Neutral Citation [2015] IEHC 773

THE HIGH COURT

COMMERCIAL

[2015 No. 5553 P.]

[2015 No. 92 COM]

BETWEEN

C&F GREEN ENERGY LIMITED AND C&F TOOLING LIMITED

PLAINTIFFS

AND

BAKKER MAGNETIC B.V.

DEFENDANT

JUDGMENT of Mr. Justice Hedigan delivered the 8th day of December, 2015

1. The defendant applies for the following orders:-

> (i) an order pursuant to O. 25, r. 1 and/or O. 34, r. 2 and/or O. 63A, r. 5 of the Rules of the Superior Courts directing the trial of a preliminary issue as to the applicability of Dutch law to the claims made by the plaintiffs in these proceedings;
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> (ii) in the alternative, an order pursuant to O. 63A, r. 5 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court directing the modular trial of the issue of the applicability of Dutch law to the claims made by the plaintiffs in these proceedings.

2. The plaintiffs are wholly owned subsidiaries of the C&F Group which has its principal offices and manufacturing facilities at Cashla, Athenry, Co. Galway. CFGE was established on 24th August, 2009, to produce wind turbines for sale to homes, farms and businesses and has developed a range of small to medium sized wind turbines for sale to customers within these markets. The defendant is a Dutch company having its registered office at Science Park, Eindhoven, 5502, 5692 EL Son, Netherlands. In these proceedings, the plaintiffs who carry on the business of wind turbine manufacture seek declaratory relief and damages arising out of an alleged breach of contract and negligence on the part of the defendant in connection with the supply of magnets to the plaintiffs for use in wind turbines. The defendant denies liability and has counterclaimed for the sum of US$1,593,840, in respect of unpaid invoices and the sum of US$758,486, in respect of loss of profit.

3. Order 25 of the Rules of the Superior Courts 1986 provides that:-

> "1. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the Court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.
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> 2. If, in the opinion of the Court, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court may thereupon dismiss the action or make such other order therein as may be just."

4.1 Order 34, rule 2 provides that:-

> "If it appear to the Court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court may make an order accordingly, and may direct such question of law to be raised for the opinion of the Court, either by special case or in such other manner as the Court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

4.2 Dealing with the trial of a preliminary issue, in *Campion v. South Tipperary County Council* [2015] IESC 79, the Supreme Court, McKechnie J. summarised the circumstances in which the jurisdiction might be successfully invoked:-

> "(a) There cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application.
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> (b) There must exist a question of law which is discreet and which can be distilled from the factual matrix as presented.
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> (c) There must result from such a process a saving of time and cost, when the same is contrasted with any other suggested method by which the issues may be disposed of: in default with a unitary trial of the entire action. In the absence of admissions, appropriate evidence will usually be necessary in this regard: impressions of what might or might not be, will not be sufficient.
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> (d) The greater the impact which a decision on the preliminary issue(s) is likely to have, on the entire case, the stronger will be the argument for making the requested order.
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> (e) Conversely if irrespective of the courts decision on that issue(s), there should remain for determination a number of other substantial issues or issue(s) of a substantial nature, the less convincing will be the argument for making such an

order.

(f) Exceptionally however, even if the follow on impact will not dispose of any other issue, the process may still be appropriate where the subject issue is substantial in its own right and where its determination will clearly benefit the action in an overall sense.

(g) As an alternative to such a process in such circumstances, some other method or mode of proceeding, such as a modular trial may be more appropriate.

(h) It must be 'convenient' to make such an order: at one level this consideration of itself, can be said to incorporate all other factors herein mentioned, but for the purposes of clarity it is I think more helpful, to retain the traditional separation of such matters.

(i) The making of such an order must be consistent with the overall justice of the case, including of course fair procedures for all parties.

(j) The court at all times retains a discretion whether or not to make such an order: when so deciding it should exercise caution so as to make sure that if an order is made, it will meet the purposes intended by it; finally

(k) Subject to giving due and proper weight to the decision of the trial judge, the appellate court can substitute its own views for those of the High Court where it thinks it is both necessary and appropriate to so do."

4.3 Considering this summary of the jurisprudence, it seems to me that in deciding on the ordering of the trial of a preliminary issue, the following may be considered irrelevant to this case:-

(a) the jurisdiction is discretionary and is to be exercised by the court with caution;

(b) a unitary trial is the default option;

(c) there can be no dispute about the material facts;

(d) there must exist a discrete question of law;

(e) directing a preliminary issue must result in a saving of time;

(f) the impact in the main case of the decision on a preliminary issue is a factor to be considered;

(g) is the issue so substantial that even if it does not dispose of the whole case, it is still wroth resolving on a preliminary basis;

(h) would a modular trial be more appropriate; and

(i) is it convenient so to order, is it consistent with overall justice including fair procedures.

5.1 In my judgment, where as here, a single issue which is a point of law, is sought to be determined on a preliminary basis, the court should be guided by the principles outlined by McKechnie J. and set out at 4.3 In this case the issue sought to be resolved at a preliminary hearing is whether it is Irish or Dutch law which governs the contract and should be applied by the court when the case comes on for full hearing. It is not for me to determine this issue at this stage but rather to decide whether this crucial issue is to be decided at a preliminary hearing or whether it should be dealt with as one of the issues at the trial.

