Neutral Citation: [2015] IEHC 708

**THE HIGH COURT**

**[Record No. 2014/579 P]**

**BETWEEN**

**CLUBGEAR DIRECT ONLINE LIMITED**

**PLAINTIFF**

**AND**

**MITRE SPORTS INTERNATIONAL LIMITED AND**

**PROSTAR SPORTS LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Binchy delivered on the 10th day of November, 2015.**

1. This is an application brought by the defendant by way of notice of motion for an order declining jurisdiction to hear and determine this action, in favour of the Courts of England and Wales. The motion issued on 1st July, 2014 and came on for hearing on 6th October, 2015.

**Background**

2. There is no material disagreement between the parties as to the background giving rise to the proceedings and this application. The plaintiff is a limited liability company registered in Ireland with a registered office at Crosshaven, Co. Cork, (hereinafter "the Company.")

3. The first and second named defendants are limited liability companies each registered in England and Wales and a registered office at 8 Manchester Square, London.

4. In August/September 2011, the plaintiff, which was at that time a new start-up company in the business of supplying sports attire, made contact with the first named defendant with a view to being supplied with sporting goods by the first named defendant. These included footballs, bibs, tabards and other types of equipment that a football team might require. No distinction appears to have been made by the first defendant at this time between it and the second named defendant and it appears as though negotiations were conducted between the parties on the basis that, for practical purposes, the defendants were a single trading entity. In any case, the plaintiff was informed that it was required to complete a credit account opening form before any business could commence. A form was completed on behalf of the plaintiff by a Mr. Seamus Murphy on 5th September, 2011. On the form, immediately above the place provided for the signature of the applicant for credit, there is a paragraph on the form stating the following:

> "I certify that the above information is correct, and that I have read and accepted the terms of business printed overleaf. I authorise you to take up the above references and approach my bankers, any credit reference agencies and/or any other third party to obtain any information necessary to consider this application and to check my credit status from time to time during our account with you."

5. On the reverse side of the form appeared the standard terms and conditions of trading of the defendants (in very small but legible print). Clause No. 24 states:

> "The construction, validity and performance of all Contracts between the parties shall be governed by English law and shall be subject to the exclusive jurisdiction of the English Courts although this shall not limit the right of the Company to commence proceedings in any other jurisdiction the Company deems appropriate."

6. The defendants accepted the plaintiff's application and an account was opened on 26th September, 2011.

7. For reasons that it is not necessary to explain, the defendants required the plaintiff to submit a second credit application form which the plaintiff duly did on 24th January, 2012. This form was in identical terms to the form completed by or on behalf of the plaintiff on 5th September, 2011, including the terms and conditions of trading on the reverse side and the choice of jurisdiction clause contained therein. Thereafter, the parties commenced trading, during the course of which the defendants would have invoiced the plaintiff for goods supplied, although copies of invoices were not provided to the Court. This is probably because, as the Court was informed, the terms and conditions of trading were not endorsed on the reverse side of the invoices.

8. Very soon afterwards, between February and May 2012, there were further discussions between the plaintiff and the defendants (or more accurately, the representative of the defendants in Ireland a Mr. Ray Maguire of Maguire Agencies Ltd.) arising out of the fact that the plaintiff had been successful in obtaining a franchise for a brand known as "Little Kickers". The plaintiff expressed the view that this development opened the possibility of very significant business for both plaintiff and the defendants. These discussions led to an agreement between the parties for the supply of goods by the defendants to the plaintiff for the purposes of the Little Kickers franchise.

9. Very soon afterwards, the defendants ran into difficulties in meeting orders placed by the plaintiff. These difficulties and the consequences thereof are the subject matter of the proceedings issued by the plaintiff, and evidence of the problems was presented to the Court in the form of a letter from the first named defendant dated 20th May, 2013, addressed "to whom it may concern" explaining delays in the delivery of Little Kickers uniforms. It is the plaintiff's claim that as a result of these difficulties in supply it lost the Little Kickers franchise.

