

## THE HIGH COURT

Record Number: 2012 No. 4515P

Between:

Muireann Gaffney trading as Art of Fitness

Plaintiff

And

Life Fitness (UK) Limited

Defendant

**Judgment of Mr Justice Michael Peart delivered on the 26th day of February 2015:**

1. The plaintiff is a distributor of gymnasium equipment and a sales person. In July 2001 she entered into an exclusive distributor agreement with the defendant company which is a UK company with registered offices in Ely, Cambridgeshire, United Kingdom. It manufactures such equipment. The agreement was for a period of three years expiring in July 2006, and extended to the island of Ireland. Upon the expiry of the agreement in July 2006 no further agreement was executed by both parties, though the plaintiff executed a renewal contract in 2007 which the defendant had furnished to her. It was never executed by the defendant thereafter. However, the relationship continued as before.

2. The plaintiff in these proceedings alleges that the parties' agreement was unlawfully terminated in circumstances where only three months' notice of termination was given by the defendant after the contractual relationship between the parties had endured for eleven years. She claims damages for breach of contract, as well as for negligence and breach of duty. She also seeks a declaration that the period of notice given is unreasonable and in breach of contract. The facts alleged to constitute breach of contract are relied upon also in respect of the claims which she makes in tort.

3. The plaintiff commenced her proceedings by way of Plenary Summons, and served notice of such proceedings upon the defendant at its registered office in the United Kingdom pursuant to the provisions of Order 11A RSC. That notice contained the endorsement required in such cases stating that *"this Honourable Court has power under Article 5(1) of Regulation No. 44/2001 ("the Regulation") to hear and determine the instant claim; and no proceedings between the parties concerning the same cause of action are pending between the parties in another member state of the European Union"*.

4. Where the proceedings are brought against a defendant company whose registered office is in a member state of the European Union other than Ireland, the proceedings may, in accordance with the Regulation, be served outside this jurisdiction without any order of the Court, provided that there is no reason under the Regulation why the proceedings must be commenced in the jurisdiction where the defendant's registered office is located.

5. Having been served with notice of these proceedings, the defendant instructed Irish solicitors to enter a conditional appearance only, so that it could contest jurisdiction. Having entered such an appearance on the 25th June 2012, the plaintiff delivered a Statement of Claim on the 19th December 2012. Thereafter on the 18th June 2013 the defendant's solicitors issued and served the present motion which seeks an order pursuant to Order 12, rule 6 RSC either dismissing or striking out these proceedings on the basis that the parties had mutually agreed to submit to the jurisdiction of the English courts for the purpose of any disputes arising on foot of their agreement, be that written or oral in nature, and that therefore under Article 23 of the Regulation this Court has no jurisdiction to hear and determine the plaintiff's claim against the defendant.

6. Article 5 of the Regulation provides at (1) that a person domiciled in a member state may be sued in matters relating to contract in *"the courts for the place of performance of the obligation in question"*, and for the purpose of that provision, the Regulation goes on to state that *"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 ..."*.

7. Article 5 (3) provides that a person domiciled in a Member State may be sued in relation to a claim in, inter alia, tort *"in the courts for the place where the harmful event occurred or may occur"*.

8. However, the defendant relies upon Article 23 (1) of the Regulation in order to deprive this Court of jurisdiction to determine the issues raised in these proceedings by the plaintiff. This provides:

*"23. 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 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."*

9. The defendant's motion is grounded upon the affidavit of its National Sales Manager, Richard Burden. He sets out the business relationship that developed between the defendant and an Irish company, Art of Fitness Limited (AoF) in 2001. As stated at the outset, the defendant manufactures gymnasium equipment, and by written agreement dated 6th April 2001 (*"the 2001 Agreement"*), it appointed AoF as the exclusive distributor of its product in the territory therein referred to as *Eire* for a period of 5 years.

