Neutral Citation Number: [2018] EWHC 2400 (Comm)

Claim No CL-2017-000654

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Monday, 30 April 2018

BEFORE:

HIS HONOUR JUDGE DAVID WAKSMAN QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

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ACTEGY LTD V SOCIÉTÉ

Claimant/Respondent

- and -

1) LOGITIQUE NIVELLOISE SPL
(Formerly known as Distec Sprl)
2) DISTEC INTERNATIONAL SA/NV

Defendants/Applicants

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Mr N. Craig (instructed by **Fox Williams LLP**) appeared on behalf of the **Claimant/Respondent**.
Mr J. Crow (instructed by **Lee Thompson LLP**) appeared on behalf of the **First Defendant and the Second Defendant/Applicant**.

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Judgment Approved

HHJ Waksman QC:

Introduction

1. This is an application to challenge jurisdiction brought by the second, but not the first defendant, to this claim. The first and second defendants are both Belgian companies. The first defendant ("SLN" or "D1") owned the second defendant ("Distec International" or "D2") save for one share. That share is in fact owned by another company in the same group. The claimant, Actegy, is an English company which produces health and medical products. This case is all about distribution agreements in relation to those products.

2. In broad overview, Actegy made a distribution agreement with SLN to distribute the products in Belgium which contains, amongst other things, an English jurisdiction clause. As between the claimant and the first defendant, it is common ground that it satisfied the formalities imposed by Article 25 (as it now is) of the recast Brussels Regulation. D1 was served out on that basis and because of that, D1 takes no issue with jurisdiction, nor could it. As I shall explain in a little more detail hereafter, although the claimant was not aware of it, it was in fact invoicing D2 and sending product to D2's address. The evidence of the claimant is that it thought that they were both one and the same. At that stage SLN was not known as "SLN" but it was known as "Distec SPRL". Once that issue had arisen in May 2017, the parties started to negotiate to add the second defendant to the agreement, or cause it to be substituted, but those negotiations did not end in a new agreement.

3. Later in the year, the claimant served a contractual six-month notice of termination which is provided for in the relevant agreement. It actually served it on both D1 and D2. On the same day it commenced proceedings here for negative declaratory relief against both defendants. At this stage we simply have the brief details of claim. This refers to the distributorship agreement but then says that pursuant to a purported assignment and/or sub-contract and/or agency agreement between the first and second defendants, the agreement has in practice been performed by the second defendant in place of the first - and that leaves the options well open. Then it says that pending clarification as to which defendant is entitled to exercise the rights under the agreement, the claimant brings these proceedings against the first and second in the alternative. Then there is a reference to the jurisdiction clause. Paragraph 7 recites the giving of the notice on 24 October 2017. In response to that, perhaps predictably, both defendants reserved all of their rights, including in relation to the 2015 agreement. It appears that the reason why the claimant wished to establish jurisdiction and the *locus* of any possible litigation quickly was because of its concern, as it understood it, that under Belgian law, although not English law, a party whose contract has been terminated validly by notice might nonetheless still have some rights of compensation.

4. I should add that the relevant distributorship agreements also provide that they are to be governed by English law.

5. Despite being invited to do so, D2, while it challenges jurisdiction, has not unequivocally said that it is not party to any agreement with the claimant. The claimant, perhaps understandably, took the view that if D2 was going to argue that there was

some contract, it must be the 2015 contract and if so it would have done so agreeing, in the required sense, to the exclusive jurisdiction clause. On the other hand, if the second defendant disavowed any contract with the claimant, the claimant would have no case against it, but equally the second defendant would have no claim against the claimant; and at least in a practical sense, that issue would be resolved. As it happens, it has not been.

6. The terms of Article 25 of the Brussels Regulation are well-known. They include prescriptive formalities requirements which include the fact that there has to be an agreement to the relevant clause and the agreement itself must be in writing or evidenced in writing. There are cases where the court has concluded that there may be some contract or other between the parties, but not one which includes a jurisdiction clause which complies with those requirements.

