

LORD JUSTICE ALDOUS: I invite Lord Justice Robert Walker to give the first judgment.

LORD JUSTICE ROBERT WALKER: This is an appeal by Mr Heinz B. from an order of Pumfrey J made in the Chancery Division on 11th May 2001. The judge's order was made on an application by Mr B., the defendant below, for a declaration that the court had no jurisdiction to hear the action commenced against Mr B. by K. W. M. Ltd ("K."), the claimant below and the respondent in this court. By his order the judge dismissed that application. He also refused an application by K. to adduce expert evidence from a German lawyer, Dr Christian Frank, in rebuttal of the expert evidence of another German lawyer, Dr Gerd Coeler, adduced by Mr B.. That matter is raised in a respondent's notice.

The appeal raises questions on Article 5 of the Brussels Convention as incorporated into domestic law by the Civil Jurisdiction and Judgments Act 1982 and (as part of the inquiry called for under Article 5 of the Brussels Convention) on Article 4 of the Rome Convention as incorporated by the Contracts (Applicable Law) Act 1990.

The facts are reasonably simple and they are fully set out (in a manner which has not been challenged) in the judgment below. It is therefore possible to take them quite briefly.

Mr B. is a businessman resident and established in Germany, where he trades on his own account manufacturing and supplying machines for the waste disposal industry. He holds European patent (UK) no 0,106,268 for a rotary waste compactor (which is referred to in the particulars of claim as a B. Roto-Compactor). K. is based at St Albans and carries on business as a distributor of waste compactors. It is the exclusive distributor of another type of rotary waste compactor (referred to in the particulars of claim as the K. Roto-Compactor). There have been infringement proceedings in Germany between Mr B. and K., though little is known about these except for a reference (in the compromise letter dated 7th December 1999 to be mentioned below) to proceedings in the Court of Appeal of Oldenburg.

On 1st November 1999 Mr B. sent a letter (in the English language) to a customer of K., A. Stores Ltd (which is based in Warwickshire) threatening proceedings for patent infringement. This soon led to a letter dated 19th November 1999 to Mr B. from K.'s solicitors, Bird & Bird, drawing attention to the possibility of an action against him for threats under section 70 of the Patents Act 1977, and asking for written undertakings (in a specific form) that the threats would not be repeated to anyone in

the United Kingdom. The letter also asked for information about other communications which might have been sent. If the undertakings were not received by 9th December 1999 K. would, the letter indicated, seek an injunction without further notice.

On 7th December 1999 Mr B. responded in a letter (in the German language) which in the judge's view produced:

"... an exceedingly strongly arguable case that there is a concluded contract, at least in contemplation of English law, that Herr B. will not do the acts, at least those acts specified in numbered paragraphs 1, 2 and 3 of his letter."

Those paragraphs followed very closely - although not with absolute precision, at any rate in literal translation - the undertakings and information which Bird & Bird had asked for. The negative undertakings in paragraphs 2 and 3 were in the general form (in translation):

"We will in the future neither make (nor allow to be made) any communication to any individual or company in the UK, in which [etc] ..."

Bird & Bird acknowledged the letter with thanks and no threats action was commenced.

By a claim form issued on 2nd August 2000 K. complained that in breach of the undertakings in the written agreement constituted by the exchange of correspondence Mr B. had by letters dated 12th and 19th June 2000 made further threats, both to a company called LIDL UK based in Wimbledon and to another A. group company (incorporated in Germany but trading from a branch at Darlington). These threats were made either by Mr B. himself or by his United Kingdom distributor, a company then fairly recently renamed as B. Direct Ltd (as to whose management Mr B. rather implausibly denied any knowledge). On 8th December 2000 Mr B. made his application challenging the court's jurisdiction.

The judge correctly observed that Article 5 of the Brussels Convention provides exceptions to the general rule that a defendant is to be sued in the courts of the state where he is domiciled and that it is therefore to receive a relatively restrictive interpretation. Article 5(1) provides that a person domiciled in one contracting state may be sued in the courts of another state:

"in matters relating to a contract, in the courts for the place of performance of the obligation in question."

It is not seriously challenged, on this appeal, that the action does relate to a contract. It is agreed that the judge had three main issues to address:

What was "the obligation in question" (that to be decided as a matter of English domestic law)?

What was the law governing the obligation in question (to be decided by English conflict of laws principles, including the Contracts (Applicable Law) Act 1990)?

What was the place of performance of the obligation in question (to be decided under the governing law as ascertained in answer to the second question)?

In his judgment the judge began his discussion of the matter by referring to two questions (that is, identifying the obligation in question and the place of its performance) but there is to my mind no possible doubt but that the judge also recognised the importance of identifying the governing law (or as it used to be called the proper law): indeed the major part of his legal reasoning is devoted to that topic. The judge identified the obligation in question as a negative obligation whose nature could be ascertained from the words which I have already quoted:

"... neither make (nor allow to be made) any communication to any individual or company in the UK ..."

