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Challenging The Use Of Anchor Defendants In UK Litigation

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The summer of 2020 has seen the complex topic of the merits test for anchor defendants, in the context of multidefendant litigation involving European Union defendants, back before the English courts.

It started in June, with the judgment in Senior Taxi Aereo Executivo LTDA & Ors v. Agusta Westland SpA & Ors providing a fresh perspective on the merits test. However, an August decision involving anchor defendants, Weco Projects APS v. Piana & Ors, saw the court opting to apply the approach taken by the Court of Appeal in JSC Commercial Bank Privatbank v. Kolomoisky and Bogolyubov and other, holding that there is no abuse of process in bringing proceedings that are arguable.

This article will provide an overview of the current legal standing on anchor defendants, and the applicable merits test concerning EU-based defendants, in addition to discussing an overlooked test case — Tsareva & Ors v. Ananyev & Ors — that provides direct authority for existence of the merits test and how best to apply it.

Introduction

The issue of using anchor defendants to sue co-defendants domiciled in the EU, Iceland, Norway and Switzerland found its way back into the legal spotlight after the Court of Appeal, in a majority obiter decision in JSC Commercial Bank Privatbank v. Kolomoisky and Bogolyubov and others, held that Article 6(1) of the Lugano Convention is not subject to a "sole object" test.

To recap: The Court of Appeal held in that case that a claimant with a sustainable claim against an anchor defendant, which it intends to pursue to judgment in proceedings to which a foreign defendant is joined as a co-defendant, is entitled to rely on Article 6(1) of the Lugano Convention — even if the claimant's sole object in issuing the proceedings against the anchor defendant is to sue the foreign defendant or defendants in those same proceedings.

While most practitioners recognized the importance of the Kolomoisky judgment, little subsequent discussion focused on the fact that the decision also upheld the existence of a merits test, by holding that a claimant without a sustainable claim against an anchor defendant cannot rely on the jurisdictional gateways contained in Article 6(1) of the Lugano Convention, Article 6(1) Brussels Regulation I or Article 8(1) Brussels Recast Regulation.

Despite predating the Kolomoisky judgment, the decision in Tsareva et al. v. Ananyev et al./Galagaev et al. v. Ananyev et al. is especially relevant in the context of this merits test. The Ananyev decision saw the application of the merits test to a claim against two U.K.-domiciled anchor defendants, brought for the purpose of suing several EU-domiciled co-defendants in the same proceedings under Article 8(1) Brussels Recast.

The Ananyev decision is an apt illustration of a case where the merits test was applied, notwithstanding the fact that the parties and the judge used a different formulation of the merits test to the one used in the Kolomoisky judgment. Is there a merits test in relation to claims asserted against anchor defendants in the context of Article 6(1) Lugano Convention/Brussels I or Article 8(1) Brussels Recast?

A brief period of uncertainty followed the 2017 judgment of the Court of Appeal in Sabbagh v. Khoury & Ors. The Court of Appeal in Sabbagh grappled with the question of whether a claim made against an anchor defendant for the purposes of suing EU-domiciled co-defendants in the English courts must have some merit.

Unlike Civil Procedure Rules Practice Direction 6B Paragraph 3.1(3)(a) — which provides that there must be a "real issue … reasonable for the court to try" against the proposed anchor defendant — neither Article 6(1) Lugano Convention/Brussels I nor Article 8(1) Brussels Recast Regulation contains an explicit merits test. Its existence has been the subject of much discussion in Court of Justice of the European Union jurisprudence, which is not examined here.

In the end, the majority in Sabbagh v. Khoury held, obiter, that a claim against an anchor defendant must be sustainable or raise a serious issue to be tried. However, the judges also held that a claim against an anchor defendant that is hopeless or presents no serious issue to be tried should fall within the "sole purpose" or "sole object" exception identified in EU case law, inferring that the purpose of making an unsustainable claim is to remove the foreign co-defendant from the courts of its domicile.

