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ARTICLE

A Battle of Jurisdiction: *Paul Holgate v Addleshaw Goddard (Scotland) LLP*

Gillian Carty, Partner, Shepherd and Wedderburn LLP, Edinburgh, UK

Synopsis

In July 2019, the High Court of Justice issued a decision in the matter of *Paul Holgate v Addleshaw Goddard (Scotland) LLP [2019] EWHC 1793 (Ch)* confirming the proceedings before the Court were to be dealt with before the English Courts and thereby rejecting: (1) the submissions of Addleshaw Goddard (Scotland) LLP ('AG') that the English Courts had no power under the Civil Jurisdiction and Judgements Act 1982 ('1982 Act') to determine the causes of action or equitable remedies advanced or claimed by Paul Holgate ('Mr Holgate'); and (2) the request by AG for a stay on the grounds of *forum non conveniens* on the basis the Scottish courts would be a more appropriate or convenient forum for proceedings to be raised in.

The decision is a useful analysis of the legal principles governing jurisdiction and how jurisdiction should be determined, taking into account the application of both domestic UK law and EU regulations. In this article, we reflect on the analysis of the Court.

Background to the claim

The claim brought against AG ('AG Claim') concerns legal advice provided by Gateley (Scotland) LLP (which entity subsequently merged with AG) to the administrators of Arthur Holgate & Sons Limited (the 'Company') – then in administration and now in liquidation – in relation to a dispute between the Company and its secured lender Barclays Bank plc (the 'Bank'). The claimant, Mr Holgate, had obtained by way of assignment, the right to bring the AG Claim. One of the main issues raised as part of the AG Claim was the Bank had informal control over AG on the basis AG was on the Bank's panel of advisers and therefore AG had a conflict of interest.

Prior to administration, the Company had traded as a caravan holiday and residential park from three sites – two in England and one in Scotland.

In 2007, the Company had entered into an interest rate hedging product ('IRHP') with the Bank. However, following the financial crash of 2008, interest rates fell sharply and the Company was unable to bear the ongoing servicing requirements of the Bank debt. Accordingly, over the course of 2009 and 2010, steps were taken by the Company, at the behest of the Bank, to sell the two parks located in England. Thereafter, in December 2010, the Company put the Bank on notice that it had a claim against the Bank for the mis-selling of the interest rate hedging product ('IRHP Claim').

It is unclear what occurred between the Company and the Bank in the period December 2010 to February 2012. However, ultimately, on 1 February 2012 the Bank appointed administrators to the Company.

AG (under the previous Scottish entity of Gateley (Scotland) LLP) was the appointed legal advisor to the administrators covering the period 29 February 2012 to 3 June 2013. As part of that role, AG was to review, advise and assist the administrators in relation to the Company's IRHP Claim (amongst other things). The main individual engaged on the matter was an English-qualified lawyer registered as a foreign expert in Scotland and who operated out of AG's offices in Edinburgh.

During the course of AG's engagement, on 26 February 2013 the Company's third park in Scotland was sold by the administrators. Thereafter, on 7 June 2013, the shareholders of the Company placed the Company into creditors' voluntary liquidation (CVL) with liquidators outside of the Bank's panel being appointed.

Within a month of their appointment, the liquidators pursued the IRHP Claim, which was ultimately settled on 12 May 2016 at mediation. Following settlement of the IRHP Claim, the Court noted that the Company was 'formally solvent, but has no business as a result of the sale of its three properties'. It was the position of Mr Holgate that AG had failed in various respects. Accordingly, on 26 February 2018 (shortly before the six-year anniversary of the instruction of AG), Mr Holgate raised proceedings in relation to the AG Claim seeking damages for breach of contract, negligence and/or breach of fiduciary duty in connection with the actings of AG in relation to the IRHP Claim. The value of the AG Claim being stated to be in the range of £10-15 million.

