THE HIGH COURT

[2023] IEHC 224

[2019/ 5541 P]

BETWEEN

JUERG VON GEITZ

PLAINTIFF

AND

EDMOND DE ROTHSCHILD [SUISSE] S.A.

MARTIN PEARMUND

ARIANE DE ROTHSCHILD

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 24th of April, 2023

Introduction

1. There are two motions before the Court. These are:

(1) the Defendants' motion to dismiss the proceedings on the grounds that the Irish courts do not have jurisdiction to hear these proceedings and/or an order setting aside service of the plenary summons; and

(2) the Plaintiff's application to amend his plenary summons.

Background

2. In order to understand the current applications it is necessary to consider

(i) a set of proceedings instituted in 2012, entitled *Balthazar Holdings Limited and Waldeck Limited vs Archimedes Private Office Limited, Banque Privée Edmond*

de Rothschild and Mark Robertson (Record No. 2012/ 13086 P) which I will refer to as the "2012 proceedings"; and

(ii) the current proceedings in which these applications are brought ("the 2019 proceedings").

3. It is also necessary to understand the various parties involved in the 2012 and 2019 proceedings because there is a considerable overlap between them.

The 2012 proceedings

4. The first Plaintiff in the 2012 proceedings was a company called Balthazar Holdings Limited, ("Balthazar") a company incorporated in the British Virgin Islands. This company's business was introducing 'high net-worth' individuals to banks. Balthazar is owned and controlled by Mr. von Geitz.

5. The second Plaintiff was Waldeck Limited, ("Waldeck") a company incorporated under the laws of Gibraltar. In turn, the two shareholders in Waldeck Ltd were

(i) Balthazar which owned 66.66% of its shares and

(ii) A company called Charms Ltd which owned 33.33%. (Charms Ltd was in turn owned by a Mr. Ralph Charles).

6. Mr. von Geitz was an employee of Waldeck.

7. The first Defendant was a company called Archimedes Private Office Ltd ("Archimedes"), a company incorporated in Irish law (owned by Mr. Robertson).

8. The second Defendant in the 2012 proceedings was the Edmond de Rothschild Private Bank ("Rothschild Bank"), a private bank incorporated in Switzerland.

9. The third Defendant was Mr. Robertson who was an employee of the Rothschild Bank.

10. The essential claim in the 2012 proceedings was that:

(i) Rothschild appointed Waldeck under an agency agreement whereby Waldeck would refer some of its high net-worth clients to Rothschild Bank;

(ii) In return Waldeck was to be paid an agreed rate of remuneration under the agreement;

(iii) Waldeck introduced clients to Rothschild but was not paid for doing so;

(iv) Rothschild offered Mr. Robertson and/or Archimedes an inducement to abandon the Waldeck agency agreement and to carry out all future introductions to Rothschild through Mr. Robertson and/or Archimedes;

(v) On 21 August 2012, Archimedes terminated its contract with Balthazar;

(vi) On 21 September 2012, Rothschild terminated the Waldeck agency agreement with effect from 31 December 2012; and

(vii) As a result of the Defendants' conduct, and breach of contract, the Plaintiffs (i.e. Balthazar and Waldeck) suffered loss and damage.

11. The Waldeck agency agreement was entered into between Waldeck and the Rothschild Bank on or about 21st March, 2011. It provides at paragraph 8.1 that *"This agreement shall be governed by Swiss law".*

12. It also provides at paragraph 8.2 that *"Any dispute arising from this agreement, particularly regarding its construction and performance, shall be referred to the courts of Geneva canton which shall have jurisdiction thereover, subject to appeal to the Swiss Federal Tribunal."*

13. Paragraph 7.3 provides that:

"Notices shall be deemed validly served by either party on the other if sent by registered post to the address mentioned above or to any other address notified subsequently".

14. The address mentioned for Waldeck was given as Suite 31, Don House, 30-38 Main Street, Gibraltar.

15. Paragraph 6.4 of the agreement provides:

"Either party may at any time, effective immediately, terminate this agreement for just cause by serving notice on the other stating the said just cause."

16. Paragraph 6.1 provides that:

"This agreement shall become effective as from the date of its signature for a fixed period expiring on 31st December, 2012. It shall be renewed automatically each year thereafter for additional twelve month period, failing notification by either party to the other at least three months prior to any expiry date".

17. On 21st September, 2012, the Rothschild Bank sent a letter to Waldeck Ltd at its address in Gibraltar advising it that the agency agreement dated 21st March, 2011 between Waldeck and the Rothschild Bank *"is hereby terminated effective December 31st 2012, the cancellation date as per the notice provision in said agreement".*

18. This triggered the issuing of proceedings in December 2012 in Ireland by Balthazar Holdings and Waldeck Ltd against Archimedes Private Office Ltd, the Rothschild Bank, and Mark Robertson. In those proceedings the Plaintiffs claimed damages for breach of contract and damages for misrepresentation, negligence and/or breach of duty.