Approximately a year and a half would pass before the English courts would delve back into the merits test issue following Sabbagh v. Khoury.

The first such case was Judge Timothy Fancourt's first instance decision in PJSC Commercial Bank Privatbank v. Kolomoisky, dated Dec. 4, 2018. Judge Fancourt held that bringing a claim against an anchor defendant, even when properly arguable on the merits, amounted to abuse of Article 8(1) of Brussels Recast.

The Ananyev decision followed on Sept. 16, 2019. Judge Andrew Baker plainly confirmed that the Article 8(1) Brussels Recast gateway for EU defendants involved a merits test in relation to the claim asserted against the anchor defendant. And while he acknowledged Judge Fancourt's approach, he stated that there was no need consider it in the Ananyev case on the facts.

The Ananyev judgment was closely followed by the Court of Appeal's Kolomoisky judgment on Oct. 15, 2019, which overturned Judge Fancourt's decision and rejected the notion that Article 6(1) of the Lugano Convention was subject to a sole object test.

Background to the Tsareva v. Ananyev Case

In the summer of 2018, two separate groups of Russian claimants brought claims for fraudulent misrepresentation/torts of deceit and conspiracy against Dmitry Ananyev and Alexei Ananyev and a number of companies belonging to them in the English High Court.

The Ananyev brothers are prominent Russian businessmen with diverse business portfolios that included Technoserv, a large tech systems integration company, and a bank called Promsvyazbank, founded in 1995. By 2017, Promsvyazbank was the third largest privately owned bank in Russia by assets. However, by the end of 2017, Promsvyazbank's fortune had dramatically changed.

The claimants were existing customers of Promsvyazbank who purchased a series of loan notes issued in April 2017 and July 2017 by one of the co-defendants in the proceedings, Peters International (Cayman) Ltd. In December 2017, the Central Bank of Russia placed Promsvyazbank into administration, after Promsvyazbank failed to increase its reserves by $1.5 billion in two days at the CBR's request. As a result of this, the issuer and its two guarantors — co-defendants Promsvyaz Capital BV and Peters International Investment NV — defaulted on their loan note payment obligations in January 2018.

The claimants alleged that not only were the loan notes missold to them by Promsvyazbank's relationship managers, but that those relationship managers induced the claimants to purchase the loan notes by lying about the nature of the proposed investments. The crux of the allegations against the Ananyev brothers and their companies is that they conspired to defraud the claimants to enrich themselves and/or use that money to alleviate the alleged serious financial difficulties that Promsvyazbank had been experiencing.

Perhaps somewhat unconventionally, the claimants chose not to bring claims against Promsvyazbank or against the relationship managers themselves. Instead, they brought claims directly against the Ananyev brothers and their companies, including two that were incorporated in England.

Jurisdictional Gateways

The claims against the Ananyev brothers' English companies were brought by both sets of the claimants, with the intention of using the English companies as anchor defendants to establish the English High Court's jurisdiction over the matter, under the co-defendant jurisdictional gateways prescribed by Article 8(1) of the Brussels Recast Regulation for the EU co-defendants, and under Civil Procedure Rules Practice Direction 6B Paragraph 3.1(3) for the non-EU co-defendants.

One set of the claimants, the Galagaev claimants, also claimed that the English courts had jurisdiction under the tort gateways, as well as the contract gateway, with respect to non-EU defendants only. However, we primarily focus on the co-defendant gateways in this article.

In a nutshell, the purpose of the co-defendant jurisdictional gateways is to enable claimants to bring proceedings against defendants domiciled in different jurisdictions. For example, Article 8(1) of the Brussels Recast Regulation enables claimants to sue EU-domiciled defendants in the courts of a co-defendant's — i.e., the anchor defendant's — domicile, "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

The jurisdictional gateway in Civil Procedure Rules Practice Direction 6B Paragraph 3.1(3) similarly empowers claimants to bring claims against non-EU defendants in English courts, if there is a real issue that is reasonable for the court to try against the anchor defendant, and it is necessary or appropriate to bring non-EU defendants before the English courts as additional co-defendants.

