Neutral Citation Number [2012] IEHC 119

THE HIGH COURT

[2011 No. 4351P]

BETWEEN

LARTIGUE ENTERPRISES LIMITED

AND

PLAINTIFF

THREE LIONS UNDERWRITING LIMITED, GRAVITY UNDERWRITING LIMITED AND GREAT LAKES REINSURANCE (U.K.) PLC

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 23rd day of February, 2012.

1. The applications in the context of the procedural background

1.1 These proceedings were initiated by a plenary summons which issued on 16th May, 2011. In it the plaintiff claimed various reliefs, declaratory and injunctive, designed to secure payment on foot of a policy of insurance in relation to a hotel known as The Golf Hotel, Ballybunion, County Kerry (the Hotel) on the basis that it was a valid policy on a "full perils basis". The defendants are companies registered and domiciled in the United Kingdom. In the plenary summons, the plaintiff invoked the Court's jurisdiction under Council Regulation (EC) No. 44/2001 of 22nd December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Regulation), in particular the provisions of Article 5(1) and 9(1)(b) thereof.

1.2 On 2nd June, 2011 a limited appearance was entered on behalf of the defendants "for the purposes of disputing the jurisdiction of the Proceedings only".

1.3 Of the two applications to which this judgment relates, the first in time was the plaintiffs application for interlocutory injunctions and declaratory relief. It was acknowledged by counsel for the plaintiff that so much of the application as related to declaratory relief could not be pursued on an interlocutory basis. The only relief pursued by the plaintiff was for an order directing the defendants to furnish the plaintiff with all of the documentation relevant to the policy of insurance in respect of the Hotel, including, but not limited to, the policy itself. While the proceedings, as initiated, were drafted on the assumption that, in addition to entering into a contract for a policy of building insurance in relation to the Hotel, the plaintiff had also contracted for public liability insurance cover from the defendants, it became clear that that was not the case. Therefore, the plaintiffs proceedings relate only to the building insurance.

1.4 The second application is the defendants' application for an order that the Court should decline jurisdiction to hear and determine the proceedings, in circumstances where the agreement between the plaintiff and the defendants made provision for the mandatory jurisdiction of the English courts, and for an order staying the proceedings pending the determination of the issues by the English courts in accordance with that mandatory jurisdiction provision.

2. The relevant facts

2.1 In setting out the relevant facts, the primary focus will be on the facts relevant to the second application, which logically must be addressed first.

2.2 In broad terms, the plaintiff's case is that from late September 2010 for a period of one year the Hotel building was insured with the defendants and that the insurance cover was on a "full perils basis". On 26th December, 2010 the Hotel was damaged by water from a burst pipe, which the plaintiff contends was caused by the extremely cold spell of lengthy duration throughout the country at that time. When the plaintiff made a claim to the defendants on foot of the policy, the position of the defendants was that the cover was only on a limited or FLEA (that is to say, fire, lightening, explosion and aircraft) cover basis. While the extent of the cover provided by the policy was the core issue between the parties from the outset, as the matter has evolved, the defendants have advanced a range of answers or defences to the plaintiffs claim.

2.3 The facts are complicated by reason of the number of parties involved in the procuring, and the creation of, the insurance cover. The plaintift which is an Irish registered company, carrying on the hotel business in the Hotel in Ballybunion retained a local insurance broker, Insight Insurance Brokers Limited (Insight), which carries on business in Cork, to obtain the necessary insurance cover on its behalf. Insight, in turn, engaged with CityNet Insurance Brokers Limited (CityNet), a placing broker carrying on business in London, to obtain the appropriate cover. CityNet, in turn, dealt with the second defendant (Gravity), which was the underwriter of the policy and which dealt with CityNet for and on behalf of the insurer, the third defendant (Great Lakes).

2.4 It is not disputed by the defendants that a policy of insurance came into being. In his first affidavit, which was sworn by him on 10th June, 2011, Alan Thorne, the managing director of Gravity, averred that the policy at issue was effected from 28th September, 2010, but he also averred that the cover which the defendants agreed to implement was limited to FLEA cover. From the averments contained in that affidavit and in subsequent affidavits sworn by Mr. Thorne and the documents exhibited by him, and from the averments contained and the documents exhibited in the affidavit sworn on behalf of the plaintiff by Michael Carr, a director of the plaintiff, the sequence of events in chronological order and each side's position as to what was agreed is as follows:

> (a) In early September 2010, Insight furnished a Submission/Application for cover to CityNet, which submitted it to Gravity. Gravity furnished a quotation to CityNet, apparently, on 17th September, 2010. Subsequently, in the light of additional requirements, Gravity submitted a revised quotation, which was e-mailed by CityNet to Insight on 22nd September, 2010. The e-mail discloses that the quotation for the cover for "Property/All Risks" was €6,742.50 "plus levy".
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> (b) Mr. Thorne's position is that the quotation provided on 22d September, 2010 was overtaken by subsequent events and that is common case. By e-mail dated 24th September, 2010, Insight informed CityNet that the Hotel would close for a few months and, queried whether Gravity would consider cover on the buildings and contents while unoccupied and then extend the policy to cover the full trading risk when the business commenced again. Mr. Thorne has averred that the person with whom he was dealing in CityNet, Andy Reason, contacted him on 27th September, 2010 in relation to Insight's

queries. Mr. Thorne advised Mr. Reason that, as the Hotel was not operating and was unoccupied, cover could be incepted subject to limited FLEA perils and unoccupied conditions. Mr. Thorne has exhibited a file note created by Mr. Reason which corroborates that averment. Mr. Thorne has averred that the file of the placing brokers, that is to say, CityNet, was furnished to Gravity after the loss had occurred.

