



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 1199

No. 2014/No. 60

[Article 64 transfer]

**Kelly J.
Peart J.
Hogan J.
BETWEEN/**

BUSHELL INTERIORS LTD.

PLAINTIFF/RESPONDENT

AND

LEICHT KÜCHEN A.G.

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered 5th day of October 2015

1. The concept of prorogation of jurisdiction is – it might be thought – a relatively straightforward and simple one. After all, the concept simply envisages that the parties to a commercial relationship can, in principle, agree which court should have exclusive jurisdiction to determine any disputes arising under that contract. Provisions for the prorogation of jurisdiction in this fashion have been from the outset a central feature of the Brussels Convention and Brussels Regulation system.

2. Experience has shown, however, that the apparent simplicity of this concept has proved elusive in practice. It is true that much of the language of the original provisions of Article 17 of the Brussels Convention is still reproduced in the latest iteration of the prorogation of jurisdiction provisions of Article 25 of the Brussels Regulation (Recast) (Regulation No. 1215/2012), but there have been nonetheless subtle changes in the wording of the prorogation provisions. Many of the legislative changes have brought about in the light of experience of the operation of the Convention and, subsequently, the Brussels Regulation and the manner in which these provisions were subsequently judicially interpreted.

3. Many of these problems surface again in this appeal from the decision of Moriarty J.: see *Bushell Interiors Ltd. v. Leicht Küchen AG* [2014] IEHC 3. In his decision Moriarty J. concluded that the exclusive jurisdiction clause at issue in the present proceedings was effective and applied to the present dispute so that, as a result, the Irish courts had no jurisdiction in the matter. The plaintiff originally appealed this decision to the Supreme Court, but by a decision of the Chief Justice (with the concurrence of the other members of the Supreme Court) pursuant to Article 64 of the Constitution, this appeal was transferred to this Court following its establishment on 28th October 2014.

4. The issue in the present appeal arises in the following way. The plaintiff, Bushell Interiors, is an Irish company which is engaged in the sale and supply of kitchens and kitchen interiors to both the Irish domestic and commercial market. Bushell contends that in 2008 it was appointed as a dealer/distributor for the Dublin and eastern region and that this arrangement was subsequently extended to cover the entire State. Bushell maintains that by virtue of this arrangement it was designated as a Leicht Küchen master dealer and that it had been listed on the latter's website as such a dealer.

5. The defendant, Leicht Küchen AG, is, as the name implies, a German company specialising in the manufacture and supply of kitchens. Leicht Küchen is based in the province of Baden-Württemberg. At the hearing of the appeal we were informed that it is a typical German SME ("Mittelstand") entity which, while export oriented, would naturally prefer to ensure that any litigation is conducted within the legal system with which it is most familiar. It is for that reason that Leicht Küchen's trading terms and conditions contain provisions designed to give the local German courts exclusive jurisdiction. Clause 14 of a document entitled "General Terms of Sale, Delivery and Payment" provides:

"Place where a Contract is to be fulfilled- Venue- Validity of Laws

1. For all disputes arising from business relations, directly or indirectly, including payment problems with bills of exchange, acceptance or cheques, the involved parties agree, as merchants to the exclusive jurisdiction of the courts in Schwäbisch Gmünd. Moreover, the plaintiff is also entitled to sue/bring an action at the defendant's headquarters.

2. German law is exclusively valid for all sales and deliveries and all legally founded relations. The Vienna UN Agreement on contracts for international sales/purchase of goods of April II, 1980 cannot be applied.

3. Place of fulfilment of all mutual obligations is the head office of our company in Waldstetten."

6. In this appeal the principal issue concerns the interpretation of this clause having regard to the relevant provisions of the Brussels Regulation. It should be noted at the outset that the plaintiff's claim is for damages for breach of contract and interference with its economic interests. Furthermore, the plaintiff seeks damages pursuant to Art. 17(3) of Council Directive 86/653/EEC which Directive was transposed into domestic law by the European Communities (Commercial Agents) Regulations, 1994 (S.I. 33 of 1994) and the European Communities (Commercial Agents) Regulations, 1997 (S.I. 31 of 1997) ("the Commercial Agents Regulations").