In light of the fact that the claimants brought the claims against a combination of EU and non-EU defendants, they relied on both gateways. In response to these claims, the Ananyev brothers' English companies applied to have the claims struck out against them. The remaining defendants, with the exception of Alexei Ananyev, who had not yet been served with the claim form at the time, lodged their applications to challenge the jurisdiction of the English courts.

The Anchor Defendants

The English companies were a part of the corporate structure that held Promsvyazbank. Promsvyazbank's parent company was Promsvyaz Capital BV, the co-guarantor of the loan notes.

The English companies held 99.995% of the shares of Promsvyaz Capital BV; the remaining 0.005% was held by Menrela Ltd., a company incorporated in Cyprus. Up until the end of January 2018, the Ananyev brothers owned one of the English companies each. The ownership of Menrela was split between the two of them.

The claimants framed their claims in such a way that necessarily implicated the English companies in the Ananyev brothers' alleged wrongdoing, by virtue of their existence as intermediate holding companies alone. The claimants simply alleged that the sale of the loan notes necessarily involved concerted action between the Ananyev brothers and their co-defendants.

According to this initial stance, the English companies did not need to carry out any kind of "positive" act with respect to any alleged wrongdoing. The English companies' passive existence as intermediate holding companies was purportedly necessary to the facilitation of the fraud. But for the Ananyev brothers' direct ownership of the English companies, they would not have owned or controlled Promsvyazbank or its management, been in a position to effect the financing scheme or been able to procure the guarantee of the loan notes from Promsvyaz Capital BV.

Part way through the hearing, in an apparent volte face, the claimants advanced a different position. In addition to claiming that the English companies were the means by which the Ananyev brothers accessed Promsvyazbank's customers and instructed the relationship managers to market the loan notes to them, the claimants now argued that the English companies were not mere passive companies.

According to the claimants, the English companies must have taken particular steps and had an active involvement in the conspiracy, on the basis that it was arguable that Promsvyaz Capital BV must have received instructions in some form to provide the guarantee for the loan notes. The investors also maintained that the Ananyev brothers were the directing minds and wills of the English companies.

Decision

On Sept. 16, 2019, Judge Baker handed down the judgment in this case. He found that there was no proper basis for any of the claims — i.e., that they were hopeless — against the English companies, and he struck them out. This meant that the English companies could not be used as anchor defendants under either co-defendant jurisdictional gateway.

After finding that there was no jurisdiction against any of the EU or non-EU defendants under the tort gateways or the English contract gateway, Judge Baker held that none of the EU or non-EU defendants could be used as anchor defendants for the purpose of founding jurisdiction against non-EU defendants under Civil Procedure Rules Practice Direction 6B Paragraph 3.1(3), concluding that the court had no jurisdiction against the Ananyev brothers and the remaining defendants.

In reaching this decision, Judge Baker established early on that both the EU and non-EU co-defendant gateways involve a merits test with respect to the claims asserted by claimants against anchor defendants. While Civil Procedure Rules Practice Direction 6B Paragraph 3.1(3) contains express wording of the merits test — i.e., that there must be a real issue between the claimants and the defendants that is reasonable for the court to try — Article 8(1) of the Brussels Recast Regulation contains no such equivalent wording.

When considering the parameters of the merits test under Article 8(1) Brussels Recast Regulation, Judge Baker stated that the Court of Justice of the European Union made clear that Article 8(1) does not apply where the sole purpose of suing the anchor defendant was to remove the co-defendant. He also took into account the majority obiter view of the Court of Appeal in Sabbagh v. Khoury that Article 8(1) does not apply where there is a hopeless claim, or one that does not raise a serious issue to be tried, against an anchor defendant.

