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Judgment: approved by the Court for handing down

(subject to editorial corrections)

08/009363/02

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

ROBERT GRACEY

Plaintiff;

AND

ROYAL AND SUN ALLIANCE

Defendant.

Master McCorry

[1] The defendant applies for: (i) an order pursuant to O.12, r.8 of the Supreme Court Rules (NI) 1980 that service of the Writ of Summons be set aside; or (ii) an order staying these proceedings on the ground of lack of jurisdiction, the proper forum being England and Wales. The Writ of Summons was issued on 25 January 2008 and a conditional appearance was entered, with leave, on 22 February 2008.

[2] The plaintiff claims damages of £42,204.31 by way of specific performance of a contract of insurance in respect of damage to goods in transit. The plaintiff is a fish importer and exporter and the claim relates to an insurance policy (RKK 655692) issued in respect of a consignment of fish which he was transporting from Northern Ireland to England. The policy which was arranged through a broker in Northern Ireland covered the period 5th August 2005 to 4th August 2006 during which time a consignment of fish was spoiled as a result of a fault in a refrigeration unit, giving rise to the present claim. General Condition 9 of the policy headed "Law Applicable to this Contract" states:

"The law applicable to this Policy and for disputes arising under or in connection with it shall be English Law and the English Courts shall have exclusive jurisdiction. Payment of the premium will be taken as evidence of acceptance of the law applicable. If any other law is to apply, it must be agreed by both parties in writing."

The plaintiff says that he did not see the term until after the contract had been made. However, there is clear reference to General Condition 9 on the proposal form immediately below where it was signed by the plaintiff. That reference was in the following terms:

"Applicable Law

The parties to the policy have the right to choose the law applicable to the policy. Unless the parties agree otherwise in writing any dispute concerning the interpretation of this proposal or the Policy shall be governed and construed in accordance with English law and shall be resolved within the exclusive jurisdiction of the courts in England and Wales."

No such agreement in writing was made in this instance.

[3] The starting point with respect to the relevant law is sections 16 and 17 and Schedule 4 of the Civil Jurisdiction and Judgments Act 1982 as amended. Section 16 (1) provides that: "The provisions set out in Schedule 4 … shall have effect for determining for each part of the United Kingdom, whether the courts of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where- (a) the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings); and (b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 22 of the Regulation (exclusive jurisdiction regardless of domicile)." Section 17 (1) provides: "Schedule 4 shall not apply to proceedings of any description listed in Schedule 5 or to proceedings in Scotland under any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds." Schedule 5 is not germane to these proceedings.

Article 1 of Schedule 4 provides: "Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part." Article 3 provides: A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question." Article 12 provides: "(1) If the parties have agreed that a court or the courts of a part of the United Kingdom are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, and, apart from this schedule, the agreement would otherwise be effective to confer jurisdiction under the law of that part, that court or those courts shall have jurisdiction."

Schedule 1, Section 3 headed "Jurisdiction in Matters Relating to Insurance", at Article 7 provides: "In matters relating to insurance, jurisdiction shall be determined by this Section ….." Article 8 provides:-

> "An insurer domiciled in a Contracting State may be sued-
> 1. in the courts of the state where he is domiciled, or

2. in another Contracting State, in the courts for the place where the policy-holder is domiciled, or

3. if he is a co-insured, in the courts of a Contracting State in which proceedings are brought against the leading insurer.

An insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State."

Finally, Section 29 of the Act provides: "Nothing in this Act shall prevent any court in the United Kingdom from staying, … striking out or dismissing any proceedings before it, on the grounds of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention" (Brussels Convention or as the case may be Lugano Convention).

[4] In Walker t/a The Country Garage v BMW (GB) Ltd [1990] 6 NIJB 1 Campbell J held that in cases where the parties are resident in different parts of the United Kingdom, an exclusive jurisdiction clause may be overridden in certain circumstances and the action stayed on the grounds of forum non conveniens. Carswell J in Adair Smith and Marcus Smith t/a Adair Smith Motors v Nissan Motor (GB) Limited (Unreported, 19.05.1993) was of like mind but he held that the circumstances in which a court would override an exclusive jurisdiction clause on grounds of forum non conveniens were limited. Adair Smith Motors, the plaintiff, sued the defendant in breach of contract when it failed to appoint it as sole Nissan dealer in the Newtownabbey area. In deciding whether or not to override the exclusive jurisdiction clause Carswell J followed the principles set out by Brandon J in The Eleftheria [1970] P94, 99-100, a summary of which was approved by the Court of Appeal in The El Amria [1981] 2 Lloyd's Rep 119, 123 and accepted as correct by the House of Lords in The Sennar [1985] 2 All ER 204. Those principles are:-

