

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

NORBROOK LABORATORIES LIMITED

Plaintiff

-v-

AXIENCE SAS

Defendant

WEATHERUP]

[1] This is an application by the defendant to set aside the plaintiff's writ of summons or to strike out the plaintiff's proceedings as an abuse of process. The defendant's contention is that the appropriate forum for the determination of the dispute between the parties is by proceedings commenced in France by the present defendant against the present plaintiff before the present proceedings commenced in Northern Ireland. Mr Shaw QC and Mr Jonathan Dunlop appeared for the defendant and Mr David Dunlop for the plaintiff.

[2] The notice of writ of summons, which was issued without leave, states that the plaintiff is a company incorporated and existing under the laws of Northern Ireland and engaged in the development, formation, manufacture and marketing of pharmaceutical products for veterinary use and that the defendant is a company incorporated and existing under the laws of France with its principal place of business in France and it is engaged in the marketing and sale of pharmaceutical products for veterinary use.

[3] A written Distribution Agreement was made between the plaintiff as principal and the defendant as distributor on 3 January 2006 whereby the plaintiff granted the defendant a non-exclusive licence to distribute and sell specified products in France.

Included in the terms of the agreement was a performance clause (clause 7.5) by which the defendant undertook to achieve targets in respect of the marketing of

the products. Clause 20.2 of the agreement stated that the plaintiff should have the right summarily to terminate the agreement on the defendant failing to achieve the targets under clause 7.5.

Further the agreement contained a confidentiality clause at clause 22 which provided that the defendant should not use confidential information gained through the relationship between the parties except in connection with the agreed purpose and would not communicate such information to others except as specifically permitted by the agreement. Under clause 22.6 the defendant undertook to prevent disclosure of confidential information and the access of unauthorised persons to the information. Clause 22.11 provided that the confidentiality clause would survive the termination or expiry of the agreement.

[4] Further the Distribution Agreement contained an applicable law and exclusive jurisdiction clause at clause 25 as follows -

“This Agreement, its validity, construction and performance shall be construed in accordance with the laws of Northern Ireland and both parties submit to the sole jurisdiction of the Northern Ireland Courts of any disputes arising between the parties hereto, save to the extent that the Principal may invoke the jurisdiction of any other country.”

[5] The period of the Distribution Agreement was five years to 3 January 2011 and the relationship between the parties continued to that date and beyond. After that date the defendant continued to place orders with the plaintiff and the plaintiff continued to accept the orders. The plaintiff contends that the post 3 January 2011 trading was by extension of the Distribution Agreement and on the same terms and thus contained the exclusive jurisdiction clause. The defendant contends that such trading was outside the formal terms of the Distribution Agreement which had expired.

[6] A written agreement was entered into by the plaintiff and Bayer Healthcare AG on 12 July 2012 whereby the plaintiff granted Bayer the exclusive right to distribute certain products from the plaintiff's pharmaceutical range in France and Germany.

[7] The plaintiff gave notice to the defendant on 13 August 2012 of termination of the trading arrangement by reason of the failure of the defendant to meet the performance targets under clause 7.5. The plaintiff also had complaints that the defendant was in breach of contract by a failure to pay the plaintiff's invoices for goods supplied and by the misuse of confidential information.

[8] The French proceedings were commenced by the defendant on 3 December 2012 and served on the plaintiff in January 2013. In the French proceedings the defendant challenges the termination of the contractual relationship between the parties and claims damages against the plaintiff for the manner of termination.

[9] The Northern Ireland proceedings were commenced by the plaintiff on 21 February 2013. Accordingly, the French Court was first seised of the dispute between the parties. In these proceedings the plaintiff claims damages against the defendant for breaches of the agreement by reason of the non payment of invoices, the underperformance of the defendant and the misuse of confidential information by the defendant and also claims for an injunction restraining the defendant from misusing the confidential information.

