Neutral Citation [2012] IEHC 446

THE HIGH COURT

COMMERCIAL

[2012 No. 1443 S]

[2012 No. 150 COM]

BETWEEN

WEBSENSE INTERNATIONAL TECHNOLOGY LIMITED

PLAINTIFF

AND

ITWAY S.p.A.

DEFENDANT

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 6th day of November 2012.

1. In these proceedings, the plaintiff claims judgment against the defendant in the sum of €1,351,198.12 with interest on foot of a summary summons issued on 19th April, 2012.

2. The defendant in these proceedings (together with a number of related companies) commenced proceedings before the Court of Milan in Italy by writ of summons served in Milan on 2"d April, 2012. The defendant in those proceedings is Websense Italy S.r.l.

3. In the Irish proceedings, a conditional appearance was entered by the defendant on 17th June, 2012. On 17th September, 2012, the defendant issued a notice of motion seeking an order pursuant to O. 12, r. 26 of the Rules of the Superior Courts 1986, as amended, setting aside the service of the notice of summary summons dated 19th April, 2012, on the defendant and such further or other order as to the court may seem fit. At the hearing of this motion, counsel for the defendant informed the court that his client was not looking to have the Irish proceedings dismissed, but rather, was looking to have service set aside and, if necessary, to have the Irish proceedings stayed pending the determination of the proceedings referred to above in Italy. The Italian proceedings have been assigned a hearing date of23rd November, 2012, before the Court of Milan.

4. The defendant complains that after Websense Italy S.r.l. had been served with the Italian proceedings, the plaintiff instituted this action before the High Court in respect of non-payment of monies allegedly due and owing on foot of a Distribution Agreement which, it says, is in issue in the Italian proceedings. The defendant asserts that the Irish proceedings arise out of precisely the same facts and circumstances which ground the Italian lawsuit.

5. This application concerns the application 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. O.J. L 12/1 16.1.2001 (hereinafter "the Regulations") which have been introduced into this jurisdiction by means of the European Communities (Civil and Commercial Judgment) Regulations 2002 (S.I. No. 52 of 2002).

6. In the course of the defendant's application on this motion, a number of issues were raised by the parties. The court will have to decide whether or not the Irish and Italian proceedings are "*related actions*" within the meaning of the Regulations, and in particular, Article 28.

7. The plaintiff in the Irish proceedings argues that Irish and Italian proceedings are not related actions, but that in any event, the Irish courts have jurisdiction by virtue of an exclusive jurisdiction clause in the Distribution Agreement, which is the subject matter of the dispute between the parties, and which provides that the Agreement shall be governed by and construed in accordance with the laws of Ireland. The plaintiff argues that Article 23 of the Regulations applies and that the Irish court has therefore exclusive jurisdiction in the dispute. The plaintiff also argues that the issues are not the same in both sets of proceedings and that the parties are not the same so that the Irish and Italian lawsuits cannot be deemed to be "related actions".

The Regulations

8. Article 2 of the Regulations provides*, inter alia*:-

> "*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*."

Article 60 provides that for the purpose of the Regulations, a company is domiciled at the place where it has its (a) statutory seat or (b) central administration, or (c) principal place of business.

9. Article 28 of the Regulations provides inter alia:-

> "*1. Where related actions are pending in the Courts of different Member States, any Court other than the Court first seized may stay its proceedings*.
>
> …
>
> *3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*."

10. The Rules of the Superior Court make provision regarding the service of proceedings which take into account the Regulations. Order 11A of the Rules provides*, inter alia*:

> "... *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*:
>
> > *(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*
> >
> > *(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)."*

11. The effect of the Regulations is that where related actions are commenced in different Member States, the court, other than the court first seized of the relevant proceedings, retains a jurisdiction to stay the action before it.

