Catalyst Recycling Ltd v Nickelhütte Aue GmbH [2008] Int.Com.L.R. 05/22

CA on appeal from QBD (HHJ Grenfell) before Waller LJ; Lawrence Collins LJ; Rimer LJ. 22nd May 2008

Lord Justice Waller :

1. The respondents, Catalyst Recycling Limited, were formerly known as Chris Cutchey Limited. They operated under an "agency" agreement with the appellants Nickelhütte Aue GmbH. The object of the agreement was that the respondents, an English company operating in the United Kingdom and Ireland, acting as principals would secure for the appellants, a company in Aue in the District of Dresden, Germany, supplies of materials for recycling. The materials were defined as "spent or redundant catalysts and other residues suitable for recycling". The main source of the materials was catalyst generators within the United Kingdom. The business therefore involved the transhipment of waste for recycling between the United Kingdom and Germany, to which the European Transhipment of Waste Regulation (Council Regulation (EEC) No 259/93) (the European Regulation) applied and to which, indeed, regulations passed in both the United Kingdom and Germany also applied.

2. Amongst the requirements of the European Regulation was that there had to be in place in relation to any shipment a financial guarantee to cover the costs of reshipment of the waste in case it was rejected. A financial guarantee had in this case been obtained in relation to shipments but the guarantee referred to the respondents by their former name, Chris Cutchey Limited. The main dispute in this case arose out of the fact that there was a period during which the authorities in Dresden became concerned as to whether the guarantee covered shipments made by "Catalyst Recycling Limited" when the guarantee referred to "Chris Cutchey Limited". Although ultimately satisfied that the guarantee was effective, the authorities alleged that three shipments imported into Germany while the authorities were considering the position were made illegally under German law.

3. As between the respondents and the appellants it was also alleged that because the shipments were made illegally the respondents were in repudiatory breach of the agency agreement. In reliance on that breach the appellants terminated the agency agreement and claimed damages. The respondents denied any illegality and denied in any event that whatever occurred could amount to a repudiatory breach. In their turn they accepted the appellants' termination as repudiation and claimed damages. The issues before the judge were accordingly: (1) Were the three shipments, or any of them, illegal under German Law? (2) If so, did the consignor, by shipping the waste into Germany, commit a repudiatory breach of the agency agreement?

4. By a judgment handed down on 4th May 2007 His Honour Judge Grenfell sitting as a High Court Judge, preferring the evidence of the expert in German law called by the consignor, decided there was no illegality under German law. He further decided that even if any shipment was illegal the respondents' conduct was not a repudiatory breach of contract. He held that the respondents were entitled to damages for the appellants' repudiation. This is an appeal from that judgment.

European Regulation

5. I append to this judgment the relevant provisions of the European Regulation with which this case was concerned. [We were told that there is a new Regulation (EC) No 1013/2006 with effect from 12th July 2007, but it is not of relevance to any point in issue.] As appears, the main object of the regulation is to see that prior notification is given to the competent authorities in different member states to which waste may be transported or through which waste may be transported. The aim is to enable those authorities to be informed of the particular type of waste, its movement, its disposal or recovery so that the authorities can take measures to protect human health and the environment, including being able to take reasoned objections to any shipment. Different types of waste are dealt with in different ways. The European Regulation contemplates competent authorities in the state of dispatch, in the state of transit and the state of destination, all of whom will have a role in controlling the movement of waste. The competent authority in England which, in the case of two shipments was the state of dispatch and, in the case of one shipment from Ireland, was the state of transit, was The Environment Agency. The competent authority of the state of destination was the Regierungsprädium (Dresden RP).

6. Chapter A, which I have not produced in the appendix, is concerned with waste for disposal, but in this case we are concerned with waste for recovery covered by Chapter B. The basic structure before considering Article 9, which is perhaps the most important Article to be considered in this case, I can summarise as follows. Article 6 (the first Article in Chapter B) provides that where a notifier (in this case the respondents) intends to ship waste from one member state to another, he shall notify the competent authority of destination (in this case Dresden RP) and send copies of the notification to the competent authorities of (a) dispatch (in two cases the Environment Agency in England and in one case Cork County Council in Cork), (b) of transit (in the case of the shipment from Ireland to the Environment Agency), and (c) to the consignee. Article 6(3) provides for the notification to be through a consignment note issued by the competent authority of despatch (i.e. in two cases the Environment Agency and in one Cork County Council). Articles 6(4) and (5) specify the information to be on the consignment note and impose on the notifier (the respondents) an obligation to supply additional information and documentation if requested by the competent authorities. Article 6(6) requires a notifier (the respondents) to have concluded a contract with the consignee (the appellants) for recovery of the waste. Importantly the contract must include an obligation on the notifier to take the waste back "if the shipment has not been completed as planned or if it has been effected in violation of this regulation".

7. Article 7 requires the competent authority of destination to send within 3 working days an acknowledgement to the notifier, with copies to the other competent authorities and to the consignee. Article 7(2) then gives 30 days for any of the competent authorities to object to shipment on grounds based on those identified in Article 7(4).

