NEUTRAL CITATION NUMBER [2007] EWHC 857 (TCC)

IN THE HIGH COURT OF JUSTICE Case HT-06-136

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

Wednesday 4 April 2007

Before:

THE HONOURABLE MR JUSTICE JACKSON

HEWDEN TOWER CRANES LTD

Claimant

and

WOLFFKRAN GMBH

Defendant

MR COLIN EDELMAN QC (instructed by Mayer, Brown, Rowe & Mawe) appeared on behalf of the Claimant

MR ALEXANDER LAYTON QC (instructed by Kennedys) appeared on behalf of the Defendant

JUDGMENT
(Approved)

Transcribed from the Official Court Tape-recording

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MR JUSTICE JACKSON:

1. This judgment is in seven parts; namely, Part 1 "Introduction"; Part 2 "The Facts"; Part 3 "The Present Proceedings"; Part 4 "Does Article 5(3) apply to the whole of the claimant's claim?"; Part 5 "Does Article 23 require the present dispute to be litigated in Germany by reason of the terms of the sale contract?"; Part 6 "Does Article 23 require the present dispute to be litigated in Germany by reason of the terms of the Hire Contract?"; and Part 7 "Conclusion".

Part 1: Introduction

2. This is an application to set aside a claim form on the ground that the claim falls within the jurisdiction of the German courts, not the English courts. The claimant, Hewden Tower Cranes Ltd, is an English company whose registered office is at Castleford in Yorkshire. The defendant is a German

company, whose centre of operations is in Heilbronn. Yarm Road Ltd ("YRL") is a structural steel contractor that will feature in the narrative of events.

3. This litigation arises out of a crane collapse, which the claimant alleges was caused by the negligence of the defendant. By way of introduction, I should say something about the plant, which was involved. The vertical mast of a tower crane comprises a number of sections, which are pinned end to end. A Climbing Frame is a piece of equipment, which travels up and down the mast of a tower crane using grooved guide wheels. A Climbing Frame is used to support the masthead of the crane when an additional tower section is being inserted. The accident in the present case occurred when the Climbing Frame became detached from the crane mast on which it was being used.

4. Let me now turn to two enactments, which are central to the issues in the present application. I shall refer to the Civil Liability (Contribution) Act 1978 as "the 1978 Act". Section 1(1) of the 1978 Act provides:

"Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."

5. I shall refer to Council Regulation (EC) No.44/2001 either as "Regulation 44/2001" or as "the Regulation". Article 2(1) of the Regulation provides:

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

Article 5 of the Regulation provides:

"A person domiciled in a Member State may, in another Member State, be sued. . . .3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. . ."

Article 23 of the Regulation provides:

"1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a)
in writing or evidenced in writing; or

(b)
in a form which accords with practices which the parties have established between themselves. . ."

6. After these brief introductory remarks I now turn to the facts.

Part 2: The facts

7. The defendant company was established in 1854. For approximately 150 years it has been engaged in the manufacture of cranes. Throughout its life the defendant has been based in Heilbronn, Germany. The defendant's original name was Julius Wolff & Co GmbH. On 17 January 1997 the defendant's name was changed to MAN WOLFF-Kran GmbH. On 7 December 1999 its name changed

to MAN WOLFFKRAN GmbH. On 14 November 2005 the defendant's name changed to Wolffkran GmbH.

8. The defendant is now an international company, which exports tower cranes and their components to customers based all over the world. Following the reunification of Germany in 1989 there was a high demand for tower cranes to be used in connection with construction works in the former East Germany. Accordingly, the defendants supplied numerous cranes to large dealerships, which rented them out for construction works in East Germany. Two of these dealerships became insolvent and so the defendant was left with many surplus cranes on its hands.

9. In those circumstances, the defendant established a crane rental business. In order to carry on that business the defendant set up a subsidiary company WOLFF Baukran-Vermietungs GmbH to which I shall refer as "WBV". WBV was established in June 1997 and carried on the business of renting out cranes and associated plant.

10. On 14 December 1998 WBV and the defendant entered into an agreement under which WBV transferred, or purported to transfer, its business to the defendant with effect from 1 July 1998. The validity of that agreement under German law is in issue. On 2 October 2002 WBV's name was changed to MAN Maschinen-und Anlagenbau GmbH and the seat of that company was moved to Munich.

