

THE HIGH COURT

2002 15921P

BETWEEN

**HUGH KEARNS AND IRISH BARTERING SERVICES LIMITED,
TRADING AS CONTRANET**

PLAINTIFFS

**AND
THE EUROPEAN COMMISSION**

DEFENDANT

Judgment of Mr. Justice Herbert delivered the 21st day of October, 2005

1. The Originating Document, in this case a Plenary Summons, issued on 12th December, 2002. It was endorsed, as required by the provisions of Order 4 Rule 1A of the Rules of the Superior Courts, with a statement that this Court has power, under Council Regulation (E.C.) Number 44/2001 of the 22nd December, 2000, to hear and determine the claim under the Provisions of Article 5(1) and (3) of Council Regulation (E.C.) Number 44/2001.

2. On 7th January, 2004, a Memorandum of Appearance to Contest the Jurisdiction of the Court to hear and determine the Plaintiffs' claim was entered on behalf of the European Commission and, delivery of a Statement of Claim was required.

3. On 15th March, 2005, a Notice of Intention to Proceed with the action was served by the Defendant in compliance with the provisions of Order 122 rule 11 of the Rules of the Superior Courts, advising that on the expiry of a period of one month from that date, the Defendant would issue a Motion seeking the dismissal of the Plaintiffs' claim on the grounds that the High Court did not have jurisdiction to hear and determine claims concerning the non-contractual liability of the European Community for the actions of its institutions.

4. A Notice of Change of Solicitor was served by the Plaintiffs on the Defendant on the 25th May, 2005.

5. At paragraphs 1 and 2 of the claim endorsed on the Plenary Summons, the Plaintiffs seek a Declaration that they are the author and licensee and, the legal and beneficial owners of the copyright in an artistic work known as the, "Contra Device", or, "the Euro Symbol".

6. At paragraphs 3, 4 and 5 of this general endorsement of claim, the Plaintiffs seek a Declaration that the European Commission, their servants or agents, knowingly infringed the Plaintiffs' right of paternity and copyright in this artistic work and, falsely attributed its authorship to persons other than the Plaintiffs.

7. In the general endorsement of claim the Plaintiffs' claim damages for infringement of copyright, infringement of the Plaintiffs' right of paternity, false attribution of authorship and, conversion together with further and other reliefs.

8. By a Motion on Notice dated 18th April, 2005, returnable for 9th May, 2005, the Defendant at paragraph 1 sought:-

"An Order that the proceedings herein be dismissed on the grounds that this Honourable Court has no jurisdiction to hear and determine the Plaintiffs' claims having regard to Articles 235 and 288 of the E.C. Treaty which vest exclusive jurisdiction in relation to all claims concerning the non-contractual liability of the European Community for actions by its institutions in the European Court of Justice to the exclusion of any National Court."

9. This notice of motion was grounded on the Affidavit of Damien Young, Solicitor, of the Firm of Phillip Lee, of Fitzwilton House, Wilton Place, Dublin, 2, Solicitors on the Court record as representing the Defendant, sworn on 18th day of April, 2005.

10. A Replying Affidavit was sworn by the first named Plaintiff on 25th May, 2005. Paragraphs 12, 13, 14 and 15 of this Affidavit state as follows:-

"12. On the question of jurisdiction, I submit that Council Regulation (E.C.) No. 44/2001 holds itself subject, under paragraphs (4) and (5) of the preamble to 'any international treaties' already in place, including the Berne Convention; while the Berne Convention is not specific in regard to jurisdiction, the well-established principle is that actions are heard in the jurisdiction where the protection was first sought, in this case Ireland, and I therefore plead protection under Article 3(1)(a) of the Berne Convention.

13. Therefore, I pray this Honourable Court to deny the Motion to Dismiss on the grounds of jurisdiction.

14. Because the Defendant refused to acknowledge my or any copyright in the disputed symbol under the provisions of the Copyright and Related Rights Act, 2000, Sections 1 - 7, (3) I pray the Honourable Court to take this Affidavit as my pleading to this Honourable Court to exercise its function in vindicating my intellectual property rights under the Constitution of Ireland, Article 40, (3), 2, and under the provisions of the Berne Convention to exercise its authority in refusing the Motion to Dismiss.

