Skype Technologies SA v Joltid Limited and others

[2009] EWHC 2783 (Ch), 6 November 2009

The UK High Court ruled that only exceptional reasons can justify an exclusive jurisdiction clause chosen by contracting parties being set aside. The parties cannot 'wriggle out' of the initial agreement.

Background

The Skype Group offers 'voice over internet protocol' ('VoIP') technology, which allows telephone calls and text messages to be made over the internet. JoltID Limited ('JoltID') is owned by Skype's founders, and is the owner of copyright in certain software called the Global Index Software, which is fundamental to Skype's business, and is provided to Skype under a licence agreement ('the agreement'), which has a governing law and jurisdiction clause stating that any claim should be brought and governed 'by the laws of England and Wales'.

The Skype Group brought a claim against JoltID to request that an order should be made for an anti-suit injunction, preventing litigation regarding the agreement being pursued abroad and asserting that this agreement should be limited to the exclusive jurisdiction of England and Wales, as per clause 19.1 of the agreement.

Mr Justice Lewison agreed to do just that, on the basis that it was clearly the intention of the parties that the licence should have the exclusive jurisdiction of the courts of England and Wales, that their choice of jurisdiction was a clear choice - made all the clearer since neither of the parties are based there. As such, their contractual choice of jurisdiction clause defeated all other arguments regarding *forum non conveniens*.

The Skype Group offers a VoIP product, which is the most popular VoIP product in the world. It allows telephone calls and text messages to be made around the world for merely the cost of a subscription and of a local call. The software that was developed to produce the Skype product was based upon technology that is owned by JoltID, called the Global Index Software, which was developed originally to link peer-to-peer file-sharers. JoltID is the defendant in this matter, against a claim made by Skype that they brought a claim for infringement in America. The agreement upon which Skype relies included a governing law and jurisdiction clause which stated that any claim under or relating to the agreement should be governed by the laws of England and Wales. As such, JoltID should be subject to an anti-suit injunction preventing them from pursuing such a claim.

JoltID had claimed that Skype Technologies had breached the agreement by using, accessing and modifying the source code of the agreement that was not included in the licence. Skype stated that though the agreement referred to object code, JoltID had only provided the source code and, as such, it was the common intention of the parties that Skype be provided with the source code, and the licence had been amended by performance. JoltID then brought a claim in the UK, on the basis that the agreement had not been properly terminated, and, consequently, it could continue to use the software.

JoltID then brought claims in the US for infringement of its copyright in the software that Skype bases its technology on. Skype then argued that JoltID had breached the agreement's jurisdiction clause (clause 19.1), which stated that all claims should be brought within the jurisdiction of England and Wales. Article 23 of Council regulation (EC) No. 44/2001 - the Judgments Regulation - states: 'If one or more of the parties is domiciled in the member state and have agreed that a court...have jurisdiction to settle any disputes...such jurisdiction shall be exclusive'.

Since Skype Technologies is domiciled in Luxembourg, the court had exclusive jurisdiction.

The court believe that there are two questions:

- do the US proceedings fall within the scope of the exclusive jurisdiction clause; and
- if they do, how does it affect the court's willingness to grant an anti-suit injunction?

Is there an exclusive jurisdiction issue?

Mr Justice Lewison likened the consideration of the interpretation of jurisdiction in this agreement to the interpretation of arbitration agreements, which he said had been considered recently by the Court of Appeal and the House of Lords in Fiona Trust & Holdings Corporation v Privalov. In that case, it was said that 'if business men go to the trouble of agreeing that their disputes be heard in the courts of a particular country, they do not expect that time and expense would be taken in lengthy argument about whether a cause of action come within that phrase or not'.

The clear implication was that such clauses should not be narrowly construed. JoltID claims, however, that the jurisdiction clause 19.1 does not apply here, specifically because their claim is predicated on the assumption that the agreement has already been terminated. As such, given the agreement is terminated; it cannot be the case that a claim arises from it. Mr Justice Lewison says, however, that the heart of the current dispute between the parties is whether or not the agreement has been validly terminated. If Skype Technology is right, then JoltID's claims against Skype in the US proceedings will fail. Mr Justice Lewison seems to say that it is therefore a circular argument, based on 'an unduly narrow reading of the clause...exactly the kind of fine distinction that Fiona Trust deplored and continue.