7. Leicht Küchen contends, however, that the Irish courts lack jurisdiction to determine this dispute given that the effect of Clause 14 is to vest the German courts (and, specifically, the courts of Schwäbisch Gmünd) with exclusive jurisdiction. Bushell contends that Clause 14 only applies to the "particular legal relationship" as between the parties pursuant to the contract for sale, delivery and

payment, and not to the purported relationship of principal and agent. Since these proceedings relate to the termination of what Bushell contends was an agency agreement it submits that such claims fall beyond the reach of Clause 14.

8. It is not in dispute but that as Council Regulation No. 44/2001 EC ("the Brussels Regulation") was in force at the time of the commencement of these proceedings that it is that version of the Brussels Regulation which applies to this dispute. (The recast version of the Brussels Regulation No. 1215/12 EC which is now in force only took effect on 10 January 2015). The general jurisdiction clauses of the Brussels Regulation are well known and need only be briefly mentioned.

9. Article 2 (1) sets out the well established general rule that:-

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

10. Article 5 sets out certain exceptions to the general rule, upon which the plaintiff would seek to found jurisdiction if the exclusive jurisdiction clause did not apply:-

"A person domiciled in a Member State may, in another Member State, be sued:

1.(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

☐ in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered

☐ in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies; ...

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated."

11. Article 23 of the Brussels Regulation deals with prorogation of jurisdiction clauses and provides in relevant part as follows:

"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction....."

12. In essence, therefore, the question is whether Clause 14 should properly be interpreted as applying to a claim of this kind. Does Clause 14 apply to all possible disputes arising between the parties or is it simply confined to disputes concerning the supply and distribution of goods and services between the parties?

13. At the commencement of their business relationship, on 12th September, 2008, Leicht Küchen wrote to Bushell setting out buying, payment and delivery terms, stating:-

"Thank you for your recent orders for the supply of a showroom display kitchen and an end customer's kitchen. We now write to confirm the trading terms agreed and enclose a copy of our Terms and Conditions of Sale."

14. A further letter was furnished on 10th March, 2009, setting out renewed trading terms and stating:-

"This supersedes and invalidates all previous Typelists and Agreements. Our Terms and Conditions of Sale remain unchanged."

The judgment of the High Court

15. In the High Court Moriarty J. held that it was "abundantly clear" that the parties were bound by the terms of Clause 14 "certainly insofar as it relates to the contracts for sale and delivery of kitchen units." I might pause here to observe that the applicability of Clause 14 to what might be termed routine disputes of this kind (such as claims in relation to defective goods or non-payment for goods and services) is not in dispute.

16. Moriarty J. continued:

"A broader question arises, however, as to whether a separate legal relationship subsisted between the parties, beyond that governed by the General Terms of Sale Delivery and Payment.

The plaintiff urges upon the court to hold that the Clause 14 should not be taken as applying to the entirety of the trading relationship between the parties, but only to the contracts for sale of kitchen units. It is submitted by the plaintiff that the words "in relation to a particular legal relationship" should be strictly construed as limiting the application of Clause 14 to the General Terms of Sale Delivery and Payment

.....I am of the view that the plaintiff's submission in this regard is unsustainable. A plain reading of the terms of Clause 14, states that it applies to "disputes arising from business relations, directly or indirectly". The plaintiff has not sought to contest the efficacy of the clause, merely to suggest that its application should be limited. However, the plain and unambiguous language of the clause simply does not permit such an interpretation.

Having regard to the trading terms letters, I find that the interpretation that is proposed by the plaintiff is likewise unsustainable and flies in the face of business common sense. The letters were in the first instance furnished alongside a copy of the General Terms of Sale Delivery and Payment, and subsequently explicitly affirmed the latter's applicability. It is clear on the evidence before me that the letters and the terms must be read in conjunction and represent the totality of the agreement between the parties.....