7. The test for whether the claimant can establish jurisdiction under Article 25 (for there is no other head of jurisdiction claimed) is the familiar test of "good arguable case". There are some significant utterances from higher courts, including two members of the Supreme Court, that the word "much" which has been added since the *Canada Trust* case, to the familiar expression "the better of the argument" is not helpful and does not add anything. In any event, and giving the benefit of the doubt to the claimant, the test which I propose is the simple one of whether the claimant has the better of the argument so far as jurisdiction is concerned.

8. The claimant's sole argument for its invocation of Article 25 since last Thursday (it now being Monday) is as set out in Mr Craig's skeleton argument that in truth the second defendant acted as undisclosed principal for the first and therefore it is the other party to the relevant agreement which contains the jurisdiction clause, and so that enables the claimant not merely to sue the first defendant, but also the second defendant. Let me assume at this stage that, as a matter of the relevant law, if undisclosed principal was established, Article 23 would be made out.

9. There has not been full evidence from the defendants on the undisclosed principal issue and, in particular, into all of the internal dealings between them about it, unsurprisingly because the argument was raised only last Thursday. That said, the defendants have not sought an adjournment in order to adduce further evidence because they say that they can show sufficiently on the existing materials that the claimant cannot discharge the relevant burden.

10. Again, giving the claimant the benefit of the doubt at this stage, I simply apply English law to the question of undisclosed principal. The case of *Magellan Spirit ApS v Vitol SA [2016] EWHC 454* , a decision of Leggatt J. (as he then was) provides sufficient guidance in my view. This was a case where the ship owner, in the context of applying for an anti-suit injunction, wished to show to the sufficient standard that the defendant trading company, VSA, was in truth the undisclosed principal to the charter party which on its face was made by a company called Mansel. The reason for so arguing was to bring VSA within the purview of the English exclusive jurisdiction clause to be found in the charter party.

11. At para.14 Leggatt J. recites that argument:

> "There is nothing in the terms of the charter to suggest that Mansel was entering into it as an agent of VSA or as an agent at all."

12. That, as we will see, is precisely the same for the two distribution agreements in question. Mr Justice Leggatt, in para.15, observed that the whole doctrine of undisclosed principal is out of harmony with the objective approach of English commercial law, but that said, the doctrine was firmly established. He then recited the applicable legal principles as set out by Lloyd L. in the Privy Council in *Siu Yin Kwang v Eastern Insurance Co. Ltd. [1994] 2 AC 199 at 207* :

> "(1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued."

He then said this which is important:

> "The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."

13. Then on the question of intention, Leggatt J said this depends not on the subjective state of mind of the supposed agent at the time of contracting but, "on whether the supposed agent had communicated to the supposed principal an intention to contract on its behalf." He said that that was confirmed by a further House of Lords authority, *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* where Lord Pearson said that the agency relationship "…can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it …But the consent must have been given by each of them expressly or by implication from their words or conduct."

14. Mr Justice Leggatt goes on to say that if on an objective analysis in his case Mansel and VSA have consented to the creation of a relationship of agency and principal, it matters not that Mr Fransen, the supposed agent, did not subjectively intend or perceive this to be the case. So, he had that point well in mind.

15. Looking at the facts before him, at para.28 he said:

> "28…Where a contract is made by or on behalf of a named legal person and there is nothing in the terms of the contract or surrounding circumstances to indicate to the other contracting party that the named person is making the contract as an agent, then the presumption must be that the named person is contracting as a principal. That presumption is capable of being displaced; but in order to displace it, convincing proof is needed that the named party was - contrary to appearances - contracting on behalf of an undisclosed principal."

16. That is highly pertinent here as well. In para.29: “Implication from conduct" he said:

> "29. The most obvious method of proof would be to point to an express agreement establishing an agency relationship. There was in the present case, however, no relevant written agreement between Mansel and VSA and there is no evidence of any relevant oral agreement. In these circumstances the argument that an agency relationship was created has to be based on conduct. In principle what must be shown is conduct from which (i) a reasonable person in the position of Mansel would have understood that it was authorised to enter into the charter as agent of VSA and (ii) a reasonable person in the position of VSA would have understood that Mansel was agreeing to do so. As in any case where an agreement is sought to be implied from conduct, it is not enough to point to conduct which was consistent with an agreement or mutual intention that Mansel would contract as agent of VSA. It is necessary to identify conduct which was only consistent with such an agreement or mutual intention …Put another way, it must be fatal to the implication of an agency relationship if the parties would have or might have acted as they did in the absence of such a relationship.."

