

HAS THE TROUBLESOME ISSUE OF DETERMINING JURISDICTION FOR CLAIMS WHICH RELATE TO ECONOMIC LOSS FINALLY BEEN RESOLVED?



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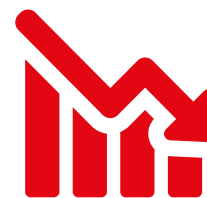
In the matter of *Kwok Ho Wan and others v UBS AG (London Branch)* [2022] EWHC 245 (Comm), Mrs Justice Cockerill has held that the English courts have jurisdiction to hear various claims which relate to economic loss because London was the place where the loss manifested itself from the relevant transaction. In doing so, she has helpfully confirmed that the place where the loss manifested is the crucial factor for the English courts when determining whether they have jurisdiction for claims which relate to economic loss.



Background

The parties were involved in a share purchase in a Chinese financial institution named Haitong for US\$1.25 billion (“**the shares**”). The parties made various agreements to implement the share purchase which included a “Co-Investment Agreement” followed by a “Letter Agreement” in December 2014 (both of which were executed in Shenzhen, China).

The net-result was that in May 2015, the shares were purchased for US\$1.25 billion by the third claimant, Dawn State Limited (“**Dawn State**”), which was owned by a third party, Haixia. The purchase was funded by the first claimant, Mr Kwok, through the second claimant, Ace Decade Holdings Limited (“**Ace Decade**”), providing US\$500 million and the defendant, UBS AG (London Branch) (“**UBS**”), providing a loan facility of US\$750 million. The shares allotted to Dawn State were assigned to UBS as security and then deposited in a secured account in London (“**the secured account**”). UBS is domiciled in Switzerland. Mr Wong of UBS advised the claimants on the structure of the investment.



Loss

In July 2015, there was a collapse in the Chinese stock market which meant that the value of the shares significantly declined. This triggered provisions in the various agreements which entitled UBS to enforce its security by liquidating the shares. UBS subsequently remitted US\$4.7 million to Dawn State after paying its fees & charges.



Claims

The claimants allege that UBS breached its duty of care to them by making negligent misstatements about the various financial arrangements which Ace Decade relied upon when purchasing the shares. On 29 May 2020, the claimants issued proceedings against UBS in the English courts claiming the following losses:

- i) The loss caused by Ace Decade's entry into the transaction less the amount recovered which equated to US\$495 million.
- ii) The loss caused by Ace Decade's failure to withdraw from the transaction which also equated to US\$495 million minus the fees which would have been payable to Haixia.
- iii) The lost returns which would have been achieved by Ace Decade if it had invested in the shares using a different structure.



Lugano Convention

The Lugano Convention applied to this matter, as under the UK-EU Withdrawal Agreement, the Lugano Convention applies to proceedings which have commenced before 31 December 2020.

The Lugano Convention and the Recast Brussels Regulation receive an autonomous interpretation. In relation to jurisdiction, the general rule under the Lugano-Brussels scheme is that a defendant should be sued in their state of domicile. The purpose of the exceptions in Article 5 of the Lugano Convention is to vest special jurisdiction on courts which have a particularly close connection to the dispute other than the courts of the defendant's domicile.

The parts of Article 5 that were relevant to this matter were:

- i) Article 5(3) "the courts for the place where the harmful event occurred or may occur."
- ii) Article 5(5) "arising out of the operations of a branch..."

UBS challenged the jurisdiction of the English courts in relation to the claims made by Mr Kwok & Ace Decade by relying on the general rule that the claims should be determined by the Swiss Courts. Mr Kwok & Ace Decade argued that the exceptions in Article 5(3) & Article 5(5) were applicable to the claims.



Decision

In her judgment, Mrs Justice Cockerill determined that both Article 5(3) & Article 5(5) were applicable to the claims which meant that the English courts had jurisdiction. This article has focused on the rationale for her findings concerning Article 5(3).

Mrs Justice Cockerill noted that the authorities for determining the jurisdiction of pure economic loss cases were "less than entirely clear".

UBS argued that there was a general rule in English law that in a case of negligent misstatement, the loss must occur at the place where the negligent misstatement was received and relied upon by the party suffering the loss. Mrs Justice Cockerill determined that the authorities which support this rule concerned cases of non-contingent loss which crystallised upon a party's immediate entering into of an agreement following the negligent misstatement. The authorities were therefore not applicable to this matter, as the value of the shares could have either increased or decreased at the time that the claimants relied upon the alleged negligent misstatements.

Mrs Justice Cockerill therefore reviewed the relevant European jurisprudence and summarised that

where receipt, acting, and loss were not contemporaneous, it is difficult to provide a clear rule for determining jurisdiction. However, she considered that there were two clear points which the European jurisprudence had established:

- i) It was the manifestation of loss from the transaction that was relevant to jurisdiction and not the transaction itself that ultimately led to the loss. Manifestation is more likely to be connected to crystallisation of the loss than the origins of the transaction, in cases where there is a difference. Together, this is the "manifestation test".

Applying the manifestation test to this matter, Mrs Justice Cockerill determined that the loss of Mr Kwok & Ace Decade was when the shares in the secured account reduced in value. This loss then manifested & crystallised in London when the shares were liquidated by UBS.

- ii) When attributing jurisdiction, the courts must also consider the specific circumstances which demonstrate the proximity between the action and the jurisdiction, and the foreseeability of that jurisdiction for the parties. Those circumstances must include the factors that help facilitate the sound administration of justice, as well as the factors that may help the parties determine where they should institute proceedings or where they might be sued because of their actions. These are known as the "specific circumstances" which derive from the case of *Vereniging van Effectenbezitters v BP plc, Case C-709/19*.

Applying the specific circumstances to this matter, Mrs Justice Cockerill determined that the secured account was in London as this was the place where all the parties had agreed that the shares would be held. All the contractual documents that UBS had entered were in English and governed by English law. It was therefore completely foreseeable to all the parties, particularly UBS, that they might sue or be sued in the jurisdiction of England in relation to the shares.

