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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **19/02/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE DECISION OF MASTER McCORRY

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BETWEEN:

PAUL TWEED AND SELENA TWEED

Plaintiffs

AND

J & E DAVY TRADING AS DAVY

Defendant

_____

McALINDEN J

[1] By Summons dated 19th June, 2017, the Defendant sought an Order setting aside the Writ of Summons and service of the Notice of the Writ in this action pursuant to Order 12, rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 and/or staying the action pursuant to the inherent jurisdiction of the High Court on the grounds that the Court has no jurisdiction to hear and determine the claim.

[2] The matter was heard before the Master and he delivered a detailed written judgment on 7th September, 2018 in which he determined that the Court had jurisdiction to hear and determine the Plaintiffs' claims arising out of contract but had no jurisdiction to hear and determine the Plaintiffs' claims grounded in tort. Both parties have appealed the decision of the Master and the matter comes before me by way of a full re-hearing of the Summons. At the outset, I express my gratitude to Mr Ringland QC who appeared with Mr John Kerr for the Plaintiff and Mr Humphreys QC who appeared with Mr Richard Shields for the Defendant for their very helpful written submissions and Senior Counsels' focused and enlightening oral submissions. I am also grateful for the detailed judgment provided

by Master McCorry. This has made my task in hearing and determining the appeal much more straightforward than would otherwise have been the case. The hearing of this appeal was completed in two days on the afternoon of 1st and the morning of 12th February, 2019.

[3] By Writ of Summons dated 5th June, 2013, the Plaintiffs, who are husband and wife and are now partners in the law firm Tweed and are domiciled in Northern Ireland, claim damages against the Defendant, a provider of wealth management and financial advisory services, having its registered office in Dublin and a branch office in Belfast. The claim is founded in misrepresentation, negligence, negligent misstatement, breach of fiduciary duty, breach of statutory duty and breach of contract in the provision of investment and financial advice and services by the Defendant to the Plaintiffs in or around June, 2007.

[4] In essence, the Plaintiffs allege that the Defendant, in the course of its business of provision of wealth management services, investment advice and investment services, in Northern Ireland, encouraged and advised the Plaintiffs to invest in and lend money to a company, Ballymore International Developments Ltd, in the Republic of Ireland, which said company was set up to engage in overseas property development. It is alleged that the Plaintiffs were consumers in the sense of being ordinary, unsophisticated, retail investors and that this unregulated, pooled or collective investment scheme, involving unusual, speculative and complex assets, was wholly unsuitable for them and should not have been offered to them, being only suitable for sophisticated investors which they allege they were not. It is alleged that the advice and encouragement included the guarantee of a good return which was so attractive that Davy itself was investing in the scheme.

[5] It is alleged that as a result of being encouraged and advised by servants or agents of the Defendant, operating as such within Northern Ireland, the Plaintiffs decided to borrow €515,000 from the Anglo Irish Bank in Dublin which was then paid into the Defendant's bank account on 27th June, 2007, with €500,000 to be invested in this scheme and €15,000 being Davy's fees. It is alleged that contrary to the assurances given to the Plaintiffs by the Defendant, the investment scheme failed and the Plaintiffs lost the entirety of their investment.

[6] The Plaintiffs' case is that the investment advice provided by the Defendant's servants or agents to the Plaintiffs was either provided during the course of face to face meetings in Northern Ireland or during telephone calls with the first-named Plaintiff. Crucially, the Plaintiffs allege that the Defendant was providing wealth management and financial advisory services in Northern Ireland at the relevant time and that as a result of receiving and relying upon such advice and encouragement to invest in this scheme, they went on to invest in this scheme and suffered loss as a result.

[7] The Defendant's case is that neither it nor any of its servants or agents encouraged or advised the Plaintiffs to invest in this scheme. On the contrary, it is

alleged that there was a pre-existing relationship between Ballymore International Developments Limited and the Plaintiffs as a result of which a Ballymore Director informed Davy that the first-named Plaintiff wished to invest in Ballymore and requested Davy in Dublin to contact the first-named Plaintiff in Belfast to enable this investment to take place.

