Neutral Citation Number: [2010] IEHC 228

THE HIGH COURT

Record No. 2005 1900 P

BETWEEN

MICROSOFT IRELAND OPERATIONS LIMITED

Plaintiff

AND

EIM INTERNATIONAL ELECTRONICS LIMITED AND EIM COMPUTERISED TECHNOLOGIES LIMITED

Defendants

Judgment of Mr. Justice de Valera dated the 9th day of June, 2010

This matter involves an application by the defendants for an order pursuant to Order 12, rule 26 of the Rules of the Superior Courts, or pursuant to the inherent jurisdiction of the Court, setting aside the service of the plenary summons or staying the proceedings on the grounds of *forum non conveniens*. The defendants further seek an order discharging the order of Quirke J. made on 31st May, 2005 which granted the plaintiff liberty to serve notice of the plenary summons on the defendants outside the jurisdiction. The defendants claim that the Israeli courts are the appropriate forum to determine the dispute between the parties and that Ireland is a *forum non conveniens*.

The plaintiff, a company incorporated in Ireland, and the defendant companies, incorporated under the laws of the State of Israel, entered into a standard form distribution agreement for the period between 1st April, 2003 and 30th June, 2005. The business of both defendant companies, both part of the EIM Group, involves the sale and supply of computer software and is carried on exclusively in Israel.

Upon obtaining the Order for service out of the jurisdiction, the plaintiff proceeded to serve the defendants pursuant to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters of 15th November, 1965 ("the Hague Convention"). The plaintiff's solicitors, Matheson Ormsby Prentice, contacted the relevant section of the Israeli Directorate of Courts (the relevant authority in Israel pursuant to the Hague Convention) to effect service of the proceedings on the defendants.

The Defendants'/Applicants' Submission

The defendants claim that the order granting leave to serve the proceedings outside the jurisdiction should be set aside because it did not recite the proper provision of the Rules of Court pursuant to which it was made and which it was required to do and because they would be greatly prejudiced if the proceedings were to be heard in Ireland given that the majority of the witnesses in the case are Israeli citizens living and based in Israel.

The defendants refer to Order 11 of the Rules of the Superior Courts which provides:

> "1. Provided that an originating summons *is not a summons to which Order 11A applies*, service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever – …
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> (e) the action is brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract, where any one of the following three conditions is fulfilled: … [or]
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> (iii) the contract is, by its terms or by implication to be governed by Irish law…" (Emphasis added)

Order 11 states that service out of the jurisdiction may, not must, be allowed. The fact that one or more of the conditions specified in Order 11 have been fulfilled does not entitle the plaintiff as of right to succeed in an application for leave to effect service out of the jurisdiction. The matter is one entirely at the discretion of the court. Order 11 is exhaustive and is applicable only to the matters specifically listed in the Order itself.

The defendants say the order made on 31st May, 2005 was defective because it was expressed in the order that the intended proceedings fell within the class of action set out in "Order 11 Rule B" of the Rules of the Superior Courts. The defendants submit that in this regard the order was clearly defective in that Order 11B does not list any class of action in respect of which the High Court has jurisdiction to make orders giving liberty to issue and serve proceedings outside the jurisdiction.

The Affidavit upon which the application for leave to serve out of the jurisdiction was grounded sets out Order 11 Rule 1(e)(iii) as the basis for the application, not Order 11B, which is the provision mentioned in the Order itself. The defendants submit, therefore, that the order is fatally flawed. In this regard, the defendants rely on *Shipsey v. British and South American Steam Navigation Co. Ltd* [1936] I.R. 65, which concerned an application for leave to serve out of the jurisdiction under Order 11 of the then 1905 Rules of the Superior Courts. In that case, the Supreme Court affirmed the necessity for any such order specifically to mention the particular class of action within which the court considered the intended action to fall. Kennedy C.J. stated, at p. 83:

> "…I think that it is very important that, in a matter of the international comity of courts, the High Court, when making an order giving leave for service out of the jurisdiction, should specifically mention in the order the particular class of action within which the court decides the intended action to fall, so as to confine jurisdiction to allow service out of the jurisdiction within the expressed terms either of Order XI of the Rules of 1905, or of Order VI of the Rules of 1926… "