Separately, on 22 February 2018, Mr Holgate, in his capacity as a shareholder of the Company, had sought permission (which was granted) to raise a misfeasance

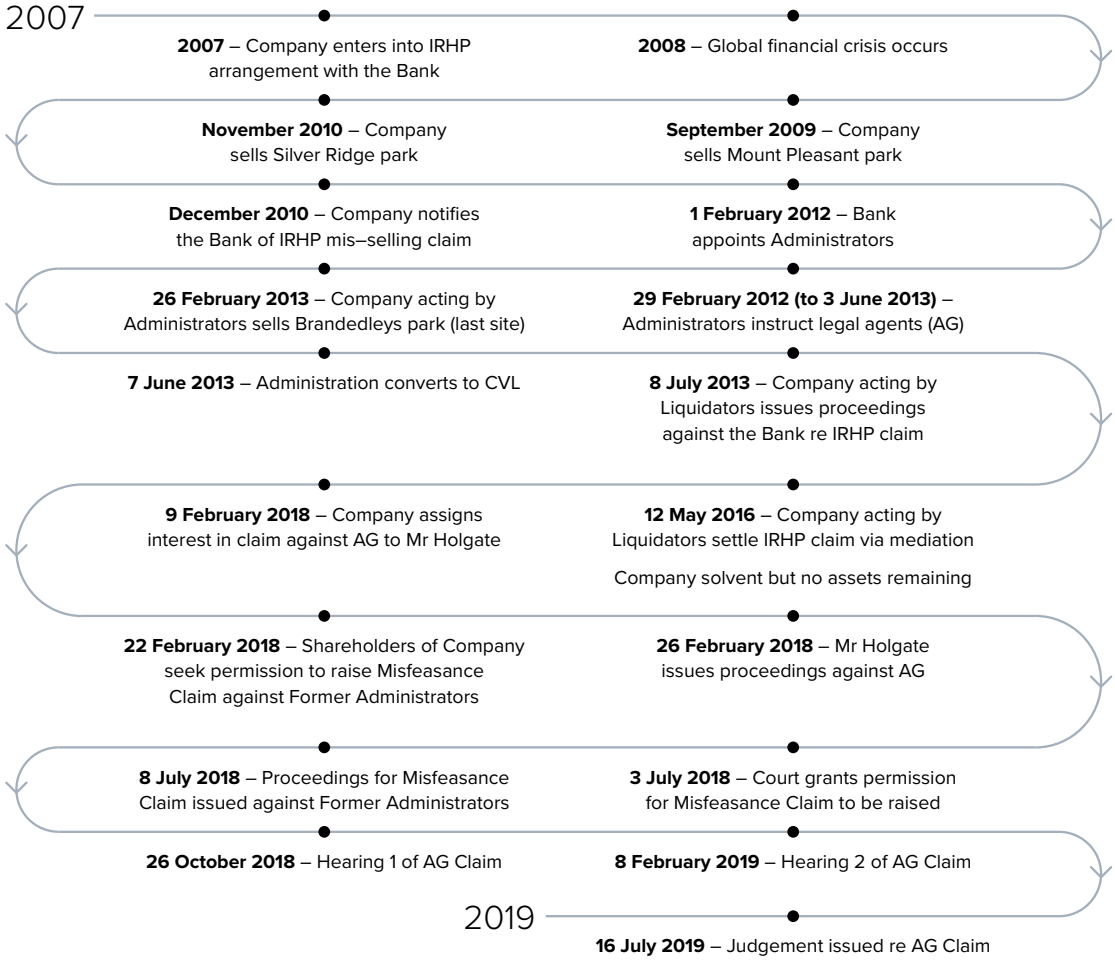

Figure 1.

claim against the administrators, and that claim was issued on 8 July 2018 ('the Misfeasance Claim').

Figure 1 shows a timeline summarising the key events.

The AG Claim raised the following three jurisdictional issues:

1. Whether the Act applies to the AG Claim at all on the basis the AG Claim falls within Article 1(2)(b) of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters ('Judgements Regulation') ('EU Exclusion');
2. If the Act does apply, whether the Act provides for the AG Claim to be heard in the Courts of England and Wales. If not, it was contended by AG that the AG Claim should be struck out; and
3. If the AG Claim was subject to the jurisdiction of the English court, AG wished the AG Claim be stayed on the basis that the Scottish Courts would be the more convenient forum in terms of the principle of *forum non conveniens*.

