JUDGMENT OF THE COURT (First Chamber)

6 September 2012 (*)

(Regulation (EC) No 1206/2001 – Cooperation in the taking of evidence in civil or commercial matters – Matters covered – Hearing by the court of a Member State of a witness who is a party in the main proceedings residing in another Member State – Possibility to summon a party as a witness before the competent court in accordance with the law of its Member State)

In Case C-170/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 1 April 2011, received at the Court on 7 April 2011, in the proceedings

Maurice Robert Josse Marie Ghislain Lippens,

Gilbert Georges Henri Mittler,

Jean Paul François Caroline Votron

v

Hendrikus Cornelis Kortekaas,

Kortekaas Entertainment Marketing BV,

Kortekaas Pensioen BV,

Dirk Robbard De Kat,

Johannes Hendrikus Visch,

Euphemia Joanna Bökkerink,

Laminco GLD N-A,

Ageas NV, formerly Fortis NV,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič (Rapporteur), E. Levits and J.-J. Kasel, Judges,

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 March 2012,

after considering the observations submitted on behalf of:

– Messrs Lippens, Mittler and Votron, by P.D. Olden and H.M.H. Speyart, advocaten,

– the Netherlands Government, by C. Wissels and J. Langer, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by T. Henze, K. Petersen and J. Kemper, acting as Agents,

– Ireland, by P. Dillon Malone BL,

– the Austrian Government, by A. Posch, acting as Agent,

– the Polish Government, by M. Szpunar, acting as Agent,

– the Finnish Government, by J. Heliskoski and H. Leppo, acting as Agents,

– the United Kingdom Government, by H. Walker, acting as Agent,

– the European Commission, by R. Troosters, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1).

2 The reference has been made in proceedings between Messrs Lippens, Mittler and Votron ('Lippens and Others'), residing in Belgium, members of the board of directors of Ageas NV, formerly Fortis NV ('Fortis'), and Mr Kortekaas, Kortekaas Entertainment Marketing BV, Kortekaas Pensioen BV, Messrs De Kat and Visch, Ms Bökkerink and Laminco GLD N-A (collectively 'Kortekaas and Others'), holders of securities in Fortis, and that company, concerning the damage allegedly suffered by the holders of securities because they relied on information concerning Fortis' financial position disseminated by those board members.

Legal context

European Union law

3 According to recitals 2, 7, 8, 10 and 11 in the preamble to Regulation No 1206/2001:

'(2) For the purpose of the proper functioning of the internal market, cooperation between courts in the taking of evidence should be improved, and in particular simplified and accelerated.

…

(7) As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State, the Community's activity cannot be limited to the field of transmission of judicial and extrajudicial documents in civil or commercial matters which falls within the scope of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the serving in the Member States of judicial and extrajudicial documents in civil or commercial matters [OJ 2000 L 160, p. 37]. It is therefore necessary to continue the improvement of cooperation between courts of Member States in the field of taking of evidence.

(8) The efficiency of judicial procedures in civil or commercial matters requires that the transmission and execution of requests for the performance of taking of evidence is to be made directly and by the most rapid means possible between Member States' courts.

…

(10) A request for the performance of the taking of evidence should be executed expeditiously. If it is not possible for the request to be executed within 90 days of receipt by the requested court, the latter should inform the requesting court accordingly, stating the reasons which prevent the request from being executed swiftly.

(11) To secure the effectiveness of this Regulation, the possibility of refusing to execute the request for the performance of taking of evidence should be confined to strictly limited exceptional situations.'

4 Article 1 of Regulation No 1206/2001, entitled 'Scope', provides:

'1. This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

(a) the competent court of another Member State to take evidence; or

(b) to take evidence directly in another Member State.

2. A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.'

5 Articles 10 to 16 of that regulation concern the performance of the taking of evidence by the requested court.

6 Under Article 10 of Regulation No 1206/2001, entitled 'General provisions on the execution of the request':

'1. The requested court shall execute the request without delay and, at the latest, within 90 days of receipt of the request.

2. The requested court shall execute the request in accordance with the law of its Member State.

3. The requesting court may call for the request to be executed in accordance with a special procedure provided for by the law of its Member State ... The requested court shall comply with such a requirement unless this procedure is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties. If the requested court does not comply with the requirement for one of these reasons it shall inform the requesting court …

4. The requesting court may ask the requested court to use communications technology at the performance of the taking of evidence, in particular by using videoconference and teleconference.

