Neutral Citation Number: [2019] EWHC 3128 (Comm)

Case No: CL-2019-000160

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QB)

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

Date: 21/11/2019

Before :

MR JUSTICE PHILLIPS

- -

Between :

LOTUS CARS LIMITED	**Claimant**
- and –	
MARCASSUS SPORT S.A.R.L	**Defendant**

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- -

Henry Byam-Cook (instructed by **Laytons LLP**) for the **Claimant**
Tom Wood (instructed by **Scornik Gerstein LLP**) for the **Defendant**

Hearing dates: 4 October & 21 October 2019

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Judgment Approved by the court

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Mr Justice Phillips :

1. By an application notice dated 11 June 2019 the defendant ("Marcassus") applies for a stay of these proceedings under Article 29, alternatively Article 30, of EU Regulation No 1215/2012 (the Recast Brussels Regulation or "RBR"), on the ground that an action that Marcassus had already commenced against the claimant ("Lotus") in the Commercial Court in Toulouse, France, involves the same cause of action or, alternatively, is a related action.

2. Lotus resists the application on the grounds that (i) Marcassus has not demonstrated that the Toulouse court was first seised, but in any event (ii) the proceedings do not involve the "same cause of action" within the meaning of Article 29 and (iii) the proceedings are not "related actions" within the meaning of Article 30, but even if they are related, this court should decline to grant a stay.

3. On 21 October 2019, at the conclusion of the hearing, I notified the parties that I would dismiss Marcassus' application, with reasons to follow. This judgment sets out those reasons.

The facts

4. Lotus, an English company, is a well-known manufacturer of cars. By a series of four written contracts entered in 2016, Lotus appointed Marcassus, a French company in the business of distributing sports cars, as a non-exclusive dealer and authorised repairer of Lotus cars in Toulouse and Bordeaux.

5. Each of these contracts was governed by English law and provided for the non-exclusive jurisdiction of the English courts.

6. Further, each of the two contract appointing Marcassus as "Dealer" includes, at clause 29.2, the following provision:

> "*Where a Lotus Product is not supplied on Finance, upon receipt of an invoice from Lotus, the Dealer shall pay for each Lotus Product ordered by it in full without deduction, withholding or qualification in accordance with the provisions of Schedule 7.*"

7. Schedule 7 of the dealer contracts set out the Payment Terms and provided, in relation to Lotus Products not purchased on finance, as follows:

> *"1. The Dealer shall pay in full cleared funds without deduction, withholding or qualification the Manufacturer's Price for each Lotus Product as follows within seven days of the date of the Invoice for the Lotus Product.*
>
> …….
>
> *4. The Dealer shall be liable for any bank charges, taxes, duties or other levies (however described and by whosoever imposed) which may arise in connection with this transfer of funds.*"

8. The two other contracts, appointing Marcassus as "Authorised Repairer", contained equivalent provisions to those set out above. Both parties, for convenience, referred only to the provisions of the dealer contracts set out above on the understanding that the effect of the equivalent terms in the repairer contracts was identical. I shall adopt the same approach in this judgment.

9. During 2018 Lotus supplied cars and parts to Marcassus and invoiced sums (net of credit notes) totalling €1,002,505 and £18,331.74. It appears that there is no dispute that those sums are now due and owing, save that Marcassus has returned seven cars to Lotus, against which Lotus has given credit, the amount of which is disputed.

10. In September 2018 Lotus gave notice terminating one of the four agreements. It is common ground that the parties' overall relationship thereafter terminated.

11. Marcassus then brought proceedings in the Toulouse Commercial Court, claiming loss of profits and bonuses and seeking to enforce contractual penalties. A summons was filed with the Hussier de Justice on 21 December 2018 for onward transmission to the Foreign Process Section of the High Court for service on Lotus, summoning Lotus to appear in Toulouse on 26 March 2019.