Legal analysis

Legislative background

For the purposes of answering the above questions, the starting point is a review of the key legislative provision. In this regard, the Act provides:

– in terms of Section 16, that Schedule 4 to the Act will determine, for each part of the United Kingdom, which Court has jurisdiction in proceedings where the subject matter of those proceedings is within scope of the Judgements Regulation. In particular, the Judgements Regulation will apply in civil and commercial matters but would not apply to, amongst other things, proceedings in relation to the winding up of insolvent companies;

– at Section 17, that Schedule 4 of the Act will not apply to proceedings of any description contained in Schedule 5 to the Act. In that regard, Schedule 5 provides that the proceedings to be excluded from Schedule 4 are those for the winding up of a company under the Companies Act or the Insolvency Act 1986 or, proceedings relating to a company where jurisdiction is conferred on the Court having

jurisdiction to wind up the company in terms of the foregoing legislation (Rule 1 of Schedule 5); and

– under Schedule 4, that whilst persons domiciled in a part of the United Kingdom are to be sued in the courts of that part, there are grounds on which that person can be sued in the courts of another part of the United Kingdom. In particular, a person domiciled in a part of the United Kingdom may in another part of the United Kingdom be sued:
  - in matters relating to a contract, in the courts for the place of performance of the obligation in question (Rule 3(a));
  - in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur (Rule 3(c)); and
  - where the person is one of a number of defendants, in the courts for the place where any of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings (Rule 5(a)).

It was accepted by Mr Holgate and AG that in relation to the AG Claim, that:

1. the AG Claim would ordinarily require to be brought in Scotland and it would be for Mr Holgate to prove one of the foregoing exceptions applied to the AG Claim:
   a. Rule 1 of Schedule 5 (this being referred to as the 'UK Exclusion' in the judgement); or
   b. one of the excepted categories contained in Schedule 4 namely:
      i. Rule 5(a) – on the basis the AG Claim is connected to the Misfeasance Claim against the administrators and it is therefore expedient to hear and determine them together;
      ii. Rule 3(a) – in matters relating to contract that the obligations were performed in England; or
      iii. Rule 3(c) – in matters relating to tort, delict or quasi-delict, that the harmful event occurred in England; and
2. in the event the AG Claim was subject to the jurisdiction of the English Courts, that it would be for AG to prove that the Scottish Courts would be the more convenient forum.

The Court proceeded to consider the key points to be addressed and which we will cover in the same order as contained in the judgement.

Jurisdiction argument 1 – EU Exclusion

The Court was required to consider whether or not the AG Claim was excluded from Section 16 of the Act on the basis that Article 1(2)(b) excludes from the Judgements Regulation proceedings relating to the winding-up of insolvency companies (amongst other things).

To answer that question, reference was made to the case of *Polymer Vision v Van Dooren [2011] EWHC 2951 (Comm)* and the *Gourdain* formulation as set out therein, which required that in excluding decisions relative to winding-up from the Brussels Convention, the decisions must derive directly from the relevant winding-up proceedings or be closely connected to those proceedings. The Court noted that such a test is in line with the wording contained in Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings ('Insolvency Regulation') and which Insolvency Regulation also provides for the recognition of judgements of other Courts which are closely linked with, or derive directly from, the insolvency proceedings to which they relate.

Whilst both AG and Mr Holgate agreed the *Gourdain* formulation was the applicable test, they took differing interpretations on its application to the AG Claim. In particular, Mr Holgate pursued the argument that the EU Exclusion applies, and the AG Claim therefore falls outside the scope of Section 16 of the Act on the basis the AG Claim was closely linked to the administration of the Company. In the alternative, AG claimed that to satisfy the *Gourdain* test, the AG Claim must:

i. derive directly from the Company's administration;

ii. be closely connected with the administration process;

iii. have a direct and indissociable consequence of the exercise by the administrators of their powers in that capacity; and

iv. relate specifically and exclusively to the extent of the powers of the administrators …

(the latter two criteria being set out in *SCT Industri AB (in liquidation) v Alpenblume AB (C-111/08) Bus LR 559 (2009)*, which was the case referred to within the *Polymer Vision* case). It was AG's position that the AG Claim did not meet these tests.

The Court did not find favour with the arguments made by AG, and in particular rejected the notion that the conditions laid down in the SCT Case required to be met. However, the Court also rejected the submissions of Mr Holgate that the AG Claim related to the internal management of the administration of the Company or to the conduct of the administrators, and accepted that AG's role was that of legal adviser. Similarly, the Court noted that the existence of the Misfeasance Claim did not change that position on the basis that the administrators and AG had distinct responsibilities and powers.

Accordingly, the Court was satisfied that the AG Claim was not 'closely linked' to the administration and found that the EU Exclusion did not apply to the AG Claim. In consequence of that finding, the Court proceeded to consider whether the AG Claim fell within the UK Exclusion in terms of Rule 1 of Schedule 5 to the Act such that the Act would not apply to the AG Claim.

