James Finlay (Kenya) Ltd Litigation in Scotland

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The Court of Session was tasked with determining whether the past and present employees of James Finlay (Kenya) Ltd ("JFKL") could sue in Scotland for musculoskeletal injuries sustained whilst tea picking in Kenya allegedly caused by JFKL's negligence. JKLF is registered in Scotland and carries out its business activities directly in Kenya without relying on a local subsidiary. Before adjudication on the *forum non conveniens* issue, Lord Carloway ([2022] CSIH 29, [5]) had decided that the issues of fact or law are sufficiently similar or related to justify the grant of permission for group proceedings pursuant to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. JFKL proceeded to seek an anti-suit injunction in the Kenyan courts, but the Scottish proceedings were well under way at this juncture. In retaliation, an interim anti anti-suit interdict was sought and granted ([2022] CSOH 57 (Lord Braid) affirmed in [2022] CSOH 94 (Lord Weir)) by the Scottish courts. The legal basis of the latter injunctive relief may be justified in terms of protecting the jurisdiction of the Scottish courts. Alternatively, the conduct of JFKL was held to be unconscionable, vexatious and oppressive as there was evidence of harassment of employees, misrepresentation in the Kenyan proceedings and misuse of the group register.

The Court of Session (Inner House) sisted the Scottish proceedings until the claims are resolved through a statutory administrative procedure in Kenya ([2023] CSIH 39). Lord Carloway (with Lords Pentland and Doherty) adjudicated on the issue of *forum non conveniens*. Although the Court of Session had jurisdiction to hear the claims, the employment contracts provided for the application of Kenyan law to workplace injury claims. The court found that the injuries suffered by the group members fell within the ambit of the Work Injury Benefits Act 2007 ("WIBA"). This posed a "jurisdictional dilemma", as the Court of Session lacked experience in applying the WIBA scheme and could only award no fault compensation. These considerations rendered Kenya as the more appropriate forum. The judicious approach under the circumstances was to suspend the Scottish proceedings until the resolution of claims under the Kenyan statutory administrative procedure. The court refrained from stating that the WIBA system could not deliver "substantial justice" to the group members. The latter could perhaps be better phrased in the language of the "interests of justice" (see Professor Paul Beaumont in *Anton's Private International Law*, 3rd edition, para 8.410). The words of Lord

Goff of Chieveley remind us that the "advantage of financial assistance available here to obtain a Rolls Royce presentation of his case, as opposed to a more rudimentary presentation in the appropriate forum" is not sufficient to justify the refusal of a stay of proceedings (*Connelly v RTZ* [1997] UKHL 30, page 874D; See also, *Limbu v Dyson* [2023] EWHC 2592 (KB), [44] (Sheldon KC)). It may be observed that references to the "general public interest" and available Scottish "heads of loss" in [2023] CSIH 39, [69] are inconsistent with *Lubbe v Cape* [2000] UKHL 41, [51]-[54] (Lord Hope of Craighead) and Article 4(1) read along with Article 15(c) of the retained Rome II Regulation respectively. Regarding the latter, the retained Rome II Regulation has now been legally transposed into the 'assimilated' Rome II from 1 January 2024 pursuant to Section 5 of the Retained EU Law (Revocation and Reform) Act 2023. If the claims in Kenya were not determined according to WIBA or faced unreasonable delays, the court reserved the right to resuscitate the proceedings.

It may be argued that the protective jurisdictional provision in Section 15C of the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982) could have been harnessed to give rise to the right to sue the employer in Scotland and the correlative duty not to be sued abroad. However, it is noteworthy that this provision operates within a unilateral jurisdictional regime (in the absence of harmonised rules for the recognition and enforcement of judgments) and the pre-IP completion day CJEU jurisprudence and expert reports on the Brussels regime only retain persuasive interpretative value under Section 15E(2) of the CJJA 1982. Therefore, a stay of proceedings would still be possible on the basis of *forum non conveniens*.

For the judgment see, https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2023csih39.pdf?sfvrsn=50a40816_1 .

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