12. Marcassus' claim was filed at the Toulouse Commercial Court on 7 January 2019. Lotus did indeed appear at the hearing on 26 March 2019 and has served a defence disputing the claim, but not claiming in respect of or relying on Marcassus' non-payment of the 2018 invoices. Lotus offered to undertake not to make such a claim in the Toulouse proceedings hereafter, provided of course that these proceedings were permitted to continue.

13. Meanwhile, on 13 March 2019, Lotus issued these proceedings claiming the amounts due under the 2018 invoices. Marcassus was served with the claim form on 24 April 2019.

14. Marcassus filed an acknowledgment of service disputing this court's jurisdiction and made the present application, seeking an order declaring that the English court will not exercise any jurisdiction and staying these proceedings.

The issues to be determined

15. Lotus contended that Marcassus' application should fall at the first hurdle because Marcassus has not demonstrated when, if at all, the summons in the Toulouse proceedings was received by the "*authority responsible for service*" of that summons for the purposes of Article 32 of the RBR, and so cannot establish that the Toulouse court was seised before the English court was seised by the issue of the claim form on 13 March 2019.

16. Marcassus' case is that the relevant authority is the Hussier de Justice, it being accepted that he received the summons on 21 December 2018. But, in the alternative, if the relevant authority is the Foreign Process Section of the High Court (as Lotus contends), Marcassus invites the inference that it was received by that authority shortly after that date, but in any event before 13 March 2019. Marcassus points to the fact that Lotus appeared before the Toulouse court on 26 March 2019 and has taken no point on service in those proceedings.

17. As I have decided, for the reasons set out below, that these proceedings should not in any event be stayed pursuant to Article 29 or Article 30, it is not necessary for me to decide the merits of Lotus' highly technical and rather unattractive preliminary objection. I will therefore proceed to consider Marcassus' application on the basis that the Toulouse court was first seised.

Article 29

18. Article 29 provides as follows:

> "*1. Without prejudice to Article 31(2), where proceedings involving the same cause of action are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established...*
>
> *3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.*"

19. Whilst Mr Wood, for Marcassus, formally maintained that these proceedings should be stayed pursuant to Article 29, he accepted that the proceedings, whilst between the same parties, do not presently involve the same "*cause of action*" within the independent and autonomous meaning of that term as a matter of European law. Mr Wood argued that the court could take into account the likely future shape of the proceedings, namely, that Marcassus would seek to set-off and counterclaim the very same claims it has brought in Toulouse. But he also accepted that the CJEU in *Gantner Electronics GmbH v Basch Exploitatie Maatschappij BV* C-111/01 [2003] ECRI-4207 ruled against such an approach in the following terms:

> "*30… the objective and automatic character of the lis pendens mechanism should be stressed….Art [29]…adopts a simple method to determine, at the outset of proceedings, which of the courts seised will ultimately hear and determine the dispute. The court second seised is required, of its own motion, to stay its proceedings until the jurisdiction of the court first seised is established. Once that has been established, it must decline jurisdiction in favour of the court first seised. The purpose of Art [29]…would be frustrated if the content and nature of the claims could be modified by arguments necessarily submitted at a later date by the defendant. Apart from delays and expense, such a solution could have the result that a court initially designated as having jurisdiction under that article would subsequently have to decline to hear the case.*
>
> *31. It follows that, in order to determine whether there is lis pendens in relation to two disputes, account cannot be taken of the defence submissions, whatever their nature, and in particular of defence submissions alleging set-off, on which a defendant might subsequently rely when the court is definitively seised in accordance with its national law.* "

20. Mr Wood referred to an apparently different approach taken at first instance by Peter Smith J in *Secret Hotels 2 Ltd v EA Traveller* [2010] EWHC 1023 (Ch), but accepted in his skeleton argument that "the weight of authority" is that *Gantner* precludes consideration of any set-off rights that may be raised in the proceedings. I would go further. *Gantner* is authority from the highest European Court on the proper application of Article 29 of the RBR and is binding on me. I would add that the reasoning of the CJEU in *Gantner* would seem to apply with particular force when, as here, the claimant in the second set of proceedings has the benefit of what is at least arguably an effective no set-off clause.

