

THE HIGH COURT

[2010 No. 9766 P]

BETWEEN

BUSHELL INTERIORS LIMITED

PLAINTIFF

AND

LIECHT KUCHEN A.G.

DEFENDANT

JUDGMENT of Mr. Justice Michael Moriarty delivered on the 14th day of January, 2014

1. This matter comes before the court by way of the defendant's Notice of Motion seeking to set aside the within proceedings for want of jurisdiction, pursuant to Order 12 Rule 16 of the Rules of the Superior Courts, 1986, as amended.
2. The plaintiff is a limited company, having its registered office in the State. The defendant is a corporation with a registered office at Grounder Strasse, 70 D- 73550 Valdstetten, Germany.
3. In these proceedings, the plaintiff seeks damages for alleged breach of contract and interference with its economic interests. Furthermore, the plaintiff seeks compensation pursuant to Art. 17(3) of Council Directive 86/653/EEC of 18th December, 1986, on the Co-Ordination of the Laws of Member States related to Self-Employed Commercial agents, which was implemented in Irish law by way of 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) (taken together, "the Commercial Agents Regulations").
4. The parties were engaged in a commercial relationship from around September of 2008, whereby the plaintiff supplied the defendant with what are described in the pleadings as "high end kitchens" for further distribution. The plaintiff submits that the relationship between the parties went beyond that of supplier and purchaser, and that it acted as agent for the defendant in this jurisdiction. The plaintiff claims, in support of this contention, that it had been listed on the defendant's website as a dealer and that it was referred to by the defendant in *inter partes* correspondence as a "highly qualified Leicht Master Dealer". It is common case, however, that any agency agreement between the parties was not reduced to writing at any point.

Legal Issues Arising

5. The defendant submits on various grounds that this court lacks the jurisdiction to adjudicate upon this matter. These submissions broadly centre around whether Clause 14 of the plaintiff's General Terms of Sale, Delivery and Payment ("Clause 14") is binding upon the defendant, having regard to the provisions of Article 23 of Regulation 44/2001, and in the alternative that the defendant is not a commercial agent.

6. In response, the plaintiff submits that Clause 14 applied only 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.

Council Regulation No. 44/2001

7. There is broad consensus between the parties as to the articles of Council Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I") that are relevant to this application. 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."

8. However, Article 5 sets out certain exceptions to the general rule, upon which the plaintiff seeks to rely:-

"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".

9. Article 23 of Brussels I (regarding "Prorogation of Jurisdiction") provides the following:-

"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.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22. "

10. The plaintiff argues that, pursuant to Articles 5(1) and 5(5), the Courts of this jurisdiction are the appropriate forum to deal with this dispute, while the defendant submits that, notwithstanding these provisions, Clause 14 sets out a binding prorogation of jurisdiction for the purposes of Article 23.

Interpretation and Effects of Clause 14

11. Clause 14 provides, inter alia, the following:-

"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 Schwabisch Gmund. 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."

12. At the commencement of their business relationship, on 12th September, 2008, the defendant wrote to the plaintiff 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."

13. 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"

14. In *McCabe Builders (Dublin) Limited v. Sagamu Developments Limited* [2011] 3 I.R. 480 at p. 492, Fennelly J. stated:-

"I agree with the statement in Contract Law, by Paul A. MacDermott (Butterworths, Dublin, (2001)) at p. 171, that in 'commercial arrangements it will be presumed that the parties intended to create legally binding contracts'. Lord Wright said in Hi/las & Co. Ltd v. Arcos Ltd (1932) 147 L.T 503 at p. 514:-

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law ... '

In other words, the courts should seek to give effect to the apparent intentions of parties to enter into binding contracts. It is clear that the parties to the present proceedings intended that their relationship would be governed by a formal legal contract. The question is what the terms of the contract are. "

15. In the case of *Clare Taverns v. Gill* [2000] 1 I.R. 286 at p. 295, McGuinness J. considered the incorporation of a forum clause in circumstances where it had formed part of the general terms and conditions printed on the reverse side of an invoice:-

"In the submissions made before this Court, it was not seriously suggested that the practice of printing general conditions of sale on the reverse side of invoices and similar documents, with a reference on the face of the document to the said conditions, was not a common commercial practice in the type of international trade with which we are concerned here. Indeed, from the point of view of practical experience every ordinary consumer, and still more anyone

engaged in trade or commerce, must be familiar with this type of document.