11. Let me now turn to the claimant. The claimant is a company based in Yorkshire, which carries on the business of supplying tower crane equipment and associated labour to construction companies. For many years the claimant has had a close business relationship with the defendant. The claimant has purchased many tower cranes and associated plant from the defendant. In more recent years, the claimant has also hired such items either from WBV or the defendant.

12. On 31 October 1997 the claimant entered into contract of hire No.32200291 with WBV whereby the claimant hired one KWH 20.5 Climbing Frame ("the Climbing Frame") from WBV for a rental of DM1,500 per month. I shall refer to this contract as "the Hire Contract". By a contract dated 30 July 1999 the claimant purchased from the defendant a 320 BF luffing jib tower crane ("the Crane") as well as certain other cranes and related equipment. I shall refer to this contract as "the sale contract". The Climbing Frame and Crane to which I have referred formed but a small part of the total equipment, which the defendant supplied to the claimant during that period.

13. During 1999 a 44-storey office block was being built for the Hong Kong and Shanghai Banking Corporation at Canary Wharf, London E14. YRL was engaged upon that project as structural steel contractor. Pursuant to a sub-contract made between YRL and the claimant, the claimant provided both the Crane and Climbing Frame (as well as much other similar equipment) for use at the Canary Wharf site. This particular crane was known on site as TC3.

14. On the afternoon of 21 May 2000 an erection crew was using the Climbing Frame to increase the height of Crane TC3. An accident occurred as a result of which the Climbing Frame and the top part of the Crane fell to the ground. Three employees of the claimant were killed in the accident; two others were injured. Following the accident, the claimant faced a number of claims. Claims were brought by the families of the men who had died, by the employees who had suffered injury and also by YRL. The claimant settled all those claims. The claimant also faced claims for property damage brought by other companies based or operating in Canary Wharf. Those claims are still current.

15. The claimant maintains that the accident of 21 May 2000 was caused by defects in the Climbing Frame; namely, defective welds which failed and caused the guide wheels, or one of them, to disengage from the mast of the Crane. The claimant attributes those defects to negligence by the defendant in the design and/or manufacture of the Climbing Frame. Accordingly, in order to recover its substantial losses flowing from the accident, the claimant commenced the present proceedings.

Part 3: The present proceedings

16. By a claim form issued in the Technology and Construction Court on 17 May 2006 the claimant claimed damages and a contribution under the 1978 Act against the defendant in respect of the accident on 21 May 2000. In the accompanying Particulars of Claim the claimant alleged that the defendant had been negligent in the design and/or manufacture of the Climbing Frame. The claimant alleged that as a result of the accident it had (a) suffered property damage and consequential losses and (b) incurred substantial liabilities to third parties.

17. The claimant selected England as the forum for this litigation because the relevant accident had occurred in London. The claim is pleaded in tort. Under English law the cause of action accrued in London where damage occurred, not Germany where the allegedly negligent design and manufacture took place. Furthermore, for the purposes of Article 5(3) of Regulation 44/2001, the “harmful event” occurred in London. The claimant duly served the claim form on the defendant outside the jurisdiction, namely in Germany.

18. Upon being served with these proceedings the defendant took a different view about the appropriate forum. The defendant maintained that Article 23 of the Regulation applied on the grounds that the parties had agreed to settle their disputes at the courts of Heilbronn in Germany. Accordingly, on 15 December 2006 the defendant issued an application for the following relief: first, a declaration that the English court does not have jurisdiction over the claimant’s claim; and, second, an order that the claim form be set aside.

19. Both parties have served factual evidence in support of their respective positions as well as expert evidence on German law. The defendant’s application was listed for hearing on Friday 30 March and the argument lasted for a day. Mr Colin Edelman QC, represents the claimant. Mr Alexander Layton QC, represents the defendant. Since the hearing on Friday both counsel have written to me drawing attention to further authorities, which I have duly taken into account.

20. The issues between the parties, as they have emerged during argument, may be formulated as follows:

(i)
Does Article 5(3) apply to the whole of the claimant’s claim?

(ii) Does Article 23 require the present dispute to be litigated in Germany by reason of the terms of the sale contract?

(iii)Does article 23 require the present dispute to be litigated in Germany by reason of the terms of the Hire Contract?

I shall address the three issues in that order.

