

JUDGMENT OF THE COURT (Third Chamber)

11 October 2007*

In Case C-98/06,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Högsta domstolen (Sweden), made by decision of 8 February 2006, received at the Court on 20 February 2006, in the proceedings

Freeport plc,

v

Olle Arnoldsson,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Löhmus, J. Klučka (Rapporteur), P. Lindh and A. Arabadjiev, Judges,

* Language of the case: Swedish.

Advocate General: P. Mengozzi,
Registrar: R. Grass,

after considering the observations submitted on behalf of:

- Freeport plc, by M. Tagaeus and C. Björndal, advokater,
- Mr Arnoldsson, by A. Bengtsson, advokat,
- the Commission of the European Communities, by L. Parpala, V. Bottka and A.-M. Rouchaud-Joët, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2007,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

- 2 The reference has been made in the context of proceedings between a company incorporated under English law, Freeport plc ('Freeport'), and Mr Arnoldsson, who has sued the company before a court other than that for the place where it has its head office.

Legal context

- 3 Recitals 2, 11, 12 and 15 in the preamble to Regulation No 44/2001 state:

'(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

...

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. ...

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

...

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. ...'

4 Article 2(1) of the Regulation, which forms part of Chapter II, Section 1 thereof, under the heading 'General provisions', provides:

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

5 Pursuant to Article 3 of the Regulation, which also forms part of Chapter II, Section 1 thereof:

'1. 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.

2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.’

- 6 Article 5 of Regulation No 44/2001, which forms part of Chapter II, Section 2, headed ‘Special jurisdiction’, provides that a person domiciled in a Member State may be sued in another Member State on certain conditions.
- 7 In addition, Article 6(1) and (2) of that regulation, which also forms part of Section 2 thereof, provides:

‘A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims 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;
2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case’.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 8 A company with which Mr Arnoldsson worked has, since 1996, carried out, 'factory shop' retail centre development projects in various places in Europe. Freeport acquired a number of those projects from that company, in particular the most advanced of them, in Kungsbacka (Sweden).

- 9 At a meeting on 11 August 1999 between Mr Arnoldsson and the managing director of Freeport, an oral agreement was concluded between them that the former would personally receive a GBP 500 000 success fee when the Kungsbacka factory shop opened.

- 10 By a written undertaking of 27 August 1999, Freeport confirmed that oral agreement but added three conditions to payment of the fee. Mr Arnoldsson accepted those conditions, one of which provided for the payment which he would receive to be made by the company which was to become the owner of the Kungsbacka site. After fresh negotiations, on 13 September 1999 Freeport sent Mr Arnoldsson written confirmation of the agreement concluded with him ('the agreement').

- 11 Inaugurated on 15 November 2001, the Kungsbacka factory shop is owned by a company incorporated under Swedish law, Freeport Leisure (Sweden) AB ('Freeport AB'), which manages it. The company is held by one of Freeport's subsidiaries, of which Freeport AB is a wholly owned subsidiary.

- 12 Mr Arnoldsson has asked both Freeport AB and Freeport to pay the fee on which he agreed with Freeport. Freeport AB refused the request on the ground that it is not a party to the agreement and that, furthermore, it did not exist when the agreement was concluded.

- 13 Since he had still not received payment, on 5 February 2003 Mr Arnoldsson brought an action before the Göteborgs tingsrätt (Göteborg District Court) seeking an order against both companies jointly to pay him the sum of GBP 500 000 or its equivalent in Swedish currency, together with interest.
- 14 To establish that that court had jurisdiction with regard to Freeport, Mr Arnoldsson based his action on Article 6(1) of Regulation No 44/2001.
- 15 Freeport pleaded that it was not established in Sweden and that the claims were not so closely connected as to confer jurisdiction on the Göteborgs tingsrätt pursuant to that provision. In that regard, Freeport maintained that the action against it had a contractual basis, whereas the action against Freeport AB was based in tort, delict or quasi-delict, since there was no contractual relationship between Mr Arnoldsson and that company. The difference in the legal bases of the actions against Freeport AB and Freeport was such as to exclude application of Article 6(1) of Regulation No 44/2001, since it could not be shown that the two actions were connected.
- 16 The plea of inadmissibility was rejected by the Göteborgs tingsrätt.
- 17 Freeport appealed before the Hovrätten för Västra Sverige (Western Sweden Court of Appeal), which dismissed its appeal.
- 18 The company then took the case to the Högsta domstolen (Supreme Court), which points out, in its decision for reference, that the Court of Justice held in Case 189/87 *Kalfelis* [1988] ECR 5565 that a court which has jurisdiction under Article 5(3) of the

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; 'the Brussels Convention') over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based. According to the national court, the Court of Justice concluded therefrom, in Case C-51/97 *Réunion Européenne and Others* [1998] ECR I-6511, paragraph 50, that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected. Thus, the national court wishes to ascertain whether the claim against Freeport AB is contractual in nature despite the fact that the undertaking was not given by either the company's legal representative or its agent.