Application in 2012 proceedings to strike out for lack of jurisdiction

19. However in the 2012 proceedings the Plaintiffs accepted that there was an exclusive jurisdiction clause in the Waldeck agreement and that this applied to the 2012 dispute between the parties. As a result the Defendants in that case brought an application to the High Court in Ireland to strike out the 2012 proceedings on the grounds that the Irish courts lacked jurisdiction to deal with the issue because the exclusive jurisdiction clause in the agreement provided that the courts of Switzerland were to have exclusive jurisdiction. Although this was

initially contested by the Plaintiffs in the 2012 proceedings, they ultimately conceded the matter and the High Court in Ireland struck out the 2012 proceedings on consent on the grounds that the Irish courts lacked jurisdiction.

The 2019 proceedings

20. In the 2019 proceedings, the Plaintiff is Mr. von Geitz. He pleads (at para. 6 of his statement of claim) that he was the sole shareholder and sole director of Balthazar and an employee of Waldeck.

21. The first Defendant is the Rothschild Bank; the second Defendant is a former director of the said bank; the third Defendant is the chairman of the said bank. All Defendants are based in Switzerland.

22. The essential nature of the 2019 proceedings is as follows:

(i) that on 21 May, 2011, Rothschild and Waldeck entered into the Waldeck agency agreement (as set out above);

(ii) that Waldeck would introduce clients to Rothschild and would be paid for so doing;

(iii) that Mr. Robertson incorporated Archimedes Ltd in Ireland and became a director and employee of Archimedes;

(iv) that on 23 September, 2012, Mr. von Geitz received notice from the Rothschild bank informing him that it intended to terminate the Waldeck agency agreement;

(v) that Mr. von Geitz had made various communications which he called "Protected Disclosures" under the Irish Protected Disclosures Act, 2014 to various parties - including the Defendants in the 2019 proceedings (being the Rothschild Bank, the chairman of the said bank and a former director of the

Rothschild Bank) and also to others including the Swiss Financial Market Supervisory Authority, and the Central Bank of Ireland.

(vi) that as a result of these protected disclosures, Mr. von Geitz has "suffered detriment".

(vii) that the Rothschild Bank caused this financial detriment and damage to Mr. von Geitz by the termination of the Waldeck agency agreement.

(viii) that this resulted in the loss of

(i) *"significant salary payments ordinarily due to the Plaintiff as an employee of Waldeck"* and

(ii) dividends to Mr. von Geitz due to Mr. von Geitz's company, Balthazar which was the majority shareholder of Waldeck.

23. In essence, the protected disclosures as pleaded, were allegations that Archimedes Private Office Ltd, a company incorporated in Ireland, was a "concealed branch" of the Rothschild bank in Ireland and had not sought authorisation from the Central Bank in Ireland.

The alleged detriment suffered by the Plaintiff as pleaded in his statement of claim.

24. At paragraphs 18 and 19 of the statement of claim in the 2019 proceedings the Plaintiff sets out the detriment he allegedly suffered as a result of his protected disclosures. Given the importance of these matters to this judgment I will set out in full the case as pleaded on this matter.

The detriment

25. *"18. On 23rd September, 2012, the Plaintiff received by email, written notification from David Heuar of the Rothschild Bank informing the Plaintiff of the purported termination of the Waldeck agency agreement causing the Plaintiff detriment.*

19. *Following the Plaintiffs follow up Protected Disclosures, the first, second and third Defendants have neglected and refused to recognise his detriment and their*

collective neglect and refusal to recognise his detriment, causes him continued detriment from 21st March, 2011 to the date of hearing of these proceedings."

Particulars of Detriment

(a) The Plaintiff, having made several protected disclosures to the employees of the first named Defendant, including Mr. Mark Robertson and the second named Defendant between 12th September, 2012 and 19th September, 2012, has suffered detriment and continues to suffer detriment following the enactment of the Protected Disclosures Act, 2014.

(b) The first named Defendant, its servants or agents did cause personal reputational and financial detriment and damage to the Plaintiff as a result of the first named Defendant, its servants or agents, and second named Defendant's invalid termination of the Waldeck agency agreement and this has resulted in a loss of significant salary payments ordinarily due to the Plaintiff as an employee of Waldeck from the creation of the Waldeck agency agreement on 21st March, 2011 to the date of hearing of these proceedings and the loss of dividends ordinarily due to the Plaintiff's company Balthazar as a shareholder of Waldeck from 21st March 2011 to the date of the hearing of these proceedings." (emphasis added)

26. In the prayer for relief in the statement of claim the Plaintiff claims:

"1. Damages for detriment.

2. Interest pursuant to statute.

3. Such further or other relief as to this honourable court sees fit to grant.

4. The cost of these proceedings".

Overlap between 2012 and 2019 proceedings

27. It is clear therefore that, on a proper analysis, there is a considerable overlap between the two sets of proceedings in that:

(i) the Plaintiffs in the 2012 proceedings are Balthazar, (a company owned and controlled by Mr. von Geitz) and Waldeck (a company the majority of whose shares are owned by Balthazar and thus indirectly by Mr. von Geitz); and the Plaintiff in the 2019 proceedings is Mr. von Geitz personally;

(ii) both sets of proceedings are concerned with the termination of the Waldeck agency agreement by Rothschild; and

(iii) in the 2012 proceedings, Waldeck seeks damages from the Rothschild Bank (and related parties) for breach of contract arising from the termination of the Waldeck agency agreement; in the 2019 proceedings, Mr. von Geitz says he made a number of "protected disclosures" about the Rothschild Bank, and that he suffered "detriment" arising from the Rothschild Bank's termination of the Waldeck agency agreement.