(c) Early on 28th September, 2010, before 9am, Insight e-mailed CityNet setting out the basis on which the plaintiff agreed to go on cover at a premium of €6,742.50 plus levy and stated that, if agreement could be reached on that basis, cover was required with immediate effect. Three hours later, Mr. Reason of CityNet e-mailed Mr. Thorne of Gravity setting out the basis on which CityNet had instructions to proceed at the quoted premium. Mr. Thorne has pointed out that there are "material discrepancies" between the queries raised by Insight and the queries raised by CityNet with Gravity. In any event, whether that is so or not is for another day. For present purposes it is sufficient to state that the response of Mr. Thorne, on behalf of Gravity, to CityNet was that the proposal was acceptable and he looked forward "to signing the slip within the next seven days". Mr. Thorne has averred that he spoke to Mr. Reason of CityNet by telephone on 28th September, 2010 and that he confirmed to him that FLEA only cover would be applicable (without business interruption insurance) for the period when the Hotel was not fully operational. Mr. Thorne has exhibited Mr. Reason's file note, which recorded that he had advised Insight that the underwriters were happy to proceed whilst the Hotel was unoccupied at limited FLEA perils and that they would reinstate full perils and collect the remaining premium when the Hotel re opened. By e-mail sent by Mr. Reason to Insight at 16.22 on 28th September, 2010, Mr. Reason confirmed that the plaintiff was on cover with effect from that day.

(d) There was a change of approach on the part of the plaintiff on 1st October, 2010. On that day, Insight e-mailed CityNet asking CityNet to arrange to put the risk "on full cover", as the plaintiff had secured a number of functions and the Hotel would be trading earlier than expected. Mr. Thorne has averred that none of the defendants were advised of that communication, or that the request had been made that the risk be placed on full cover, or that the premises would be trading earlier than expected. Therefore the position of the defendants is that the situation remained as agreed by the communications up to 28th September, 2010, that is to say, that FLEA cover would apply until the Hotel became fully operational. On that basis it is the defendants' case that the alleged losses sustained by the plaintiff on 26th December, 2010 are not covered by the policy. Whether the defendants are correct in those assertions or not is for another day.

(e) The defendants' contention that the change in relation to the plaintiffs requirements was not brought to the attention of the defendants is disputed by the plaintiff and it is also disputed by CityNet, as agent of the plaintiff. The position of CityNet is that the fact that the Hotel would not be closing was advised by CityNet to Gravity, the matter was discussed with Mr. Thorne and the "slip" document was prepared and initialled based on full peril. This is denied by Mr. Thorne. That factual controversy cannot be, and does not have to be, resolved on these applications. However, the so-called "slip" document is of particular relevance to the defendants' application.

(f) The "slip" document (the "Slip" document) was exhibited in Mr. Carr's first affidavit sworn on 2nd June, 2011 for the purpose of demonstrating that Mr. Thorne of Gravity knew that "full perils" insurance was in place. The "Slip" document, which was prepared by CityNet, described the policy as "Commercial Combined Insurance" on the front or cover page and was stated to be dated 29th September, 2010. The document exhibited by Mr. Carr, excluding the cover page, was an eight page document. Under the heading "Risk Details" (on page 1) it disclosed that the risks covered certainly went beyond FLEA. On page 3 it was stated that the policy form would be "Gravity Combined Wording, but including" certain specified conditions. As regards choice of law and jurisdiction it was stated on page 3:

> "Disputes over the coverage of this policy shall be governed and construed in accordance with the laws of England and Wales by a competent court in England".

It was stated on page 4 that the policy documentation would be produced by Gravity. Page 8, as exhibited by Mr. Carr, contained CityNet's reference number. It also contained what appears to be a stamped notation which stated the name of Gravity, for and on behalf of Great Lakes, and gave what was obviously Gravity's reference number. There was then a notation in manuscript, which I understand indicated that Gravity, on behalf of Great Lakes, was solely liable, the manuscript notation being "100% of whole". There followed Mr. Thorne's signature and the date in manuscript, 18th November, 2011. Mr. Thorne's only comment on the "Slip" document in his first affidavit was to point to the provision therein in relation to choice of law and jurisdiction quoted above.

(g) However, Mr. Thorne did exhibit in his first affidavit a document entitled "Evidence of Cover" in relation to the contract of insurance, which was issued by CityNet to Insight on 23rd November, 2010 (the "Evidence of Cover" document). This document, which was an eight page document without a cover page, largely replicated the "Slip" document. At page 3 there was a provision as to the policy form in the same terms as the provision in the "Slip" document. As Mr. Thorne pointed out, it contained (at page 4) a similar provision in relation to choice of law and jurisdiction as had been included in the "Slip" document, which is quoted at (f) above. There were additional terms at the bottom of page 7 and on page 8 of this document, which do not appear in the copy of the "Slip" document exhibited by Mr. Carr. The last provision on page 8 provided that the evidence of cover had been prepared by CityNet and that it was not represented as insurer authorised. It was further stated that Gravity would issue the policy documentation. That provision was immediately preceded by a provision in the following terms:

> "In the event of any inconsistency between the policy or policies and this evidence of cover, the terms and provisions of the policy or policies shall prevail."