12. The purpose of the Regulations is to provide certainty to litigants and both the European Court of Justice (E.C.J.) and the domestic courts have interpreted the Regulations as providing for the achievement of the objective to avoid multiplicity of proceedings in relation to the same legal dispute and to prevent forum shopping. The basic principle, as provided for in Article 2 of the Regulation, is that persons domiciled in a Member State are, regardless of their nationality, to be sued in the courts of that Member State.

13. When one looks at Articles 27 to 30 of the Regulations, it can be seen that they are intended to avoid, as far as possible, cases in which a decision given in one contracting state is liable to conflict with a decision given by another contracting state. The general rule is that the court first seized of jurisdiction is given priority. In actions coming within the scope of Article 27- where proceedings commenced in another Member State concern both the same cause of action and the same parties - any other court is bound to stay its own proceedings of its own motion until the court seized established whether or not it has jurisdiction. However, where the identities of the parties in the proceedings commenced in another Member State is not precisely the same, the court retains a discretion as to whether to stay its own proceedings. The exercise of such a discretion, in appropriate cases, prevents wasteful expenditure and avoids the possibility of conflicting judgments arising out of the same claim. This objective is reflected in the definition of a related action outlined in Article 28(3).

14. Article 23.1 of the Regulations provides as follows:

> "*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*
> >
> > (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*. "

15. It is clear that s. 22 of the Distribution Agreement provides that the Agreement shall be governed by and construed in accordance with the laws of Ireland. Any dispute between the parties arising out of the Agreement is to be settled by arbitration in accordance with the UNCITRAL Arbitration Rules with arbitration proceedings conducted in Dublin. In the event of failure of the arbitration process, exclusive jurisdiction for litigation of any dispute, controversy or claim arising out of or in connection with the Distribution Agreement or breach thereof shall be only in the applicable court with competent jurisdiction located in Dublin. It is clear, therefore, that this clause comes within the ambit of Article 23.1.

16. The plaintiff argues that because of the jurisdiction clause in the Distribution Agreement, Ireland is indisputably the place in which all disputes arising out of or in connection with the Agreement should be settled. In those circumstances, no proceedings arising out of, or in connection with, the Distribution Agreement ought to have been brought in Italy by the defendant.

17. Before considering whether the Irish and Italian proceedings are "*related actions*" within the meaning of Article 28 and considering the effect of the jurisdiction clause in the Agreement, I propose referring to some of the authorities which have been opened by the parties in the course of their submissions.

The Law

18. In *Erich Gasser GmbH v. MISAT S.r.l.* (Case C-116/02) [2003] E.C.R. 1- 14693, the E.C.J. was requested to hear a reference from a higher regional court in Austria where the issues concerned an exclusive jurisdiction clause and the question of the relevance of delay in proceedings in the State of the court first seized of the case. At para. 42 of the judgment, the court stated:

> "*From the clear terms of Article 21 it is apparent that, in a situation of lis pendens, the court second seised must stay proceedings of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter*."

19. The court held that where there is an agreement conferring jurisdiction within the meaning of Article 17 of the Regulations, the parties always have the option of declining to invoke it, and in particular, the defendant has the option of entering an appearance before the court first seized without alleging that it lacks jurisdiction on the basis of a choice of jurisdiction clause. The court also stated that other than where the parties have declined to invoke the jurisdiction clause, it is incumbent on the court first seized of the matter to verify the existence of the Agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agree to designate the court second seized as having exclusive jurisdiction (para. 49). The court also pointed out that the court of a contracting state is required to declare of its own motion that it has no jurisdiction only where it is seized of a claim which is principally concerned with a matter over which the courts of another contracting state have exclusive jurisdiction.

20. The court also expressed its view on an issue which has been raised by the plaintiff at the hearing of this motion, namely, the question of delay in the legal procedures of the court first seized of the matter. In this case, the plaintiff complains that if the Italian

court is permitted to deal with the matters in dispute before it, it will take a great deal longer than would be the case in this jurisdiction and the plaintiff will thereby be prejudiced. In the Gasser case, the court stated at para. 68:

> "*It is not compatible with the philosophy and the objectives of the Brussels Convention for national courts to be under an obligation to respect rules on lis pendens only if they consider that the court first seised will give judgment within a reasonable period. Nowhere does the Convention provide that courts may use the pretext of delays in procedure in other contracting States to excuse themselves from applying its provisions*."

