Claims against directors under the Brussels Regulation

The ECJ has recently considered when the special employment jurisdiction rules in the Brussels Regulation will apply to claims against directors. Andrew Taggart, Anna Pertoldi and Donny Surtani consider the implications

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'The ECJ held that if there was a contract of employment between Mr Spies and Holterman, the employment provisions in the Brussels Regulation applied.'

In *Holterman Ferho Exploitatie BV v Spies von Büllesheim* [2015], the European Court of Justice (ECJ) has considered a number of jurisdiction questions that are relevant to companies both when drafting contracts of employment and considering claims against directors. It may also be relevant in the context of shareholder agreements.

The case first considers when a director is an employee for the purposes of the Brussels Regulation, which requires a relationship of subordination between the director and the company. That will not be the case where the director can influence that relationship, for example by reason of having a shareholding in the company.

Where a director is also an employee, the case goes on to hold that the special jurisdiction rules in the Brussels Regulation for employment-related claims apply, even if the claims brought against the director are framed as breaches of company law. In practical terms, this means that the director is entitled to be sued in their EU domicile and the company will not be able to sue in other jurisdictions on the basis of the usual jurisdiction rules on contracts and torts. This has particular significance where a company wishes to bring proceedings alleging breaches of company law against a number of directors – each will be able to insist on proceedings in the courts of the member state of their own domicile, which will increase costs, management time and the risk of inconsistent judgments. It may be possible to avoid this outcome by including an arbitration agreement in the contract of employment, but whether this would be effective in all circumstances remains untested.

The decision does not, unfortunately, give any general guidance on what claims will be considered to be 'matters relating to employment', a question which has caused considerable uncertainty in English law. In the opinion of the advocate general, for the employment provisions to apply, the claim must derive from the contract of employment in the sense of being considered a failure to perform obligations deriving from the contract. The ECJ does not, however, address this. Further consideration of the issue and guidance may be forthcoming in 2016 with the hearing of the appeal in *Arcadia Petroleum Ltd v Bosworth* [2015].

Overview of the Brussels regime

The general rule under the Brussels Regulation (No 44/2001) is that defendants should be sued in the courts of the member state where they are domiciled. There are additional specific jurisdiction rules under the Brussels Regulation for 'matters relating to a contract' and 'matters relating to tort' (articles 5(1) and 5(3) respectively), which provide alternative jurisdictions in which to bring proceedings.

There are also special jurisdiction rules which apply to employment contracts to protect the employee as the weaker party to the contract (s5, articles 18-21 of the Brussels Regulation). Article 20 permits an employer to bring proceedings against an employee only in the courts of the member state where the employee is domiciled.

The Brussels Regulation has been replaced with the Recast Brussels Regulation (No 1215/2015), which applies to proceedings commenced on or after 10 January 2015. While the special provisions on claims against employees remain materially the same under the Recast Brussels Regulation, a significant change is that non-EU employers have been brought within the Brussels regime.

Facts of the case

Mr Spies von Büllesheim, a German national, resident in Germany, was a director and employee of Holterman Ferho Exploitatie BV, whose registered office is in the Netherlands. Mr Spies was also a director of three German subsidiaries of Holterman and performed his duties largely in Germany. Additionally, he was a shareholder of Holterman.

Subsequently, Holterman and its subsidiaries dismissed Mr Spies and brought proceedings against him in the Netherlands alleging breach of contract and breach of his duties as a director under company law. Relying on the employment provisions in the Brussels Regulation, Mr Spies argued that he should be sued in Germany, where he was domiciled. Holterman (on behalf of itself and its subsidiaries), on the other hand, argued that in respect of Mr Spies' breach of his statutory director's duties, the general contractual jurisdiction ground in article 5(1) (and not the special employment provisions in articles 18-21) should apply. Holterman further argued that the courts of the Netherlands had jurisdiction because his director's duties should be deemed discharged in the place where the company was incorporated.

Court decision

The ECJ held that if there was a contract of employment between Mr Spies and Holterman, the employment provisions in the Brussels Regulation applied and precluded the application of any other potentially relevant provisions, including the general contractual jurisdiction ground in article 5(1) and the tort ground in article 5(3).

As to whether there was such a contract of employment, this was for the national court to determine, applying the principles established in EU case law. The ECJ said a key consideration would be whether there was the necessary relationship of subordination between Mr Spies and Holterman. If Mr Spies' ability to influence Holterman when it gave him instructions and monitored their implementation turned out not to be negligible (for example because he was a shareholder), it would be appropriate to conclude that he was not an employee as a matter of EU law.

The court went on to hold that if Mr Spies was not an employee, then claims based on breaches of company law would come within the concept of 'matters relating to a contract' in article 5(1). Any claims which fell outside article 5(1) could come within article 5(3).

In remitting the matter back to the national court on this basis, the ECJ neither adopted nor refuted the advocate general's opinion on what claims will be deemed 'matters relating to employment'. The advocate general had suggested the claim must derive from the contract of employment in the sense of being considered a failure to perform obligations deriving from the contract. However, the ECJ made no reference to this issue in its judgment.

Implications for claims against whole boards

The ECJ's decision that claims for breach of company law duties need to be brought in the courts of the member state of a director's domicile if that director is also an employee raises a problem it may be significantly more difficult to bring claims efficiently against whole boards of directors (for example for a collective failure to exercise proper care in relation to a particular act or decision).

