Neutral Citation Number: [2023] EWHC 1608 (Comm)

Case No: CL-2022-000466

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Date: 29/06/2023

Before :

MR JUSTICE FOXTON

- -

Between :

ROBERT GAGLIARDI	**Claimant**
- and -	
EVOLUTION CAPITAL MANAGEMENT LLC	**Defendant**

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Daniel Oudkerk KC (instructed by **Brahams Dutt Badrick French LLP**) for **Mr Gagliardi**
Richard Leiper KC and **Judy Stone** (instructed by **Morrison & Foerster (UK) LLP**) for **Evolution Capital Management LLC**

Hearing date: 15 June 2023
Draft Judgment Circulated: 20 June 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Thursday 29 June 2023 at 10:30am.

The Honourable Mr Justice Foxton:

1. This is the hearing of an application by the claimant (**Mr Gagliardi**) for an anti-suit injunction (**ASI**) to give effect to what he contends is his statutory right under s15C(3) of the Civil Jurisdiction and Judgments Act 1982 (**CJJA 1982**) to be sued in England and Wales, in relation to an employment dispute.

2. The ASI is sought against Evolution Capital Management LLC (**Evolution**). Evolution is a Nevada-based investment adviser which I am told is owned by a Mr Michael Lerch.

3. Section 15C was introduced by regulation 26 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479, pursuant to the European Union (Withdrawal) Act 2018. Its effect is to retain, in England and Wales, what was previously Section 5, Article 22 of the Brussels I Recast Regulation. Section 15C(3) provides:

   > "If the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer)."

4. It is accepted (for the purposes of this hearing) that, before the court could grant an ASI against Evolution, it must be satisfied that it has personal jurisdiction over Evolution in respect of the claim which Mr Gagliardi seeks to bring (*Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 892). Mr Gagliardi relies on s.15C(2)(b) of the CJJA 1982 which provides that an employer may be sued by an employee "in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so".

5. Evolution disputes that it has commenced proceedings against Mr Gagliardi which fall within s.15C(3) of the CJJA 1982, and it also disputes that the claims which Mr Gagliardi has brought against it fall within s.15C(2)(b) of the CJJA 1982.

The appropriate decision-making framework

6. It is important at the outset to identify the appropriate framework for determining the issues which I have been asked to decide.

7. So far as the application for an ASI is concerned, the effect of the order which Mr Gagliardi seeks will be to prevent Evolution from pursuing proceedings before a court of its choice and whose jurisdiction under its own rules has been established. Given the final effect of ASIs, the court does not usually apply *American Cyanamid* principles when deciding whether or not to make an order of that kind. In cases in which the ASI is sought to enforce compliance with a jurisdiction or arbitration agreement, the approach which the court should take is as summarised in *AIG Europe SA v John Wood Group Plc and ors* [2021] EWHC 2567 (Comm), [58], and [2022] EWCA Civ 781, [10]:

   (1) The court's power to grant an ASI to restrain foreign proceedings, when brought or threatened to be brought in breach of a binding agreement to refer disputes to

arbitration (or before the English court), is derived from s.37(1) of the Senior Courts Act 1981, and it will do so when it is "just and convenient".

(2) The touchstone is what the ends of justice require.

(3) The jurisdiction to grant an ASI should be exercised with caution.

(4) The injunction applicant must establish with a "high degree of probability" that there is an arbitration or jurisdiction agreement which governs the dispute in question.

(5) The court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief.

8. The same test has been applied when the basis on which the ASI is sought is that the defendant is seeking to pursue a right, the exercise of which is conditioned by an obligation to assert that right only in a specific forum, even when the party seeking the ASI does not contend that the foreign proceedings are brought in breach of a contract between the claimant and the defendant: see *QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros* [2022] EWHC 2062 (Comm), [10]-[11].

9. In this case, the ASI is not sought on either of those bases, but in reliance upon what can fairly be described as a controversial right of an employee arising under the Brussels Regulation and its successors only to be sued in a court recognised as an appropriate court by the Regulation. However, the effect of an ASI on Evolution's ability to litigate in New York will be the same as in a case involving an application for a contractual or quasi-contractual ASI, and I am satisfied that the same test should apply.