Judge Baker concluded that the claimants' claims against the English companies were not viable. First, he found that the English companies' passive existence as intermediate holdings companies in the Promsvyazbank corporate structure did not render them liable for the alleged wrongdoing of the other co-defendants, irrespective of whether the wrongdoing took advantage of the fact of that ownership. He confirmed that a positive act was required for the possibility of any liability to be found: The English companies must do something more than merely exist.

He similarly rejected the claim that English companies were necessary to the conspiracy simply because they were a part of the ownership structure of Promsvyazbank. He rejected the necessity submission on the basis that the English companies were not required to have any involvement in the process of marketing and selling the loan notes whatsoever.

Second, the claimants presented no evidence that the English companies themselves did anything with respect to the loan notes. Particularly, he recognized, when presented with the defendants' evidence, that the English companies' approval as the shareholders of Promsvyaz Capital BV was not needed by Promsvyaz Capital BV to become the co-guarantor of the loan notes.

In addition, even if their approval had been required, that would not have automatically meant that the English companies were privy to any misselling of the loan notes. To Judge Baker, it was plain that the English companies had no involvement in the issuance, sale or marketing of the loan notes.

Third, the assertion that the Ananyev brothers were the directive minds and wills of the English companies was meritless, because the claimant were contradicted by extensive evidence to the contrary. To him, it was "beyond sensible argument" that the English companies were passive asset-holding companies whose limited necessary functions were carried out by their directors, not the Ananyev brothers.

He concluded that there was no basis at all for the suggestion that the English companies might be liable to the claimants, finding that the claims against them were without foundation.

Brief History of Appeals in Tsareva v. Ananyev

One set of the Investors, the Tsareva claimants, sought permission to appeal Judge Baker's judgment in October 2019. Their application was rejected in November 2019 by Judge Julian Flaux, who found that Judge Baker was correct in concluding that there was no serious issue to be tried against the English companies.

He confirmed that Judge Baker correctly concluded that the English companies were not necessary for the operation of the conspiracy, and that there was no arguable case that the English companies sanctioned or approved Promsvyaz Capital BV's participation in the alleged conspiracy in any way.

After Judge Flaux rejected the claimants' application for permission to appeal, the Tsareva claimants sought permission to reopen the final determination of their application pursuant to Civil Procedure Rules 52.30. However, their final attempt was rejected on Feb. 7 of this year, and the proceedings had finally concluded.

Why the Ananyev Decision Is Important

As noted above, most of the academic discussion on anchor defendants outside of the courts has focused narrowly on the Kolomoisky judgment, because it confirmed (obiter) that Article 6(1) of the Lugano Convention is not subject to a sole object test. However, the Kolomoisky judgment also confirmed the threshold for the application of Article 6(1) of the Lugano Convention or its equivalent provisions, as it provided that a claimant with an unsustainable claim against an anchor defendant will not be entitled to rely on Article 6(1).

While Judge Baker's decision predates the Kolomoisky formulation of the merits test as the sustainable claim test, it applies this very test, nonetheless. The Ananyev decision is a prime example of a claimant bringing an unsustainable claim against anchor defendants.

As such, the importance of the Ananyev decision should not be overlooked: It is a recent, illustrative example of successful strikeout and jurisdictional challenge applications in the context of anchor defendants. It is a decision that provides an understanding of what an unsustainable or helpless claim against anchor defendants looks like in practice, making it a useful precedent in an area of law where there are still too few cases.

Notably, while both Queens Counsel Christopher Hancock, in Weco Projects, and Judge David Waksman, in Agusta Westland, referred to Kolomoisky, neither acknowledged Judge Baker's judgment in Ananyev — presumably because the parties did not point them to the said authority — notwithstanding the fact that Ananyev was the first English case to apply the merits test, thereby giving direct authority for its existence.

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Disclosure: The authors of this article represented the third, fourth and fifth defendants to the claim in the Ananyev matter.