Neutral Citation Number: [2011] IEHC 413

THE HIGH COURT

1998 4338 P

BETWEEN

BIO-MEDICAL RESEARCH LIMITED

TRADING AS SLENDERTONE

AND

PLAINTIFF

DELATEX S.A.

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 29th day of July, 2011.

1. The proceedings

1.1 The plaintiff is a limited company incorporated in this jurisdiction which is involved in the manufacture and marketing of muscular electrostimulation products under the brand name "Slendertone". The defendant is a company incorporated in France which, *inter alia*, distributes pharmaceutical products in France. There was a contractual business relationship between the plaintiff and the defendant between mid-1990 and 1998 under which the plaintiff supplied "Slendertone" products to the defendant, which sold them on in France. The business relationship developed during that period and for a time the defendant was by far the plaintiff's biggest customer for its products.

1.2 These proceedings have a long history. When they were initiated in 1998, the primary relief sought by the plaintiff against the defendant was a declaration that the plaintiff was not a party to an exclusive distribution agreement with the defendant in relation to the sale and distribution of its products and services in France. Alternatively, the plaintiff sought a declaration that, if such an exclusive distribution agreement existed between the parties, it had been effectively terminated by a letter of termination dated 14th October, 1997 from the plaintiff to the defendant. At an early stage in the proceedings an issue arose as to whether an Irish court had jurisdiction to determine whether an exclusive distribution agreement existed and, if it did, whether it was properly terminated. The jurisdiction issue was determined by the High Court (McCracken J.), and by the Supreme Court on appeal, against the plaintiff. The Court was informed that those issues were subsequently litigated in France.

1.2 The claims which remain in the proceedings are the following:

(a) the plaintiffs claim for the sum of €200,410.54 (FF1,314,607), which is the sum alleged to be outstanding in respect of goods and services provided by the plaintiff to the defendant between 1995 and 1997 under the terms of the agreement entered into between them, which claim is wholly denied by the defendant; and

(b) the defendant's counterclaim against the plaintiff for -

(i) €625 (FF4,099.98) alleged to represent the amount of a credit due on the account between the parties by the plaintiff to the defendant, and

(ii) €59,455.12 (FF390,000) claimed as damages for breach of contract in respect of defective product allegedly supplied by the plaintiff to the defendant.

1.3 By order of the Court (Quirke J.) made on the 14th May, 2007 a claim for interest pursuant to s. 22 of the Courts Act 1981 by the plaintiff against the defendant was disallowed.

1.4 Accordingly, the only issues which the Court has to determine are whether -

(a) the sum of €200,410.54 or any sum is due by the defendant to the plaintiff on foot of the plaintiffs claim; and

(b) whether any sum is due by the plaintiff to the defendant on foot of the defendant's counterclaim.

2. The evidence

2.1 Four witnesses gave evidence on behalf of the plaintiff, namely:

(a) Kieran Rooney, a qualified chartered accountant, who held the position of Financial Controller of the plaintiff from February 1994 to 1996 and the position of Group Financial Controller from 1996 to 2000;

(b) Martin Coggins, a chartered accountant, who between 1992 and 2004 was a partner in the firm of East & Co., Chartered Accountants, who practised in Sligo and who between 1992 and 1999 or 2000 carried out audit work on the plaintiff’s accounts on a contract basis for Deloitte & Touche, Chartered Accountants;

(c) Mr. Thomas Tierney, who was Financial Director of the plaintiff from mid-1995 to the spring of 1999; and

(d) Mr. Kevin McDonnell, who was the Managing Director of the plaintiff from May 1990 to 31st July, 2004.

One former employee of the plaintiff whose evidence would have been useful but who did not testify was James Murphy who was the Marketing Director of the plaintiff around 1996 and 1997, who had direct dealings with Mme. Colette Chouchana of the defendant company.