Part 4: Does Article 5(3) apply to the whole of the claimant’s claim?

21. Mr Layton accepts that the claimant's claim for damages for the tort of negligence falls within Article 5(3) of Regulation 44/2001. He also accepts that for this purpose the harmful event occurred at Canary Wharf in London. Accordingly, Mr Layton accepts that pursuant to Article 5(3) the English courts have jurisdiction over the claim in negligence, unless the defendant can successfully invoke Article 23. Mr Layton makes no similar concession in respect of the claimant's claim for a contribution under the 1978 Act. He submits that this is a statutory claim, which does not fall within the ambit of Article 5(3). Accordingly, Article 2 applies and the defendant must be sued in the state where it is domiciled, namely Germany.

22. Let me begin by reviewing the authorities which counsel have cited on this issue. In Kalfelis v Bankhaus Schröder, Munchmeyer, Hengst & Co[1988] ECR 5565 Mr Kalfelis concluded, through a Luxembourg bank, some spot and futures stock exchange transactions, which resulted in a total loss. Mr Kalfelis sued the bank in the German courts for breach of contract, tort and unjust enrichment. The bank challenged the jurisdiction of the German courts, which sought a preliminary ruling from the European Court of Justice. In its judgment the court gave the following guidance about the meaning of Article 5(3):

"16. Accordingly, the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept, which is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect.

17. In order to ensure uniformity in all the Member States, it must be recognised that the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)."

23. In Santa Fe (UK) Ltd v Gates Europe NV (Court of Appeal transcript 16 January 1991) a hose broke on an oil rig in the Scottish area of the North Sea causing injury to the plaintiff's employee. The plaintiff was held liable in damages to its employee. The plaintiff then brought contribution proceedings in London under the 1978 Act against (1) a Belgian company that had sold the hose to the plaintiff and (2) a Hungarian company, which had manufactured the hose. The defendants challenged the jurisdiction of the English courts. The plaintiff accepted that the accident had occurred in Scottish waters. The plaintiff argued, however, that it had suffered a "harmful event" in England, namely being held liable to the employee in the English courts. That argument was rejected by the master, the judge in chambers and the Court of Appeal. The Court of Appeal rejected the submission that the ECJ's reasoning in Kalfelis brought the plaintiff's claim within the jurisdiction of the English courts.

24. In Davenport v Corinthian Motor Policies at Lloyds[1991] S.L.T. 774 the pursuer was injured in a road traffic accident in Scotland. She obtained judgment in the Glasgow Sheriff Court against the driver responsible, but that judgment was not satisfied. The pursuer then brought an action in the Glasgow Sheriff Court against the driver's insurers pursuant to section 151 of the Road Traffic Act 1988. The insurers argued that because they were domiciled in England the Glasgow Sheriff Court had no jurisdiction. The Inner House of the Court of Session held that the insurers were correct and the Scottish courts did not have jurisdiction. The Inner House held that the pursuer's claim against the insurers was based solely on the insurance certificate issued by the insurers and the provisions of the Road Traffic Act 1988. The pursuer's claim (unlike the claim in Kalfelis) did not fall within Article 5(3).

25. In Molnlycke AB v Procter & Gamble Ltd [1992] 1 WLR 1112 the Court of Appeal held that an action for patent infringement fell within Article 5(3). The harmful event in that case was the marketing of allegedly infringing nappies in England. Accordingly, the English courts had jurisdiction.

26. In Kleinwort Benson Ltd v Glasgow City Council[1999] 1 AC 153 the plaintiff, an English bank, entered into seven interest rate swap transactions with Glasgow City Council. Such transactions were subsequently held to be ultra vires and void by the House of Lords. The plaintiff brought an action in England claiming restitution of the sums paid to Glasgow City Council on the ground of unjust enrichment. The House of Lords held that the English courts did not have jurisdiction. At page 172 Lord Goff said this:

“Before the Appellate Committee, Mr. Pollock Q.C., for Kleinwort, advanced a brief argument to the effect that Article 5(3), which is concerned with “matters relating to tort, delict or quasi-delict” and places jurisdiction in the courts for the place “where the harmful event occurred or in the case of a threatened wrong is likely to occur,” applied in cases of unjust enrichment, and was therefore applicable in the present case. This argument is impossible to reconcile with the words of Article 5(3), if only because a claim based on unjust enrichment does not, apart from exceptional circumstances, presuppose either a harmful event or a threatened wrong. The argument was based on a misreading of paragraph 2(a) of the ruling of the Court of Justice in Kalfelis v Bankhaus Schröder at page 5587, a misreading which is plainly inconsistent with paragraph 2(b) of the same ruling (which I have referred to earlier in this opinion). There is, in my opinion, no substance in the point, which was rightly rejected by Leggatt L.J. in the Court of Appeal.”