[8] It is alleged by the Defendant that on 20th June, 2007, the Plaintiffs were e-mailed an application form to enable them to open their Davy "account" and the following day the first-named Plaintiff responded by email to inform Davy that he would complete the paperwork on his return from France and leave it for collection by the Defendant at the office of the solicitors' practice where he was a partner at that time. It is alleged that the paperwork was duly completed by both Plaintiffs on 25th June, 2007 and was collected by a servant or agent of the Defendant from the solicitors' office in Belfast on 26th June, 2007 and brought to Dublin for processing. The account was opened and funds were transferred on 27th June, 2007 and the investment was perfected. In essence, the Defendant's case is that no financial or investment advice or encouragement was provided by the Defendant to the Plaintiffs in respect of this investment. Davy simply facilitated an investment which the Plaintiffs had already decided to make.

[9] The Defendant's terms and conditions which were allegedly accepted by the Plaintiffs stated that the Defendant was providing an "execution only service" to be governed by the laws of the Republic of Ireland. The terms and conditions also expressly stated that the Defendant "will not advise you about the merits of a particular transaction when you give the order for the transaction nor will we assess the suitability of any such investment for you…you will make and be responsible for all investment decisions." In essence, the Defendant denies that any advice or encouragement was given to the Plaintiffs to make this investment decision which was, in effect, made by the Plaintiff in advance of any contact between the Plaintiffs and the Defendant, with the Defendant being contacted initially about this investment by Ballymore.

[10] Following service of the Writ of Summons in this case, with leave of the Court, a Conditional Appearance was entered on behalf of the Defendant on 26th June, 2014. A Statement of Claim was served on 9th May, 2017. The Summons which this Court is required to adjudicate upon was issued on 19th June, 2017. Thereafter, a number of Affidavits were lodged by the Defendant's Solicitors in support of the relief sought and three Affidavits were filed by Mr Tweed opposing the grant of the relief sought.

[11] Without going into the minutiae of the claims and counterclaims set out in the Affidavits filed in this case, Mr Tweed avers in the strongest terms that Davy was operating its wealth management and investment advice business in Northern Ireland on and prior to 27th June, 2007, even if its Belfast Office was not officially opened until sometime after that date; the advice and encouragement to invest in Ballymore was provided to the Plaintiffs by the servants or agents of the

Defendant, including one individual described in the Defendant's email of 20th June, 2007 as the Portfolio Manager of the Defendant's Belfast office; during face to face meetings and telephone calls in Northern Ireland prior to 27th June, 2007; and that, by reason of the specific wrongful advice and encouragement provided in Northern Ireland, the Plaintiffs invested in this ill-advised and unsuitable investment scheme in the Republic of Ireland.

[12] The Affidavit evidence lodged on behalf of the Defendant makes the case that no advice or encouragement was given to the Plaintiffs by the Defendant or any of its servants or agents, and, importantly for the purposes of the present Summons, that Davy was not operating a branch office in Belfast until later in the summer of 2007. In essence, Davy's case is that any contact that did occur between the Defendant and the Plaintiffs on or before 27th June, 2007 when the contract was entered into, was made by means of e mail or telephone communication between the first-named Plaintiff and the Defendant in Dublin, did not involve the giving of advice and encouragement in relation to this investment scheme and did not include any face to face meetings taking place in Northern Ireland. Any such meeting took place later in the summer of 2007 after this specific investment was perfected.

[13] In addition to denying liability in this case, the Defendant, by means of this Summons, supported by Affidavit evidence, now makes the case that the Northern Ireland Courts do not have jurisdiction to adjudicate upon this dispute and that any civil proceedings brought by the present Plaintiffs against the present Defendant seeking relief by way of an award of damages by reason of breach of contract or tort, must be brought in the Courts in the Republic of Ireland by reason of the provisions of Council Regulation (EC) No 44/2001 of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I") which governs jurisdiction in disputes of this nature.