17. In para.31 he said:

> "It is clear from the evidence that the purpose of chartering the ‘Magellan Spirit’ was solely to carry cargoes bought and sold by VSA. There was no intention of trying to make a profit by re-letting the vessel to any entity outside the Vitol Group…it went without saying that the vessel would be operated ‘at cost’ such that Mansel would be reimbursed by VSA for all costs and liabilities incurred in operating the vessel."

18. He then went on to say:

> "33…It is true that, if the evidence showed an intention that the vessel would or might be operated by Mansel for its own profit, that would have been inconsistent with an agency relationship. But the converse is not true. It is perfectly possible to have an arrangement between parties dealing as principals whereby one agrees to make a ship or other property available for the other’s use in return for reimbursement of all operating costs. The critical difference between such an arrangement between principals and an agency relationship is that a principal may sue and be sued on a contract made by an agent on its behalf. In order to infer an intention that Mansel should charter …as agent of VSA, it would therefore be necessary to identify conduct which signifies an intention that VSA would have rights directly against or liabilities directly towards the Owner."

19. He then concludes that on the evidence available there was no support for the owner’s case that Mansel had entered into the time charter as agent for VSA.

> "There is nothing which displaces the presumption that the time charter was just what it appeared on its face to be: namely, a contract made by Mansel dealing as a principal. It follows that VSA is not bound by the terms of the time charter

and hence is not bound by [the clause]."

20. Against that background, I return to the facts. Chronologically, the first document, putting it neutrally, is the letter of intent as between the claimant and D1. It is dated and signed on 1 February 2013. It says that both parties will express their willingness to agree upon and sign a distributorship agreement. Then it sets out what it is. It sets out the intended term and the payment provisions and a termination notice provision of 90 days with law and jurisdiction being English and the contract language being English. For a letter of intention it was quite formal. It ended up by saying: "In witness whereof the parties have executed this Agreement on [the date]." Then you have the signatures on behalf of the claimant and the signature on behalf of D1. I am going to come back to the agreement between D1 and D2 in a moment, but otherwise the next thing that happens on distribution is the formal distribution agreement dated 1 May 2013. There are a number of material clauses there. It is dated 1 May. It runs from then but it is actually signed in July 2013. The overarching point is that there is absolutely nothing in there to indicate that D1 was signing as the agent for anyone, let alone D2. Clause 8 deals with termination provisions. The initial term was three years, but subject to 30 days' notice if there is an unremedied material breach; 90 days' notice if there is a failure by the distributor to meet the annual target; otherwise six months' written notice. Clause 11.1 prevents any assignment by the distributor of the rights and obligations under the agreement without the prior written consent of the supplier. Clause 13 deals with the governing law being English and an English jurisdiction clause.

21. I interpose to say that although that is expressed to be a very full and formal agreement, I do not regard the letter of intent as being entirely meaningless. It is signed in a formal way. There is clearly an expectation of trading and, importantly, it marks the beginning of the actual commercial relationship between these parties. As I shall indicate hereafter, it looks as if the defendants viewed it in that way as well.

22. A second distributor agreement was made on 1 May 2015 on materially the same terms and as a substitute therefor.

23. I then turn to the agreement made between the two defendants. This refers back to 1 February 2013 and it is dated 5 February 2013. I need to recite a large part of it. It is made between the first and second defendants, respectively. The recitals recount that D1 entered into the distributorship agreement with Actegy granting it the right to distribute as an exclusive distributor the products. That in fact was the letter of intent. Recital 2 recites that D2 is a company with commercial experience and know-how in this area, and 3 "[D1] hereby wishes to entrust the performance of the Contract to [D2]."

