

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2020] SC EDIN 15

A487/19

JUDGMENT OF SHERIFF N A ROSS

in the cause

HERIOT-WATT UNIVERSITY

Pursuer

against

CHRISTIAN SCHLAMP

Defender

Act: Pugh, advocate

Alt: McNairney, advocate

Edinburgh, February 2020: The sheriff, having resumed consideration of the cause, sustains the preliminary plea-in-law number 1 for the defender (no jurisdiction) and dismisses the action; continues consideration of expenses to hearing on a date to be afterwards fixed.

Note

[1] The pursuer has raised this action in respect of a claim for fees. The defender is domiciled in Germany. There is a dispute about whether fees are outstanding, but as a preliminary point the defender disputes that this court has jurisdiction. This debate was about jurisdiction.

The factual background

[2] The defender resides in Germany where he is domiciled. On averment, on 12 January 2012 he entered into a contract with the pursuer for the provision of educational

services. He enrolled on a distance-learning academic study programme which led towards conferment of a DBA (Doctor of Business Administration) from the pursuer's Edinburgh Business School. The fee structure is set out in the pleadings. The maximum period of study was 10 years. On 26 July 2018 the defender completed his studies and was awarded a DBA. The pursuer has demanded payment of fees. The defender avers that he has made part-payment, but intends to defend any action on the basis of alleged failures and delays on the part of the pursuer. He challenges the jurisdiction of this court.

[3] The pursuer avers that there was a contract for services, that those services were provided at the pursuer's premises at Riccarton, Edinburgh, and accordingly that jurisdiction is conferred on this court on the basis of place of performance. The defender, on the other hand, claims that this was a consumer contract. Place of performance is therefore not available as a basis for jurisdiction. The action can only be based on domicile, and accordingly only the German courts have jurisdiction.

The legislative background

[4] The domestic law is set out in the Civil Jurisdiction and Judgments Act 1982. The 1982 Act incorporated the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels I"). The 1982 Act was amended in 2002, by the Civil Jurisdiction and Judgments Order 2001. Subsequently, the EU Parliament and Council attempted to refine Brussels I. That resulted in Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast). Those 2012 Regulations ("Brussels I Recast") led to the further amendment

of the 1982 Act, by the Civil Jurisdiction and Judgments (Amendment) Regulations 2014 and the Civil Jurisdiction and Judgments (Amendment) (Scotland) Regulations 2015.

[5] In terms of Brussels I Recast the main ground of jurisdiction is the defender's domicile. The preamble states:

“(18) 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”.

Section 4 relates to consumer contracts. Article 17 provides:-

“In matters relating to contracts 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...”.

[6] Article 17(c) regulates contracts such as the present contract, with a party which 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. Parties accepted that formula was apt to cover the provision of distance learning services by the pursuer to the defender.

[7] Article 18 provides that a consumer has a choice when bringing proceedings against such a commercial party, and can elect to bring proceedings either in the domicile of that party or in the consumer's own domicile. That choice does not, however, apply the other way round. If a commercial party wants to sue a consumer, then they must do so in the courts of consumer's domicile.

[8] If the defender is not a consumer, then Article 7 applies, and he may be sued:

“in matters related to a contract, in the courts for the place of performance of the obligation in question.”

As payment was required in Edinburgh, that would constitute jurisdiction in this court.

[9] The pursuer, as a commercial provider of educational services, seeks decree against an individual defender domiciled in Germany. If the defender is a “consumer”, then it cannot use the Scottish courts, and must raise the action in Germany.

Pleadings and submissions

[10] The pursuer pleads and offers to prove that the defender undertook an educational course for reasons closely connected to his self-employment as a consultant in finance and business administration. The course was not an undergraduate course but a Doctorate in Business Administration. The defender is said to have been in employment between 1993 and 2002 in the fields of tax, audit, accounting and financial control. In 2003 he became self-employed in finance and business administration. In 2009 he completed an MBA at an educational institution in Hamburg. On applying for the pursuer’s DBA course, he described himself as busy as a self-employed consultant advising on external control and budgeting, and in charge of financial structure optimisation. He studied part-time while he continued to work. The subject-matter of his dissertation is set out, and described as closely connected to his self-employment. The study activity was for a business purpose, namely the furtherance of his existing career in business administration, and the DBA was a professional qualification. It is believed and averred that his study attracted tax relief in Germany for that reason.

[11] The pursuer accordingly pleads that the educational services provided to the defender were not outside the defender’s profession, but were part of those activities. Accordingly, he does not meet the criteria for a “consumer”, and jurisdiction is therefore constituted in terms of Article 7 of Brussels I Recast.