[14] At the hearing before the Master and on Appeal before me, it was agreed by the parties that the outcome of this application would be determined solely by reference to "Brussels I" and that issues such as forum non conveniens or exclusive jurisdiction clauses were irrelevant to the outcome of this application.

[15] For the purposes of this appeal, it was common case that the general jurisdictional principle set out in Article 2 of "Brussels I" establishes the default position that a company is sued where it is domiciled and that, for the purposes of these proceedings, the domicile of the Defendant is the Republic of Ireland (see Article 60). Therefore, it was agreed that the general jurisdictional principle in "Brussels I", if it applied in this case without qualification, mandated that proceedings should be brought in the courts of the Republic of Ireland. See Article 3 of "Brussels I".

[16] It was further agreed by the parties that the general jurisdictional principle was subject to a number of special exceptions specifically set out in "Brussels I" and,

for the purposes of the present proceedings, the relevant provisions of "Brussels I" were Article 5 "special jurisdiction" and Article 15 "jurisdiction over consumer contracts".

[17] Article 5 (1) provides that a person domiciled in a Member State may be sued in matters relating to a contract in the courts of another Member State which is "the place of performance of the obligation in question." Unless otherwise agreed, in the case of a contract for the provision of services, the place of performance shall be the place in a Member State where the services were provided or should have been provided.

[18] It is immediately apparent and is properly conceded by the Plaintiffs that the Plaintiffs cannot rely on the provisions of Article 5 (1). However, it is cogently and compellingly argued that the Plaintiffs can rely on the special jurisdictional provisions set out in Article 5 (3) and Article 5 (5) of "Brussels I".

[19] Article 5 (3) deals with proceedings arising out of tort. In such cases, a person domiciled in one Member State may be sued in the courts of another Member State where that Member State is the "place where the harmful event occurred or may occur." This phrase is "intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued at the option of the applicant, in the courts for either of those places…" See paragraph [28] of the judgment of the Second Chamber in the case of *Universal International Holding BV v Schilling and Others* [2016] 3 WLR 1139.

[20] In this case, irrespective of the merits of opposing arguments as to where the damage occurred, it is again immediately apparent that if the Plaintiffs case is correct, the place of the event giving rise to the loss is Northern Ireland as, according to the Plaintiffs, the wrongful investment advice and encouragement was provided by the Defendant and its servants in this jurisdiction.

[21] From the Plaintiffs' perspective, this may be a much more straightforward case to make than to argue that the place where the damage occurred is Northern Ireland. In paragraph [34] of *Universal International Holding BV v Schilling and Others,* the Court stated:

> "…it should be noted that the term "place where the harmful event occurred" may not be construed so extensively as to encompass any place where the adverse consequences of an event, which has already caused damage actually arising elsewhere, can be felt…"

[22] At paragraph [35] of the same judgment, the Court noted that:

> "the expression does not refer to the place where the applicant is domiciled and where his assets are

> concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another member state…."

[23] The Second Chamber went on to state at paragraph [40]:

> "…Article 5(3) of Regulation 44/2001 must be interpreted as meaning that…"the place where the harmful event occurred" may not be construed as being, failing other connecting factors, the place in a member state where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another member state."