Mr Philip Punwar (appearing in this court, as he did below, for Mr B.) has in his written and oral submissions criticised the judge for answering the first question by repeating the words of the contractual document without elucidating their exact meaning. Mr Punwar has submitted that there is a question of construction to be decided. He has pointed out that the particulars of claim complain of letters being written and sent, and (as he rightly said) for the most part written and sent from Germany, not of letters being received in the United Kingdom. Mr Punwar has also drawn attention to some small (and to my mind insignificant) differences between Bird & Bird's letter seeking the undertakings and the English translation of Mr B.'s letter giving those undertakings.

In the respondent's written skeleton argument (prepared by Mr Giles Fernando, who appeared below and has also appeared in this court, although in this court led by Mr Michael Silverleaf QC) it is pointed out that the word "communication" (or indeed "communications" in the plural) plainly imports that information is not only sent, but also received: as Mr Fernando has put it, you may shout as loud as you like, but if you are not heard you have not succeeded in communicating anything. I am not persuaded by Mr Punwar's criticisms of the judge's answer to the first question. I see that the wording of the pleading in the particulars of claim is open to criticism, and in due course it may be amended. As a question

of substance, however, it seems to me that the judge correctly identified the obligation in question.

The second question (the ascertainment of the governing law) sent the judge to Article 4 of the Rome Convention, and in particular to paragraphs (1), (2) and (5). Neither side argued in this court for an express or implied choice of law under Article 3. Article 4 paragraphs (1), (2) and (5) are in the following terms:

"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated."

I then pass over paragraphs (3) and (4) and come to paragraph (5):

"5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

I should add that paragraph (3) is concerned with contracts relating to the ownership or use of immovable property, and paragraph (4) is concerned with contracts for the carriage of goods. Those two are therefore particular special cases.

The judge held that the governing law of the contract was the law of England, on the basis that paragraph (5) of Article 4 displaced paragraph (2), and that the contract was more closely connected with the United Kingdom. On that basis he went on to answer the third question in favour of K., that is by deciding that the place of performance of the obligation in question was the United Kingdom. But he also held that the result would

have been the same if (contrary to his view) Article 4 paragraph (2) had applied and the governing law had been the law of Germany.

These conclusions provided alternative answers (but leading to the same ultimate conclusion) on what I have called the second and third questions.

Mr Punwar has criticised the judge's reasoning on both the second and the third questions. On the second question the judge commented that:

"The interrelationship of the second sentence or the second part of paragraph 5 with paragraph 2 and, thus, paragraph 1 is not, it seems to me, conceptually clear."

The judge went on to avoid that perceived difficulty, as I understand it, by asking himself what was "the place of characteristic performance" of the contract because that was relevant both to paragraph (2) and to paragraph (5) of Article 4.

Mr Punwar has in his written submissions criticised the judge for coining and using the expression "the place of characteristic performance" and I have to say that I do see some little force in that criticism. Paragraph (2) refers to "the performance which is characteristic of the contract" (abbreviated in paragraph (5) to "the characteristic performance") and paragraph (2) establishes a rebuttable presumption that the closest connection for the purposes of the basic rule in paragraph (1) is with the habitual residence (or place of establishment) of the party who is to effect (to use the abbreviation) the characteristic performance.

I would accept that the way the judge expressed this part of his judgment may have displayed or led to some degree of confusion. But any such confusion must in my view have been dispelled by the end of the next page of the judgment, where the judge said:

"It cannot be emphasised too strongly that the connection which was made through paragraph 2 of Article 4 of the Rome Convention is a connection with a person and not with a place."

The judge therefore correctly concluded that if Article 4(2) was not displaced by paragraph (5), German law would be the governing law. So the judge proceeded to consider whether paragraph (5) did displace paragraph (2).

At this point I must come back to what the judge said about the relationship between paragraphs (1), (2) and (5) of Article 4 not being conceptually clear. There are two schools of thought on this topic, as was very clearly explained by Morison J in *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 4 All ER 283, at

paragraphs 9 and following. After discussing counsel's submissions in that case, Morison J said, at page 287 (paragraph 15):

"It seems to me not to be helpful to characterise art 4 by asking whether there is a one, two or three-stage test. Nor am I attracted to the notion that the words of the article should be twisted so as to accord with what is thought to be the intention of the draftsman. With an international convention of this sort, I prefer to stay with the words and apply them as best as possible. On that basis, it seems to me that the presumption in article 4.2 'shall be disregarded' (not rebutted) if it appears from the circumstances as a whole that the contract is more closely connected with Germany rather than England. I accept that it is for the defendant to show that the presumption should be disregarded, by establishing factors which point to Germany. I accept that this will be more readily achievable where the place of performance is different from the place of the performer's business. But in carrying out what must be regarded as a comparative exercise, due weight must be given to the factor identified in art 4.2."

