*"From Samengo-Turner to Duarte"*

**BIICL Seminar at Herbert Smith LLP: 25th September 2008**

## CASE STUDY

### The facts

In August 2004, Mr Small, an Englishman, was recruited by Cleansinks Inc. (**"Cleansinks"**), as Head of International Sales. Cleansinks, which is incorporated and has its head office in New York, is a manufacturer and distributor of household cleaning products.

The recruitment of Mr Small took place in London and was conducted by Mr Big, a member of Cleansinks' senior management team. The contract was concluded at the offices of Cleansinks Services Limited (**"Services"**), an English subsidiary of Cleansinks. Services' function is to employ personnel for the purposes of Cleansinks' business worldwide and Services was the employing entity for the purposes of Mr Small's contract of employment. The contract of employment was expressed to be governed by New York law and subject to the exclusive jurisdiction of the courts of New York.

The understanding between Mr Small and Cleansinks was that Mr Small would remain living in London in the short to medium term, travelling regularly between London and New York (and to other international cities) as necessary. In the medium to long term, however, it was envisaged that Mr Small would relocate to New York with his family.

As part of his benefits package, Mr Small entered into a loyalty bonus agreement with Cleansinks (the **"Bonus Scheme"**). Under the terms of the Bonus Scheme, senior management employees were credited with a cash award every 6 months for the duration of their employment and for a period of 12 months post termination provided that:

(i) no post-termination credits would be payable where the employee breached the post-termination non-competition covenant (the **"Non-Compete Clause"**). The Non-Compete Clause imposes an obligation on Mr Small not to work for a competing business anywhere in the world for a period of 2 years post termination; and

(ii) in the event of a breach of the Non-Compete Clause by Mr Small, Cleansinks would be entitled to call for repayment of any payments already made under the Bonus Scheme during the post-termination period and during the 12 month period prior to termination.

The Bonus Scheme is also expressed to be governed by New York law and subject to the exclusive jurisdiction of the courts of New York.

Some four years later, in early September 2008, Mr Small was still International Head of Sales. He had not (to the annoyance of Cleansinks' senior management) relocated to New York as was originally envisaged and still lives in London with his wife and children. He had continued to travel between New York and London and was often posted for periods of time in major European cities on particular projects.

During the period January to September 2008, in preparation for the launch of a new product into the French market, Mr Small spent part of his working week in London and part (at least 2 days and nights per week) in Paris.

On 20 September 2008, whilst working in Paris, Mr Small received a telephone call from Mr Big telling him that certain "serious allegations" of misconduct had been made against him by a junior employee in his team. Mr Big was vague about the particulars of the allegations but made clear that it would be "best for all concerned" if Mr Small resigned. Following a series of similar phone calls received over the next 24 hours during which pressure was exerted upon him to resign, a stressed and confused Mr Small resigned his employment whilst still in Paris.

Four months later, Mr Small took up a post as Sales Director of Evencleanersinks Limited, an English company. Upon learning of Mr Small's new employment, Cleansinks refused to make post-termination payments to him under the Bonus Scheme.

**Points for discussion and notes**

*Mr Small wishes to make a claim in the Employment Tribunal against Services for unfair constructive dismissal.*

*(a) Can he do so?*

1. As a matter of Community Law:

    1.1. Mr Small is seeking to sue Services, a company domiciled in England, in a civil and commercial matter. Accordingly, the Brussels Regulation applies;

    1.2. The claim being one related to an *"individual contract of employment"* it falls within Section 5 of the Brussels Regulation;

    1.3. Article 19(1) Brussels Regulation provides that an employer domiciled in a Member State i.e. Services, may be sued in the courts of the Member State in which it is domiciled, namely England.

2. There is then a question as to whether the parties' choice of exclusive New York jurisdiction prevents Mr Small from invoking Article 19(1). It is suggested that it does not. If the validity of the jurisdiction agreement is an issue to be determined as a matter of English law, s203 ERA 1996 would appear to render the exclusive New York jurisdiction clause void as it purports to preclude a person from bringing proceedings under the Employment Rights Act 1996 (the **"ERA"**) before an employment tribunal. Alternatively, if the question is to be answered by applying Community law, Article 21(2) of the Brussels Regulation provides that the provisions of Section 5 can only be departed from by an agreement on jurisdiction which *allows the employee* to bring proceedings in other courts.