[24] In this case it is tolerably clear that the "loss" which is the failure of the investment scheme occurred in the Republic of Ireland and the liability to repay the loan to Anglo Irish Bank arose and was incurred in the Republic of Ireland. Any consequential depletion of the Plaintiffs' assets in Northern Ireland for the purposes of discharging that liability, on the basis of the cited caselaw, would not, in itself, qualify as a relevant connecting factor entitling the Plaintiffs to avail of that limb (place where the loss occurred) of the special jurisdictional provision of Article 5(3). See paragraphs [38] and [40] of *Universal International Holding BV v Schilling and Others.* However, it is clear that the Plaintiffs are relying on another significant and important connecting factor, namely the alleged provision of wrongful advice by the Defendant to the Plaintiffs in Northern Ireland and, therefore, it can be legitimately argued by the Plaintiffs that both alternative limbs of the Article 5(3) test may be satisfied so as to allow them to sue the Defendant in tort in the Courts of Northern Ireland.

[25] Turning then to the provisions of Article 5 (5) of Regulation 44/2001; for the purposes of these proceedings, Article 5 (5) of "Brussels 1" provides that a company registered in a Member State may be sued in another Member State "as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated."

[26] Having regard to the Affidavit evidence served by the parties in this case, it is clear that the issue of whether the Davy Belfast branch office was or was not operating on or prior to 27th June, 2007, is hotly contested. The first-named Plaintiff is adamant that even if the branch office was not officially open on or before 27th June, 2007, he distinctly remembers meeting the Belfast office Portfolio Manager in an office in Belfast where there was a smell of fresh paint prior to that date. This is disputed by the Defendant, but even if it was accepted by the Court that such a meeting did take place in an office which had not officially been opened, would that be sufficient to satisfy the provisions of Article 5(5) on the basis that the dispute

arises "out of the operations of a branch, agency or other establishment," and this Court is the court "for the place where the branch, agency or other establishment is situated"?

[27] Bearing in mind that the special jurisdictional provisions constitute a derogation from the default position set out in Article 2, and paying full heed to the need to interpret any such derogating provision strictly (see Fourth Chamber judgment in *Holbohm v Benedikt Kampik Ltd and Co. KG* [2016] All ER (D) 77), it would appear that in order to avail of this special jurisdictional provision, a physical branch, agency or establishment must be in existence at the relevant time in order to do justice to the phrase "for the place where the branch, agency or other establishment is situated". Further, the dispute must arise out of the "operations of" that "branch, agency or other establishment." Therefore, strictly interpreted, this special jurisdictional provision requires the branch, agency or establishment to be in existence and operating at the relevant time. It would appear from the Affidavit evidence presented to the Court that, whatever the level of business being conducted by Davy in Northern Ireland and whatever the state of completion or readiness for business of the office premises in Donegall Square North at the relevant time, the payment made by the Plaintiffs to the Defendant, including Davy's fees of €15,000 was made directly to the Defendant in the Republic of Ireland and the paperwork relating to this transaction was processed in Dublin. The question to be addressed is whether such a state of affairs is consistent with the Davy Belfast branch being in existence and operating at the relevant time. An issue which I will return to in due course.

[28] The Plaintiffs also seek to avail of the jurisdictional provisions of Article 15 and Article 16 contained in Section 4 of "Brussels I". This Section deals with "Jurisdiction over consumer contracts." The Plaintiffs principally rely on the provisions of Article 15 (1) (c) of the Regulation. This provides that if a contract, other than a consumer credit agreement relating to goods, has been entered into by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, with another 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, then jurisdiction shall be determined in accordance with Section 4 of the Regulation.

[29] The other key provision in Section 4 of the Regulation is Article 16 which provides that a consumer may bring proceedings against the other party to the contract either in the courts of the Member State in which that party is domiciled or in the courts of the Member State where the consumer is domiciled.

[30] It is clear that regardless of whether the Belfast branch of Davy was in existence and operating at the relevant time, there is cogent and compelling evidence to support the claim that Davy was pursuing commercial activities in Northern Ireland at the relevant time or at the very least was directing commercial

activities to Northern Ireland at the relevant time. As identified by the Master, the key question in relation to the applicability of provisions of Section 4 of the Regulation is whether the Plaintiffs were consumers. In order to be classified as a consumer for the purposes of Article 15 it would appear that a party has to establish that he entered into a contract that can be regarded as "being outside his trade or profession". In this case, both Plaintiffs are and were at the relevant time practising Solicitors. There is no suggestion that this investment contract was entered into in the course of their trade or profession as Solicitors but that it not the end of the matter.