10. He makes the point that neither this agreement nor any subsequent agreement was ever entered into with the named plaintiff in these proceedings, namely "Muireann Gaffney trading as Art of Fitness", and that the defendant was always dealing with her company, AoF. However, while that may well appear as an issue in the proceedings at some later stage, it is of secondary importance for the purpose of this present motion which addresses only the jurisdiction issue. The appearance by the defendant has been entered solely for the purpose of challenging the jurisdiction of the Irish Courts to determine the plaintiff's claim. Mr Burden states that Muireann Gaffney executed the 2001 Agreement in her stated capacity as "*duly authorised representative for and on behalf of Art of Fitness Limited*" as appears on the execution page of that agreement. I should refer to the fact that in her replying affidavit at paragraph 4, Ms. Gaffney states that on a without prejudice basis she is prepared to meet the present motion on the basis that the defendant contracted only with AoF, since that is the sole basis on which the defendant can succeed on the motion, as there is no evidence whatsoever that there was any consensus reached between the plaintiff in her personal capacity and the defendant company as to jurisdiction.

11. The 2001 Agreement contained the following jurisdiction clause at paragraph 14.2:

*"This Agreement shall be construed in accordance with and governed in all respects by English law and the parties submit to the exclusive jurisdiction of the English courts".*

12. The 2001 Agreement came to an end on the 5th April 2006, and between that date and the date on which any new agreement was concluded the parties continued to do business together on the same basis as before. It appears that the terms of a new agreement were committed to writing in May 2007, and the parties to it are the same as those in the 2001 Agreement. It was not executed by either party until it appears that AoF executed it on the 1st December 2007 ("the 2007 Agreement"). As with the 2001 Agreement Muireann Gaffney executed this agreement on behalf of AoF as the person duly authorised to sign it for and on behalf of the company. The defendant has never executed that Agreement, but it was operated by the parties, and clearly formed the basis of their ongoing contractual relationship. In paragraph 11 of his first affidavit Mr Burden seeks to illustrate the fact that this Agreement was operated by the parties, even though it was never executed by the defendant company, by referring to the fact that the agreement contained a new provision in paragraph 5 thereof whereby the defendant company was required to apply 3% of the amount invoiced to the distributor towards a fund to be available to the distributor to cover its marketing expenses. He goes on to state that such a fund was established, the first payment into it being made in June 2007, and also that between that date and September 2009 AoF in fact withdrew a sum of €12,339.76 from the fund.

13. The 2007 Agreement contained a jurisdiction clause at paragraph 15.2 thereof which is in precisely the same terms as that in the 2001 Agreement set forth above.

14. The fact that the defendant company has never executed the 2007 Agreement assumes some significance in the light of the legal submissions made on this application on behalf of the plaintiff, and certain case-law relied upon, and I will come to that.

15. The 2007 Agreement was due to come to an end on the 30th November 2012. However, in 2009 discussions took place with a view to substituting the 2007 Agreement with a replacement Agreement. A copy or draft of that proposed 2009 Agreement ("the 2009 Agreement") is headed "*This Agreement is made on the 1st January 2009 and supercedes the Distributor Agreement of similar form dated May 2007*". That reference to "May 2007" must be read as being December 2007 being the date on which the 2007 Agreement was actually executed by AoF. The proposed 2009 Agreement states its 'Commencement Date' as 1st December 2007 reflecting the date of execution of the 2007 Agreement by AoF. It was not proposed that the 2009 Agreement would commence a new 5 year term, but would simply replace the 2007 Agreement and would come to an end on the same date as the 2007 Agreement would have terminated.

16. The proposed 2009 Agreement contained a jurisdiction clause in precisely the same terms as the 2001 Agreement and the 2007 Agreement, but was never executed by either party. Nevertheless, Mr Burden says in his first affidavit that both parties operated the 2009 Agreement as they had the 2007 Agreement, and again, as he stated in relation to the latter, the defendant company was required to pay a reduced 1% of the amount invoiced to the distributor into the same marketing fund, instead of the previous 3% under the 2007 Agreement. He states further that AoF continued to draw down sums from that fund following that amendment, and refers to particular sums withdrawn by AoF in both 2009 and 2010.