24. Under substantive Article 1:

> "[D1] hereby entrusts the mission to perform the Contract to [D2] which accepts…A copy of that Contract is annexed and is an integral part of this Agreement. [D2] acknowledges having taken cognisance of the provisions of the Contract and adhering thereto."

25. Then it is expressly agreed between the parties that in the framework of the performance of the Contract D2 shall entirely substitute D1 with respect to Actegy. D2 consequently undertook to take responsibility of all the contractual obligations subscribed by D1 with

respect to Actegy, in particular as regards purchasing quotas and so on. Article 2:

> "In exchange for the contribution of the contract to [D2], [D1] shall collect or be paid commission, which would be equal to five per cent of the turnover achieved by [D2] on the sale of the products."

26. Then from a later date on a commission going up to seven per cent, and then provision for payment is made. Article 3 says the agreement was entered into for an indefinite period beginning on 5 February but that either party could terminate on three months' notice. D1 could also terminate with immediate effect without notice in the event of D2's serious breach of the contracts provisions, but in any event the duration of this agreement would be limited to the duration of the underlying contract. Article 4 says that D1 acknowledges being "liable for the proper and full performance of the contract. It undertakes to hold harmless [D1] against any claim or legal proceedings instituted by Actegy or any third-party which originates directly or indirectly from [D2's] breach of the provisions of the Contract." The agreement is then governed by Belgian law.

27. There was an addendum on 1 September 2015 which dealt with an increase in commission.

28. I now analyse the position with regard to those materials. Critically, as I have indicated, there is no suggestion of any express agency between the parties at all, not only in the underlying distribution contract but in fact even in the agreement made between themselves. In my judgment, it is difficult to infer that there was an agency, even if subjectively they thought that there was not. Let me refer to the features of the agreement between themselves. Here the alleged agent is in fact the parent company of the second defendant. It is not conclusive, but it is odd to find that position commercially. Secondly, it speaks, in a variety of places, of entrusting performance to D2 from D1. That is very redolent, in my judgment, of a sub-contract (see in particular Recital 3 and Article 1). Thirdly, even if what this agreement was purporting to do was to novate the contract in some way - difficult because of the non-assignment clause, but putting that to one side - any attempted novation is not the same as an agency based on undisclosed principal. It is quite different. Fourthly, Article 4 is, in my judgment, acknowledging the liability of the second defendant to the first defendant for performing the agreement. It is not directly reciting any liability to the claimant for the performance and, unsurprisingly, because D2 is principally promising to D1 that it will perform the underlying contract, D1 has to have the stated indemnity. The fifth point is that if there is an internal choice of Belgian law, that might be neutral but if it goes to the agency relationship with the claimant, then on the face of it there are conflicting choice of law clauses which would be unusual. More significantly, the termination provisions do not square with each other. What that means is it would be open to the first defendant to terminate on three months' notice even if, for example, the claimant had no wish to terminate the underlying distribution agreement, but the effect of that termination by D1 would be to remove D2 from the picture altogether - in which case it would be very odd if the status of D2 was as principal because, of course, in relation to an agreement once an undisclosed principal, always an undisclosed principal. There is no middle ground. Equally the second defendant, as supposed principal, could remove itself and absolve itself, it would seem, from all rights and obligations as an acknowledged principal, which would be highly unusual.

29. Mr Craig has placed some emphasis on the question of commission. Of course here, on the face of it, it is the alleged principal who is having to pay commission to the agent. That, he says, is a classic indicator of an agency relationship. It may indeed be so where, for example, the principal trader then instructs agents to make a variety of contracts on its behalf which will then be performed by the principal; or where an agent more loosely described is in effect simply a distributor from the principal, but that would be more akin to the relationship between the claimant and the first defendant, and not the first defendant to the second defendant.

30. Context is everything in my view. What we in fact have here is a payment described as “a commission" between two group companies, one parent, one subsidiary and where the subsidiary is making payment to the parent for the benefit of collecting the revenue in exchange for performing the obligations on the first defendant set out in the distributorship agreement.

