

The English Commercial Court Rejects Application to Set Aside Service out of the Jurisdiction in Fraud Claim Against Indian Financial Group

21 June 2023

INTRODUCTION

In [Manek & Ors v 360 One WAM Ltd \[2023\] EWHC 710 \(Comm\)](#), Simon Rainey KC (sitting as High Court judge) dismissed an application to set aside service of proceedings out of the jurisdiction, and rejected the applicants' arguments that: (i) the respondents' claims lacked any realistic prospect of success; and (ii) the respondents breached their duties of full and frank disclosure.

The judgment includes noteworthy legal analysis relating to Article 4(1) of Regulation No 864/2007 ("Rome II"), and the application of the English limitation rules. We explore the Court's reasoning in respect of these provisions below.

BACKGROUND

The decision is the latest in a major fraud claim concerning the sale of minority shares in an Indian company, Hermes i-Tickets Pte. Ltd ("Hermes"). The minority shareholders claim that they are victims of a fraud which resulted in them selling their shares at a significant undervalue. The Claimants advance four causes of action against the Indian financial group IIFL Wealth, its co-founder Amit Shah, and the former majority owners of Hermes ("Original Defendants"). We have written about this case in a previous post [here](#).

The Claimants allege that the Defendants are vicariously liable for deceit, intimidation and conspiracy committed by the Original Defendants. In June 2022, Foxton J granted *ex parte* permission to the Claimants to serve proceedings on the Defendants out of the jurisdiction.

The Defendants applied to set aside service on grounds that: (i) the Claimants' claims had no realistic prospect of success as they were time-barred; and (ii) the Claimants had

breached their duty of full and frank disclosure. The decision is notable for grappling with an issue of limitation at a summary stage which is unusual in a major fraud case.

JUDGMENT

No Realistic Prospect of Success

The Defendants argued that the Claimants' claims were time-barred, and thus the Claimants had no realistic prospect of success.

In order to determine this issue, the Court first considered whether the applicable law would be English, or Indian, law. If the English Limitation Act 1980 ("LA 1980") applied, the Claimants would have to establish that they did not discover and could not with reasonable diligence have discovered the fraud and the involvement of the Defendants in it before 16 February 2016. If Indian law applied, the relevant date would be later.

Indian or English law? (Article 4 Rome II)

The Court first noted that the question of applicable law to the torts alleged by the Claimants is governed by Article 4 Rome II.¹

The Defendants contended that the place of direct damage was India (Article 4(1) Rome II), but in any case the application of Article 4(2) Rome II, which focuses on the law of the jurisdiction where both the person alleged to be liable and person sustaining damage have their habitual residences at the time when damage occurs, would also lead to the application of Indian law.

Conversely, the Claimants argued that Article 4(1) Rome II would lead to the application of English or UAE law, but in any case, Article 4(3) Rome II, which applies the law of the country which is manifestly more closely connected with the tort other than countries indicated by Articles 4(1) or 4(2) Rome II, would point to England rather than any other country.

The Court approached the application of Article 4(1) Rome II as follows:

- Under Article 4(1), the relevant exercise was "to identify and locate the outward consequences of the defendant's conduct—or of an event for which the defendant is claimed to be legally responsible—and then to treat as the relevant "damage" those

¹ Rome II is retained in retained in English law in amended form by virtue of section 3 of the European Union (Withdrawal) Act 2018 and the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (reg 11).

consequences which are closely and foreseeably linked to that conduct etc., which are in some sense irreversible and which do not simply reflect or follow from other consequences occurring in another country”.

- The Court held that where a claimant was first induced to enter into an unfavourable transaction by reason of a defendant’s representation, the claimant suffers damage at the point and place where he concludes the transaction. In this case, for example, key meetings took place in London, at which a series of misrepresentations were made and the Claimants had thereafter entered into the SPAs which bound them to transfer and hand over the shares. This pointed the Court towards England as an appropriate jurisdiction.
- It did not matter that the “irreversible” point where damage can be said to have happened as a result of the Defendants’ representation occurred later in India, where the shares were registered in the name of GIR.

However, the Court was ultimately convinced by the Claimants’ submission that the most critical events in the commission of the deceits or the “*centre of gravity of what was done*” took place in England and that the application of Art 4(3) pointed to England “*in all the circumstances of the case*”.

Accordingly, the Court held that English law should apply. It was therefore necessary to consider s.32 LA 1980 to determine whether the Claimants had any realistic prospect of success.

Application of s.32 LA 1980

The Claimants were required to establish that they had a realistic prospect of establishing at trial that they did not discover and could not have discovered the fraud and the Defendants’ involvement in it before 16 February 2016, such that the claims were still within the six-year limitation period.

The Court adopted the approach in *OT Computers Ltd (in liquidation) v Infineon Technologies AG* [2021] QB 1183, and highlighted three practical questions to ask in this case:

- (i) When should the Claimants have been put on notice of the need to investigate the Hermes transaction?
- (ii) What steps thereafter could they and should they have taken to investigate matters further?

(iii) In terms of a pleadable case in respect of each tort and each defendant (as defined above), what would those steps have shown and when?

The significance of (i) is to objectively identify the earliest time the Claimants should have been put on notice to investigate the fraud. The importance of (ii) and (iii) is to identify the reasonable steps that the Claimants should have taken to have discovered the fraud upon being put on notice, and considering these steps, the earliest point that the Claimants could have discovered the fraud.

As to (i), the Court concluded that the Claimants were put on notice of the need to investigate the transaction no earlier than 27 November 2015. This was when the Wirecard purchase of Hermes was publicly announced.

As to (ii) and (iii), while the Court took the view that there was a strongly arguable case that there was nothing the Claimants could have done in the three months between 27 November 2015 and 16 February 2016 that would have revealed the information upon which they now rely to allege that the Defendants were involved in the fraud.

In reaching this conclusion, the Court had regard to the fact that *specific evidence* which would have been needed to establish that the Defendants were vicariously liable for the actions of the Original Defendants could not have been available by 16 February 2016 even if the Claimants had conducted reasonable investigations.

For these reasons, the Court rejected the Defendants' argument that the Claimants' claims had no realistic prospect of success. The denial of permission to serve out of the jurisdiction was therefore upheld.

KEY TAKEAWAYS

The legal analysis of the court is noteworthy in two respects:

- The English courts have accepted that a “place of damage” under Art 4(1) Rome II can be based on an event where there has been some outward manifestation of damage, even if the point of “irreversible” damage occurs later.
- When identifying the earliest point that a claimant could have come into relevant information after taking reasonable investigations under s.32 LA 1980, the court will only consider information that would support the claimants' *specific allegations* against the defendants in the proceedings.

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Please do not hesitate to contact us with any questions.

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