The defendants submit that this was not done in the present case: the particular class of action within which the court decides the intended action to fall is not specifically stated in the Order of the Court. The defendants further submit that in circumstances where the jurisdiction of the court is being invoked on an *ex parte* basis, particular care needs to be taken in reviewing any documentation to be served upon a non-resident defendant and that this was not done in the present case. If greater care had been taken, the error in the Order could have been spotted and an application to court made to amend the documentation prior to service of it on the defendants. This was not done and it is submitted therefore that the order of Quirke J. should be discharged and the originating summons set aside.

The defendants also complain that the Statement of Claim served on them in May 2006 was significantly out of time and therefore ineffective. They point to the fact that no application was made by Microsoft for service out of time and that there was no consent between the parties to late delivery.

The defendants further informed the Court that the purported Statement of Claim differed from the claim as described by the plaintiff in its application for leave to serve the proceedings out of the jurisdiction and that this is an additional reason why the order of 31st May 2005 should be set aside. The principal difference between the claim as presented to the Court in the making of the applicant for leave to serve out of the jurisdiction and the actual Claim as served on the defendants is that the latter included a new claim for damages for negligence and/or breach of duty which was not disclosed in the plaintiff's application to court. The defendants say the plaintiff was not granted leave to serve proceedings for the purpose of advancing any claim in negligence and that therefore the service ought to be set aside.

In this regard, the defendants rely on *Parker v. Schuller* (1901) 17 T.L.R. 299, where an Order permitting service of a writ on a defendant outside the jurisdiction was set aside in circumstances where the cause of action stated in the Affidavit grounding the application for leave and the cause of action sought to be relied on by the plaintiff in court proceedings were at odds. Collins L.J. stated, at p. 304:

> "… an application for leave to issue a writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which the leave was obtained in the first instance turned out to be unfounded, the plaintiff ought not to be allowed… to set up another and a distinct cause of action which was not before the Judge upon the original application. It was clear from the affidavit that the only case made on the original application was that the defendants were bound to deliver the goods in this country, and that there was a breach of that contract here, and upon that representation alone leave was originally granted to issue the writ and serve notice thereof abroad."

The defendants argue that the Court should have regard to the comparative cost and convenience of proceedings in Ireland, the plaintiff's domicile, and in Israel, where the defendants are based. As regards the costs issue, the defendants submit that the plaintiff did not comply with Order 11 rule 2 of the Rules of the Superior Courts in making its application for leave to serve outside the jurisdiction. They say that the plaintiff should have put some evidence before the Court to enable it to form a view as to the comparative costs and convenience of having the proceedings in Ireland as opposed to Israel so as to allow the Court to factor that issue into the exercise of its discretion. The defendants submit that the plaintiff failed to adduce any evidence regarding the appropriate and requisite local knowledge or the availability of witnesses and the matter of their expenses. Order 11 rule 2 provides:

> "Where leave is asked from the court to serve a summons or notice thereof under rule 1, the court to whom such application shall be made shall have regard to the amount or value of the claim or property affected and to the *comparative cost and convenience* of proceedings in Ireland, or in the place of the defendant's residence…" (Emphasis added)

The plaintiff indicated its intention to rely on Council Regulation 44/2201 but the defendants claim that the plaintiff is not now entitled to rely on the Regulation in circumstances where the plaintiff only refers to it for the first time in its opposition to this application.

Furthermore, the defendants say that Order 11 of the Rules only applies to cases which do not fall within the scope of Order 11A and that Order 11A is the relevant provision of the Rules regarding cases to which Council Regulation 44/2001 applies. The relevant portions of Order 11 A provide as follows:

> "1. The provisions of this Order only apply to proceedings which are governed by Article 1 of Regulation No. 44/2001 and, so far as practicable and applicable, to any order, motion or notice in any such proceedings.
>
> 2. Service of an originating summons or notice of an originating summons out of the jurisdiction is permissible without the leave of the Court if, but only if, it complies with the following conditions:
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> (1) the claim made by the summons or other originating document is one which, by virtue of Regulation No. 44/2001, the Court has power to hear and determine, and
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> (2) no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union (other than Denmark)…
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> 4.
>
> (1) Where two or more defendants are parties to proceedings to which the provisions of this Order apply, but not every such co-defendant is domiciled in a Member State of the European Union or a Contracting State of the 1968 Convention or a Contracting State of the Lugano Convention for the purposes of Regulation No. 44/2001 or the 1998 Act, then the provisions of Order 11 requiring leave to serve out of the jurisdiction shall apply to each and every such co-defendant.
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> (2) This rule shall not apply to proceedings to which the provisions of Article 22 of Regulation No. 44/2001 concerning exclusive jurisdiction or Article 23 of Regulation No. 44/2001 concerning prorogation of jurisdiction apply.

Service of such proceedings on all co-defendants shall be governed by the provisions of this Order."

The defendants say the plaintiff cannot now for the first time seek to rely on Council Regulation 44/2001 and they rely on the decision of Finlay Geoghegan J. in *Spielberg v. Rowley* (Unreported, High Court, Finlay Geoghegan J., 26th November 2004) where she made an order setting aside the service of the proceedings:

> "Counsel for the plaintiff did seek to raise article 22(2) of Council Regulation E.C./44/2001 of 22 December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters… and sought to assert that this Court had jurisdiction thereunder to hear and determine the claim as against the first and second named defendants. I ruled that *such submission could not now be made in response to the present application on behalf of the first and second named defendants as Council Regulation E.C./44/2001 had not been relied upon at the time of service of the proceedings on the first and second named defendants*. Service on the first and second named defendants was effected pursuant to the order of the High Court of the 17th May, 2004, following an application under O.11 of the Rules of the Superior Courts, 1986. The first and second named defendants are now entitled to an order setting aside such service." (Emphasis added)

Later on in the judgment, again in relation to the entitlement of a party to rely on article 22(2) of Council Regulation 44/2001 on jurisdiction, Finlay Geoghegan J. continued as follows:

> "The exclusive jurisdiction provided for in article 22(2) is an exception to the general rule in article 2 that persons are sued in the courts of their domicile. The principles set out by Finlay C.J. (with whom all the other members of the court agreed) in *Handbridge Ltd. v. British Aerospace Communications Ltd.* [1993] 3 I.R. 343 apply. The first such principle stated at p. 358 is:
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> > '(1) The onus is on the plaintiff who seeks to have his claim tried in the jurisdiction of a contracting state other than the contracting state in which the defendant is domiciled to establish that such claim unequivocally comes within the relevant exception'.
>
> The Supreme Court in that case was considering the Brussels Convention and the exception provided for in article 5(1) thereof. I am satisfied that the same principle applies to the exception in article 22(2) relied upon herein."

The defendants also rely on the decision of Geoghegan J. in *Norburt Schmidt v. The Home Secretary of the Government of the United Kingdom* [1995] 1 I.L.R.M. 301, where the defendant in that case succeeded in obtaining an order setting aside the service of the plenary summons and discharging an order giving liberty to serve out of the jurisdiction. Geoghegan J., in holding that the order should be discharged, held as follows:

> "The order of Carney J. must… be set aside. In my opinion breaches of constitutional rights and actionable breaches of community law which give rise to a claim for damages, are 'matters relating to tort' within the meaning of article 5 of the Judgments Convention… Furthermore, in each case 'the harmful event' for the purposes of article 5(3) of the Judgments Convention must be regarded as having occurred in Ireland…
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> *O.11A… deals with the service of originating summonses in cases coming within the Judgments Convention… I am of opinion that it… applies to this case. Accordingly, there was no power in the court to grant leave for service out of the jurisdiction under O.11*. The application before Carney J. was quite properly made *ex parte* and he did not have the benefit of either the evidence or the arguments which were now before me on the application by the second and third named defendants to set aside his order…
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> *I accept the defendants' submission based on the evidence now before the court that this would be a case falling within the Judgments Convention and therefore O.11, r.1 of the main Rules of the Superior Courts does not apply*. On both grounds, therefore, I set aside and discharge the order of 28 May 1993."

