could Mr. Mirza plead his own change of position – that he had spent the money in accordance with the bargain and could no longer give restitution?

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AUTONOMOUS CHARACTERISATION UNDER THE BRUSSELS I REGULATION RECAST

IN *Arcadia Petroleum Ltd. v Bosworth* [2016] EWCA Civ 818, three companies in the Arcadia Petroleum Group sued their de facto CEO and CFO and others in England for siphoning off money for their own benefit. One of the companies was incorporated in England, the others in Singapore and Switzerland. The companies claimed for unlawful means conspiracy, breach of fiduciary duty, dishonest assistance and knowing receipt. Could these claims all be litigated in England under the Lugano Convention, which allocates jurisdiction to determine disputes among the members of EFTA (the provisions at issue are identical to those of the Brussels I Regulation (No 44/2001) applicable in the EU)? The conclusion depended on whether the claims related to a contract of employment, or were contractual or were tortious. Each characterisation led to a different court with jurisdiction. The Court of Appeal held that mostly they could be litigated in England; only those for breach of fiduciary duty arising during the period of the directors' employment could not.

Directors have a contradictory relationship with their companies. They manage the company's business as the embodiment of the company. English company law imposes fiduciary duties to control directors' misbehaviour. Directors may also be employees of the company taking the benefit of employment protections drafted to protect weaker parties. Those contradictions are carried through into the Lugano Convention (2007 OJ L 339/3), Brussels I Regulation (Regulation 44/2001 2001 OJ L 12/1) and to the almost identical provisions of the Brussels I Regulation Recast (Regulation 1215/2012 2012 OJ L 351/1). For convenience, this note refers to the Articles as numbered in the Recast Regulation rather than the Lugano Convention/Brussels I Regulation.

The defendant directors made all the strategic decisions of the companies, including moving themselves and the business to Switzerland. Nevertheless, they wanted the benefit of the special protective rules of jurisdiction for employees in Article 22. They argued the claims were related to their individual contracts of employment and therefore could only be brought in Switzerland. The companies countered by arguing that the claims fell into the special rules of jurisdiction for torts permitting proceedings in a court other than the domicile of the defendants (Article 7(2)).

None of the parties argued for a contractual characterisation (Article 7(1)). At first instance, Burton J. had drawn a distinction between the claims for conduct occurring while the defendants were employed as directors of the particular company making the claim and those which were made for conduct occurring outside that temporal relationship. The former were related to the employment contract and the latter were not. The defendants appealed the latter decision.

Characterisation of the claim into one of the grounds of jurisdiction under the Brussels I Regulation is autonomous – that is, independent of national law. In principle, clever use of the flexible approach to pleading claims in England cannot be permitted to circumvent the characterisation in order to give the claimant a preferred court. It can be difficult to predict how the autonomous characterisation will be done. The Court of Justice of the European Union (CJEU) has adopted a contractual characterisation where there is no actual contract between the parties to the litigation provided that there is a relationship in which obligations have been voluntarily consented to (Case C-9/87, *Engler*; Case C-419/11, *Česká spořitelna a.s.*; Case C-366/13, *Profit Investment v Ossi*). But it has also held that a tortious characterisation is possible despite the existence of a contract where the claim has been founded in a legal obligation imposed by law (Case C-147/12, *ÖFAB v Koot*). None of these cases was cited in *Arcadia.* However, *Holterman Ferho Exploitatie BV v Spies von Bullesheim* (Case C-47/14) and *Brogsitter v Fabrication de Montres Normands* (Case C-548/12) were discussed. In those cases, the CJEU made the contractual characterisation primary with the tortious characterisation of a claim being residual. A claim is tortious only where the claim does not fall within the autonomous definition of a matter relating to a contract. In *Holterman Ferho*, the CJEU also decided that an action against a director for misconduct in the performance of his duties could be related to his contract of employment. If he was in a position of subordination to the company, he was an employee. If he was, as a shareholder, able to influence the company's administrative body, the director was possibly not an employee – in which case, the claim did not relate to the contract of employment, but was contractual. The Court of Appeal in *Arcadia*, however, decided similar claims to be tortious, and neither relating to the employment contract nor to a contract.