8. Article 8(1) allows shipment to be effected if, after the 30 day period, no objection has been lodged. Article 8 (2) requires the notifier to insert the date of shipment in the consignment note and send copies to the competent authorities 3 working days before shipment. The remainder of Article 8 is concerned with the completion of the consignment note by others and with obtaining confirmation that the waste has been recovered not later than 180 days following receipt of the waste.

9. Article 9 is important in this case. It allows, by Article 9(1), for "competent authorities having jurisdiction over specific recovery facilities" (in this case Dresden RP) to decide "notwithstanding Article 7, that they will not raise objections concerning shipments of certain types of waste to a specific recovery facility." Dresden RP, in the case of the shipments with which this case is concerned, did so decide. Articles 9(3) and (5) I should quote in full:-

> *"9(3) All intended shipments to such facilities shall require notification to the competent authorities concerned, in accordance with Article 6. Such notification shall arrive prior to the time the shipment is dispatched.*
>
> *The competent authorities of the Member States of dispatch and transit may raise objections to any such shipment, based on Article 7(4), or impose conditions in respect of the transport.*
>
> . . . . .
>
> *9(5) For the actual shipment, Article 8 (2) to (6) shall apply."*

10. It would seem (and it seems logical) that it was contemplated that if an Article 9 decision had been taken by a competent authority of destination, only the competent authorities of dispatch and transit would have any right to make objections based on Article 7(4). It also seems to have been contemplated that when Article 9 was being used notification had to be made to the competent authorities and that that notification had to be sent 3 working days before the shipment is made (Article 8(2)) to arrive with the competent authorities "prior to the time the shipment is dispatched"(Article 9(3)). In this instance, as I read the regulation, it seems to have been intended that there should be no period of 30 days for any of the competent authorities to consider the making of objections under Article 7(2), which seems to explain the omission of Article 8(1) in Article 9(5). I will return to this point, about which there may be an issue.

11. Article 26 deems certain shipments of waste to be illegal traffic e.g. if notification has not been given to all competent authorities or consent has not been obtained or consent has been obtained by fraud. The Article imposes obligations on the competent authorities for the illegality of entities within their jurisdiction including an obligation on the competent authority of despatch if the illegal traffic is the responsibility of the notifier to take the waste back. Even more critical to the issues in this case by Article 27 "all shipments of waste… shall be subject to the provision of a financial guarantee or equivalent insurance covering costs for shipment including cases referred to in…Article 26."

12. So far as the obligation to provide security is concerned, highly relevant to the issues in this case, Section 7 of the German Waste Transport Law as translated provided as follows:-

> *"(1) Executing Article 27 of the EU Regulation on the Trans-Frontier Shipment of Waste, a trans-frontier shipment of waste requiring notification into, from and through the area where this law is applicable may only be made if the notifying person has previously provided security or proved a corresponding insurance cover and has fulfilled its obligation to participate in the solidarity fund according to Sec.8 para. 1 sentence 6.*
>
> *(2) Responsible for the determination and release of the security is the competent authority of the place of shipment. If in the event of the trans-frontier shipment of waste into the area where this law is applicable, the competent authority at the place of shipment does not make the decision on the trans-frontier shipment dependent on the deposit of a security or the proof of a corresponding insurance cover, or if the domestic authority has reason to assume that the security or insurance cover requested by the authority at the place of shipment is not suitable to cover all costs and risks stated in Article 27 of the EU Regulation on the Trans-Frontier Shipment of Waste, it determines the required security or insurance cover itself by way of condition or obligation."*

The facts

13. The appellants and the respondents operated under what were called "Agency Agreements". The agreement before us and before the judge was signed by both parties and dated on dates in October 2001. At about the same time Dresden RP made a decision under Article 9 of the European Regulation confirming that Dresden RP had decided not to raise any objections to the transportation of waste materials from overseas to the appellants. That decision stated that it "entitles you" [which seems to refer to the appellants] to enter "yes" in section 3 of the notification document under heading "fully approved recycling plant". It further stated that the decision did not affect the requirement that completed notification documents must be submitted for planned transportation of the named waste materials to the appellants.

14. There was already in existence a financial guarantee in accordance with Article 27 issued by Westdeutsche Landesbank guaranteeing the proper fulfilment of all obligations (according to the regulations) by the appellants and by the respondents, named at this time Chris Cutchey Ltd, up to the amount of 100,000 Deutschmarks.

15. The respondents changed their name to Catalyst Recycling Limited in May 2003. They attempted to notify Dresden RP of that change of name by facsimile message dated 27 May 2003 but that facsimile message was (as found by the judge) never received by Dresden RP.