10. However, before the plaintiff took any action against the defendants, the second named defendant caused its agent, Madison Account Control, to send a letter of demand to the plaintiff on 7th October, 2013, demanding payment of the amount of STG£49,718.20 in respect to goods supplied, and in that letter it was stated that in default of payment, papers would be sent to

Croskerry's solicitors in Dublin to issue proceedings to recover the amount claimed. A comprehensive response to this letter was issued by Messrs. Healy O'Connor solicitors on behalf of the plaintiff on 22nd October, 2013 in which the basis of the plaintiff's claim against the defendants was set out. It does not appear as though any response was issued on behalf of the defendants to Messrs. Healy O'Connor, who wrote again to the defendants on 4th December, 2013 informing them that proceedings had now been issued and requesting the defendants to nominate a firm of solicitors in Ireland to accept service of proceedings. Proceedings were served by Messrs. Healy O'Connor solicitors directly upon the defendants on 27th January, 2014. On 7th February, 2014 Messrs. O'Shea Barry solicitors wrote to Messrs. Healy O'Connor on behalf of the first named defendant requesting payment of sum of STG£48,906.71, which they stated was the amount due by the plaintiff to the defendants. This letter stated that in default of receipt of payment within 7 days, proceedings would be issued against the plaintiff without further notice. In all of the correspondence referred to above, neither party made an issue as to whether the plaintiff was in contract with the first defendant only or both defendants, although it is clear from the correspondence that the representatives of the plaintiff wrote to: the first named defendant but also using both trade names, Mitre and Prostar, while the representatives of the defendants identified their client as Prostar Sports Ltd. In the case of Messrs. O'Shea Barry solicitors this was followed by the words "trading as Mitre Prostar".

11. On 27th February, 2014 Messrs. O'Shea Barry solicitors entered an appearance on behalf of the defendants which was stated to be entered solely for the purpose of contesting jurisdiction. This was the first occasion on which the issue of jurisdiction of proceedings was raised. Subsequently, on 22nd May, 2014, the solicitors for the defence raised a notice for particulars in which it is stated at the outset:

> "These further and better particulars are sought for the purpose of contesting jurisdiction and the defendants reserve their rights in full to raise further particulars in due course and if necessary."

On 1st July, 2014, the defendants issued a notice of motion seeking an order of this Court declining jurisdiction to hear and determine the proceedings in favour of the Courts of England and Wales.

**Defendants' case**
12. The defendants' application is grounded on the affidavit of Mr. Kevin Barry, solicitor of O'Shea Barry, solicitors, 5 Fitzwilliam Place, Dublin 2, dated 1st July, 2014. In this affidavit Mr. Barry states that the agreement the subject matter of the plaintiff's claim was in fact entered into between the plaintiff and the second named defendant on 24th January, 2012. He then advances two grounds in support of the application on behalf of the second named defendant:

> Firstly, that the second defendant agreed to supply goods to the plaintiff in accordance with their terms and conditions to which the plaintiff agreed in writing as described in paragraphs 4-7 supra. More specifically, the second defendant says that it is the form dated 24th January, 2012 that relates to the agreement the subject matter of the plaintiff's claim. The second defendant maintains that the forms that were signed on 5th September, 2011 and on 24th January, 2012 were signed on behalf of the Company by persons who were directors of the Company and as such had authority to bind the Company.

13. The second defendant relies upon Article 23 of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Regulations") which states:

> "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 should be either:
>
> (a) in writing or evidenced in writing; or
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> (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."

14. The second defendant submits that if it is established that there is an agreement meeting the requirements of Article 23, that the terms of the Article are mandatory and that jurisdiction must be declined in favour of the Court nominated by the parties in the choice of jurisdiction clause. In this regard the defendants rely upon the case of *Leo Laboratories v Crompton B.V.* [2008] 2 I.R. 225.