The defendants had argued that, if a claim *could* be pleaded as a breach of employment contract, it could not be shaped into another jurisdictional rule by means of pleading. The employment relationship has precedence. However, Gross L.J. rejected that argument as mechanistic and potentially too wide. He asked, first, what was the "reality and substance" of the conspiracy claims (*Petter v EMC Europe Ltd.* [2015] EWCA Civ 828)? The mere fact of the existence of a contract of employment does not suffice. Secondly, there must also be a "material nexus between the conduct

complained of and those contracts" (Davis L.J. in *Alfa Lava Tumba v Separator Spares International* [2012] EWCA Civ 1569). Thirdly, can "the legal basis of the claims reasonably be regarded as a breach of contract so that it is indispensable to consider those contracts in order to resolve the matter in dispute" (*Brogsitter v Fabrication de Montres Normands*)? Gross L.J. concluded that the defendants' fraud arose out of their roles, not their contracts. Some of them did not have contracts of employment with the claimant companies. The nexus between any contracts of employment and the claims was tenuous. The contracts were not material, let alone indispensable to the resolution of the claims for conspiracy. However, Gross L.J. went on to conclude that the fiduciary-duty claims relating to the conduct for the time they were employed had a "material nexus" to the employment contract and therefore fell within Article 22 and could not be disputed in England (following *Holterman Ferho*).

In conclusion, all the claims for conspiracy, dishonest assistance and knowing receipt did not relate to the employment contracts, but were tortious. These claims could therefore be disputed in England under the special rules of jurisdiction. That might not surprise the reader. The legal basis for the claims in English law is not contractual. By carefully pleading in tort, the claimants had a considerable advantage of suing in England. On the other hand, the fiduciary-duty claims relating to the conduct for the time the directors were employed were related to the employment contract. Those had to be litigated in Switzerland. That is strange. The legal basis of the claims for breach of fiduciary duty, just as those for the other claims at issue, does not depend on the directors' employment relationship. Directors do not even have to have been properly appointed to be subject to fiduciary duties. In reality, the claims all arose out of the relationships the directors had with the companies. These relationships are voluntary and give rise to obligations. Some of those relationships were formalised by employment contracts and some were not. It would be more consistent to conclude that either all the claims were related to the contracts of employment or none of them was. If they were not related to the contracts of employment, the claims surely were all contractual, not tortious, for the purposes of jurisdiction under the Brussels I Regulation Recast. The claims arose out of a relationship between the parties under which obligations were freely assumed (*Česká, Profit Investment v Ossi* and *Holterman Ferho*). Regrettably, some of the CJEU cases that indicate the error of its conclusion were not brought to the attention of the Court of Appeal.

In any event, Gross L.J. swept aside all the complexities by concluding that over-elaboration is to be guarded against. To the Court of Appeal, the characterisation of the claim is determined by the reality and substance of the matter. It is apparently to be decided as a matter of fact. The CJEU also espouses a factual characterisation of claims. That is disingenuous. Characterisation cannot be merely a matter of fact. Both contract and tort

characterisations require some *obligation* either voluntarily assumed (for contract) or imposed by law (for tort) in order for the rules of the Regulation to operate. The obligation is a creature of law. Although the legal rules are not tested at the jurisdictional stage, they are not irrelevant. The manner in which a claimant frames a claim before a national court has to take into account that legal context. Therefore, the final decision on characterisation for the purpose of jurisdiction is likely to continue to be difficult to predict.

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THE ALCOHOL (MINIMUM PRICING) (SCOTLAND) ACT 2012 AND THE COLLISION BETWEEN SINGLE-MARKET OBJECTIVES AND PUBLIC-INTEREST REQUIREMENTS

THE recent and high-profile decisions of the Court of Justice (Case C-333/14, ECLI: EU:C:2015:845) and of the First Division of the Inner House of the Court of Session ([2016] CSIH 77) in *The Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland* have shed further light both on the role of national courts in cases where Member States invoke the protection of public health to justify derogations from the TFEU provisions on the free movement of goods and on the application of the proportionality test. The model of free movement provided in the Treaty is not one that guarantees an entirely untrammelled freedom of trade across the EU or the automatic precedence of common-market objectives. While Article 34 TFEU provides for the removal of national obstacles of a non-fiscal nature, Article 36 TFEU allows Member States, in the absence of harmonisation, to argue a number of public-interest grounds to justify national measures that, in principle, contravene Article 34 TFEU. The protection of public health ranks very prominently in this list of interests. However, although it is for the Member States to decide the appropriate level of health protection that they wish to ensure (C-174/82, *Sandoz* [1983] E.C.R. 2445), the national action must be proportionate and national authorities must select the action that is the least restrictive of intra-Union trade (Case 40/82, *Commission* v *UK* [1984] E.C.R. 283). The outcome in *The Scotch Whisky Association* case has highlighted the difficulties involved in choosing among alternatives the least restrictive measure that would achieve the public-health objectives of the national legislation. Moreover, it has demonstrated clearly, in these difficult times for the EU, that EU law can be interpreted and applied to safeguard sensitive national policies.