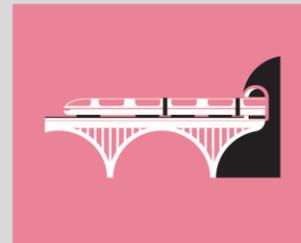


Home or Away?

Jurisdictional issues in claims relating to overseas property

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The Scenario: Facts

- Clare and Donatella want to buy a house in Italy
- C lives in the UK, D in Italy
- They agree:
 - The property will be registered in Italy in D's name
 - C will pay the deposit of €10,000
 - D will find tenants, collect the rent and maintain the property
 - Any profit will be shared 50/50 between C and D
- Ten years go by...
- C notices that she hasn't received any payments
- D says that all the rent was eaten up maintaining the property
- C says she doesn't believe her, and wants to sell and get out
- D says that the €10,000 was a loan and that property is 100% hers



The Scenario: Claims

- C wants to issue claims for
 - An account
 - Disgorgement of profits
 - A declaration as to the beneficial ownership
 - An order for sale
- By this time, both C and D are permanently resident in the UK
- For each claim:
 - Where can it be issued?
 - Where should it be issued?



The Brussels I Regulation

- Italy and (for now...) the UK are EU member states
- So the jurisdiction rules are set out in EU Regulation 1215/2012, as amended by EU Regulation 542/2014 ('the Brussels I Regulation').

Article 24

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

- (1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.



Proceedings which have as their object rights in rem

- Think about it free from authority...
- What is the “object” of proceedings?
 - Remedy against party sued?
 - Declaration of rights against the world?
- What are “rights in rem”?
 - Right for a declaration as to beneficial ownership?
 - Right to order for sale?
 - Right to proceeds of sale?
 - Right to profits generated by use of a property?



The old authorities: (1) Webb v Webb

- Webb v Webb (EU Case C-294/92) under previous regulation
- Father and son both domiciled in UK
- Father wanted to buy flat in France, but registered in son's name
- Father applied to English High Court for
 - declaration that that the son held the property for him as trustee and
 - an order that the son should execute such documents as should be required to vest legal ownership of the property in the father.
- Son challenged jurisdiction, relying on forerunner of article 24(1)



The old authorities: (1) Webb v Webb

- High Court held
 - the proceedings do not have as their object rights in rem. They have as their object the establishment of the defendant's accountability as a trustee for the plaintiff
- Son appealed to Court of Appeal
- Scott LJ and Taylor LJ would have dismissed the appeal
 - the 'object' of this action was the enforcement of rights in personam arising out of the arrangements made between the plaintiff and the defendant and not 'rights in rem'
- Nourse LJ would have allowed the appeal
 - I think it clear that the 'object' of this action, by which is meant its subject matter, is a right in rem in immovable property
- Court of Appeal therefore made a reference to the ECJ



The old authorities: (1) Webb v Webb

- The son, supported by the Commission, made a sensible suggestion:
 - the test...is the plaintiff's ultimate purpose and...by his action the father is ultimately seeking to secure ownership of the flat
- ECJ rejected this on two grounds:
 - The aim of the proceedings...is to obtain a declaration that the son holds the flat for the... benefit of the father and that in that capacity he is under a duty to execute the documents necessary to convey ownership of the flat to the father. The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights as against the son. Consequently, his action is not an action in rem...but an action in personam.
 - the conferring of exclusive jurisdiction...is justified because actions concerning rights in rem in immovable property often involve disputes frequently necessitating checks, inquiries and expert assessments which must be carried out on the spot...the immovable nature of the property held in trust and its location are irrelevant to the issues to be determined in the main proceedings which would have been the same if the dispute had concerned a flat situated in the United Kingdom or a yacht.
- So it seems that an action for a declaration that A holds a property on trust 100% for B is not an action which has as its object rights in rem



The old authorities: (2) Prazic v Prazic

- Prazic v Prazic [2006] EWCA Civ 497 under old regulation
- Husband was domiciled in France, wife (following separation) in UK
- Wife applied to English County Court under TLATA 1996 for
 - A declaration that she was the equal owner in equity of two London flats
 - A tracing order in relation to the proceeds of sale of a property in Essex
- Husband challenged the jurisdiction of the English Court; wife relied on Article [24]
 - DDJ Morris found for husband; High Court for wife; husband appealed to CoA
- Thorpe LJ and Law LJ unanimously allowed appeal
 - Counsel below were heavily criticised for not citing Webb
 - The claim “in relation to the long since departed Essex home...cannot conceivably be said to be an action in rem”
 - “in relation to the other two properties all that is really in issue is whether the dealings between the parties result in the creation of an equitable interest. It matters not where the property itself is situated and, accordingly, it matters not where the issues between the parties, the issues of fact, are to be tried out. There is nothing in that dispute that requires any on-the-spot investigations or enquiries.”