The other members of the House of Lords expressed similar views.

27. In Casio Computer Co Ltd v Sayo (6 February 2001) Mr Anthony Mann QC, sitting as a deputy High Court judge, held that a constructive trust claim fell within Article 5(3). At paragraph 17 of his judgment Mr Mann said this:

“The claim is clearly not a tort claim as English lawyers would understand that term. The expressions “delict” and “quasi-delict” are not expressions used by English lawyers to describe English causes of action, but the overall expression “tort, delict or quasi-delict” must be interpreted in accordance with Conventional law, not merely English law. It must be given an autonomous meaning - Kalfelis v Bankhaus Schröder[1988] ECR 5565. In the absence of any clear authority on the point I think I can be guided by what Lord Goff of Chieveley said in the Kleinwort Benson case when rejecting a submission that Article 5(3) subsumed the unjust enrichment claim made in that case. He said: ‘In my opinion, this argument is impossible to reconcile with the words of article 5(3), if only because a claim based on unjust enrichment does not, apart from exceptional circumstances, presuppose either a harmful event or a threatened wrong’: see Lord Hutton at page 196 where he too relies on the absence of a harmful event as being important to a consideration of whether an unjust enrichment claim does or does not fall within the Article. In that case the unjust enrichment claim related to payments made under void interest rate swap transactions, so Lord Goff’s reasoning makes sense - there was no harmful event. The same cannot be said of constructive trust claims, or at least those based on knowing assistance. In those cases there is scope for describing what happened as amounting to or involving a harmful event within the meaning of Article 5(3). Such a conclusion is supported by the fact that, even though the English law of tort is not operating where equity imposes a constructive trust, one can see parallels. A wrong is being committed and loss can be said to be caused or at least contributed to. It is also supported by the views of Briggs & Rees on Civil Jurisdiction and Judgments 2nd Edn at para 2.150.”

28. That decision was upheld by the Court of Appeal: see Casio Computer Co Ltd v Sayo[2001] EWCA Civ 661 at paragraphs 10 to 16. In particular, the Court of Appeal approved Mr Mann's reasoning at paragraph 17 of his judgment.

29. In Verein fur Konsumenteninformation v Karl Heinz Henkel[2002] ECR 1-08111, a consumer protection organisation sought an injunction to prevent a trader from using unfair terms in consumer contracts. The European Court of Justice held that that claim fell within Article 5(3). At paragraph 41 of its judgment the court said this:

"Such an action meets all the criteria established by the Court in the case-law referred to in paragraph 36 of this judgment inasmuch as, first, it does not concern matters relating to a contract within the meaning of Article 5(1) of the Brussels Convention; and, second, it seeks to establish the liability of the defendant in tort, delict or quasi-delict, in the present case in respect of the trader's non-contractual obligation to refrain in his dealings with consumers from certain behaviour deemed unacceptable by the legislature."

30. From this review of authority I derive two general propositions: first, the term "matters relating to tort, delict or quasi-delict" in Article 5(3) is an autonomous concept of European law which is wider than the English law of tort; secondly, in determining whether and how Article 5(3) applies it is necessary to look at the substance of the claim being brought and the factual basis of the defendant's alleged liability.

31. With the aid of the authorities cited by counsel, I must now address the claimant's contribution claim in the present case. Section 1 of the 1978 Act enables a tortfeasor who has been sued to recover a contribution from any other tortfeasor liable in respect of the same damage. The substance of the claimant's contribution claim is as follows: the defendant negligently designed and manufactured a Climbing Frame in Germany, which resulted in an accident in England causing fatalities, personal injuries, property damage and consequential losses. The defendant would if sued be liable in tort to (a) the families of the men who died, (b) the men who suffered personal injuries and (c) the various companies which have suffered property damage or financial loss as a result of the accident. Accordingly, the defendant is liable under the 1978 Act to make a contribution to the claimant who has been sued by those parties.