15. The second ground advanced the second defendant in support of its application is that even if the Court concludes for any reason that the choice of jurisdiction clause does not apply, the Courts of England and Wales are in any case the appropriate forum in which to adjudicate the dispute by reason of Article 5 of the Regulations which states:

"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 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;

2. in matters relating to maintenance [*not applicable* in this case];

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occurred;"

16. The second defendant contends that while the plaintiff's claim is framed in the first instance in terms of a tortuous wrong, the relationship between the parties undoubtedly arises from a contract for the sale and supply of goods, and that the goods were manufactured in various countries outside the EU and delivered directly to the plaintiff's customer, Little Kickers in Australia, Canada, South Africa, Saudi Arabia, New Zealand, Hong Kong, UK and Ireland and therefore the Irish courts are not the place for performance of the obligations under the contract.

**Plaintiff's case**

17. Firstly, as a matter of fact, Mr. Denis Behan who swore the replying affidavit on behalf of the plaintiff in opposition to this application, denied that the application for credit referred to above formed part of the contractual relationship between the parties and stated that he had never seen a copy of the same prior to the proceedings. Furthermore, he stated that the agreement to which the proceedings relate was concluded between the parties in May, 2012 and therefore even if the application for credit, in which the choice of jurisdiction clause is contained, forms part of the contractual relationship between the parties, it did not form part of the contractual relationship between the parties to which these proceedings relate.

18. Mr. Behan also states that it is not correct to say that the place for performance of the obligations of the defendants is as described by Mr. Barry in his affidavit. While acknowledging that some goods supplied under the contract were distributed directly to franchisees in Australia, Canada, Hong Kong and South Africa, more than 50% of goods ordered were delivered to the plaintiff's warehouse in Cork, for distribution by the plaintiff to franchisees in Ireland, the UK and Cyprus.

19. The plaintiff resisted the application on six grounds:

> 1. The jurisdiction clause does not form part of the agreements between the parties due to a lack of consensus on the same. The plaintiff submits that there was no evidence that it had agreed to the choice of jurisdiction clause as required by the Regulations and the applicable authorities;
>
> 2. Even if the clause is found to be part of the contract between the parties, and although the general principle is that the choice of jurisdiction of the parties must be upheld, there may be exceptions to this where there are strong reasons not to enforce the choice of jurisdiction. In this case the plaintiffs submit that by writing to the plaintiff (as they did through their debt collection agents) stating that they intended to pursue the plaintiff for the amount claimed in the Irish courts, that it would be unfair to allow the defendant to resile from this initial choice of jurisdiction, and furthermore that the defendant is estopped from doing so;
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> 3. The choice of jurisdiction clause is not binding because it is insufficiently precise, inherently contradictory and is at best what the plaintiff describes as a hybrid jurisdiction clause;
>
> 4. The first named defendant cannot rely on the terms and conditions provided by the second defendant;
>
> 5. The application should be dismissed on grounds of delay;
>
> 6. The contract does not apply because it pre-dates the contract giving rise to the proceedings, and constitutes a different agreement between the parties to the agreement the subject of the proceedings.

20. The plaintiff relies upon the decision of the European Court of Justice in the case of *Estasis Salotti v. RUWA* [1976] ECR 1831 and also the decision of the European Court of Justice in the case of *Tilly Rus v. Haven* [1985] QB 931 as well as the decision of O'Neill J. in *Stryker v. Sulzer* [2006] IEHC 60 in relation to the principles applicable to the enforceability of a choice of jurisdiction clause.