10. By contrast, the question of whether the court has in personam jurisdiction over Mr Gagliardi's claim requires him to establish a "good arguable case" that s.15C(2)(b) is engaged. In answering that question, I have applied the test as discussed by Green LJ in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [70]-[80]. In brief summary:

(1) The claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway, which, subject to (3), requires the claimant to show that it has the better of the argument.

(2) If there is an issue of fact as to the application of gateway, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so, applying common sense and pragmatism.

(3) The nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

Is there any need for the Court to consider this application now?

11. Before proceeding further, it is necessary to address the question of whether there is any need for the court to consider Mr Gagliardi's application at this point. To answer that question, it is necessary to consider the history of the proceedings to date.

12. After originally indicating that he would start proceedings against Evolution in New York, Mr Gagliardi issued these proceedings on 26 August 2022 claiming outstanding bonus amounts which he says are due to him. He did not immediately serve them, but Evolution's lawyers were informed that proceedings had been issued in this jurisdiction and provided with a copy of the claim form on 9 September 2022. The parties attended a mediation on 9 November 2022. The mediation was unsuccessful, and that evening Evolution commenced proceedings against Mr Gagliardi in the State of New York seeking, inter alia, a declaration that Mr Gagliardi was not owed the bonus he had claimed in these proceedings, and seeking to recover bonus amounts previously paid to Mr Gagliardi. Mr Gagliardi issued a motion asking the New York court to dismiss the New York proceedings (**the Motion to Dismiss**).

13. Mr Gagliardi issued this application for an ASI on 9 February 2023. Evolution issued an application to challenge the jurisdiction of the English court. Mr Gagliardi sought an expedited hearing of his ASI application. Correspondence followed between the parties in an effort to reach an agreement which would allow the Motion to Dismiss to be determined, prevent the need for an expedited ASI application, and allow that application and the jurisdictional challenge to be brought on together.

14. On 8 March 2023, Evolution's solicitors wrote to Mr Gagliardi's solicitors confirming that if agreement was reached that the ASI and jurisdiction applications were heard together, and no expedited application for ASI relief was made, then:

> "We confirm that, other than in relation to our client's application for a sealing order or in relation to your client's motion to dismiss, our client will undertake not to further prosecute the New York proceedings between now and the combined hearing of the Jurisdiction Application and the Anti-Suit Application."

This offer did not address the position where the New York Court made an order of its own motion, and did not agree to Mr Gagliardi's request that an undertaking should be provided by Evolution to address that risk.

15. On 15 March 2023, Mr Gagliardi's solicitors wrote to the Commercial Court seeking expedition. This application was supported by a witness statement from Mr Redniss, a US attorney acting for Mr Gagliardi in the New York proceedings, which stated:

> "If the New York Court denies the Motion to Dismiss, absent a stay granted by Justice Reed or an appellate court, Mr Gagliardi would then be required to answer the Complaint and the New York Court would set a court conference and require the parties to enter into a discovery schedule with deadlines for compliance. These steps would be taken by the New York Court of its own motion".

16. It is important to note that this witness statement expressly identified the fact that, if the Motion to Dismiss was refused, then the New York Court might require Mr Gagliardi to file his Answer to the Complaint, and make an order to this effect of its own motion.

17. In response, on 16 March 2023, Evolution offered a further undertaking to "co-operate to ensure that no further steps are taken by the New York court of its own motion". On 17 March, Mr Gagliardi's solicitors wrote stating:

> "For the avoidance of doubt, in the event that the New York court makes an order for directions in relation to the underlying claim (i.e., not in relation to the motion to dismiss or the application for a sealing order) we will expect your client inter alia to make a joint application that these directions be suspended. Further, in the event that your client breaches the terms of the Undertaking we are instructed to bring these matters immediately before the English Court on an expedited basis".

18. In response, on 23 March, Evolution confirmed through its solicitors that:

> "We agree that, in the event the New York court makes an order for directions in respect of the underlying claim (i.e., not in relation to the motion to dismiss or the application for a sealing order), we will make a joint application with your client that these directions be suspended".

