Neutral Citation Number: [2006] IEHC 235

THE HIGH COURT

[2006 No 1141 P]

BETWEEN

NESTORWAY LIMITED TRADING AS ELECTROGRAPHIC INTERNATIONAL

PLAINTIFFS

AND
AMBAFLEX B. V.

DEFENDANT

Judgment of Mr. Justice Clarke delivered on the 19th day of July 2006

1. Introduction

1.1 The plaintiffs ("Nestorway") and the defendant ("Ambaflex") entered into a series of agreements providing that Nestorway should be the exclusive distributor of certain products on behalf of Ambaflex in a territory defined for the purposes of the agreement as consisting of the United States of America, the United Kingdom, Ireland and Spain ("the Territory").

1.2 Nestorway contends that Ambaflex have wrongfully terminated the most recent agreement and have commenced proceedings seeking damages for breach of contract and appropriate injunctive relief. It would appear that Nestorway accepts that the agreement would, in the ordinary way, come to expire on 21st August, 2006. In that context Nestorway seeks an injunction restraining any termination prior to that date. In addition Nestorway seeks injunctive relief which would have the effect of preventing Ambaflex from selling the relevant products within the territory.

1.3 The proceedings were commenced on 13th March, 2006. The plenary summons has an endorsement in which Nestorway claims that this court has jurisdiction to deal with these proceedings under Article 5(1) of Council Regulation 44/2001, ("The Brussels Regulation").

1.4 Immediately on commencing the proceedings Nestorway also brought a notice of motion before the court seeking an interlocutory injunction. The hearing of that interlocutory injunction was initially delayed because of difficulties with service. Thereafter Ambaflex entered a conditional appearance on 9th May, 2006, and brought a motion contesting the jurisdiction of this Court to deal with the matter. On that basis the application for an interlocutory injunction was adjourned from time to time to allow for the argument and determination of the jurisdiction issue. This judgment is directed towards that jurisdiction of issue. In the context of the issue which I have to decide it is, therefore, necessary to turn to the agreement which is the subject of these proceedings and certain surrounding facts.

2. The Facts

2.1 The parties entered into two agreements previous to the agreement which is the subject of these proceedings. Those predecessor agreements were, to a significant extent, in the same form as the agreement whose termination is now disputed. Nothing now turns on those agreements. However the agreement which is sought to be enforced by Nestorway is in writing and is stated to be dated "11th (sic) of June, 2001, (back working force)".

2.2 On its face the agreement was signed on 22nd August, 2001 on behalf of both parties. The agreement is stated to be effective for a period of five years "from the date hereof". There is, amongst other things, a dispute between the parties as to when that five year period commenced and when, therefore, it expired. Nestorway contends that the five year period commenced on the signing of the agreement and thus expires on 22nd August, 2006. Ambaflex contend that, by particular reference to the phrase "back working force" it was intended to confirm that the agreement commenced on 1st June, 2001, (despite being signed later) and thus would have expired in the ordinary way on 1st June, 2006.

2.3 Two further aspects of the agreement require to be noted. Firstly the agreement expressly provides for the application of Dutch law. Secondly the agreement makes reference to what, I understand, are standard conditions frequently used in respect of the sale of goods in the metal products industry in the Netherlands known as the "metaalunie conditions". On page two of the agreement under the heading "Warranties and After Sales Service", paragraph 1 provides:-

> "The manufacturer will guarantee the product mechanically for twelve months after delivery, further according the metaalunie conditions as attached. During the guarantee period the manufacturer will bear the expenses on the spare parts required. During the guarantee period the distributor will bear the man hour costs for first line service and replacement."

2.4 A note on page 3 of the agreement also suggests that the metaalunie conditions were attached. The metaalunie conditions themselves provide, at Article 20. for applicable law and choice of forum in the following terms:-

> "20.1 The law of the Netherlands is applicable.
>
> …
>
> 20.3 Only the civil court that has jurisdiction in the place of establishment of the contractor may take cognisance of disputes, unless this would be contrary to peremptory law. The contractor may deviate from this rule of jurisdiction and apply the statutory rules governing jurisdiction."

2.5 It should also be noted that, on the evidence currently before the court, it appears to be accepted that, during the currency of the agreement, no sales, in fact, took place to Ireland, with all of the sales which were affected under the terms of the agreements being to other countries within the territory.