The court went on to express the view that delays in proceedings which might be such as to seriously affect a litigant can be examined by the European Court of Human Rights, but that the national courts cannot substitute themselves by recourse to the Regulations.

21. In *Popely v. Popely* [2006] 4 I.R. 356, Finlay Geoghegan J. referred to a number of decisions of the E.C.J. and to Briggs & Rees '*Civil Jurisdiction and Judgments*' (3rd Ed. p. 77) and Layton & Mercer, '*European Civil Practice*' (2nd Ed. pp. 745-6), following which she set out what she understood to be the principles which would derive from those decisions and comments in the texts. At p. 365, she said:

> "*[T]he national court, in considering whether the two sets of proceedings had the same cause of action should consider only the claims made by the applicant in each of the relevant proceedings to the exclusion of a defence made by the parties*."

She quoted from the decision of the E.C.J. in *Gantner Electronic GmbH v. Basch Expolitatie Maatschappij B.V.* (Case C-111/01) [2003] E.C.R. 1-4207, where the court stated at paras. 30-32:-

> "*Finally, the objective and automatic character of the lis pendens mechanism should be stressed. As the United Kingdom Government correctly points out, article 21 of the Convention [article 27 ofCouncil Regulation E.C./44/2001} adopts a simple method to determine, at the outset of proceedings, which of the courts seised will ultimately hear and determine the dispute. The court seised is required, of its own motion, to stay its proceedings until the jurisdiction of the court first seised is established. Once that has been established, it must decline jurisdiction in favour of the court first seised. The purpose of article 21 of the Convention would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later date by the defendant. Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case. It follows that, in order to determine whether there is lis pendens in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set off, on which a defendant might subsequently rely when the court is definitively seised in accordance with its national law. In the light of the foregoing, the answer to the first two questions is that article 21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different contracting states have the same subject matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant*."

22. In *Tatry v. Maciej Rataj* (Case C-406/92) [1994] ECR I-05439, the E.C.J. considered the meaning of the expression "related actions". It said at para. 53:

> "*In order to achieve proper administration ofjustice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive*. "

23. The House of Lords followed that decision in *Sarrio S.A. v. Kuwait Investment Authority* [1999] 1 A.C. 32. The Law Lords were considering, *inter alia*, the objective of Article 22 of the Brussels Convention which is equivalent to Article 28 of the Regulations before the court. In his speech, Lord Saddle of Newdigate said at p.39:

> "*... I can find nothing in the opinion of the Advocate General or the judgment of the European Court in The Maciej Rata} which lends support to the suggestion that a distinction should be drawn between those facts necessary to establish a cause of action and other facts and matters on which conflicting decisions might arise. On the contrary it seems to me that the case leads to the opposite conclusion*.
>
> *Both the Advocate General and the European Court were at pains to emphasise that the objective of article 22 is to improve co-ordination of the exercise of judicial functions within the Community and to avoid conflicting and contradictory decisions, thus facilitating the proper administration of justice in the Community... On this basis, the court rejected the argument that the phrase 'irreconcilable judgments' should be interpreted so as to confine it to cases where the decisions would have mutually exclusive legal consequences, as Hoffmann v. Krieg (Case 145186) [1988} ECR 645 had decided was the case under article 27(3). As the court pointed out, at p. 5479, the objective of article 27(3) is different from the objective of article 22. Thus, the court concluded, at pp. 5478, para. 53*:
>
> '*In order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive*'.
>
> *This reasoning does not suggest that the phrase 'irreconcilable judgments' in article 22 should be given a limited meaning. Indeed, to limit the application of article 22 to cases where there is a potential conflict between so-called 'primary' issues, so far from giving the article a broad interpretation, comes dangerously close to the argument rejected in the Maciej Rata}. If there are only to be irreconcilable judgments where one or more of 'the facts which are necessary to establish a cause of action' are potentially in conflict, then at least in cases where the parties are the same, the article will be likely to be confined to situations where there is a risk that the legal consequences will be legally exclusive*.
>
> *In the second place, it seems to me that the words of the article itself militate against the suggested limitations. The actions, to be related, must be 'so closely connected that it is expedient to hear and determine them together' to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of article 21) to cases where although this is not the position, the connection is close enough*