19. Against that background, on 30 March a Consent Order was made by Bright J recording Evolution's undertaking:

> "not to further prosecute or procure the prosecution of proceedings commenced by the Defendant against the Claimant in the New York County Supreme Court under case number 654273/2002 prior to a combined hearing of the Anti-Suit Application and the Defendant's application to dispute the jurisdiction of the English Court and to co-operate to ensure that no further steps are taken by the New York court of its own motion (other than in relation to the motion to dismiss the New York proceedings and application for a sealing order)".

20. A 1.5-day hearing was listed for Mr Gagliardi's application for anti-suit relief and Evolution's jurisdiction challenge, which was fixed for December 2023.

21. On 23 May 2023, the Motion to Dismiss was the subject of oral argument. Immediately after the argument, the Honourable Justice Reed dismissed the motion, holding that the New York Court had personal jurisdiction over Mr Gagliardi because he had transacted business in New York. At the end of his ruling, the Judge ordered Mr Gagliardi to serve his Answer in the proceedings by 22 June 2023. There was no reaction by either attorney. However, on 26 May, Mr Gagliardi's solicitors wrote to Evolution's solicitors, asking Evolution to join Mr Gagliardi in applying to Justice Reed to stay the New York proceedings. A letter to the same effect was sent between the parties' New York attorneys.

22. Evolution refused to take that step, its basis for doing so being set out in a letter from its New York attorneys: it was suggested that the order requiring Mr Gagliardi to file an Answer was an order "in relation to the motion to dismiss the New York proceedings". That explanation has since been supplemented by the suggestion that the order requiring the Answer to be filed was not taken "by the New York court of its own motion" because it would have been open to Mr Gagliardi's attorney to object to it, and/or that there was no point in making such a request because it would inevitably be refused.

23. I am satisfied that Evolution's New York attorneys were in error in their interpretation of the undertaking offered by Evolution to the English court:

    (1) The words "in relation to the motion to dismiss" did not extend to an order requiring Mr Gagliardi to take a step which is generally of jurisdictional significance, namely filing an Answer on the merits, nor is such an interpretation tenable in the face of Mr Redniss' witness statement explaining why this part of the undertaking was necessary.

    (2) An order made by the New York court "of its own motion" is one made other than at the request of one of the parties. An order requiring Mr Gagliardi to file an Answer if the Notice to Dismiss failed was specifically identified by Mr Redniss as an order which the New York court might make of its own motion.

    (3) It was not for Evolution to decide not to do what (in my determination) it had undertaken to do, merely because it had decided the Judge would not accede to any application. Nor would it be appropriate for the English court to seek to determine how a New York judge would or might respond to an application made in their court.

24. It follows that I am satisfied that Evolution has not complied with the undertaking it gave to this court. While I am willing to accept that it persuaded itself its conduct could be reconciled with the undertaking it had given, its actions appear more than a little opportunistic, and raise legitimate concerns as to whether an undertaking, on its own, provides a sufficient basis to "hold the ring" pending the hearing of the two applications in December. In these circumstances, I have concluded that it was appropriate for Mr Gagliardi to seek further relief from the court at this stage. Evolution has since confirmed its readiness to file a joint stipulation from counsel staying or extending the date for the Claimant to file his Answer in the NY Proceedings.

Does the court have personal jurisdiction over Evolution?

25. As I have stated, Evolution has issued a challenge to the court's jurisdiction which is not due to be heard until December 2023. That application has not been the subject of any expedition application. Mr Leiper KC for Evolution says that the issue of jurisdiction is not before the court, and (by inference) it would not be fair to determine the issue now.

26. In these circumstances, I have decided that I will approach the jurisdiction issue on the basis that this was a "without notice on notice" hearing so far as that issue was concerned,

save to the extent that a particular matter relevant to the issue of jurisdiction is necessarily determined by any ruling made on the ASI application, which is an "on notice" application.

27. The question of whether the court has jurisdiction turns on three issues:

(1) Whether Mr Gagliardi is an employee for the purposes of s.15C of the CJJA 1982.

(2) Whether Mr Gagliardi habitually worked for Evolution in England within the meaning of s.15C(2) of the CJJA 1982.

(3) Whether the claims he asserts fall within the scope of s.15C, if Evolution is arguably an employer.