[12] Both counsel submitted and adopted written arguments. In brief summary, their submissions were as follows:-

[13] For the defender, counsel submitted that the defender was a consumer, and could only be sued in Germany, his domicile. He referred to the 1982 Act, schedule 8, rule 3, which replicated the Brussels I Recast rules. He cited academic sources, which did not resolve the issue, and the cases of *Benicasa v Dentalkit SrL* [1997] ECR I-3767 and ECR I-3769, *Semple Fraser v Quayle* 2002 SLT (Sh Ct) 33, *de Grote - Hogeschool Katholieke Hogeschool Antwerpen v Kuipers* [2018] EUECJ C-147/16 and *Costea v SC Volksbank Romania SA* 2016 1 WLR 814.

[14] For the pursuer, counsel submitted that the onus was on the defender to show there was no jurisdiction. The pursuer offered to prove that the defender was not acting outside the course of his profession when he enrolled on the pursuer's course. The defender was therefore not a consumer, and could be sued in the place of performance. He referred to and distinguished the cases relied on by the defender. He submitted that the challenge to jurisdiction should be dismissed and the case appointed to a proof before answer.

Decision

[15] In terms of Article 17 of Brussels I Recast, if the defender was acting for purposes outside his trade or profession, then he is a consumer and must be sued in the courts of his domicile, namely Germany, and not in the Scottish courts. In my view, the pursuer's averments are compatible with the defender acting as a consumer. Taken at their highest, they do not exclude that status. Accordingly the action falls to be dismissed due to lack of jurisdiction, in respect that on the face of the averments the defender is a consumer.

[16] From the legislation and the authorities cited in argument I take the following principles:-

[17] The individual circumstances of each contract are of central importance. A student undertaking an educational course may or may not be a consumer, depending on the purposes and content of the contract for supply of educational services. For a contract to be a consumer contract it has to be one which “can be regarded as being outside his trade or profession” (Brussels I Recast, article 17(1); 1982 Act s. 3);

[18] The status of consumer is an objective and functional definition. Whether a contract confers such a status depends on all the circumstances, but particularly the terms of the contract and the nature of the goods or services covered (*Costea*, above at para 21 (Advocate General));

[19] No-one can be deprived of the status of consumer by reason of his general knowledge or his occupation. What is exclusively relevant is his position in relation to the specific legal transaction (*Costea*, above, para 28 (Advocate General); paras 21, 22 and 26 (ECJ));

[20] When considering the definition of consumer it is a crucial point that the definition is applied by reference to the capacity of the contracting parties. That capacity is assessed according to whether or not they are acting for purposes relating to their trade, business or profession. That criterion corresponds to the idea that the consumer is in a weaker bargaining position (*De Grote - Hogeschool Katholieke Hogeschool Antwerpen*, paras 37, 66, ECJ, discussing Directive 93/13/EEC relating to unfair terms in consumer contracts);

[21] The purpose of the exception is to protect the weaker party. The consumer is deemed to be the weaker party economically (*Benincasa*, above, at para 17). The protection is

unwarranted if the contract is for the purpose of trade or professional activity. The weaker position relates both to the level of knowledge of the consumer and to his bargaining power under terms drawn up in advance by the supplier, the content of which the consumer is unable to influence (*Costa*, above, para 27);

[22] Only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer. The specific protective rules enshrined in the rule apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future. (*Benincasa*, above, para 18);

[23] There is no onus on the defender to establish that he is a consumer. His status is one which the court must examine of its own motion even when not specifically requested to do so. (*de Grote - Hogeschool Katholieke Hogeschool Antwerpen*, above, para 37);

[24] Finally, if the national court finds that it is not established that the contract was concluded exclusively with either a private purpose, or a trade or professional purpose, the contracting party in question must be regarded as a consumer if the trade or professional purpose is not predominant (*Costea*, para 47 (AG)). Counsel for the pursuer made a conflicting submission to this principle. He submitted that a contract could only be a consumer contract if the trade or professional aspect was "negligible". He relied on *RTA (Business Consultants) Ltd v Bracewell* [2015] EWHC 630. I do not accept that submission. That case was decided before *Costea*, with which it conflicts, and on the basis of quite different facts, where the defendant was seeking to sell a business. *RTA (Business Consultants)* relied in turn on excerpts from *Gruber v BayWa AG* [2006] 2 WLR 205, which said the test was "not negligible". Counsel did not produce or analyse *Gruber*. I note that

Costea post-dated *Gruber*, that the ECJ in *Costea* must have considered but did not overrule or disapprove the AG's decision (that it is a consumer contract unless the trade purpose is "predominant") and that accordingly that appears to be the most recent authoritative analysis of the term consumer. I note for completeness that the *Di Pinto* case does not bear to resolve the matter either way, except to say that a trader is not a consumer. Accordingly, both the emphasis and the boundary have been shifted. Whereas formerly a minor ("not negligible") trade purpose would remove consumer status, now such a contract will be a consumer contract as long as the trade purpose is "not predominant".