The recent authorities: (1) Komu v Komu

- Komu v Komu EU Case C-605/14 under previous regulation
- Five Finns owned a house in Spain in unequal shares
- The claimant co-owners brought a claim in Finland for an order for sale
- Defendants challenged jurisdiction, relying on Article [24]
- Finnish District court held it did have jurisdiction and ordered sale and distribution of proceeds
- Finnish Court of Appeal disagreed and held it did not have jurisdiction
- Finnish Supreme Court was unsure and made a reference to the ECJ, asking whether
 - “an action by which some of the co-owners of immovable property apply for the property to be sold for the purpose of terminating the relationship of co-ownership and for an agent to be appointed to conduct the sale constitute proceedings which have as their object rights in rem in immovable property”



The recent authorities: (1) Komu v Komu

- ECJ referred to Weber C-438/12, where it was held that a claim for a declaration that the exercise of a right of pre-emption was invalid did not fall within Article [24]:
 - the exclusive jurisdiction...does not encompass all actions concerning rights in rem.. but only those which..are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest
 - the difference between a right in rem and a right in personam is that the former...has effect erga omnes, whereas the latter can be claimed only against the debtor
 - the essential reason for conferring exclusive jurisdiction...is that the courts of the *locus rei sitae* are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated
- It then held that the present claim did fall within Article [24]
 - such an action, designed to bring about the transfer of a right of ownership in immovable property, concerns rights in rem which have effect erga omnes and is intended to ensure that the holders of those rights can protect the powers attached to their interest
 - the rights of ownership in the properties and the rights of use encumbering those rights are the subject of entries in the Spanish Land Register ...rules governing the sale, by auction where appropriate, of those properties are those of the Member State in which they are situated, and ...the obtaining of evidence will be facilitated by proximity to the locus rei sitae.
- So it seems that an application, e.g. under TLATA 1996, for an order for sale of a co-owned property will be an action which has as its objects rights in rem



The recent authorities: (2) Magiera v Magiera

- Magiera v Magiera [2016] EWCA Civ 1292 still under previous regulation
- Polish husband and wife were party to divorce proceedings in Poland
- Wife applied to English High Court under TOLATA seeking
 - an order for sale of a house in London
 - an order that the proceeds of sale be distributed between her and the husband in equal shares
- Husband disputed jurisdiction, Bodey J held that it had jurisdiction under Article [24], distinguishing Webb:
 - “In my judgment, the instant case is distinguishable from Webb v Webb . There the father was seeking to establish and acquire rights in immovable property by way of a constructive or resulting trust, on the basis that the French flat in the son's name had been purchased with his (the father's) money. Here, by contrast, the existence (or not) of a trust is not in dispute. The wife already has proprietary rights in the London house as co-owner. What she is seeking to do is to enforce and give effect to those rights. It is fair comment that the order which she seeks would be as against the husband personally, requiring him to join with her in selling the property. To that extent it would be an in personam order; but the right which would lead to such an order is a right of ownership in the property ‘available against the whole world’.”
- Husband appealed to the Court of Appeal



The recent authorities: (2) Magiera v Magiera

- Black LJ gave the only judgment:
 - “The wife is already a joint owner of the property here, whereas the father in Webb...was not. If it is appropriate to analyse what the “principal subject matter” of the claim is here, it is to achieve a sale of the property, as it was in Komu ...It would be wrong...to put too much weight on the fact that the application is technically under section 14 of TLATA for an order relating to the exercise by a trustee of his functions, when such an application is conventionally coupled with, or followed swiftly by, an application for an order for sale by order of the court. The action could be said to involve the external relations of the trust, rather than (or at the very least, as well as) the internal relations of the trust. Reflecting the language of ...Komu , I think it would be fair to describe the wife, as one of the two joint owners of the property both in law and in equity, as having “rights in rem which have effect erga omnes”. She is seeking to “protect the powers attached to [her] interest” by “bring[ing] about a transfer of a right of ownership” in the house by a sale of it. ’.”
- The claim fell within Article [24]



What can we conclude?

- Two possible grounds for the distinction
 - Whether Claimant already has undisputed rights in rem in the property or is seeking to establish that it does
 - Whether Claimant is seeking a declaration (inter partes) or an order for sale (erga omnes)
- But what if:
 - Claimant already has undisputed 25% share but seeks declaration that owns 100% of the property?
 - Claimant seeks both a declaration and order for sale?
- Back to scenario – can some claims be brought here but not others?



Brexit and the future

- Assuming the European Union (Withdrawal) Bill passes as drafted
 - Direct EU legislation [includes regulations and European Court decisions], so far as operative immediately before exit day, forms part of domestic law on and after exit day
 - A court or tribunal— (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day.
 - A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.
 - In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law.
- So that's clear then....



Questions?



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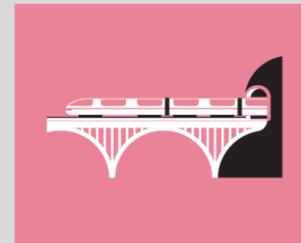
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