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Print Concept GmbH v GEW (EC) Ltd

COURT OF APPEAL (CIVIL DIVISION)

[2001] EWCA Civ 352, (Transcript: Smith Bernal)

HEARING-DATES: 2 MARCH 2001

2 MARCH 2001

COUNSEL:

M Briggs QC for the Appellant; R Plender QC and P Infield for the Respondent

PANEL: TUCKEY, LONGMORE LJ, SIR CHRISTOPHER SLADE

JUDGMENTBY-1: LONGMORE LJ

JUDGMENT-1:

LONGMORE LJ: [1] If parties to what is often called a distributorship agreement do business in different countries but do not expressly agree what law is to govern their contractual relationship, it is often difficult to decide what that law should be. That is the problem which arises in this case where the parties agree that they entered into a binding contract in November 1995 for the exclusive distribution in Germany, Switzerland and Austria by the German claimants ("Print Concept") of air-cooled drying systems to be made and supplied by the defendants, GEW (EC) Ltd ("GEW"), who carry on business in England. The answer to the problem is said to be of importance because the contract has now terminated and, if German law governs the contract, GEW will have to pay an indemnity assessed as a proportion of the average contractual turnover while the contract lasted, whereas no such indemnity is said to be payable if the contract is governed by English law.

[2] An English court, like a German court, must answer the question "which law applies to the contract?" by reference to the Rome Convention, which was introduced into English law by the Contracts (Applicable Law) Act 1990. Art 4 of the Convention is headed "Applicable law in the absence of choice". It relevantly provides:

"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.

2. 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. ...

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."

[3] S 3(3) of the 1990 Act encourages the court to have regard to the Giuliano-Lagarde report on the Convention in the Official Journal of the Communities of 31 October 1980. That report makes it clear at page 20 that the law of characteristic performance

"defines the connecting factor of the contract from the inside, and not from the outside by elements unrelated to the essence of the obligation such as the nationality of the contracting parties or the place where the contract was concluded."

[4] The authors, having observed that the concept of characteristic performance gives rise to no difficulty with unilateral contracts, state that in bilateral contracts the counter-performance of one of the parties in a modern economy usually takes the form of payment of money; the authors then say that that counter-performance will not be the characteristic performance and continue:

"It is the performance for which the payment is due, ie depending on the type of contract, the delivery of goods... the provision of a service ... etc which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction."

[5] For this reason the parties in this case have agreed that in an ordinary sale and purchase contract the law governing the contract will be that of the vendor's central administration or place of business. Nothing turns in the present appeal on the difference between the place of central administration or the place of business of either party. Since we are concerned here with a contract entered into in the course of trade, I will refer to the principal place of business of the relevant party, viz Germany or England, as the case may be.

[6] The 13th edition of Dicey and Morris, edited by Sir Lawrence Collins and others, informs its readers (page 1237) that the source of the expression "characteristic performance" is Swiss doctrine and develops the discussion of the concept by reference to examples to be found in art 117 of the Swiss Private International Law Act of 1987. In para 32-115 on page 1238, the editors say:

"Swiss case-law provides more examples, including the case of a distribution agreement, where the characteristic performance has been held to be that of the vendor. But distribution agreements commonly involve reciprocal obligations other than the payment of money: the distributor of the goods may have an obligation to build up the market by advertising the goods, and using its best endeavours to market them. Such a case demonstrates the fragility of the concept of characteristic performance, and provides an example of a case where it may not be possible to determine it, or where it may be disregarded."

[7] Mr Justice David Steel, who was invited to decide the question of the applicable law as a preliminary issue in the court below, correctly observed that in this passage Sir Lawrence Collins had identified the fence which, by the time he came to page 16 of his judgment, that learned judge could no longer straddle.

[8] The judge determined two preliminary issues ordered to be tried by Langley J, but it is only the question of the applicable law which arises on this appeal. The agreement between the parties was an oral agreement and related to the manufacture, sale and distribution of drying systems which are used to dry printed material on printing presses. The particular system to which the agreement applies was called a narrow web system, and the products manufactured by GEW are thus sometimes called narrow web products as opposed to wide web products, which are also manufactured by GEW but are not the subject of the particular oral agreement with which this appeal is concerned.

