19 NOV 2018

Neutral citation no. [2018] EWHC 3149(QB)

Claim No. HQ17X03652

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

CENTRAL OFFICE

MASTER KAY QC

B E T W E E N :- -

LES AMBASSADEURS CLUB LIMITED

Claimant/Respondent

- a n d -

MR IVAN VONA

Defendant/Applicant

Appearances

For the Claimant/Respondent – Ms. Helena Drage instructed by Candey Limited

For the Defendant/Applicant – Ms. Kristina Lukacova instructed by B&M Law LLP.

Hearing: 11th June 2018

APPROVED JUDGMENT

(Handed down 19th November 2018)

The Application

1. By an application dated the 20th March 2018 the Defendant seeks to contest the jurisdiction of the Court to hear the claim brought by the Claimant for £250,000 for payment of a debt as a result of four dishonoured cheques dated the 24th October 2016.

Background

2. The evidence is provided by the Defendant's witness statement and the witness statement of Ms Michelle Elliott on behalf of the Claimant.

3. The Claimant is the owner and operator of a Mayfair casino known as Les Ambassadeurs ("the Club"). The Defendant is an Italian entrepreneur who does not speak English and has never lived outside of Italy. The Defendant became a member of the Club on 21st October 2016 and visited the Club between 21st and 24th October 2016. During that period the Defendant signed a number of requests for a Cheque Cashing Facility ("CCF"). A CCF enables members to draw "script" or house cheques up to the limit of the CCF in exchange for gambling tokens. According to the letter from

Messrs Candey, the Claimant's solicitors, dated 14th March 2018 the following was an express term of the CCF: "*I agree that this application and the CCF agreement will be governed, construed and interpreted pursuant to the laws of England and Wales and that Les A may litigate any dispute involving a debt or the payee in any court and in any jurisdiction.*" The CCF was signed by the Defendant on 23rd October 2016.

4. On the 24th October 2016 the Defendant drew four script cheques in exchange for gambling tokens worth £250,000. Also on 24th October, having reached the credit limit provided by the CCF, the Defendant wrote a personal bank cheque for Euros 285,600 to consolidate the balance on his account. That cheque was subsequently returned to the Club unpaid due to insufficient funds.

5. Despite efforts by the Club's debt collection agent, the Defendant has not repaid the debt. On 5th October 2017, the Claimant issued a claim form against the Defendant for a total of £250,000 for "*payment of a debt as a result of four dishonoured cheques dated 24 October 2016*". It was served on the Defendant's solicitors on 16th February 2018, the date for service having been extended by consent between the parties. On 6th March 2018, the Defendant filed and served an acknowledgment of service, stating his intention to contest jurisdiction. There has been no attempt to repay the debt and, at present no defence to the claim has been put forward.

6. In addition to the above the Defendant has drawn attention to the following matters:
    a. In early October 2016, the Claimant's agent, Mr Patrizio Parrini ("Mr Parrini"), called the Defendant on the Claimant's behalf on a number of occasions, inviting the Defendant to fly from Italy to London to gamble at the Club, all expenses covered by the Claimant (including flights, hotel accommodation, meals for the duration of the stay, as well as complimentary tickets to a Chelsea game). It is common ground that Mr Parrini was acting as the Claimant's agent. Despite the Defendant's initial hesitation he accepted the Claimant's invitation.
    b. The statement of Michelle Elliott dated the 5th June 2018 states: "*It is correct that Mr Vona was introduced to the Club by Mr. Patrizio Parrini. Mr Parrini is one of the Club's former agents and members, who like other agents, recommends customers to the Club in return for enhanced membership benefits . . . Mr Parrini is also an Italian national who resides in Monte Carlo . . .*"
    c. In late October 2016, the Defendant and his partner at the time flew to London for the Defendant to gamble at the Club. In accordance with their offer, the Claimant covered all of the Defendant's and his partner's expenses associated with the trip to London. Between 21st to 24th October 2016, the Defendant provided the Club with four house cheques, against which he was given gambling tokens. At the end of the last session, the Defendant wrote a further cheque.

d. On 20th March 2018, the Defendant issued a Part 11 application ("the Application") contesting the Court's jurisdiction on the basis that since Article 18(2) of Regulation (EU) No. 1215/2012 ("the Brussels Regulation (recast)") applies, the Claimant can only bring proceedings against the Defendant, a consumer, in Italy. The Claimant opposes the Application.

