

Neutral Citation No. [2014] NICty 3

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **22/10/2014**

IN THE COUNTY COURT FOR THE DIVISION OF ARDS

**IN THE MATTER OF AN APPEAL UNDER ARTICLE 30(4)(ab) OF THE
COUNTY COURTS (NI) ORDER 1980**

Between;

MY LHD UK

Appellant/Defendant

PETER GAY

Respondent/Plaintiff

Judge Piers Grant

1. The appellant, a firm based in England at 2, The Arena, Standard Hill, Nottingham appeals against the decision and order of District Judge Collins, sitting in the Small Claims Court in the Division of Ards. The final order was made on 17 February 2014, although it is clear that the matter came before the learned district judge for her consideration on a number of occasions before the making of the final decree. The appeal is brought under the provisions of Article 30(4)(ab) of the County Courts (NI) Order 1980 which provides as follows:

30. - (1) Subject to paragraph (3), any action in which the amount claimed, or the value of specific chattels claimed, does not exceed £5,000 [re proceedings commenced before 25 Feb 2013] £10,000 [re proceedings commenced since 25 Feb 2013], shall, save as otherwise provided by county court rules, be heard and determined by a district judge in accordance with those rules.

(2) Any order, decision or determination made by a district judge under this Article (other than one made in dealing with a claim by way of arbitration under paragraph (3)) shall be embodied in a decree which for all purposes (including the right of appeal under Part VI) shall have the like effect as a decree pronounced by a county court judge.

4. (ab). Any party may appeal on a question of law to a judge (not being a deputy judge) against any order, decision or determination.

2. The facts that can be discerned from the papers are that in or about May 2013 the plaintiff/respondent, Peter Stewart Gay purchased a Citroen C 4 car from the defendant/appellant for the sum of £10,800. This was a left-hand drive vehicle which he purchased for use outside the United Kingdom. He asserted before the learned District Judge that a number of problems quickly developed. In particular the vehicle suffered the ingress of water leading to damage to the electrics and a number of parts necessary for the spare wheel were missing.
3. The plaintiff /respondent claimed the sum of £950 as damages for breach of contract. This was the amount decreed in his favour following a hearing of evidence on 17 February 2014.
4. The appellant/defendant did not appear before the court on any occasion but made the case that the Small Claims Court in Northern Ireland had no jurisdiction to hear plaintiff's claim on the basis that the contract between the parties was evidenced by express written terms which included a term that the English courts should have exclusive jurisdiction to hear and determine any dispute between the parties. District Judge Collins considered this issue on 20 January 2014 and determined that she did have jurisdiction and that the Northern Ireland Small Claims Court was entitled to and should determine the dispute between the parties. The appellant was so informed and a date was then fixed for the substantive hearing. The appellant was given notice of that date but did not appear on 17 February 2014 when the learned District Judge heard the relevant evidence and entered a decree in favour of the plaintiff/respondent in the sum of £950.00.

5. The notice of appeal is set out in the following terms: “our terms and conditions accepted and sent to the customer give jurisdiction to English courts, exhibited here too (sic). The County Court does not have jurisdiction to judge the case.” The notice in response to the notice of appeal is expressed in the following terms: “No terms and conditions regarding a guarantee were sent to me”.

6. The provisions of the County Court Rules determine where it is appropriate to commence proceedings within the jurisdiction of the County Court. Order 1 is expressed in the following terms:

“ORDER 1 - WHERE PROCEEDINGS MAY BE COMMENCED

Actions generally

1. - (1) Except as otherwise provided by any enactment including Order 26 rule 29, Order 27 rule 8, Order 30 rule 3 and Order 52 rule 17, an action may, irrespective of the place of residence of any defendant, be commenced-

- (a) in a court for the division in which the defendant or one of the defendants resides or carries on business; or
- (b) subject to the succeeding paragraphs of this Rule, in a court for the division in which the cause of action wholly or in part arose.

(2) Where the plaintiff sues as the assignee of a debt or other legal thing, in action, the action may be commenced in any court in which, but for the assignment, the action might have been commenced, but in no other court.

(3) Where a plaintiff relies on paragraph (1)(b) he shall set out in his civil bill the facts on which he relies as giving the court jurisdiction.”