[9] As it happened, the majority of the narrow web drying systems supplied pursuant to the oral agreement of 1995 were ultimately supplied to a manufacturer of printing presses in Germany called Arsoma Druckmaschinen GmbH This supply was made pursuant to a tripartite written delivery and purchase agreement made on 24 June 1996 between Print Concept, GEW and Arsoma. It is, however, not the law of that agreement but the law of the antecedent oral agreement which has to be determined for the purpose of this appeal.

Outline Submissions

[10] For Print Concept Mr Michael Briggs QC's main submission was that the antecedent oral agreement was a contract whereby, in return for GEW agreeing that Print Concept were to have exclusive rights of distribution in Germany, Switzerland and Austria, Print Concept impliedly agreed to use their best endeavours to promote GEW's products in those territories. He then submitted that the performance of that "best endeavours" obligation was the performance which was characteristic of the contract, and that it was Print Concept who were to effect that performance. Print Concept's principal place of business was Germany so the contract was governed by the law of Germany.

[11] Mr Plender QC for GEW accepted that there was an oral distribution agreement which was antecedent to the Arsoma agreement, and that that was a binding contract between GEW and Print Concept. He also accepted that there was a promise by GEW that Print Concept was to have exclusive rights of distribution in Germany, Switzerland and Austria and, probably, that there was an implied obligation on Print Concept to use their best endeavours to promote GEW's product in the territories. But he submitted that that was not the sum total of the parties' obligations because there was also an agreement that if Print Concept could find customers who wanted the product and were prepared to order it, at any rate in a not excessive quantity, GEW agreed that they would supply the product to Print Concept and Print Concept agreed that they would pay for it at a reasonable price. He therefore supported the judge's conclusion that the real substance of the contract (and thus the characteristic performance) was the sale and delivery of the systems for which Print Concept had been given exclusive distribution rights.

The Contract

[12] In order to determine the performance which is characteristic of a contract one has to know what the terms of the contract are. When a contract is an informal and oral but nevertheless binding agreement, it may be difficult to discover the terms. Much may well be implied rather than express and the parties may intend that any gap be left for the court to fill, as necessary: see, for example, *Hillas v Arcos* (1932) 147 LT 503. In the present case one needs to know something of the background to the agreement before ascertaining its terms.

[13] Before 1995 Mr Jurgen Welle, now the owner and managing director of Print Concept, had been the sole distributor in Germany for a company called Spectral Limited, which also manufactured and sold drying systems for use in the printing industry. Mr Malcolm Rae, now the managing director of GEW, was originally employed by Spectral as a technical manager, and in that capacity got to know Mr Welle quite well. In about April 1991 Mr Rae left Spectral and set up GEW starting his business from home. Mr Welle lent him some initial capital which was soon repaid out of the first two or three sales of small driers to German buyers which were made with Mr Welle's help. One of Spectral's customers in Germany was Arsoma and it was Mr Welle who had introduced Arsoma to Spectral. Mr Rae would have liked Mr Welle to act as his distributor in Germany but Mr Welle was committed to Spectral.

[14] Mr Rae therefore appointed another distributor on behalf of GEW in German-speaking countries. GEW supplied equipment to that distributor, Karl Baier, and Mr Baier would then sell the products in Germany at his own prices. In due course Spectral was sold to an American company and Mr Welle decided to leave Spectral, and since Mr Rae had (as Mr Welle put it) always asked Mr Welle to work more closely with him, he (Mr Welle) agreed to be GEW's exclusive distributor of GEW's narrow web products in Germany, Austria and Switzerland. The agreement began on 1 March 1995 and was wholly informal, but the way it worked was (as with Mr Baier) that GEW would supply its equipment to Mr Welle at an agreed price and Mr Welle would resell for whatever price he could get. Mr Welle further agreed not to sell narrow web systems manufactured by anyone other than GEW and GEW agreed they would not sell direct to any customer in the German-speaking territories.