(h) There was attached to the copy of the "Evidence of Cover" document as exhibited by Mr. Thorne (exhibit AT11) a copy of Gravity's standard wording for "Commercial Combined" contract, entitled "Commercial Combined Wording" (ref. TLU/94/003/PW). This contained a provision in relation to applicable law on page 2 in the following terms:

> "U.K. law allows both the Insured and the Insurer(s) to choose the law applicable to the contract. The contract will be subject to the relevant law of the United Kingdom, the Channel Islands or the Isle of Man relating to the address of the Insured as shown in the Schedule. If there is any dispute as to which law applies it shall be English Law".

In all of the relevant documentation exhibited in relation to the plaintiff, the address of the plaintiff is given as "Main Street, Ballybunion, Co. Kerry, Republic of Ireland".

(i) On 24th November, 2010, CityNet e-mailed the "Evidence of Cover" document to Insight, although, as I understand the position, the exhibit AT11 attachment was not part of it, which means that it is the only document referred to in this chronology which was

not communicated contemporaneously with the events.

(j) On 9th December, 2010 Gravity issued a debit note to CityNet claiming the premium of €6,742.50 plus the levy. The debit note stated that the terms, conditions and exclusions were "as per Gravity ... Commercial Wording". The debit note has given rise to a further dispute which has emerged between the parties, in that it stated:

> "Please note that cover at the stated premium is subject to receipt of a satisfactory completed Proposal Form or a signed Statement of Fact within 21 days of policy inception".

An issue has been raised as to the liability of the defendants based on the defendants' contention that that requirement was not complied with. Although there was a misunderstanding on the part of the defendants' solicitors initially in this regard, it is common case that the premium was, in fact, paid by the plaintiff.

2.5 Mr. Thorne's reliance on the jurisdiction clauses in the "Slip" document, in the "Evidence of Cover" document and in the standard "Commercial Combined Wording" document as the basis for the defendants' contention that this Court does not have jurisdiction has given rise to a plethora of averments, which in some cases are more a form of advocacy than an exposition of the facts, and exhibited documentation, which I believe is accurately characterised as not being contemporaneous with the negotiations and the dealings between the parties prior to the event which gave rise to the plaintiff's claim. In outline, what emerges from this material, which is set out in the sequence in which it emerged, is as follows:

(a) Mr. Carr in his second affidavit sworn on 15th June, 2011 has exhibited a letter from CityNet's English solicitors, Beachcroft LLP (Beachcroft). In that letter it is stated:

> "As to the policy wording which should have been issued by Gravity, our client informs us that, as this was Irish business, the policy wording would (as you would expect) have specified Irish law and jurisdiction as the governing insurance. Accordingly the reference in the Slip to English law and jurisdiction was a mistake (which would have been corrected by the policy wording which would have evidenced the parties' intention that Irish law and jurisdiction apply). We attach a specimen Gravity policy wording of the type we understand would and should have been issued by Gravity to your client."

The attached document (the Beachcroft attachment), which was obviously intended to be the Irish version of the Commercial Combined Wording document (ref. TLU/94/001/PW Irish Final VI 29.09.2009), sets out the law applicable to the contract (on page 2) as follows:

> "Both you and The Insurer with which your contract will be concluded can choose the law within the European Union which will apply to the contract. We propose that the law of the Republic of Ireland apply."

There is an endorsement included in that document (page 62) in the section of the document headed "Liability Endorsements". The particular endorsement is headed "Disputes Clause (the Republic of Ireland law)" and provides:

> "All disputes concerning the interpretation of the terms, conditions, limitations and or exclusions contained herein is understood and agreed by both the Insured and the Insurers to be subject to the Laws of the Republic of Ireland. Each party agrees to submit to the jurisdiction of any Court of competent jurisdiction within the Republic of Ireland and to comply with all requirements necessary to give such Court jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such Court".

I would observe that the Beachcroft attachment is a much more extensive document, running as it does to sixty three pages, than the Commercial Combined Wording document exhibited by Mr. Thorne (exhibit AT11), which, as exhibited, only extends to thirty nine pages. I would also observe that certain specific conditions in relation to cover, which were expressed to be included both in the "Slip" document and the "Evidence of Cover" document, are contained in Beachcroft's attachment but not in Mr. Thorne's exhibit AT11.

(b) In a later letter exhibited by Mr. Carr, Beachcroft stated that the "Evidence of Cover" document, which effectively mirrored the terms of the "Slip" document, mistakenly provided for English law and jurisdiction to apply. It was stated that no policy documentation was produced by Gravity, but, if it had been, it would have used "Insurers' Irish wording". It was stated that the Commercial Combined Wording exhibited by Mr. Thorne was, in fact, Insurers' U.K. policy wording.

(c) To complicate matters even further, in his affidavit grounding the defendants' motion, which was sworn on 16th June, 2011, Mr. Thorne exhibited (as exhibit ATJ3) what he referred to as being a "true copy of the said Gravity Combined Wording" (ref. TLU/94/003/PW) which was applicable in respect of the policy referred to in the "Evidence of Cover" document. This is a long document, similar to the Beachcroft attachment referred to at para. 2.5(a) above, and it does include the specific conditions in relation to cover included in the "Evidence of Cover" document. However, as regards the law applicable to the contract, it contains at (page 2) a term in identical terms to the standard Commercial Combined Wording document attached to the "Evidence of Cover" document exhibited by Mr. Thorne (exhibit AT11) in his first affidavit and quoted at para. 2.4(h) above. It also contains an endorsement (at page 74) which is in similar terms to the endorsement in the Beachcroft attachment referred to at para. 2.5(a) above, subject to two variations: the substitution of "English law" for "the laws of the Republic of Ireland"; and the substitution of "within England" for "within the Republic of Ireland".