UK Exclusion – Rule 1 of Schedule 5 to the Act

Mr Holgate's position was that, in view of the Company's administration, the effect of Rule 1 of Schedule 5 was to exclude all proceedings relative to a company which is subject to insolvency proceedings under the Insolvency Act 1986.

AG opposed this interpretation and the Court found that such an expansive interpretation was unsustainable. Rather, the Court's opinion was that to be excluded in terms of Rule 1, the claim would require to be one which could be brought in the Insolvency and Companies List.

Rule 5(a) of Schedule 4 to the Act – anchor provisions

Mr Holgate's final argument was that the AG Claim fell within the exclusion contained in Rule 5(a) of Schedule 4 (otherwise referred to as the anchoring provision) on the basis of the Misfeasance Claim.

In particular, Rule 5(a) provides for claims affecting a number of defendants, one of whom is domiciled in England, to be dealt with before the English Courts where the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements. It was accepted by the parties that AG could not be a party to the Misfeasance Claim.

The Court acknowledged that there was a risk of irreconcilable judgements given what the Court referred to as being a substantial overlap in the factual and legal issues to which the AG Claim and the Misfeasance Claim related.

The competing arguments for Mr Holgate and AG can largely be summarised as follows:

AG contended that:

- Rule 5(a)'s primary purpose was determining in which jurisdiction a person should be sued and not with case management;
- The fact that the Misfeasance Claim had not been raised at the time the AG Claim was brought, meant there was no 'anchor defendant'. In particular reliance was placed on *Canada Trust Co v Stolzenberg (No 2) [2002] 1 AC 1*, which related to Article 6(1) of the Lugano Convention, the wording of which is almost identical to the provisions of Rule 5(a). In particular, AG argued that the decision of the House of Lords in the foregoing case should be given 'weighty respect' and that it was irrelevant that the AG Claim involved an intra-UK position as opposed to a question around domicile of parties across the EU; and
- the capacities in which Mr Holgate brought the AG Claim and the Misfeasance Claim were different insofar as the AG Claim had been brought by him as an assignee to the Company's claim, whereas, the Misfeasance Claim had been brought in his capacity as a contributory.

Mr Holgate on the other hand argued that:

- the fact AG could not be joined as a party to the Misfeasance Claim was a procedural irregularity;
- the decision of the House of Lords in *Canada Trust* was irrelevant on the basis that (a) there was no EU issue in the AG Claim and no question as to domicile of the parties; (b) the question of jurisdiction in that case was relative to the issues in establishing the domicile of the defendant between the date of issuing the claim and the date of service of the claim; and (c) the case did not establish that proceedings must first be issued against the other defendant for the anchoring provision to apply;
- in particular, reliance was placed by Mr Holgate on the judgement of *Cook v Virgin Media [2015] EWCA Civ 1287* arguing that in matters intra-UK, there was to be no application of case law applicable to similarly worded provisions in the Judgements Regulation and Lugano Convention;
- it did not matter that the Misfeasance Claim had not been raised at the time of the AG Claim being raised and, in any event, the permission sought for the Misfeasance Claim to be raised preceded the AG Claim; and
- Rule 5(a) was there to address exactly the present circumstances and particularly where it would serve the needs of efficient case management and the objective of avoiding the risk of irreconcilable proceedings.

The Court supported the position of AG that *Canada Trust* was applicable, notwithstanding the absence of an international element, and that it would require the anchor claim to be in existence at the time of the AG Claim being issued. However, the Court was not satisfied that *Canada Trust* answered whether the issuing of a subsequent claim could allow for retrospective application of the anchor provision. In that regard, the Court considered there needed to be a determination as to the priority of the two conflicting objectives, i.e. the need to establish jurisdiction at the time of a claim being issued and the need to avoid the risk of irreconcilable judgements being issued.

The Court ultimately found favour with the argument of Mr Holgate as to the inability to join AG to the Misfeasance Claim as being a procedural irregularity and determined that the Misfeasance Claim could be an anchor claim retrospectively, provided the remaining conditions of Rule 5(a) could be met. However, the Court further added that, in any event, the application for permission to bring the Misfeasance Claim could be treated as the originating anchor claim. The Court also rejected the claim of AG that the different capacities in which the claims were brought had an impact.

Accordingly, the exclusion in Rule 5(a) to the AG Claim could be applied.

