Neutral Citation no. [2003] NIQB 11 | *Ref:* **GILF3857**

Judgment: approved by the Court for handing down | *Delivered:* **29/01/2003**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

COLM HURL

Plaintiff:

and

FUTURE TRAVEL LIMITED
T/A INSTANT HOLIDAYS AND GOLD MEDAL TRAVEL GROUP PLC

Defendants.

GILLEN J

[1] This is an appeal by the plaintiff/appellant from an Order of Master Wilson made on 17th December 2002, in which he ordered that pursuant to Order 12, rule 8, the Writ of Summons in this matter should be set aside as against the defendants to the action.

[2] The plaintiff's claim in this case is for damages for personal injuries, inconvenience, distress, upset, loss of enjoyment, loss and damage sustained by the plaintiff by reason of the negligence, misrepresentation and breach of contract of the defendants and each of their servants and agents in and about the provision, sale and supply of holiday accommodation, facilities and services to the plaintiff between 11th January 1999 and 18th January 1999 at or about "Bally's Las Vegas", Nevada, USA.

[3] As appears from an affidavit of Geraldine Hurl dated 5th December 2002, the plaintiff's case is as follows: Sometime in December 1998, the plaintiff's wife Geraldine Hurl saw an advertisement for a package holiday on Teletext. A contact telephone number was provided. She believed that that telephone number was of the first-named defendant. As a result of a conversation between Mrs Hurl and the servant or agent of the first-named defendant, she booked a package holiday for her husband and a companion to Bally's Hotel, Las Vegas, USA. She understood that the entire package holiday, which included flights, hotel accommodation, food and itinerary were organised by the first-named defendant. She now understands that apparently both the first and second-named defendants were involved in organising and/or retailing the package holiday. Arising out of that holiday, the plaintiff has instituted the proceedings mentioned above. In her affidavit, Mrs Hurl indicates that she did not book this package holiday in any business capacity but rather as a private individual and saw it as purely a consumer agreement entered into between herself on behalf of her husband and his companion and the defendants.

[4] The defendants and respondents in this matter sought to set aside the Writ under Order 12, rule 8, essentially on the basis that Northern Ireland was neither the appropriate court nor the forum conveniens for the hearing of this matter. Before me Mr Neeson, who appeared on behalf of the defendants, submitted the following points in the course of his argument;

> (a) The law of England applied to the agreement since the acceptance of the plaintiff's offer to engage in the contract emanated from England. Accordingly, it is the defendants' case that the plaintiff's claim, if any, does not arise out of any contract made within the jurisdiction of Northern Ireland or made or through an agent trading or residing within the jurisdiction of Northern Ireland and accordingly the contract is not governed by the law of Northern Ireland.
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> (b) The defendants and their witnesses all reside in England and all the documentation and records relating to the transaction between the plaintiff's wife and the first-named defendant are held in England. In addition he argues that all personnel of the second-named defendant connected in any way with the plaintiff's travel arrangements and/or accommodation arrangements, are resident in England.

[5] Mr Mulholland who appears on behalf of the plaintiff/appellant, submitted the following;

> (a) The court should rely on the terms of the Rome Convention on the Law Applicable to Contractual Obligations 1980 ("The Rome Convention") in the Contract (Applicable Law) Act 1990. The Rome Convention is the basis he submits for determining the proper law of the contract in this instance. In particular he draws my attention to Articles 5 and 6 of The Rome Convention which contain special rules for determining the law applicable to certain

consumer contracts in individual employment contracts. Of relevance to this case, a contract which, for an exclusive price, provides for a combination of travel and accommodation (a so-called "package tour") is specifically made subject to the Article under Article 5(5). A key element in Article 5 is the restriction on the effect of a choice of law contained in a contract which is subject to the Article. Notwithstanding Article 3, "a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he had his habitual residence", if any one of 3 specified conditions is satisfied. The first condition is where, in the country of the consumer's habitual residence, the contract was proceeded by a specific invitation addressed to the consumer or by advertising and the consumer has taken, in the country of his habitual residence, all the steps necessary on his part for the conclusion of the contract. In this case, he says the contract was proceeded by advertising on teletext and the consumer, namely the plaintiff and his wife, took all further steps necessary for their part to conclude the contract in their own country.

(b) If the law of the country to be applied is Northern Ireland, it would be incongruous for a court in Northern Ireland to order that the case should not be heard in Northern Ireland.

(c) The plaintiff's medical witnesses including Mr McClelland, an Orthopaedic Consultant, and a consultant radiolologist are both based in Northern Ireland. There is a third doctor upon whom he may be relying, namely Mr Gleadhill, who is a Northern Ireland doctor now residing in Australia. A primary witness of the plaintiff is his brother-in-law who I am told resides in Northern Ireland. Mr Mulholland further submits that important witnesses in the case will be from America and that it will be immaterial whether or not those witnesses have to attend in Northern Ireland or in England.

The Law Applicable to this Application

[6] I have derived great assistance in this case from the judgment of O'Donnell LJ in Macret v Guardian Royal Exchange (1988) NILR 332, Spiliada Maritime Corporation v Cansulex Ltd (1986) 3 AER, 843 and the principle set out in the Supreme Court Practice 2001 at 11/1/13. Distilling the principles therein set out, I have concluded as follows;

(a) The fundamental principle applicable to both the stay of proceedings in Northern Ireland on the ground that some other forum is the appropriate forum (in this case it is argued by the respondent that England is the appropriate forum) and also to the grant of leave to serve proceedings out of the jurisdiction, is that the court will choose that forum in which the case can be tried more suitably for the interests of all the parties and for the end of

justice. It seems to me in this case that the greater number of potential witnesses in this case, including important medical witnesses, have a closer connection with Northern Ireland than England and I have come to the conclusion that this trial can be more suitably tried in Northern Ireland. One must remember that London is a relatively short plane journey from Northern Ireland and since I perceive that the greater number of witnesses in this case will all come from Northern Ireland, this is the more convenient forum without attendant gross inconvenience for other witnesses.

(b) Upon an application for a stay of Northern Ireland Proceedings, the burden of proof lies on the defendant to show that the court should exercise its discretion to grant a stay. Moreover, the defendant is required to show not merely that Northern Ireland is not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than the Northern Ireland forum. In considering whether there is another forum which is more appropriate, the court will look for that forum with which the action has the most real and substantial connection, eg in terms of convenience or expense, availability of witnesses, the law covering the relevant transaction and the places were the parties reside or carry on business. I have come to the conclusion that it is strongly arguable that under The Rome Convention the applicable law in this case is Northern Ireland law, and as I have said, the greater number of witnesses in this case are attached to Northern Ireland. The expense of having these witnesses attend on behalf of the plaintiff in England would outweigh the expense occasioned to the defendants in bringing witnesses to Northern Ireland on balance. I do not consider, therefore, that the defendants have proved that there is another forum which is prima facie more appropriate.

[7] In all the circumstances, therefore, I have decided that I should exercise my discretion in favour of the appellants and reverse the finding of the Master. Accordingly, I uphold this appeal and reverse the Master's decision.