In this case I do not have the details surrounding the negotiation leading up to the making of this contract, how and where offers were made and accepted and the circumstances in which the contract was concluded. This appeal however does not seek to challenge the jurisdiction of the Small Claims Court on the basis that these proceedings could not have been brought within the provisions of Order 1 of the County Court Rules but is limited to the terms of the notice of appeal which I have already set out above. It is the notice of

appeal that defines the question of law for my consideration. It would not be appropriate for me to extend the scope of the notice of appeal or to consider questions of law which do not arise from the notice of appeal and I do not intend to do so.

7. It seems clear that District Judge Collins considered the issue of jurisdiction as a preliminary issue. I am satisfied that she was entitled to do so and that it was appropriate for the learned district judge to consider the matter in this way. (See the judgment of His Honour Judge Hart in Cooper v Royal British Legion (2004) 4 BNIL106). Secondly, raising as it does an issue as to the jurisdiction of the court the notice of appeal raises an appeal on a point of law within the provisions of Article 30(4)(ab) of the County Courts (NI) Order 1980.
8. Two issues arise at this point. The first is to determine as a fact whether or not a jurisdiction selection clause ever formed part of the agreement between the parties. Strictly speaking this is a question of fact which is outside the scope of this appeal, although it might be argued that it raises a mixed question of fact and law. On the basis that I do not have before me, any reasoned decision from the learned judge I feel that it is appropriate that I should consider this issue. As I have already said the appellant did not appear before the Small Claims Court in January 2014 and to that extent the court did not have before it any evidence from the appellant. It is clear that the appellant, by his notice of dispute dated 6 December 2013 asserts that both a guarantee and terms and conditions were agreed between the parties. The documentation currently before me, although it includes a document headed "contract" which includes the purported jurisdiction selection clause, that document bears no signature or other acknowledgement either on the part of the seller or the buyer. There is nothing on the document itself or in any other documentation which indicates that the standard terms and conditions now relied upon by the appellant were ever drawn to the attention of the plaintiff/respondent prior to the agreement. The plaintiff/respondent has indicated that they were not and by implication he neither accepted nor agreed any such terms. As this court understands the position no contrary evidence was ever laid before the District Judge.
9. If the appellant claims to rely upon the written terms, including the forum selection clause, then the onus of proof rests upon the appellant to establish that they formed part of the agreement between the parties and that the buyer

was aware of the term and accepted the specific term. It appears likely that the court, hearing this matter in January 2014, was faced with the uncontroverted evidence of the plaintiff/respondent that he was unaware of the terms and conditions which the appellant now seeks to rely upon and in particular that he was unaware of any term which purported to select a jurisdiction in which proceedings must be brought should a dispute arise between the parties. Furthermore the respondent has consistently denied that he ever agreed such a term. In such circumstances it would have been impossible for District Judge Collins to determine this issue in favour of the appellant and she was bound to resolve this particular issue in favour of the respondent.

10. The matter does not end there and it is at this point that the second issue falls to be considered. That issue can be formulated in the following terms: If the term set out in paragraphs 10.7 and 10.8 of the terms and conditions, now relied upon by My Left-hand Drive UK, formed part of the agreement between the parties *does this operate, in law, to oust the jurisdiction of the Small Claims Court in Northern Ireland?* Although clause 10.8 is the most directly relevant clause I set out the text of both clauses:

“10.7 Your order and the information on the contract are governed by and interpreted in accordance with English law.

10.8 The English courts have jurisdiction to hear disputes between us.”

It can be seen that the terms of clause 10.8 are simply expressed and on the face of such terms it is clear that the appellant firm sought to reserve to the English courts, jurisdiction in relation to any dispute between the parties.

11. The institutions of the European Union have long been concerned to regulate and standardise commercial arrangements between parties particularly in circumstances where a consumer is considered to be a weaker or more vulnerable party when negotiating or concluding a contract with a stronger or more powerful merchant or trade seller. In modern commerce, businesses supply goods and services to a wide variety of geographical locations, particularly where those goods and services can be sought, ordered and agreed upon by mail, internet and a wide range of other means. Thus business suppliers may be domiciled and based in one jurisdiction but supply and deliver goods and services great distances and in other jurisdictions. Businesses, not unnaturally, wish to resolve any dispute arising out of a

contract in the most cost effective and convenient way for the business. To that extent it is not uncommon for businesses to seek, from the outset of the commercial relationship, to include within the terms of the contract standard terms and conditions which specify the jurisdiction and court where any dispute will be resolved. In order to regulate a field in which businesses supplying goods or services contrive to have any dispute determined at the, for them, most convenient and most cost effective location notwithstanding that this is highly inconvenient and expensive to the consumer, the provisions of the Brussels 1 Regulation (No 44/2001) have intervened.