[31] The Master dealt with the issue of whether the Plaintiffs entered into this contract as consumers for the purposes of the Regulation in paragraphs [18] and [19] of his judgment. He referred to the decisions of *Standard Bank London Ltd v Apostolakis* [2001] 1 Lloyd's Rep Bank 240 and *Maple Leaf Macro Volatility Master Fund and another v Rouvroy and another* [2009] All ER (D) 247 (Feb). These decisions and the important ECJ judgments relating to the concept of consumer in EU law including *France v Di Pinto* [1993] 1 C.M.L.R. 399, *Benincasa v Dentalkit Srl* [1998] All ER (EC) 135, *Cape Snc v Idealservice Srl* [2001] E.C.R. I-09049, and *Gruber v BayWa AG* [2006] QB 204 were the subject of very detailed and erudite analysis in paragraphs 128 to 171 of the judgment of His Honour Judge Hegarty QC sitting as a Deputy High Court Judge in the case of *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659 (QB). Having conducted this analysis, the learned judge derived a set of principles which he set out in paragraphs 169 and 170 of his judgment.

[32] These principles subsequently received the endorsement of the Court of Appeal in England and Wales in the case of *Ashfaq v International Insurance Company of Hannover PLC* [2017] EWCA Civ 357 and for present purposes, it is instructive and sufficient to quote the relevant passage of the judgment of Flaux LJ at paragraphs [27] and [28].

> "27. Regulation 3(1) of UTCCR 1999 in force at the relevant time provided that a consumer is:
>
> > *"any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession."*
>
> 28. That definition was considered by His Honour Judge Hegarty QC sitting as a High Court Judge in the Mercantile Court in Manchester in *Overy v Paypal (Europe) Limited* [2012] EWHC 2659 (QB). After an extensive review of the European and domestic case law, he summarised the applicable principles at [169] of his judgment:

"The principles to be derived from this survey of the relevant case law seem to me to be as follows:

1. The expression "consumer" for the purposes of Council Directive 93/13/EEC [to which the UTCCR 1999 gave effect] should be given an autonomous, Community-wide, interpretation, rather than one anchored to the particular jurisprudence of any individual Member State.

2. At least where the language adopted in Community instruments is substantially the same and they have as their objective, at least in part, the protection of consumers, a similar approach to the construction and application of the expression should be adopted unless the context and purpose of the relevant instrument requires a different approach.

3. It is a question of fact for the court seised of the dispute to decide the purpose or purposes for which a person was acting when entering into a contract of a kind which might be covered by the Directive; and it is similarly a question of fact as to whether he was so acting for purposes outside his trade, business or profession.

4. The court must resolve these factual issues on the basis of all of the objective evidence placed before it by the parties; but that evidence is not confined to facts and matters which were or ought reasonably to have been known to both parties.

5. Though the words of the Directive must ultimately prevail, a party will normally be regarded as acting for purposes outside his trade, business or profession if, and only if, the purpose is to satisfy the individual's own needs in terms of private consumption.

6. Furthermore, where the individual in question is acting for more than one purpose, it is immaterial which is the predominant or primary purpose; and he will be entitled to the protection

> of the Directive if and only if the business purposes are negligible or insignificant.
>
> 7. However, even where the objective purpose or purposes for which the individual was acting were, in fact, wholly outside his trade, business or profession, he may be disentitled from relying upon the protection afforded to him by the Directive if, by his own words or conduct, he has given the other party the impression that he was acting for business purposes so that the other party was and could reasonably have been unaware of the private purpose or purposes."