Conclusion

In summary, in my judgment Clause 14 is binding upon the parties, representing an effective prorogation of jurisdiction for the purposes of article 13 of Brussels I. The clause is stated to govern, "disputes arising from business relations, directly or indirectly". On any reasonable interpretation, this clause is couched in sufficiently broad terms so as to encompass the entirety of the business relations between the parties."

The interpretation of Clause 14

17. Similar questions regarding the scope of prorogation clauses also have arisen in a number of earlier Supreme Court decisions. In *Bio-Medical Research Ltd. v. Delatex S.A.* [2000] IESC 32, [2000] 4 I.R. 307 the plaintiff was an Irish company which was engaged in the supply and manufacture of slimming products. The defendant was a French company which contended that it had the exclusive rights to distribute the plaintiff's products in France. This was disputed by the plaintiff which commenced proceedings in Ireland claiming declaratory relief regarding the nature of the parties' contractual obligations.

18. Central to the plaintiff's argument on the jurisdictional issue was that the prorogation clause gave the Irish courts' exclusive jurisdiction. The relevant clause simply stated:

"The contract shall be governed by and construed in accordance with the laws of Ireland and the buyer irrevocably submits to the jurisdiction of the Irish courts in relation to all matters in dispute hereunder."

19. While it was not disputed that the clause was a valid and effective one for the purposes of Article 17 of the Brussels Convention, the Supreme Court, applying by analogy the reasoning of the Court of Justice in Case C-159/97 *Societa Transporti Castelletti SpA v. Hugo Trumphy SpA* [1999] ECR I-1957, stressed that such clauses must be "strictly construed".

20. In his judgment for the Supreme Court Fennelly J. accordingly held ([2000] 4 I.R. 307, 309) that the jurisdiction clause did not apply to the present claim:

"It is unnecessary to set out in full the terms of the printed conditions. None of them contains any reference to distribution, exclusive or otherwise, or even to the fact that the goods are being sold for resale in France. They have all the appearance of standard conditions regarding the sale of goods and nothing more. It would require a very strained interpretation to apply them to the question of the exclusivity of an agreement for distribution of goods sold in another Member State of the European Community."

21. This matter was further considered by the Supreme Court in *Leo Laboratories Ltd. v. Crompton B.V.* [2005] IESC 31, [2005] 2 I.R. 225. In that case, the plaintiff, an Irish company, had purchased raw materials for the manufacture of pharmaceutical products from a Dutch company. The applicable terms and conditions provided that any disputes:

"..arising out of or on account of a contract...shall be adjudicated, with the exclusion of any other courts, by the court having jurisdiction at Haarlem."

22. The plaintiff claimed that one shipment of product supplied by the defendant Dutch company was contaminated and caused it financial loss. The plaintiff then commenced proceedings in the Irish courts, claiming damages for breach of contract and in tort. The Supreme Court held that the exclusive jurisdiction clause in favour of the Dutch courts was effective to deprive the Irish courts of jurisdiction ([2005] 2 I.R. 225, 239):

"It is my view that the respondent's claim in tort clearly falls within the scope of clause 36 of the terms and conditions. It is impossible to consider that claim independently of the contractual relationship between the parties. The clause applies to disputes "arising out of or on account of a contract." Paragraph 3 of the statement of claim commences the narrative by pleading the "purchase order" placed by the respondent with the appellant in December 1998. The affidavit of Mr Peter Young speaks of the parties having had "a trading relationship for many years." It says that they "traded under standard terms and conditions." All of this relates to a contractual relationship. One then poses the question: what is the dispute about? It is about the alleged delivery by the appellant of defective product. How did that product come to be delivered? Answer: it arose out of a contract. If we are to understand words in their commonsense and ordinary meaning rather than some meaning contrived for the purpose of avoiding the obvious, the dispute arises out of a contract."

Accepting, as I must, the requirement that the application of Article 23 of the Brussels Regulation should be strictly construed, I am, nonetheless, satisfied that clause 36 formed part of the trading relationship between the parties. I am also satisfied that it is a clause conferring jurisdiction on the Courts at Haarlem, where jurisdiction has already been established and accepted. In the terms of Article 23, that is exclusive jurisdiction."