3. As a matter of English law:

    3.1. s54 ERA confers a right not to be unfairly dismissed;

    3.2. s111 ERA provides that a claim for unfair dismissal may be presented to the employment tribunal;

    3.3. s204 provides that the ERA applies irrespective of the law which governs the contract.

4. The scope of the right under s94 not to be unfairly dismissed in circumstances where the employee works in different countries is determined by Lawson v Serco Ltd [2006] ICR 250 according to which the right extends to:

    4.1. an employee working in Great Britain at the time of dismissal;

    4.2. a peripatetic employee ordinarily based in Great Britain;

    4.3. an expatriate employee, where his employer is based in Great Britain; and (i) he is posted abroad for the purpose of a business carried on in Great Britain; or (ii) he is operating in an extra-territorial social or political British enclave in foreign country.

5. As regards the second category – peripatetic employees - Lord Hoffman in Lawson v Serco adopted the approach of Lord Denning in Todd v British Midland Airways [1978] ICR 959: *"A man's base is the place where he should be regarded as ordinarily working even though he may spend days, weeks or months working overseas…You have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the man is based."* Applying this test it is arguable that Mr Small falls (at least) within the second category of employees entitled to claim for unfair dismissal.

*(b) If so, what is the law applicable to the question whether Services has breached Mr Small's contract for the purpose of his unfair dismissal claim?*

6. Mr Small will need to show that he was dismissed. s95(1)(c) ERA 1996 provides that an employee will be dismissed where he terminates the contract under which he is employed in circumstances in which he is entitled to terminate it by reason of the employer's conduct. As a matter of English law, serious mistreatment of Mr Small by Cleansinks may be characterised as a breach of the implied duty of trust and confidence and constitute a repudiation of the contract of employment. But assume, for the purposes of our discussion, that as a matter of New York law such mistreatment does not amount to conduct entitling the employee to resign. Which law is the applicable law for this purpose?

7. The starting point is that the parties have chosen New York law to govern their contract (Article 2, Rome Convention).

8. The parties' choice of New York law is subject to Article 7(2) Rome Convention which provides that: *"Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."* The body of rules contained in the Employment Rights Act 1996

(which includes the right not to be unfairly dismissed) applies irrespective of the law applicable to the contract (s204 ERA 1996) and is therefore a mandatory law of the forum for the purposes of Article 7(2).

9. The choice of New York law will also be subject to the provisions of Article 6 of the Rome Convention[1] which concerns *"contract*[s] of *employment"*. Article 6(1) provides that *"a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable….in the absence of choice"*. Here the phrase 'mandatory rules' is used in different sense to Article 7(2) and means (i) rules relating to employment protection; which (ii) cannot be derogated from by agreement. Mandatory rules of English law for the purposes of Article 6(1) include the unfair dismissal provisions of the Employment Rights Act 1996.

10. The law which governs an employment contract in the absence of choice is determined by Article 6(2) and, in most cases, will be the law of the country in which the employee *"habitually works"*, even where he is temporarily employed in another country (Article 6(2)(a)).[2]

11. Does Mr Small habitually work in any one country for the purposes of 6(2)(a)? We are told that he lives in London, travels between New York and London as necessary and that in the 9 months preceding the termination of employment he worked at least 2 days/nights each week in Paris.

    11.1. No guidance is given by the Rome Convention as to where an employee habitually works. Difficulties arise in cases (such as this) where the employee carries out his work in more than one country;

    11.2. The distinction to be drawn is between *"habitually"* and *"temporarily"* as used in the provision;

    11.3. Analogies might be drawn with earlier cases in the context of determining jurisdiction under the Brussels Convention in which it was held that the place where an employee habitually carries out his work is the place where he has established the

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1 Given effect in England by the Contracts (Applicable Law) Act 1990

2 Where the employee does not habitually carry out his work in any one country, the applicable law will be the law of the country in which the place of business through which he was engaged is situated (Article 6(2)(b)). Both presumptions are subject to a rule of displacement: where it appears, from the circumstances as a whole, that the contract is more closely connected with another country, the law of that country will apply.