**Decision**

21. As to the facts, there are two matters of significance in dispute, firstly, whether or nor the plaintiff agreed to the conditions of contract incorporating the choice of jurisdiction clause, and secondly, the place of performance of the contract. In a replying affidavit delivered on behalf of the defendant dated 27th April, 2015, Mr. Chris Degnam deposes that the 2011 application form was completed by Mr. Seamus Murphy who is listed as a shareholder of the plaintiff in the companies registration office. He deposes that the directors of the plaintiff are listed as being Christine Murphy, Lynda Behan (who he believes was at the time the wife of Mr. Behan) and Eileen Maguire. He further deposes that Christine Murphy is the wife of Seamus Murphy.

22. As to the application form completed on 24th January, 2012 Mr. Degnam deposes that the application form was completed by Christine Murphy, wife of Seamus Murphy and director of the plaintiff.

23. A Mr. Ray Maguire, of Maguire Agencies Ltd., also swore an affidavit on behalf of the defendant. He deposed that Maguire Agencies Ltd. is and has been a commercial agent on behalf of the defendants in Ireland since 2009 and that he was responsible for negotiations with the plaintiff following on from the initial approach made by the plaintiff to the first defendant for the supply of goods. Mr. Maguire exhibited to his affidavit a companies registration office search which includes the annual return of the Company for the year ended 15th January, 2012, and which identifies Mr. Denis Behan, Ms. Lynda Behan, Ms. Eileen Maguire, Mr. John Maguire, Ms. Christine Murphy and Mr. Seamus Murphy as shareholders in the Company and Ms. Christine Murphy and Ms. Eileen Maguire as directors of the Company.

24. None of this was denied by the plaintiff and I am satisfied that as a matter of fact the forms of application for credit completed on behalf of the plaintiff in 2011 and 2012 were completed with the authority of the Company, even if Mr. Denis Behan was not personally acquainted with the same or with their contents.

25. As to the place of performance of the contract, it is clear that the plaintiff directed delivery of goods to various countries. According to Mr. Behan (whose averment in this regard was not contradicted) any goods for delivery to franchisees in Ireland, the UK and Cyprus were first delivered to the plaintiff at its warehouse in Cork from were they were then distributed to the Little Kickers franchisees in Ireland, the UK and Cyprus. This accounted for more than 50% of goods supplied, and the remaining goods were distributed directly to franchisees in Australia, Canada, Hong Kong and South Africa. There were therefore various places for the performance of the contract, but the predominant place of performance of the contract was Ireland.

26. I turn next to the question of whether or not the application for credit completed on behalf of the plaintiff by Christine Murphy on 24th January, 2012 is applicable to this transaction. The plaintiff contends that this could not be so, because the problems of supply giving rise to the proceedings arose out of the Little Kickers franchise secured by the plaintiff, and of this I believe there is no doubt.

The plaintiff agrees that this is an agreement for supply between the parties that post-dates the agreement that gave rise to the signing of the applications for credit terms by the plaintiff, and that accordingly the terms and conditions of the defendants could have no application to the agreement for supply reached between the parties in May, 2012. In effect, the plaintiff's argument is that there were different agreements between the parties, and that even if the terms and conditions apply to the first agreement of 2011/2012 they have no application to the amendment of May, 2012. However, the opening paragraph of the terms and conditions of sale state:-

> "All business is carried on subject to the following terms and conditions ("Terms") except as varied by specific written agreement of the Company. By placing any order with the Company the customer shall be deemed to have agreed to and accepted these Terms. In these Terms "Contract" means that the contract for the supply of Goods formed by the Company's acceptance of the customers' order."

Accordingly if the terms and conditions of sale are deemed applicable, I think it is clear that they apply to all goods supplied by the defendants to the plaintiff, whether immediately after the commencement of dealings between the parties, or at any later stage when dealings may well have increased, unless the terms and conditions are varied or replaced by other terms and conditions, by the agreement of the parties.

27. In *Salotti*, the European Court of Justice stated:-

> "The mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction. It is otherwise in (sic) the case where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction.
>
> Thus it should be answered that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled only if the contract signed by both parties contains an express reference to those general conditions."