The relevant provisions

7. The primary issue is whether the Defendant is entitled to be sued in the courts of his own country which is governed by Regulation (EU) No. 1215/2012 (Brussels I Regulation (recast)) ("the Regulation"). This applies to civil cases which were instituted after 10th January 2015, see Articles 1(1) and 66(1).

8. The general rule is founded upon the principle that the defendant is usually entitled to be sued in the courts of the jurisdiction in which he is domiciled, Recital 15 and Art.4(1). However a person domiciled in a Member State may be sued in the courts of another Member State but only by virtues of the rules set out in sections 2 to 7 of Chapter II, see Art. 5(1).

9. Section 2 ('Special jurisdiction') of Chapter II, Article 7(1) of the Regulation states that:

"A person domiciled in a Member State may be sued in another Member State: (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question".

10. Section 7 ('Prorogation of jurisdiction') of Chapter II, Article 25(1) states that:

"If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either: (a) in writing and evidenced in writing;"

11. Section 4 ('Jurisdiction over consumer contracts') of Chapter II, Articles 17(1) and 18(2) state that:

"Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, of for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities (emphasis added).

Article 18

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State which the consumer is domiciled".

Article 19

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State."

12. Section 7 ('Prorogation of jurisdiction) of Chapter II provides:

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State . . .

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

The Defendant's case

13. For the Defendant, Ms Kristina Lukacova has submitted:

a. That Article 18(2) applies and therefore the Claimant can only bring proceedings against the Defendant, a consumer, in Italy.

b. Article 18(2) applies because:

i. this is a matter relating to a contract concluded by the D as a consumer (Article 17(1));

ii. The Claimant plainly directed its commercial and professional activities to Italy (or to several Member State including Italy) when it invited the Defendant to fly over from Italy to London to gamble at the Club, especially in light of the incentive of offering to cover (and in fact covering) all of the Defendant's expenses (Article 17(1)(c)); and

iii. The contract falls within the scope of C's commercial and professional activities (Article 17(1)(c)).

iv. The Defendant is an entrepreneur who occasionally likes to gamble in his spare time, purely for recreational purposes. This was not challenged by the Claimant. The Defendant entered into a contract with the Claimant for purposes outside his trade or profession, and is therefore a consumer for the purposes of section 4.

v. The principal issue between the parties is whether the Claimant directed its commercial or professional activities to Italy, the Member State of the Defendant's domicile.

vi. The fact that the Claimant, by its agent, reached out to the Defendant in Italy to invite the Defendant to fly over to London to gamble at the Club, offering to cover (and in fact covering) all of his expenses, is a blatant example of a trader directing their commercial activities to another Member State.

vii. Mr Parrini was the Defendant's agent and he recommended the Defendant to the Club. The Claimant has not challenged the Defendant's evidence that he received a phone call from Mr Parrini, who invited him to visit the Club on the Claimant's behalf.

viii. Nor has the Claimant challenged the Defendant's evidence that, when he did not immediately accept the Claimant's invitation, Mr Parrini called the Defendant a few more times, repeatedly telling the Defendant that he was invited by the Claimant to gamble at the Club, and that the Claimant would pay for the Defendant's (and his partner's) flights from Italy to London, accommodation at the Hotel Metropolitan on Old Park Lane (Mayfair), meals for the duration of the stay and complimentary tickets to a Chelsea game.

ix. The Claimant accepts that it did cover all of these expenses.

x. Therefore not only did the Claimant specifically invite the Defendant to visit the Club, they plainly intended to incentivise the Defendant. Further the causal link between the Claimant's specific invitation to the Defendant and the conclusion of the contract constitutes strong evidence which the Court may take into account when determining whether the Claimant's activity was in fact directed to Italy (see Case C-218/12 *Lokman Emrek v Vlado Sabranovic* at [26]).

xi. It is common ground that the Defendant did not enter into a contract with the Claimant until he came to London but that is irrelevant because the contract does not need to be concluded at a distance (see Case C-190/11 *Daniela Muhlleitner v Ahmad Yusufi* at [45]).

xii. Article 18(2) has not been departed from by agreement, as none of the conditions set out in Article 19 are satisfied.