*"effective centre of his working activities"*. Factors relevant to determining the location of that *"effective centre"* include: the fact that the employee spends most of his working time in one Contracting State in which he had an office, where he organises his activities for his employer and to which he returns after business trips abroad;[3]

11.4. Other factors may well be relevant depending on the circumstances of the particular case;

11.5. Whilst the matter is not beyond doubt, it appears as though the applicable law will be that of the country in which the employee habitually works *at the time of dismissal* (albeit that this contravenes the general principle that the law applicable to a contract should be capable of determination at the time the contract is made). Therefore where an employee initially habitually carries out his work in one country but later in another where he is dismissed, the law of the latter country will apply.[4]

12. On the basis that (i) Mr Small's principal residence is in England to which he *"returns"* after working stints abroad; (ii) he spends most of the working week in England; and (iii) his work in France, albeit over a period of 9 months, appears to have an essentially temporary character – it is for the purpose of a specific project with a definable end date (i.e. the product launch), it is arguable that England is the *"effective centre"* of his working activities / that he habitually works here.[5] Accordingly the parties' chosen law - New York law - will apply subject to the protections provided to Mr Small by the rules of English employment protection which cannot be derogated from by contract.

13. In summary then: Mr Small's employment contract is governed by New York law subject to either or both (i) the mandatory rules of English law which apply irrespective of the law otherwise applicable to the contract (Article 7(2)) and/or (ii) the mandatory English rules of

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3 Rutten v Cross Medical Ltd, Case C-303/95

4 See Dicey, Morris & Collins (14th Edn) at 33-076 - notes that this approach reflects the spirit of Article 6(2)(a) which is to give primacy to the law of the habitual place of work if this is in one country.

5 [*Although it is interesting to note that if he habitually works in England he apparently does so contrary to the understanding reached between Small and Big when the contract was concluded which was that Small would relocate and work habitually in New York. The relocation does not seem to have been a term of the contract but it raises an interesting question: what is the position where an employee works habitually in one country but by virtue of his breach of contract? Might this be taken into account when considering whether another country is more closely connected with the contract for the purposes of the rule of displacement?*]

employment protection which cannot be derogated from by contract (Article 6). The ERA falls into both categories of mandatory rule.

14. But – and this is the more difficult question - is English law relating to the implied term of trust and confidence part of the *"mandatory rules"* of English law such that the employee cannot be deprived of their protection? Can it be said that the implied term of trust and confidence is a rule of employment protection which cannot be derogated from contract?

15. Or is New York law the applicable law which determines the question whether the employee is entitled to terminate the contract by reason of the employer's conduct which is a gateway to the application of the relevant mandatory rule i.e. the right not to be unfairly dismissed?

16. If the latter is correct, does the choice of law fall foul of s203 ERA which renders void any provision in an agreement which purports to exclude or limit the operation of any provision of the ERA? It does not appear that the choice of New York law serves to exclude or to limit the application of any provision of the ERA – Mr Small is not deprived of the right to claim unfair dismissal, he simply fails to establish an element of his claim. The point is nonetheless tricky and unclear.

*Cleansinks wishes to sue Mr Small in New York to enforce the Bonus Scheme (and the Non-Compete Clause therein) and to recover awards made pursuant to the Bonus Scheme during the 12 month period pre-termination. Can it do so?*

17. Section 5 of the Brussels Regulation provides as follows:

    17.1. *"in matters relating to an individual contract of employment jurisdiction shall be determined by this Section… ."* (Article 18)

    17.2. *"An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled"* (Article 20)

    17.3. *"The provisions of this Section may be departed from only by an agreement on jurisdiction which (1) is entered into after the dispute has arisen; or (2) which allows the employee to bring proceedings in courts other than those indicated in this section"* (Article 21)

18. Is the Bonus Scheme a *"matter relating to an individual contract of employment"*? Is Cleansinks Mr Small's *"employer"*?

19. In Samengo-Turner v Marsh & McLennan[6] individuals employed by an English entity entered into a bonus agreement with the employing entity's New York parent company. The bonus agreement was subject to New York law and jurisdiction. The parent company sought to enforce a term of co-operation in the bonus agreement and to recover payments made under the bonus agreement in proceedings issued against the individuals in New York.

20. The Court of Appeal held that the bonus agreement did *"relate to their contracts of employment"*. It was not possible to ascertain the terms upon which the individuals were employed without looking both at the original contracts of employment and the bonus agreement.

21. The Court of Appeal in Samengo-Turner further held that the parent company should be regarded as employers for the purposes of Section 5, Brussels Regulation.