In the instant case the defendant had regularly traded with the first third party both from 1987 to 1989 and subsequently from 1995 onwards. It is established by the affidavit of Mr. Dodd and the exhibits thereto that the defendant had repeatedly received invoices, which included clause 19, the jurisdictional clause. At no stage had the defendant even raised a query in regard to this clause. Still less had he refused to be bound by it. It seems to me, therefore, that the contract entered into by the defendant and the first third party, whether it be a written contract or a contract partly in writing and partly oral, incorporated the terms and conditions set out repeatedly on the invoices sent out by the first third party in the course of trade. In these circumstances the Court must hold that there was consensus between the parties as to the jurisdictional clause ... "

16. In *Leo Laboratories Ltd. v. Crompton BV* [2005] 2 I.R. 235, Fennelly J. approved the foregoing dictum of McGuinness J, stating at p. 235:-

*"[T]he defendant's acceptance of the plaintiffs order contained reference to the 'general terms and conditions of sale and delivery as stated on the back hereof'. Counsel for the plaintiff stated, at the hearing of the appeal, that the plaintiff had not seen the conditions before their production in court. They were, nonetheless, before the High Court. O'Higgins J. dealt specifically with the contention that these terms did not form part of the contract between the parties. He decided that they did. He referred to the High Court judgment of McGuinness J. in *Clare Taverns v. Gill* [2000] 1 I.R. 286. He held that the plaintiff 'knew or should have known [of these terms] and are attached with the knowledge of the terms of the contract'.*

*I fully agree with this conclusion of O'Higgins J. It is well established that it is for the national court to determine the terms of the contract. I so stated in my judgment, delivered in this court with which the other members of the court agreed, in *Bio-Medical Research Ltd. v. Delatex S.A.* [2000] 4 I.R. 307. I relied on the decision of the European Court of Justice in *Leathertex v. Bodeltex* (Case C-420-97) [1999] E.C.R. I-6747.*

17. In the context of the consideration of the effect of Article 23 of Brussels I, Fennelly J. held in *O'Connor v. Masterwood* [2009] IESC 49 (Unreported, Supreme Court, 1 st July, 2009) at para 19:-

"It would be to overlook the obvious, if the court were to ignore the admitted signature of the first named plaintiff on a set of printed conditions containing a clear and express jurisdiction clause. It may well be that the first-named plaintiff paid little attention to the terms of printed conditions. That is commonplace. However, people engaged in trade, certainly in international trade, must be taken to be aware that printed conditions contain clauses which can affect their rights. They choose to ignore them at their peril. That is why Article 23, section 1, subparagraph (c) refers to practices of which parties 'ought to have been aware. '"

18. Therefore, it is abundantly clear that the parties are bound by the provisions of Clause 14, certainly insofar as it relates to the contracts for sale and delivery of kitchen units. 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.

19. 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

20. In support of this submission, the plaintiff relies upon *Biomedical Research v. Delatex* [2000] 4 IR 307. In that case, the parties had entered into a distribution arrangement whereby the French-based defendant company distributed products furnished by the Irish-based plaintiff. The plaintiff's terms and conditions of sale, endorsed on its invoices, contained a "Governing Law" clause, prorogating jurisdiction to the courts of Ireland. Fennelly J considered that this clause could not be interpreted as modifying or affecting the distribution agreement, stating at page 319:-

"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 Union. This is, as agreed, a matter of Irish law. ... I do not think that the common sense approach recommended in those cases at all requires that the condition be interpreted as requested by the plaintiff"

21. Referring to the application of article 5 of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988 (No.3), which had given effect to the 1968 Brussels Convention in this jurisdiction and is identical insofar as relevant to article 5 of Brussels I, Fennelly J stated at page 315:-

"Before reaching a conclusion on this point, I should refer briefly to the relationship, as it has been described by the Court of Justice and by this court, between the general principle of jurisdiction based on domicile of the defendant and the cases of special jurisdiction laid down in article 5. Section 4 of the Act of 1988 requires the Court to take judicial notice of 'any ruling or decision of, or expression of opinion by, the European Court' in the matter.