The Claimant's case

14. For the Claimant, Ms Helena Drage has invited the Court to dismiss the Defendant/Applicant's application and give directions as to the filing and service of the defence in the event that a further acknowledgment of service is filed pursuant to CPR 11.1(7). She has submitted:

a. The Claimant accepts that the claim is a matter relating to a contract and that the Defendant is a consumer within the meaning of the Regulation. The Claimant also accepts that that the contract was concluded with the Club, that Italy is the Member State of the Defendant's domicile and that the provision of gambling services falls within the scope of the Club's commercial or professional activities. It is therefore common ground that Article 18(2) would apply so as to vest exclusive jurisdiction in the courts of Italy if the Club directs its commercial or professional activities to Italy or to several States including Italy. Further the Claimant does not contend that the provisions of Section 4 have been departed from by an agreement within the meaning of Article 19 of the Regulation.

b. However the Claimant does not direct nor has directed its activities to Italy. Article 17 is therefore not engaged and as such the English Court has jurisdiction to determine the claim under Article 7(1) or alternatively Article 25(1) of the Regulation.

c. Mr Parrini is an Italian national and was one of the Club's former agents. Mr Parrini recommended customers to the Club in return for enhanced membership benefits. He had been acquainted with the Defendant for some 20 years and had known the Defendant to frequent four casinos in Italy. The Defendant accepted that he was introduced to Mr Parrini by other gamblers and that the Defendant had *"given him [his] mobile phone number when [they] met a while ago at the Saint Vincent casino in Valle D'Aosta, Italy"*. Mr Parrini recommended the Defendant to the Club on the basis of their prior relationship, the Defendant had provided him with a means by which he could communicate with the Defendant and Mr Parrini knew the Defendant to be an experienced and sophisticated gambler. Mr Parrini offered the Defendant the Club's hospitality services and complimentary items if the Defendant were inclined to visit the Club. Such promotions are very common in high-end casinos where hospitality plays an important part in maintaining customer relationships. These offers are recognised by the

Gambling Commissions as acceptable practices. The offer made to the Defendant was unconditional and the Defendant had no contractual obligation to gamble at the Club.

d. On the 20th October 2016 the Defendant completed and signed a declaration worded as follows "*I, Ivan Vona, do hereby confirm that my bankers Banco Popolare di Novara will honour and pay all script (house) cheques drawn in favour of Les Ambassadeurs Club Limited. I irrevocably confirm that all script (house) cheques drawn by me at Les Ambassadeurs Club Limited will have the same status in law as pre-printed cheques issued by Banco Popolare di Novara*". The Defendant also signed three CCF requests which stated on their face that "*I agree that this application and CCF agreement will be governed, construed and interpreted pursuant to the law of England and Wales and that Les A may litigate any dispute involving a debt or the payee in any court and in any jurisdiction*".

e. The European Court of Justice ("ECJ") has set out the principles and guidance with respect to this type of matter in the joined cases of *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C-144/09), [2012] Bus LR 972. The court was concerned with Article 15(1)(c) of Regulation No 44/2001, which has been superseded by Article 17(1)(c) of the Regulation. The wording of the relevant Articles is identical as between the two Regulations. With respect to the meaning of "*directs such activities to*" the court asked the question "*whether intention on the part of the trader to target one or more other Member States is required and, if so, in what form such an intention must manifest itself*". The principles derived from paragraphs 65 to 93 of *Pammer* are summarised in *Oak Leaf Conservatories Limited v Weir* [2013] EWHC 3197 (TCC).

f. The key guidance to be derived from *Pammer* is as follows:

   i. For Article 17(1)(c) [15(1)(c)] to be applicable "*the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States including that of the consumer's domicile*";

   ii. "*It must be therefore be determined, in the case of a contract between a trader and a given customer whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers*". A trader's "*overall activity*" must be considered;

   iii. "*Intention is implicit in certain methods of advertising... whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman*";

iv. "*The classic forms of advertising expressly referred to in the previous paragraph involve the outlay of, sometimes significant, expenditure by the trader in order to make itself known in other Member States and they demonstrate, on that very basis, an intention of the trader to direct its activity towards those States*";

v. The mere establishment of a website which is accessible in other member states will not of itself amount to activity "*directed to*" other Member States;

vi. "*Clear expressions of such an intention on the part of the trader include mention that it is offering its services or its goods in one or Member States by name... However, a finding that an activity is 'directed to' other Member States does not depend solely on the existence of such patent evidence*". The Court provides non-exhaustive lists of the type of evidence which is capable of demonstrating the existence of an activity "*directed to*" the Member State of the consumer's domicile at paragraphs 83 and 93 of the Judgment;

vii. The court is looking for "*a clear expression of the intention to solicit the custom of that State's consumers*".