22. This broad construction of Section 5 was said to *"give effect to the objectives of the Regulation"*. By ensuring that all members of the group who wished to sue on the terms of the bonus agreements were obliged to do so in England, the Court of Appeal took the view that such a construction promoted certainty and avoided multiplicity of proceedings. It also had the

6 [2007] EWCA Civ 723

effect of conferring jurisdiction upon the courts most closely connected with the dispute: another key objective of the Regulation.

23. Granting an anti-suit injunction to restrain the parent company pursuing the New York proceedings, Lord Justice Tuckey said as follows: *"A multinational business must expect to be subject to the employment law applicable to those they employ in different jurisdictions. Those employed to work in the….group in London who are domiciled here are entitled to be sued only in the English courts and to be protected if that right is not respected. There is nothing to prevent….any company in the…group from enforcing their rights under the bonus agreements here."*

24. Adopting the Court of Appeal's approach in Samengo-Turner, the bonus agreement in our scenario is certainly capable of *"relating to an individual contract of employment"* and Cleansinks is arguably an *"employer"* for the purposes of Section 5. On the basis that Mr Small, the employee, is domiciled in England[7] the English court may exercise its jurisdiction to restrain, by way of anti-suit injunction, any proceedings issued in New York by Cleansinks in order to give effect to the Regulation and Mr Small's right to be sued here.

[7] It appears he is resident in England and the circumstances of his residence indicate that he has a substantial connection with the jurisdiction. It also appears that he has been resident in England for 3 months or more in which case a substantial connection will presumed (SI 2001/3929, Schedule 1, paragraph 9)

*If Cleansinks decides to bring proceedings against Mr Small in England, will it be permitted to enforce the terms of the Bonus Scheme here?*

25. Mr Small being an employee domiciled in England for the purposes of Section 5 of the Brussels Regulation, the English court will have jurisdiction over claims brought against him in relation to the Bonus Scheme, if those claims are brought by an *"employer"* and *"relate to an individual contract of employment*" (following the Court of Appeal's reasoning in Samengo-Turner) (Article 20, Brussels Regulation). The English would, in any event have jurisdiction over Mr Small on the basis of his domicile (Article 2, Brussels Regulation).

26. But will the English court enforce the terms of the Bonus Scheme, in particular the Non-Compete Clause? The first question is what law the English Court will apply to the Bonus Scheme. The agreement is expressed to be governed by New York law. To what extent, if any, will this choice of law be overridden by virtue of the provisions of the Rome Convention?

27. There is a preliminary question as to how the Bonus Scheme is to be characterised. Is it an ordinary commercial contract or a *"contract of employment"* such that the applicable law must be determined in accordance with Article 6, Rome Convention?

28. In Duarte v Black and Decker[8], Field J (on the basis of the Court of Appeal's reasoning in Samengo-Turner addressing the meaning of the phrase *"relating to a contract of employment"* in the context of determining jurisdiction under Article 18, Brussels Regulation) concluded that a Long Term Incentive Plan governed by the laws of Maryland was *"obviously intended to operate as part of an overall package of Mr Duarte's employment terms"* and was therefore a *"contract of employment"* for the purposes of Article 6, Rome Convention. Field J said further as follows: *"I also think that it cannot have been the intention of the framers of the Convention to allow Article 6 to be circumvented by hiving off certain aspects of an employment relationship into a side agreement which, standing alone, would not amount to an individual employment contract because neither party promises to work for the other."*[9]

29. If the Bonus Scheme is treated as a *"contract of employment"* for the purposes of determining the applicable law, the chosen law - New York law – will be displaced by the mandatory rules of the law which would be applicable in the absence of choice: arguably English law.[10]

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8 [2007] EWHC 2720

9 Note that there is a difference in the language of Article 18 of the Brussels Regulation which refers to *"matters relating to individual contracts of employment"* and Article 6 of the Rome Convention which applies to *"contract[s] of employment"*

10 Applying the same analysis as above.

30. But the only mandatory rules of English law which apply by virtue of Article 6(1) are those which relate to employment protection. In Duarte, Field J concluded that provisions of English law relating to the enforceability of restrictive covenants are part of the general law of restraint of trade and do not constitute mandatory rules affording protection to employees. The law of New York will not therefore be displaced by English law on the basis of Article 6(1).[11]