17. The defendant submits that this course of dealing between the parties from 2001 establishes that there was a consensus between it and AoF that any disputes which might arise in relation to their contractual relations would be determined by the courts of England, and that in those circumstances the question of jurisdiction is determined not on the basis of Article 5 of the Regulation, but of Article 23.

18. Ms. Gaffney in her replying affidavit denies that the 2001 Agreement, the 2007 Agreement (executed only by AoF) and the 2009 Agreement (never executed by either party) either individually or taken together constitute a consensus as to jurisdiction at the date of termination of contractual relations communicated to AoF by email dated 12th February 2012 from the defendant which, I note was issued "*in accordance with clause 9.3 (a) with 3 month notice commencing with today's date*". Clause 9.3 is a reference to the termination clause in the 2001 Agreement, being the only Agreement actually executed by the defendant company. She relies on the expiry of the 2001 Agreement in 2006, and the fact that while she executed the 2007 Agreement, the defendant company did not. She submits that the jurisdiction clause in the 2001 Agreement expired when that agreement came to an end, and that there cannot be deemed to have been some sort of continuing consensus as to the jurisdiction clause simply because the parties continued to do business on a less formal basis, and that the 2009 replacement of the 2007 Agreement advances that matter no further since it was never in fact executed by either party.

19. There is no doubt, given the content of emails that have been exhibited by the parties on this application, that each party considered that they were contractually bound, even after the expiration of the 2001 Agreement. They continued to trade together as they had before, even though the 2007 Agreement was never executed by the defendant company, and the 2009 Agreement was executed by neither. However, the fact that the defendant never signed the 2007 Agreement, and that neither party signed the 2009 Agreement is relied upon by the plaintiff for her submission that while the parties continued to do business together, they must be considered to have done so on the basis of an oral agreement after the expiration of the 2001 Agreement, and that thereafter the relationship was governed by what is stated in her written legal submissions to have been "*an opaque 'similar' framework wherein no explicit clear or precise references to jurisdiction clauses were made*".

20. Much is made by the plaintiff of her unsuccessful efforts in 2008 to get the defendant to furnish her with the 2007 Agreement duly executed by the defendant company. Had her efforts been successful, there is no doubt that the jurisdiction clause would have operated without any ambiguity, since the plaintiff company had already executed this Agreement. The defendant company had retained the very same clause when drafting both the 2007 and 2009 Agreements. There is no conceivable reason to suppose that

the defendant company was unhappy that the clause specified English jurisdiction for the settlement of contractual disputes.

21. Ms. Gaffney in her replying affidavit at paragraph 7 states:

*"... It is clear from the 2001 contract that Art of Fitness Ltd agreed to be bound by an exclusive jurisdiction clause for a period of five years from April 2001. There is no evidence whatsoever that Art of Fitness Limited intended that a clause in relation to exclusive jurisdiction was to survive the term of the contract. I say that the written consent to exclusive jurisdiction as given by Art of Fitness Limited for a period of five years in 2001 can not be extended to apply in late 2011 early 2012 when the same was given for a defined and limited five-year period from April 2001."*

22. I cannot accept that there is "there is no evidence whatsoever that Art of Fitness Limited intended that a clause in relation to exclusive jurisdiction was to survive the term of the contract" as stated by her therein". After all she signed up to an identical clause when she executed the 2007 Agreement on behalf of AoF, and indeed operated and benefited from the revised terms of that Agreement in relation to the marketing fund from June 2007 to September 2009, and did so again on the basis of the unexecuted 2009 revision of the 2007 Agreement (which also contained an identical clause) by drawing down monies from the fund in 2009 and 2010. That all amounts to objective evidence that AoF for its part was content that, and intended that, the clause in relation to exclusive English jurisdiction should survive the expiration of the 2001 Agreement, and endure into the future for the term of the 2007 Agreement which would have been to 30th November 2012 had notice of termination not been served or the agreement otherwise come to an earlier end. She certainly never made any contrary intention apparent after she executed the 2007 Agreement.