32. In my judgment, a claim of this character falls within the European concept of "matters relating to tort, delict or quasi-delict". The reasoning in the following decisions supports this conclusion: Kalfelis, Molnlycke, Kleinwort Benson, Casio Computer Co and Verein fur Consumenteninformation. The Court of Appeal's decision in Santa Fe should be distinguished. In that case, unlike the present, the relevant accident occurred outside England and Wales and the only "harmful event" relied upon as occuring in England was litigation. Likewise, Davenport should be distinguished. The defender's liability in that case, unlike the present case, rested solely upon statutory provisions and the issue of an insurance certificate and not upon any responsibility for the relevant accident.

33. Let me now draw the threads together. For the reasons set out above, I hold that the claim against the defendant under the 1978 Act falls within Article 5(3). Accordingly, subject to the defendant's contentions concerning Article 23, the English courts have jurisdiction. My answer to the question posed in Part 4 of this judgment is "yes".

Part 5: Does Article 23 require the present dispute to be litigated in Germany by reason of the terms of the sale contract?

34. As set out in Part 2 above, the Crane which was involved in the accident was sold by the defendant to the claimant pursuant to the sale contract dated 30 July 1999. The sale contract incorporated general terms of delivery, clause 8 of which provided as follows:

“These business conditions and all legal relations between the contracting parties are governed by the law of the Federal Republic of Germany to the exclusion of the UN purchase law insofar as our general conditions do not apply.

Insofar as the buyer is a qualified merchant, a public corporate body, or a public separate estate, the Court of Heilbronn is sole competent for any disputes arising directly or indirectly out of the contractual relation.”

35. The defendant’s expert on German law, Dr Peter Andreas Brand, asserts that the claimant is regarded under German law as “a qualified merchant”. Professor Hanns-Christian Salger, the claimant’s expert on German law, does not dispute this proposition. Accordingly, I accept that for the purpose of clause 8 of the general terms of delivery the claimant is a qualified merchant.

36. It follows from the foregoing that any disputes between the parties arising directly or indirectly out of the sale contract dated 30 July 1999 must be litigated in the courts of Heilbronn. The question, which I must address, is whether or not the present action in the London Technology and Construction Court concerns a dispute, which arises directly or indirectly out of the sale contract.

37. Having considered the competing submissions of counsel on this issue and the opinions of the experts on German law, I have come to the conclusion that the present action is completely unrelated to the sale contract dated 30 July 1999. None of the claims advanced in the particulars of claim arises either directly or indirectly out of the sale contract.

38. I reach this conclusion for three reasons. First, both the claim for damages in tort and the claim for a contribution under the 1978 Act are based upon the proposition that the defendant was negligent on some date prior to 30 October 1997 in designing and manufacturing the Climbing Frame. Secondly, the sale contract dated 30 July 1999 was entered into some two years after the alleged acts of negligence. The subject of the sale contract comprised five new cranes being purchased by the claimant and seven used cranes being sold back to the defendant. The allegedly defective Climbing Frame was not an item of plant, which featured in the sale contract. Thirdly, on the evidence before the court it appears to have been pure chance that Crane TC3 rather than some other crane was involved in the accident. The claimant does not plead any defect in the Crane or allege any negligence in the design or manufacture of it. The claimant does not plead any facts, which would constitute a breach by the defendant of the terms of the sale contract. On the claimant’s pleaded case, Crane TC3 was merely the location where the defects in the Climbing Frame manifested themselves with devastating consequences.

39. For the reasons set out above, I conclude that the jurisdiction clause incorporated in the sale contract does not require the present litigation to be conducted in the courts of Germany. My answer to the question posed in Part 5 of this judgment is “no”.

Part 6: Does article 23 require the present dispute to be litigated in Germany by reason of the terms of the Hire Contract?

40. It will be recalled from Part 2 above that although the defendant manufactured the Climbing Frame, it was WBV (a subsidiary of the defendant) which entered into the Hire Contract with the claimant. The Hire Contract was signed by Herr Mentel and Herr Zuber of WBV on 13 October 1997.

It was signed by Mr Paul Phillips, a director and general manager of the claimant, on 31 October 1997. The Hire Contract included the following provisions:

“14. Contract conditions: The lessee confirms with his signature that he is fully instructed with the contract conditions of the lessor and knows that they have a non-restrictive validity. The following mentioned enclosures are parts of the contract. . .