2.2 Mme. Chouchana, who described herself as the President Director of the defendant since 1998, and who had previously been the Financial Director of the defendant testified on behalf of the defendant. The other witnesses for the defendant were

> (a) Dr. Michel Le Faou, who described himself as a doctor for "medical sport", who worked as a medical consultant to and advised the defendant and whose evidence was primarily directed to the defendant's counterclaim; and
>
> (b) M. Philippe Hazan, a chartered accountant and legal auditor.

M. Hazan has been working for the defendant since about the year 2006. An independent examination of the dealings between the plaintiff and the defendant, which was carried out by M. Olivier Rafik on behalf of the defendant in 1998, was given as the basis of the defendant's contention that there was a credit of €625 due by the plaintiff to the defendant. However, Mr. Rafik did not testify on behalf of the defendant.

3. Terms and conditions
3.1 The terms and conditions on which the plaintiff supplied product to the defendant were set out on the rear of every invoice issued by the plaintiff to the defendant. In accordance with the standard terms, the product was sold "ex-works", which meant that the plaintiff was responsible for collecting the product from the plaintiff's place of business at Bunbeg, Letterkenny, Co. Donegal, whereupon the risk passed to the defendant. The standard terms provided for payment for product within 30 days of the date of the invoice.

3.2 However, a special arrangement was entered into between the plaintiff and the defendant from April 1996, at which time the defendant's credit limit was established at FF4m. At the same time, an arrangement was made that sums due by the defendant to the plaintiff would be settled by a 90 day letter of credit. The plaintiff s case is that that arrangement was entered into on condition that the defendant would be liable for any additional charges incurred in discounting letters of credit. Mr. Rooney's understanding was that those special terms had been agreed between Mr. Murphy, on behalf of the plaintiff, and Mme. Chouchana, on behalf of the defendant. Mme. Chouchana's evidence was that there was never an agreement with the plaintiff that the charge for discounting letters of credit would be borne by the defendant. Mr. Rafik disputed the defendant's liability for letter of credit discount charges in a document dated 30th March, 1998, which he contended had never appeared on the statements of account "until the bursting of the disputes". Deloitte & Touche in a draft report to the plaintiff dated 31st July, 1998 stated that they had found evidence of payment of discounting charges due on letters of credit in relation to two transactions. Counsel for the plaintiff acknowledged in his closing submissions that, given the inability of the plaintiff to call Mr. Murphy as a witness, the Court might conclude that there is an evidential deficit in relation to the liability of the defendant for discounting charges due on letters of credit. Having regard to the state of the evidence before the Court, it is not possible to conclude, as a matter of probability, that the defendant agreed to assume such liability.

3.3 The only other issue which arose on the terms and conditions arose in relation to the duration of the warranty as to quality and fitness of the products sold. While the terms and conditions endorsed on the invoices are silent as to its duration, Mme. Chouchana's evidence, which was consistent with that of the plaintiffs witnesses, was that the defendant was given a two year guarantee by the plaintiff. However, there was a conflict on the facts as to when the two year period commenced, Mme. Chouchana contending that it commenced when the purchaser from the defendant received the product. In my view, the evidence of the plaintiff's witnesses, that the warranty commenced when the risk passed, that is to say, when the defendant took possession of the product from the plaintiff, is to be preferred and I so find.

4. Quantification of the plaintiffs claim
4.1 1 am satisfied that the proper starting point for considering the quantification of the plaintiff s claim is 31st December, 1996. As had happened in previous years, in March 1997, the defendant, in a document executed on its behalf by Mme. Chouchana, informed the plaintiff that it agreed that the balance due by the defendant to the plaintiff on the running account which related to their dealings as of that date was FF4,305,297. In setting out the particulars of the amount due and owing by the defendant in the statement of claim, which was a very clear and comprehensive document, the balance due as per the July 1997 statement on the account was used as the opening balance. The invoices which issued after that date were debited to the account, as were letter of credit discount charges from the period June to September 1997, which aggregated FF75,874. Credit was given for the payments received from the defendant and credit notes issued by the plaintiff to the defendant thereafter until February 1998. The balance due as at 31st March, 1998 was then shown as FF1,314,607, which is the amount claimed by the plaintiff in these proceedings. While the evidence indicated that there had been some transactions post-March 1998 between the plaintiff and the defendant, the product was furnished by the plaintiff to the defendant on a cash basis only. No issues arise in relation to the period after 31st March, 1998.