23. Ultimately the issue for decision is whether the provisions of Article 23 of the Regulation are satisfied as to the existence of an agreement or consensus between the parties that it is the English courts which have jurisdiction to settle the dispute which has arisen in relation to the parties' legal relationship. Only if such an agreement is properly established on the basis of European Community law, is the special rule of jurisdiction in Article 5 of the Regulation, and the more general rule of domicile contained in Article 2 of the Regulation, overridden.

24. A number of legal principles can be seen as firmly established by a number of cases decided here on the basis of judgments from the ECJ, and to which this Court has been referred by the parties. Firstly, the question of whether there is or is not a consensus between the parties as to jurisdiction is not determined by reference to national law, but rather according to European law in the interests of ensuring consistency of interpretation throughout the European community. Secondly, the provisions of Article 23 must be strictly construed in view of the consequences for the parties of such a choice of jurisdiction. Thirdly, whether or not such a consensus exists must be assessed objectively, and in the context of the commercial environment in which the parties were conducting their business; fourthly, the purpose of the formal requirements in Article 23 is to ensure that a consensus between the parties is clearly and precisely demonstrated; fifthly, Article 23 can be satisfied where the jurisdiction clause is either in writing or evidenced in writing, but that the signature of a party on any such writing is not required in order that the party be bound by same; sixthly, the fact that a party may have paid little attention to the jurisdiction clause, or perhaps did not even read a document containing same and therefore was not actually aware of its existence, does not prevent that party being deemed to be aware of it and therefore bound by it; seventhly, the question whether the requirements of Article 23 are met for the purpose of deciding the preliminary issue of jurisdiction is a wholly separate question from the validity or enforceability of the contract in which the clause exists, the latter question being determined at a later stage in the proceedings under national law; eighthly, it is the moving party seeking to rely upon Article 23 who has the onus of proving any relevant facts on the balance of probability, and who, so far as legal issues are concerned, must satisfy the Court as to the correctness of any legal submissions made by them.

25. I have already concluded that the execution by AoF of the 2007 Agreement is sufficient evidence that it was satisfied that the English jurisdiction clause that bound the parties under the 2001 Agreement should continue to bind them. The fact that the defendant company drafted and proffered the 2007 draft Agreement to AoF for execution containing the jurisdiction clause is sufficient evidence that it also was content that English jurisdiction should apply. The fact that the latter never returned the Agreement duly executed does not alter the fact that at that point both parties were in agreement that jurisdiction should rest with the English courts. Execution of the Agreement by both parties is not a requirement under Article 23. This is suggested by an obiter comment by Fennelly J. at paragraph 17 of his judgment in *O'Connor v. Masterwood (UK) Limited* [2009] IESC] 49.

26. Looking at Article 23 objectively, and construing same strictly and in accordance with EU law, I am satisfied that the jurisdiction clause which was set forth in the 2001 Agreement, and again in the 2007 Agreement (albeit the latter was not actually executed by the defendant company), continued to operate by a clear consensus between these parties. The fact that the 2009 Agreement was never executed by either party does not alter the fact that AoF signed up to the clause when the plaintiff executed the 2007 Agreement on its behalf. While the plaintiff now says that there can have been no consensus since the defendant never signed that agreement, it is clear that the defendant's signature is not a strict requirement for such a consensus to exist. Article 23 speaks of a jurisdiction clause "in writing or evidenced in writing". The circumstances of this case satisfy that requirement. A clear written jurisdiction clause existed in the 2001 Agreement. AoF signed up to the same clause in the 2007 Agreement. The parties continued to operate on the basis of that 2007 Agreement without any demurral in relation to the jurisdiction clause, or at all in fact. The 2009 Agreement not having been executed at all does not alter the situation regarding the continued existence of the consensus regarding, inter alia, the jurisdiction clause. Any objective assessment of the facts of this case must conclude both as a matter of fact and a matter of law, both EU law and national law, that there was a clear consensus between the parties in this regard.

27. For these reasons, I will accede to the defendant's application, and make an order pursuant to the provisions of Order 12, rule (26) RSC striking out these proceedings on the ground that by virtue of the Regulation this Court has no jurisdiction to hear and determine the plaintiff's claim against the defendant.