2.6 On 19th January, 2006 Ambaflex purported to effect an early termination of the agreement. Ambaflex claims to be entitled so to do by virtue of what it contends was a failure on the part of Nestorway to discharge outstanding invoices. In substance it would appear that Nestorway's contention is to the effect that the early termination was contrived to meet a desire on the part of Ambaflex to bring the agreement to an end for commercial reasons unconnected with any contention that Nestorway was in breach of its obligations sufficient to justify an early termination.

2.7 The issues in the case would, therefore, appear to centre around the validity or otherwise of the purported early termination of

the agreement and the natural expiry date of the agreement (in the event that the agreement was not found to have been terminated by virtue of the letter to which I have referred). The obligations of Ambaflex which are, therefore, the subject of the dispute are the continuing obligations of Ambaflex under the agreement which would arise in the event that the agreement is found not to have been validly determined and up to its proper date of natural termination (whichever date might be appropriate for that purpose). Those obligations are specified in the agreement as obligations of the manufacturer in the following terms:-

> "1. The Manufacturer shall pass all enquiries from end users in the territory and industry to the distributor.
>
> 2. The Manufacturer will provide the distributor with net price lists valid until the end of each calendar year for each territory, unless stated, different.
>
> 3. The Manufacturer will provide the distributor with different basic materials and basic instructions to be used for documentation and to initiate and carry out marketing sales and after sales activities.
>
> 4. The Manufacturer will offer the distributor a training course for one of her service engineers for three days in her workshop (hands on training). Both parties will pay their own expenses.
>
> 5. The Manufacturer will notify the distributor about on all sales activities and proposals made to Muller Martini CH, UK and USA. (sic)
>
> 6. The Manufacturer will not sell direct to Muller Martini UK and USA (concerning bookbinding applications) for the duration of this agreement. All leads will be passed to the distributor."

It would also appear be implicit that Ambaflex will sell and provide the relevant goods in accordance with the terms of the agreement and will refrain from selling goods to any other party within the territory during the continuance of the agreement.

2.8 Against that contractual and factual background it is necessary to turn to the arguments put forward on behalf of Ambaflex for its contention that this court does not have jurisdiction.

3. The Case against Jurisdiction

3.1 Ambaflex puts forward three separate arguments.

3.2 The first argument centres on a contention that there is an agreement between the parties conferring jurisdiction on the Dutch courts, which is sufficient to satisfy Article 23 of the Brussels Regulation.

3.3 Secondly, in the event that the first argument should be unsuccessful, Ambaflex suggests that, by virtue of Article 5(1)(b) of the Brussels Regulation, the Irish courts do not have jurisdiction.

3.4 Finally, in the event that both of the earlier arguments should fail, Ambaflex contends that under Article 5(1)(a) of the Brussels Regulation, Nestorway has failed to discharge the onus of proof necessary to establish that the Irish courts have jurisdiction. I propose dealing with each of the arguments in turn.

4. Choice of Forum

4.1 Article 23 of the Brussels Regulation confers jurisdiction on courts agreed by the parties to a contract. Article 23 provides that an agreement conferring jurisdiction must be either:-

> "(a) In writing or evidenced in writing; or
>
> (b) In a form which accords with practices which the parties have established between themselves; or
>
> (c) In international trade or commerce, in a from 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."

4.2 Ambaflex contends that the metaalunie conditions were incorporated into the contract between the parties. On that basis it is contended that there is a choice of forum clause (in favour of the Netherlands) which is in writing so as to satisfy Article 23. While there is some dispute on the affidavit evidence before me as to whether the metaalunie conditions were in fact attached to the agreement, it appears to be common case that at least some of the goods supplied had, in respect of the documentation dealing with the specific goods concerned, a copy of the metaalunie conditions attached.

4.3 However it seems to me that the first, and most difficult, question which arises is as to whether, on a proper construction of the agreement, the metaalunie conditions were applicable to the contract as a whole or were merely applicable to the warranty in respect of mechanical performance or, perhaps, to each separate sale. In particular I am faced with the difficulty that the agreement is, on its terms, to be construed in accordance with Dutch law. There is an issue, therefore, as to whether the agreement, construed in accordance with Dutch law, would properly be interpreted as incorporating the metaalunie conditions as to the entirety of the agreement (and thus incorporate the choice of forum clause in respect of all disputes). Alternatively the proper construction of the agreement as a whole in accordance with Dutch law may simply apply the metaalunie conditions to the warranty provided and/or each individual sale. This is a matter which I cannot determine in the absence of evidence of Dutch law.