21. It follows that I see no merit in the argument that these proceedings should be stayed pursuant to Article 29.

Article 30

22. Article 30 provides as follows:

> "*1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.*
>
> *2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*
>
> *3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.*"

(a) Whether the proceedings are related

23. The first question is, therefore, whether the actions are "related" in the sense that they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

24. It was common ground that the test requires a broad common sense approach, bearing in mind the objective of the Article is to avoid irreconcilable judgments, itself a flexible concept: see *The Tatry* C-406/92 ECLI:EUC:1994:400 at§53 and *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32 HL. Further, the time at which the comparison between the two actions is to be made is the time of the hearing of the application under Article 30: *FKI Engineering Ltd v Striborg Ltd* [2011] Bus LR 1410 CA per Mummery LJ at §40-44, cited with approval in *The Alexandros T* [2013] UKSC 70 at §75.

25. Marcassus contended that the two sets of proceedings under consideration are plainly related, pointing out that both actions concern the same four contracts, the dealings of the same two parties under the terms of those contracts and the sums due from one to the other following their termination. Further, Mr Wood asserted, if these proceedings

are not stayed, Marcassus will inevitably have to advance its claim in the Toulouse proceedings by way of set-off and counterclaim in these proceedings. Marcassus alleged that there is therefore a plain risk of a conflict in the resulting judgments, at least in a broad sense.

26. Marcassus alleged that there was one specific overlap in the two sets of proceedings, even as presently constituted. Among its grounds for disputing Lotus' entitlement to terminate the contracts, Marcassus has referred to five invoices raised by Lotus shortly before termination, asserting that those invoices related to purchases which had been financed, the debt being assigned by Lotus to the finance company, so not sums Lotus could properly invoice. However, the point appears to have no force because (i) Lotus did not rely upon the non-payment of invoices as a ground for termination, nor has it done so in the Toulouse proceedings; (ii) it appears clear that the cars were not in fact supplied on finance in any event and (iii) three of the 5 cars have been returned to Lotus in any event.

27. Having disposed of that suggested specific overlap, Lotus contended that the two sets of proceedings do not, at present, raise common facts, let alone common issues. As for the potential set-off and counterclaim, Lotus made the following two points:

    i) that Marcassus' solicitor says that Marcassus "*may be left with little choice but to raise its damages claim for wrongful termination….*". Mr Byam-Cook, for Lotus, argued that such evidence was too equivocal to justify a finding that there is currently a risk of overlapping issues and irreconcilable judgments;

    ii) that in any event a defence to Lotus' claim by way of set-off was contractually precluded by clause 29.2.

28. I see little force in the first point. I understand Marcassus' position to be, understandably, that it has no wish to mount its claim against Lotus in this court as well as in Toulouse, but that if these proceedings continue, it may well be forced to do so in an attempt to avoid Lotus obtaining and enforcing a prior judgment on its invoice claim. The slightly equivocal wording referred to above was by way of explanation of an earlier assertion that if both claims be allowed to continue to trial "*it is inevitable that the proceedings will come to be mirror images of each other*".

29. The existence of a valid and effective no set-off clause in the contracts would, however, in my judgment, remove any question of the actions being related. The effect of such a clause would entitle Lotus to summary judgment on its claim on the invoices with no stay of execution, meaning that Marcassus' cross-claim would not be ventilated in these proceedings, but would continue quite separately in Toulouse. Mr Wood argued that, even if Marcassus was not entitled to set-off its counterclaim, it would nevertheless have pleaded and would be entitled to pursue its counterclaim in these proceedings, resulting in parallel proceedings. I see no merit in that contention. If Lotus succeeds in an application for summary judgment based on clause 29.2, it would be entitled to immediate judgment without a stay. Should Marcassus then contiunue with its counterclaim, it would be by way of independent proceedings, such that it would be Marcassus that was pursing exactly the same cause of action in two sets of proceedings: at that point the court might well be obliged to stay them under Article 29. The reality, of course, is that Marcassus would have no reason to pursue its counterclaim in this

jurisdiction once the rationale of attempting to avoid immediate judgment and enforcement in respect of Lotus' claim had been removed.