28. Issue (3) was not disputed. Issue (1) also arises in relation to the application for ASI relief, where Mr Gagliardi faces a higher evidential burden, and I will consider it there.

29. As to issue (2), on the question of where an employee "habitually" works, I was referred by Mr Oudkerk KC to the decision of the Court of Justice in *Nogueira v Crewlink Ireland Ltd* [2018] ICR 344, [63]:

> "As observed by the Advocate General in point 85 of his opinion, as regards work relationships in the transport sector, the court, in *Koelzsch*, para 49 and *Voogsgeerd [2011] ECR I-13275* , paras 38–41, mentioned several indicia that might be taken into consideration by the national courts. Those courts must, in particular, determine in which member state is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found."

30. Most of the CJEU case law on this issue has arisen where employees undertake their work from more than one place. Ugljesa Grusic in *The European Private International Law of Employment*, 110, suggests that "the habitual place of work is easily identifiable where the work is performed in one place".

31. I have read the evidence of Mr Lerch, Mr Chisholm and Mr Brindle filed for Evolution carefully. That evidence does not suggest that Mr Gagliardi's physical location when doing what he did for Evolution was anywhere other than London. I am satisfied that the habitual place of Mr Gagliardi's work for the period of nearly one year prior to his termination is not affected by the disputed evidence filed by Evolution that it was always intended that the place of that habitual work would at some point, and perhaps at some point soon, become a place of work somewhere in the United States. Taken at face value, the effect of that evidence is that Mr Gagliardi was planning to relocate to the US, or was "going to live" in or "move back" to the US, but had yet to make the move. Implicit in those statements is an acceptance that for the nearly one year, he was working in London, without yet having made the allegedly anticipated move. It is noteworthy that Los Angeles, Miami

and New York are all identified by Evolution's witnesses as cities under consideration for the re-location, but none was ever committed to.

32. By contrast, Mr Brindle, Evolution's CFO, confirms that office space in the Fulham Road was rented by a related company so that Mr Gagliardi could work there and his evidence is that Mr Gagliardi attended that office around 3 times a week. That is more than sufficient to establish a good arguable case as to the application of s.15C(2)(b).

33. Had the application of s.15C(2)(b) turned on the issue of whether it was always intended that Mr Gagliardi would do his work from somewhere in the US, then this would have involved a conflict of witness evidence as to which I am not able to make a reliable assessment at this stage, given the limitations of the materials available and the nature of the interlocutory process. However, I am satisfied that Mr Gagliardi has a plausible case that there was no clear or settled expectation of him moving to work in the US:

(1) There was clearly an amendment to the proposed contract between Mr Gagliardi and Evolution, between a version circulated on 22 April 2021, which provided "your employment will be in the Company's Crystal Bay, Nevada office, although you may work remotely as approved by Michael Lerch", and the version signed on 28 April 2021 (**the Contract**), which stated "your employment will be in the Company's Crystal Bay, Nevada office, although you may work remotely from *the location of your choosing* as approved by Michael Lerch" (emphasis added). That provides some documentary corroboration for Mr Gagliardi's account that it was agreed he would work in London.

(2) Contemporaneous communications from both Mr Gagliardi's English and New York lawyers sent or forwarded to Evolution are to similar effect. Mr Gagliardi's English solicitors stated, "as I understand it Rob will be employed here in England" (23 April), and Mr Gagliardi's New York lawyer sent an email stating "the letter needs to accurately reflect that you'll be providing services from the UK as well as the US so that you're not required to relocate".

(3) No one appears to be suggesting that it was ever seriously contemplated that Mr Gagliardi would work from Nevada, which raises the possibility that the terms of the Contract had a fiscal or regulatory motivation.

(4) The document on which Evolution placed some reliance was an email, to which Mr Gagliardi was not a party, sent on 30 June 2021, stating that Mr Gagliardi "spends time between US and London and expect post COVID for Rob to reside a majority of time in US". However, the opening quotation appears to represent something of a gloss on a position whereby, at the time the email was sent, Mr Gagliardi had worked for Evolution for a couple of months and, on Evolution's evidence, spent at best a handful of days in the U.S. for business reasons, across several locations. There is a plausible basis for contending that the email "spins" Mr Gagliardi's US nexus for maximum effect.