4.4 If I were required to construe the agreement in accordance with Irish law I would be inclined to the view that the agreement does not incorporate the metaalunie conditions other than in respect of the warranty and guarantee condition in which they are expressly mentioned and, possibly in respect of the individual sales concluded. This case is not, of course, about the guarantee and warranty conditions or any alleged breach of them. Nor is the case about an alleged breach of an individual contract of sale. In those circumstances, as a matter of Irish law, I would not be satisfied that the choice of forum clause contained in the mataalunie conditions was incorporated into the contract as a whole so as to amount to a choice of forum for the purposes of Article 23 of the Brussels Regulation in respect of the claims made in these proceedings. If the position would be different in accordance with Dutch law, then it seems to me that the onus was on Ambaflex to produce evidence of Dutch law sufficient to satisfy the court that, on a proper construction of the agreement in accordance with Dutch law, the choice of forum clause was to be taken as to being applicable to any dispute arising under the contract (rather than only disputes concerning the warranties and guarantees or individual contracts of sale). In those circumstances I am not satisfied that it has been shown that there is a choice of forum clause, sufficient for the purposes of Article 23, which applies to the claims brought in these proceedings. It is therefore necessary to turn to the

arguments under Article 5(1)(b).

5. Article 5(1)(b)

5.1 The provisions of Article 5 of the Brussels Convention were considered by the Supreme Court in *Bio-Medical Research Limited T/A Slendertone v. Delatex S.A* [2004] I.R. 307. In many respects Article 5 of the Brussels Convention is the same as Article 5 of the Brussels Regulation which replaced it. I address a material difference later in the course of this judgment. However the underlying principles applicable to the operation of Article 5 of the Brussels Convention are also applicable to the operation of Article 5 of the Brussels Regulations. A statement of a number those principles, derived at least in part from the jurisprudence of the European Court of Justice, are to be found in the judgment of Fennelly J. (speaking for the Court).

5.2 At page 313 Fennelly J. noted the provisions of Article 2 (which sets out what might be termed the default provision of the Convention and which are also to be found in the same form in the Regulation) which is to the effect that:-

> "Subject to the provision of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State."

5.3 The following Articles of the Brussels Regulation contain exceptions to the equivalent provision, which exceptions include Article 5. Article 5 reads as follows:-

> "A person domiciled in a Member State may, in another Member State be sued:-
>
> (a) In matters relating to a contract, in the courts for the place of performance of the obligation in question;
>
> (b) For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
>
> - in the case of the sale of goods the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
>
> - in the case of the provision of services, the place in a Member State where, under the contract the services were provided or should have been provided,
>
> (c) if subparagraph (b) does not apply then subparagraph (a) applies.

5.4 Following *de Bloos v. Bouyer* (case 14/76) [1976] 3 E.C.R. 1497 at paragraph 13, the Supreme Court noted that, for the purposes of determining the place of performance within the meaning of Article 5, the obligation to be taken into account is the obligation which corresponds to the contractual right on which the plaintiff's action is based.

5.5 Furthermore, at page 316, Fennelly J. noted as follows:-

> "The Court of Justice has ruled consistently that "the place of performance of the obligation in question is to be determined by the law governing that obligation according to the conflict rules of the court seized" (See most recently *Leathertex Divisione Sintetici Sp A v. Bodetex BVDA* K.C. – 402/97) [1999] 1 E.C.R. 6747 at paragraph 33).

In the present case, as I have said, there is no dispute that the obligation to pay for goods purchased falls to be performed in Ireland at the plaintiff's place of business. For the plaintiff to succeed regarding paragraph 2 of the Indorsement of Claim, the claim made in that paragraph has to relate to that obligation ie. the obligation to pay. As I read the dictum from *Leathertex* the place of performance of the obligation is a matter for this court to decide. As I will now explain, I do not think that is, the relevant obligation for the purposes of jurisdiction in respect of paragraph 2 of the Indoresment of Claim."

5.6 It is clear, therefore, that the starting point in any consideration of jurisdiction has to be the place of domicile of the defendant. In these proceedings that is clearly the Netherlands. It is equally clear therefore, that the onus rests upon Nestorway to establish that Article 5 confers jurisdiction on the courts of this jurisdiction as an alternative.