16. Many consignments under many different consignment notes were transported by the respondents to the appellants. In this case the first relevant consignment note was No. GB 005852, dated 24 June 2004. Under this note the respondents notified Dresden RP (as it was obliged to do under Article 6 of the European Regulation) of

its intention to ship waste to the appellants. It is this consignment note which covers two of the shipments giving rise to the issues in this case which for convenience I will call the English shipments. That notification was received by Dresden RP on 2nd July 2004, and acknowledged by them on 8th July 2004. The document was also stamped by Dresden RP on 4th August 2004 in the box entitled "consent to the movement provided by competent authority" and, by letter dated 4th August 2004 addressed to the respondents, Dresden RP issued "according to Article 6" a permit to tranship the waste the subject of notification GB 005852, by paragraph 10 of which it was stated: "The permit is only valid if a security according to Article 27 ….in sufficient amount has been provided…"

17. The judge found that, having regard to the existence of the Article 9 general consent, this further consent of 4th August was actually unnecessary. That finding is challenged on the appeal by Mr Jack on behalf of the appellants. On my reading of the European Regulation the judge's view was correct. However, in any event, so far as security was concerned the Environment Agency certified, in relation to the above numbered notification by a certificate dated 8th July 2004 addressed to the respondents, that it was satisfied that there will be in force in respect of the shipments referred to a financial guarantee satisfying the requirements of Article 27 – referring expressly to the Landesbank guarantee.

18. I turn to the second notification of relevance in this case. On 4th November 2004 notification was given by the respondents to Dresden RP of a shipment from Ireland to the appellants to be transhipped via England. Cork County Council certified, by letter dated 13th December 2004, that a financial guarantee was in place. The notification was received by Dresden RP on 15th December 2004 and acknowledged on 16th December 2004 (see copy of notification at page 200 of the bundle). By a further form dated 17th December 2004 Dresden RP was notified that the actual date of shipment would be 29th December 2004.

19. There appear to have been discussions between the respondents and Dresden RP and on 20th December 2004 the respondents faxed as follows:-

"On Friday Chris Cutchey spoke to you regarding IE 041764.

You told him that the Notification was OK and that you would fax through the signed and stamped Notification form.

Please can you confirm we have permission for this so that we can organise transport from Pfizer on the 29th December.

I will telephone you at about 9.00 am on Tuesday.

Please also find:

1. Certificate of Satisfaction from Cork County Council

2. Consent from Cork County Council for IE 041764

3. Consent from the Environment Agency for IE 041764

I believe that the paperwork somehow got lost between here and your office and I thank you for all you help in trying to process this as quickly as possible."

20. As the regards the English shipments, problems began with the issue on 17th December 2004 by the Regional Council of Dresden of what is termed a "Bescheid" – a formal administrative act imposing (as was common ground) under German law an obligation to obey the same. It prohibited the respondents from "any further trans-frontier shipments of waste under the above mentioned notifications [amongst which was No. 005852 but not, as I understand it, the Irish shipment]." It stated *"Until we have been presented with sufficient provisions of security…no waste may be transhipped to Nickelhütte . . ."* It stated "*waste already on the way …may still be received and recycled there*". In the body of the Bescheid it referred not to the Landesbank guarantee but to an insurance policy which covered quite different matters.

21. The respondents faxed this response on 21st December:-

"I have spoken to Frau Walz of West LB (0231 18114 515) and she confirms that there are no problems with our financial guarantee.

This financial guarantee is for 100,000.00 DM or 51,129.19 Euros.

This has been in place for more than 5 years now and I do not understand why the Regierungspräsidium Dresden has forgotten that it is there.

For the sake of good order I have attached a copy of our 'Certificate of Incorporation on Change of Name' and also the 'Burgschaftserklärung'.

I also enclose copies of the Certificate of Satisfaction from The Environment Agency for the following TFS notifications: GB005030, GB 005826, GB 005827, GB 005928, GB 005829, GB 005852, GB 005856, GB 005858, GB 005854.

The Environment Agency do not give out these to anyone who asks for them, like the Regierungspräsidium Dresden the Environment Agency ensure that the correct funding is in place and the Financial Guarantee is valid before they issue the Certificate of Satisfaction.

On the basis that our financial guarantee is still in place and is still valid I attach the pre-notification for notification GB 005852 which we will be shipping on Friday 24th December unless we hear to the contrary. A copy of these details will also be sent to the persons who have a legitimate interest in the movement of this waste.

Please confirm that all is in order and that you have refound the financial guarantee.

Please let me know if there is anything else I can do to help."

22. On 22nd December the appellants wrote to the respondents saying they had been informed there was no guarantee, that shipments were therefore forbidden and requesting that Dresden RP's demand be met by 21 January. It further stated that, if there was a failure to meet the demand, they would treat that as a breach of contract and cancel the contract. This letter would seem to cover both the English shipments and the Irish shipment.

23. On 23rd December lawyers for the respondents issued an appeal against the Bescheid (a Widerspruch) which as a matter of German law (as again was common ground) lifted any ban imposed by the Bescheid.

24. The Irish shipment was made on 29th December 2004.

25. By letter of 3rd January 2005 Dresden RP insisted that they needed "a confirmation of the validity of the West LB security of September 1999" and stated that "trans-shipment without sufficient and valid security is not admissible and is to be evaluated as illegal trans-shipment". In the meanwhile the eighth shipment under notification GB 005852 (the first shipment directly relevant to these proceedings) was delivered to the appellants in Germany.

26. On 4th January 2005 Dresden RP wrote to the respondents in relation to the Irish shipment in the following terms:-

"In our letter dated 16.12.2004 we confirmed receipt of the notification.