g. The Claimant has not directed its commercial or professional activities in the sense identified by the ECJ in Pammer.

h. The Claimant owns and operates only the Club: its activities are solely London-based. The Claimant does not engage in any marketing activities in Italy, nor spend any money directing activities to Italy. The Claimant's website does not make any provision for the Italian market: it does not host a domain name in Italy nor an Italian dialling code, and it does not provide an Italian translation of its website. There is no mention on the Club's website or otherwise of itineraries from other Member States going to London.

i. The question is therefore whether the telephone conversation(s) between Mr Parrini and the Defendant is sufficient to evidence the Claimant directing its commercial or professional activities to Italy.

j. Telephone communications between the Claimant's agent and the Defendant alone are not sufficient to evidence the Claimant directing its commercial or professional activities to the Member State. In this respect:

i. First, all of the relevant ECJ and English cases concerning Article 15(1)(c) of Regulation No 44/2001 and Article 17(1)(c) of the Regulation concern or refer to a trader directing its activities to a Member State via some concerted or organised activity directed to consumers of the Member State at large i.e. by advertising, sending mail-order catalogues or hosting a website offering goods and services.

ii. None of the authorities specifically address a situation where the alleged directing activity is solely an agent communicating an offer to a single individual in a Member State via telephone or in person.

iii. In *Wood v Hewitsons LLP* [2014] EWCA Civ 1698 the issue of communications via telephone was directly dealt with. In that case an English firm of solicitors was seeking payment of fees incurred under a contract concluded with a consumer domiciled in Scotland. This matter concerned jurisdiction under Section 16(1) of the Civil Jurisdiction and Judgments Act 1982 at Schedule 4, and specifically whether the consumer must be sued in Scotland rather than England. The wording of Schedule 4(iii)(c) mirrors that of Article 17(1)(c) of the Regulation. Wood, the consumer, appealed against the finding that the English court had jurisdiction to determine the claim. Lord Justice Lewison, relying on *Pammer*, found that the firm did not direct its activities to Scotland via its website. There were however, in addition to the website, communications between the parties which it was alleged amounted to the firm directing its activities to Scotland: "*here, the evidence shows that there was a meeting between Ms Wood and Hewitsons sometime in the summer; there had been chats on the phone which she refers to in her letter to Hewitsons and there had been communication by fax*". Despite these communications, Lord Justice Lewison found that *"there was nothing in the evidence that was before the judge so far as I can tell that would have established that Hewitsons were directing their activities towards Scotland as opposed to England*".

iv. It follows that communications in which the trader discusses provision of a service to a particular individual consumer in the consumer's Member State is not, in and of itself, sufficient to amount to the directing of activities to the Member State of the consumer as opposed to directing its activities to the Member State of the trader.

v. In *Case C-96/00 Gabriel,* the ECJ found that "*the Brussels and Rome Conventions cover all forms of advertising carried out in the Contracting State... as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman*". This case cannot, however, have any bearing on the question of whether an offer by telephone to a sole consumer in a Member State amounts to a trader directing its activities to that Member State. *Gabriel* considered the meaning of "*specific invitation*" and "*advertising*" within Article 13 of the Brussels Convention. That wording has been entirely replaced by the wording at, first, Article 15(1)(c) of the Regulation No 44/2001 and, later, the wording at Article 17(1)(c) of the Regulation. Furthermore, the remark at paragraph 44 (quoted above) has to be considered in context. The

context is provided at paragraph 43: "*situations of mail-order and doorstep selling*", the inference being that the relevant "*commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman*" are those made in the context of mail-order and doorstep selling.

vi. These communications with the Defendant must also be seen in their correct context. This is not a case of the Claimant or its agent cold calling high rollers on the gambling scene to drum up business. There was a prior relationship between Mr Parrini and the Defendant. In the Defendant's mind Mr Parrini was a "*client broker for different casinos in London, in other European countries and also in countries outside Europe*". Mr Parrini had been introduced to the Defendant through other gambling associates. It was against this background that the Defendant elected to provide Mr Parrini with his contact details.

vii. A trader cherry picking one individual in the Member State to direct an offer based on its previous relationship and knowledge of that individual cannot meet the threshold of manifesting the trader's intention to establish commercial relations with consumers of the Member State or an intention on the part of the trader to target one or more other Member States as required by *Pammer* at paragraph 75.