Rational businessmen would not envisage that their choice of jurisdiction would depend on who issued proceedings first, or whether an ingenious pleader could frame a cause of action without actually mentioning the licence agreement.'

Therefore he says in his judgment, these claims do fall within clause 19.1.

Anti-suit injunctions

Skype claimed that it follows automatically - if the agreement has a valid exclusive jurisdiction clause, because the European Court of Justice (ECJ) has said that it must not decline to exercise it - that granting an anti-suit injunction should follow.

It said that this was based on Owasu Jackson, which it said has now removed discretionary considerations, such as those relating to *forum non conveniens*, from playing any part in the decision of the court in a Member State from stowing its own proceedings.

However, in Owasu, the ECJ did not rule on the question of whether a court should grant an injunction, preventing proceedings in another jurisdiction. Furthermore, the ECJ has specifically stated that it does not seem to like anti-suit injunctions. It said, in Turner and Grovitt that 'any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court, which, as such, is incompatible with the system of the Convention'.

Furthermore in Allianz SpA v West Tankers Inc[1], the ECJ decided that it was not compatible with the EC Treaty - now the Treaty on the Functioning of the European Union - for the courts of EU Member States to grant injunctions restraining court proceedings brought, in breach of an arbitration agreement, in another Member State. Lewison J stated that, if anything, he would be inclined to draw the conclusion that a court should not grant an anti-suit injunction, at least where both courts of regulation state it is for the court second seized to rule on its own jurisdiction.

Discretionary anti-suit injunctions

Having dealt with the idea that it follows necessarily an anti-suit injunction, Lewison J went on to discuss whether or not he has a discretion to grant an anti-suit injunction and he concludes that he does. Interestingly, he points out that if he refused an equitable remedy of an injunction it might follow that Skype Technologies would have a remedy in damages arising from the breach of contract. Those damages might include, for example, the legal costs for successful defence in the US proceedings, since costs are not recoverable in US litigation.

Lewison J then evaluates the strength of the exclusive jurisdiction clause and concludes that it is strong. Neither Skype nor JoltID has any obvious connections with England and Wales, it is a worldwide licence, and though the breach of terms may take place anywhere, they still have made the choice to have their disputes decided in England and Wales. The same goes for infringement of local copyright law. It was therefore clearly contemplated that though a dispute might arise anywhere from anyone resident anywhere, it should be heard in England and Wales. He says it follows the standard considerations regarding *forum non conveniens* should not follow.

In evaluating JoltID Ltd's arguments, regarding why an anti-suit injunction should not be granted, the judge concludes that all of the factors were eminently foreseeable when they agreed the exclusive jurisdiction clause. In fact, he said their arguments were no more than the standard considerations that arise in an argument about *forum non conveniens* - which he had already dismissed. Furthermore, it dismisses JoltID's attempt to agree wording for an agreement whereby there is no disagreement between the courts as merely trying to 'wriggle out of its contract'.

He states that there are important considerations to avoid, such as parallel processing and the possibility of inconsistent decisions. In light of the fact that the present UK proceedings will continue, and the agreement as proposed by JoltID, is merely an attempt to 'wriggle out' of its contract, the Judge held that an anti-suit injunction should be granted in his discretion. Therefore he made three orders:

- that JoltID must not pursue or take any further step in the US proceedings;
- that JoltID must not commence or pursue or procure commencement or pursuit of any other further proceedings in any other jurisdiction; and
- that JoltID must discontinue the US proceedings against Skype.

Unusually for an anti-suit injunction, it does give JoltID Ltd the liberty to apply for a discharge or variance of this order on 24-hour notice, the point being that if JoltID should wish to begin or pursue an action in the future the onus should be upon JoltID to come to the court to displace the exclusive jurisdiction clause.

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1. Allianz SpA v West Tankers Inc [2009] EUECJ C-185/07 (West Tankers).