> *to make it expedient for them to be heard and determined together to avoid the risk in question. These words are required if 'irreconcilable judgments., extends beyond 'primary' or 'essential' issues so as to exclude actions which, though theoretically capable of giving rise to conflict, are not sufficiently closely connected to make it expedient for them to be heard and determined together. The words would hardly be necessary at all if the article was to be confined as suggested*."

24. Having expressed some further views, he stated at p.41 :

> "*For these reasons, I am of the view that there should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the object of the Article, applying the simple wide test as set out in Article 22 and refraining from an over-sophisticated analysis of the matter*. "

25. The broad interpretation of the term "*related actions*" adopted by the E.C.J. in the *Tatry* case and the House of Lords in *Sarrio SA*. case was approved by Kelly J. in *Gonzalez v. Mayer* [2004] 3 I.R. 326.

The Parties and Issues in Irish and Italian Cases

26. In looking at the Irish and Italian cases, it is necessary to look at the parties in each case and then the issues. In the Italian proceedings, the plaintiffs are Itway S.p.A., Itway Bellas A.E., Itwayvad Yasilin ve Dnamin Dagitim Ticaret Ltd. S.t.i. and Itway Turkyie. The defendant in those proceedings is Websense Italy S.r.l. Therefore, one of the plaintiffs in the Italian proceedings is the defendant in this action. However, the defendant in the Italian proceedings is a different Websense company to the plaintiff in this action. While normally the existence of different parties in a foreign suit would tend to contraindicate a related action, the position is not quite so straightforward in this case. The parties to the Distribution Agreement of 26th April, 2010, are the plaintiffs in the Italian proceedings, on the one hand, and a number of Websense companies, on the other hand, namely: Websense U.K. Ltd., Websense B.V., Websense Italia S.r.l. and Websense International Ltd.

27. In December, 2010 the benefit of the Distribution Agreement was transferred by the Websense companies named therein to the plaintiff, including, *inter alia*, the right to receive the payment owed pursuant to the Distribution Agreement. Insofar as the plaintiff named in these proceedings is Websense International Technology Ltd., it was not a party to the Distribution Agreement when it was concluded.

28. The Italian proceedings arise out of an alleged breach of the Distribution Agreement and concern what are described in para. 3 of the Writ of Summons as "*relations between Itway and the Websense Group*". The plaintiffs in those proceedings rely specifically on the provisions of the Distribution Agreement and a collateral agreement concluded in October, 2011. The existence of any such contract is contested by the plaintiff in the Irish proceedings but it is not necessary for the court to enquire further into that matter at this stage. In the Italian proceedings, the plaintiffs claim that the defendant directed the plaintiffs to supply certain companies which did not pay them, and that the defendant interfered in commercial relations developed by the plaintiffs with its own value added resellers by using its contractual power on the market. Acting on the instructions of the defendant, the plaintiffs supplied certain companies which did not pay for the goods and services provided, leaving substantial sums due and owing by the defendant to the plaintiffs. The plaintiffs claim that by virtue of the October, 2011 agreement, they were entitled to suspend certain payments to the defendant equal to some of these outstanding debts. The plaintiffs in the Italian proceedings also allege that the defendant attempted to force the plaintiffs to pay outstanding amounts due to the Websense Group since the plaintiffs had suspended payment of monies to Websense falling due from July, 2011 as a result of what it alleges were unlawful interference in its contractual and commercial relationships. The plaintiffs in the Italian proceedings claim damages for breach of an agreement which they claim it reached with the defendant on 20th October, 2011, and for what they describe as "*non-contractual tort perpetrated by Websense Italy against Itway S.p.A. and its subsidiary companies in Greece and Turkey*" for the reasons it sets out in fact and in law. Within the Writ of Summons, particulars are set out of the defendant's breach of the plaintiff's contractual freedom and breach of the agreement of 20th October, 2011.