28. It is clear that the central issue in the 2012 proceedings is the termination of the Waldeck agreement on 21st September, 2012 by the Rothschild Bank, and the Plaintiffs' claims that they lost the benefit of the Waldeck agency agreement and the Balthazar consultancy contract.

29. It is also clear that the central issue pleaded by the Plaintiff, Mr. von Geitz, in the 2019 proceedings is that Rothschild Bank terminated the Waldeck agency agreement causing Mr. von Geitz personally, the detriment about which he complains.

30. Therefore the central event in both the 2012 and 2019 proceedings is the termination of the Waldeck agreement by the Rothschild Bank.

31. When set out in these terms, it is clear that there is a considerable overlap of the factual and contractual matters complained of in both sets of proceedings and that the termination of the Waldeck agreement by the Rothschild Bank is, in substance, the central

issue about which the Plaintiffs (Balthazar and Waldeck) complain in the 2012 proceedings and about which Mr. von Geitz (as the personal Plaintiff) complains in the 2019 proceedings.

32. This analysis is of some importance because, as will be seen later in the judgment, the central question which arises on the application to strike out the case on the grounds that the Irish courts lack jurisdiction under the Lugano Convention turns on the meaning and interpretation of Article 5(1) and Article 5(3) of the Lugano Convention.

The issue of service

33. Before dealing with the Defendants' application to strike out on the grounds of lack of jurisdiction, I will first consider (a) the Defendants' application to set aside service of the plenary summons and (b) the Plaintiffs application to amend his plenary summons.

34. The Defendants are seeking an order pursuant to Order 11A Rule 8 and/or Order 12 Rule 26 setting aside service of the plenary summons, the amendment of the plenary summons and service of the notice of amended plenary summons. I will therefore consider the contested issue in this case as to whether the Plaintiff has properly served the Defendants in these proceedings.

35. The Defendants claim that the Plaintiff has made a series of errors in the service of the proceedings upon the Defendants such that the Defendants say that they have not been properly served in accordance with the rules.

36. In order to deal with this matter it is necessary to set out the chronology of events at the start of these proceedings.

The first plenary summons

37. The Plaintiff in the 2019 proceedings, Mr. von Geitz, issued the first plenary summons on 12th July, 2019. This provides on the face of the summons that the summons is to be served within twelve calendar months from the date hereof unless time for service has been extended by the Court.

38. The Plaintiff then set about trying to serve the proceedings on the Defendant. On 12th November, 2019, the Plaintiff's solicitors wrote to A & L Goodbody solicitors who had previously represented the Defendants in the 2012 proceedings. In this letter they asked whether A & L Goodbody had authority to accept service of the new set of proceedings.

39. On 19th November, 2019 A & L Goodbody replied that they did not have authority to accept service of proceedings on behalf of any of the Defendants.

40. There was then a considerable delay until 12th June, 2020 and on that date the Plaintiff through the Swiss central authority, served a copy of the plenary summons on the first named Defendant.

41. On 6th July, 2020, the first named Defendant wrote to the Plaintiff's solicitors saying that it had received a document purportedly served upon the first Defendant but that it did not comply with the applicable rules for service of proceedings in the Irish court, because the document served upon the first Defendant was a plenary summons rather than a "notice of plenary summons" contrary to the requirements of Order 11A Rule 6 of the Irish Rules of the Superior Courts. They also stated that:

> *"The Irish courts have made it clear on a number of occasions that failure to serve a 'notice of a plenary summons' on a Defendant who is not an Irish citizen is a basis for setting aside the summons and is a deficiency that has been described as a matter of some significance".*

42. The Plaintiff accepted that it had made an error in this regard and that the document which should have been served on the Defendants was a notice of plenary summons rather than a plenary summons.

43. The following week, on or about 15th July, 2020, A & L Goodbody wrote to the Plaintiff's solicitors to state that they were now instructed by the Defendants in these proceedings and that the Defendants had now filed memoranda of conditional appearance.

The letter stated that these conditional appearances were sent by post to the Central Office for filing *"without prejudice and solely for the purpose of our clients contesting the jurisdiction of the High Court to hear these proceedings* _*and/or to contest the validity of the service of the plenary summons*_ *purportedly served on the Defendants on the 12th and 15th June, 2020."* (emphasis added)

44. The letter also stated that the proceedings *"were not validly served in accordance with the requirements of O.11A r.6 of the Rules of the Superior Courts."*

45. However, in the time between when the Plaintiff received the letter from the first Defendant of 6th July 2020 and the Defendant's solicitor's letter of 15th July, 2020, the Plaintiff had brought an ex parte application before the High Court (O'Moore J.) on 9th July, 2020 seeking an extension of time to renew its plenary summons so that service could be affected in the correct manner. The Plaintiff's solicitors wrote to the Defendants' solicitors on 20th July, 2020 indicating that this application had been brought as a result of the issues raised by the first Defendant's letter of 6th July, 2020. A letter from the Plaintiff's solicitor stated in its last paragraph: *"In light of your conditional appearance can you please confirm that you are in a position to accept the service of the renewed plenary summons".*