viii. Second, further guidance on the meaning of "*directs such activities to*" a Member State was provided by the High Court *Oak Leaf Conservatories Limited v Weir* [2013] EWHC 3197 (TCC). This matter again concerned jurisdiction under Section 16(1) of the Civil Jurisdiction and Judgments Act 1982 at Schedule 4, and specifically whether Weir must be sued in Scotland rather than England.

ix. Stuart-Smith J stated that, "*adopting the test outlined in Oak Leaf's written submissions that I have set out at [16] above, the websites and previous dealings show that Oak Leaf has the willingness and the ability to work in Scotland*". At paragraph 16 the Judge referred to the test requiring evidence of "*a willingness and ability to work in Scotland*".

x. Further guidance as to the meaning of "*directs activities to*" a Member State was also provided by the Court of Appeal case of *Wood v Hewitsons LLP* (cited above). At paragraph 11, Lord Justice Lewison held that "*it will be recalled that the requirements of the paragraph is that it is the professional activities which must be directed to other parts of the United Kingdom. In other words, Hewitsons must be directing their own professional activities to Scotland, such that they themselves as Hewitsons are offering to undertake professional work in Scotland*".

xi. In both of the more recent English cases, the Court has found that evidence of a trader directing its activities to the consumer's domicile involves that trader

conveying a willingness or ability to undertake the professional work or services in the state of the consumer's domicile. In this case the Defendant defines the Club's commercial or professional activities as "*the provision of gambling services and the operation of Les Ambassadeurs Club Limited*". The Claimant did not at any point convey a willingness or ability to undertake provision of gambling services and the operation of the Club in Italy. It was the intention that any professional services would be undertaken in England. As far as the test as set out in the English cases is concerned, the Claimant has not directed its activities to Italy and the Application must fail.

xii. Third, regard must be had to the purpose of the Article 17(1)(c) of the Regulation in its interpretation. The very intention of the rewording of the legal test at Article 13 of the Brussels Convention to Article 15(1)(c) of Regulation No 44/2001 to what is now Article 17(1)(c) of the Regulation was to provide "*better protection for consumers with regard to new means of communication and the development of electronic commerce*". Further, "*in relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules*" (Recital 18 to the Regulation).

xiii. The purpose of the Regulation is to afford better protection for consumers and in particular in respect of electronic transactions. Electronic commerce generates uncertainty as to when and how contracts are entered in to between arms length parties contracting across jurisdictions. The law requires certainty as to where proceedings would be brought in the event of a dispute.

xiv. What is clear is that Article 17(1) could have provided simply for all types of consumer contract to come within Article 17(1), but deliberately did not do so. Although the Regulation must be interpreted to give effect to the objective to protect consumers, by its terms it can be seen that it is not to apply to all consumers.

xv. It is perhaps therefore not surprising that neither the European nor English courts have considered a case, as far as I am aware, where a trader allegedly directed its activities in the manner alleged in this case. It was not the intention of Article 17(1)(c) to respond to the circumstances of this consumer contract. First, and most obviously, this was not a matter of electronic commerce. This of course does not prohibit Article 17(1)(c) applying. Second, the parties were not arms length. Third, there was no cross-jurisdictional element to the contract which might throw uncertainty as to where any dispute would be litigated: the Defendant always knew that any contract he entered in to with the Club would be concluded and performed in England. If the objective of the Regulation is to

protect consumers, but not all consumers are protected by the Regulation, then the Defendant is one such consumer which does not require the jurisdictional protection conferred by Recital 18. The Defendant is an experienced and sophisticated gambler. Four casinos contacted by the Claimant prior to the Claimant providing the CCF reported that the Defendant "*was a good customer and had no outstanding debts*". On his visit to London in October 2016 the Defendant gambled at "Genting Casino" and used his £50,000 winnings to gamble at the Club.

xvi. The circumstances of this case are a world away from the circumstances in which the European and English courts have found a trader to be directing its activities to a Member State. The means by which such activity is directed is commonly characterised by arms length parties, distance selling and consumers being induced to accept a trader's goods or services by some kind of State-wide concerted activity. None of those factors apply in this case.

15. Ms Drage has also submitted that the Claimant/Respondent is entitled to its costs of the Application to be summarily assessed or, if the court is so minded, to be subject to detailed assessment if not agreed with a payment on account of the Claimant's costs in the sum of £6,500 to be paid within 14 days.