4.2 On the suggestion of the Court, the plaintiff s accountant during the course of the hearing, prepared, in manuscript form, a statement using as the opening balance; the agreed balance as at 31st December, 1996 (FF4,305,297). In that statement, every invoice issued after 31st December, 1996 and every letter of credit discounting charge claimed is itemised, as is every amount paid by the defendant and every credit note issued by the plaintiff to the defendant. The "bottom-line" on that statement is FF1,314,609, which is just FF2 higher than the amount claimed in the proceedings.

4.3 M. Hazan in his statement dated 12th November, 2010, which was put in evidence, and in his oral testimony, was critical of the basis on which the plaintiff claimed the sum due from the defendant, contending that "Excel worksheets" are not accountancy and that the accounts provided by the plaintiff were not reliable, on the basis that there were "a lot of crossings-out". The Court's function is to determine; on the evidence, how much is due by the defendant to the plaintiff for goods and services supplied. The method which was utilised by the plaintiff to record the relevant transactions is immaterial, provided that it is accurate, even if a quill pen was used.

4.4 In relation to the specific complaints made by M. Hazan, my observations are as follows:

> (a) I am satisfied that the defendant got credit for the sum of FF430,000 paid by it by way of letter of credit, which is the crucial point, notwithstanding M. Hazan's complaints as to the manner in which the payment was recorded in the books of the plaintiff. That was confirmed by Mr. Coggins, who had examined the records of the plaintiff. Mr. Coggins explained that there had been confusion, in that the plaintiff was giving credit for the amount in its books at the date of discounting, whereas the defendant was recording the amount later when the letter of credit expired. On one occasion, because the two dates were not consistent, the plaintiff, in order to assist the defendant in understanding how the

account was being operated, adjusted its record to record payment on the same date as it had been recorded by the defendant, i.e. January 1996, whereas originally the plaintiff had recorded it as of November 1995. However, as Mr. Coggins pointed out, the key point is that the defendant got credit for the sum.

(b) An issue arose in relation to a credit transfer from the defendant's bank, Banque San Paulo, to the plaintiff's account with Anglo Irish Bank Corp. in July 1996. As the plaintiff s statement of its French Francs deposit account shows, a sum of FF500,000 was credited to the deposit account from the defendant's bank on 4th July, 1996. However, an adjustment was made to the plaintiff's account on 9th July, 1996 when FF100,000 was debited and the explanation given on the statement was: "re overpayment of FRF100,000 received from Banque San Paulo 4/6/96", which obviously should have referred to 4th July, 1996. While critical of the manner in which the matter was treated for accountancy purposes, M. Hazan stated that he could not say whether the sum of FF100,000 had been reimbursed to the defendant or not. What is clear on the evidence is that the plaintiff only received the net amount, FF400,000, and the defendant was only entitled to credit for that amount.

(c) Other matters arose from M. Rafik's examination of the running account in relation to which M. Hazan was not competent to testify. On the basis of the evidence of Mr. Rooney and the evidence of Mr. Coggins, broadly speaking, I am satisfied that the defendant was not at any loss by reason of various matters alleged by M. Rafik, namely:

(i) missing electrodes, which were replaced by the plaintiff,

(ii) a pallet of goods which was shipped to the defendant in error, but for which it was not charged, and

(iii) missing product, in respect of which a credit note was issued by the plaintiff.

4.5 Aside from the debiting of the defendant with the letter of credit discount charges, I am satisfied that the plaintiff's statement of account, which shows a balance due to the plaintiff from the defendant of FF1,314,607, is correct. However, for the reasons outlined earlier, I do not think the plaintiff has established an entitlement to be reimbursed the letter of credit discount charges. As I have stated, those charges for the period June to September 1997 aggregate FF75,874. On my calculations, the remainder of such charges which appear on the manuscript statement of account from the beginning of January 1997 (i.e. other than in the period from June to September 1997) aggregate FF85,246. Therefore, the amount claimed to be due to the plaintiff by the defendant should be reduced by FF161,120, which, on the basis of the French Franc/Euro rate of exchange used by the parties by agreement, is equivalent to €24,562. Accordingly, in my view, the balance now due by the defendant to the plaintiff on foot of the account is €175,848.54.