(d) Mr. Thorne swore a third affidavit on 21st June, 2011. In this affidavit Mr. Thorne took issue with the contention of Beachcroft that the reference to English law in the "Slip" document and in the "Evidence of Cover" document was in error. He averred that the specimen policy exhibited by Mr. Carr was not the correct specimen wording and he reiterated that it was a term of the agreement between the parties that any dispute was to be litigated in the English courts and subject to English law. It was contended that CityNet had brokered the business with Gravity on the basis that English law would apply and it was accepted on that basis. Mr. Thorne concluded that affidavit by averring that the position adopted by Gravity was entirely consistent with the course of dealing between Gravity and CityNet and that he had commenced a review of other business placed by CityNet with Gravity and he noted that "the first four files" he had reviewed had been on the basis of English jurisdiction only and he believed that so too was all the business placed from the source in question, i.e. CityNet.

(e) By a further affidavit sworn on 22nd June, 2011, Mr. Carr exhibited a further letter from Beachcroft dated 21st June, 2011 in which it was stated that it was CityNet's understanding that "Gravity's Irish wording" would be produced in cases where risks were placed with Gravity on a hundred per cent basis, although in cases where there was co-insurance (i.e. the risks were not written on a hundred per cent basis by Gravity) the intention was that the policy wording which provided for English law and jurisdiction would apply. In the case of the plaintiff, it was stated, the business had been placed with Gravity on a hundred per cent basis. Beachcroft queried whether the "first four files" reviewed by Mr. Thorne

had been written on a hundred per cent basis by Gravity and continued:

> "In any event, we attach a redacted copy of the Evidence of Cover issued by our client in respect of another Irish hotel and in respect of which Gravity issued its Irish policy wording, specifying Irish law and jurisdiction. As will be noted, the "Evidence of Cover" had, again, mistakenly referred to English law and jurisdiction as being applicable, but this was corrected, as expected, by Gravity's own policy wording issued in this matter (copy attached)."

(f) The redacted "Evidence of Cover" document attached by Beachcroft was dated 22nd October, 2010. As counsel for the defendants pointed out, it differed from the "Slip" document which bears the date 29th September, 2010 and, indeed, from the "Evidence of Cover" document dated 23rd November, 2010, both of which related to the plaintiff, in that it envisaged (on page 7) the conditions as being as per the Gravity policy Irish version form, while the documents which related to the plaintiff referred to conditions as per "policy form Gravity Combined Wording". While that difference is there, the choice of law and jurisdiction provision on the same page (page 7) in the redacted "Evidence of Cover" document dated 22nd October, 2010 furnished by Beachcroft was in precisely the same terms as the corresponding provision in the "Slip" document dated 29th September, 2010, in referring to English law and jurisdiction as being applicable, thus disclosing a glaring inconsistency internally within the redacted document.

(g) The foregoing led to Mr. Thorne's fourth affidavit, which was sworn on 13th July, 2011. In that affidavit Mr. Thorne contradicted CityNet's assertion that policies placed by it with Gravity in relation to Irish hotel properties were governed by the jurisdiction of the Irish courts. He averred that he had carried out a review of all policies placed with Gravity by CityNet which related to hotels or similar properties in Ireland and all of the "Slips" provided for the exclusive jurisdiction of the English courts in respect of any dispute over the coverage of the policy. He averred that the various "Slips" made reference to a number of different policy wordings but none, save the example given in Mr. Carr's affidavit referred to at (e) and (f) above, referred to the "Irish policy wording", which "was historical and rarely used". Mr. Thorne averred that that wording did not apply in respect of the plaintiffs policy. Mr. Thorne exhibited redacted versions of fourteen insurance "Slips", which had been prepared by CityNet and which he had reviewed.

(h) The fourteen redacted "Slip" documents exhibited by Mr. Thorne were reviewed by CityNet and the results of the review were set out in emails to the plaintiff's solicitors exhibited in Mr. Carr's final affidavit worn on 15th July, 2011. The outcome of that review was that CityNet considered that the only risks in the fourteen cases reviewed which were similar in nature to that covered by the plaintiffs contract had "the Irish Wording issued". The dissimilarity between the other "Slip" documents reviewed and the Beachcroft/CityNet example was partly attributed to the fact that in eight cases the risks were not underwritten by Gravity as lead insurer. In the cases in which the risks were underwritten solely by Gravity, CityNet was of the view that the risks did not relate to hotel risks such as were to be covered by the plaintiff's policy.