Mr Punwar has criticised that approach as being too literal, and, correspondingly, as being insufficiently purposive. However, it must be noted that Morison J had already referred to Article 18 of the Convention which insists on the need for a uniform and autonomous interpretation, and to the problems of a purposive construction of treaty provisions which represent a compromise (as appears from the relevant passages in the authoritative commentary in the Guilianno-Lagarde Report, OJEC C 282 at pp. 20-23).

Morison J's reference to the centre of gravity of the contractual dispute (which comes just after the passage which I have read) echoes the Guilianno-Lagarde Report's reference (at page 20) to "the centre of gravity and the socio-economic function of the contractual transaction."

Morison J did not express a clear adherence to either of the two schools of thought which he identified. He determined the issue before him on the facts before him and on what he saw as a fair interpretation of Article 4. I do not think it necessary or appropriate for this court (especially in a case in which we have not found it necessary to hear full argument from both sides) to go any further than that. The two schools of thought may be seen as representing the familiar tension between the advantages of certainty on the one hand and flexibility on the other hand. This is not to my mind an appropriate occasion on which to express any concluded views on that difficult topic.

The judge concluded that the contract was "exceedingly strongly connected" with the United Kingdom and was "objectively more closely

connected with the United Kingdom than it is with Germany". He reached that conclusion mainly by reference to (first) the objective of the contract being to achieve results (albeit what might be called negative results) within the United Kingdom; (secondly) the substratum of the contract being K.'s assertion of a purely English right of action for threats under section 70 of the Patents Act 1977; and (thirdly and fourthly, because I think these points are really the same) that the contract was intended effectively to compromise a proposed action which would inevitably have been an English action.

Much of Mr Punwar's criticism of this part of the judge's judgment appears to me, on closer examination and with all respect to Mr Punwar, to go to form rather than substance. Mr Punwar says that the judge failed to answer the first question or to grapple with the point of construction which in his submission it raised, that the judge then conflated the first question with the third question, and that the judge also mixed up the second and third questions.

I have already rejected the first of these criticisms and I have to say I do not think there is much substance in the others. On the second question the judge gave clear reasons for applying Article 4(5) of the Rome Convention. Mr Punwar's criticisms of his train of reasoning stress various points of connection with Germany (and those points do exist) but I am not at all persuaded that they come anywhere near outweighing the factors identified and relied on by the judge as substantial connections with the United Kingdom. I have already indicated that I accept the submission that "communication" (or communications in the plural) to (or with) persons in the United Kingdom points to a result, albeit a negative result, to be achieved in the United Kingdom. I do not think the judge was wrong to attach weight to what he called the substratum of the contract. The proposed threats action did indeed provide the centre of gravity of the matter.

Nor am I impressed by the criticism that the judge was inaccurate in his references to the United Kingdom (on the one hand) and England (no doubt including Wales) on the other hand. Mr Punwar's written submission that:

"the United Kingdom is a reference to a legal system and not a specific country"

seems to me, with respect, to be a misstatement of the legal position (which is dealt with in domestic law, and within what the judge referred to as the black box of domestic law, by Schedule 4 to the Civil Jurisdiction and Judgments Act 1982).

The judge approached the third question on alternative bases as to the governing law. On the basis that it was English law (that being the relevant component of the law of the United Kingdom) he concluded that the place of performance of the obligation in question was the United Kingdom. Much of the reasoning relevant to the first question applies here also. The judge distinguished the decision of this court in *Boss Group Ltd v Boss France SA* [1996] 4 All ER 970. That was a claim for a declaration as to the non-existence of a distributorship contract, which if established would have imposed an obligation (among other obligations) on an English company (the claimant) not to supply forklift trucks for distribution in France otherwise than to the defendant, a French company (both companies had formerly been in the same group but had ended up in separate hands after the group went into receivership). In the past the products had been delivered in England, ex works Leighton Buzzard. That was the context in which Saville LJ (with whom Otton and Russell LJJ agreed) said (at page 976):

"As to what could be described as the negative obligation not to supply others, I take the view that this is probably performable everywhere, including both here and France ..."

In any case the more important positive obligation alleged in that case, to supply the products to the defendants, was plainly to be performed in England. I agree with the judge that the *Boss* case is distinguishable on the facts. In this case the negative obligation was to achieve a state of affairs within the United Kingdom, as was expressly stated in Mr B.'s letter.

The general observations of Finlay LJ in the Supreme Court of Ireland in *Hanbridge Services Ltd v Aerospace Communications Ltd* [1993] IL.Pr 778, at 783 paragraph 13, do not to my mind cast doubt on that conclusion or provide the court with much assistance in the circumstances of this case.