15. Further, I pray the Honourable Court under Section 139, (2) of the Copyright and Related Rights Act, 2000 to presume that Copyright exists in the work in question, under Section 139, (3) to presume that I am the owner of the right and my client, Irish Bartering Services Limited, is the exclusive licensee, and under Section 139, (4)(b), that the © symbol appended to the published work is sufficient evidence that a person is the owner or exclusive licensee of the Copyright in the work."

11. A further Affidavit was sworn by Mr. Damien Young on 27th May, 2005. I find, however, that the several averments in this Affidavit do not touch upon the issue of jurisdiction. An additional Replying Affidavit was sworn by the first named Plaintiff on 13th June, 2005. I consider it necessary to set out in full paragraphs. 3 to 7 inclusive of this Affidavit which are in the following terms:

"3. Further, on reviewing my first Affidavit for other possible misinterpretations I say to this Honourable Court that I may have through lack of precision, put the legal cart before the horse in pleading the Berne Convention as the superior instrument in this case; the invocation of the international Berne Convention is of course predicate upon the exercise of

the relevant Irish National Statutory instrument, in this case the Copyright and Related Rights Act, 2000.

4. Further, under the provisions of Article 67 of the E.C. 224/200, the aforesaid Act is a qualifying Harmonised instrument of national legislation, thereby governing jurisdiction in this case. [the Court assumes this to be a reference to Council Regulation (E.C.) No. 44/2001]

5. I also say to this Honourable Court that the claim of jurisdiction set out at 10. in the Affidavit of Damien Young is not accurate in that Article 235 of the E.C. Treaty does not establish exclusive jurisdiction as stated.

6. I would say further to the Honourable Court that, as an Irish Citizen, I have right of audience before this Honourable Court as a lay litigant under Section 127, (3) of the Copyright and Related Act, 2000 and, for the Honourable Court to deny that right on foot of the Defendant's Motion to Dismiss for want of jurisdiction, would be contrary to natural justice and would place an unjust and inequitable burden on me in having to prosecute this case in another jurisdiction.

7. In conclusion, I say to this Honourable Court that the Defendant's actions, of which I complain, took place in this jurisdiction and continue to take place in this jurisdiction, the Defendant's Representative in this jurisdiction accepted service of the Summons of this Honourable Court, and now seeks to deny the right of this Honourable Court to exercise its Constitutional duty in vindicating my Intellectual Property Rights as an Irish citizen."

12. By reference to the Certificate of Jurisdiction endorsed on the Plenary Summons, the Plaintiffs contend that this Court has jurisdiction by virtue of the provisions of Article 5(1), and (3), of Council Regulation E.C. No. 44/2001, to hear and to determine this action. By Chapter II Section 7 Article 24 of this Regulation it is provided as follows:-

"Apart from jurisdiction derived from other provisions of this Regulation, a Court of a Member State before which a Defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another Court has exclusive jurisdiction by virtue of Article 22."

13. Council Regulation (E.C.) No. 44/2001 is, by virtue of Article 249 (formerly 189) of the E.C. Treaty, of general application, binding in its entirety and, directly applicable in this Member State of the European Union whether or not there has been an amendment of Order 12 of the Rules of the Superior Courts with regard to Appearance.

14. There can be no doubt that the appearance entered on behalf of The European Commission in this case on 7th January, 2004, was an appearance entered to contest jurisdiction. It is headed:-

"MEMORANDUM OF APPEARANCE TO CONTEST THE JURISDICTION OF THE COURT."

15. It then continues as follows:-

"Enter an appearance for the Defendant in this Action. Such appearance is limited to an appearance for contesting the jurisdiction of the Court to hear and determine the claimants' claim. Without prejudice to such appearance the Defendant reserves the right in the alternative to defend these proceedings and further, to apply for an order of this Honourable Court to set aside the service upon it of the plenary summons herein."