"(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court,

assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiff. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, and without prejudice to (4), the following matters, where they arise, may properly be regarded:-

(a) In what country the evidence on the issues of fact is situation, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

[5] The issue of whether or not to stay an action on grounds of forum non conveniens arose before Higgins L.J. in Batey v Todd Engineering (Staffs) Ltd (Unreported 07.03.07).
Somewhat unusually this case arose not from a commercial dispute but in a personal injuries action. There was no exclusive jurisdiction clause and the issue concerned the appropriateness of pursuing the action in the courts in Northern Ireland where the accident had occurred and early medical treatment had been provided: as opposed to England where both plaintiff and defendant were domiciled, continuing medical treatment had been provided and most of the medical experts were based. Higgins L.J. stated:-

"The locus classicus of the principle applicable in an application to stay proceedings on grounds of forum non conveniens is the speech of Lord Goff in

Spiliada Maritime Corp. v Cansulex Ltd 1987 1 A.C. 640 at page 466. In that case it was alleged that corrosion was caused to a chartered Liberian owned vessel when it was loaded in Vancouver, British Columbia, with sulphur bound for ports in India. Leave to serve proceedings on the shippers in Canada was granted by Staughton J, in the High Court in London, on the ground that the proceedings involved breach of a contract governed by English law. The Court of Appeal set aside the writ on the ground that it was impossible to conclude that the English court was distinctly more suitable for the ends of justice. The ship-owners appealed to the House of Lords who allowed the appeal. It was held that the determination whether a case was a proper one for service out of the jurisdiction required the court to apply the same principles as in an application to stay proceedings on the ground of forum non conveniens. Thus the court had to identify the forum in which the case could most suitably be tried for the interests of all the parties and for the ends of justice. Having reviewed the authorities Lord Goff, with whom the other members of the House agreed, set out a summary of the law and its application between pages 474 and 484. At page 474 he identified the fundamental principle in these terms -

> "In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In The Abidin Daver [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:
> 'the plea can never be sustained unless the court is satisfied

> that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'."

[6] Lord Goff then went on to emphasise that the application of the principle did not involve a consideration of what was convenient for the parties, rather what was the most suitable or appropriate jurisdiction. At page 476 he summarised the law in these terms -

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Société du Gaz case, 1926 S.C. (H.L.) 13, 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice

requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established................. In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795, per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in

the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin *478 Daver [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted.

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be

granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage." "

[6] In Antec International Limited v Biosafety USA Inc [2006] EWHC 47 (Comm) the courts in England had jurisdiction to hear the case because the plaintiff company was incorporated and domiciled in the United Kingdom. The claim concerned a distribution agreement which contained a clause whereby the parties submitted to "the non-exclusive jurisdiction of the English Courts". The defendant argued that the appropriate forum for trial was Florida. Gloster J summarised the applicable principles derived from the authorities as follows:

"i) The fact that the parties have freely negotiated a contract providing for the non- exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive ….

ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdicition unless there are overwhelming, or at least very strong, reasons for departing from this rule …..

iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain …"

[7] These authorities reveal a number of distinct and different approaches to the question of jurisdiction reflecting the different situations which arise including: the straightforward jurisdiction clause (exclusive or non-exclusive); the pure forum non conveniens case; the forum non conveniens versus exclusive jurisdiction case, and the Schedule 4 domestic United Kingdom cases as opposed to the United Kingdom jurisdiction versus foreign jurisdiction (international) cases. The plaintiff contends that the Antec case can be distinguished in the present situation because it is an international case and is not the appropriate authority in this instance. However, that did not for example prevent Carswell J in Adair Smith Motors v Nissan Motors from applying the Brandon J Eleftheria principles in what was not only a domestic United Kingdom Schedule 4 case, but also an exclusive jurisdiction clause versus forum non conveniens case. For their part the defendant seeks to distinguish the Spiliada Maritime Corporation approach adopted in Batey v Todd Engineering (Staffs) Ltd on the basis that it was a pure forum non conveniens case. This argument carries some force because unless it can be argued that the insurance contract was a consumer contract and the jurisdiction clause unfair this court cannot ignore the fact that there is an exclusive jurisdiction clause in this case, which it logically must do if this is to be regarded as a pure forum non conveniens case.