46. On 27th July, 2020, (i.e. the following week) the Defendants' solicitors wrote an important letter to the Plaintiff solicitor stating as follows:

> *"We refer to your letter dated 20th July and to the enclosures thereto.*
>
> *In the interests of not inconveniencing the court or the Swiss authorities further,* _*we confirm that we have authority to accept service of the plenary summons*_ *on behalf of the three Defendants to this case.*
>
> *For the avoidance of doubt we will continue to rely on our client's conditional appearances which we filed before receiving your letter* _*for the purposes of challenging the jurisdiction of the court*_ *to hear this claim.*

We also note we have not received your client's statement of claim in these proceedings and request that you file same by return.

Yours faithfully […]*"* (emphasis added)

47. In my view, it is clear from this letter that the Defendants, through their solicitors, were confirming that they had authority to accept service of the plenary summons on behalf of the three Defendants in the 2019 proceedings. This is the most obvious reading of the second paragraph of this letter.

48. Moreover, in my view, the third paragraph of this letter puts the matter beyond doubt as the Defendants' solicitors say that *"we are continuing to rely on the conditional appearances to challenge the jurisdiction of the court to hear the claim".* The clear implication of this statement, in my view, is that the Defendants would be challenging the jurisdiction of the Court but would not be challenging the issue of service.

49. Despite this, the Defendants continued to submit at this hearing that the service of the proceedings upon them was invalid and that they were continuing to seek to set aside the service of the proceedings and to rely on the conditional appearance to contest both jurisdiction and service.

50. In my view, however, it is clear from this letter that the Defendants accepted service of the proceedings as and from 27th July, 2020.

51. I am of the view that this letter of the 27th July, 2020 is evidence that the Defendants, through their solicitors, accepted service of the plenary summons as and from that date and that any arguments which they make since that time to contest service of the plenary summons are of little merit.

<u>The second plenary summons</u>

52. Unfortunately, to compound the errors made by the Plaintiff, having incorrectly served the plenary summons (instead of the notice of plenary summons) on the Defendants,

the Plaintiff then made a second mistake by amending the plenary summons without leave of the Court and then serving the amended plenary summons on the Defendants.

53. Thus, on 10th September, 2020, the Plaintiff's solicitors wrote to the Defendant solicitors stating:

> *"We welcome your confirmation that you have authority to accept service of the plenary summons on behalf of the three Defendants in this case.*
>
> *Following further instructions from our client we have amended the plenary summons in accordance with O.28 r.2 of the Rules of the Superior Courts. This was completed on 25th August, 2020.*
>
> *For the avoidance of doubt in relation to service, we have attached the following documents.*
>
> 1. *Amended plenary summons*
> 2. *Notice of amended plenary summons."*

54. What the Plaintiff should have done, for the avoidance of doubt, was to serve the plenary summons and the notice of the plenary summons on the Defendants' solicitors in Ireland. That would have put the matter of service beyond any doubt.

55. Instead, the Plaintiff decided that it would amend the plenary summons - without the leave of the Court - which it subsequently accepted was incorrect as a matter of law. An order of the Court to amend the summons was required.

56. The second plenary summons (i.e. the plenary summons amended without the leave of the court) differed from the first plenary summons in two respects as follows:

(1) Paragraph 2 of the plenary summons (i.e. the claim for damages for loss of breach of contract, negligence, fraud or fraudulent misrepresentation, breach of duty, breach of fiduciary, breach of trust) was deleted in its entirety, and

(2) It corrected the endorsement as to jurisdiction in order to refer to the Lugano Convention of 2007 instead of the Lugano Convention of 1988.

57. Clearly as this purported amended plenary summons had not been amended with the leave of the court, these amendments were invalid. As such, the service by the Plaintiffs on the Defendants of a purported amended plenary summons and a notice of an amended plenary summons could not be regarded as proper service as this was not a lawfully amended plenary summons.

58. The Defendants relied on all these matters to indicate that the service of the amended plenary summons on their clients could not be regarded as a lawful or proper service in accordance with the rules. Absent the solicitor's letter set out above, I agree with this submission. However I am of the view that the Defendants' solicitors letter set out above had already stated in clear terms that the Defendants were accepting the plenary summons previously served and that they would accept service of that document.

59. The Defendants' solicitors received the Plaintiff's solicitor letter of 10th September, 2020 enclosing the amended plenary summons and notice of amended plenary summons. They replied on 22nd September, 2020 pointing out that the Plaintiff had withdrawn his claim under para. 2 of the amended plenary summons without leave of the Court.

60. On 24th September, 2020, the Plaintiff's solicitors replied. However it is clear from this exchange of correspondence that the Plaintiff had not adverted at this point of time to the fact that plenary summons could not be amended without the leave of the Court.

