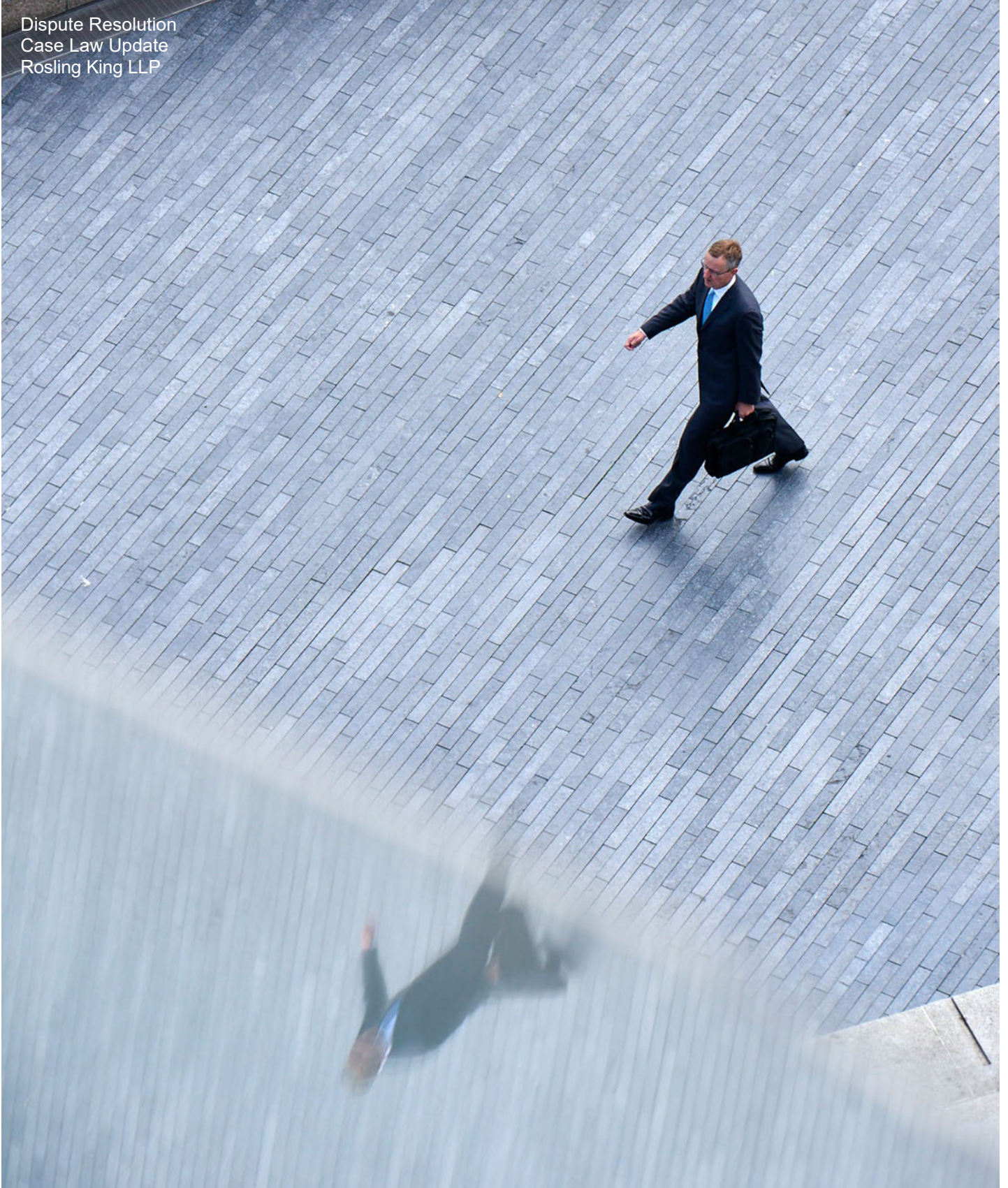


Dispute Resolution
Case Law Update
Rosling King LLP



Case Summary

On 30 March 2023, Simon Rainey KC, sitting as deputy Judge of the High Court, handed down a judgment which dismissed a jurisdiction challenge brought by three corporate Defendants in the “Indian Infoline” (“IIFL”) group companies. In dismissing the application, Simon Rainey KC, considered that *“the Claimants have a strongly arguable case, which has a more than realistic prospect of success at trial...”*.

Background

The claims concerned an alleged fraudulent scheme, which resulted in the Claimants selling, for 36 million Euros, 6% of their shareholding in an Indian company, Hermes i-Tickets Pte Limited (“Hermes”) to another Indian company, Great Indian Retail Pte Ltd (“GIR”) in September 2015. This sale was at a significant undervalue. Approximately six weeks later, on 27 October 2015, the Claimants discovered that the same shares had been purchased for a hugely increased consideration of over 200 million Euros (and in excess of Euros 300 million when earn-out payments were included) by Wirecard AG (“Wirecard”), an international payment services company, with its head office in Munich, Germany. It has been reported that Wirecard is now insolvent and that it is being wound up.

The Claimants first launched proceedings, on 6 October 2017, against those who were the majority shareholders in Hermes. The Defendants in those proceedings were Mr Ramu Ramasamy, his brother Mr Palaniyapan Ramasamy, (who were also the controllers and owners of GIR), and Mr Amit Shah; as well as a UK company called IIFL Walth (UK) Ltd. The Claimants alleged that they had been induced to sell their shares in Hermes at an undervalue by fraudulent misrepresentation (the “2017 Proceedings”). It is noted that the 2017 Proceedings are currently pending in the Commercial Court.