[8] The plaintiff filed an affidavit (sworn 18.11.09) in response to the defendant's grounding affidavit, in which he described the circumstances in which he took out the insurance policy. In summary he avers that the insurance policy was arranged by

Autoline Insurance Group Newry, and covered both the vehicle and refrigeration unit. The policy was "completely incidental" to his business, and he was "completely reliant" upon the broker. He completed the proposal form and returned it. He acknowledges signing the declaration and that he has "been made aware that there is a section referring to applicable law". Although he does not expressly say so I read this as meaning that he did not notice the reference to applicable law even though it is contained in the document immediately below where he signed. He goes on to state that he has no connection with England save that on occasion he delivers fish there. He claims that at no point was it put to him that he could choose the law applicable and if he had it would have been the law of Northern Ireland. He states that the insurance company has conducted all examinations of the vehicle in Northern Ireland and is relying upon Irish experts. The lorry was maintained in Northern Ireland and it will cause unnecessary expense and inconvenience to run this case in any other jurisdiction. The defendant did not challenge any of the factual averments contained in the plaintiff's affidavit, but argues that this is not a consumer contract but rather a commercial matter namely a contract of insurance between a business man and an insurance company arising out of the course of his business. This is not an unreasonable contention in the circumstances and given the content of the plaintiff's own affidavit, I find it correct.

[9] It follows that this is not a pure forum non conveniens case but a forum non conveniens versus exclusive jurisdiction case in the domestic United Kingdom context and it seems to me that the best guidance as to the applicable principles is to be found in the judgment of Carswell J in Adair Smith Motors v Nissan Motors (GB) Limited and his application in a situation similar to the present case of the Brandon J Eleftheria principles.

Applying those principles to the present case where the plaintiff has issued proceedings in Northern Ireland in breach of an exclusive jurisdiction clause, this court has discretion whether or not to grant a stay but in exercising that discretion ought to grant the stay unless strong cause for not doing so is shown. The burden of proving such strong cause is on the plaintiff. In exercising its discretion this court

should take into account all the circumstances of the case with particular regard to the following:-

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

[10] I will deal with each matter individually with respect to its application to the facts of this case. (a) On the basis of the evidence before me it appears that the country in which the evidence on the issues of fact is situated, or more readily available, is Northern Ireland. (b) There is no material difference between the law applicable in Northern Ireland and that applicable in England so far as the substantive issues in the action are concerned. (c) The plaintiff is closely connected with Northern Ireland with no real connection to England whereas the defendant is a major insurance company operating throughout the United Kingdom. (d) On the evidence before me it is difficult to say whether the defendant genuinely desires trial in England. The exclusive jurisdiction clause is not an absolute one in this instance, the insured being allowed the opportunity to nominate his preferred jurisdiction with England being, as it were, the default jurisdiction. (e) As the question concerns which domestic United Kingdom court should have jurisdiction it is not suggested that: if the action is stayed the plaintiff may be deprived of security for his claim; that he would be unable to enforce any judgment obtained; that he faces a time bar not applicable in Northern Ireland, or that he is unlikely to get a fair trial for political, racial, religious or other reasons.

[11] Mindful that the burden rests upon the plaintiff to show strong cause why a stay ought not to be granted, the question for this court is whether or not such strong cause can be found in factors: (a) the fact that the evidence on issues of fact is situated, or more readily available, in Northern Ireland; and (c) the plaintiff's close connection with this jurisdiction with little connection with England compared to the defendant's close connection with both jurisdictions?

[12] The practical difficulties which existed in terms of travel and access between Northern Ireland and England are much less now than previously and travel between the jurisdictions is a routine matter for many businesses. It must also be borne in mind that the test is not one of relative convenience. Against that this court must look at all the circumstances of the case including regard to questions of delay and also cost and the fact that the evidence as to issues of fact is situated in Northern Ireland or more readily available here are important considerations. As a major insurance company operating throughout the United Kingdom the running of the action here should not put the defendant to extra cost whereas running the case in England will inevitably be more costly for the plaintiff than running the case in Northern Ireland. Having regard to all the circumstances of the case and in particular factors 5(a) and (c) of the Eleftheria principles I find that the plaintiff has discharged the burden of showing strong cause why a stay ought to be refused in this case. I do not regard the alternative remedy sought by the defendant(setting aside service) to be appropriate in a jurisdiction case because standard practice is either to grant or refuse a stay rather than set aside a Writ of Summons which, jurisdiction issue aside, is perfectly valid (See Carswell J in Adair Smith Motors). I therefore dismiss the summons with costs to the Plaintiff and certify for counsel.