Consideration

16. Counsel for each of the parties provided helpful skeleton arguments and made oral submissions. I have summarised the content of the skeleton arguments above. There was no material change to each of the parties' cases during the oral submissions although both counsel directed my attention to the salient parts of the evidence, the Regulations and the relevant authorities during the course of argument. I am grateful to both counsel for the helpful and sensible way in which they each presented their cases.

17. It is common ground that the Regulations apply to the present case. With respect to the construction of the Regulations I note that Ms Drage has advocated the use of a purposive approach in her submissions. I consider that approach to be correct. The Regulations form part of domestic law and must be construed as such. In the event of any doubt as to meaning they may be construed bearing in mind the same "purposive approach" which English Courts apply to the construction of its own domestic legislation.

18. The starting point arises from Art. 4(1) of Section 1 of Chapter II of the Regulations which states that, as between persons domiciled in different Member States, the jurisdiction is conferred on the

courts of the domicile of the defendant. However by Article 7 of Section 2 of Chapter II of the Regulations such a defendant may be sued in another Member State in cases where the obligation arising under a contract is to be performed in that other Member State or, by Article 25 of Section 7 of Chapter II where it is agreed that the jurisdiction of the other Member State may be invoked. In their letter dated the 14th March 2018 Messrs Candey rely upon the terms of the CCF and Article 25 as giving jurisdiction to the English Courts. In the absence of any contention that the court of England and Wales should regard the CCF agreement as "*null and void as to its substantive validity*" and absent any applicable provisions in the Regulations which restricts the provisions of Art 25 with respect to consumers I consider that Messrs Candey's arguments are correct as far as they go.

19. However the question which arises in the present case is whether the provisions of Art. 18.2 apply to this case where the Defendant is acknowledged to be a consumer. In their letter of the 14th March 2018 Messrs Candey appears to advance the proposition that Art.25 takes precedence over the provisions of Articles 17 and/or 18 of the Regulations. It appears to me that the provisions of Articles 18.2 and 25 do contradict one another as there is no reason why a person should not be a consumer and enter into an agreement as to jurisdiction so as to bring Article 25 into play. However I consider that effect must be given to the wording of Article 19 which provides that the provisions of Section 4, ie. Articles 17 to 19 inclusive, may only be departed from where the agreement as to alternative jurisdiction is entered into <u>after</u> the dispute has arisen. It seems to me that this resolves the dichotomy between Articles 18.2 and 25 as the intention of the Regulations appears to be to give special protection to consumers so that the provisions of Art.25 are restricted by the express terms of Art.19 in the case of consumers who are within the provisions of Section 4.

20. In the present case it is accepted that the Defendant is a consumer and Ms Lukacova submitted that this meant that Art.18.2 is applicable. Taken literally that would be an end of the matter but a question arises as to whether Art.18.2 applies to all consumer contracts or whether the wording of Art.17 restricts the meaning of the word "consumer" for the purposes of the Regulations. Ms Drage's submissions clearly assumed that there is such a restriction and those of Ms Lukacova appear to accept that Art.17 applies. Upon consideration it appears to me that the operation of Article 17 is restricted to contracts where one party is a consumer and the type of contract falls within subparagraphs (a)-(c). This is because the Article states that it is in those cases that "*jurisdiction shall be determined <u>by this Section</u>*". Thus it is only in those specific cases that other provisions of the Section, such as Art. 18.2 are brought into effect.

21. Upon that basis the only issue is whether this is a consumer contract within the meaning of Art.17.1(c). The question is whether the contract has been concluded with a person who pursues commercial activities in the Member State of the Defendant's domicile or "<u>by any means, directs such activities to that Member State or to several Member States including that Member State and</u>

the contract falls within such activities". Ms Drage has drawn attention to several authorities but both Counsel acknowledge that there is no decision which is directly on point.

22. The most helpful decisions are *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and the principles derived from the summary in *Oak Leaf Conservatories Limited v Weir.* From these it is clear that the court needs to consider whether the trader has manifested an intention to establish commercial relations with consumers from one or more other Member States including that of the consumer's domicile and whether there is evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States in the sense that it was minded to conclude a contract with those consumers. It is to be noted that such intention may be implicit in certain methods of advertising "*whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman*".