In light of Geoghegan J.'s findings in *Schmidt*, the defendants submit that proceedings under O. 11 and O. 11A are mutually exclusive and that a plaintiff must elect which procedure to adopt. If a plaintiff wishes to rely on the provisions of Council Regulation 44/2001, then O. 11A is the appropriate procedure to adopt and, furthermore, a plaintiff cannot rely on the Regulation in defending an application to set aside leave to serve proceedings out of the jurisdiction if that plaintiff did not so rely at the time of service of the proceedings. In other words, the Regulations cannot be mentioned for the first time at this stage.

Apart from their argument based on the Rules, the defendants also argue that the Court should grant them the relief sought on the basis of *forum non conveniens*. They say the balance of common-sense favours a trial in Israel over Ireland.

In relation to the non-exclusive jurisdiction clauses in the agreements entered into between the parties, the defendants say that the acceptance by them of Ireland as the appropriate jurisdiction for the resolution of any disputes was not exclusive of any other potentially more appropriate jurisdiction. They say there is insufficient evidence before the Court to plainly establish that they agreed to the exclusive jurisdiction of the Irish courts. They make the point that a non-negotiated contract proffered by the plaintiff, a powerful global corporation, in 127 countries, is not to be regarded, for choice of jurisdiction purposes, in the same way as a freely negotiated contract made between parties with equal commercial bargaining power.

In any event, the defendants say that the fact of the existence of the jurisdiction clause should not of itself persuade the Court that Ireland is the most appropriate forum and the Court should consider whether or not Israel may be the more appropriate jurisdiction for the determination of this dispute. In *Kutchera v. Buckingham International Holdings Ltd* [1988] I.R. 61, the Supreme Court held as follows:

> "Counsel on both sides agree… that the correct legal principle is that the parties' choice of jurisdiction should be upheld and the necessary procedural orders granted *unless there are strong reasons to the contrary*." (Emphasis added)

The defendants list a number of reasons why Israel would be a better forum for the resolution of the dispute. These include:

> (1) Israel is the country in which all the relevant business of the defendants about which the plaintiff complains was being transacted and in which the events complained of have arisen.
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> (2) Israel is the country in which explanations, directions and assurances directly relevant to the proceedings were given

to it by representatives of the plaintiff organisation.

(3) Almost all of the events the subject of the proceedings occurred in Israel. Almost all of the defendants' dealings were with Microsoft Israel, a company wholly owned by the Microsoft Corporation and responsible for Microsoft distributors and business in Israel. This included daily communications dealing with prices, marketing, logistics, advertisements, discounts, conventions and other matters such as technical support.

(4) Almost all of the intended witnesses live in Israel.

(5) The majority of the documents are in Hebrew.

(6) There are unlikely to be many witnesses from Microsoft Ireland (if any) which will be required to give evidence in the case.

(7) There are already existing proceedings in Israel involving the same parties which are at an advanced stage. If the defendants were now required to fully defend these proceedings in Ireland, it would be subjected to the very considerable costs and expense of Irish solicitors and counsel where it already has Israeli counsel and is already involved in litigation against Microsoft Ireland before the Israeli courts.

(8) There would be no injustice to the plaintiff if it had to litigate its claim in Israel.

The Plaintiff's/Respondent's Submissions
The plaintiff submits that the reference in the Order of Quirke J. made on 31st May, 2005 to "Order 11 Rule B" was made in error and that if necessary, it will seek to have this Order amended pursuant to Order 28 rule 11 in circumstances where it was always the plaintiff's intention and was stated to the Court that the Order sought was one pursuant to Order 11, rule 1(e)(iii) and that this was at all times clear to the court, the error having occurred through administrative oversight.

On the topic of the comparative cost and convenience of having the proceedings in Ireland as opposed to Israel, the plaintiff submits that it did in fact put sufficient evidence in relation to this matter before the Court in its application for leave to serve out of the jurisdiction. The plaintiff says it made it clear to the Court in its initial application that the proceedings were governed by Irish law and were subject to the jurisdiction of the Irish courts and in those circumstances Ireland was the most convenient jurisdiction to hear the matter, given that the parties had expressly acknowledged the suitability of the jurisdiction of the Irish courts by entering into an agreement expressly providing for same.