The requested court shall comply with such a requirement unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties.

…'

7 Article 12 of that regulation, entitled 'Performance with the presence and participation of representatives of the requesting court', provides:

'1. If it is compatible with the law of the Member State of the requesting court, representatives of the requesting court have the right to be present in the performance of the taking of evidence by the requested court.

2. For the purpose of this Article, the term "representative" shall include members of the judicial personnel designated by the requesting court, in accordance with the law of its Member State. The requesting court may also designate, in accordance with the law of its Member State, any other person, such as an expert.

…

4. If the participation of the representatives of the requesting court is requested in the performance of the taking of evidence, the requested court shall determine, in accordance with Article 10, the conditions under which they may participate.

…'

8 Article 17 of Regulation No 1206/2001, which governs the direct taking of evidence by the requesting court, provides:

'1. Where a court requests to take evidence directly in another Member State, it shall submit a request to the central body or the competent authority … in that State …

…

3. The taking of evidence shall be performed by a member of the judicial personnel or by any other person such as an expert, who will be designated, in accordance with the law of the Member State of the requesting court.

4. Within 30 days of receiving the request, the central body or the competent authority of the requested Member State shall inform the requesting court if the request is accepted and, if necessary, under what conditions according to the law of its Member State such performance is to be carried out …

In particular, the central body or the competent authority may assign a court of its Member State to take part in the performance of the taking of evidence in order to ensure the proper application of this Article and the conditions that have been set out.

The central body or the competent authority shall encourage the use of communications technology, such as videoconferences and teleconferences.

5. The central body or the competent authority may refuse direct taking of evidence only if:

(a) the request does not fall within the scope of this Regulation as set out in Article 1;

(b) the request does not contain all of the necessary information pursuant to Article 4; or

(c) the direct taking of evidence requested is contrary to fundamental principles of law in its Member State.

6. Without prejudice to the conditions laid down in accordance with paragraph 4, the requesting court shall execute the request in accordance with the law of its Member State.'

9 Article 21(2) of that regulation, entitled 'Relationship with existing or future agreements or arrangements between Member States', provides:

'This Regulation shall not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further facilitate the taking of evidence, provided that they are compatible with this Regulation.'

Netherlands law

10 In the Netherlands, the hearing of witnesses and the provisional hearing of witnesses are governed by the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering; the 'WBR').

11 Article 164 of the WBR provides:

'1. The parties may also appear as witnesses.

…

3. If a party who is required to make a statement as a witness does not appear at the hearing, does not answer the questions put to him or refuses to sign his statement, the court may draw the conclusions from this that it deems necessary.'

12 Article 165(1) of the WBR provides that '(a)ny person summoned to be heard as a witness in accordance with the procedures laid down by law is obliged to come and deliver his testimony'.

13 Article 176(1) of the WBR provides:

'Unless otherwise provided by treaty or by EU regulation, if a witness is resident abroad, the judge may request an authority, to be designated by him, of the country where the witness is resident, to hold a hearing, if possible under oath, or may instruct the Netherlands consular agent within whose jurisdiction the place of residence of the witness is located to do so.'

14 Article 186 of the WBR states:

'1. In cases where the law allows witness evidence, a court may immediately order a provisional hearing of a witness, on the application of the party concerned, before proceedings are instituted.

2. A provisional hearing of witnesses may be ordered by the court on the application of a party where the case has already commenced.'

15 Article 189 of the WBR provides that '[t]he provisions concerning the hearing of witnesses shall also apply to provisional hearings'.

The dispute in the main proceedings and the question referred for a preliminary ruling

16 On 3 August 2009, Kortekaas and Others, holders of securities in Fortis, brought proceedings before the Rechtbank Utrecht (District Court, Utrecht, Netherlands) against Lippens and Others, members of the board of directors of Fortis, and against the company itself. In those proceedings, Kortekaas and Others seek damages for the harm they allegedly suffered by buying or holding securities as a result of information publicly disseminated in 2007 and 2008 by Lippens and Others concerning the financial situation of Fortis and the dividends it was to distribute in 2008.

