposit in LFF's name, related to a type of commercial activity of a different character altogether from the multi-package account later opened in 2014 which is the subject of this claim. They were not therefore within the same scope of commercial activity as required by the proviso to section 15E (1) (c) of the 1982 Act.

My conclusion

63. In my view many if not all of the points relied on by the Claimant to support his case that this court has jurisdiction, if taken in isolation, would not amount to evidence that the Bank was targeting or directing its commercial activities to the United Kingdom or England. Each can be said to be entirely consistent with the Bank's case that it had no interest in gaining business here. Some points relied upon by the Claimant seem to me, whether taken in isolation or in combination with other factors, to carry no weight at all in support of his case: thus the use of international dialling codes and a high level website domain, the establishment of arrangements with correspondent banks in London are all unsurprising given that, as is not in dispute, the Bank was targeting new business outside Lebanon and the use of correspondent banks in one of the major financial centres in the world says nothing about where the Bank's customers who might need to use such services are based. I would put in the same category the visit to London by a senior director to attend a meeting of the International Institute of Finance and to meet representatives of the Bank's correspondent banks there.

64. Other aspects that are insufficient in themselves include use of the English language in the marketing materials, the dropdown menu of options for those contacting the Bank which includes the United Kingdom and the evidence that there are some

customers of the Bank who live in the United Kingdom. These are of course perfectly consistent with the Bank's case that it was not targeting potential customers here and may simply show that they would not turn away business if a customer came forward for whatever reason from this jurisdiction. However these aspects of the evidence do not, unlike the points referred to in the previous paragraph, have no probative value at all once they are combined with other aspects. More significant are the references to a strategy to target Europe through the Bank's subsidiaries LFF and SBA and the Bank's 2014 annual report referring to its residential mortgage business with private banking clients in Paris and London. As for the latter, though one would not expect a company annual report to be read by potential non-commercial customers in the same way as marketing materials on the Internet, this nevertheless has evidential value as showing that there is no reason to treat such materials where they refer to Europe as excluding the United Kingdom.

65. As for the evidence of Mr Chadarevian as to the Bank's actual intentions, other than that annual report, there seems no reason to doubt that the Bank was particularly interested in the expatriate community in places where it set up branches or representative offices in Baghdad, Abu Dhabi and in Lagos. While what he says is in no way inconsistent with the proposition that the Bank was content to do business with those resident in the United Kingdom (and thus *"envisaged"* so doing) in the sense that they would not turn away such business even though this country would not be regarded as a particularly important source of new business, if subjective intention were the relevant test I would be prepared to accept that on the evidence before me the better argument is that the Bank did not intend to direct its business to the United Kingdom. At most, gaining business here would be entirely incidental to its marketing strategy and relatively unimportant. But that is not the test and it seems to me that the website pages to which I have referred which were visible from the United Kingdom do indeed give the impression to a fair-minded observer—and I would say quite a strong impression—that the Bank was interested in obtaining custom from the expatriate Lebanese community in whichever part of the world not insignificant numbers of those who can be treated as falling within that expression were gathered and that in 2014 did include England. In my view therefore this material alone satisfies the test of a manifestation of intention, objectively assessed, on the part of the Bank to direct its business to England.

66. If I had not accepted the Claimant's primary case, I would not have regarded it as improved by reference to his secondary argument based upon his dealings with LFF as it does seem to me that there is no evidence that these dealings were any way prompted by marketing material put out by the Bank. Viewed objectively, whatever the Claimant might himself have in fact thought, it was clear that LFF was a separate legal entity making various investment proposals which unsurprisingly included, but were in no way limited to, products offered by the Bank which was part of the same group. I agree that LFF was not apparently singling out the Bank's products.

67. The US dollar account opened by the Bitar family in my view plainly falls within the scope of the commercial activities which I conclude the evidence demonstrates that the Bank was directing to the United Kingdom. The fact that the Claimant and his family were not seeking out one of the *"expat packages"* being marketed, the banking agreement they signed in Beirut in 2014 being for a *"multi-package"* account, seems to me to be too fine a distinction to be made. By definition it was a banking

arrangement being entered into by a consumer and it does not seem to me that that requires it to be a retail banking account which precisely matches examples given in the marketing materials targeting expatriates.

68. I can therefore answer the test as explained in *Kaefer* (*supra*) in the following way: I find that the Claimant has supplied a *"plausible evidential basis for the application of a relevant jurisdictional gateway"* and I am able to *"take a view on the material available"* as to what that evidence demonstrates namely that, applying *"a test combining good arguable case and plausibility of evidence*", the Claimant's case has *sufficient strength to allow the court to take jurisdiction".* I therefore dismiss the Bank's application under CPR part 11.