16. In these circumstances I am satisfied that there is no merit in the argument advanced at paragraph 7 of the second Replying Affidavit sworn by the first named Plaintiff on 13th June, 2005, and orally by the first named Plaintiff at the hearing of this Motion.

17. Article 235, [formally Article 178], provides that:-

"The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288."

18. The second paragraph of Article 288, [formerly Article 215(2)], of the E.C. Treaty provides that:-

"In the case of non-contractual liability the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."

19. At paragraph 7 of his second Replying Affidavit sworn on 13th June, 2005, the first named Plaintiff asserts that the Defendant's actions of which he complains took place and continued to take place in this Member State of the European Union. I find that the claim endorsed on the Plenary Summons is framed exclusively against The European Commission which is the sole named Defendant. No act or omission is alleged against the National Government which is not a party to the proceedings. A joint action by the Plaintiffs against The European Commission and the National Government is not possible because of the involvement of strictly separate legal systems. In my judgment, though no express reference is made in the pleadings in this case to Article 288 paragraph 2 of the E.C. Treaty, the Plaintiffs' claim is clearly within this Article and is maintainable only by virtue of it.

20. I find that the Plaintiffs' claim in these proceedings is a claim based solely on non-contractual liability for damage allegedly caused to the Plaintiffs by the institutions or by one or more servants of the Community acting within the scope of their official duty. The facts disclosed in the several Affidavits show that no Community Contract is in issue in this case, and the matters falling to be determined appear to me to be the same sort of matters as were considered by the European Court of Justice in cases such as, *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] E.C.R. 975, *Lütticke v. Commission* [1971] E.C.R. 325 and, *Union Malt v. Commission* [1978] E.C.R. 57.

21. Consequently I am satisfied that the Plaintiffs' claim in this case falls within the provisions of Article 235 of the E.C. Treaty.

22. The provisions of Chapter 9 of the Copyright and Related Rights Act, 2000, which provides remedies in the domestic jurisdiction of this Member State for Copyright infringements, cannot in my judgment limit, exclude or take precedence over the primary law provisions of Articles 288 part 2 and 235 of the E.C. Treaty. By Section 2 of the European Communities Act, 1972, as amended by the European Communities (Amendment) Acts, 1973-2003 as enabled by the several Acts amending Article 29 of the Constitution, it is provided that:-

"The treaties governing the European Communities...shall be binding on the State and shall be part of the domestic law

thereof under the conditions laid down in those treaties.”

23. Part II of the Schedule of the Third Amendment of the Constitution Act, 1972 provides, *inter alia* that:-

“No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevent laws enacted, acts done or measures adopted by the Communities, or institutions thereof from having the force of law in the State.”

24. In the event of any conflict between E.C. law, particularly directly effective law, and National Law, even National Constitutional Law, the effect of Article 10 [formerly 5] and Article 249 [formerly 189] of the E.C. Treaty is that domestic law must give way to the E.C. Law provisions. This is clearly established by the European Court of Justice in a series of well known cases such as:-

Costa v. E.N.E.L. [1964] E.C.R. 585

International Handelsgesellschaft mbH [1970] E.C.R. 1125

Commission v. Italy (case 48/71)

Simmenthal Spa [1978] E.C.R. 629, and,

Commission v. The United Kingdom (case 213/89)

25. In my judgment, the clear effect of Articles 235 and 288 Part 2 considered together is that national courts have no jurisdiction and the European Court of Justice has exclusive jurisdiction in all cases where a claim based on non-contractual liability is made against the Community. The term, “exclusive” does not appear in Article 235. However, Article 240 [formerly Article 183] of the E.C. Treaty provides that:-

“Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or the tribunals of the Member States.”

26. In Case 101/78 *Granaria B.V. v. HVA* [1979] E.C.R., it was held by the European Court of Justice at p. 638 that:-

“The determination of the Community’s liability under the second paragraph of Article 215 of the Treaty falls within the jurisdiction of the Court of Justice as provided in Article 178 of the Treaty and lies outside that of any national court.”