19 Furthermore, that court points out that, in paragraphs 8 and 9 of the judgments in *Kalfelis*, the Court held that the exception laid down in Article 6(1) of the Brussels Convention, derogating from the principle that the courts of the State of domicile of the defendant have jurisdiction, must be interpreted in such a way that it cannot call into question the very existence of that principle, inter alia by allowing the plaintiff to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled. However, the national court observes that, although Article 6(2) of Regulation No 44/2001 expressly envisages such a situation, that is not true of Article 6(1). It asks how Article 6(1) should be interpreted in that regard.

20 In addition, the national court has doubts as to whether the question of the probability of the action brought against the defendant before the courts of the Member State where he is domiciled succeeding must be assessed differently when examining the question of the likelihood of irreconcilable judgments referred to in Article 6(1) of Regulation No 44/2001. Before that court, Freeport submitted that there was no likelihood of irreconcilable judgments. In its view, under Swedish law agreements cannot require a third party, in the present case Freeport AB, to make a

payment. Freeport concluded therefrom that the action brought against Freeport AB was devoid of legal basis and was brought solely for the purpose of suing Freeport before a Swedish court.

21 In those circumstances, the Högsta domstolen decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

- '(1) Is an action based on an alleged obligation on the part of a joint-stock company to make a payment as a consequence of an undertaking given to be regarded as being based on contract for the application of Article 6(1) of ... Regulation [No 44/2001], even though the party which gave the undertaking was neither a representative nor an agent of the company at the relevant time?

- (2) If the answer to the first question is in the affirmative: is it a precondition for jurisdiction under Article 6(1), in addition to the conditions expressly laid down therein, that the action against a defendant before the courts of the State where he is domiciled was not brought solely in order to have a claim against another defendant heard by a court other than that which would otherwise have had jurisdiction to hear the case?

- (3) If the answer to the second question is in the negative: should the likelihood of success of an action against a party before the courts of the State where he is domiciled otherwise be taken into account in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1)?'

The questions referred for a preliminary ruling

The first question

- 22 By its first question, the national court asks whether an action based on an alleged obligation on the part of a joint-stock company to make a payment, as a consequence of an undertaking given, is contractual in nature as regards application of Article 6(1) of Regulation No 44/2001, even though the party which gave the undertaking was neither a representative nor an agent of the company.

Observations submitted to the Court

- 23 Both the parties to the main proceedings and the Commission of the European Communities note that the expression ‘matters relating to contract’ is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another. In that regard, they refer to the case-law of the Court relating to Article 5(1) of the Brussels Convention, the provisions of which are essentially identical to those of Regulation No 44/2001 (see, *inter alia*, Case C-26/91 *Handte* [1992] ECR I-3967, paragraph 15; *Réunion Européenne and Others*, paragraph 17; and C-334/00 *Tacconi* [2002] ECR I-7357, paragraph 23).
- 24 On the basis of that observation, Freeport pleads that there was no contractual relationship between Freeport AB and Mr Arnoldsson, the former having given no undertaking to the latter. It submits that no legal representative or agent of Freeport

AB gave any undertaking to him and nor did the company ratify the agreement for payment of the sum due.

25 Mr Arnoldsson agrees that, at the date of conclusion of the agreement, no company owned the Kungsbacka factory shop, which was not yet open. He states that on that date there could have been no legal representative or agent in a position to represent Freeport AB. However, he submits, firstly, that Freeport concluded the agreement both on its own account and for the company which would own that shop in the future and, secondly, that under such an agreement Freeport gave instructions to the future company, that is to say Freeport AB, to pay Mr Arnoldsson the sum due. Furthermore, by joining the Freeport group, Freeport AB accepted its obligation to make the payment.

26 Accordingly, Mr Arnoldsson takes the view that the obligation set out in the agreement, freely accepted by Freeport AB, is not, it is true, non-contractual in nature but, nevertheless, forms part of a contractual relationship. Thus he pleads that, for the purposes of application of Article 6(1) of Regulation No 44/2001, the action brought against both Freeport AB and Freeport is an action to establish contractual liability.