[10] The defendant entered a conditional appearance in the present proceedings on 22 March 2013. This application is grounded on the affidavit of Barbara Creed of the defendant's solicitors who states that the plaintiff endorsed the notice of writ of summons under the Civil Jurisdiction and Judgments Act 1982 and certified that the proceedings did not engage the same cause of action in any Convention territory. Ms Creed points to the proceedings engaging the plaintiff and the defendant, commenced in France on 3 December 2013 before the commencement of the present proceedings. The defendant contends that the appropriate forum for the determination of the dispute is in France and that proceedings should continue in France because, first of all, the plaintiff's writ has not been validly served on the defendant, as the plaintiff required leave to serve the notice of writ of summons on the defendant; secondly, substantive proceedings engaging the same parties have been issued in France; thirdly, the defendant is domiciled in France and should be sued in the jurisdiction where it is based; fourthly, that France is the *forum conveniens*; and, fifthly, that France is the appropriate forum as a matter of law.

[11] The plaintiff's replying affidavit, filed by Deirdre Cormican of the plaintiff's solicitors, states that the cause of action in France is not the same as that in the present proceedings. The French proceedings brought by the defendant claim that the contractual relationship between the parties was terminated by notice inadequate according to the provisions of French law, as opposed to the terms of the contract between the parties, whereas these proceedings rely on the contract between the parties. In the present proceedings the plaintiff advances a case of underperformance by the defendant, breach of obligations of confidentiality owed by the defendant and debts due for goods supplied under the contract. Thus the plaintiff contends that there is not the same cause of action in the two proceedings.

[12] A rejoinder affidavit from Ms Creed states that the original Distribution Agreement of 3 January 2006 expired on 3 January 2011. The defendant does not accept that the original agreement continued to govern the terms and conditions between the parties and, in particular, contends that the exclusive jurisdiction clause did not continue to govern the relationship between the parties after 3 January 2011. Further, there is exhibited a statement signed by the defendant's advocate in France in which she asserts that the cause of action in France relates to the same matters as are alleged in the proceedings in Northern Ireland.

Service of the notice of writ of summons without leave.

[13] Order 11 Rule 1(2) of the Rules of the Court of Judicature provides that service of notice of a writ of summons is permissible without the leave of the Court provided that each claim made by the writ is a claim which, by virtue of the Civil Jurisdiction and Judgments Act 1982, the Court has power to hear and determine, and the following conditions apply:

- (i) no proceedings between the parties concerning the same cause of action are pending in the courts of any other Convention territory and
- (ii) the defendant is domiciled in any other Convention territory.

[14] The defendant contends that leave was required by the plaintiff to issue the notice of writ of summons as the proceedings concern the same cause of action as that pending in the French Court. The plaintiff contends that the two proceedings involve different causes of action and so leave to issue the notice of writ of summons was not required.

[15] Do the proceedings in France and in Northern Ireland involve the same cause of action? There was a contractual relationship between the parties, initially at least under the terms of the Distribution Agreement of 3 January 2006. After that date there was a continuing contractual relationship between the parties, which was either founded on an extension of the terms of the Distribution Agreement or was founded on other implied terms. One issue in both proceedings will be to determine the nature of the contractual relationship from 3 January 2011 to the date of termination. The plaintiff's claim in Northern Ireland relates to the performance and termination of the contractual relationship and relies on events both before and after 3 January 2011. The Defendant's claim in France relates to the circumstances of the termination of the contractual relationship.

[16] Virginie Bernard, Avocat a la Cour, of the Paris Bar, is instructed on behalf of the defendant in the French proceedings. In her statement she asserts that by the proceedings in the Paris Commercial Court the defendant claims damages on the ground that the breaking off of the relationship between the plaintiff and the defendant was sudden and could not be justified by any breach such as underperformance. Ms Bernard states that issues arise about the renewal of the Distribution Agreement, enforceability of performance targets under the agreement, the good faith of the plaintiff in invoking the underperformance of the defendant and the merits of the alleged underperformance. It would appear that the defendant's case in France will also involve consideration of events prior to and post 3 January 2011. However, the plaintiff contends that the defendant's claim in France is based, not on any agreement between the plaintiff and the defendant, but on a statutory entitlement under the French Civil Code.

[17] I am satisfied that both proceedings are concerned with the performance and termination of the contractual relationship between the plaintiff and the defendant. In substance both proceedings involve the same cause of action. The substantive French proceedings obviously rely on the relevant French Code to determine whether liability can be established and to measure the quantum of the claim. By the same token the substantive proceedings in this jurisdiction would rely on what is in effect the Northern Ireland Code, namely our legal framework for determining liability and quantum in relation to the performance and termination of contractual relationships. This is the same cause of action for the purposes of Order 11 Rule 1(2).