After having reviewed the documents received we inform you that we cannot yet deal with the matter as the documentation is incomplete. You are requested to submit the following supplements/amendments by 31.01.2005:

1. Presentation of approval for transport/insurance of the designated waste carrier;

2. Presentation of a sufficient and unlimited bank guarantee of a German bank in favour of Regierungspräsidium Dresden in the amount of at least €7,500.00

We draw your attention to the fact that until all required documents have been presented, all deadlines are inhibited. The shipment may only be made after the final approval of Regierungspräsidium Dresden.

"Intended shipments are not permitted"

Please note that your application is likely to be refused if the requested documents are not received by the date mentioned above.

The responsible authorities at the place of shipment, the transit states and the recipient of the waste will all receive a copy of this letter."

27. On 6th January Westdeutsche Landesbank wrote to Dresden RP stating as follows:-

"In the above matter we are referring to your telephone conversations with Mr Roeseler and the legal signatory, where we discussed the bank guarantee Nickelhuette Aue GmbH.

To summarize we are informing you about the following:

West LB has guaranteed against the regional council and the Environment Agency directly enforceable and voiding affirmative defence of objection and compensation up to an amount of DEM 100,000, if Nickelhuette Aue or Chris Cutchey Ltd. International fail to meet their dues in total or partially. As regards to details we refer to the content of the bank guarantee, which is to you.

As the bank guarantee is not limited in time and the document has not been returned to us marked invalid, WestLB's obligation with regard to this guarantee has continued to exist without restrictions to the present day. Should the claims resulting from this guarantee be made use of by the beneficiaries, we, as guarantor are entitled and obliged vis-à-vis our client to examine the legitimacy of the claim. In the course of this examination it should also be established whether Catalyst Recycling Ltd. is identical with Chris Cutchey Ltd. And whether this fact is sufficiently proven through the Certificate of Incorporation of Change of Name dated 28 April 2003, of which we have a copy.

A copy of this letter has been sent to Nickelhuette Aue GmbH for their information."

28. On 10th January 2005 the second shipment under notification 005852 arrived in Germany.

29. On 28th January 2005 Dresden RP granted approval in accordance with Article 6 for the Irish shipment. This approval contained the same clause 10 as the August permit for the English shipments, i.e. it was only valid if sufficient security had been supplied in accordance with Article 27. On the judge's construction of the European Regulation (with which as I have said I agree), since an Article 9 consent existed, this permit was unnecessary.

30. Also, on 28th January a more senior official in Dresden RP allowed the appeal against the Bescheid of 17th December. The objection was found to be well founded, and it was found "there was no need for a prohibition order; the order is contrary to law". But following the ruling some notes appeared on the document in the following terms:-

"Without prejudice to the above-mentioned decision, the Regional Council of Dresden still holds the opinion that at present there is no sufficient security according to Article 27 of the Regulation (EEC) 250/93 for the notifications in question GB 005826, GB 005827, GB 005828, GB 005829, GB 005852, GB 005853, GB 005856, GB 005858. The copy of the insurance company Bray Wintor Patis plc of the policy no. ODP108813985/T.B.A. dated May 13, 2003 and April 30, 2004, respectively, presented as proof for a sufficient security does not contain any information on the purpose of the insurance and who shall be the beneficiary of the insurance. It is probably rather a general manufacturer's liability insurance. Moreover, the term of validity does not cover the entire notification period.

The guarantor does not let the unlimited provision of a security in the form of a guarantee declaration of WestLB (file no.: 14-62210 or) for mutual business transactions between Chris Cutchey Ltd. and Nickelhütte Aue GmbH in the amount of DM 100,000.00 (Eur 51,129.19) apply without restrictions. According to the letter dated January 6, 2005 of WestLB available to us, the opinion there is not clear on whether the guarantee of WestLB is valid for your

Client. WestLB reserves the right to only examine this in case of claiming. An unrestricted access to the guarantee is thus no longer given. Insofar, there is still the necessity to present a legal certainty, we would like to ask you to strive for an unrestricted confirmation of the guarantee by WestLB or to document the continued existence of the guarantee In another manner. Up until then, all trans-shipments of waste carried out under the above-mentioned notifications fulfil the facts of illegal trans-frontier shipments of waste (criminal offence according to Sec.326 StGB)."

31. It was common ground that these notes could not themselves be construed as a "Bescheid".

32. By letter of 3rd February notarised copies confirming the respondents' change of name were sent to Dresden RP by Dr Venus a lawyer acting for the respondents in Germany. This resulted in a letter from Dresden RP of 25 February 2005 in the following terms:-

"Thank you for your letter of 03/02/2005.

The conclusion/ascertainment that we arrived at in our letter of 28/01/2005, that no sufficient bank guarantee was in place, is no longer maintained. It is accepted that this merely/simply dealt with a name change.

In view of the necessity for the implementation of the Notification procedures in the case of the use of article 9 of the Regulation (EEC) No. 259/93, we would like to give you the following explanation:

No objections referring to the plant are allowed to be raised through the implementation of the notification procedure according to article 6 of the Regulation by the competent authority of destination. The competent authorities of despatch and of the transit countries are however permitted to raise such objections. The subsequent demands for the completion of the notification documents (article 8, paragraphs 2 to 6 of 259/93) still remain."