61. On 2nd October, 2020 A & L Goodbody, the Defendants' solicitors replied saying that their clients intended to bring an application before the court to challenge the jurisdiction of the High Court to hear these proceedings.

62. Further correspondence took place between the parties' respective solicitors and on 15th December, 2021 the Defendants' solicitors served its notice of motion and grounding

affidavits seeking to strike out the Plaintiff's proceedings on the grounds that the Irish courts lacked jurisdiction to deal with the matter and/or seeking to set aside service.

63. However, as set out above, I am of the view that the Defendants accepted service of the proceedings and in the circumstances I will not accede to their application to set aside service.

The application to amend the plenary summons

64. The second application before the Court is an application for the Plaintiff to amend his plenary summons. I have set out above the first and second plenary summonses which existed in this case. The third iteration of the plenary summons was the draft amended plenary summons exhibited in the motion to amend before the Court. The draft amendments to the plenary summons in the draft exhibited to the grounding affidavit actually deleted the endorsement required for the Lugano Convention. This was clearly another error.

65. In the circumstances I permitted the Plaintiff to file a supplemental affidavit to put before the court the exact copy of the amendments which he sought to make to the plenary summons. As a result the Plaintiff's solicitors swore a supplemental affidavit on 12th January, 2023 exhibiting what was in effect the fourth suggested plenary summons in this matter. This plenary summons deleted para. 2 (the damages for breach of contract etc) and contained the appropriate endorsement as to jurisdiction in relation to the Lugano Convention.

66. Having received this amended plenary summons counsel for the Defendants indicated that they were neutral on the application.

67. In the circumstances (and having regard to the principles set out by the courts in relation to the amendment of pleadings) I will permit the Plaintiff to amend his plenary summons accordingly.

Grounds for strike out application

68. I now turn to deal with the substantive application before the Court which is the Defendants' application to strike out the proceedings on the grounds that:

(1) The Irish courts lack jurisdiction under Article 5 (3) of the Lugano Convention 2007;

(2) That this matter falls under Article 5 (1) of the Lugano Convention 2007 as it relates to a contract; and

(3) The Irish courts lack jurisdiction as a result of the exclusive jurisdiction clause in the agreement which confers jurisdiction on the Swiss courts.

The relevant Articles of the Lugano Convention

69. Article 2 of the Lugano Convention 2007 sets out the general rule on jurisdiction and provides that:

> *"1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State."*

70. Section 2 of the Convention sets out the Rules on Special Jurisdiction and Article 5(1) provides that

> *"A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:*
>
> *(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question"*(emphasis added)

71. Article 5 (3) provides as follows:

> *"A person domiciled in a State bound by this Convention may, in another State bound by this Convention, be sued:*

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

72. Article 23 (1) of the Convention deals with prorogation of jurisdiction and provides that:

> *"If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."*
> (emphasis added)

73. Thus, the general rule of the Convention is that all persons who are domiciled in a particular state should be sued in the courts of that state.

74. All other rules of jurisdiction under the Convention must be regarded as exceptions to that rule. In the present case it is an agreed fact that the domicile of all three Defendants is Switzerland. Therefore in the normal course of events all three Defendants should be sued in Switzerland unless the Plaintiff can establish that his case comes within one of the exceptions to the Lugano Convention.

75. Switzerland and Ireland are both signatories of the Lugano Convention which applies in the present case to determine jurisdiction. The Lugano Convention 2007 (Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [2007] OJ L 339/3) replaced the Lugano Convention of 1988. It entered into force within the European Union on 1 January 2010 and was given effect, as a matter of Irish law, by the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012.

76. The jurisdictional rules under the Lugano Convention 2007 are substantially the same as those under the Brussels I Regulation (Council Regulation (EC) 44/2001 of 22 December

2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L 12) and the Brussels I Regulation (Recast) (Council Regulation (EC) 1215/2012) and decisions of the Court of Justice of the European Union interpreting these regulations are relevant when interpreting equivalent provisions of the Lugano Convention. Section 20 (c) of the Jurisdiction of Courts and Enforcement of Judgments Act 1998 (as amended) provides that a court is required to take due account of the principles laid down in those decisions.

The central issue

77. The central issue in this application is therefore whether these proceedings are matters relating to a contract under Article 5 (1) (in which case, as the contract has an exclusive jurisdiction clause, the Swiss courts have jurisdiction, and the Irish courts must decline jurisdiction) or whether these proceedings are matters relating to a tort under Article 5 (3).

Expert evidence

78. In considering this central issue, the Defendants have put before the Court an affidavit of Professor Nicolas Jeandin who is a Professor of Law at the University of Geneva since October 2002 where he teaches "Procedure Law, Debt Collection and Bankruptcy Law". Professor Jeandin also practices law in Switzerland. Professor Jeandin has exhibited an expert report in relation to this matter which I have read and considered.

79. Professor Jeandin considered two questions in particular. The first was whether clause 8.2 of the Waldeck agreement applied to a dispute arising out of this agreement – including a claim brought in tort pursuant to section 13 of the Protected Disclosures Act, 2014 in Ireland.