34. It follows that, on a "without notice" basis, I am satisfied that Mr Gagliardi has a good arguable case that his habitual place of work for Evolution was London.

The "in principle" entitlement to injunctive relief

35. The right relied upon to support the application for ASI relief is an alleged entitlement to be sued only in the court of Mr Gagliardi's alleged domicile. That an ASI could be granted in support of such an entitlement was first recognised by the Court of Appeal in *Samengo-Turner v J&H Marsh & McLennan (Services)* [2008] ICR 18. In that case, the New York-based defendants instituted proceedings in New York against the claimants – UK-domiciled employees – on the basis of an exclusive New York jurisdiction clause in the relevant bonus agreements. The claimants applied for anti-suit relief on the basis of a right to be sued only in the courts of their domicile pursuant to section 5 of the Regulation. The trial judge refused to grant the anti-suit injunction.

36. The Court of Appeal allowed the claimants' appeal, accepting that the grant of an ASI was the only way to make the claimants' statutory rights to be sued in England (under the Regulation) effective. Tuckey LJ held at [39]-[44]:

> "39. The position we are in is as follows. The New York court has rejected the challenge to its jurisdiction because of the clear and unambiguous terms of the exclusive New York jurisdiction clause in the bonus agreements. Had we not been concerned with the contracts of employment we should have upheld such a clause as well. But, as it is, our law says that we cannot give effect to it. The claimants can only be sued here. What shall we do? The only choice it seems to me is between an anti-suit injunction or nothing.
>
> 40. An anti-suit injunction is not a remedy to be dispensed lightly, particularly where the defendants sought to be restrained have brought proceedings in courts of high repute in a friendly foreign state. The injunction of course is directed at the litigating party and not the court. The premise for the remedy is that this party should not be litigating in that court and so the principles of comity are not offended by granting an injunction which does no more than require that party to comply with his legal obligations and ensure for the claimant that he does so. Although this is the correct analysis, one can understand why not everyone would see the situation in quite this way which is why the court should always be cautious before granting such relief.
>
> 41. We were referred to various English cases which have dealt with these problems in the context of commercial disputes where injunctions have been claimed on the basis of an exclusive jurisdiction clause or forum conveniens. But no case was cited to us where the exclusive jurisdiction of the English court was mandated by statute. …
>
> 42. …

43. Doing nothing is not an option in my judgment. The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction. The only way to give effect to the English claimants' statutory rights is to restrain those proceedings. A multinational business must expect to be subject to the employment laws applicable to those they employ in different jurisdictions. Those employed to work in the MM 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 MMC and GC or any other company in the MM group from enforcing their rights under the bonus agreements here.

44. For these reasons I think we should allow this appeal and grant an anti-suit injunction."

37. That case was followed with varying degrees of enthusiasm by the Court of Appeal in *Petter v EMC Europe Ltd* [2015] CP Rep 47, the Court overturning the decision of Mr Justice Cooke who had sought to distinguish it.

38. At [29], Moore-Bick LJ observed that "some commentators have suggested that the effect of art.22(1) of the Regulation is to create rights of a public, rather than a private, nature which are not capable of being protected by injunction. However, no argument of that kind was addressed to us and it would in any event have been precluded by the decision in *Samengo-Turner*, in which the existence of a right capable of protection by injunction was the foundation of the decision."

39. At [31], he "spell[ed] out" the principle which emerges from *Samengo-Turner* in the following terms:

> "…in a case falling within Section 5 of the [Brussels I Recast] Regulation an anti-suit injunction should ordinarily be granted to restrain an employer from bringing proceedings outside the Member States in order to protect the employee's rights."