Rule 3(a) of Schedule 4 – place of performance

The Court proceeded to consider the submissions of both Mr Holgate and AG in relation to the exclusion contained in Rule 3(a) of Schedule 4; that is whether the AG Claim fell within the jurisdiction of the English Courts on the basis that the obligations of AG were performed in England.

Mr Holgate contended that the AG Claim was predicated on a breach of fiduciary duty and not necessarily a breach of contract in terms of the engagement letter between AG and the administrators. In particular, it was the position of Mr Holgate that AG had breached its fiduciary duty in the first instance by accepting the instructions from the administrators.

In considering the requirements of Rule 3(a) the parties addressed the following key points:

i. The meaning of 'matters relating to a contract'

   Mr Holgate sought a restrictive interpretation of Rule 3(a) such that it would be limited to causes of action in contract. Mr Holgate argued that Rule 3(a) was to be interpreted in accordance with English law and not European jurisprudence which position was supported by the decision in *IHP Limited v Fleming [2009] 7 WLUK 279 (10 July 2009)*. To the extent English jurisprudence was to be considered, Mr Holgate contended that the 'centre of gravity' concept should be applied in relation to the obligations.

   AG on the other hand argued that 'matters relating to a contract' would have an autonomous meaning and cover the various causes of action that Mr Holgate had made in terms of the AG Claim.

   The Court agreed with the submissions of AG.

ii. What the relevant contract is

   Mr Holgate argued that where there was no written engagement letter, an engagement with the administrators could not be implied. Rather, Mr Holgate contended that AG owed duties to the insolvent estate of the Company on the basis that AG was 'employed' by the administrators, as agents of the Company, to perform services for the Company in accordance with the applicable insolvency rules, and AG was remunerated from the insolvent estate and not by the administrators.

iii. What the obligation in question is

   Mr Holgate contented that central to the AG Claim was the breach of the equitable obligation of accepting an appointment to provide advice in relation to the administration of the Company where to do so would give rise to a position of conflict, rather than a contractual or tort claim in relation to the obligation of AG to advise upon the merits of the IRHP Claim.

   However, AG's position was that the 'obligation in question' was the obligation of AG to assess the IRHP Claim in an independent and competent manner and thereafter to advise on the IRHP Claim.

   The Court found that the Particulars of Claim require to be assessed to determine the principal obligation. The Court's view was that the main complaint alleged was in relation to the decision of AG to accept the instruction where there was a potential conflict of interest and which was contended to be a breach of fiduciary duty.

iv. The place of performance of the contract

   It was the clear view of Mr Holgate that the place of performance of the contract was England on the basis that AG could only be paid in London, any dispute under the contract was to be determined in London, and the work undertaken was in relation to English law matters relative to an English insolvent company and therefore the 'centre of gravity' was England; the location of the relevant agent providing the advice in Scotland was irrelevant.

   AG however submitted that the relevant agent was based in Scotland and had carried out the assessment of the IRHP Claim in Scotland. Further, it was in AG's view, irrelevant to the determination of the place of performance of the agent's obligation, that the Company and the Bank were registered in England and that the IRHP Claim related to events in England. In any event, the advice had been given to persons from the offices of the administrators, who were based in Scotland. Accordingly, AG argued the 'centre of gravity' was in Scotland, notwithstanding that the administrators were appointed by the English courts.

   The Court determined that the advice was given to the administrators as agents of an English-registered company. The obligation was therefore performed in England.

Taking all of the above into account, the Court ultimately reached the view that the conditions of

Rule 3(a) of Schedule 4 had been met. Having made such a determination, the Court opted not to proceed with assessing whether the exclusion contained in Rule 3(c) applied.

However, in view of the findings of the Court in relation to Rule 5(a) and 3(a), the Court was required to consider whether the Scottish courts would be a more convenient forum for determining the AG Claim on the basis of *forum non conveniens*.

Forum non conveniens

AG contended that the proper law of the AG Claim was Scotland on the basis of the terms of the engagement letter and accompanying terms of business and the applicable law in relation to contract law, tort and breach of fiduciary duty. Mr Holgate however argued that in view of the Misfeasance Claim and the significant overlap with the AG Claim, the English Courts would remain the appropriate forum.

In applying the legal principles set down in *Spilada Maritime Corporate v Consulex Ltd (The Spilida) [1987] A.C. 460, HL,* the Court preferred the submissions of Mr Holgate that the appropriate forum was England and proceeded to dismiss the application of AG.