80. The second question was whether, under Swiss law, clause 8.2 of the Waldeck agreement applied to the claims asserted by the Plaintiff against the Rothschild Bank -even though the Plaintiff was not a party to the Waldeck agreement.

81. In relation to the first question, Professor Jeandin considered the scope of the jurisdiction clause and whether the jurisdiction clause applies to a situation involving extra-contractual liability or tort. At paragraph 6.22 of his report he states:

> *"As a result it should be noted that the contractual jurisdiction clause may also apply when the claim for damages brought by one of the parties to the contract is related to the relevant contract but is based on an extra-contractual liability, or tort".*

82. At para. 6.24, Professor Jeandin states that a recent decision of the Swiss Supreme Court ("SSC") held that when assessing the scope of the jurisdiction clause

> *"the court has to interpret it extensively i.e. assuming that it covers all disputes arising from the contract. A jurisdiction clause applies first and foremost to all claims arising out of the contract but also to claims based on unlawful acts when they constitute at the same time a breach of this contract or when there is a link between the claims and the contract".*

83. Professor Jeandin noted that the Waldeck agreement contained an exclusive jurisdiction clause at para. 8.2. He noted the nature of the allegations and alleged wrongdoing by the Defendants in the 2019 proceedings and he concluded at para. 6.37 that under Swiss law the Plaintiff's claim in tort <u>would be covered by the jurisdiction clause</u> contained in the Waldeck agreement for the following reasons:

"- *The scope of jurisdiction clause has to be interpreted extensively, assuming it covers all disputes arising from the contract.*

- *The jurisdiction clause contained in the Waldeck agreement is worded in general terms and applies to 'any dispute arising from this agreement' which, according to the case law discussed above, also covers claims resulting from illicit deeds if those deeds constitute a breach of the agreement or, as in this*

case, if there is a direct connection between said deeds and the purpose of the contract.

- *The SSC* [Swiss Supreme Court] *has confirmed that claims in tort arising out of a contractual relationship should be submitted to the court designated by the parties in the contract.*
- *According to the principle of good faith, the jurisdiction clause should be understood to cover disputes regarding the termination of the Waldeck agreement or claims in tort in connection with its termination.*
- *It is clearly in the interests of the parties that the courts designated by them in a contract deal with all the issues arising out of their contractual relationship whatever the legal grounds of such claims".*

84. He therefore concludes that in his opinion *"clause 8.2 of the Waldeck agreement would apply to the kind of claims which the Plaintiff is bringing"* (see para. 6.38 of his report).

85. In relation to the second question which the professor addressed (i.e. whether clause 8.2 of the Waldeck agreement applied to the claims asserted by the Plaintiff against the Rothschild Bank even though the Plaintiff is not a party to the Waldeck agreement) he concluded at para. 6.54 of his opinion:

> *"In my opinion under Swiss law the Plaintiff is bound by the jurisdiction clause even though he is not a party to the Waldeck agreement for the following reasons:*
>
> - *The Plaintiff signed the Waldeck agreement on behalf of Waldeck;*
> - *he was an employee of Waldeck and the sole director and shareholder of Balthazar who was in turn a 65% shareholder in Waldeck;*
> - *the alleged claims in tort asserted by the Plaintiff appear to have arisen only because there was a contractual relationship between Waldeck and EDR* [the

Rothschild Bank]. *There is therefore clearly a close connection between the contract and the alleged tort;*

- *in other words, the Plaintiff's allegations essentially stem from the termination of the contract that he himself negotiated and entered into in his capacity as the governing body and economic owner of Waldeck. In addition, he complains essentially of the damage resulting from the loss of profit which he himself claims to have suffered as a result of the allegedly wrongful termination of the contract by the first named Defendant;*
- *Waldeck (along with Balthazar) has already issued proceedings against EDR* [the Rothschild Bank] *in 2012 alleging breach of contract and misrepresentation in connection with the termination of the Waldeck agreement. The proceedings were struck out by agreement between the parties on 3rd November, 2015* [These are the 2012 proceedings which were instituted in Ireland and struck out by agreement on the basis that the Irish courts lacked jurisdiction pursuant to the Lugano Convention].
- *In those circumstances it would be inequitable i.e. against good faith to uphold the legal distinction between the Plaintiff and Waldeck"*

86. The professor concludes at para. 7 of his opinion:

"7.1. In conclusion the Waldeck agreement requires that the type of claim that the Plaintiff has issued under the Protected Disclosures Act, 2014 be heard and determined by the courts of Geneva.

7.2. Clause 8.2 of the Waldeck agreement is fully binding upon the Plaintiff in his personal capacity in relation to the claim he is asserting.

7.3. Therefore only the courts of Geneva shall have jurisdiction to settle the present claim to the exclusion of the Irish courts".

Analysis

87. It is clear that the phrase *"matters relating to a contract"* in Art 5 (1) has an autonomous meaning. As Briggs says in *Civil Jurisdiction and Judgments* (7th ed.) *"This expression was not intended to indicate any claims which are seen in English domestic law as being founded upon a contract"* (see p. 225). He also states that the words 'matters relating to' *"may mean and include some issues which are not themselves contractual"* (p. 225).