The exclusive jurisdiction clause.

[18] The jurisdiction clause in the Distribution Agreement states that the applicable law and the exclusive jurisdiction for disputes in relation to the Distribution Agreement should be that of Northern Ireland. The defendant contends that the five year agreement ended on 3 January 2011 and accordingly there was no longer a clause 25 to be relied on after that date. The plaintiff's case is that there was an extended agreement which continued after 3 January 2011 and which incorporated the same terms as the original agreement and therefore incorporated the exclusive jurisdiction clause.

[19] The plaintiff also contends that in any event the Distribution Agreement applied prior to 3 January 2011, as agreed by the parties, and that part of the plaintiff's claim in these proceedings relates to the default of the defendant before that date. Accordingly, the plaintiff says that the Northern Ireland proceedings concern underperformance and breach of confidentiality and non-payment of invoices and relate to conduct prior to, as well as post, 3 January 2011. I am satisfied that the defendant's claim in the French proceedings will also include consideration of events prior to and post 3 January 2011. The issue to be determined is whether the Distribution Agreement applied after 3 January 2011 and contained the exclusive jurisdiction clause?

[20] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provides at Article 23 in relation to an agreed jurisdiction clause -

“1. 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.”

[21] Article 27 deals with *lis pendens*, that is proceedings in two Member States, and provides:

“1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.”

[22] Article 27.1 only arises if the proceedings in Northern Ireland and in France involve the same cause of action. Undoubtedly they are between the same parties. For the reasons given above in relation to the same cause of action for the purposes of Order 11 Rule 1(2) I am satisfied that the proceedings in Northern Ireland and in France involve the same cause of action for the purposes of Article 27.

[23] An agreed jurisdiction clause establishes the Court with jurisdiction (clause 25). Thus, if the agreed jurisdiction clause applies, Northern Ireland has jurisdiction under Article 23.1. A Court second seised with proceedings in the same cause of action shall stay proceedings until the jurisdiction of the Court first seised is established (Article 27.1). Thus, Northern Ireland must stay the proceedings until jurisdiction is established. Is it the Court in Northern Ireland, as designated by the disputed jurisdiction clause, or the Court in France, as the Court first seised of proceedings, that establishes where jurisdiction lies?

Which Court decides jurisdiction?

[24] Counsel referred to three cases. In Gubisch v Palumbo (1989) ECC 420 Gubisch sued in the German courts for enforcement of a contract with Palumbo and by a subsequent action Palumbo sued in the Italian courts for a declaration that the same contract was inoperative or should be rescinded. The ECJ found that the two actions had the same cause of action, the contract, (and in accordance with the requirements of the predecessor of Article 27, the same subject matter, its enforceability) and that, therefore, the conditions for *lis pendens* under the Article were met and the second proceedings, the Italian action, should be discontinued. This was an application of the general principles of the *lis pendens* scheme in the absence of an exclusive jurisdiction clause.

[25] In Overseas Union Insurance Ltd, a decision of the ECJ of 27 June 1991, case reference C351 of 89, the headnote commences "Without prejudice to the case where the Court second seised has exclusive jurisdiction" - I pause to comment that the present case is one where it is said that the Court second seised (Northern Ireland) has exclusive jurisdiction -

"Without prejudice to a case where the second court seised has exclusive jurisdiction under the Convention the Convention must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court second seised may, if it does not decline jurisdiction, only stay the proceedings and may not of itself examine the jurisdiction of the court first seised."

Thus the second Court may not examine the jurisdiction of the first Court. This maintains the priority of the first Court to decide the jurisdiction issue. However, this was expressly stated to be without prejudice to a case where the second Court has exclusive jurisdiction under the Convention. That does not answer the question arising in this case.

[26] Erich Gasser v MISAT [2005] 1 All ER (Comm) 3538 addresses directly the issue arising in the present case. The ECJ stated that the Article has to be interpreted as meaning that a Court second seised, whose jurisdiction had been claimed under an agreement conferring jurisdiction, should nevertheless stay proceedings until the Court first seized had declared that it had no jurisdiction.

[27] The issue is discussed from paragraphs 41-54 of the judgment of the Court.