5. The counterclaim

5.1 Apart from the contention that there is €625 due by way of credit on the account by the plaintiff to the defendant, which, on the basis of the finding I have made on the claim, has not been sustained, the thrust of the counterclaim is that the plaintiff supplied defective products to the defendant occasioning loss and damage to the defendant. In reply to a notice for particulars; the defendant has identified the alleged defective goods as:

(a) 21 “type programme 16” Neurotech goods; and

(b) 18 “type NT 16” Neurotech goods.

In other words, the counterclaim relates to 39 items. On 4th November, 1998 the defendant issued an invoice in the sum of FF390,000 to the plaintiff in respect of 39 items described as "appareils medicaux NT 16 programmables" at FF10,000 per unit. Requests by the plaintiff’s solicitors for particulars of the complaints made by the defendant in respect of the alleged defects and of the nature of the defects elicited very vague responses. For instance, it was stated that the goods "were just not working at all" and, when the defendant attempted to switch them on, "nothing happened". It was stated that despite visits by the plaintiff's technicians, the defects were not remedied.

5.2 There was a total conflict of evidence as to the. source of the alleged defects in the Neurotech products, which, as I understand it, are medical devices used in hospitals; and as to when complaints were first made by the defendant to the plaintiff in relation to the alleged defects. Unfortunately, the translation of the evidence of the witnesses who testified in French to English left a lot to be desired. Even with the benefit of transcripts of the three days of the proceedings, I have experienced difficulty in assessing the evidence.

5.3 It was common case that the Neurotech product was purchased by the defendant from the plaintiff in 1992. Mme. Chouchana suggested in her evidence that the Neurotech product had been sourced from a German associated company of the plaintiff, BMR GmbH, which she contended had gone bankrupt in 1990. The basis of that contention was that the product was programmed to give instructions in the German language. Her evidence was that complaints were made to the plaintiff about the defects in the product in 1994, 1995 and 1996, and that, despite the machines being re-programmed to give instructions in French, the machines still did not work. Her evidence was that 80 machines were acquired by the defendant, and that they still had 39 in stock.

5.4 The evidence of Dr. Le Faou did not bring clarity in relation to the complaints which formed the basis of the counterclaim. He described himself as a medical doctor whose medical speciality is electrotherapy. He was asked by the defendant to develop new equipment, which I understand to mean the Neurotech product, which I understand to have been an innovation in France at the time, for sport and sport medicine. My understanding of his evidence is that he introduced clinics and hospitals to the product. He was quite explicit that his job was to teach people how to use the equipment and, if he found something wrong, he reported to Mme. Chouchana or the defendant's staff. A s regards the problems encountered. with the Neurotech product, his evidence was that he introduced the equipment but, "after a while the quality of the electricity passing was very very difficult". His evidence was that he followed the equipment in the different clinics and that it broke down in less than six months. The equipment broke down in some of the clinics and they could not use it. He explained the situation to Mme. Chouchana and he met with the plaintiff's representative to explain the problem. His evidence was that he met Mr. Murphy in Paris, that he went twice to England and he came to Ireland twice, to Dublin and to Galway, to explain the problem sometime in 1992. Dr. Le Faou also stated that in one period all of the equipment received was programmed in German. In cross examination, Dr. Le Faou accepted that the product was a new product, but I think that by so accepting he meant that it was innovative. He was aware that the equipment had been used previously in England "but the electricity was poor". He was assured by Mme. Chouchana that her product was a new product and, at the time, he saw that it was a new product. He stated that the "electronic was good", he tried it for himself, and he tried it with his patients at the time it was working.