27. In joined cases 106 to 120/87, *Asteris A.E. and Others v. Hellenic Republic and E.E.C.* [1988] E.C.R. 5515 at 5538, the European Court of Justice held as follows:-

“The Court of Justice has exclusive jurisdiction only where the action seeks compensation for alleged damage attributable to the Community, which is bound under the second paragraph of Article 215 of the E.E.C. Treaty to make good, in accordance with the general principles common to the laws of the Member States any damage caused by its institutions or by its servants in the performance of their duties. Pursuant to Article 178, it is the Court of Justice to the exclusion of any national court which has jurisdiction to determine such liability, (judgment of 14th January, 1987, in Case 281/84 *Zuckerfabrik Bedburg v. Commission and Council* (1987) E.C.R. 49 at 84.

It must therefore be stated that in reply to the first question that this Court has exclusive jurisdiction pursuant to Article 178 of the E.E.C. Treaty to hear actions for compensation brought against the Community under the second paragraph of Article 215 of the E.E.C. Treaty. However, national courts retain jurisdiction to hear claims for compensation for damages to individuals by national authorities in implementing Community law.”

28. In the Case C-275/00, European Community represented by the Commission of the *European Communities v. First N.V. and Franex N.V.* [2002] E.C.R. 10943 at 10971, the European Court of Justice found that:-

“It is settled case law that, while national courts retain jurisdiction to hear and determine claims for compensation for damage caused to private persons by national authorities in the application of Community law, Article 235 E.C. gives the Community Courts exclusive jurisdiction to hear and determine actions for reparation of damage brought under the second paragraph of Article 288 E.C. against the European Community...”

29. While accepting, as a general principle, that European Community legislation should be construed so far as possible to be consistent with international law, I am unable to find anything in Article 3, (1)(a) in Article 5 or in Article 36 or in any other provisions of the Berne Convention for the protection of the rights of authors in their literary and artistic works, which is inconsistent with the jurisdictional provisions of Article 235 of the E.C. Treaty which as I have already indicated, is part of the domestic law of this Member State of the European Union and of the other Member States.

30. Council Regulation (E.C.) Number 44/2001, chapter VII, Article 67 “RELATIONS WITH OTHER INSTRUMENTS” provides as follows:-

“This Regulation shall not prejudice the application of provisions governing jurisdiction...in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.”

31. Article 249 [formerly Article 189] of the E.C. Treaty, deals with the power to make Regulations by the European Parliament, (acting jointly with the Council), the Council and the Commission in order to carry out their task in accordance with the provisions of the E.C. Treaty. It provides that such Regulations shall have general application, be binding in their entirety and directly applicable to all Member States. Council Regulation (E.C.) Number 44/2001 is therefore applicable and of binding effect in this Member State of the European Union.

32. Whether Council Regulation (E.C.) Number 44/2001, has any application in the case of the independent cause of action established by Article 288 Part 2 of the E.C. Treaty is an issue which this court finds it unnecessary to determine in the present matter. Council Regulation (E.C.) Number 44/2001 is secondary legislation whereas the E.C. Treaty is the primary law of the European Communities. It was held by the European Court of Justice in the case *Compagnie Maritime Belge Transports v. Commission* [1996] E.C.R. II – 1201 paragraph 152, that in case of a conflict between the E.C. Treaty and secondary legislation of the European Community, the Treaty provisions prevail. It is therefore manifestly clear, altogether apart from any considerations of Chapter VII

Article 67 of Council Regulation (E.C.) Number 44/2001, (if it applies) that the Special Jurisdiction provisions of Section 2, Article 5 of the Regulation, which the Plaintiffs contend to apply on this matter, cannot oust the clear and emphatic provisions of Article 235 of the E.C. Treaty, conferring exclusive jurisdiction on the European Court of Justice in respect of claims to which Article 288 Part 2 applies.

33. In the circumstances this Court is obliged to decline jurisdiction to hear and determine this action.