[33] I propose to consider the question of the status of the Plaintiffs as consumers, having specific regard to the principles set out in the case of *Overy* and endorsed in the case of *Ashfaq*. Of key importance for present purposes are principles 5, 6 and 7. In respect of the proposition that a party will normally be regarded as acting for a purpose outside his trade, business or profession if, and only if, the purpose is to satisfy the individual's own needs in terms of private consumption, there is nothing to suggest that any profits obtained from this investment were to satisfy anything other than the Plaintiffs' own needs in terms of private consumption.

[34] Further, there is nothing to suggest that the Plaintiffs were acting for more than one purpose when they entered into this investment contract. If there was more than one purpose, it is immaterial which is the predominant or primary purpose; the Plaintiffs would only be able to claim entitlement to the status of consumers if and only if any business purposes are negligible or insignificant.

[35] Finally, Davy has not in any of the Affidavit evidence, stated or suggested that the Plaintiffs, by their word or conduct gave Davy the impression that they were acting for business purposes so that Davy was or could reasonably have been unaware of the private purpose or purposes of the investment.

[36] The question now arises as to how and by what means these issues are to be determined by this Court on the basis of incomplete pleadings, Affidavit evidence containing competing and contradictory versions of events and without the aid of full discovery at what is an interlocutory stage of the proceedings. The superior Courts have been required to grapple with these problems in this context and it is clear that the correct approach is that advocated in the recent decision of the Court of Appeal in England and Wales in the case of *Kaefer Aislamientos SA de SV v AMS Drilling Mexico SA de CV and Others* [2019] EWCA Civ 10 at paragraphs [62] to [80].

[37] In summary form, the Court should proceed on the basis that the *Canada Trust* test which was set out in the judgment of Waller LJ in *Canada Trust v Stolzenberg (No 2)* [1998] 1 WLR 547 and which was subsequently approved on appeal by the House of Lords reported at [2002] AC 1, to the effect that the party seeking to establish

jurisdiction had to possess a "much" better argument on the material available so that the Court is satisfied that factors exist which allow the Court to take jurisdiction, is no longer to be regarded as the appropriate test.

[38] Following the UK Supreme Court Judgments in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80 and *Goldman Sachs International v Novo Banco SA and Others* [2018] UKSC 34, it is clear that there is a three limbed test that one can wrap up under the heading of a "good arguable case":

(i) The claimant must supply a "plausible evidential basis" for the application of the relevant jurisdictional gateway. A "plausible evidential basis" means an evidential basis that the claimant has the better argument. The test must be satisfied on the evidence relating to the position as at the date when proceedings were commenced. The burden of proof remains on the claimant. But the test at this stage is not on the balance of probabilities. The test is context specific. The Court in expressing a view on jurisdiction must be astute not to express any view on the ultimate merits of the case even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits. The adjunct "much" in the *Canada Trust* formulation must be laid to rest.

(ii) If there is a dispute of fact or some other reason for doubting whether the relevant jurisdictional gateway applies, the Court must take a view on the material available, if it can reliably do so. The exercise is one conducted with due dispatch and without hearing oral evidence.

(iii) The nature of the issue and the limitations of the material available at the interlocutory stage may be such that it may not be possible to make a reliable assessment, in which case there is a good arguable case for the application of the gateway if there is plausible (albeit contested) evidential basis for it.

[39] It can be seen that limbs (i) and (ii) are relative tests in that one has to compare the relative strengths of the opposing arguments. However, in limb (iii) there is a move away from a relative test which is replaced by a test combining "good arguable case" and "plausibility of evidence". This is a more flexible test which is not necessarily conditional on the relative merits. The previously much quoted requirement of having "clear and precise evidence" should be interpreted in such a manner as to highlight the relative nature of the assessment in limbs (i) and (ii), and, insofar as the Court cannot resolve material outstanding disputes (limb iii), the requirement affords an indication as to the sort of evidence a Court will seek.

[40] I intend to apply this approach in determining whether the Plaintiffs can avail of the jurisdictional gateways set out in Article 5 (3), Article 5 (5) and Articles 15 and 16 of "Brussels I".