30. Marcassus contended that clause 29.2 was not effective to exclude rights of set-off as there is a presumption that a party to a contract does not intend to abandon rights and remedies in respect of its breach, and that express words are needed to rebut that presumption. Mr Wood referred to the conclusion in *Lewison -The Interpretation of Contracts* at §2.19 that "*… in most cases, a right of set-off will only be excluded where the clause refers to set-off expressly.*" As clause 29.2 does not expressly refer to rights of set-off being excluded, Mr Wood argued that it was (at least) highly arguable that Marcassus was entitled to rely on such rights as a defence to Lotus' claims on its invoices.

31. It is nonetheless clear that the issue is ultimately a question of interpretation of the specific clause in the context of the contract in question. Whilst the failure to refer expressly to rights of set-off being excluded may be highly pertinent, the intention of the parties to exclude such rights may be sufficiently clear from the use of other words.

32. Thus in *Marubeni Corp v Sea Container Ltd.*, an unreported Commercial Court decision on 17 May 1995, Waller J stated:

> "*First, in the same way as the words "deduction or withholding*" *are not terms of art which will always include "set-off", they are equally not terms of art which limit their meaning to only covering taxes, levies or duties. Second, the fact that clear words are necessary does not mean that the word "set-off" must be used. The words can be clear from their context. Third, what is said in one contract between other parties in one context, cannot really assist in the construction of another contract between different parties in a quite different context.*"

33. More recently, in *FG Wilson (Engineering) Ltd v John Holt & Company (Liverpool) Ltd* [2012] 2 Lloyd's Rep. 479, Popplewell J said:

> "*A right of set-off may be excluded by agreement of the parties. If set-off is to be excluded by contract, clear and unambiguous language is required… but no more than that is required. In particular such a term is not to be treated in the same way as an exclusion clause…*
>
> *Whether the set-off would operate as a substantive defence or as a remedy, what matters in each case is whether there has been clearly expressed an intention that the payment is to be made without reference to the claim which would otherwise be set off. Where the language used does not mention set-off, it may be difficult for a party to satisfy the requirements of clarity if the clause relied on does not in terms qualify the payment obligation. Conversely where the provision does expressly qualify the payment obligation, it may readily be construed as sufficiently clear to be effective… But there is no principle of*

> *construction that a no set-off clause can not be effective unless it is expressed in terms to qualify the payment obligation.*"

34. In the present case, clause 29.2 and paragraph 1 of Schedule 7 provide that payment shall be made "*in full without deduction withholding or qualification*". On its face, that wording appears to be more than wide enough to exclude the right to reduce or withhold a payment by setting-off a cross-claim. Any suggestion that the clause is excluding only the deduction or withholding of taxes, levies or duties can be discounted because paragraph 4 of Schedule 7 makes separate provision for those charges to be the liability of Marcassus.

35. Further, the wording used in this case encompasses (and expands) wording which was recognised by the Court of Appeal as standard wording to exclude a right of set-off in *BOC Group plc v Centeon LLC* [1999] 1 All ER (Comm) 970. In that case the Court of Appeal held that contractual wording did not exclude set-off, contrasting that wording with what would be expected if that was intended. Evans LJ (with whom Brooke LJ agreed) stated p 980A:

> "Here the hypothesis that the parties intended to exclude rights of set-off can be tested in this way: what words might they have used to make their meaning clear? There is not necessarily a magic formula, but words such as 'payment in full without deduction or withholding of any sort are all familiar in contexts such as this. The failure of the parties to use any such words amounts to an eloquent silence."

