

**Neutral Citation No. [2013] NIQB 142**

*Ref:* **WEA9107**

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

*Delivered:* **19/12/2013**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**BETWEEN:**

**QUINN BUILDING PRODUCTS LIMITED**

**Plaintiff**

**-v-**

**P&S CIVIL WORKS LIMITED**

**Defendant**

**WEATHERUP J**

[1] This is the defendant's application to stay proceedings on the basis that the Court does not have jurisdiction. Mr Aiken appeared on behalf of the defendant and Mr Shiels on behalf of the plaintiff.

[2] The plaintiff claims £257,075.02 in respect of building works undertaken on a road development project in County Cavan in the Republic of Ireland. The defendant entered a conditional appearance and then the present Summons to stay the proceedings. The defendant's grounding affidavit sworn by the defendant's solicitor stated that the defendant is a company based in the Republic, engaged in civil engineering works and with a registered address in County Cavan. The plaintiff is a company registered in Northern Ireland with its registered office in Derrylin, Co Fermanagh.

[3] The dispute concerns a sub-contract for the tarmacadam works for the Cavan Town Eastern Access Road Construction Project, undertaken in County Cavan by the defendant as contractor and the plaintiff as sub-contractor. The contract engineer raised issues over the tarmacadam works carried out by the plaintiff relating to the amount of the binder used and the failure to lay the tarmacadam

properly causing ponding to occur. The main contract provided that the law of the Republic governed the main contract and that jurisdiction in respect of disputes arising under the main contract rested with the courts in the Republic. The defendant relied on the Brussels 1 Convention as founding jurisdiction in the Republic, rather than Northern Ireland, on the basis that the defendant was domiciled in the Republic, the place of performance of the sub contract was in the Republic and a clause giving jurisdiction to the Republic was contained in the main contract.

[4] The plaintiff's replying affidavit sworn by Paul Lendrum, the manager at the Tarmac Division of the plaintiff, stated that the contract between the plaintiff and the defendant was formed in Northern Ireland. The defendant faxed the plaintiff's offices and included a bill of quantities to be priced; negotiations about the rates to be applied were then undertaken between the plaintiff's offices at Derrylin and the defendant's offices in County Cavan and on 28 July 2011 an agreement was reached; the rates were varied in the same manner on 24 July 2012.

[5] The plaintiff contended that the plaintiff's conditions of sale are relevant to the issue of jurisdiction. Clause 18.1 of the conditions stated that the terms and conditions "shall be governed by the laws of Northern Ireland and the parties hereto submit to the exclusive jurisdiction of the courts in Northern Ireland". Mr Lendrum exhibited copies of invoices issued by the plaintiff to the defendant in connection with the sub contract works and the terms and conditions, including the jurisdiction clause, were copied onto the backs of the invoices.

[6] Further, the plaintiff relied on the course of business between the plaintiff and the defendant. The plaintiff exhibited invoices relating to other contracts between the plaintiff and the defendant, containing the terms and conditions and the jurisdiction clause, issued to the defendant from 2007. It was said that this course of dealing between the parties was such that the defendant ought reasonably to have been on notice of the existence of the plaintiff's conditions and the jurisdiction clause. An invoice dated 18 December 2010 referred to waiting time but it was not clear to what work it related. An invoice of 30 September 2009 did not identify the work undertaken. An invoice of 22 February 2008 referred to an order but did not identify the subject matter of the charge imposed. An invoice dated 26 June 2007 was clearly for similar work to the present contract as it referred to "Supply & Lay Base Course Macadam".

[7] The defendant filed a rejoinder affidavit from Killian Smith, the Managing Director of the defendant. The rejoinder referred to the working relationship between the parties and stated that the plaintiff had operated under the terms and conditions of the public works regime in the Republic for many years and expressed no doubt that the plaintiff possessed its own copy of the public works contract which was the main contract in respect of the works in Cavan and that main contract gave exclusive jurisdiction to the courts of the Republic.

[8] Further Mr Smith referred to faxes and conversations which founded the agreement between the parties and stated that there was no mention of jurisdiction clauses or standard terms and conditions when agreement was reached. The documents included a fax message of 27 October 2010 from Mr Lendrum to Peter Fay of the defendant which stated "Rates as Requested" with an attached bill of quantities. Eight items on the bill were priced, being for the pavement, the dense bitumen macadam, binder course, and polymer modified stone mastic asphalt surface course, for overlay the dense bitumen macadam binder course and polymer modified stone mastic asphalt surface course, for bond cost the bitumen emulsion tack coat, for cold milling (planning) the milling of the existing road pavement and the graded asphalt concrete surface course.

[9] A further fax message dated 9 June 2011 between the same parties referred to adjusted rates in the bill of quantities. An e-mail of 24 June 2011 from Paul Lendrum to Peter Fay referred to the adjustment of the price for the surface course. A fax message of 28 July 2011 from Paul Quinn to Richard Fitzsimmons, being the date the plaintiff claimed the contract was agreed, referred to "Revised Rates as Requested" and attached various revisions to the rates in the bill. An email of 24 July 2012 from Paul Lendrum referred to new rates applying the raw uplift of bitumen costs and four rates are set out. The documents making up the agreement do not refer to any terms and conditions.