[15] The narrow web systems were made to order, which meant that a customer specification was usually required before the systems were created. Mr Welle would be responsible for producing that specification but Mr Rae was (according to his own evidence) involved in the vast majority of prospective orders directly with the end user in relation

to the specification. GEW would then give its quotation to Mr Welle in sterling and Mr Welle would quote his own price to the customer in Deutschmarks. Since it was a made-to-order product of a technical nature, GEW would frequently be involved when the time came for the product to be installed on the customer's machines. Of the position between them at this stage Mr Welle stated:

"If I did not arrange the sale of a sufficient number of systems I believe that GEW would have been justified in ending the arrangement."

[16] In the next sentence of his witness statement, he says that he founded the company Print Concept GmbH in November 1995 in order to carry out the exclusive sales from GEW. Mr Welle became the owner and managing director of Print Concept but the initial arrangements, made with him individually, continued as before.

[17] The next material event was that Arsoma started to require GEW products. There is some (irrelevant for present purposes) debate about how the introduction came about but it was formalized in the tripartite "Delivery and Purchase Agreement" of 24 June 1996 which I have already mentioned. By this agreement Arsoma undertook to equip the printing machines which it manufactured with GEW's drying systems and to purchase those drying systems exclusively through Print Concept. Print Concept and GEW agreed not to supply Arsoma's customers with the GEW drying systems directly or indirectly. Price and terms of delivery were to be agreed between Print Concept and Arsoma before the beginning of each year, the agreement was to apply until 31 December 1997 and was automatically renewable for a further two years unless terminated no less than six months prior to the expiry date.

[18] Before the judge it was common ground that the earlier distribution agreement and the tripartite Arsoma contract stood or fell together so far as their governing law was concerned. Although the judge does not expressly say so, his conclusion that the distribution agreement was governed by English law may well have been influenced by the existence of the later Arsoma contract which, because it was in terms a sale and purchase agreement, would be governed by English law as the principal place of business of the vendor, who was the party effecting the performance which was characteristic of that contract. Before the judge Print Concept's then counsel argued that both the distribution agreement and the Arsoma agreement were governed by German law.

[19] Mr Briggs, however, accepted that the Arsoma contract was governed by English law because the characteristic performance was that of the vendor; he accordingly withdrew previous counsel's concession that the contracts must be governed by the same law. He emphasised the fact that the distribution agreement preceded the Arsoma agreement and must have had its own law from the date of inception, regardless of the fact that an English law "delivery and purchase agreement" was made subsequently.

[20] It is for that reason that I have felt it necessary to set out at some length the largely uncontroversial history of how the distribution agreement came into existence. On the basis of that history, what were its terms?

[21] First, it was expressly agreed that Mr Welle and later his company were to have the exclusive right to distribute GEW's narrow web systems in Germany, Switzerland and Austria. I draw no distinction between Mr Welle and his company and therefore refer to the company as if it were party to the agreement throughout, while appreciating that the contract sued upon by Print Concept only came into existence in November 1995 (probably by way of novation of the original contract). Secondly, it was expressly agreed that Print Concept would not sell any other company's narrow web systems in the territories. Thirdly, it was agreed (probably by conduct rather than express oral discussion) that the mechanism of the arrangement was to be a sale by GEW to Print Concept and an on-sale by Print Concept to the customer. It was thus a principal to principal transaction rather than an agency on commission transaction.

[22] Beyond that, were there any implied terms? I have already referred to Mr Welle's view that if he did not arrange a sufficient number of sales, GEW would be entitled to end the arrangement. The judge did not come to a final view about this, saying merely that there was no such express obligation, while acknowledging that there may have been some such implied obligation. Mr Briggs submitted not merely that there was indeed such an implied obligation

but that it was the performance of that obligation which was characteristic of the contract.

[23] The formulation which Mr Briggs proposed was that Print Concept was under an obligation to use its best endeavours to maximise sales in the German-speaking market place. Mr Briggs' primary submission was that there was no need for any other implied obligations in the contract. He submitted in the alternative that, if there was any other implied obligation, it could not be an obligation, the performance of which was characteristic of the contract.