2.6 What emerges from the foregoing is that there is total disagreement between CityNet, as agent for the plaintiff, on the one hand, and Gravity, on the other hand, as to what, if anything, was agreed between them as to the jurisdiction which was to apply to the plaintiffs policy. The final position of Gravity is that CityNet, as agent of the plaintiff, brokered the business on the basis that English law would apply and the business was accepted on that basis. The position of CityNet, however, is that it was their understanding that, because the business related to a hotel in this jurisdiction, Irish law would apply and that the reference to English law in the "Slip" document and in the "Evidence of Cover" document was CityNet's mistake, which, in any event, is not material because the policy document which should have issued should have contained an Irish jurisdiction clause, which would have prevailed over the jurisdiction provision in the "Evidence of Cover" document. At the hearing, it was also suggested by counsel for the plaintiff that, ifthe plaintiff, as it contended was the case, was entitled to rely on the "Slip" document as evidence of the terms of the contract, the plaintiff could seek to have the jurisdiction provision in the "Slip" document rectified in accordance with the principles outlined in *Irish Life Assurance Co. Ltd. v. Dublin Land Securities Ltd*. [1989] I.R. 253.

2.7 Aside from the core dispute as to whether Gravity agreed with CityNet to provide "full risks" cover, as the plaintiff contends, or merely FLEA cover, as the defendants contend, another dispute evolved in the course of the exchange of affidavits. In his affidavit sworn on 21st June, 2011, Mr. Thorne stated that no policy documentation in relation to FLEA was issued due to the failure by the plaintiff to issue a completed Proposal Form or signed Statement of Fact within the time period stipulated in the debit note of 9th December, 2010 in accordance with the provision which I have quoted at para. 2.4(j) above. Mr. Carr's response to that averment in his affidavit sworn on 22nd June, 2011 was that the "purported" outstanding matter was never indicated to him, or as far as he is aware to his brokers, and he asserted that this was the first occasion the issue had been raised as the basis upon which the defendants failed to issue the requisite policy documentation. He commented that the defendants had accepted that a contract of insurance arose for which they had received the premium from the plaintiff. In his affidavit of 13th July, 2011, Mr. Thorne contended that what Mr. Carr had stated was incorrect and that the obligation on the plaintiff to provide a completed Proposal Form or a signed Statement of Fact within twenty one days of policy inception had been brought to the attention of the plaintiffs solicitors prior to the commencement of the proceedings, referring to a letter dated 22nd March, 2011. In his final affidavit, sworn on 15th July, 2011, Mr. Carr, probably correctly, interpreted the exchanges which I have just outlined as relating to the plaintiff's claim for an interlocutory injunction. Apart from that, he contended that the debit note made no mention of the issuing of the policy documentation being predicated on the defendants receiving any completed Proposal Form or signed Statement of Fact. Furthermore, he made the point that the policy of insurance was incepted on 28th September, 2010. I mention those matters in the context of the defendants' application with a view to recording my understanding that, notwithstanding the argument which has developed out of those exchanges, the defendants accept that there was a policy in existence from 28th September, 2010, albeit, that, on the defendants' case, it was a policy which was limited to FLEA cover.

3. The law on the jurisdiction issue

3.1 As I have recorded at the outset, as regards jurisdiction, the plaintiff has invoked Article 5.1 and Article 9.1(b) of the Brussels Regulation in the plenary summons. Article 9.1, insofar as it is relevant to these proceedings, provides as follows:

> "1. An insurer domiciled in a Member State may be sued:
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> (a) in the courts of the Member State where he is domiciled, or
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> (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,
>
> (c) …"

Absent any other relevant provision in the Brussels Regulation, the plaintiff, which is domiciled in this jurisdiction, is entitled to sue the

defendants in this jurisdiction.

3.2 However, prorogation of jurisdiction is dealt with in Article 23, which, in point I provides:

> "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:
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> (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."

3.3 The most recent decision of the Supreme Court to which this Court was referred by counsel was the decision in *Dan 0'Connor v. Masterwood (UK.) Ltd.* [2009] IESC 49, in which judgment was delivered by Fennelly J. (*nem. diss*.). Having quoted Article 23, Fennelly J. stated (at paras. 13 and 14 of the judgment):

> "It is well-established that it is for the courts of the Member States to determine the facts. That includes deciding the terms of the contract. (See *Leo Laboratories Ltd v Crompton BV* [2005] 2 I.R. 225 at 235*; Bio-Medical Research Ltd v Delatex SA* [2000] 4 I.R. 307; ...).
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> According to the case law of the Court of Justice, 'the requirements laid down by article 17 of the Convention must be strictly interpreted in so far as that article excludes both jurisdiction as determined by the general principle of the defendant's courts laid down in article 2 and the special jurisdictions provided for in articles 5 and six ... ' (Case C-106195 *MSG v Gravieres Rhenanes* [1997] ECR I-911, paragraph 14). The Court was there referring to article 17 of the Brussels Convention, which has been replaced by Brussels I. Article 23 is in the same terms as the former Article 17. The Court explained that, *'by making the validity of any jurisdiction clause 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 that clause conferring jurisdiction upon it was in fact the subject of consensus between the parties which must be clearly and precisely demonstrated .* .. '(ibid. paragraph 15)."

3.4 Counsel for the plaintiff referred the Court to a passage from the judgment of Fennelly J. in *Leo Laboratories Ltd. v. Crompton BV* [2005] 2 I.R. 225, which commences at page 236, in which, as a preliminary to considering the terms and scope of application of a jurisdiction clause in a contract, he stated:

> "I dealt with a not dissimilar problem in my judgment in *Bio-Medical Research Ltd. v. Delatex SA*. ... I pointed out there that the European Court of Justice requires national courts to scrutinize the effects of exclusive jurisdiction clauses. At p. 319 of the report, I cited a passage from *Estasis Salotti v. R.Ü.W.A.* (Case C-24176) [1976] E.C.R. 1831, dealing with article 17 of the Brussels Convention at para. 7:-
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> > '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.
> >
> > 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.
> >
> > 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.'"