[10] The plaintiff began work on site in the summer of 2011. At the formation of the sub contract there were no invoices issued and no other reference to the plaintiff's terms and conditions. It was contended by the defendant that the jurisdiction clause contained on the reverse of the invoices had no relevance to the sub contract. The plaintiff contended that the first invoice submitted by the plaintiff in respect of the sub contract works was issued on 29 October 2011 after the sub contract was already in existence. The exhibits included an invoice which appears to be dated 1 August 2011 and refers to the Cavan Eastern Relief Road and therefore the plaintiff may have been mistaken in referring to the first invoice being dated 29 October 2011. However that date does not make any difference to the argument.

[11] Further the defendant contended that the plaintiff's terms and conditions related to contracts for the supply of goods and were not relevant to the sub contract as the plaintiff did not sell any goods to the defendant. The defendant described the sub contract as involving the plaintiff bringing its own materials to site to perform the service of laying the road surface. Thus the defendant contended that terms and conditions relating to the supply of goods were not relevant.

[12] The defendant relied on Council Regulation EC 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Article 2 states -

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

Thus the defendant, being domiciled in the Republic, is in the first place to be sued in the Republic and not in Northern Ireland.

[13] Article 3 of the Regulation states –

“Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.”

[14] In Section 2 of the Regulation, which relates to “Special Jurisdiction”, Article 5 states –

“A person domiciled in a Member State may, in another Member State, be sued:

1(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

in case of the sale of goods, the place in a Member State where, under the contract the goods were delivered or should have been delivered,

in the case of the provision of services, the place in the Member State where, under the contract, the services were provided or should have been provided.”

Thus the place of performance of the present contract, insofar as goods and services were supplied, namely the tarmacadam and the laying thereof, is the place where the goods and services were delivered, namely County Cavan. On that basis also jurisdiction lies with the courts of the Republic.

[15] There was a debate in the affidavits about the place of formation of the contract between the parties. However the place of formation of the contract is not relevant. The place of formation of the contract does not found jurisdiction. Thus whether or not the contract was formed in Northern Ireland is irrelevant as special jurisdiction under Article 3 is determined by the place of performance, which is the Republic.

[16] In Section 7 of the Regulation, which relates to “Prorogation of jurisdiction”, Article 23 states –

“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. Such an agreement conferring jurisdiction should be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves.”

[17] What must be established under Article 23 is actual acceptance of jurisdiction. The burden of proof is placed on the party asserting the agreement for jurisdiction. The standard of proof is that the party demonstrates clearly and precisely that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. As appears from Bols Distilleries BV v Superior Yachts Services Ltd [2006] UKPC 45 (*italics added*) –

“The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice what amounts to ‘a good arguable case’ depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in Article 2(1) is ousted by Article 23(1), the claimants *must demonstrate ‘clearly and precisely’ that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties.* So, applying the ‘good arguable case’ standard, the claimant must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in Article 23(1) are met and that it can be established, clearly and precisely, that the clause confirmed jurisdiction on the court was the subject of consensus between the parties.”

[18] Thus the plaintiff must demonstrate clearly and precisely that the defendant agreed to the jurisdiction clause providing that jurisdiction should rest in Northern Ireland. That agreement may arise from an express jurisdiction clause in the contract entered into by the parties or secondly from express incorporation of a jurisdiction

clause or thirdly by a course of dealing between the parties that denotes incorporation of a jurisdiction clause.

[19] As to the first matter, an express term, the plaintiff referred to the invoices delivered to the defendant. The invoices contained the jurisdiction clause. The invoices cannot be relied on by the plaintiff because the invoices and any notice of the terms and conditions contained therein only came about after the contract had been entered into between the parties in July 2011. There was no express term as to jurisdiction included in the terms of the agreement entered into by the parties.

[20] Secondly, the term may be incorporated by reference to a jurisdiction clause or to another contract that contains a jurisdiction clause. In Africa Express Line Limited v Socofi SA [2009] EWHC 3223 (Comm) the plaintiff carrier contracted with the first defendant fruit exporter and sought to rely on a jurisdiction clause contained in a contract with the second defendant grower. It was held that the jurisdiction clause had not been incorporated. Christopher Clarke J noted that –

The authorities distinguished between (i) cases where parties agree to incorporate standard trading terms (either of their own or standard in the trade) which contain a jurisdiction clause, into their contract; and (ii) cases where the parties incorporate the provisions of an existing, separate contract with a third party (para 26).

Where the contract refers expressly to one party's standard terms it is not necessary for there to have been a specific reference to the jurisdiction clause for the purposes of establishing the real consent required by Article 23 (para 28). The contract must contain an express reference to the general conditions (containing the jurisdiction clause) and if the express reference is in a prior written offer the general conditions must have been communicated with the offer.