Enclosure:

a) Terms and conditions for the hire of Wolff tower cranes and components.

b) Delivery conditions.”

41. Enclosure a) to the Hire Contract comprises two pages setting out terms and conditions for hire. These terms cover matters such as rental period, payment, notice of termination and so forth. These terms and conditions do not include a jurisdiction clause.

42. I turn now to enclosure b), the delivery conditions. There is an issue between the parties as to what constituted the delivery conditions and whether they incorporated a jurisdiction clause. Before I address the evidence on this issue I must first determine how I should approach the question. Mr Layton contends that the burden is on the claimant to establish the court’s jurisdiction to the standard of a good arguable case: see paragraph 16 of his skeleton argument. Mr Edelman contends that the burden is on the defendant to show that it has the better of the argument: see paragraph 12 of his skeleton argument.

43. I shall now review the authorities relevant to this issue upon which counsel relied in oral argument. In Sallotti RUWA v Polstereimaschinen GmbH[1976] ECR 1831 a German company contracted to supply machinery to an Italian company. The issue that arose was whether a German jurisdiction clause contained in the seller’s conditions of sale should prevail. Accordingly, the European Court of Justice had to consider the effect of Article 17 of the Brussels Convention (the predecessor of Article 23 of Regulation 44/2001). At paragraph 7 of its judgment the court said this:

“The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the convention.

In view of the consequences that such option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.

By making such validity subject to the existence of an agreement between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated.

The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.”

44. In Konkola Copper Mines plc v Coromin Ltd[2006] EWCA Civ 5; [2006] 1 Lloyds Law Reports 410, Rix LJ reviewed a line of English authorities bearing on the standard and burden of proof. At paragraphs 94 to 95 he set out his conclusions as follows:

“94. I would seek to sum up these authorities, which are all at first instance, in this way: that where an established Regulation (or Convention) jurisdiction in England is challenged under article 23 (or article 17), (1) there are conflicting views as to where the burden of proof lies (there is a decision in Carnoustie that the burden remains on the claimant, a decision in Knauf (at first instance) that it is on the defendant, and a view in Bank of Tokyo-Mitsubishi also to the latter effect); (2) that the standard of proof has not been settled, but that there is a general tendency to apply the good arguable case test in a form which is more or less consistent with the Canada Trust gloss, but that question was expressly reserved in this court in Knauf; and (3) that no case cited to us has dealt specifically with either aspect of the present case which is of particular interest here, namely (a) a situation where the foreign jurisdiction clause is not within article 23 (17), and (b) the jurisdiction clause issue goes to the heart of the ultimate merits at trial.

95. As for the difference of opinion at first instance on burden of proof, I would hazard the opinion, without seeking to decide the issue, that the views of David Steel J and Lawrence Collins J are to be preferred. It seems to me to be counter-intuitive to think that, where a statutory jurisdiction has been established but an exceptional jurisdiction elsewhere is put forward based on a contract which must be clearly shown to have the assent of both parties, it remains the burden of the claimant to prove a negative rather than that of the applicant who challenges the established jurisdiction to prove that he is entitled to rely on the clause in question. After all, article 23 comes in a section of the Regulation (section 7) called ‘Prorogation of Jurisdiction.”

Both the Master of the Rolls and Richards LJ agreed with that judgment.

45. In Bols Distilleries BV v Superior Yacht Services Ltd[2007] 1 WLR 12 the claimant, a Gibraltar company, brought proceedings in Gibraltar against two companies domiciled in the Netherlands and Poland respectively. The claimant relied upon a contractual provision that the courts of Gibraltar should have jurisdiction. The defendants disputed that any contract had been concluded and contended that by reason of Article 2(1) of Regulation 44/2001 they could be sued only in their own states. The claimant was successful at first instance and in the Gibraltar Court of Appeal. The Privy Council allowed the defendants’ appeal. Lord Rodger delivering the judgment of the Privy Council reviewed a line of authorities on the question of approach. He set out his conclusions as follows at paragraph 28:

“The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a “good arguable case” depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in article 2(1) is ousted by article 23(1), the claimants must demonstrate “clearly and precisely” that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the good arguable case standard, the claimants must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in article 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties.”