[24] Mr Plender did not strongly oppose Mr Briggs' implied term but contended that, if such a term was to be implied, it would be necessary to imply some other term about responsibility for supplying the products if they were ordered, otherwise Mr Briggs' term was hopelessly one-sided. We were thus treated to the unusual spectacle in this court of counsel enthusiastically suggesting that each of their respective clients should be subject to comparatively onerous implied obligations over and above what their clients had expressly agreed. Mr Plender's formulation of the implied term, to which GEW were subject, was that GEW would make available for distribution a commercially viable volume of products at a reasonable price whenever Print Concept were in a position to purchase and distribute them.

[25] For my part, I would accept that the contract did contain Mr Briggs' implied term, since the purpose of the contract could hardly be promoted if Print Concept did nothing to try to achieve sales in its territories.

[26] But I think that Mr Plender was also correct in submitting that there would have to be a concomitant obligation on GEW to supply products as and when asked to do so, because the purpose of the contract could not be promoted in the absence of any such term any more than in the absence of Mr Briggs' term.

[27] In this context it is important to remember that the relationship of exclusive distributor had been established some months before Print Concept had been incorporated and took over Mr Welle's responsibilities. During that time narrow web products had been supplied to Mr Welle and Mr Welle had sold them on. It must have been the contemplation of both GEW and Print Concept, when Print Concept took over Mr Welle's position in November 1995, not merely that that supply would continue but that it would continue in the same form, namely that of a sale by GEW to Print Concept and an on-sale by Print Concept to the German-speaking customer.

[28] The judge went so far as to say, not merely that there were reciprocal obligations in the form of a sale of the drying systems by the defendant and a purchase of them by the plaintiff, but that they were express reciprocal obligations. I do not find it possible to go so far as to say on the evidence that the obligations were express reciprocal obligations, since neither witness is saying that there were express oral terms to that effect, but I do consider that there was an implied obligation on GEW in some such formulation as that suggested by Mr Plender. I would myself prefer to formulate the term in these words:

"As and when reasonably required by Print Concept GEW will supply and Print Concept will purchase the products the subject matter of our agreement at a price on the price list for the current year or at a price to be otherwise agreed."

[29] This is in substance the same term as that for which Mr Plender contended but perhaps has the advantage of emphasising the reciprocity of the sale and purchase obligation which I (like the judge) consider to be of importance.

Party effecting characteristic performance.

[30] Now that the terms of the contract have been ascertained, which party is the one who, in the words of art 4(2), "is to effect the performance which is characteristics of the contract"? Mr Briggs submitted that the real and indeed only purpose of the contract was to penetrate the German-speaking market. He claimed that GEW's junior counsel had conceded as much in the court below when, almost at the beginning of the oral evidence of the first witness, Mr Welle, and well before any detailed submissions could have been made, he objected to a question from Mr Randolph, then, but not now, appearing for Print Concept. Mr Randolph asked Mr Welle why GEW had been unable, before Mr Welle came on the scene, to penetrate the German market. GEW's counsel said that, if the court were to go into that, it would mean trying the whole case rather than the preliminary issues ordered by Langley J, no doubt because Mr Rae did not

accept that GEW had been unable to penetrate the German-speaking market before Mr Welle agreed to become GEW's exclusive distributor. The judge upheld the objection but before he did so said:

"It seems to me that this perhaps is an argument of modest significance. I do not believe, as presently advised, that there is any controversy in the description that the purpose of the agreement was for Print Concept to distribute systems within the German-speaking market. I am bound to say at the moment why they [by which the judge meant GEW] had been unable to penetrate that market other than through the assistance of this particular claimant does not seem to me to help me."

[31] Counsel said that he did not disagree with that for a moment. If Mr Briggs were seeking to hold GEW to a binding concession made by GEW's counsel, different in kind from the concession of Mr Randolph already mentioned in relation to the oral agreement and the Arsoma agreement having a common law, I would decide that counsel's assent was confined to the third sentence of the judge in the passage I have quoted rather than the second sentence. But this would be ridiculously formalistic. The question is not to be decided on the basis of throwaway remarks by counsel during the evidence, but by an even-handed examination of all the evidence once it is given.