*In *Handbridge Ltd. v. British Aerospace Communications Ltd.* [1993] 3 I.R. 342, at p. 358, Finlay C.J, delivering the unanimous judgment of the Supreme Court held that the*

'onus is on the plaintiff who seeks to have his claim tried in the jurisdiction of a contracting state other than the contracting state in which the defendant is domiciled to establish that such claim unequivocally comes within the relevant exception. '

The cases of special jurisdiction constitute, nonetheless important independent bases of jurisdiction. The derogations were introduced:-

'in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be called upon to take cognisance of the matter, with a view to the effective organisation of the

proceedings."

22. The plaintiff seeks to impute from the defendant's use in its letter of 12th September, 2008, of the phrase, "*We now write to confirm the trading terms agreed and enclose a copy of our terms and conditions of sale*" and in its letter of 10th March, 2009 of the words, "*This supersedes and invalidates all previous Typelists and Agreements. Our Terms and Conditions of Sale remain unchanged*", the existence of separate "trading terms" as distinct from the terms and conditions of sale.

23. 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.

24. 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. In assessing the dealings between the parties in this regard, I am fortified in the view I have taken by the robust words of Steyn LJ in *Continental Bank NA v. Aeokos Cia Naviera SA* [1994] 2 All ER 540, as approved by McGuinness J in *Clare Taverns v. Gill*, already referred to.

25. Furthermore, I am not satisfied that the plaintiff has discharged the onus upon it to demonstrate to this court that business common sense and the effective organisation of proceedings require that this court should assume jurisdiction pursuant to article 5 of Brussels I.

Application of the Commercial Agents Regulations

26. Given my findings in relation to the application of Clause 14, it is not necessary to embark upon a detailed analysis of whether a relationship of principal and agent could be said to have existed between the parties for the purposes of the Commercial Agents Regulations. However, for completeness, I propose to briefly consider the position as it appears to me.

27. Regulation 4 of S.I. 33 of 1994 states:-

"The agency contract shall not be valid unless it is evidenced in writing."

28. It is common case that no written agreement was entered into between the parties appointing the plaintiff as agent of the defendant. The plaintiff submits that, notwithstanding this fact, the purported agreement is adequately evidenced by way of the "Trading Terms letters" furnished by the defendant to it on a regular basis, as adverted to *supra*.

29. Even taking this argument at its height, there is nothing in the trading terms letter that evidences or that may allow the court to infer the existence of an agency agreement between the parties, nor has any documentary evidence been produced that may entitle the court to make such a finding. I am therefore of the view that the purported agency contract, would be invalid for the purposes of the Commercial Agents Regulations as not having been adequately evidenced in writing. However, I must also add that it seems to me that there is no evidence before the court of such a contract having been entered into as between the parties.

Conclusion

30. 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. Furthermore, insofar as it was necessary to consider the point for the purposes of adjudicating upon this application, I am not convinced that the plaintiff has made out a stateable case that it was the agent of the defendant for the purposes of Commercial Agents Regulations.

31. In any event, notwithstanding foregoing considerations, I am not satisfied that the plaintiff has discharged the onus upon it to demonstrate that article 5 of Brussels I should apply in this case.

32. Accordingly, I will grant the defendant's application and order that these proceedings be dismissed for want of jurisdiction, pursuant to Order 12, Rule 26 of the Rules of the Superior Courts, 1986 (as amended).