23. Applying these principles, I find myself obliged to conclude that it is the German courts which alone have jurisdiction in this matter. It is true that, on one view, there is, perhaps, a difference of emphasis between the judgment in *Bio-Medical* on the one hand and that in *Leo Laboratories* on the other. It can equally be said that, just as in *Bio-Medical*, the present case concerns issues in relation to a distributor agreement and not simply standard issues arising from the supply defective products or the non-payment for

goods and services.

24. The key point of distinction, nonetheless, is that the wording of the prorogation clause in the present case ("For all disputes arising from business relations....") is broader than that which was in question in *Bio-Medical*. Unlike the prorogation clause at issue in *Bio-Medical*, the all-encompassing wording of the prorogation clause at issue in the present case is capable of applying more broadly than simply to questions of the supply of goods and payment for those goods.

25. Applying, moreover, the approach adopted by Fennelly J. in *Leo Laboratories*, if the question is posed as to the provenance of the plaintiff's claim that it enjoyed the status of a distributor, the answer must be given that it derived from a contract of some kind between the plaintiff and the defendant. Yet the very wording of the contractual agreement between the parties was to the effect that "all" disputes arising from the parties' business relations – whether "directly or indirectly" – were committed to the exclusive jurisdiction of the German courts. Even if the existence of such a distributor contract outside the framework of the general terms and conditions supplied by the defendant were to be admitted, any dispute regarding the termination of such a contract would represent a dispute concerning the parties' business relations and would thus be captured by the words of Clause 14.

26. It is, of course, correct to say that – as the Supreme Court stressed in both *Bio-Medical* and *Leo Laboratories* – prorogation clauses of this kind must be strictly construed. The substance of such commercial agreements of this kind in relation to jurisdiction must nevertheless be honoured and the courts must accordingly respect the plain meaning of such clauses.

The decision of the Dutch Supreme Court in Hacker Küchen

27. Counsel for Bushell, Mr. Conlan Smyth S.C., also helpfully drew our attention to a decision of the Dutch Supreme Court in *Hacker Küchen GmbH v. Bosma Huygen Muebelimpex B.V.* [1992] International Litigation Procedure 379 on which he relied. That was a case whose facts were admittedly quite similar to the present one.

28. In *Hacker Küchen* a Dutch company brought proceedings in the Netherlands claiming damages for breach of contract against a German company arising from what it claimed was the wrongful termination of a sales concession contract. The German company relied on a jurisdiction clause giving the German courts jurisdiction which clause was contained in associated contracts of sale between the parties. In essence, therefore, the German company contended that the jurisdiction clause in the sales contract should govern the sales concession contract even though that latter contract did not itself contain a jurisdiction clause. The Dutch Supreme Court rejected that argument, endorsing a lower court decision to the effect that the differences between the two contracts was such that "it cannot be assumed that the parties also intended to apply that [jurisdiction clause] to the concession contract."

29. Despite the apparent similarities of the two cases, there is one fundamental and critical difference of fact so far as the jurisdiction clause issue is concerned. In *Hacker Küchen* the plaintiff could point to the existence of two separate written contracts governing the relationship between the parties and the essence of the Dutch Supreme Court decision is that one could not import the jurisdiction clause contained in the sales contract into the contract for distribution agreement.

30. By contrast, the plaintiff in the present case can point only to one written agreement which contains an all encompassing jurisdiction clause which purports to govern "all disputes arising from business relations." This is a critical point of distinction between the two cases and leads to the obvious inference that all contractual disputes (of whatever nature) are governed by the prorogation clause.

Conclusions

31. In my view, it is clear that, for the reasons stated, the jurisdiction clause provided for in Clause 14 is sufficiently broad so as to apply to all contractual disputes between the parties, whatever their nature. It follows that inasmuch as these proceedings claim damages for breach of a distributorship agreement between the parties only the courts of Schwäbisch Gmünd have the appropriate jurisdiction to hear and determine this claim.

32. It follows that I believe that the decision of Moriarty J. to the effect that the High Court had no jurisdiction in the matter was correct and I would accordingly dismiss the appeal.