[25] Having regard to these principles, the question is whether the pursuer has made sufficient averments to prove that the defender was not acting "outside his trade or profession". In my view it has not.

[26] The pleadings set out the pursuer's working history, as outlined above. The averments claim that the purpose of the DBA was to provide the defender with knowledge and skills to take on responsibility and obtain higher-level management positions, and that the defender intended to use the DBA to promote his business as a self-employed consultant in finance and business administration. The defender's study had a business purpose.

[27] In my view, these averments are irrelevant, having regard to the content and purpose of the Brussels I Recast Regulations, for the following reasons:-

[28] First, when the matter is looked at as one of the capacity in which the defender contracted (*de Grote - Hogeschool*, above), there are no averments to show it was in anything other than a personal capacity. The pleadings identify no employer, or third-party interest in the contract. References to "business" are to an activity, not a body. The defender applied personally, and not in any other capacity. He was not sent or sponsored by, and did

not represent, any third party business, body, trade or profession. There are no averments that any business had an interest of any sort in whether the defender completed his studies.

[29] Second, the averments support a case based on the personal needs for private consumption (*Benincasa*, above). Many, and probably most, students will seek education in order to promote themselves in the employment market. That does not by itself remove them from the category of consumers. The averments about the defender's past career do not inform his current intentions. The averments about his future career are entirely vague. No specific, or even generic, trade or profession is averred. The averments include descriptions such as "high-level management positions", "finance and business administration", "external controlling and budgeting", "financial structure optimisation", and "furtherance of a career in business administration". These could apply to any business and are entirely vague. On these averments, no evidence could be led showing any link to a particular trade, employer, business sector or profession. The averments are consistent with private consumption, namely seeking education with a view, in some unspecified way, to use the qualification to enjoy a better career and make a better life. On ordinary rules of pleadings, where the averments are consistent with a case which does not found liability, they are not relevant for proof.

[30] Third, although details are sparse, the contract was one for provision of educational services. The contract was formed by "a signed DBA agreement, which incorporated the pursuers' Ordinances and Regulations". There is no averment about negotiation of terms, or of opportunity to do so. The defender was in a weaker bargaining position, as that term is discussed in the European case law. As such, he falls into the category of persons protected by the Regulations. The fact he may be an experienced businessman does not remove his

consumer status (*Benincasa*, above). There is no averment that the terms of contract were other than imposed on the defender, or that he had any influence or negotiating power.

[31] Fourth, while status as a consumer contract depends on all the circumstances, particular importance attaches to the terms of the contract and the nature of the goods or services covered (*Costea*, above). There is no averment that the pursuer had any stake, influence or even interest in the defender's trade or profession. What he did with his doctorate was of no contractual relevance to either party. On averment, the services supplied were generic educational services, albeit at a high level. The services did not depend on the existence of any business, and were not related to any particular business need. The averments are consistent with the defender simply educating himself. The contract for education would be unaffected if the defender never worked again, or if his aspirations were unrealised. Not only was no third party interested in the outcome of the course, but neither was the pursuer. The contract was to provide education, not to assist any commercial operation, or to promote the defender's business, trade or profession.

[32] Fifth, even if the foregoing were wrong and a stateable case had been pled, there is no basis to prefer the pursuer's case over that of the defender. That would be fatal on normal pleading principles, but particularly so where the case law directs that the onus is on the pursuer to show that the trade purpose was not predominant. Article 17 of Brussels I Recast, and the corresponding provision in the 1982 Act, start from a position that if a contract "can be regarded" as outside a trade or profession, then it is a consumer contract. That inclusive wording is underlined by the courts. When it is not clear whether the predominant purpose of the contract was for consumer services, or for the purposes of a trade or profession, the court must regard the contracting party as a consumer (*Costea*,

above). There is no onus on the defender to prove that he is a consumer (*de Grote - Hogeschool* above). Even if I were wrong on the interaction between *Costea* and *Gruber*, discussed above, the pleadings are consistent with the purposes of any business being a negligible consideration under the contract, for the reasons discussed above.

Disposal

[33] For these reasons, even were the pursuer to prove all of the averments (and no more), the pursuer's case on jurisdiction is bound to fail. The action falls to be dismissed for lack of jurisdiction.

[34] Parties should attempt to resolve any remaining questions of expenses and sanction for counsel, and a final interlocutor can be issued. If agreement is not reached, parties should please contact the clerk to arrange a hearing.