5.7 In that context it is necessary to turn to the argument made on behalf of Ambaflex which places reliance on Article 5(1)(b). In *General Motors Ireland Limited v. SES-ASA Protection S.p.* A. [2005] I.E.H.C. 223, Finlay Geoghegan J. had to consider the practical application of the provisions of Article 5. As noted on pp. 7 and 8 of the judgment, Article 5(1)(a) is in similar terms to the equivalent Article under the former Brussels Convention. However the Brussels Regulation contains the new deeming provision specified in Article 5(1)(b). Finlay Geoghegan J. analysed the difficulties which had previously arisen in relation to the determination of the proper place of performance of multiple obligations and noted that Article 5(1)(b) "gives an autonomous definition for the place of performance in the case of contracts for the sale of goods and in the case of contracts for the provision of services."

5.8 For the reasons analysed by Finlay Geoghegan J. in *General Motors* it is clear that the Brussels Regulation continues to rely on the place of the "obligation in question" as being the primary matter which determines the alternative jurisdiction in contractual matters. Article 5(1)(b) introduces a deeming provision in relation to the place of performance of that obligation. Finlay Geoghegan J. went on, at page 11, to consider the meaning of the phrase "in the case of the sale of goods". As noted at page 12 further questions might arise as to how a relevant contract might be characterised in claims with multiple obligations in question of a different nature. However that issue did not arise on the facts of the case before her. It does here.

5.9 The obligation in question is, in accordance with the jurisprudence, the contractual obligation upon which the claim is based. The claim in this case is based upon a contention that Ambaflex wrongfully terminated an exclusive distribution agreement. It seems to me that an exclusive distribution agreement encompasses two separate and equal principal obligations, being an obligation to supply the distributor, within the terms of the agreement, with the goods concerned together together with a further obligation not to supply any other person within the parameters defined by the agreement (in this case within the territory and so long as the agreement should subsist). The agreement may also, as here, provide for other matters (see para 2.7 above) which may or may not be significant in relation to the obligations concerned on the facts of any individual claim.

5.10 While performance of the terms of the contract would, necessarily, involve separate individual contracts for the sale of goods, it does not seem to me that the obligations in question in these proceedings can be said to be a "sale of goods". In those circumstances I am not satisfied that the deeming provisions of Article 5(1)(b) apply and it is necessary , therefore, to consider where the place of the performance of the obligation would be, in the ordinary way, under Article 5(1)(a). I now turn to that issue.

6. Article 5(1)(a)
6.1 As is clear from *Bio Medical Research* and the jurisprudence of the European Court of Justice referred to therein, the obligation rests upon the party asserting a jurisdiction under Article 5(1)(a) to establish that jurisdiction. Furthermore the jurisdiction is to be taken to be the place of performance of the obligations concerned in accordance with the law applied, in accordance with the principles of private international law, by the court which would be seized of the proceedings. In that context, and, therefore, in accordance with Irish private international law, the law which must be applied to the contract in question is Dutch law, having regard to the clear choice of law clause contained in the agreement.

6.2 It, therefore, follows that the question as to where the relevant obligations of the contract in this case are to be preformed, is to be determined in accordance with Dutch law. No evidence of Dutch law was placed before the court. In those circumstances it is not possible to determine where the place of performance of the relevant obligations would have been in accordance with Dutch law.

6.3 Given that the relevant obligations would involve the supply of goods to the territory and also refraining from supplying goods to others within the territory, I would be inclined to take the view that Ireland, in accordance with Irish law, would be considered to be at least a place where the obligations in question were due to be performed. It would appear that the French Courts have taken a similar view in respect of French law. In SARL *Noge v. Gotz GmbH* [1998] I.L. P.r 189 the Cour du Cassation took the view that, in accordance with French law, the place for the performance of the relevant obligations in respect of a claim alleging breach of an exclusive distribution agreement, for which France was the territory, was France. It is possible that the question may, in certain cases, turn upon the precise obligation which, it is alleged, has been the subject of breach. However in general terms I would be inclined to the view that Irish law would adopt a similar principle to that adopted by the Cour de Cassation and would take the relevant obligation in respect of a termination of an exclusive distribution agreement, as being one which was to be preformed within the territory of that agreement.

6.4 However it is not possible to tell whether Dutch law would take a similar view.

6.5 Therefore given that the onus clearly rests upon Nestorway to establish that the Irish courts have jurisdiction under Article 5(1)(a), it seems to me that I must hold that Nestorway has failed to establish where the place of performance of the relevant obligations would have been under Dutch law and that it has, therefore, failed to discharge the onus of establishing that the Irish courts have jurisdiction under Article 5(1)(a).

6.6 In those circumstances I propose setting aside the service on Ambaflex of the proceedings on the ground of want of jurisdiction.