[32] Giving that even-handed consideration to the evidence before him, the judge concluded that the real substance of the arrangements between the parties was that:

"There has taken place a series of orders for drying systems under the terms of the oral facility ... supplemented and indeed effectively dominated by the Arsoma contract ... The case falls fairly and squarely within the category of bilateral contracts whose performance by one of the parties takes the form of payment of money. Indeed, one cannot help but notice that the Arsoma contract is indeed called a 'delivery and purchase agreement'. Accordingly in my judgment the characteristic performance of the contracts is that of the vendor and, accordingly, English law applies."

[33] Mr Briggs criticised this approach of the judge because he relied on the Arsoma contract to come to his conclusion when that contract came into existence only after the oral distributorship agreement. I would comment that, since the parties were agreed at that stage that the distributorship agreement and the Arsoma agreement had the same law, the judge can hardly be criticised for the approach he adopted. But now that concession is withdrawn and the focus is solely on the distributorship agreement, Mr Briggs' point is well made. It is necessary to determine the law which governed the distributorship agreement as at November 1995.

[34] So I stand back and ask myself the question, who was the party in 1995 who was to effect the performance which was characteristic of the contract? As it seems to me, the "real meat" of the arrangement of that date, to adopt the phrase of Messrs Forsyth and Moser in their useful article entitled *The Impact of the Applicable Law of Contract on the Law of Jurisdiction under the European Conventions* (1996) 45 ICLQ 190, was the supply of the products rather than the penetration of the German market. No doubt they were both important; but the penetration of the German market could not even take place without the supply and purchase of the drying systems, and it was the performance of that supply obligation (which usually included vetting the specification and helping to instal the equipment sold) which was, in my judgment, characteristic of what was a distributorship agreement intended to be fulfilled by individual contracts of sale and purchase. Mr Briggs sought to dismiss the fact that the distributorship agreement would be implemented by individual contracts of sale and purchase as a fact of little importance and, indeed, as showing that the essence of the oral distributorship agreement must have been not sale and purchase, which would happen in the future, but the only other obligation of substance, viz to use best endeavours to penetrate the German-speaking market. But it is not appropriate to separate the obligations in this way. The global picture must be assessed, and in that global picture it is of the essence that the parties contemplated that the agreement would be performed by the making of sale and purchase contracts which would almost inevitably, under Rome Convention principles, be governed by the law of the vendor. This is not to fall into the error of using a later contract to govern the law of an earlier contract; it is to accept the good sense of saying that the essential characteristic of the particular distributorship agreement before us was the intended supply and purchase of narrow web products, pursuant to the implied term for which Mr Plender contended. The party who was to effect that characteristic performance was of course GEW and English law therefore governs the agreement.

[35] I should add that we were referred to authorities in the courts of Germany, Holland and Scotland but, speaking for myself, I did not find those authorities of assistance, since they dealt with different contracts in different terms. It is therefore possible to decide this appeal on the basis of the presumption in art 4(2) of the Convention without reference to the fallback position adopted by art 4(5). As to that, I will only say that if I did feel it necessary to refer to that paragraph of art 4, and to ascertain with what country the contract was most closely connected pursuant to art 4(1), I would, like the judge, conclude that the contract was most closely connected with England in any event. I would dismiss this appeal.

JUDGMENTBY-2: SIR CHRISTOPHER SLADE

JUDGMENT-2:

SIR CHRISTOPHER SLADE: [36] I agree.

JUDGMENTBY-3: TUCKEY LJ

JUDGMENT-3:

TUCKEY LJ: [37] I also agree.

DISPOSITION:

Appeal dismissed; detailed assessment; permission to appeal to House of Lords refused.

SOLICITORS:

Fladgate Fielder; Morrisons, Redhill

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Time Of Request: Friday, October 22, 2010 13:42:36