28. The reference to Article 17 in *Salotti* is a reference to Article 17 of the Convention of 27th September, 1968 on the jurisdiction and enforcement of judgments in civil and commercial matters ("the Brussles Convention"). That article was in almost identical terms to article 23 of the Regulations. The interpretation given to Article 17 by the European Court of Justice in *Salotti* has been followed by Courts in this and other jurisdictions ever since. In *Leo Laboratories Ltd. v. Crompton B.V.* [2005] IESC 31, Fennelly J. cited the following further passage from *Salotti*, in relation to the application of Article 17 of the Brussels Convention:-

> "The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention.
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> In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.
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> By making such validity subject to the existence of an "agreement" between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.
>
> The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established."

29. *Leo Laboratories* was concerned with a case in which the defendant's terms and conditions did not appear in any of the documentation exchanged between the parties in the contract that gave rise to the proceedings, but were referred to in a document issued by the defendant confirming the plaintiff's order for goods. The Supreme Court held that the plaintiff was bound by the defendant's terms and conditions in circumstances where the plaintiff knew or ought to have known of their existence and content as a result of the course of business between the parties. In affirming the decision of the trial judge, Fennelly J. stated that he:

> "was correct to conclude that the plaintiff was fixed with the general terms and conditions of sale. It was put expressly on notice of their existence and thus put on inquiry as to their terms. The parties were engaged in international trade. It is a very general practice of suppliers in international trade to impose conditions relating to applicable law and jurisdiction."

30. In *Leo Laboratories*, the Court held that the plaintiff was fixed with the general terms and conditions of sale of the defendant. It held that having been put expressly upon notice of same, the plaintiff was thus put on inquiry as to their terms. The Court noted that the parties were engaged in international trade and that it is a very general practice of suppliers in international trade to impose conditions relating to applicable law and jurisdiction. In effect therefore the Court concluded that the terms and conditions in that case met the requirements of Article 23(1)(a) and (c).

31. In this case, not only were the terms and conditions of the defendants endorsed on the rear of the application for a credit account completed by the plaintiff, but on both occasions on which the application form was completed, the Company certified, through a person who was entitled to bind the Company, that he/she had read and accepted the terms of business printed overleaf. That is an express acknowledgement and agreement to the terms and conditions of the defendants on the part of the plaintiff. Whether or not the plaintiff actually read and considered the terms and conditions and specifically considered the choice of jurisdiction clause is immaterial; the plaintiff confirmed to the defendants that it had done so and that it accepted those terms, including the choice of jurisdiction clause. I consider that it is quite clear that the application for a credit account completed by Mr. Séamus Murphy on behalf of the plaintiff in 2011 and by Christine Murphy on behalf of the plaintiff 24th January, 2012 not just to the transactions contemplated at the time that that document was signed, but to subsequent transactions also and that the forms of acceptance and acknowledgment signed by Mr. Séamus Murphy and Ms. Christine Murphy each constitute a written acceptance of the terms and conditions of business proffered by the second defendant, including the choice of jurisdiction clause and that this meets the requirements of Article 23 of the Council Regulation.

32. The plaintiff submits however, that by reason of the demands for payment made by the defendants prior to the initiation of the

plaintiff's proceedings, in which demands it was indicated that the defendant intended to issue proceedings for recovery of its debt in Ireland, that it would now be unfair to allow the defendants to resile from their initial choice of jurisdiction and further argues that the defendants are estopped from doing so. These two arguments are very similar in substance and amount to an argument that by sending a letter or letters of demand indicating that proceedings will be issued in Ireland, but otherwise without in any way referring to choice of jurisdiction, the defendants have irrevocably committed themselves to the jurisdiction of the Irish Courts.

33. Counsel for the plaintiff referred the Court to the decision of the Supreme Court in *Doran v. Thompson Ltd.*[1987] 1 I.R. 233 in relation to the test for promissory estoppel in which Griffin J. stated:-

> "Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance."

