

OWUSU v JACKSON – Is there any place left for a plea of *Forum Non Conveniens* (or any other Latin phrase)?

The day before the last Newsletter went to print the ECJ gave its ruling in *Owusu v Jackson* [2005] 1 Lloyd's Reports 452 and at the end of my article on the Brussels Convention I promised to explore the significance of that decision on another occasion. This is that occasion.

To repeat the facts of *Owusu*, the action arose out of a serious accident to the claimant when he was bathing in the sea in Jamaica. He walked into the sea, dived in, struck his head against a submerged sand bank, sustaining a fracture of his fifth cervical vertebra that rendered him tetraplegic. The claimant and the first defendant were both domiciled in England. The other 5 defendants were all limited liability companies domiciled in Jamaica. The claimant claimed against the first defendant in contract and against the other defendants in tort. The defendants made an application for a declaration that the court should not exercise its jurisdiction in relation to the claims against them on the basis that Jamaica was the forum *conveniens*, the relevant events having occurred in Jamaica and the witnesses being resident there.

Article 2 of the Brussels convention provides:-

"Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."



Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."

In *Owusu* the ECJ decided that it was not open to the English court to decline to exercise jurisdiction conferred on it by Article 2 on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State was in issue or the proceedings had no connection to any other Contracting State. At the forefront of the ECJ's reasoning was a desire for legal certainty and consistency of jurisdiction.

Does that mean that the plea of *forum non conveniens* is to be consigned to history? Not entirely. *Forum non conveniens* is still available to a party against whom jurisdiction is founded on a basis other

than the Brussels Convention, the Lugano Convention or the Brussels Regulation. Furthermore a party domiciled in the UK can still raise forum arguments in favour of another jurisdiction within the UK because the Conventions and Regulations do not affect the allocation of jurisdiction within member states – *Cumming v Scottish Daily Record* [1995] EMLR 538.

In *KCM v Coromin* [2005] EWHC 889 Colman J held that the court remained entitled to refuse jurisdiction by staying its proceedings in the exercise of its discretion in circumstances where there was a binding jurisdiction clause in favour of a non-Contracting State. In the case of a jurisdiction clause in favour of a Contracting state, Article 23 of the Regulation/Article 17 of the Convention provide for that Contracting state to have exclusive jurisdiction. It was argued before Colman J that the effect of *Owusu* was

that, in the case of a jurisdiction clause in favour of a non-Contracting State, there was no longer any discretion to give effect to that jurisdiction clause if the defendants were domiciled here. The Judge rejected that argument relying on a passage in the Schlosser Report and the comments in *Owusu* concerning the desire for legal certainty. Indeed it is difficult to see what could reflect legal certainty better than to hold the parties to the jurisdiction they had bargained for.

It remains to be seen whether the *forum non conveniens* doctrine has survived in any other areas. For example it may be argued that it still exists to allow a court to decline jurisdiction on the grounds of *lis alibi pendens* if there is pre-existing litigation involving the same or similar issues before the courts of a non-member state. However this appears to have been rejected in the opinion of the Advocate General in *Owusu*. ▲



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