That passage from the *Estasis Salotti* case quoted there is of prime importance in relation to the course to be adopted in determining the issue which the Court has to determine on the defendants' application. It not only gives general guidance as to the proper application of what is now Article 23 of the Brussels Regulation, but it lays down the manner in which the Court must approach the application of Article 23. However, the relevance of another passage from the judgment of Fennelly I. relied on by counsel for the plaintiff, in which he followed the decision of Steyn LJ. in *Continental Bank v. Aeokos S.A.* [1994]1 WLR 588, which had been previously followed by the Supreme Court in *Clare Taverns v. Gill* [2000]1 I.R. 286, is not obvious to me. That is because, essentially, the plaintiff's case is that there was no consensus between tbe plaintiff and the defendants that English law would apply to the contract, not as to the proper construction of a clause which it is contended confers exclusive jurisdiction. In the passage in question, as Fennelly J. pointed out (at p. 238), Steyn L.J., having held that the clause in issue before the Court of Appeal contemplated the submission of disputes to English courts, went on to say (at pp. 592 and 593):

> "But what disputes does it cover? The answer is not to be found in the niceties of the language of clause 21.02. It is to be found in a common sense view of the purpose of the clause. We are emboldened to adopt this approach by the observation of Lord Diplock in *Antaios Campania S.A. v. Salen A.B.* [1985] A.C. 191, at p. 201:-
>
> > 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

3.5 To elaborate on the reason why I have stated that the relevance of that provision is not obvious, it is that if, for instance, it were to be established as a fact that the plaintiff agreed with the defendants that disputes between the parties would be governed by reference solely to the clause in the Commercial Combined Wording (exhibit ATJ3 referred to at para. 2.5(e) above) at page 74, which is in form analogous to the clause in the Beachcroft attachment (at page 62) and which is quoted at para. 2.5(a) above, but

subject to the variations outlined at para. 2.5(e), there could be no issue as to whether the plaintiff's claim came within that provision and was subject to English law and, by agreement, was to be submitted to the jurisdiction of a court of competent jurisdiction within England. However, before one gets to that point, it is clear on the authorities that it is necessary to consider what, if any, consensus there was on the application of the exclusive jurisdiction as provided for in that provision.

In assessing the evidence to determine whether such consensus existed, it seems to me that it is necessary to consider how that dispute clause, which is in an exhibit which was first relied on by the defendants in Mr. Thorne's second affidavit, is to be interpreted in the context of the totality of the policy wording document of which it forms part. In particular, in my view, it is necessary to consider it in conjunction with the clause setting out the law applicable to the contract in the Commercial Combined Wording attached to the "Evidence of Cover" document exhibited in Mr. Thorne's first affidavit as AT11, which clause is quoted at para. 2.4(g) above and was replicated in exhibit ATJ3.

3.6 Counsel for the plaintiff also referred the Court to a recent decision of this Court (Clarke J.) in *Ryanair Ltd. v. Bravofly and Travelfusion Ltd*. [2009] IEHC 41. One of the issues in that case was whether Travelfusion Ltd., a company incorporated under the laws of England, with its registered office in England and its principal place of operation in London, and with no place of business in Ireland, which had been joined as a co-defendant in the proceedings, was entitled to an order dismissing the proceedings against it on the basis that the Irish courts had no jurisdiction to hear the matter. The factual foundation of the claim of Ryanair was that the defendants were involved in what was referred to as "screen scraping" from Ryanair's website and thereby breaching Ryanair's online terms and conditions and infringing its intellectual property rights. Travelfusion Ltd. relied on a clause in the terms of use of the Ryanair website, which stated that disputes arising from the use of the website and the interpretation of the Terms of Use of the Ryanair website were governed by English law and that all disputes relating to the Terms of Use and the Ryanair website were subject to the exclusive jurisdiction of the English courts, save that Ryanair might, at its sole discretion, institute proceedings in the country of domicile of the defendant. Travelfusion Ltd., of course, was domiciled in England.

3.7 The decision is of interest in the context of this case because one of the bases on which Travelfusion Ltd. sought the order to dismiss was in reliance on Article 23 of the Brussels Regulation. It was submitted on its behalf that it was clear under Ryanair's own Terms of Use that any disputes relating to the Terms of Use or the use of the Ryanair website were subject to the exclusive jurisdiction of the English courts. Ryanair, on the other hand, contended, in reliance of the decision of the ECJ in the *Estasis Soletti* case, that Travelfusion Ltd. had not established the precondition to the application of Article 23 that there was consensus between the parties in relation to the jurisdiction clause. Apropos of the imposition of the duty upon a court which is required to apply Article 23 to examine first whether the clause conferring jurisdiction was in fact the subject of a consensus between the parties which was to be clearly and precisely demonstrated, as stated in the decision in the *Estasis Soletti* case, Clarke J. stated (at para. 7.16):

> "It is important, however, to note that the court was in that case concerned with the situation where the party who might be said to have inserted the jurisdiction clause in dispute was the one that was seeking to rely on it. In this case the party who might be said to have inserted the jurisdiction clause is the one seeking to deny it. It would create no unfairness or injustice to permit a party in a position such as Travelfusion to accept, for the purposes of jurisdiction, the existence of the relevant choice of jurisdiction clause. Travelfusion is, in this case, happy to accept the jurisdiction clause. The clause itself was inserted into any contractual relations that might be said to exist by Ryanair. That, in my view, is a sufficient consensus to meet the requirements of the Regulation even though Travelfusion asserts the absence of any contractual relationship."