34. Counsel also referred the Court to a decision of Lord Denning in the case of *Amalgamated Property Co. v. Texas Bank* [1982] 2 Q.B. 84 where he put the matter further:-

> "When the parties to a transaction proceed on the basis of an underlying assumption – either of law or a fact – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between the them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

35. It could hardly be said that a letter of demand threatening to issue proceedings in this jurisdiction constitutes a promise or an assurance, less still a submission to the jurisdiction of the Courts of Ireland. Nor do I believe that it could be said that the letters of demand issued on behalf of the defendants could be held to fall within the description of a "transaction" or to amount to an understanding as to how a transaction was to proceed, in the context in which that word is used by Lord Denning in the passage referred to above. Nor has it been suggested by counsel for the plaintiff that the plaintiff has in any way acted to its detriment by reason of the letters of demand issued on behalf of the second defendant.

36. By these arguments, the plaintiff invites the Court to declare that the letters of demand issued on behalf of the defendants in themselves constitute the exercise of a choice of jurisdiction even though nothing is said to this effect in the letters, although it is clear that they do contemplate the issue of proceedings in Ireland. The letters certainly do not constitute an express choice of jurisdiction or a clear and unambiguous promise or assurance of any kind. Nor did the parties embark upon a "transaction" on the basis of an underlying assumption, i.e. that legal proceedings would be conducted in Ireland. By analogy, if this argument were to succeed, a party who threatened to issue court proceedings in circumstances where an arbitration clause applied, could afterwards be deemed to be estopped from relying upon the arbitration clause without doing anything further to advance proceedings before the Court. This could not be correct. Indeed, to take the analogy with an arbitration clause further, a party who wishes to dispute the jurisdiction of the Court is usually entitled to do so up to and including the time at which the party enters an appearance to proceedings, as the defendants have done in this case.

37. I should add that in this case not only did the defendants enter an appearance which was stated to be solely for the purpose of contesting jurisdiction, they also issued a notice for particulars which was also stated to be for the purpose of contesting jurisdiction, and while the plaintiff argued that it was too comprehensive for that limited purpose, I am satisfied that the queries raised were directed to this issue and did not constitute a step towards acceptance of jurisdiction of the Irish courts. For the reasons given above, I cannot accept the arguments made on behalf of the plaintiff that the defendants are estopped or that it is unfair to allow the defendants to rely upon the choice of jurisdiction clause.

38. It was further submitted on behalf of the plaintiff that the choice of jurisdiction clause in this case is a hybrid clause insofar as the clause permits the second defendant to commence proceedings in any jurisdiction that it deems appropriate. It was argued that once the defendants have selected a jurisdiction, they should not be allowed to resile from same. I consider that to be a moot point in this case because as I have held above, I do not believe that the defendants' did in fact select jurisdiction by the issue of letters before the action and only did so at the point of issuing the within motion.

39. It was further submitted that the jurisdiction clause in this instance is a "hybrid" clause of a kind that has been found to be contrary to public policy and Article 23 of the Regulations by a decision of the of the Court of Cassation in France. A copy of that decision in French was handed into court untranslated and regrettably therefore it was not possible for the Court to consider that authority. As no other authority was provided to the Court in this regard, and as the argument was not otherwise expanded upon or argued by counsel, I do not propose to make any decision at all on this point.

40. It was further argued that the clause could not be binding on the parties and does not come within Article 23 of the Council Regulation as it is insufficiently precise due to what counsel submits is its inherently contradictory nature. In this regard it was argued on behalf of the plaintiff that the form of application signed on behalf of the plaintiff is addressed in the top left hand side to the second named defendant only, and the general terms and conditions of sale are headed with the name of the second defendant only, and there is no reference at all to the first defendant therein. Accordingly, the plaintiff argued, that the first named defendant cannot rely on the terms and conditions at all. However, the trade names of both defendants are prominantly printed on the top right hand corner of the front page.