Transports are only permitted to take place after the 30-day notification period (article 8, paragraph 1, sentence 1 of 259/93).

Transports without the permission of the competent authorities that take place before the expiry of the 30-day period are deemed illegal shipments."

33. Thus, to summarise, so far as the English shipments were concerned it was not in issue that in fact there was at all times in existence a financial guarantee under Article 27; it was further not in issue that there was in existence a permit to ship, either by virtue of Article 9 or by virtue of the permit issued on 4th August. There was not, at the time of shipment, any Bescheid overriding those permits. There was however a period during which Dresden RP were not satisfied that the financial guarantee covered Catalyst. The question is whether Community Law or German law made it illegal to ship while Dresden queried the financial guarantee. Quite separately arises the question whether, even if illegal, the respondents' conduct was such as to amount to a repudiatory breach of contract as between the respondents and the appellants.

34. As regards the Irish shipment, again there is no issue that a financial guarantee was in place. Since at the time of shipment the permit of 28th January had not been issued, the question is first whether by virtue of Article 9 the respondents had permission to ship – this turns on whether the respondents had given proper notification of shipment. That itself turns on whether the respondents were required to give a period of 30 days from notification. As I have already indicated, in my view and in agreement with the judge, that was not a requirement of the European Regulation where Article 9 consent was in place. In my view the issue again in relation to the Irish shipment is whether the respondents were entitled to ship during the period when Dresden RP were saying they were not satisfied that they had got a financial guarantee covering the respondents operating under a name that did not appear in the guarantee. If the shipment was illegal the question would then be whether taken together with the English shipments the respondents' conduct was repudiatory.

The allegation of illegality

35. Experts were called to deal with German Law. One criticism that Mr Jack makes of the judge is that the judge failed to take into account other evidence relevant to ascertaining German law. In particular he complains that the view expressed by the key figure in Dresden RP who, as he pointed out, had to deal with infringement of the laws relating to shipment of waste on a daily basis, and the view of the prosecutor in Germany, who had instituted proceedings against Mr Cutchey, was not given any weight. I do not myself think there is a great deal in this criticism since German law needed to be proved through experts, and the view of the prosecuting authority which has actually mounted a prosecution, or Dresden RP who were supporting that prosecution, would be unlikely to fulfil the role required of an independent expert. But the particular letter relied on by Mr Jack is in fact a convenient starting point for identifying the case on illegality, which he submits his expert established. The letter was written in answer to a letter from lawyers acting for Mr Cutchey seeking to get the prosecution withdrawn and seeking to get Mr Beer, of Dresden RP, to alter the evidence he had put in by way of a statement in the English proceedings.

36. The response of Dr Henry Hasenpflug, by letter dated 20th November 2006, contained the following :-

"1. In paragraph 1 of your complaint you state that with respect to the three disputed shipments (8 and 9 deliveries of notification GB005852 as well as 1 delivery of notification IE041764) all responsible authorities were in receipt of the necessary documentation at the time the deliveries were made.

According to our inquiries the facts are as follows: With notice of 04.08.2004 the agreement (approval) to ship (notification GB005852) was given subject to conditions and obligations. The approval contains the condition whereby it is only valid if adequate security pursuant to Article 27 [of the European Regulation] is provided, which covers the costs for a return transport as well as the costs for the disposal of or utilisation of the waste. In its

notification dated 17.12.2004 Regierungspräsidium Dresden informed Catalyst Recycling Ltd. that the security provided was not sufficient.

Pursuant to Section 7 para 1 of the German Waste Transport Law security is to be provided prior to the shipment. Shipments without security are illegal and punishable according to Section 326 of the German Criminal Code. The 8 and 9 deliveries of notification GB005852 were made on 01.01.2005 and 10.01.2005. At this point in time Regierungspräsidium Dresden had not been presented with sufficient security.

Regierungspräsidium Dresden received notification IE041764 on 15.12.2004, which was confirmed by Mr Beer on 16.12.2004. In its letter dated 04.01.2005 Regierungspräsidium Dresden requested that missing documents which relate to this notification be provided.

These documents were sent by your firm under cover of a letter dated 17.01.2005. Regierungspräsidium Dresden confirmed the completeness of the documentation and gave the approval for shipment on 28.01.2005.

However, shipment had already been made on 29.12.2004. At this point in time Regierungspräsidium Dresden had not been presented with a complete set of notification documentation.

2. In paragraph 2 you state that pursuant to Appendix III of the systematic and the provisions of The European Regulation and German Waste Transport Law the shipment of waste for recycling is generally allowed and does not require approval and that for the transport of such waste a notification pursuant to Articles 6 to 9 of the European Regulation is sufficient.

We agree with you in that. An approval is not required. However, there is nothing to say against obtaining a written approval within a 30 day period as set out in Article 8(1) of the European Regulation. This is usual practice in middle-European countries (refer to approvals by the Environment Agency as well as Cork County Council.)

We cannot see an illegal or incorrect behaviour of Mr Beer.