27 The Commission takes the view that it is for the national court to examine the legal relationship between Freeport AB and Mr Arnoldsson in order to determine whether it may be regarded as contractual. That court could have regard to all the factual and legal circumstances of the case in the main proceedings in order to establish whether Freeport was, when the agreement was concluded, the legal representative or agent of Freeport AB.

28 However, the Commission takes the view that the first question referred is not relevant to an interpretation of Article 6(1) of Regulation No 44/2001, so that an answer to that question is redundant.

- 29 In its view, the first question seeks to ascertain whether Article 6(1) of Regulation No 44/2001 may be interpreted in the light of the considerations in paragraph 50 of the judgment in *Réunion Européenne and Others*. The factual and legal context of the dispute in the main proceedings is completely different from that of that judgment. Unlike the latter case, where the main proceedings had been brought before a court of a Member State in which none of the defendants was domiciled, the dispute in the main proceedings concerns the application of Article 6(1) of Regulation No 44/2001, since Mr Arnoldsson brought his action before a Swedish court in whose jurisdiction Freeport AB has its head office. According to the Commission, paragraph 50 of the judgment in *Réunion Européenne and Others* constitutes merely a reminder of the general rule that an exception to the principle of jurisdiction based on the defendant's domicile must be interpreted strictly.
- 30 In the event that the Court should consider it necessary to answer the first question referred, the Commission submits that the difference between a claim based on contract and a claim based on tort or delict does not exclude application of Article 6(1) of Regulation No 44/2001, but may be taken into consideration by the national court in the context of its assessment of the condition that there be a degree of connection between the claims that justifies their being heard and determined together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Answer of the Court

- 31 It is established case-law that, in the procedure laid down by Article 234 EC providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end the Court of Justice may have to reformulate the questions referred to it (Case C-210/04 *FCE Bank* [2006] ECR I-2803, paragraph 21, and the case-law cited).

- 32 The national court asks whether an action such as that brought by Mr Arnoldsson against Freeport AB is contractual in nature, since that court takes as its premise that Article 6(1) of Regulation No 44/2001 applies only where actions brought against different defendants before the courts for the place where any one of them is domiciled have identical legal bases.
- 33 Consequently, it is appropriate to consider whether that premise is in accordance with Regulation No 44/2001 by examining, essentially, whether Article 6(1) of that regulation applies where actions brought against a number of defendants before the courts for the place where any one of them is domiciled have different legal bases.
- 34 In that regard, the jurisdiction provided for in Article 2 of Regulation No 44/2001, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general principle and it is only by way of derogation from that principle that that regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (see, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 22, and the case-law cited).
- 35 Moreover, it is settled case-law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged by Regulation No 44/2001 (*Reisch Montage*, paragraph 23, and the case-law cited).

- 36 As stated in recital 11 in the preamble to Regulation No 44/2001, the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.
- 37 With regard to the special jurisdiction laid down in Article 6(1) of Regulation No 44/2001, that provision states that a defendant may be sued, where there are a number of defendants, in the courts for the place where any one of them is domiciled, provided 'the claims 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'.
- 38 It is not apparent from the wording of Article 6(1) of Regulation No 44/2001 that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases.
- 39 As the Court has already held, for Article 6(1) of the Brussels Convention to apply, it must be ascertained whether, between various claims brought by the same plaintiff against different defendants, there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings (*Kalfelis*, paragraph 13).

- 40 The Court has had occasion to point out that, in order that decisions may be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact (Case C-539/03 *Roche Nederland and Others* [2006] ECR I-6535, paragraph 26).
- 41 It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgments if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court.
- 42 That interpretation cannot be called into question by paragraph 50 of the judgment in *Réunion Européenne and Others*.
- 43 As the Commission has rightly pointed out, that judgment has a factual and legal context different from that of the dispute in the present main proceedings. Firstly, it was the application of Article 5(1) and (3) of the Brussels Convention which was at issue in that judgment and not that of Article 6(1) of the Convention.
- 44 Secondly, that judgment, unlike the present case, concerned overlapping special jurisdiction based on Article 5(3) of the Brussels Convention to hear an action in tort or delict and special jurisdiction to hear an action based in contract, on the ground that there was a connection between the two actions. In other words, the

judgment in *Réunion Européenne and Others* relates to an action brought before a court in a Member State where none of the defendants to the main proceedings was domiciled, whereas in the present case the action was brought, in application of Article 6(1) of Regulation No 44/2001, before the court for the place where one of the defendants in the main proceedings has its head office.