5.5 The evidence of Mr. Tierney, who testified on behalf of the plaintiff, was that in the period from 1995 to mid to late 1997, in his capacity as Financial Director of the plaintiff, he had not been made aware of any issue in relation to the Neurotech product. In mid to late 1997 the issue was raised about the machines, which had been supplied in 1992, and the issued was referred to Mr. McDonnell, who had been involved in the initial transaction. His recollection was that the issue was shown to be "a historic issue" and that there was no value involved.

5.6 Mr. McDonnell's evidence, in my view, was helpful in that it clarified a number of issues. First, BMR GmbH was a trading subsidiary of the plaintiff, which was trading when he acquired the plaintiff company, which was in receivership at the time. Secondly, he distinguished between the two different types of product produced by the plaintiff: "Slendertone" products, which were used by consumers; and Neurotech, which was a medical device. Thirdly, the medical device business of the plaintiff was conducted in Europe through BMR GmbH. The Managing Director of the German company trained the defendant's sales force in relation to the use of the Neurotech product so that it could be established on the French market. Fourthly, Mr. McDonnell clarified the quantity of Neurotech product which was supplied to the defendant: 10 NT16, of which another 10 were given free; and 10 each of two other models. Fifthly, and significantly, Mr. McDonnell's evidence was that he only became aware that there were complaints by the defendant in relation to the Neurotech product in 1997, when some form of communication was received from the defendant, which was a faxed manuscript letter dated 12th March; 1997 from the defendant to the plaintiff. Finally, one observation of Mr. McDonnell seems to me to throw light on the complaint which forms the basis of the counterclaim. He stated that the consumer side of the business in France grew rapidly and his suspicion is that "the Neurotech side of the business was neglected when it didn't work out". That the Neurotech side of the business did not work out seems to be consistent with the general thrust of the evidence of Dr. Le Faou and the approach adopted by the defendant in relation to the devices.

5.7 The only documentary evidence before the Court from the defendant in relation to the alleged defective Neurotech product comprises the fax dated 12th March, 1997 referred to above, a fax dated 7th October, 1997, which appears to be in response to a fax from the plaintiff seeking details of the alleged defective devices, and a fax dated 30th December, 1997 from the defendant, in which it was stated that the defendant had not received a solution to the problem although it had the stock for seven years and queried what was to be done. Even though there were intense negotiations between the plaintiff’s representatives, and, in particular, Mr. Tierney, on the one hand, and the defendant's representatives, in particular, Mme. Chouchana; on the other hand, in September and October 1997 in relation to what was due to the plaintiff by the defendant on foot of the statements of account, the issue of the Neurotech product does not appear to have arisen at the various meetings which took place. I think it is reasonable to infer that in issuing the invoice dated 4th November,1998 in the sum of FF390,000, the defendant was reacting to these proceedings, which had been initiated by plenary summons which issued on 7th April, 1998. No evidential basis whatsoever for a charge of FF10,000 per alleged defective device was put before the Court.

5.8 1 am not satisfied on the evidence that the Neurotech product supplied by the plaintiff to the defendant was defective so as to give rise to an entitlement to damages for breach of contract on the part of the defendant. The evidence of Mme. Chouchana and Dr. Le Faou, in my view, falls short of what is necessary to establish that the devices supplied were defective. One would expect that a mechanical or engineering expert would have examined the devices and given evidence to the Court. The fact, as I find, that no complaint was made or redress was sought by the defendant in respect of the alleged defects until 1997, which was in the order of two to three years outside the warranty period provided for in the terms and conditions, suggests that the defendant did not consider that it had a remedy against the plaintiff on account of the fact that it had certain Neurotech machines out of use and in storage. No evidence whatsoever has been adduced on the basis of which damages for breach of contract could be assessed, even if the Court could find that the Neurotech product supplied to the defendant was defective, which it cannot.

5.9 Accordingly, I consider that the defendant's counterclaim should be dismissed.

6. Order
6.1 The order of the Court will -

(a) give judgment in favour of the plaintiff in the sum of €l75,848; and

(b) dismiss the defendant's counterclaim.