3. With regard to your statements in paragraphs 3 and 4 we agree with you to the extent that the disputed transports are subject to a notification obligation according to Article 9 of the European Regulation. It is our view that Article 8(1) of the European Regulation applies. Pursuant to Article 9(3) of the European Regulation objections may be raised by the authority at the place of shipment or by the authority dealing with the shipment. Although Article 9(4) of the European Regulation stipulates that only Article 9(2) to (8) apply, the shipment may only be made after the 30 day notification period, because both the shipping authority or the authority dealing with the shipment may raise objections (refer praxis handbook on international waste disposal, publisher: Umweltbundesamt, author: Dr Joachim Wutzke, November 2000, Erich-Schmidt Verlag).

. . . .

Pursuant to Section 7 para 1 of the German Waste Transport Law in connection with Article 27 of the European Regulation the security is to be provided and proven prior to shipment. As stated above, this did not happen. Therefore, both shipments relating to notification GB005852 (8 and 9 deliveries) were made without valid notification.

With regard to notification IE04176 shipment was made on 29.12.2004 (date of shipment). At this point in time Regierungspräsidium Dresden was not in receipt of a complete set of notification documentation. Therefore, this shipment, too, was made without valid notification as set out in Article 6 of the European Regulation."

37. Mr Jack also suggested the judge should have had regard to the charge which is being made against Mr Cutchey in Germany, signed as it is by a judge. The charge seems to relate simply to the absence of a financial guarantee and makes no separate allegation in relation to the Irish shipment. The thrust of the charge is in the following sentences:-

"The Corresponding bank guarantee from WestLB was issued to Chris Cutchey Ltd., but not to Catalyst Recycling Ltd. The Westlandesbank had, up to that point, not recognized the change in the company name and was not prepared offhand to fulfil offhand the bank guarantee obligations for Catalyst Recycling Ltd. With the decision on 17 December 2004, your company, Catalyst Recycling Ltd., 3 Derby Road, Burton Upon [sic] Trent, Staffordshire DE14 1RU in Great Britain was informed in an authoritative way that the necessary adequate security was not present. According to the authorisation issued to you according to the decision on 12 October 2004, which mentions in section 10 that the authorisation is only valid when there is a security in an adequate amount according to article 27 of the (EEC) regulation no. 259/93, by which the costs for a return transport as well as the costs for the disposal or recycling of the waste are covered. From this time up until the confirmation of the presence of an adequate security by the responsible competent authority, the Regional Commission/Administration of Dresden, you were not allowed to carry out further shipments. You were only able to provide proof of the presence of an adequate security by verification of the identity of both companies Chris Cutchey Ltd. and Catalyst Recycling Ltd after the transports had been carried out. As long as the security was not valid, a significant provision of the authorisation decision on 12 October 2000 did not apply and therefore the authorisation itself did not apply either. With regard to all 3 shipments of a total of 60 tons of nickel catalytic converters (first shipment 88 barrels/second shipment 20 ASP containers/third shipment 73 barrels), the necessary authorisation was missing."

38. It may indicate at least some doubt as to the position under German Law that allegations have not been absolutely consistent. The letter from Dresden RP of 25th February 2005 quoted above seems to assert that, since there was in place a Financial Guarantee, no point was now being taken on that aspect. The point taken appears to be that, although the competent authority of destination had no right to object under the notification procedure,

other competent authorities did have that right and it is asserted the 30 day period envisaged by Article 7(2) for objecting applies. So it is asserted shipment is only allowed after the 30 day period has expired.

39. This same point is taken in the letter of 20th November 2006 under paragraphs 2 and 3. But in this letter, so far as the English shipments are concerned, reliance is now placed on Section 7 paragraph 1 of the German Waste Transport Law. A breach of that paragraph is alleged on the basis that shipments without security are illegal and punishable under section 326 SGB, and reliance is placed on the assertion that at the dates of shipment Dresden RP "had not been presented with sufficient security."

40. The charge does not take any point relating to the 30 day period or suggest illegality on that basis. It asserts that, until the consignor had confirmation of the presence of adequate security, the consignor was not entitled to carry out further shipments.

German Law

41. Mr Jack concentrated to a considerable degree on the views expressed as quoted in paragraphs 36 and 37 above and, as I have said, he was critical of the judge for ignoring those views. In my view what was important both for the judge and for the argument of either side was to consider, with the aid of the experts, precisely what the relevant German law was. That is not to say that the views of those representing Dresden RP and the prosecutor were inadmissible, but on no view could their opinions as to what was lawful or unlawful be said to be an independent view of an expert seeking to help the court.