Clarke J. had earlier stated (at para. 7.15) that "a defendant is entitled, while denying the existence of any contract, to rely on a choice of jurisdiction clause which will necessarily be contained in any contract should same be found to exist" (Emphasis in original).

4. Conclusions on application of Article 23.

4.1 On the basis of my understanding of the respective positions of the parties as set out earlier, and, in particular, on the basis of what I have stated at para. 2.7 above, there is consensus between the parties as to the existence of a contract of insurance but there is a dispute as to the terms of the contract. While there is also a dispute as to whether the plaintiff has been in breach of certain contractual obligations, such as its obligation of disclosure, it is not necessary to address that dispute here. The dispute, which is at the heart of the defendants' application and relates to whether, as contended for by the defendants, a jurisdiction clause conferring exclusive jurisdiction on the English courts was a term of the contract, has arisen because of the conflict as to what was agreed between the parties as to jurisdiction. Having regard to the decision of the ECJ in the *Estasis Soletti* case, the first question which the Court has to determine is whether the defendants have discharged the onus of proving that a term conferring jurisdiction upon the English courts was in fact the subject of a consensus between the parties and have done so clearly and precisely.

4.2 In considering whether there was consensus in relation to the jurisdiction issue, the focus must be on the plaintiff, acting by its agent CityNet, on the one hand, and Gravity, acting on its own behalf and on behalf of Great Lakes, on the other hand. As I have already observed at para. 2.6 above, having outlined in detail what I consider to be the relevant facts, there is total disagreement between CityNet and Gravity as to what was agreed in relation to jurisdiction. The conflict of evidence on affidavit is between Mr. Thorne, on behalf of Gravity, and Mr. Carr, on behalf of the plaintiff. Mr. Carr did not deal directly with Mr. Thorne but his evidence is based on information furnished by Beachcroft, who, in turn, obtained the information from their client, CityNet. The kernel of the conflict is the disagreement between the main players, Mr. Thorne and Mr. Reason, as to what was agreed. There is no affidavit from Mr. Reason before the Court. While that is unsatisfactory, even if there was, presumably it would reflect the conflict, which could not be resolved on affidavit evidence. Neither side sought to examine the other side's deponent.

4.3 Notwithstanding that conflict, it is necessary to consider whether the formal requirements imposed by Article 23, the purpose of which was stated in *Estatis Soletti* case as being to ensure that consensus between the parties is in fact established, assists in determining whether there was sufficient consensus between the parties on the issue of jurisdiction. Of the formal requirements in Article 27, on the evidence, only those set out in paragraph (a), which requires the agreement conferring jurisdiction to be in writing or evidenced in writing, and paragraph (b), which requires the agreement to be in a form which accords with the practices which the parties have established between themselves, appear to be relevant.

4.4 As regards the requirement in paragraph (a), both the "Slip" document and the "Evidence of Cover" document, which are the only documents which purport to evidence what was agreed in relation to jurisdiction, expressly provide that disputes over the coverage of the policy, which is what is primarily at issue between the parties, were to be governed and construed in accordance with the laws of England and Wales by a competent court in England. On the information supplied by Beachcroft, acting for CityNet, the plaintiff contends that the inclusion of such provisions was a mistake. As regards the "Slip" document, the defendants attach importance to it because it is the document on which the plaintiff has relied as evidence of an agreement on the part of the defendants to provide full perils cover. The "Slip" document was produced by CityNet, it was presented to Gravity, and it was signed by Mr. Thorne on 18th November, 2010. Apart from the question whether there was a mistake on the part of CityNet in respect of which, if necessary, the

plaintiff could be entitled to an order for rectification, the choice of law and jurisdiction clause in the "Slip" document, as a standalone provision, admittedly does clearly and precisely suggest that there was agreement to confer exclusive jurisdiction on the Courts of England. However, the fact that it was expressly provided in the "Slip" document that the policy form would be as per "Gravity Combined Wording", indicates that it cannot be read on its own as governing the terms and conditions of the agreement between the plaintiff and the defendants.

4.5 As regards the "Evidence of Cover" document, it was prepared by CityNet, and it expressly stipulated that it was not represented as insurer authorised. Further, it provided that, in the event of any inconsistency between it and the provisions of the policy, the latter would prevail. It also contained a provision as to the applicable form of policy similar to that in the "Slip" document, which indicates that it cannot be taken on its own as clearly and precisely conferring exclusive jurisdiction on the English courts.