46. From this review of authority I derive two propositions which are relevant to the present case: First, where one party relies upon Article 23 in order to oust the jurisdiction of the courts which would otherwise deal with their dispute, the burden is upon that party to prove an agreement satisfying the requirements of Article 23. Secondly, since jurisdictional questions are resolved at an

interlocutory stage upon written evidence, the standard of proof required must be moderated. The party invoking Article 23 must show that it has much the better of the argument.

47. Let me now turn to the question whether the Hire Contract included a German jurisdiction clause. No such clause is included in the general conditions for hire. It is by no means clear on the evidence what document constituted the delivery conditions. Unfortunately, the actual document annexed to the Hire Contract cannot be found. Herr Schock, an employee of the defendant who deals with sales and service, has produced a set of conditions, which he believes would have been the delivery conditions annexed to the Hire Contract. This document, which was found at the office of the defendant's former lawyers, is headed "Allgemeine Liefer und Montage Bedingungen". Clause 17 of this document provides that all disputes arising out of the contract shall be dealt with by the courts of Heilbronn.

48. Herr Zuber, who in 1997 was employed by the defendant to deal with rental contracts, has produced a different document. The document produced by Herr Zuber is entitled "General Terms of Delivery" and is dated 10.98. It includes a jurisdiction clause referring all disputes to the courts of Heilbronn. The document produced by Herr Zuber came into existence a year after the Hire Contract with which this court is concerned. Furthermore, the document is in the name of the defendant, not WBV. Nevertheless, Herr Zuber believes that a similar if not identical document would have been attached to the Hire Contract of October 1997.

49. I turn to the claimant's evidence on this point. Mr Paul Phillips was the director and general manager of the claimant who signed the Hire Contract. He cannot now recall what constituted the delivery conditions attached to the Hire Contract of October 1997. He is however confident that he would not have accepted any conditions which were in German because he does not read German.

50. It is clear from the witness statements of Herr Schock, Herr Zuber and Mr Phillips that there is considerable doubt about what constituted the delivery conditions attached to the Hire Contract of October 1997. The German conditions produced by Herr Schock should, in my view, be ruled out for the reasons given by Mr Phillips. The document produced by Herr Zuber came into existence a year too late and it is not in the name of WBV. It is not at all clear that a document in this form would have been attached to the Hire Contract of October 1997. The language of the document produced by Herr Zuber is inconsistent with a hiring arrangement. The party receiving the plant is described as the buyer. Indeed, neither the conditions produced by Herr Schock nor the conditions produced by Herr Zuber appear to fit with the provisions of the Hire Contract dated October 1997.

51. Having considered all of the evidence on this issue, it seems to me that the claimant has much the better of the argument. The evidence before the court falls far short of demonstrating that the Hire Contract of October 1997 included a German jurisdiction clause.

52. Let me assume I am wrong and that the Hire Contract did include a jurisdiction clause as set out in Herr Schock's document, alternatively Herr Zuber's document. The next question which arises is whether the defendant, which was not a party to the Hire Contract, can invoke that clause. In this regard the defendant relies upon the transfer agreement dated 14 December 1998, whereby WBV transferred all of its business to the defendant. The defendant contends that following this transfer it became substituted for WBV in the hiring contract of October 1997.

53. Counsel have debated whether the transfer agreement of 14 December 1998 was a valid agreement under German law. Professor Salger's opinion is that the agreement is not valid because it

was not authenticated by a notary: see paragraph 1.1.2 of his first report. Dr Brand holds the opposite opinion as set out in section 1 of his second report.

54. I am not going to embark upon an analysis of German law. Suffice it to say that I have read the two expert reports and have studied the terms of the transfer agreement. On this issue I am quite satisfied that the defendant has much the better of the argument. I shall therefore proceed upon the basis that the transfer agreement was valid. With effect from 1 July 1998 WBV transferred its assets and liabilities to the defendant. One of the assets so transferred was the Hire Contract of October 1997.

55. In those circumstances, the question arises whether the German law equivalent of a novation occurred, so that the defendant became lessor of the Climbing Frame in place of WBV. It is clear from the expert evidence that this could have occurred under German law but only if the claimant was informed of the substitution and consented to it. Such consent may be communicated by conduct: see section 5 of Dr Brand's first report, paragraph 1.2.3 of Professor Salger's first report and section 2 of Dr Brand's second report.