42. As I read Prof Dr Reinhard Müller's Expert Report on behalf of the appellants, he did not assert, at least as a matter of German law, that the respondents had in any way infringed the European Regulation (see the third paragraph on page 227). His view was that the legal situation in Germany was different and that indeed Section 7 of the German Waste law had filled a gap as Article 27(3) of the European Regulation contemplated. His view, I understand from his report to have been first that by virtue of paragraph 1 of section 7 a guarantee (or its equivalent), must have been furnished prior to shipment. His view was that it was a mandatory requirement that the competent authority had satisfied itself that the need for security was satisfied with any guarantee deposited, and that under section 7(2) the verification was to be carried out by the competent authority of destination. Indeed he points out that it is "even possible for the authority to determine itself the required security." His view was that the Bescheid of 17th December had shown "there is a security deficit", and that that security deficit constituted a violation of section 7(1) and of collateral clause 7(2). His view was that the 30 day time limit was an irrelevance because the guarantee had to be furnished before dispatch. His view was further that it was unnecessary for there to be a Bescheid forbidding shipment because section 7(1) requires a guarantee prior to shipment. (See page 230 the last three paragraphs).

43. The view of Dr Michael Malterer, the expert for the consignor, was as follows. First he expressed views on the proper construction of the European Regulation as to which English lawyers are as competent to express a view as an expert in German law. It is however of interest that he was of the view that, once an Article 9 consent had been given, no other permits were required (see paragraphs 12 to 14); as I have indicated that was also the view of the judge and my own view. All that was required was notification in accordance with Article 6 (see paragraphs 20 and 21). He further expresses the view that, once Article 9 is applied, the 30 day period referred to in Article 8(1) has no application; again that was the view of the judge and a view which I share. He points out that once an Article 9 consent is in being it is only the competent authorities of despatch and transit that can raise objections (see Article 9(3)). That also appears to be clear.

44. He then considers Section 7 of the German Waste law. His view was that section 7(1) makes it mandatory that a notifying person has already supplied the financial guarantee and in this case they had. His view on Section 7(2) can, I think, be summarised in this way. As a general rule it is for the competent authority of dispatch to be responsible for determining the effectiveness of the financial guarantee. In the case of the English shipments the Environment Agency determined that the Financial Guarantee was adequate (see their notice of 8th July 2004), and in the case of the Irish Shipment the Cork County Council determined the adequacy (see their notice of 13th December 2004). Only in exceptional circumstances will the competent authority of destination be entitled to determine the adequacy of the guarantee. The circumstances are (i) if a guarantee has not been required by the competent authority of dispatch or (ii) if the "domestic authority" i.e. Dresden RP has reason to believe the guarantee is not sufficient.

45. His view was that neither condition applied in this case. He was clearly right about condition (i) and there is no dispute on that aspect. His view as to why (ii) was not fulfilled he supported by reference to the fact that in effect the Dresden RP were not, in their letter of 17th December, considering the right guarantee. Thus it was his view that Dresden RP did not state why they believed the relevant guarantee to be inadequate. Further he said that if Dresden RP wished to rely on Section 7(2) they would have had to refer "explicitly to these provisions" and as I understand it have issued a Bescheid.

46. He then deals with the Bescheid of 17th December and the fact that under German law it would be suspended by the notice of appeal (the Widerspruch) (paras 28 to 37). Finally he deals with the notes at the end of the decision to uphold the objection to the Bescheid. His view was that the notes were wrong because there was in place a financial guarantee; in addition he was of the view that the notes could not themselves constitute "an administrative act" i.e. a Bescheid with the effect of imposing a prohibition on shipment.

47. Ultimately his conclusion was that at no time were the respondents prohibited by German law from shipping waste for recovery to the appellants either from Great Britain or from Ireland.

48. The judge preferred the view of Dr Malterer. Mr Jack criticised the judge for his approach. Mr Jack had successfully shown that Dr Malterer was unaware of a decision on Section 8 of the German Waste Transport Law (irrelevant to the case but an important decision on waste law in Germany). He submitted that the judge was wrong to dismiss this point as "hardly a killer point". He further submitted that Professor Müller was at a disadvantage needing in many instances the help of an interpreter. He furthermore relied heavily, as I have already made clear, on the views expressed by the prosecutor and those acting for the Dresden RP, which he submitted the judge was wrong to ignore.

Discussion

49. The question whether any shipment was illegal as a matter of German law turns on the proper interpretation of Section 7(1) and (2). We have those subsections in translation. Scott LJ in *A/S Tallina Laevauhisus and others v Estonian State S.S. Line and another* (1947) 80 Ll.R 99 at 107 gave some useful guidance on the right approach to experts interpreting foreign statutes saying:-

"The general rule of English private international law, that foreign law is in our Courts a question of fact, is fundamental, although it does not inhibit the Court from using its own intelligence as on any other question of evidence. The material proposition of foreign law must be proved by a duly qualified expert in the law of the foreign country, and the burden of proof rests on the party seeking to establish that law. The Court is free to scrutinize both the witness and what he says as on any other issue of fact. The translation from the foreign language must be proved by a duly qualified interpreter; but even when a proved or agreed translation takes the place of the foreign document, it is still primarily the function of the expert witness to interpret its legal effect, in order to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it, if applied correctly the law of that country to the questions under investigation by the English Court. His function necessarily extends to interpretation as well as application in the light of the general law of that country. The degree of freedom which the English Court has in putting its own construction on the written translation of foreign statutes before it, arises out of, and is measured by, its right and duty to criticize the oral evidence of the witness. If he says that the foreign statute bears a meaning which is patently inconsistent with the words of the English translation, the Court is entitled to reject his construction unless he goes further and proves some extraneous rule of law, written or unwritten, of the foreign country which compels that apparently forced interpretation.