- 45 It was in the context of Article 5(3) of the Brussels Convention that the Court of Justice was able to conclude that two claims in one action, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected (*Réunion Européenne and Others*, paragraph 50).
- 46 To accept that jurisdiction based on Article 5 of Regulation No 44/2001, which constitutes special jurisdiction limited to an exhaustive list of cases, could serve as the basis on which to hear other actions would undermine the scheme of the Regulation. Conversely, where a court's jurisdiction is based on Article 2 of that regulation, as is the case in the main proceedings, application of Article 6(1) of the Regulation becomes possible if the conditions set out in that provision and referred to in paragraphs 39 and 40 of this judgment are met, without there being any need for the actions brought to have identical legal bases.
- 47 Having regard to the foregoing considerations, the answer to the first question must be that Article 6(1) of Regulation No 44/2001 is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision.

The second question

48 By its second question, the national court asks essentially whether application of Article 6(1) of Regulation No 44/2001 presupposes that the action was not brought against a number of defendants with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

Observations submitted to the Court

49 Mr Arnoldsson and the Commission are of the opinion that the special jurisdiction laid down in Article 6(1) of Regulation No 44/2001, unlike that laid down in Article 6(2), is not subject to the condition that the action must not have been brought for the sole purpose of ousting the jurisdiction of the courts for the place where one of the defendants is domiciled. They consider, essentially, that the condition referred to in Article 6(1) of Regulation No 44/2001 concerning the existence of a connection between the claims is sufficiently strict to avoid the risk of misuse of the rules on jurisdiction.

50 However, Freeport takes the view that that risk justifies application of Article 6(1) of Regulation No 44/2001 being subject to the same condition as that set out in Article 6(2). Firstly, the latter condition, prohibiting misuse of the rules on jurisdiction laid down by that regulation, is a general principle which must also be observed in the application of Article 6(1) of the Regulation. Secondly, application of such a condition is justified, *inter alia*, by the principle of legal certainty and by the requirement that the principle that a defendant may be sued only before the courts for the place where he is domiciled should not be undermined.

Answer of the Court

- 51 As the national court rightly pointed out, Article 6(1) of Regulation No 44/2001, unlike Article 6(2), does not expressly make provision for a case in which an action is brought solely in order to remove the party sued from the jurisdiction of the court which would be competent in his case. The Commission stated on that point that, when amending the Brussels Convention, the Member States had refused to include the proviso contained in Article 6(2) in Article 6(1), taking the view that the general condition that the claims be connected was more objective.
- 52 It should be recalled that, after mentioning the possibility that a plaintiff could bring a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants was domiciled, the Court ruled, in *Kalfelis*, that it was necessary, in order to exclude such a possibility, for there to be a connection between the claims brought against each of the defendants. It held that the rule laid down in Article 6(1) of the Brussels Convention applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
- 53 Thus, that requirement of a connection did not derive from the wording of Article 6(1) of the Brussels Convention but was inferred from that provision by the Court in order to prevent the exception to the principle that jurisdiction is vested in the courts of the State of the defendant's domicile laid down in Article 6(1) from calling into question the very existence of that principle (*Kalfelis*, paragraph 8). That requirement, subsequently confirmed by the judgment in *Réunion Européenne and*

Others, paragraph 48, was expressly enshrined in the drafting of Article 6(1) of Regulation No 44/2001, the successor to the Brussels Convention (*Roche Nederland and Others*, paragraph 21).

54 In those circumstances, the answer to the question referred must be that Article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.

The third question

55 By its third question, the national court asks essentially whether the likelihood of success of an action against a party before the courts of the State where he is domiciled is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1).

56 However, it is apparent from the account given by the national court that the question was referred on the premise that, for there to be connection between a number of claims, those claims should have the same legal basis. Such was the context in which Freeport submitted that there was no risk of irreconcilable judgments since, under Swedish law, agreements cannot oblige a third party to make a payment and, consequently, the action brought against Freeport AB was devoid of legal basis.

57 As has been stated in answer to the first question, Article 6(1) of Regulation No 44/2001 may apply where actions brought against different defendants have different legal bases.

58 In view of that answer, there is no need to give a reply to the third question.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

- 1. Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision.**

2. **Article 6(1) of Regulation No 44/2001 applies where claims brought against different defendants are connected when the proceedings are instituted, that is to say, where it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings, without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled.**

[Signatures]