56. The defendant's factual witnesses do not assert that they informed the claimant of the transfer or that the claimant consented to it. The only evidence which they give on this issue is that there was a change in the invoicing arrangements. The copy invoices produced by Herr Zuber are not helpful to the defendant's case. The invoices up to February 1998 are in the name of WBV. In March 1998 the name changes from WBV to Wolffkran. That was four months before the date of transfer and nine months before the execution of the transfer agreement.

57. It is also significant that throughout this period the payment instructions remained the same. Rental payments were made to the parent company's account at Commerzbank in Munich. The only change made to those arrangements concerned the note, which was to accompany payments. From March 1998 onwards this note referred to the defendant rather than WBV.

58. The claimant's evidence on this issue is contained in Mr Phillips' witness statement. Mr Phillips states as follows:

"12. I was aware in general terms that Wolffkran's group was consolidated in the late 1990s, which I believe was essentially for tax reasons. I do not recall having been formally told of the consolidation, whether before or after it took place. I believe that it was mentioned to me informally over drinks by one of my business contacts in the Wolffkran group and that this discussion occurred after the consolidation had taken place (but I cannot recall how long afterwards). My recollection is that I was told that the purpose of the consolidation was to generate certain tax losses that could be utilised by the group for tax mitigation purposes.

13. I was not given any reason to believe that the consolidation of the group would have any effect on Hewden, as a third party trading partner. As far as I was concerned, the consolidation of the Wolffkran group was an internal, intra-group matter for them and did not have any effect on the Hire Contract. It did not have any effect on operational matters; we continued to deal with the same people throughout the hire period.

14. I am not aware of any assignment of the hire contract, whether in connection with the above consolidation or otherwise. I was not told that the above consolidation of the group would have any effect on existing contracts, nor was I asked to consent to an assignment of the hire contract from WBV to Wolffkran. I do not recall any new standard terms for hire contracts being issued.

15. If there had been any dispute under the hire contract and Hewden wished to pursue a claim against our contracting partner, I would have regarded WBV as the company against whom Hewden should bring its claim. We continued to hire the Climbing Frame from WBV, even if within the Wolffkran group ownership of that equipment had passed to Wolffkran for tax reasons."

59. Mr Phillips goes on to say that accounts clerks dealt with the invoices. The invoicing arrangements never alerted Mr Phillips to the fact that there was any change to the contracting parties under the Hire Contract.

60. Having reviewed the evidence of both parties on this issue, I come to two conclusions: first, the fact that WBV's business was transferred to the defendant in 1998 was never drawn to the claimant's attention; secondly, the claimant never consented either expressly or by conduct to the substitution of the defendant as lessor under the Hire Contract of October 1997. The conclusions which I reach on these issues are not final, because no witness has given oral evidence. My decision is that the claimant has much the better of the argument on these issues.

61. A further question which has been debated between counsel is whether the claimant's claim in the present action falls within the jurisdiction clause contained in Herr Schock's document or Herr Zuber's document. In view of my conclusions on incorporation and novation that question does not arise for decision.

62. Let me now draw the threads together. For the reasons set out above, I have come to the conclusion that the claimant has much the better of the argument on both the incorporation issue and the novation issue. I do not accept that the Hire Contract of October 1997 contained a German jurisdiction clause. Furthermore, I do not accept that the defendant became a party to that contract by being substituted as lessor. Indeed, I would reach the same conclusions about those matters on the evidence whether the burden of proof lay on the claimant or the defendant.

63. It follows from these conclusions that the defendant cannot rely upon the terms of the Hire Contract in order to require that the present dispute be litigated in Germany. My answer to the question posed in Part 6 of this judgment is "no".

Part 7: Conclusion

64. For the reasons set out in Parts 4 and 5 above, I have come to the conclusion that this is a case to which Article 5(3) of the Regulation applies. The claimant's claims relate to tort, delict or quasi-delict and the harmful event occurred in England. Accordingly, the English courts have jurisdiction. The defendant is unable to rely upon any agreement requiring the present dispute to be litigated in Germany. Accordingly, the defendant's challenge to this court's jurisdiction on the basis of Article 23 fails.

65. I am grateful to counsel on both sides for the excellence of their written and oral arguments. For the reasons stated above, the defendant's application is dismissed.