The judge then considered the position on the basis that (contrary to his view) Article 4(2) applied and the governing law was German law. He had evidence of German law from Dr Coeler which he quoted in his judgment. He also set out section 269(1) of the German Civil Code which states in translation:

"If a place of performance is neither fixed nor can be deduced from the circumstances, especially from the nature of the obligation, performance shall be effected in the place where the debtor [or perhaps better the obligor] had his residence at the time when the obligation arose."



The judge held that the place of performance could in this case be deduced from the circumstances.

The respondent's notice, on which we have not heard argument, sought to reverse the judge's decision not to let in the evidence of Dr Frank on behalf of K.. In my view it is unnecessary to go into the circumstances in which the judge reached that decision. As I say, we have not heard argument on it. Nor in my view is it necessary for the resolution of this appeal.

At the end of his oral submissions Mr Punwar suggested that if in doubt this court should make a reference to the Court of Justice of the European Communities under Article 2 of the 1971 Protocol to the Brussels Convention. In my view, there is no need to make such a reference in this case.

For all these reasons, I would dismiss this appeal so far as the original grounds of appeal are concerned. It remains, however, to consider a point raised in an application to add an additional ground of appeal. That relates to a procedural point which I shall have to explain at a little length.

When the proceedings were first commenced and served on Mr B., he decided (as was his right) to challenge jurisdiction under CPR 11. Consequently, his acknowledgement of service was made only for the temporary purpose of challenging jurisdiction. CPR 11.1(7) provides that in the event of a challenge to jurisdiction being made and being unsuccessful, an acknowledgement of service made for that purpose is to cease to have effect.

What seems to have happened in this case was that when the judge (after reserving judgment overnight) gave judgment on 11th May 2001, there was at the end of his judgment argument as to what should be embodied in the order. Mr Punwar tells us (and it is not of course challenged) that he specifically referred to CPR 11.1(7) and submitted that certain parts of the order which the judge indicated he was minded to make would not be appropriate. The judge, having heard that submission, gave directions which are embodied in the order which was eventually perfected (with a manuscript amendment which I must mention in a moment) on 26th June 2001, that is almost six weeks after the date when judgment was given.

The order as perfected deals in paragraph 1 with the application to adduce further evidence. In paragraph 2 it contains the dismissal of the application for a declaration that the court has no jurisdiction. Paragraph 3 stayed proceedings in the action until 25th May 2001 (a date which had already passed a month before by the time the order was perfected) in order to enable Mr B. to decide whether or not to bring a claim for patent

infringement by way of counterclaim. Paragraph 4 was in the following terms:

"In the event that the Defendant does not before 4pm on 25 May 2001 bring by way of counterclaim proceedings for patent infringement against the Claimant, the Defendant do serve [and then the next five words were inserted in manuscript by the judge himself] his acknowledgement of service and [and then I continue with the original text] Defence (if any) by 4pm on 8 June 2001."

Nothing turns on paragraphs 5, 6 and 7.

Mr Punwar's argument is that he had specifically raised an objection based on CPR 11.1(7) which the judge disregarded in giving directions while it remained uncertain whether or not his client would take the opportunity of putting in a second and final acknowledgement of service.

Mr Silverleaf has submitted that the lodging of an acknowledgement of service is not a precondition to the court having jurisdiction to give directions, although in the nature of things it is no doubt likely to come before any directions are given. He accepts that acknowledgement of service is of great importance in a case with an overseas element, as being indicative of the defendant's submission to the jurisdiction.

Mr Punwar (in reply) accepted that a letter to the judge which he sent on 21st June 2001 may not have spelt out his objection with complete clarity. Nevertheless, he says the objection was there and the judge had no jurisdiction, as he submits, to give the directions embodied in paragraphs 3 and 4 of the order.

I have to say that, bearing in mind the time which has elapsed since then, this point seems to me highly technical. Moreover, to my mind it is not only highly technical but also not ultimately sound. I would not accept that the absence of an acknowledgement of service deprived the judge of jurisdiction to give any directions in the matter. Indeed, as Mr Silverleaf pointed out, taken to its ultimate conclusion that argument would lead to the absurd conclusion that the judge had no jurisdiction and no power to grant an extension of time for the second acknowledgement of service.

Mr Punwar referred in his reply on this part of the case to the overriding objective in CPR 1. But for my part I cannot see any possible infringement of the overriding objection if this court dismisses the appeal and simply gives such directions as may be necessary in order to update those which the judge gave in his order under appeal.

For those reasons, I would dismiss this appeal.

LORD JUSTICE KEENE: I agree.

LORD JUSTICE ALDOUS: I also agree.

ORDER: Appeal dismissed with costs assessed in the sum of £25,000; if the claimant wishes to serve an acknowledgement of service it should be served by 4pm on 14th February; permission to appeal to the House of Lords refused.

(Order not part of approved judgment)