40. Vos LJ was particularly troubled by the issue (which does not arise in this case), that the decision in *Samengo-Turner* involved the court granting an ASI to restrain proceedings before the court on which the parties had agreed to confer exclusive jurisdiction. At [44], he stated:

> "In my view, there are powerful arguments that ought perhaps to have required closer attention to the balance between the enforcement by anti-suit injunction of a statutory domestic or European employment right on the one hand, and the need, on the other hand, to give effect to the freely agreed exclusive jurisdiction clause conflicting with that statutory right. What if, for example, an employee in Mr Petter's position had expressly agreed that he would not take advantage of the protections in the Regulation when signing up to the Stock Plan and the RSU agreements? Even in our situation, it seems to me that the judge's solution of allowing the two pieces of

litigation to continue had some merit. At least, it did not put EMC on the horns of an impossible dilemma between either having to give up its undoubted contractual rights to proceed in Massachusetts or to be in contempt of an English court order. It is not, I think a conclusive answer to this problem to say, as Tuckey LJ did, that the overseas corporation has chosen to employ people in London where the Regulation gives them certain rights, because the employees in question have agreed to be bound by a contract for their own benefit that is in conflict with those rights. The decision is, therefore, in my judgment, rather more nuanced and fact dependent than *Samengo-Turner* allows."

41. Sales LJ offered a strong defence of the decision, observing at [55]:

"In my view, s.5 of the Regulation reflects and seeks to give expression to a clear public policy to protect employees in relation to litigation relating to their employment, because they are taken to be in a weaker negotiating position by reason of their economic and social status as against employers. The decision in *Samengo-Turner* gives effect to this public policy, as reflected in the Regulation. In my opinion, it was legitimate for the court in *Samengo-Turner* to do this."

42. The decisions in *Samengo-Turner* and *Petter* have been strongly criticised in Thomas Raphael KC's *The Anti-Suit Injunction* (2nd), [4.41]-[4.46] and "Do as you would be done by? System-transcendent justification and anti-suit injunctions" [2016] LMCLQ 256 and by Professor Adrian Briggs KC, "Who is bound by the Brussels Regulation?"[2007] LMCLQ 43. However, they have the strong support of Sales LJ's judgment. There is no point in this judgment in my seeking to offer any contribution to a debate which already has such distinguished protagonists. The decisions are binding on me.

43. I accept that the approach adopted to Article 22(1) of the Brussels Regulation applies so far as English-domiciled employees are concerned under s.15C(3) of the CJJA 1982. That provision was intended to preserve the employee protection afforded by the relevant parts of the Brussels Regulation. The consumer protection provisions of the Brussels Regulation were also preserved in the CJJA 1982, by the same legislative enactments. Popplewell LJ noted of those provisions in *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297, [55] that:

"The Explanatory Memorandum says in no fewer than six places that the instrument is intended to 'adopt', 'retain' or 'restate' the protections afforded to consumers (and employees) in the Recast Regulation… It is clear beyond dispute that the intention expressed in the Explanatory Memorandum was one of restatement and retention in domestic law of the consumer protection in the Recast Regulation, following withdrawal…"

44. To my mind, that is equally true of section 15C. Nor am I persuaded that the present case can be distinguished factually from *Samengo-Turner* and *Petter*:

(1) I accept that the employees in *Samengo-Turner* and *Petter* appear to have been recruited by and integrated into a more substantive English employment set-up than Mr Gagliardi. If, however, Mr Gagliardi can bring himself within s.15C(3), he will have the jurisdictional entitlement and immunity which the Court of Appeal has held should ordinarily be protected by an ASI.

(2) I am satisfied to a high degree of probability that Evolution contemplated that for a significant period of no fixed duration, Mr Gagliardi would work from a London location, and were content to facilitate that. Evolution was, therefore, subjecting its relationship with Mr Gagliardi to the UK employment regime (whether willingly or not): see [31], [32] and [52]-[53].

45. That leaves the question of whether Mr Gagliardi can satisfy me to "a high degree of probability" of three things:

(1) That he is domiciled in England.

(2) That he is an employee of Evolution for "Brussels Regulation" purposes.

(3) That his claims against Evolution, and its claims against him, arise in relation to his employment.

46. If issues (1) and (2) are resolved in Mr Gagliardi's favour, Evolution did not suggest that issue (3) was not satisfied.

Domicile

47. For the purposes of s15C, s41(2) of the CJJA 1982 (titled "Domicile of individuals") provides:

> "An individual is domiciled in the United Kingdom if and only if—
>
> (a) he is resident in the United Kingdom; and
>
> (b) the nature and circumstances of this residence indicate that he has a substantial connection with the United Kingdom."