41. In his affidavit Mr. Degnan states that the plaintiff's contract was with the second named defendant. He does explain that there is a degree of inter-connection in the relationship between the defendants in that both defendants are owned by the same holding company, Pentland Brands Plc. ("Pentland") and that following the acquisition of the second named defendant by Pentland, the UK and Irish Mitre and Prostar businesses were amalgamated into Prostar so that Prostar became the sole seller of Mitre and Prostar branded products in the UK and Irish markets. Mr. Degnan states that this is the reason why the forms of application completed by the plaintiff contained the logos of both Prostar and Mitre in the top right hand corner, but the plaintiff's dealings were with the second named defendant and that is the reason why its details appear in the top left hand corner of the form. While this is somewhat difficult to reconcile with the letter issued by the first named defendant on the 20th May, 2013 in relation to difficulties of supply (see paragraph 9 above) what is clear is that the plaintiff entered into a single agreement for the supply to it of goods, with one, other or both defendants. Whether that agreement was with the first or second defendant, or both, is an arguable point but it was one agreement governed by one set of terms and conditions to which the plaintiff agreed.

42. The plaintiff argues that the possible confusion as to the parties with whom the plaintiff was contracting renders the choice of

jurisdiction clause imprecise and contradictory, but in my view this argument cannot be sustained.

43. It was further submitted on behalf of the plaintiff that the choice of jurisdiction clause allows numerous courts to have jurisdiction and that this is inherently contradictory. Therefore, it is submitted on behalf of the plaintiff, the courts of Ireland are seized of jurisdiction pursuant to Article 29 of the Council Regulation which states:

> "Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favor of that court."

44. I cannot agree that the clause confers jurisdiction on several courts. It clearly confers jurisdiction on the courts of England and Wales unless the defendant elects to nominate another jurisdiction for the purpose of proceedings, and in such event the defendants will be bound by such nomination, and that the nominated court will have jurisdiction.

45. The final argument made on behalf of the plaintiff is that the application should be dismissed on grounds of delay. In making this submission, the plaintiff relies to some extent on the letters before action issued on behalf of the defendants on 7th October, 2013 and 7th February, 2014. However, in my view the time for assessing delay does not begin to run until such time as the proceedings were served upon the defendants, which was on 27th January, 2014. An appearance was entered on behalf of the defendants on the 4th March, 2014. The notice of motion issued on 12th May, 2014 and having regard to the time required to be taken for assembly of materials, referral of papers to counsel and drafting of documentation, I do not think that there was any unusual or inexcusable delay on the part of the defendants in bringing forward the within motion.

46. In summary, my conclusions are –

1. the parties entered into an agreement for supply of goods by both the defendants to the plaintiffs;

2. the place for the performance of the agreement was Ireland;

3. that agreement was subject to terms and conditions signed and accepted by the plaintiff on 5th September, 2011 and again on 24th January, 2012 which applied to all goods supplied by the defendants to the plaintiff;

4. accordingly, even if the original agreement for sale and supply of goods, when the terms and conditions were accepted in writing by the plaintiff, was a different supply agreement between the parties to that agreed in May, 2012 (and I make no finding to that effect) the terms and conditions still apply to all subsequent dealings between he parties unless varied by agreement;

5. the defendants are not bound by estoppel from relying on their terms and conditions;

6. there has been no delay of any significance by the defendants in issuing this motion;

7. the defendants are entitled to an order in the terms of paragraph (1.) of the notice of motion.

47. For all of these reasons I consider that the defendants are entitled to succeed with their application and I will make an order in the terms of paragraph 1 of the notice of motion, declining jurisdiction in favour of the courts of England and Wales.

Counsel for the applicant: Brian Conroy BL

Instructed by O'Shea Barry Solicitors.

Counsel for the respondent: Patrick O'Riordan BL

Instructed by Healy O'Connor Solicitors.