31. That is not, however, the end of the analysis. However the Bonus Scheme is characterised, the application of New York law will be subject to:

    31.1. Article 7(2): mandatory rules of the forum which apply irrespective of the law otherwise applicable to the contract; and

    31.2. The public policy of the forum: *"the application of a rule of law of any country specified by this Convention may be refused only if such application is manifestly incompatible with English public policy"* (Article 16)

32. If asked to give effect to the terms of the Bonus Scheme the English court will first consider whether the Non-Compete Clause is enforceable as a matter of New York law (assuming that New York law is pleaded and expert evidence is adduced). However, even if the Non-Compete Clause is valid and enforceable as a matter of New York law, New York law will not be applied if the Non-Compete Clause is too widely drawn to be enforceable as a matter of English public policy: Duarte. On the face of the information provided, a clause which restricts Mr Small from being employed by a competing business, anywhere in the world, for 2 years seems likely to be too widely drawn.

33. Employers should therefore seek to ensure that restrictive covenants are enforceable both under the chosen law of the agreement and the law of the country in which the relevant employees work. Plainly it will be important to seek appropriate English law advice when framing restrictive covenants in agreements which, albeit governed by a foreign law, will need to be enforced in England.

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[11] Practically speaking, it does not matter (for our purposes) how the Bonus Scheme is characterised. If held to be an ordinary commercial contract, the parties' choice of law will be subject to Article 3(3): which provides for the displacement of the chosen law by the mandatory rules of the law of another country where *"all elements relevant to the situation at the time of contracting are connected with that country"*. That is not the case here.

*Mr Small wishes to bring proceedings against Cleansinks in England to recover the post-termination payments it has withheld. Can he do so?*

34. We have already considered the question of the law applicable to the Bonus Scheme/Non-Compete Clause and concluded that, before an English court, Mr Small has good prospects of establishing that the Non Compete Clause is too wide to be enforceable as a matter of English public policy, even if enforceable as a matter of New York law. Assuming that his argument succeeds, the approach of the English court would be to sever the unreasonable restraint of trade, allowing the rest of the Bonus Scheme to stand and Mr Small to claim the benefit of the awards without the restraints imposed by the Non-Compete Clause.

35. There is a further issue as to whether the English court will assert jurisdiction over Cleansinks in relation to proceedings brought by Mr Small under the Bonus Scheme.

36. The first question is whether the case is one which falls within the scheme of Section 5 of the Brussels Regulation. We have seen already that the case is likely to be one *"relating to individual contracts of employment"* and that Cleansinks will likely be characterised as Mr Small's *"employer"* for the purposes of Section 5, Brussels Regulation. Whether or not Section 5 applies to determine jurisdiction over claims brought by employee against employer will depend upon whether the employer is domiciled or deemed to be domiciled in a Member State.

37. Cleansinks is not domiciled in England. It will be deemed domiciled in England if it has *"a branch, agency or other establishment in one of the Member States"* and the dispute arises *"out of the operations of the branch, agency or establishment."*

38. Does Services fall within the category of *"agency or other establishment"*? It is a subsidiary and so legally distinct. Strictly speaking therefore it is not an establishment of Cleansinks. In light of the broad constructions preferred by the court in Samengo-Turner and Duarte however, is it possible that *"other establishment"* might be interpreted to include group companies? If the English subsidiary is capable of constituting another *"establishment"*, query whether this dispute arises out of its operations?

39. If Cleansinks is not deemed domiciled in England then questions of jurisdiction fall to be determined by applying the ordinary common law rules.[12]

[12] See Article 4, Brussels Regulation: if the Defendant is not domiciled in a Member State the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State

40. What about the potential for proceedings by Mr Small against Services: is there any scope to argue that it was an implied term of his contract that Services would procure Mr Small's participation in the Bonus Scheme and that its performance in this regard was faulty? If there are grounds for a claim against Services, this might serve as a 'jurisdictional anchor' – a claim to which Cleansinks might be joined as a necessary and proper party, subject to the exercise of the court's discretion. Such a claim against Services seems unlikely to succeed. Services had procured Mr Small's participation in the Bonus Scheme, its terms were arguably a matter for Mr Small and Cleansinks. Loss of value through the Bonus Scheme might form part of the claim for compensation for unfair dismissal against Services although any damages would ordinarily be subject to the statutory cap of £63,000.