88. The phrase 'matters relating to tort' also has an autonomous meaning.

89. As was stated in Case C-189/87 *Kalfelis v Bankhaus Schröder* [1988] ECR 5565:

> *"17. In order to ensure uniformity in all the Member States, it must be recognized that the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a Defendant and which are not related to a 'contract' within the meaning of Article 5 (1)."* (emphasis added)

90. As Briggs states at page 258 when discussing the interaction of Articles 5 (1) and (3):

> *"The starting point is the decision in Kalfelis v. Bankhaus Schröder Munchmeyer, Hengst & Co. 1988 [ECR] 5565* […] *The European Court held that the expression 'matters relating to tort, delict or quasi delict' had an autonomous meaning which comprehended 'all actions which seek to establish the liability of a Defendant and which are not related to a contract within the meaning of Article 5 (1).*
>
> *It was inevitable that the expression should be held to have an autonomous meaning. But the content of that meaning may not be obvious at first sight: in particular, where the boundary of 'matters relating to a contract' is uncertain, the scope of 'matters relating to tort' will also be. The point of departure is still to ask whether the subject matter of the action relates to a contract in the sense of Article 5 (1). That condition will be met if the claim could have been brought as a claim alleging breach of contract, or if the contract needs to be pleaded and proved to establish the cause of*

action even though the claim is not formulated as one for breach of contract. If it could or does, Article 5(3) does not apply, no matter how national law would see it. But if the matter does not relate to a contract in this sense the matters may fall within Article 5 (3).” (emphasis added)

91. The interaction between Article 5(1) and 5(3) of the Brussels Regulation was also considered by the CJEU in C-548/12 *Brogsitter* [2014] ECLI 2014:148. The Court held that civil liability claims which are made in tort under national law must nonetheless be considered as ‘matters relating to a contract’ within the meaning of Article 5 (1) (a) of Council Regulation (EC) 44/2001 (Brussels Regulation), where the conduct complained of may be considered to be a breach of the terms of the contract, which may be established by taking into account the purpose of the contract.

92. The Court also stated that (at 21)*“In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature (see, to that effect, Case C-167/00* Henkel *[2002] ECR I-8111, paragraph 37).”*

93. These cases raise the question as to whether the claim in the present case is actually, in substance, a claim relating to a contract under Article 5 (1) rather than a claim in tort.

94. I am of the view that the answer to that question is that the Plaintiff’s claim is one ‘relating to a contract’ for a number of reasons. Firstly, as set out above in Briggs, the subject matter of an action could ‘relate to a contract’ rather than a claim in tort, in the sense of Article 5 (1), *“if the claim could have been brought as a claim alleging breach of contract or if the contract needs to be pleaded and proved to establish the causes of action even though the claim is not formulated as one for breach of contract”*. In the present case, the case could have been brought as a breach of contract claim and the contract *is* pleaded to establish the cause of action. This indicates, in my view, that the Plaintiff’s claim in this matter is indeed

'relating to a contract' – even though his claim is formulated as a tort and even though he was not a direct party to that contract.

95. Secondly, the expert report from Professor Jeandin – that the contract between Waldeck and the Rothschild Bank is sufficiently broad to permit, as a matter of Swiss law, Mr. von Geitz, to make his claims against the Defendants in Switzerland – is persuasive and establishes that the Plaintiff's claim is, in substance, a matter 'relating to a contract'.

96. Thirdly, Mr. von Geitz pleads in these proceedings that the Rothschild Bank's alleged invalid termination of the Waldeck agency agreement resulted "in a loss of significant salary payments" due to the Plaintiff as an employee of Waldeck and the loss of dividends due to the Plaintiff's company (Balthazar) as a shareholder of Waldeck. Thus, this is a case where the Plaintiff has pleaded the contract as a matter of necessity to prove his detriment but then goes on to formulate the claim not as one of breach of contract but as one in tort.

97. I am satisfied therefore that these proceedings when properly analysed are – in substance if not in form – matters relating to a contract in the sense of Article 5 (1) of the Lugano Convention. – even though the Plaintiff is not a direct party to that contract and even though his claim is formulated in tort.

98. I am also satisfied that the relevant contract has an exclusive jurisdiction clause conferring jurisdiction on the Swiss courts. In these circumstances, the Irish courts have no jurisdiction.

The place where the harmful event occurred is not Ireland but Gibraltar

99. Moreover I am also of the view that the Plaintiff has failed to establish that the harmful event occurred in Ireland as required by Article 5(3).

100. It is clear from the Supreme Court decision in *Handbridge Ltd v British Aerospace Communications Ltd* [1993] 3 IR 342, that where a Plaintiff seeks to invoke one of the derogations from the principle in the Brussels Convention the onus is on the Plaintiff,

unequivocally to show that his claim fell within the scope of the derogation relied upon. A similar principle clearly applies under the Lugano Convention. This standard is the balance of probabilities.

101. Therefore in order for the Plaintiff to succeed in establishing that the Irish courts have jurisdiction under Article 5(3) he must establish that the place where the harmful event occurred is Ireland.