17 In order to obtain clarifications about the claims made by Lippens and Others and the information they had in that period, on 6 August 2009, Kortekaas and Others lodged an application with the Rechtbank Utrecht for a provisional witness hearing of Lippens and Others. That court upheld the application by decision of 25 November 2009, stating that the hearing would take place with a delegated judge who would be appointed for that purpose.

18 On 9 December 2009, Lippens and Others lodged an application before the Rechtbank Utrecht for a letter of request so that they could be heard by a French-speaking judge in Belgium where they reside. Their application was rejected by order of 3 February 2010.

19 Following an appeal brought by Lippens and Others against that order, the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) upheld the order by decision of 18 May 2010 on the basis of Article 176(1) of the WBR, under which the Netherlands judge who is to hear a witness who is resident abroad has the discretion but not the obligation to issue a letter of request. That court stated that witnesses must in principle be heard by the court before which the substantive proceedings are pending and that, in the instant case, no special circumstance justified making an exception to this rule in favour of Lippens and Others, particularly as it was opposed by Kortekaas and Others. A hearing in Belgium cannot be justified on linguistic grounds, as Lippens and Others will have the possibility of being assisted by an interpreter at their hearing in the Netherlands.

20 Lippens and Others brought an appeal on a point of law before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) against the decision of the Gerechtshof te Amsterdam.

21 The referring court considers that Regulation No 1206/2001 does not preclude a court in one Member State from summoning a witness resident in another Member State to appear before it in accordance with the rules of procedure in force in the first Member State or prevent the failure of the witness to appear from giving rise to consequences provided for by those rules.

22 In that regard, the referring court takes the view that no provision of Regulation No 1206/2001 supports the conclusion that the means of taking evidence provided for therein excludes recourse to the means of taking evidence laid down by the law of the Member States. In its view, Regulation No 1206/2001 aims only to facilitate the taking of evidence and does not require the Member States to change the means of taking evidence provided for by their national procedural law. However, it wishes to know if it follows from Case C-104/03 *St. Paul Dairy* [2005] ECR I-3481, paragraph 23 that the Member States are obliged to use that regulation when taking evidence located in another Member State.

23 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Regulation [No 1206/2001], in particular Article 1(1) thereof, be interpreted as meaning that a judge wishing to hear a witness who resides in another Member State must always, for that form of the taking of evidence, use the methods put in place by the Regulation, or does he have the power to use the methods provided by his own national procedural law such as summoning the witness to appear before him?'

Consideration of the question referred

24 By its question, the referring court asks essentially whether the provisions of Regulation No 1206/2001, in particular Article 1(1) thereof, must be interpreted as meaning that the competent court of a Member State, which wishes to hear as a witness a party residing in another Member State, must, in order to have such a hearing, always use the means of taking evidence laid down by that regulation, or whether, to the contrary, that court has the possibility to summon that party to appear before it and hear him in accordance with the law of its Member State.

25 As a preliminary point, it must be recalled that, according to Article 1(1) of Regulation No 1206/2001, that regulation is applicable in civil or commercial matters where a court of a Member State, in accordance with the provisions of its legislation, either requests the competent court of another Member State to take evidence or takes such evidence directly in the latter State.

26 In that regard, it must be held, first of all, that the scope *ratione materiae* of Regulation No 1206/2001, as defined by that article and as is clear from the scheme of that regulation, is limited to two methods of taking evidence, namely the taking of evidence by the requested court in accordance with Articles 10 to 16 thereof following a request from the requesting court of another Member State and the taking of evidence directly by the requesting court in another Member State, the detailed rules for which are set out in Article 17 of the regulation.

27 However, Regulation No 1206/2001 does not contain any provision governing or excluding the possibility, for the court in one Member State, of summoning a party residing in another Member State to appear and make a witness statement directly before it.

28 It follows that Regulation No 1206/2001 applies as a general rule only if the court of a Member State decides to take evidence according to one of the two methods provided for by that regulation, in which case it is required to follow the procedures relating to those methods.

29 Next, it must be recalled that, according to recitals 2, 7, 8, 10 and 11 in the preamble to Regulation No 1206/2001, the aim of the regulation is to make the taking of evidence in a cross-border context simple, effective and rapid. The taking, by a court of one Member State, of evidence in another Member State must not lead to the lengthening of national proceedings. That is why Regulation No 1206/2001 established a regime binding on all the Member States, with the exception of the

Kingdom of Denmark, to remove obstacles which may arise in that field (see Case C-283/09 *Weryński* [2011] ECR I-601, paragraph 62).