23. Evidence of relevant advertising may include anything which demonstrates an intention of the trader to direct its activity towards the Member States by the outlay of expenditure "*by the trader in order to make itself known in other Member States*". Although the principles set out a list of the type of evidence which is capable of demonstrating the existence of an activity "*directed to*" the Member State of the consumer's domicile the list is not exhaustive and the authorities clearly demonstrate that each case must turn on its own evidence so the issue is whether, in the present case, there is evidence that the Claimant intended to direct its activities to other Member States.

24. In my view the consideration needs to be directed towards the time before or when the contract was made. In this respect I do not consider that the decision in *Wood v Hewitsons LLP* [2014] EWCA Civ 1698, cited by Ms Drage is of any assistance as it is concerned with communications after the contract related to the recovery of solicitor charges had been performed. Therefore the mere fact that it relates to telephone communications is of no assistance in the present case. This is demonstrated by the words of Lord Justice Lewison who found that *"there was nothing in the evidence that was before the judge so far as I can tell that would have established that Hewitsons were directing their activities towards Scotland as opposed to England*". This was despite the finding that there had been communications between the parties which it was alleged amounted to the firm directing its activities to Scotland. In my view what was lacking in that case was evidence that the solicitors were seeking to pursue commercial activities leading to the contract before the contract was entered into.

25. Against that background and bearing in mind that it is clear that the objective of Article 17 is to provide protection for consumers I consider:

a. The fact that the Claimant owns and operates only the Club and that its activities are London-based is irrelevant if the Claimant engages in marketing activities in Italy and spent money directing such activities to Italy or any other Member States.

b. Although Ms Drage submitted that the Claimant's website does not make any provision for the Italian market or host a domain name in Italy nor an Italian dialling code nonetheless the evidence is clear that the Claimant used Mr Parrini to make contact with and encourage persons to visit the Club for the purposes of gambling. The evidence of Ms Elliott is that Mr Parrini was an "agent" who was expected by the Claimant to recommend customers in return for "enhanced membership benefits". The precise meaning of these words has not been explained but, in my view, must be taken to mean that there was consideration passing to the agents for their efforts. Thus the Claimant was prepared to, and did, expend money or give benefits of a financial nature to persons who were "touting" the advantages of visiting the Club to persons in Italy and/or other Member States.

c. It is also clear that Mr Parrini was only one of such agents. In my view it is impossible to differentiate between the efforts of these agents and the efforts of those described in *Pammer* and in *Oak Leaf Conservatories Limited v Weir* as *"an agent or door-to-door salesman"*;

d. Ms Drage sought to differentiate the type of communications in the present case on the basis that there had been a prior relationship between Mr Parrini and the Defendant who had been introduced to the Defendant through other gambling associates and that the Defendant elected to provide Mr Parrini with his contact details. In my view these points are irrelevant. The question is whether the Claimant had extended its "touting operation" into Italy and the employment of Mr Parrini by the Claimant clearly indicates that it had.

e. Further Ms Drage's submission that a trader "cherry picking" one individual in the Member State to direct an offer based on its previous relationship and knowledge of that individual cannot meet the threshold of manifesting the trader's intention to establish commercial relations with consumers of the Member State or an intention on the part of the trader to target one or more other Member States cannot be accepted. The reality is that the evidence of the Claimant demonstrates that the Claimant had extended its activities into Italy and whether such activities manage to obtain one or twenty possible customers is only a matter of degree. The Claimant's evidence is clear that it had a policy of using agents for such purposes.

f. Further Ms Drage's submission that the Defendant always knew that any contract he entered in to with the Club would be concluded and performed in England and that he is an experienced and sophisticated gambler are equally irrelevant. It is accepted that, for the purposes of the Regulations, the Defendant is a consumer. The Regulations do not differentiate between degrees of consumer. If Section 4 of the Regulations apply it is

because he is a consumer and the provisions in Art.17(1)(c) are satisfied. There cannot be different subjective rules which apply to different types or characterisations of "consumer".

Conclusion

26. In these circumstances I consider that before the contract with the consumer was concluded, there was evidence demonstrating that the Claimant was directly involved in commercial activities in the Defendant's domiciled Member State and that it directly involved the contract entered into between the Defendant with the Claimant.

27. It follows that the Defendant's application dated the 20th March 2018 for a declaration that the English court has no jurisdiction should succeed and that the Claimant must pursue its claim against the Defendant in the courts of his own domicile, namely Italy.

Dated this 19th day of November 2018