102. In Case 21/76 *Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 01735 ('*Bier*'), the European Court of Justice held, in interpreting the meaning of Article 5(3) of the Brussels Convention, *"that the place where the harmful event occurred"* must be understood as being intended to cover:

(a) both the place where the damage occurred and

(b) the place of the event giving rise to it.

103. It is clear therefore that the *Bier* case allowed a Plaintiff to decide whether to issue proceedings under Article 5 (3):

(a) In the courts of the place where the damage occurred or

(b) The courts of the place of the event giving rise to the damage.

104. Therefore, the questions in this case are:

(a) What is the place in which the damage occurred? and

(b) What is the place of the event giving rise to the damage?.

105. In the present case, the Plaintiff has pleaded that the detriment about which he complains was the purported termination of the Waldeck agency agreement by the Rothschild Bank. It is pleaded in the 2012 proceedings (in the statement of claim at para. 23) that the Rothschild Bank terminated the Waldeck agency agreement by letter dated 21st September, 2012 (effective 31st December, 2012) *"as per the notice provisions of the said agreement"*.

106. Waldeck is a limited liability company incorporated under the laws of Gibraltar with its registered office in Gibraltar. It is the termination of this Waldeck agency agreement – as the Plaintiff pleads in his statement of claim in the 2019 proceedings – which constitutes the *"detriment"* which he has suffered. It is clear therefore that the 'harmful event' about which the Plaintiff complains was the termination of the Waldeck agreement.

107. However the termination of the Waldeck agreement occurred when the Rothschild Bank sent a notice of termination of the contract by registered post to the registered office of Waldeck in Gibraltar. Therefore the place where the damage occurred was Gibraltar not Ireland.

108. Likewise, it could be argued that the place of the event giving rise to the damage was either Gibraltar – or Switzerland from where the letter of termination was sent.

109. I am satisfied therefore that, on a proper analysis, the harmful event about which the Plaintiff complains did not occur in Ireland but in Gibraltar or Switzerland.

Damage as immediate consequence of harmful event

110. Moreover, in order to prove that the Irish courts have jurisdiction under Article 5(3), the Plaintiff has to establish, in addition to establishing that the harmful event occurred in Ireland, that any damage he suffered was the direct or immediate consequence of the harmful event, and not the indirect consequence of any harm suffered by any other persons who were direct victims of the harmful act.

111. In C-220/88 *Dumez France SA v Hessische Landesbank* [1990] ECR I-49, the European Court of Justice held (at 22) that *"the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets"*

112. As Briggs states at page 269:

"The rule that the relevant damage is that done to the immediate victim, rather than remoter victims, of the harmful act was established in *Dumez France SA v Hessische Landesbank.* *1990 [ECR 1-49]. In that case the European Court ruled "that the damage which was jurisdictionally significant was that which was done to the immediate victim of the bank's wrongful act, not that which was done to indirect or more remote victims of it, even if the more remote victim advanced a cause of action which was based on its own, independent loss"*(emphasis added)

113. In my view, the harm alleged by Mr. von Geitz is merely the indirect consequence of the alleged financial losses suffered by Waldeck by virtue of the termination of the Waldeck agency agreement with the Rothschild Bank.

114. Furthermore in Case C-364/93 *Marinari v Lloyds Bank plc* [1995] ECR I-2719 the European Court of justice held that the term 'place where the harmful event occurred' in Article 5 (3) of the Convention *"*[…]*does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State."* (at 21)

115. It is clear that there really is no connection between the Plaintiff's case and the Irish jurisdiction - other than the fact that the Plaintiff claims that he made protected disclosures under an Irish statute, and allegedly that as a result of these protected disclosures, Rothschild Bank terminated the Waldeck agreement in Gibraltar.

116. Whilst the Plaintiff has indicated that the actions of the first Defendant did cause "personal reputational and financial detriment and damage to the Plaintiff" these pleas of "personal and reputational damage are not, in my view, properly or adequately pleaded at all. They must be regarded as essentially "make weight" claims added to the Plaintiff's statement

of claim to what is, in substance, a claim for indirect financial loss due to the termination of the Waldeck agreement by the Rothschild Bank.

117. In any event, such personal or reputational damage to the Plaintiff are again an indirect consequence of the damage caused by the termination of the Waldeck agency agreement in Gibraltar by the Rothschild Bank. I also note in this regard that the Plaintiff applied for bankruptcy and was adjudicated a bankrupt in Northern Ireland. Insofar as this is the personal or reputational damage about which he complains, I note again, there is no connection with this jurisdiction.

Conclusions

118. In the circumstances, I am of the opinion that these proceedings are, when properly analysed, 'matters relating to a contract' within the meaning of Article 5(1) of the Lugano Convention.

119. As the contract contains an exclusive jurisdiction clause conferring exclusive jurisdiction of the courts of Switzerland, and as the expert evidence is that this contract covers claims such as those made by the Plaintiff, I am satisfied that the Irish courts do not have jurisdiction in this matter and that jurisdiction is vested in the Swiss courts.

120. I would therefore conclude:

1. The Plaintiff validly served the proceedings on the Defendants;
2. The Plaintiff will be given liberty to amend his plenary summons; and
3. The proceedings will be struck out on grounds of lack of jurisdiction.