36. At p. 980G Evans LJ concluded as follows:

> "Finally, I would ask: does this clause provide with sufficient clarity that the purchaser is to pay subsequent instalments of the price, regardless of any lawful rights of cross-claim which it may have? I regard the word 'whatsoever', for the reasons given, is ambivalent. There is no specific reference in the clause to deduction, withholding or payment in full, and in those circumstances I do not think that the clause does have that effect."

37. As the parties in this case have deployed the very words identified in *BOC* as being what parties might be expected to use to exclude set-off, it is, in my judgment, difficult to conclude that clause 29.2 is not intended to have that effect. Not only is the *BOC* case persuasive authority as to the meaning of those words, but also, in using the very words identified in that decision, the parties can be taken to have known their significance and intended them to be so understood.

38. It follows that a textual analysis of the relevant provisions, in the context of the contracts as a whole, firmly indicates that set-off was excluded. In my judgment there is nothing in the commercial context of the contracts that points to a different conclusion. It makes entire sense that a supplier of valuable vehicles and parts to a distributor would require payment in full for those supplies without being exposed to delays whilst cross-claims were litigated, possibly in a foreign jurisdiction.

39. It follows that I am satisfied, on the material before me, that the no set-off clause is valid and effective, or at least (for present purposes) that Lotus has by far the better of the argument in that regard.

40. It also follows that I do not consider that the actions are related for the purposes of Article 30.

(b) Discretion

41. If, contrary to my conclusion above, the two sets of proceedings are related within the meaning of Article 30, the question would then arise as to whether these proceedings should be stayed as a matter of discretion.

42. In *The Alexandros T*, at §92, Lord Clarke summarised the factors identified by Advocate General Lenz in *Owens Bank Ltd v Bracco* (Case C-129/92) [1994] QB 509 as being relevant in exercising the discretion as follows:

> "*The circumstances of each case are of particular importance but the aim of article [30] is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors of being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in the set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion the Advocate General said, at para 79, that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question.*"

43. The initial, and possibly only, issue in these proceedings is whether Lotus is entitled to rely on clause 29.2 as precluding any set-off against the sums due on the outstanding invoices or any stay of execution of a judgment for the sums due. That is a relatively straightforward question of the proper interpretation of that clause as a matter of English law, a question which may well be determinative of the whole proceedings, probably in the context of an application for summary judgment by Lotus.

44. In my judgment it is obvious that these proceedings should be permitted to continue so that the question of whether clause 29.2 is an effective no set-off clause is determined in this jurisdiction. That issue. which does not arise in the Toulouse proceedings (limiting the extent of "relatedness"), is an issue of the interpretation of an English law contract (establishing close proximity with this jurisdiction) and can be determined speedily in a summary judgment application (indicating that the stage proceedings have reached is not a factor against this jurisdiction). Further, the parties have expressly agreed to the jurisdiction of the English courts, albeit on a non-exclusive basis.

45. Further, and conclusively in my judgment, if clause 29.2 is (as it appears to be) a valid no set-off clause, the very purpose of such clause is to enable Lotus to obtain and enforce a judgment for goods supplied to Marcassus without regard to any cross-claims

Marcassus may advance. The effect of staying these proceedings and requiring Lotus to advance its claims on the invoices in Toulouse would be to undermine that purpose and to deprive Lotus of the benefit of its contractual bargain. Eder J, in *Nomura plc v banca Monte Dei Paschi Spa* [2014] 1 WLR 1584 at §79, regarded giving effect to the parties' bargain as a compelling factor in the exercise of the court's discretion under Article 30.

(c) Decision on Article 30

46. It follows that Marcassus is not entitled to a stay of these proceedings under Article 30.

Conclusion

47. For the reasons set out above, Marcassus' application fails under both Article 29 and 30. However, I should record that Lotus has given an undertaking that it will not, provided these proceedings are on-going and not stayed, claim in respect of the sums due under the invoices which are the subject of these proceedings in the action before the Toulouse Commercial Court.