31. The fact that the parties contemplated that the second defendant would in fact invoice and receive revenue from the claimant is not itself conclusive, and I do not regard the provisions here as in any way being classic indicators of the agency relationship, and certainly not matters which are only consistent with such a relationship. The 2015 addendum providing for higher commission does not add anything.

32. Mr Craig placed importance on the fact that the agreement between the two defendants came first. So, that must form a critical back drop to the first distribution agreement. I do not accept that. First of all, it did not in fact precede the letter of intent which, as I have indicated from the agreement between the defendants, seems to have been regarded as important and binding by them. Secondly, I do not regard the order of events as particularly important here. In *Magellan Spirit* it had always been intended that VSA would actually perform the underlying charter parties, but that was not sufficient to make it the undisclosed principal.

33. Mr Craig then argues that looking at all of this, the first defendant is purely a front. But that is not an argument. That is stating the conclusions and simply begs the question of whether there is an agency or something different.

34. Overall, it is plain to me that there is nothing in the agreement between the defendants to suggest that what has emerged objectively can only be an agency, and there is a great deal to suggest that it is not. It is a perfectly coherent contract intended to operate between two group companies without any intention to affect the first defendant as the true contracting party as against the claimant.

35. That leaves the question of what happened on the ground, as it were. It is true that the second defendant seems to have done all of the performing and has received the product at its address and then distributed it onwards, and it has billed the claimant. However, that is not of any great importance to me in a situation where the claimant did not even appreciate that there were two different companies, and that only emerged by happenstance when there was a query raised by the VAT inspector which immediately promoted the negotiations to which I have referred.

36. The negotiations themselves did not proceed on either side as if there was in reality a contract with an undisclosed principal. So, what happened on the ground does not help

the claimant here on its agency case.

37. It is true that the second defendant has not disavowed any possible reliance on the 2015 contract. That is not the issue which is before me. It is true that it has reserved its rights in some way. (See paras.32 and 34 of Mr Janssens' witness statement) But there has been something of a lack of clarity on both sides. The original case against the defendants left open a number of possibilities, only one of which has been pursued. The second defendant has not been very helpful by sitting on the fence as to whether there might be some contract out there that could in some way bind it and the defendant, although not one which would include a specific agreement to the exclusive jurisdiction clause. As it so happens for what it is worth, but this is not before me, I do have very considerable difficulty in seeing how, if the second defendant is not a party to the distribution agreement by way of undisclosed principal, and it says that it is not, how there could be any other contract at all. It seems to me the second defendant has really bitten the bullet here, although it is not quite prepared to say so. At the end of the day, that is not a matter for me, so they are not concluded findings on my part.

38. Let me deal with some other points. As I said, I conduct this analysis on the basis that English law governs everything. I am not making any finding that it does in every respect, particularly on the relations between the defendants *inter se* , but that is the basis on which I make this judgment. I have also indicated that I assume for present purposes that if there was undisclosed principal that, without more, would bind the second defendant to the exclusive jurisdiction in the written contract of which it was the undisclosed principal. There are authorities to suggest that is certainly the case in a normal agency. The position may or may not be a little more open to undisclosed principal, but it is not necessary for me to decide those interesting points.

39. Ostensible authority is not really relevant here. It is simply that one of the questions concerns actual agency. I should add there is nothing to my mind in the contract made between the two defendants which indicates that as between them, the second defendant actually has the right to sue under the 2015 agreement, or that it can be directly liable for it as opposed to being in breach of the agreement with D1 to perform the relevant obligations under the underlying contact. As I have indicated, I do not think the second defendant can be criticised for not putting in more evidence about the internal dealings in relation to agency because there simply was not time to do so. The defendant's position is that it has got sufficient evidence to prevent the claimant from discharging its burden and I agree.

40. For all of those reasons, in my judgment it cannot possibly be said, on all of the materials, that there is a good arguable case in the sense of the better of the argument that there was an undisclosed principal so that the second defendant becomes a second party liable under this agreement, and would therefore be bound by the exclusive jurisdiction clause. In my view, there plainly is not such an agency. Accordingly, the claimant's claim against the second defendant must be dismissed for want of jurisdiction.