5.2 The defendant argues that the issue is a very discrete question of law relatively easily established. It argues that pursuant to Article 3.1 of the Rome I Regulation, a contract shall be governed by the law chosen by the parties. It argues that the defendant's general conditions of sale were incorporated into the contract because of their attachment to a series of quotations delivered by email and their inclusion in their order confirmation forms. Thus, Dutch law was chosen by the parties to govern their contract. It argues that if they succeed on this point then little remains to be decided because certain clear time limits will apply and these, they claim, have clearly not been met. If they are successful and the case proceeds beyond the preliminary issue, then it will be a much simpler case to resolve because if Dutch law is applicable then the case will resolve itself down to factual questions as to whether notice was given of the alleged defects within either a reasonable time after discovery of the defects alleged or within two years after delivery – see Article 6.89 and 7.23(i) of the Dutch Civil Code and Article 39(2) of the CISG (the Vienna Convention). The defendant argues that there is no dispute on the facts because they are prepared for the purposes of the trial of a preliminary issue to agree all the relevant facts. Insofar as the plaintiffs claim all the facts are not, in fact, agreed, they argue that the plaintiffs are eliding the facts relevant to the formation of the contract with the facts relevant to the choice of law. Much time and cost will be saved if the applicable law is identified prior to the full hearing since otherwise the parties would have to prepare their case on two different bases i.e. Dutch law and Irish law.

5.3 The plaintiffs argue that it is not Article 3 but Article 4(3) of the Rome I Regulation that should apply. This Article provides that it is the law of the country most closely connected to the contract that shall apply. Although Article 4 provides for the applicable law only in the absence of a choice of law, the plaintiff argues that this Article will fall to be considered if they can establish that the orders for the goods were not, in fact, made subject to the condition importing Dutch law. In this regard, they characterised the emails relied upon by the defendant as merely pre-contract correspondence. They will rely upon the evidence of the parties to demonstrate that Dutch law was never accepted as the law of the contract. They will argue that the choice of law should be determined pursuant to Article 4(3) by an examination of all the numerous connections between the contract and Ireland. This, they argue, will involve a consideration of all the evidence of the negotiations that took place between the parties. In relation to their claim in tort, they argue that the general rule under Rome II Article 4(1)(i) should apply i.e. the law of the country where the damage occurred. They argue that Article 4(3) of Rome II further brings into play evidence as to manifest proximity. Both of these, they argue, will involve evidence of the parties.

5.4 Thus, the plaintiffs argue that even if a preliminary issue was ordered, it would involve nearly all, if not all, of the evidence that would be heard in a full hearing. The remainder of the case would involve relatively simple matters i.e. the magnets are defective and clearly so, the damage is readily ascertainable. So they argue no real saving of time or cost would ensue. By hearing the matter either by way of preliminary issue under O. 34 or even by way of a modular trial under O. 63, they argue the case is unnecessarily and

unhelpfully complicated by splitting up the trial under either process. The possibility of either party appealing a decision made on such preliminary process is also something that needs to be considered, as a source of delay. All in all, they argue the case cannot be resolved as easily as the defendants say. They argue that the default position should apply. There should be a unitary trial because, in the end, to coin a phrase, "the longest way round is often the quickest route home".

6.1 The decision of the court. The key issue in this application is the establishment of what law was chosen by the parties to the contract the subject matter of these proceedings. The plaintiff says this is not as clear cut as the defendant claims. The plaintiff wishes to introduce evidence of the negotiations which led up to the emails and the confirmation document. They hope to establish that in fact Rome I 4 (3) applies and then to adduce evidence of the many links between Ireland and the contract contained therein in order to establish the applicable law. This they will argue, will involve a very substantial amount of the evidence that will be heard by the court at a full hearing. Little time or cost will be saved they argue. In relation to their tort claim, the same evidence they argue will have to be adduced to establish where damage occurred and manifest proximity. See Rome II Articles 4 (1) (i) and 4 (3).

6.2 As the default option is a unitary trial, the court has to be satisfied that there is no dispute on the material facts, that there is a discreet question of law, that there will be a saving of time, that there will be a beneficial impact on the main case and that directing such a preliminary issue would be consistent with overall justice.

6.3 I note the arguments of the defendant that there is a certain elision on the part of the plaintiff of the evidence relating to the contract's substantive content and the choice of law. Nonetheless, there does appear to remain a factual element in the dispute as to what law if any was chosen. The plaintiff does not agree it is so simple as the defendant argues. They wish to argue this point on evidence as to the pre-contract negotiations which they say include a whole series of meetings and telephone calls between a number of people. I'm not satisfied that there is no dispute on the material facts. I cannot resolve the issue of the choice of law at this stage of the proceedings. I can only decide whether the issue should be tried separately before the main hearing. Moreover, I have some difficulty in accepting that there will be a saving of time and cost. The plaintiffs will argue their case on the issue at the preliminary stage relying on evidence that will have to trawl through all the negotiations. A great deal of the evidence in this regard will most likely require to be heard again at a full trial.

6.4 There is also the possibility of either side appealing the decision on the preliminary issue. This is a case of very high value and thus likely to be fought very hard. An appeal seems to me to be quite likely. I have to bear in mind that these proceedings are in the commercial list where the guiding principle is the expeditious resolution of commercial disputes. I think that a preliminary hearing with a strong possibility of an appeal may run counter to that principle.

6.5 As to the argument that much time will be saved because the parties will only have to prepare the case on the basis of one applicable law whatever the result of the preliminary issue, I think this argument is a little overblown. In my view all that will be added to a full hearing where that issue is still alive will be the necessity to take the advice of two Dutch lawyers. It may well be that there may even be agreement as to what the relevant Dutch law is. Moreover, the question of Dutch law, on the evidence before this court will be focussed on time limits and/or date of delivery of the goods. I cannot see either of these giving rise to much difficulty at a full hearing.

6.6 Thus I am not satisfied on a number of grounds that the case has been made out for departing from the normal practice of a unitary trial and therefore I will refuse the order sought.