29. In summary, the Italian proceedings involve a claim against Websense Italy for breach of the Distribution Agreement of 26th April, 2010; the breach of an agreement of 20th October, 2011, and what is described as "*non-contractual tort*".

30. In the Irish proceedings, the plaintiff is Websense International Technology Ltd. and the defendant is Itway S.p.A. The claim is one arising on foot of a summary summons for judgment for a liquidated sum of €1,351,198.12 with interest pursuant to contract and/or statute. The plaintiff's claim arises out of the same Distribution Agreement of 26th April, 2010. As I have already indicated, the plaintiff was not a party to that agreement but brings these proceedings on foot of the transfer of the benefit of the agreement to the plaintiff in December, 2010.

31. The special endorsement of claim recites at para.7 that:

> "... *all goods and services provided by Websense under the agreement of 26th April 20I 0 have been provided by Websense International Technology Limited and invoiced by Websense International Technology Limited. The invoices alleged to be outstanding concern products supplied for further distribution in Greece, Italy and Turkey*. "

32. Looking at the two sets of proceedings side by side, it seems clear that there is a substantial degree of overlap in the issues. For example, the plaintiffs in the Italian proceedings claim, *inter alia*, damages for what they described as "*non-contractual tort perpetrated by Websense Italy against Itway S.p.A. and subsidiary companies in Greece and Turkey*". In terms of their scope and the issues, both proceedings have striking similarities. It seems to me that I should follow the broad interpretation of the term "*related actions*" adopted in the *Tatry* and *Sarrio S.A.* cases and the Irish case of Gonzales v. Mayer. Giving the term a broad interpretation, I come to the conclusion that the Italian and the Irish proceedings are "*related*" actions within the meaning of Article 28 of the Regulations. They both arise out of the same Distribution Agreement and, were it not for the transfer of the benefits of the agreement to the plaintiff in December, 2010 the parties in the Irish proceedings would include some, at least, of those in the Italian suit.

33. That leaves the question of the jurisdiction clause in the Distribution Agreement and the question of prejudice arising out of delay.

34. If this court decides to stay the proceedings, the matter will proceed in the Italian court which is the court first seized of the dispute. One of the first things that court will have to decide is whether or not it can accept jurisdiction, having regard to the jurisdiction clause in the Distribution Agreement. If the Italian court declines jurisdiction, then it may decide the matter should proceed to arbitration in Dublin pursuant to clause 22 of the agreement or to cede jurisdiction in favour of the Irish courts.

35. On the issue of delay and the prejudice alleged by the plaintiff, the E.C.J. has made it clear in the *Gasser* case that the Brussels

Convention does not provide that the courts may use the pretext of delays in procedure in other contracting states to excuse themselves from applying its provisions. Therefore, the plaintiffs arguments that it would be prejudiced by the delays it apprehends in the Italian proceedings is not, in my view, a valid reason for this court to exercise its discretion in refusing to stay the proceedings.

Conclusion

36. Since the Irish and Italian proceedings are "*related actions*" within the meaning of the Regulations and the jurisprudence which has been cited to the court, I propose to stay these proceedings until such time as the Italian court decides whether or not it will accept jurisdiction, having regard to the jurisdiction clause. I will give the parties liberty to apply so that when the Italian court has decided on jurisdiction, the parties can address this court as to what procedural steps should follow.