The Claimants also issued proceedings in the Commercial Court, against Wirecard in 2019. The cause of action advanced against Wirecard was unlawful means conspiracy. Wirecard applied to strike out the proceedings against it, and, in doing so, relied on a series of documents which demonstrated the role of the IIFL group companies in the Hermes sales process. In deciding the application, in July 2020, Sir Ross Cranston, sitting as a Judge of the High Court, struck out the claim against Wirecard on the basis that the Claimants’ case had no real substance in their allegations vis-à-vis Wirecard.

Consequently, in February 2022, the Claimants issued further proceedings for conspiracy and deceit against three other corporate bodies in the IIFL group companies. The Defendants in these proceedings are: 360 One Wam Limited (formerly known as IIFL Wealth Management Limited), 360 One Asset Management (Mauritius) Limited (formerly known as IIFL Asset Management (Mauritius) Limited), and 360 One Capital PTE Limited (the “Defendants”) (the “2022 Proceedings”). By bringing these proceedings, the Claimants expanded *“the circle of Defendants in respect of these allegations to include the IIFL Defendants”*. The Claimants advanced four causes of action against each of the Defendants: deceit, intimidation, conspiracy and joint tortfeasance. In his judgment, Simon Rainey KC also noted that the underlying factual allegations made in the 2022 Proceedings *“effectively mirror those made by the Claimants in another set of proceedings issued on 6 October 2017”*.

On 7 June 2022, Foxton J granted the Claimants *ex parte* permission to serve the 2022 Proceedings on the Defendants out of Jurisdiction.

The Defendants issued an application challenging the Court's jurisdiction on two grounds. First, on the basis that the claims were time-barred under both English and Indian law. Secondly, it was alleged by the Defendants that the Claimants were in breach of their duty of full and frank disclosure in various respects which warranted the setting aside of the permission granted to serve proceedings on the Defendants out of the Jurisdiction.

The Decision

Deciding on the first ground, the Judge, outlined the relevant differences between Indian and English law in relation to limitation, the applicable time bars being three years and six years, respectively. It was also noted that both the English and Indian limitation statutes provide for the postponement of the running of the limitation period in the cases of fraud, concealment, or mistake in very similar terms.

On the question of applicable law in relation to the torts alleged by the Claimants, the Judge noted that this is governed by Article 4 of the Regulation No 864/2007 (Rome II), retained in English law in amended form by virtue of section 3 of the European Union (Withdrawal) Act 2018 ("**Article 4**") and the Law Applicable to the Contractual Obligations and Non-Contractual Obligations (Amended etc) (EU exit) Regulations 2019 (reg 11). Under Article 4 the general rule is that the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country in which the indirect consequences of that event occurred.

In support of their application, the Defendants argued, *inter alia*, that the Claimants have no realistic prospect of success of establishing that English law applies pursuant to Article 4 and that the Court should determine that the applicable law is Indian law. The Claimants on the other hand argued that the application of Article 4 was complex and that in the present case, its application provided for a number of possible answers "of which India was the least likely". The Claimants contended that England or the UAE were the stronger contenders because these were the places where the Claimants either signed the Sale and Purchase Agreement by which they sold their shareholding or by the physical handing over of the share certificates by the Claimants to the purchasers, which took place in the UAE.

On this point, the Judge stated that "*the Claimants plainly have the better of the argument and if I were to go further and to "grasp the nettle" I would hold that the law applicable to the Claimants' claims against each of the Defendants is English law.*" However, he acknowledged that it was not necessary for him to do so, on the Defendants' application. Instead, he concluded that it is "*enough that the Claimants are able to establish, at this stage and when put to the test by the Defendants, that their case that Article 4 leads to the result that English law applies has a more than realistic prospect of success.*" Further, he noted that the "*application of Article 4(1) points variously to England, the UAE and Kenya*".

April 2023
Page 4

In terms of the application of Section 32 of the Limitation Act 1980, the Judge stated that the Claimants must establish that they have a realistic prospect of establishing, at trial, that they did not discover or could not with reasonable due diligence have discovered the fraud and the involvement of the Defendants in it before 16 February 2016. Summarising the principles to be applied under Section 32 (in paragraph 54 of his judgment), the Judge concluded that he did not consider that the Claimants could have fully discovered the claims and brought them into court before 16 February 2016 or, in other words, that “*there is a realistic prospect of success of the Claimants arguing that the essential facts for the cause of action in relation to “the fraud” could not have been discovered so as to be pleaded before 16 February 2016.*”

In terms of limitation, he noted that, whilst the 2022 Proceedings are *prima facie* out of time in both jurisdictions (as the causes of action began after the sale in or around September 2015), the Claimants had shown they have a strong arguable case, which has a more than realistic prospect of success, that they did not and could not have discovered the relevant facts to enable them to make their claims in the 2022 Proceedings until much later. Therefore, the relevant starting date for the limitation period under English law was accordingly postponed.

The Court has also rejected the second ground of the Defendants application, that the Claimants, when applying for permission *ex parte*, failed to comply with their duty to make a full and fair presentation of material matters.

Commentary

The decision reinforces the requirements for establishing English law applies pursuant to the provisions of Article 4 of the Regulation No 864/2007 (Rome II), in the context of an interim application. The decision also reinforces the principles to be applied under Section 32 of the Limitation Act 1980.

Should you wish to discuss this in more detail, please do not hesitate to contact [Kate Rigby](#) or [Ligia Bob](#), or the Partner with whom you usually deal.