30 An interpretation of the provisions of Regulation No 1206/2001 which prohibits, in a general manner, the court in a Member State from summoning as a witness, pursuant to its national law, a party residing in another Member State and hearing that party under that national law would be contrary to that objective. As the Czech and Polish Governments and the Advocate General, in point 44 of his Opinion, observed, such an interpretation would limit the possibilities for that court to hear such a party.

31 Thus, it is clear that, in certain circumstances, in particular if the party summoned as a witness is prepared to appear voluntarily, it may be simpler, more effective and quicker for the competent court to hear him in accordance with the provisions of its national law instead of using the means of taking evidence provided for by Regulation No 1206/2001.

32 In that regard, it must be stated that a hearing, carried out by the competent court pursuant to its national law, gives the latter the possibility not only to question the party directly, but also to confront him with the statements of other parties or witnesses present at the hearing and to verify itself, with further questions, the credibility of his statement, taking account of all the factual and legal aspects of the case. Such a hearing is thereby distinguishable from the taking of evidence by the requested court in accordance with Articles 10 to 16 of the regulation, although Article 12 thereof allows, under certain conditions, the presence and participation of representatives of the requesting court during such a performance. The direct taking of evidence in accordance with Article 17 of that regulation, even if it enables the requesting court to perform the hearing itself in accordance with the law of its Member State, remains none the less subject to the authorisation and conditions imposed by the central body or competent authority of the requested Member State, and other detailed rules laid down by that article.

33 Finally, the interpretation according to which Regulation No 1206/2001 does not govern exhaustively the taking of cross-border evidence, but simply aims to facilitate it, allowing use of other instruments having the same aim, is supported by Article 21(2) of Regulation No 1206/2001, which expressly authorises agreements or arrangements between Member States to further facilitate the taking of evidence, provided that they are compatible with the regulation.

34 It is true, as the Court held, in paragraph 23 of *St. Paul Dairy*, that an application to hear a witness in circumstances such as those which gave rise to that case could be used as a means of sidestepping the rules in Regulation No 1206/2001 governing, on the basis of the same guarantees and with the same effects for all individuals, the transmission and handling of applications made by a court of a Member State and seeking to have an inquiry carried out in another Member State.

35 However, that finding cannot be interpreted as requiring the court of one Member State, which has jurisdiction to hear the substance of the case and wishes to hear a witness residing in another Member State, to perform that hearing according to the rules laid down by Regulation No 1206/2001.

36 In that connection, it must be observed that the circumstances which gave rise to that judgment were characterised by the fact that the request for a provisional witness hearing, made by one of the parties, was addressed directly to the court of the Member State in which the witness resided, which did not have jurisdiction to hear the substance of the case. Such a request could in fact be used as a means to sidestep the rules of Regulation No 1206/2001, in that it is able to deprive the competent court, to which the request should have been addressed, of the opportunity to hear the witness in accordance with the rules laid down by that regulation. However, the facts of the present case are distinguishable from those in *St. Paul Dairy* in so far as the request for a provisional hearing was made to the competent court.

37 It is clear from the foregoing that the competent court of a Member State has the power to summon as a witness a party residing in another Member State and to hear him in accordance with the law of the Member State in which that court is situated.

38 Furthermore, if a party fails to appear as a witness without a legitimate reason, that court remains free to take any measures laid down by the law of its Member State, provided that they are applied in accordance with European Union law.

39 In those circumstances, the answer to the question referred is that the provisions of Regulation No 1206/2001, in particular Article 1(1) thereof, must be interpreted as meaning that the competent court of a Member State which wishes to hear as a witness a party residing in another Member State has the option, in order to perform such a hearing, to summon that party before it and hear him in accordance with the law of its Member State.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The provisions of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in particular Article 1(1) thereof, must be interpreted as meaning that the competent court of a Member State which wishes to hear as a witness a party residing in another Member State has the option, in order to perform such a hearing, to summon that party before it and hear him in accordance with the law of its Member State.

[Signatures]

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* Language of the case: Dutch.