As regards the defendants' complaint that the Statement of Claim was served out of time, the plaintiff urges the Court to note that no application was brought by them to dismiss the proceedings for want of prosecution arising out of the failure to serve the Claim within the time provided by the Rules nor was any objection made by the defendants about this matter until they brought this application to set aside the service of the proceedings on them.

In relation to the validity of the jurisdiction clause, the plaintiff submits that where parties have agreed to submit to the jurisdiction of a foreign court, this amounts to an unequivocal acceptance of the jurisdiction of that court and a party to a contract should not be permitted to evade an express contractual provision whereby it agreed that the Irish courts should have exclusive jurisdiction unless it could advance strong reasons to the contrary. Clause 26(a) of the 1st April, 2003 Agreement ("the 2003 Agreement") which the defendants entered into with the plaintiff provides as follows:

> "This agreement is governed by and construed in accordance with the laws of Ireland and the [first/second defendant] hereby agree for the benefit of the [plaintiff and its affiliates], and without prejudice to the right of the [plaintiff and its affiliates] to take proceedings in relation hereto before any other court of competent jurisdiction, that the courts of Ireland have jurisdiction to hear and determine any suit, action or proceedings that may arise out of or in connection with this agreement, and for such purposes irrevocably submits to the jurisdiction of such courts. Process may be served on either party in the manner authorised by applicable law or court rule."

Similarly, the agreement of the 1st July, 2004 provides as follows:

> "Applicable Law: This agreement is construed and controlled by laws of Ireland and you consent to jurisdiction and venue in the Irish courts in all disputes arising out of or relating to this agreement."

The plaintiff submits that the relevant jurisdiction clauses are unambiguously exclusive, with the exception of the 2003 cause which reserves the right to the plaintiff alone to issue in any other court of competent jurisdiction. It was argued that if it is necessary for the Court to consider the true intention of the parties, the fact that Irish law was to be the governing law of the agreements is conclusive evidence of the parties' intention that Ireland has exclusive jurisdiction of all disputes arising therefrom.

Furthermore, the plaintiff submits that the defendants at all times knew that the plaintiff was the relevant contractual counterparty and that their reference to their dealing primarily with Microsoft Israel does not take from this fact. The plaintiff points to a conference it held in Dublin in February 2004 which was attended by a representative from EIM, a Mr. Ariel Gabriel and at which a number of presentations were given in which the plaintiff was specifically referred to as the contractual counterparty with all distributors.

It is further submitted on behalf of the plaintiff that Article 23 of Council Regulation 44/2001 applies to the Agreements the subject matter of the dispute. Article 23 provides:

> "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 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 the practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with the usage of which the parties are or ought to

have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

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

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

The plaintiff says their agreement with the defendants falls within Article 23 in that the plaintiff is domiciled in Ireland and they therefore satisfy the requirement that at least one party to an agreement must be domiciled within a Member State. With regard to the remaining formal requirements of Article 23, the plaintiff submits that the jurisdiction clauses are express clauses which are incorporated into or part of executed written agreements and that they are therefore in compliance with all of the requirements of the Regulation in this regard.

The plaintiff submits that the doctrine of *forum non conveniens* does not apply in cases where there is a jurisdiction clause – regardless of whether or not Article 23 of the Regulations apply. If Article 23 applies, then the provisions of that article are mandatory and the relevant courts of the country nominated in the jurisdiction clause must hear and determine the issue. If for some reason Article 23 does not apply, and the plaintiff argues that it does, then the common law principles apply to the issue of jurisdiction and these, the plaintiff submits, favour adherence to jurisdiction clauses and holding parties to such clauses where they had been expressly agreed, unless a defendant could advance strong reasons to the contrary. In *Kutchera*, Walsh J. held as follows, at p. 68:

"There is no dispute between the parties as to what is the proper law of the contract. It is quite clearly Irish law because that is the express provision of the contract according to the agreement of the parties. The proper law of the contract in this case is Irish law and the parties have expressly agreed that their rights and obligations under the contract are to be determined in accordance with Irish law and to be determined by an Irish court… Irish law is applicable because the parties have chosen it, and, in the absence of strong evidence to the contrary, of which there is none, the parties must be deemed to have intended to refer to the domestic rules of Irish law, and not to the conflict rules of Irish law… In this court the case was really contested on the basis of the defendant's claim that the case should not be submitted to an Irish jurisdiction. In other words the defendant is seeking to avoid the terms of the contract to which it agreed in respect of this matter. As in the case of the proper law, the parties to the contract expressly chose that the Irish courts should have exclusive jurisdiction, notwithstanding the Irish courts constitute a foreign jurisdiction for all of the parties."

Decision

Professor Binchy, in his book *Irish Conflicts of Law* (1988), at p. 124, has the following to say on the importance of complying with the rules of court in relation to jurisdiction:

"Irish courts have jurisdiction in a case involving a foreign element if the defendant has been duly served with an originating summons *in accordance with the rules* governing issue and service of summonses. If the rules allow for service of a summons in a case of the kind concerned and if service has been duly effected, jurisdiction exists… Even where it has jurisdiction, the Court may in its discretion decide to decline jurisdiction and stay the proceedings because the balance of common sense favours a trial somewhere else." (Emphasis added)

The parties in this case entered into two contracts which contained clauses to the effect that Ireland was the relevant jurisdiction for the resolution of any dispute arising out of the agreements. Exclusive jurisdiction clauses must be strictly construed. Common sense, as referred to by Professor Binchy in his book *Irish Conflict of Law*, does not favour a trial anywhere other than the location agreed to in the relevant contracts. The simple fact of the defendants' witnesses having to travel to Ireland, does not, of itself, mean that it would be more sensible to have the trial in Israel. Factors such as inconvenience for witnesses, location of documents, the timing of trial and related concerns cannot entitle a defendant to escape from a jurisdiction clause as these are all factors which are eminently foreseeable at the time they enter into the contract. In light of authorities such as *British Aerospace v. Dee Howard* [1993] 1 Lloyd's Rep. 368, defendants who wish to successfully object to jurisdiction must be in a position to point to factors which were not readily foreseeable at the time they entered into the relevant contract. The defendants have not persuaded me of the existence of any such factors and I can see no valid reason why they should not be held to their agreement.

It is clear that the reference in the Order of Quirke J. to "Order 11 Rule B" was an administrative error and that at all times the application was made and the order was granted pursuant to Order 11, rule 1(e)(iii).

The defendants' claims as to the invalidity of the jurisdiction clauses were made for the first time in these proceedings in an attempt to extricate themselves from their contractual obligations. If the clauses were so objectionable to the defendants it is difficult to say why they did not raise any such objections at any stage with the plaintiff. Given the size and volume of the defendants' business and the fact that the second named defendant is publicly quoted, it is difficult to understand why any concerns they might have had with the jurisdiction clauses could not have been the subject of at least some form of negotiation between the parties at the time the various agreements were entered into. Yet no dissatisfaction is evident anywhere in the correspondence and the defendants never sought to challenge any aspect of the governing jurisdiction clauses at any time until now.

From the evidence placed before the Court on this application, it seems clear that, contrary to the contentions advanced on behalf of the defendants, the parties were in correspondence and had frequent dealings with one another and I reject the defendants' claim that they had almost no contact with the plaintiff organisation. There was a letter of 2nd April, 2003 from the plaintiff to the defendants which the defendants themselves exhibited through the Affidavit of Mr. Abraham Dulberg. In addition to that letter, from June 2004 onwards, the defendants communicated with the plaintiff through the web-based portal, 'Explore MS'.