12. These regulations are drawn so as to provide considerable protection to the consumer. Section 4 of the regulations governs jurisdiction in relation to consumer contracts and specifies differing and sometimes contrasting rights to the parties.
13. Article 15 specifies the type of contract, a consumer contract to which the provisions of section 4 apply. It provides as follows:

Article 15

- 1. In matters relating to a contract concluded by a person, the consumer for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

- (a)** *it is a contract for the sale of goods on instalment credit terms; or*
- (b)** *it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*
- (c)** *in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.*

- 2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall,

in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

- 3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.”

14. These provisions must of course be read in conjunction with other regulations under the Treaty and in accordance with judgments of the European Court.

The concept of consumer contracts was described and defined in a decision of the European Court, Bertrand v Paul Ott KG (Case 150/77). The court makes it clear that the term consumer must be interpreted narrowly and that the provisions of Section 4 are not designed to provide protection beyond what is necessary to safeguard the interests of individuals who have entered into contracts for the purpose of buying goods or services for their own personal needs or private consumption rather than as part of a business or commercial activity. As an illustration of the narrow interpretation, a person who buys goods or services in a private capacity but in anticipation of starting a business will not receive the protection of the section. On the other hand a person who engages in a trade or profession and who purchases goods or services will not fall outwith the scope of the protection provided the goods or services are not purchased or ordered in the course of a trade or profession. Thus a doctor who orders medical equipment for use in his practice will not be regarded as a consumer but a doctor who purchases gardening equipment or household furniture for private use will be regarded as a consumer.

15. A consumer contract will only arise where the consumer enters into a contract with a party who agrees to supply the goods or services in the course of commercial or professional business. Thus the sale of a second-hand bicycle agreed between two neighbours in a private capacity will not be a consumer contract. Similarly when both parties enter into an agreement in the course of their trade and profession and for the purposes of that trade profession it will not qualify as a consumer contract.

16. In the case which is the subject of this appeal I am satisfied that the respondent, at the time that he entered into the agreement with the appellant was acting in a purely private capacity unconnected with any trade or profession and the appellant agreed to supply the goods to the respondent in

its capacity as a motor dealer who specialised in the supply and sale of left-hand drive vehicles. I am satisfied that the agreement between the parties was a consumer contract attracting the protection of the provisions of Section 4.

17. Having reached that conclusion I now turn to the provisions of Article 16 which provides as follows: (*my italics*)

“Article 16

- 1. A consumer may bring proceedings against the other party to a contract either *in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.*

- 2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

- 3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.”

18. These provisions are clear and unambiguous. They provide a right to the consumer to bring proceedings against the merchant or commercial supplier in the jurisdiction of his choice, either in the courts of the state in which the merchant is domiciled or in the courts of the state or at the place where the consumer is domiciled himself. Thus the protection of the consumer is enhanced with the option to bring proceedings not only in the member state where the consumer is domiciled but in the place where the consumer is domiciled. The purpose behind this departure from the generally understood principle that the regulation applies only to international jurisdiction was explained by the importance of enabling the consumer to take proceedings against the merchant as close as possible to the consumer’s home. This provision recognised that the consumer will in general be of lesser means than the merchant and that the cost of proceeding in a place relatively far from home might have the effect of denying the consumer a remedy.

19. In VB Penzugyi Lizing Zrt v Ferenc Schneider (2010) EUECJ C-137/08 the European Court recognised the potential unfairness of contractual terms which seek to confer exclusive jurisdiction to the merchant’s “local” court. The

Directive referred to is Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. The Court stated:

“48 In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be corrected only by positive action unconnected with the actual parties to the contract (*Océano Grupo Editorial and Salvat Editores*, paragraph 27, *Mostaza Claro*, paragraph 26, and *Asturcom Telecomunicaciones*, paragraph 31).

49 Thus, in the exercise of the functions incumbent upon it under the provisions of the Directive, the national court must ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of that Directive. If it does, that court must assess that term, if necessary, of its own motion, in the light of the requirements of consumer protection laid down by that Directive.

50 As regards the first stage of the examination to be carried out by the national court, it appears from Article 1 in conjunction with Article 3 of the Directive that it applies to any term conferring exclusive territorial jurisdiction which was not individually negotiated appearing in a contract concluded between a seller or supplier and a consumer.

51 In order to safeguard the effectiveness of the consumer protection intended by the European Union legislature, the national court must thus, in all cases and whatever the rules of its domestic law, determine whether or not the contested term was individually negotiated between a seller or supplier and a consumer.