A flowchart illustrating the key arguments made is given in Figure 2.

Summary

Leaving aside the subject matter of the AG Claim, the judgement is a helpful reminder as to the complexities that can arise in determining the appropriate jurisdiction, taking into account intra-UK legislation and wider European legislation. Given these complexities, and the potential for a number of grounds of challenge to jurisdiction to be raised, it would certainly seem prudent in such cases to raise any action in early course to avoid the claimant party being time-barred from bringing an alternative claim if a challenge to jurisdiction is upheld. Certainly in this case, had the Court determined that the AG Claim should have been raised in Scotland, Mr Holgate would have been out of time to do so.

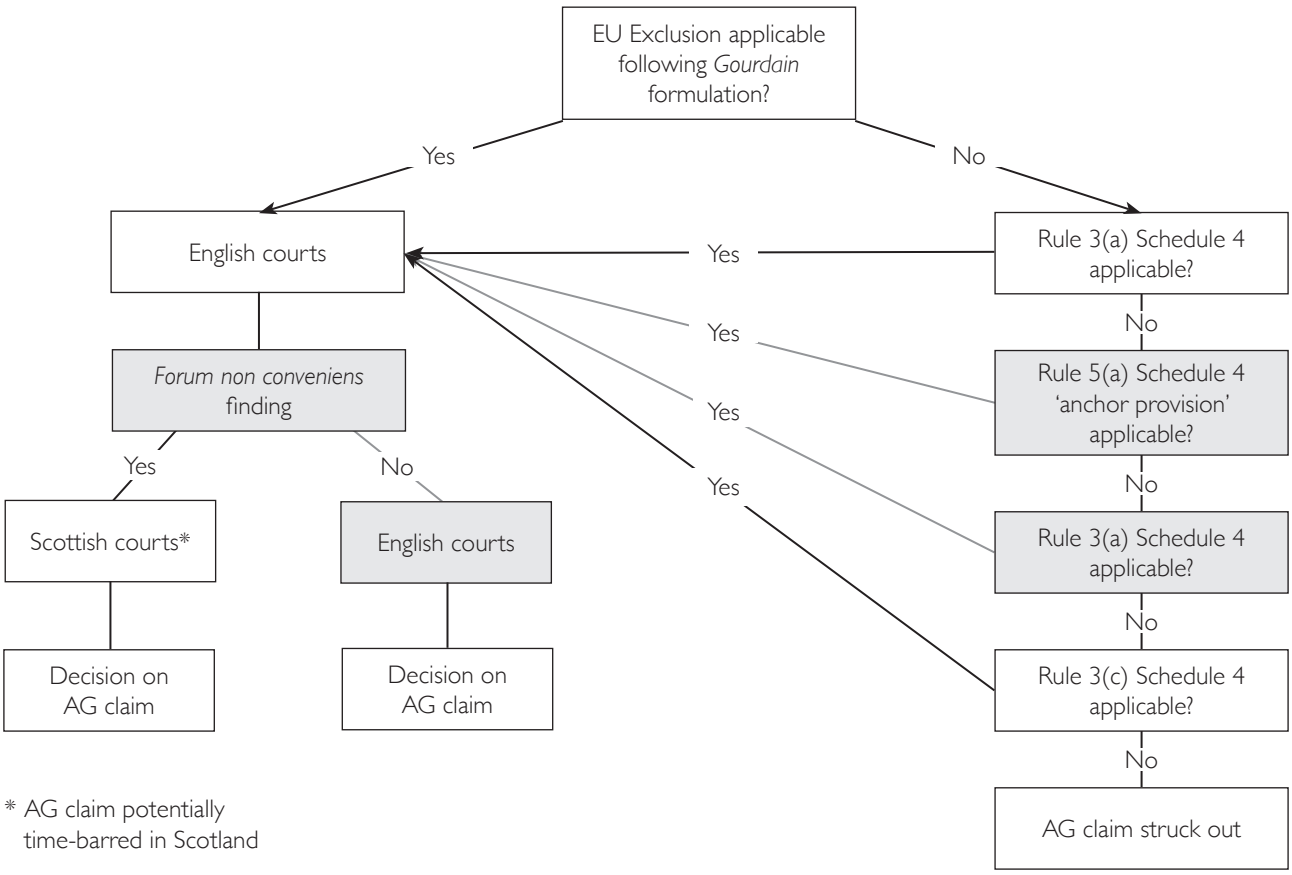

Figure 2.

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