Article 6(1) of the Brussels Regulation provides that if there are several EU domiciled defendants, proceedings may be brought against them in a single place where any of them is domiciled (the 'necessary and proper party' rule). However, the ECJ in *Glaxosmithkline v Rouard* [2008] and the Court of Appeal in *Alfa Laval Tumba AB v Separator Spares International Ltd* [2012] have held that the special jurisdiction rules in s5 take precedence over article 6(1). These decisions, coupled with Holterman, suggest that where a company seeks to sue a number of its directors (who are also employees), it will have to bring concurrent proceedings in different jurisdictions. This is likely to result in increased costs and the risk of inconsistent judgments. However, EU domiciled directors who are not employees (such as non-executive directors) may be joined to proceedings outside the country of their domicile under article 6(1). Further, non-EU defendants may be joined by relying on the 'necessary or proper party' gateway under the common law rules.

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Under the Recast Brussels Regulation, the provisions of s5 have been made subject to article 8(1) (which is the corresponding provision to article 6(1) of the Brussels Regulation). However, article 8(1) only applies to proceedings initiated against an employer (and not against an employee), so the position will not be any different for claims against employees under the Recast Brussels Regulation.

Implications for claims under shareholder agreements

The applicability of the special jurisdiction rules in s5 depends on whether it is a matter relating to an individual contract of employment. However, it is not clear whether claims with merely indirect links to employment, for instance claims under shareholder agreements, could be considered matters to which the special jurisdiction rules apply.

This question has received mixed treatment from English courts. The Court of Appeal in *Alfa Laval* found

Key points

The key points to take away from *Holterman* are:

- 'employee' is given an autonomous meaning under EU law;
- for a director to be an employee, there must be a sufficient level of subordination;
- if the director is an employee, they are entitled to be sued in their domicile over matters relating to their employment, which will include breaches of company law;
- uncertainty remains over exactly what claims will come within the employment provisions;
- claims in different jurisdictions may be required where whole boards are sued and directors are domiciled in different EU countries; and
- options to arbitrate may become more popular in contracts with directors.

claims against an employee for breach of copyright and misuse of confidential information were matters relating to an individual contract of employment, even if such claims were framed as tort claims. The test proposed by the Court of Appeal (per Longmore LJ) was: 'do the claims made against an employee relate to the individual's contract of employment?' It said this was 'a broad test which should be comparatively easy to apply'. It referred to an indication by Sir Andrew Morritt (the Chancellor of the High Court) in argument that (without proposing a test of any kind):

> It might in many cases be helpful to ask whether the acts complained of by the employer constitute breaches of contract by the employee. If so, the claims would be likely to 'relate' to the contract of employment. If not, not.

In *Arcadia*, the High Court (Burton J) considered jurisdiction over, among other things, claims for conspiracy against former employees of the claimants. It referred to the question suggested by the Chancellor, but indicated that it was 'not to be a test of any kind' and:

> Even if the question were asked, it was at most the case that if the acts complained of constituted a breach of contract, then they were likely to relate to the contracts of employment, not that they must do so.

It held that the substantive claim was a tortious claim of conspiracy and did not relate to the individuals' contracts of employment. That decision is subject to appeal, due to be heard next year.

As discussed above, the ECJ in *Holterman* does not, unfortunately, provide any guidance on what, if any, connection there needs to be between the employment contract and the subject matter of the claim. A shareholder-director might, for example, breach a covenant in a shareholders' agreement which is not part of their employment law duties (such as a provision that if certain profit targets are not met, they will not exercise voting rights at directors' or shareholder meetings). It is not clear whether this would be treated as an ordinary contractual matter or an issue sufficiently linked to their employment to activate s5 of the Brussels Regulation. The issue may be particularly acute if the shareholders' agreement dispute is part of a wider factual narrative which culminates in the director's suspension or dismissal.

In the absence of a clear understanding of what claims may be construed as 'matters relating to individual contracts of employment' – which may lead to the potentially wide application of s5 – evasive defendants could simply resort to forum shopping. In other words, they could shift their domicile to a member state with slow court timetables or backlogs to frustrate the claims being brought against them.

Better off arbitrating?

The uncertainty associated with the applicability of the s5 provisions to claims against whole boards and claims under shareholder agreements may lead to arbitration clauses in contracts with directors becoming increasingly popular. While there is no general prohibition on arbitrating employment-related disputes, arbitration clauses cannot be used to contract out of employment protection legislation. (See, for example, s203(1)(b) of the Employment Rights Act 1996 and, in the discrimination context, the High Court decision in *Clyde & Co LLP v Krista Bates van Winkelhof* [2011].) Further, although the Brussels Regulation explicitly states that it does not apply to matters relating to arbitration, it would be interesting to see how the ECJ would deal with an employer seeking to avoid s5 by using an arbitration clause.

When contemplating claims against whole boards, arbitration clauses would need to be suitably worded to enable a company to pursue claims against multiple directors in a single arbitration (and to cover non-contractual claims). But if that can be done, then despite *Holterman*, it is likely that an arbitral tribunal would accept jurisdiction to hear an employer's claims against directors for breaches of company law or shareholders' agreement provisions. Any award rendered would be likely to be enforceable in a large number of jurisdictions with limited court scrutiny, under the 1958 New York Convention. However, if the arbitral tribunal's decision on jurisdiction was challenged before a member state court, or if an employee sought an anti-arbitration injunction on public policy grounds, the courts would again have to grapple with the question: just how wide is the scope of s5 of the Brussels Regulation intended to be? ■

Alfa Laval Tumba AB & anor v Separator Spares International Ltd & ors [2012] EWCA Civ 1569

Arcadia Petroleum Limited & ors v Bosworth & ors [2015] EWHC 1030 (Comm)

Clyde & Co LLP & anor v Krista Bates van Winkelhof [2011] EWHC 668 (QB)

Case C-462/06 *Glaxosmithkline & anor v Rouard* [2008] ECR I-03965

Case C-47/14 *Holterman Ferho Exploitatie BV & ors v Spies von Büllesheim* [2015] ECJ (Third Chamber), 10 September