Where the terms of a wholly separate contract are incorporated, different considerations apply. Only those terms directly germane to the parties' agreement are carried over. The presumption is that these usually exclude a jurisdiction clause (para 30) - (by analogy with a bill of lading which incorporates all the conditions of a specified charterparty but will not usually incorporate a charterparty arbitration clause and also with a jurisdiction clause in an insurance (or reinsurance) contract into another reinsurance contract).

[21] In reaching agreement with the defendant the plaintiff did not make any express reference to the plaintiff's general conditions so as to incorporate the jurisdiction clause relied on by the plaintiff.

Similarly, the defendant, in so far as the reference to the jurisdiction clause in the main contract was intended by the defendant to support jurisdiction in the Republic,

did not make any express reference to the main contract in concluding the agreement with the plaintiff. In any event there would be a presumption that the jurisdiction clause would not be carried over from the main contract to the sub contract. The jurisdiction clause in the main contract is of no assistance to the present application.

[22] Thus the issue under Article 23 comes down to the course of dealing between the parties. The plaintiff contended that because it had entered into a number of such contracts with the defendant over the years and relied on the jurisdiction clause contained in the invoices submitted to the defendant in the previous dealings, the defendant must have known from the course of dealing that the jurisdiction clause was a term of the present sub contract.

[23] The plaintiff relied on Chitty on Contracts, 31<sup>st</sup> Edition at paragraph 12-011 which states (*italics added*) -

“Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions. But they may be incorporated by a “course of dealing” between the parties where *each party has led the other reasonably to believe that he intended that their rights and liabilities should be ascertained by reference to the terms of a document which has been consistently used by them in previous transactions.* It should, however, be noted that a more relaxed approach is adopted in Art 23 of Council Regulation 44/200156 to the degree of consensus required for the incorporation of an exclusive jurisdiction clause.”

[24] The plaintiff further relied on the decision of the European Court of Justice in Partenreederel MS. Tilly Russ v Haven & Vervebedrijf Nova N.V. [1985] 3 WLR 179 where reliance was sought to be placed on a jurisdiction clause in a bill of lading. Three propositions were stated as to a jurisdiction clause in a bill of lading signed by the carrier.

First of all the mere printing of the jurisdiction clause is not sufficient and the shipper must express in writing his consent to the conditions (para 16).

Second, an oral agreement to a jurisdiction clause, with the bill of lading regarded as written confirmation of the agreement, will be sufficient where the carrier signs the bill even if the shipper does not sign the bill (para 17).

Thirdly at paragraph [18] it was stated (*italics added*) -

“Finally, such a jurisdiction clause not signed by the shipper may still satisfy the requirements laid down in ... the convention, even in the absence of a prior oral agreement

relating to that clause, provided that the bill of lading *comes within the framework of a continuing business relationship* between the shipper and the carrier, in so far as *it is thereby established that that relationship is governed as a whole by general conditions containing the jurisdiction clause* drawn up by the author of the written confirmation, in this case the carrier (*Galeries Segoura Sprl v Rahim Bonakdarian* [1976] ECR 1851) and provided that the bills of lading are all issued on *pre-printed forms systematically containing such a jurisdiction clause*. In those circumstances, it would be contrary to good faith to deny the existence of a jurisdiction agreement.”

[25] The plaintiff referred to the expression “the framework of a continuing business relationship” and contended that the present subcontract was part of the framework of a continuing business relationship. The judgment of the ECJ requires the contract in question to fall within the framework of a continuing business relationship and further that it is “thereby established that the relationship is governed as a whole” by terms that include the jurisdiction clause.

[26] It has not been established that there was actual agreement by the defendant to the plaintiff’s jurisdiction clause. An on-going business relationship between plaintiff and defendant has been established. That business relationship involved a number of public works contracts. That relationship reflected the commonplace of recurring contractual arrangements. What must be established is that the overall relationship is governed by terms that include the jurisdiction clause. It has not been established that this sub contract came within the framework of a continuing business relationship that was governed by terms that included the jurisdiction clause.

[27] Similarly, to the extent that the defendant seeks to rely on a course of trading involving a continuing business relationship with the use of the standard form public works main contract, it has not been established that there was any overall relationship governed by those terms. However it is not necessary for the defendant to establish jurisdiction in the Republic on such a basis as the matter is governed by the Regulation.

[28] The outcome is that I have not been satisfied that there was actual consensus between the plaintiff and the defendant as to jurisdiction resting in Northern Ireland, nor was there such a course of dealing between the plaintiff and the defendant as established a relationship governed by terms that provided for jurisdiction in Northern Ireland. The Regulation provides that jurisdiction lies in the Republic as the domicile of the defendant and the place of performance of the contract. Jurisdiction does not lie in Northern Ireland. Accordingly I stay the proceedings in Northern Ireland.