From a simple reading of Article 23 of Council Regulation 44/2001, it is clear that the agreements between the parties as to the appropriate jurisdiction come within the terms of this provision. According to Dicey, Morris and Collins on *The Conflict of Laws* (14th ed.), in cases where Article 23 applies, the chosen court has no discretion to decline jurisdiction and other courts have no power to override the jurisdiction agreement. Where Article 23 does not apply, the court has a discretion not to give effect to a jurisdiction clause but, as highlighted in *Kutchera v. Buckingham International Holdings Ltd.* [1988] 1 I.R. 61, this discretion should only be exercised where the defendant shows very grave cause. In *Kutchera*, the Supreme Court did not regard the difficulty inherent in company directors and other witnesses having to travel from Hong Kong and Canada to Ireland as amounting to a "very grave cause" sufficient to warrant the Court in exercising its discretion to relieve the parties from the terms of the contract (which provided that

Ireland was the appropriate jurisdiction for determination of disputes). Similarly in this case, I do not consider the arguments advanced on the part of the defendants concerning the logistical inconvenience and expense of witnesses travelling from Israel to Ireland as sufficiently grave to warrant a departure from the express terms of the contracts they entered into with the plaintiff and, as already noted, these were matters known to the parties at the time of entering into the agreement. Furthermore, Counsel for the plaintiff submits that a procedure exists whereby any Israeli witnesses unavailable to attend court in Dublin may be in a position to give their evidence in an Israeli court and that in this way, the Israeli courts could be of assistance to an Irish court in relation to this issue. This, it appears, is a relatively straightforward procedure under Israeli law, under which witnesses can, if necessary, be compelled to testify and in requesting the taking of evidence in this way, the Irish courts may request that Irish procedural and evidential rules apply.

In any event, if the proceedings were to be held in any jurisdiction other than Ireland, then given that Irish law is to govern any dispute, Irish lawyers would have to be involved in order to assist the parties in putting the relevant law before the court. This would entail just as much if not more significant expense and impracticality as would be involved in the bringing of witnesses from Israel to Ireland for the purposes of the trial.

The defendants also submitted that because there is in being other proceedings involving Microsoft and the defendant organisations in Israel, it would make more sense for these proceedings also to be brought in that jurisdiction. However, it appears that the Israeli proceedings involve a completely different cause of action: this matter involves a contract claim and the Israeli litigation is tort based. Furthermore, the Israeli proceedings are, by the defendants' own admission, at a considerably more advanced stage than this fledgling contract claim. In those circumstances, I am not convinced that there would be any merit in directing that this claim ought to be brought in Israel when there is no real likelihood of it being consolidated with the Israeli proceedings.

Given the existence of the jurisdiction clause and appropriateness of the procedures so far adopted by the plaintiff, I am satisfied that that in itself is sufficient to warrant a refusal of the orders sought and that I am not obliged to carry out any fuller investigation of the *forum non conveniens* issue. However, for completeness, I have had regard to a number of factors in identifying the *forum conveniens* for these proceedings and I am satisfied that Ireland is the appropriate forum for hearing this dispute given that it is the domicile of one of the parties, there are acceptable measures by which the attendance or co-operation of witnesses may be secured, there is a valid jurisdiction clause in place and, most significantly, it has been agreed by the parties that Irish law will govern the dispute.

I am not convinced by the defendants' claim that the plaintiff cannot rely Article 23 of Council Regulation 44/2001. Even if the defendants were correct in their submission that the plaintiff cannot now rely on Article 23 in circumstances where it did not do so earlier on in the proceedings or at the time it sought leave to serve outside the jurisdiction, I would nonetheless hold the defendants to the jurisdiction clauses by virtue of the relevant common law principles referred to and relied upon by the plaintiff and exercise my discretion to refuse the relief sought in this application. I agree with the views expressed by McCarthy J. in *Kutchera* in this regard:

> "In my view, it must be the policy of this and other courts to hold parties to the bargains into which they enter. Whilst that remains the policy, there may be circumstances of a compelling nature in the light of which the court may permit a party to renege upon his bargain."

There are no such compelling circumstances in this case as would convince me to allow the defendants to avoid their agreement to confer jurisdiction on the Irish courts. Furthermore, on the issue of the exclusivity or otherwise of the relevant clauses, I accept the plaintiff's contention that the absence of the word "exclusive" does not make such a clause non-exclusive in cases where Article 23 applies as that article specifically provides that the choice of jurisdiction clause is deemed to be exclusive unless expressly agreed not to be.

For all of the above reasons, I dismiss the defendants' application.