48. Section 41(6) provides that the requirements of s41(2)(b) "shall be presumed to be fulfilled unless the contrary is proved" in the case of an individual who:

> "(a) is resident in the United Kingdom, or in a particular part of the United Kingdom; and
>
> (b) has been so resident for the last three months or more".

49. It has been noted that "Residence is an ordinary word with an ordinary meaning, which denotes the place where a person lives, is settled, has their usual abode, with some degree

of permanence" (*Stait v Cosmos Insurance Ltd Cyprus* [2022] EWCA Civ 1429, [59], per Whipple LJ). I was also referred to the comments of Ritchie J in *Chowdhury v PZU SA* [2021] EWHC 3037 (QB), [2022] RTR 13, [41] that in determining residence, "[a]ll of the relevant factual matrix is taken into account" and "[n]o one factor trumps all others".

50. In this case, there is a great deal of evidence, some of which is hotly disputed. However, the following facts were not disputed:

(1) Mr Gagliardi is a US citizen.

(2) He moved to Geneva in 2007 and to London in 2012.

(3) He rents a house in London.

(4) He has three children who live in and attend school in London.

(5) In the course of his work for Evolution, Mr Gagliardi paid US Federal Tax, rather than UK income tax, payment being made into a US bank account and pay checks sent to a US address or Evolution's address.

(6) Mr Gagliardi did not provide a US residential address which could be used for the payroll, with the result that Evolution's address was used for payroll purposes.

(7) On 9 July 2021, Mr Gagliardi acquired a UK resident permit.

(8) Mr Gagliardi has in fact performed his work for Evolution from London.

(9) Mr Brindle was keen to obtain confirmation of Mr Gagliardi's residence in and legal right to work in the UK, which was (in the event) provided.

(10) Evolution, through Mr Brindle, procured the leasing of office accommodation in London in part so that Mr Gagliardi would work from that office.

51. As I have mentioned, there is a hotly tested dispute of fact, which I am unable to resolve, as to whether Mr Gagliardi's working from London was intended to be temporary, on the understanding that he would be relocating. This is the effect of evidence from Evolution's CEO, Mr Chisholm, CFO, Mr Brindle and founder and CIO, Mr Lerch, but it strongly disputed by Mr Gagliardi who alleges that these witnesses are seeking to paint a false picture.

52. As I have stated, the evidence of Evolution's witnesses speaks to a future planned relocation, expressed in vague terms as to its timing and the eventual location, which remained unfulfilled for a lengthy period. At best, that expectation would have come into existence in or around April 2021 (by which time Mr Gagliardi had been living and working in London since 2012), and it is difficult to see any realistic basis on which it would have survived the termination of Mr Gagliardi's contract in March 2022, in

circumstances in which it is the position at the commencement of proceedings in August 2022 which matters.

53. Further, if Mr Gagliardi is not resident in England, it can legitimately be asked where he is resident? There is, on the material before me, no rival credible contender, with New York, Florida and Los Angeles all, apparently, in the running.

54. Having regard to all of the evidence, I am satisfied to the requisite high degree of probability that Mr Gagliardi is resident in England and Wales and, hence, domiciled here.

Was Mr Gagliardi an employee of Evolution?

55. Mr Gagliardi signed a document which was described as a contract of employment with Evolution dated 28 April 2021. However, Evolution alleges that Mr Gagliardi lacked the requisite degree of subordination to be an employee for the purposes of the special regime in the Brussels Regulation, relying on the decision of the Court of Justice of the European Union in *Arcadia Petroleum Ltd v Bosworth* [2020] ICR 349 and on the subsequent decision of the English Court of Appeal in the same litigation in *Alta Trading UK Ltd v Bosworth* [2021] ICR 1358. I should mention that I was counsel for Mr Bosworth in the case in proceedings before the Court of Appeal, the Supreme Court and the Court of Justice, although not in the subsequent proceedings.