It is said that there are inconsistencies between the reasoned judgments of reported cases in our Courts, even in the House of Lords, or at least obiter dicta, which make our law on the point uncertain. I am not satisfied that that is so; as I incline to think that the explanation of any apparent inconsistency is to be found in what I have just said. The witness, however expert in the foreign law, cannot prevent the Court using its common sense; and the Court can reject his evidence if he says something patently absurd, or something inconsistent with the rest of his evidence – including the correct translation, for instance, of a foreign statute which ex hypothesi has been proved and therefore is before the Court. Subject to the above qualification, or rather explanation, the rule that our Courts must take the foreign law from the expert witness in that law is universal, and the authority of the House of Lords is, I think, unambiguous."

50. The court will naturally look at the translated provision and ask itself whether the wording supports the view of one of the experts. Section 7(1) as translated seems to me to make it clear that a notifier must, before notification, have provided security. In this case the respondents had before notification provided security and thus on a natural reading of the words in translation no breach of section 7(1) can be established. Section 7(2) places the responsibility for determination of the security on the competent authority at place of shipment, i.e. on the Environment Agency for the English shipments and on Cork County Council for the Irish shipment. However it does, in certain circumstances, allow the "domestic authority" i.e. Dresden RP to determine the adequacy of the required security. It allows the domestic authority so to do if the domestic authority "has reason to assume that the security…requested by the authority at the place of shipment is not suitable to cover all costs etc". If that state of affairs exists under Section 7(2) the section says that the domestic authority "determines the required security …itself by way of condition or obligation". In other words, by some official determination Dresden RP could, prior to shipment, have stated their reason why the security was not sufficient and determined what security was required in its place but unless they did so no breach of section 7(2) could be established.

51. It was not in dispute before us that if a domestic authority was to make a determination under Section 7(2) it would have to do so by "an administrative act" i.e. a Bescheid. Thus, even if it could be said to be arguable that there were circumstances which might have allowed Dresden RP as the domestic authority to say that the security they held was not suitable to cover costs etc, since Dresden RP never determined by a Bescheid what other security should be produced before shipment, no breach of section 7(2) would seem on its wording to have been established.

52. The above views expressed by reference to the wording we have in translation equate entirely as I understand it with the views expressed by Dr Malterer. In my view the judge cannot be criticised for adopting that view as correct. In my view he was right in the view he took that no illegality under German law had been established in relation to any of the shipments.

Repudiation

53. Even if the above view were wrong, I also agree with the judge that on any view the consignor could not be held to be in repudiation of the Agency Agreement. I will take this aspect quite shortly. First this is not a case where the

consignor had not attempted to obtain all requisite permits under the European Regulation, and it is not a case where he had in fact failed to obtain the financial guarantee required by Article 27. If he has acted unlawfully by reference to a provision of German law which goes beyond what the European Regulation required, the breach was a highly technical one. Furthermore, it is not alleged that the consignor was deliberately flouting a provision of German law. He was endeavouring to perform the contract, and deliver on time and a guarantee was in fact in place. Even if contrary to the view I have expressed an Article 9 permission was not sufficient, ultimately all permissions were granted and there was no breach of any of the terms of those permissions.

54. To establish a repudiation the appellants either must establish that the respondents were altogether refusing to carry out the contract or that they were in breach of a condition of the contract or at least some term of the contract with such consequences as to amount to a repudiation. Clearly the respondents were seeking to perform the contract and so far as a condition or any term is concerned I am still unclear what term express or implied is relied on. Simply demonstrating that in delivering goods into a foreign country a law of that country has been broken is not sufficient on its own. The question is whether a term of the contract in relation, for example, to obtaining a financial guarantee has been broken.

55. In agreement with the judge it seems to me that the consignee simply has not demonstrated a breach of a condition of the contract, or any term allowing for termination or conduct on the respondents' part which demonstrates an intention not to continue with the contract.

56. I would accordingly uphold the judge's decision on this aspect also.

Lord Justice Lawrence Collins :

57. I agree that the appeal should be dismissed. It has never been suggested that the applicable law of the agency agreements was other than English law. The substance of the obligations of the parties was therefore governed by English law. The mode of performance was governed by German law, including European Union law, but the effect of any failure to obtain requisite permission depended on English law. The only possible basis for the appellants' case was that the respondents were in such breach of an implied term of the contract as would justify the appellants in treating the contract as repudiated. The appellants pleaded an implied term that the respondents would obtain all necessary permits for delivery to the appellants' premises. For the reasons given by Lord Justice Waller I do not consider that the appellants have adequately identified the implied term on which they rely, and I am satisfied that there is no basis for their claim that the respondents repudiated the contract. The appellants failed to establish a breach of German law, and in any event would have failed to establish repudiation on the part of the respondents.

Lord Justice Rimer :

58. I agree with both judgments.

Giles Wheeler (instructed by Messrs Squire, Sanders & Dempsey) for the Respondent
Adrian Jack (instructed by Messrs Bates, Wells & Braithwaite) for the Appellant