4.6 It is clear on the evidence that there were two forms of "Gravity Combined Wording" in use by the defendants at the material time, that is to say, in the autumn of 2010, one (the English version), which provided for exclusive jurisdiction by the English courts and the other (the Irish version), which provided for exclusive jurisdiction by the Irish courts. Before considering what the evidence demonstrates as to the practice which had been established between CityNet and Gravity at the material time, some observations are appropriate in relation to the forms of policy exhibited. I think it is reasonable to assume that exhibit AT11 is not a complete document and that the English version is exhibit ATJ3. As regards the content of the English version, the applicable law provision on page 2, quoted at para. 2.4(h) above seems to envisage the insured being domiciled either in the United Kingdom, the Channel Islands or the Isle of Man. The applicable law is stated to be the relevant law relating to the address of the insured as shown on the schedule to the policy, presumably, whether located in the Isle of Man, the Channel Islands or, as regards the United Kingdom, England and Wales, Scotland or Northern Ireland. The default position in which English law applies only arises in the event of a dispute. On the wording of that provision, which, as I understand it, is the provision relied on by Gravity, as distinct from the provision on page 74, there is *prima facie* a ground for argument that such wording could not be construed as binding an insured with an address in Ireland to submit to English law.

4.7 Another issue of construction is revealed in the redacted Evidence of Cover document provided by Beachcroft. Although that document is not relevant to the determination of the terms of the contract of insurance agreed between the plaintiff and the defendants, it does suggest a degree of laxity in recording the relevant jurisdiction clause applicable in documents moving from the placing broker to the underwriter.

4.8 As the outline of the evidence, such as it is, and the arguments advanced, as set out in para. 2.5 above, demonstrate, there is also a serious conflict between Gravity and CityNet as to the practice which had been established between them. However, a very significant undisputed fact emerged in the exchange of affidavits. That is that less than one month after it was agreed by the parties that the plaintiffs policy was incepted, Gravity entered into a contract of insurance with a hotel proprietor operating in this jurisdiction, which provided for the Irish version of the policy, which confers exclusive jurisdiction on a court of competent jurisdiction within this jurisdiction, being applicable. That undisputed fact does not bear out Mr. Thorne's assertion that the "Irish policy wording" was "historical". That undisputed fact, coupled with the analysis of the fourteen "Slip" documents conducted by CityNet, supports CityNet's position as to the practice of Gravity in relation to jurisdiction provisions in policies of insurance of the type which CityNet, as the placing broker, was negotiating for the plaintiff. In other words, it supports CityNet's contention that the practice was to use "Gravity's Irish wording" in policies in relation to hotels operating within this jurisdiction, where risks were placed with Gravity on a one hundred per cent basis.

4.9 The ultimate question is whether, having regard to all of the foregoing matters, it is possible to conclude that the defendants have discharged the heavy onus of proving that there was consensus between the parties to confer exclusive jurisdiction on the English courts clearly and precisely. I have come to the conclusion that they have not. There is a complete conflict between the parties as to what was agreed. Factors, such as contemporaneous documentation, which might be expected to assist in resolving the conflict, merely compound it. In my view, the situation which has arisen between the parties is not at all analogous to the situation which was considered by Clarke J. in *Ryanair Ltd. v. Bravofly and Travelfusion Ltd*. Unlike the situation in that case, I do not think that one can find that there would be no unfairness or injustice to the plaintiff by enforcing the provisions in relation to jurisdiction in the "Slip" document and the "Evidence of Cover" document produced by CityNet. The situation in this case is that the terms and conditions of the contract of insurance were to be as set out in the policy document to be furnished by Gravity. No policy document was furnished by the defendants. The plaintiffs case, supported by CityNet, is that irrespective of the mistakes in the two documents produced by CityNet, the policy document should have conferred jurisdiction on the Irish courts. I am not satisfied that the defendants have demonstrated clearly and precisely that, on the contrary, the consensus between the parties was that exclusive jurisdiction would be conferred on the courts of England.

4.10 For completeness, I should say that I have come to the conclusion that it is not necessary to consider whether the plaintiff would be entitled to an order in equity to rectify the errors in relation to jurisdiction, which CityNet contend are in both the "Slip" document and the "Evidence of Cover" document, because the terms and conditions of the contract between the parties were to be determined by the policy document.

4.11 Accordingly, there will be an order refusing the defendants' application that the Court should decline jurisdiction to hear and determine the proceedings.

5. The plaintiffs application for an interlocutory injunction.

5.1 The injunctive relief which the plaintiff seeks is in the nature of a mandatory injunction, in that what is sought is an order directing the defendants to furnish the plaintiff "with all documentation relevant to the policy of insurance" in respect of the Hotel, but not limited to the policy itself. Presumably, although this is not expressed in the notice of motion, what the plaintiff requires is a policy which provides for cover, which is not limited to FLEA cover, which the defendants contend was the cover agreed to. Apart from the myriad of other issues and disputes between the parties to which I have alluded earlier, there is a fundamental dispute between the parties as to the extent of the cover which Gravity agreed to underwrite on behalf of Great Lakes. Until that dispute is resolved, the relevant form of policy cannot be determined, and I can see no basis on which the Court could make the order sought.

5.2 It is well established in this jurisdiction that the first test to be applied on an application for a mandatory injunction is whether the plaintiff has demonstrated that he has a strong case that he is likely to succeed at the hearing of the action. That test was laid down by the Supreme Court in *Maha Lingham v. Health Service Executive* [2005]17 ELR 137. It is certainly not possible to conclude on this application, in the light of the serious conflict of evidence as to what was agreed between CityNet and Gravity, that the plaintiff has a strong case that it is entitled to be given a policy which reflects the cover, that is to say, full perils cover, which CityNet contends, but Gravity denies, was agreed between them. In short, the injunctive relief sought cannot provide a shortcut to the resolution of the difficult issues which underlie these proceedings.

5.3 Accordingly, there will be an order dismissing the plaintiffs application for interlocutory relief.