[41] The question of whether or not the Plaintiffs can avail of the gateway provided by Article 5 (3) centrally involves the consideration of "where" the harmful event occurred. In this respect, I respectfully disagree with the Master who at paragraph [14] of his judgment appears to have determined the applicability of Article 5 (3) solely by considering the question of where the loss occurred. Having regard to the fact that the harmful event in this case is the alleged inappropriate investment advice and wrongful encouragement to invest, it is clear that the determination of where this advice and encouragement was provided is inextricably linked to the issues of whether any advice or encouragement was given and, if so, what advice and encouragement were provided. In the face of denials by the Defendant of the provision of any advice and encouragement, any determination by this court of the issue of "where" in favour of the Plaintiff inevitably involves expressing a view on the issue of whether advice and encouragement was given. However, the Court, in expressing a view on jurisdiction, must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate, substantive merits. Having regard to the nature of the issue, the limitations of the material available at the interlocutory stage supporting the completely contradictory accounts of the parties, I conclude that it is not possible to make a reliable assessment under limbs (i) and (ii) of the test and turning to limb (iii) of the test, I conclude that there is plausible (albeit contested) evidential basis for it and that the Plaintiffs are entitled to avail of the jurisdictional gateway in Article 5 (3) of "Brussels I".

[42] In allowing the Plaintiffs to avail of the gateway in Article 5 (3), I do so under the third limb of the test set out above and specifically do so on the basis that it is not possible to make a reliable assessment under limbs (i) and (ii), having regard to the nature of the issue and the limitations of the material available and having considerable concerns that the nature of the issue is such that by expressing a view on jurisdiction, the Court would inevitably be expressing a view on the ultimate merits of the case.

[43] The question of whether or not the Plaintiffs can avail of the gateway provided by Article 5 (5) centrally involves the consideration of whether "a branch, agency or other establishment" was in existence and operating at the material time. The determination of this issue is not so inextricably linked to the substantive issues in this case as to militate against making a finding under limbs (i) and (ii) of the test outlined above. Applying that test to the available material and having regard to the matters referred to in paragraph [26] above, I conclude that the Plaintiffs have not demonstrated the better argument on this issue and, therefore, they cannot avail of the gateway set out in Article 5 (5) of "Brussels I". In this respect, I agree with the Master.

[44] The question of whether or not the Plaintiffs can avail of the gateway provided by Articles 15 and 16 of "Brussels I" centrally involves the consideration of whether the Plaintiffs come within the definition of the term "consumer" and I have set out above the principles which have been extracted from the relevant European

and domestic caselaw that assist in addressing this question. In addition to using the principles set out in paragraph [32] above, it is necessary to perform the three limb test set out in paragraph [38] above in order to determine, if it is possible to do so, whether the Plaintiffs have the better argument. Again, determination by this Court in respect of the issue of whether the Plaintiffs can be regarded as consumers is solely for the purpose of deciding upon the availability of a jurisdictional gateway and this issue is not in any close way linked to the key substantive issues in this case and does not present a difficulty to the Court in relation to making a finding under limbs (i) and (ii) of the test outlined above and applying that test to the available material.

[45] Having regard to the principles set out in paragraph [32] above and the outworkings of those principles in the context of the present case as dealt with in paragraphs [33], [34] and [35] above, and applying the three limb test set out in paragraph [38] above to the available material, I conclude that the Plaintiffs have demonstrated the better argument on this issue and, therefore, they are entitled to avail of the gateway set out in Articles 15 and 16 of "Brussels I". In this respect, I agree with the Master.

[46] The Courts in Northern Ireland have jurisdiction to hear and adjudicate upon all the present causes of Action encompassed in the present proceedings and the relief sought in the Defendant's Summons dated 19th June, 2017 is refused.

[47] I will hear submissions as to costs.