52 As regards the second stage of that examination, it must be found that the contractual term which is the subject of the dispute in the main proceedings provides, as the referring court states, for the exclusive territorial jurisdiction of a court which is not the court in whose jurisdiction the defendant lives or the one with jurisdiction for the place where the applicant has its registered office but the one which is situated close to the registered office of the applicant both geographically and in terms of transport links.

53 As regards a term which is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive, where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, the Court has held, in paragraph 24 of *Océano Grupo Editorial and Salvat Editores*, that it follows that such a term must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

54 It must be observed that the term which the national court is examining in the main proceedings, like a term whose purpose is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive (see *Océano Grupo Editorial and Salvat Editores*, paragraph 22).

55 In addition, such a term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in one court, which is not the one within whose jurisdiction the consumer lives, which makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so (see, to that effect, *Océano Grupo Editorial and Salvat Editores*, paragraph 23).

56 The answer to the third additional question referred is thus that the national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is

the subject of a dispute before it, falls within the scope of the Directive and, if it does, assess of its own motion whether such a term is unfair.”

20. In this judgment the court in addition to recognising the imbalance between consumer and commercial supplier emphasises the positive role and function of the domestic courts in ensuring that the rights of the consumer are protected and that positive steps are taken by the national court to carefully scrutinise the terms of consumer contracts to guard against unfair terms. It is not open to the national court to act in a purely neutral role and rely or depend upon the consumer litigant to raise and establish issues of fairness. The court must “of its own motion” consider and determine whether a term conferring exclusive territorial jurisdiction which appears in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute, falls within the scope of the Directive. If it does so conclude it must assess whether such a term is unfair. In general it will be recognised that such terms will offend against the requirement of fairness.
21. In the case which is the subject of this appeal it is clear that the appellant sought to rely upon Clause 10.8 as depriving the Small Claims Court in Ards of jurisdiction. The respondent does not appear to have been alert to the importance or applicability of the Directive and does not appear to have made any submissions or representations to the learned District Judge. Although I have not had the benefit of considering any reasons given by the learned district judge I have little doubt that she approached this issue bearing in mind the provisions of the Directive and the guidance of the Court of Justice. Her determination is entirely consistent with those principles. In doing so I have no doubt that she was correct in determining that she had jurisdiction to hear the proceedings at first instance and that the terms of the agreement did not oust her jurisdiction.
22. If further support for the conclusion reached by the learned District Judge is required it can be found in the judgment of the European Court in Oceano Grupo Editorial v Murciano Quintero (2000)EUECJ -C-240/98. In this case the Spanish consumer entered into a contract for the purchase by instalments of a series of encyclopaedia for personal use. The plaintiff was the seller and had included in standard conditions a term conferring jurisdiction on the courts in

Barcelona. None of the defendants were domiciled within Barcelona but the plaintiff company had their principal place of business in that city. The defendants failed to pay and the plaintiffs sought to recover on foot of the contract by bringing proceedings in the Barcelona courts. The Court of Justice condemned the exclusive jurisdiction clause with the following explanation:

“A term of this kind, the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer’s entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer’s right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive.”

23. By contrast, the term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in the court in the jurisdiction of which he has his principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so.

24. It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

25. As to the question of whether a court seised of a dispute concerning a contract between a seller or supplier and a consumer may determine of its own motion whether a term of the contract is unfair, it should be noted that the system of

protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.

26. The aim of Article 6 of the Directive, which requires Member States to lay down that unfair terms are not binding on the consumer, would not be achieved if the consumer were himself obliged to raise the unfair nature of such terms. In disputes where the amounts involved are often limited, the lawyers' fees may be higher than the amount at stake, which may deter the consumer from contesting the application of an unfair term. While it is the case that, in a number of Member States, procedural rules enable individuals to defend themselves in such proceedings, there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him on the grounds that it is unfair. It follows that effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.

27. Moreover, as the Advocate General pointed out in paragraph 24 of his Opinion, "the system of protection laid down by the Directive is based on the notion that the imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract. That is why Article 7 of the Directive, paragraph 1 of which requires Member States to implement adequate and effective means to prevent the continued use of unfair terms, specifies in paragraph 2 that those means are to include allowing authorised consumer associations to take action in order to obtain a decision as to whether contractual terms drawn up for general use are unfair and, if need be, to have them prohibited, even if they have not been used in specific contracts."

For the reasons set out above I dismiss this appeal and affirm the decree entered by the learned District Judge.