56. In that case, it was held that there was a good arguable case that Mr Bosworth and Mr Hurley did not constitute employees for the purposes of the special protective regime for employees in the Lugano Convention because they lacked the necessary relationship of subordination with the putative employer. On the facts which the Court held to be arguable, it was said that Mr Bosworth and Mr Hurley had determined which company should be the counterparty to their contracts and the terms of those contracts, and that the requisite degree of subordination was not established merely because they were directors whose offices could be revoked by the company.

57. When the case came back before the English courts, there was further evidence on the basis of which it was concluded that there was a good arguable case that Mr Bosworth and Mr Hurley had a more than merely negligible ability to influence the companies said to be their employers, and that this was sufficient to preclude an employer-employee relationship for Lugano Convention purposes. It is right to say that on the facts found to be arguable, *Bosworth* was an exceptional case, and Nugee LJ said as much at [78]:

> “I do not think we can assess how wide the impact might be, but I doubt that this case will be a precedent for many others. Even senior managers are usually in a relationship of subordination to their employers. The Appellants had (or, to be more precise, the Respondents have established a good arguable case that they had) an unusually free hand in running the Arcadia Group as their own private fiefdom to the extent of writing their own contracts of employment. I do not think the Judge's Judgment means that any senior manager, or even director, who is given a degree of autonomy as to how he does his job is outside the protection of Art 18(1) ...”

58. Against that background, on what basis is it argued that Mr Gagliardi did not have the necessary subordination to Evolution? Even on Evolution's own evidence, Mr Gagliardi did not draft his contract of employment or select his corporate employer. Whilst there would appear to have been some limited negotiation of a few terms as one would expect, the evidence strongly suggests that the Contract was almost entirely drafted by Evolution and largely reflects an offer letter drafted by Evolution.

59. The Contract expressly provides for Mr Gagliardi to report to Mr Lerch, for him to be subject to the Company's rules, to enter into the Company's non-disclosure agreement, and to "perform all of the duties and obligations required… to the reasonable satisfaction of the Company". The evidence adduced by Evolution is to the effect that Mr Gagliardi had "complete" or "a lot" of autonomy over his trading strategy, provided he stayed within the trading guidelines, and complete autonomy over his working schedule, but he had to devote all his working time to Evolution.

60. What that evidence does not even touch upon, however, is influence over the activities of the employing entity in its dealings with him. The position of Mr Gagliardi as it appears on the evidence does not appear to me to be particularly unusual or surprising. Mr Lerch refers to Mr Gagliardi reporting to him, as did a handful of others, and Mr Lerch providing him with "appropriate oversight as I did for all senior employees". I have been shown WhatsApp messages showing interactions between Mr Gagliardi and Mr Lerch in which the latter exercises a senior role. Mr Gagliardi was subject to the Employee Rules Handbook and various other policies.

61. In short, I am satisfied to a high degree of probability that Mr Gagliardi was Evolution's employee for the purposes of s.15C of the CJJA 1982.

Conclusion

62. It follows that I am satisfied to a high degree of probability that Mr Gagliardi benefits from Section 15C of the CJJA 1982 so far as his claim against Evolution is concerned, and that, on the basis of authority binding upon me, that he is presumptively entitled to an ASI on that basis.

Are there strong reasons not to grant the injunction?

63. Evolution pointed to the fact that the New York court has already determined that it has jurisdiction. However, an ASI is of value principally when the alternative court has or will assert jurisdiction. In *Samengo-Turner* and *Petter*, ASIs were granted even though the courts where the employer was pursuing proceedings had jurisdiction as a result of agreements between the parties.

64. I have not been persuaded that there are any strong reasons for refusing a prohibitive ASI.

65. I am not persuaded that it would be appropriate to grant a mandatory injunction requiring Evolution to discontinue the New York proceedings. That would be an exceptional order to make at an interim hearing (*Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil* [2002] EWHC 2210 (Comm), [210]), particularly in circumstances in which Evolution has indicated a willingness to challenge the decision in *Samengo-Turner* in a higher court.

66. However, I am persuaded that it would be appropriate to order Evolution to do what it had previously agreed to do, namely to co-operate to ensure that no further steps are taken by the New York court of its own motion, and an order specifically requiring Evolution to co-operate in a joint approach to the New York court to stay or extend the date for Mr Gagliardi to file his Answer.

67. I will hear the parties further as to the final terms of the order.