"41[The Convention] is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different contracting states and to avoid conflicts between decisions which might result therefrom....

46. In this case, it is claimed that the court second seised had jurisdiction under [Article 23] of the Convention.

47. However, that fact is not such as to call in question the application of the procedural rule contained in [Article 27] of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

48. Moreover, the court second seised is never in a better position than the court first seised to determine whether the latter has jurisdiction....

49. Thus, where there is an agreement conferring jurisdiction within the meaning of [Article 23] not only, as observed by the Commission, do 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 seised without alleging that it lacks jurisdiction on the basis of a choice of court clause but, moreover, in the circumstances other than just described, *it is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with [Article 23], that the parties actually agreed to designate the court second seised as having exclusive jurisdiction* (italics added).

54. In view of the foregoing, the answer to the second question must be that [Article 27] of the Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.”

[28] Where there is an exclusive jurisdiction clause or an issue as to the application of an agreement containing such a clause, it is for the Court first seised to decide whether the agreement applies and which Court has jurisdiction. If the Court second seised is found to have jurisdiction then it is incumbent on the Court first seised to decline jurisdiction. This clearly points to France determining the jurisdiction issue in the present case.

[29] Accordingly, I am satisfied that Article 27 applies. The effect is that the French Court has to decide which Court has jurisdiction in relation to this dispute. These proceedings will be stayed under Article 27 pending determination of the jurisdiction issue by the French Court.

Related actions.

[30] The defendant’s alternative argument is that if the two proceedings do not involve the same cause of action then they are “related actions” for the purposes of Article 28, in which event the Court has a discretion whether or not to stay the proceedings.

[31] Article 28 provides -

“1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

3. For the purposes of this Article, actions are deemed to be related when 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.”

[32] In Seven Licencing Company v FFG [2011] EWHC 2967 (Comm) there were Greek proceedings and English proceedings and the defendant in the English proceedings applied to stay those proceedings in favour of the Greek proceedings and the Court refused the grant of a stay. Reference was made to a useful guide to the principles governing the exercise of discretion contained in the opinion of Advocate General Lenz in Owens Bank v Bracco 1994. It was there stated:

“... the aim of this provision is to prevent parallel proceedings before the courts of different contracting states and to avoid conflicts between decisions which might arise therefrom. It would therefore be appropriate in case of doubt for a national court to decide to stay its proceedings under [Article 28]....

... there are three factors which may be relevant to the exercise of the discretion invested in national courts by virtue of [Article 28], but this does not mean that other considerations may not also be important. Those three factors are (1) the extent of the relatedness and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case.”

[33] The burden remains on the applicant to show that it is appropriate for a stay to be granted. In Seven licensing Company it was found that the two actions were not so closely related that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments. That was stated to be the position for reasons set out in paragraph [68] of the judgment which included (1) the degree of connection between the two sets of proceedings was limited; (2) the risk of mutually irreconcilable decisions was remote; and (3) the English court was clearly in the best position to decide the issues raised in the English proceedings and so far as they overlap and/or are based on English law the issues raised in the Greek proceedings.

[34] In the present case there is first of all an acknowledgement that these are “related actions” concerning performance and termination of a contractual relationship between the same parties. There is pending before the French court next month a hearing to determine the applicable contract and the operation of any

exclusive jurisdiction clause. This Court as the Court second seised may stay the proceedings. The risk of irreconcilable judgments is obvious because there may be reasons why the Northern Ireland Court, if it were to determine the issue, and the French Court would reach different conclusions and that is obviously something to be avoided under the Convention.

[35] I am satisfied that if the proceedings in France and in Northern Ireland are to be treated as related actions for the purposes of Article 28 and not as the same cause of action for purposes of Article 27, I would exercise my discretion to grant a stay of the Northern Ireland proceedings so that the French Court may decide the jurisdiction issue.

[36] In summary I am satisfied that Article 27 applies and the present proceedings must be stayed pending a determination of the jurisdiction issue by the French Court. In the alternative, if the proceedings in Northern Ireland and in France do not involve the same cause of action, which I am satisfied they do, I am satisfied that they are related actions for the purposes of Article 28 and I exercise the discretion of the Court to stay the proceedings pending a determination of the jurisdiction issue by the French Court.