

Opinion Lord Brodie. Outer House Court of Session. 16th October 2008.

Introduction

- [1] The pursuer is Dr Bettina Breitenbücher, Insolvency Administrator, of Kübler, Feuerseeplatz 14, D-70176 Stuttgart, Germany. She is the Receiver of Bluepool AG ("*Bluepool*"), a company established under the laws of Germany, registered in register B of the Local Court of Stuttgart (Registration Number HRB225363) and having its last registered office at Gausstrasse 4, D-70771 Leinfelden-Echterdingen, Germany. On 30 September 2003 the Pursuer was appointed as Receiver of Bluepool AG by order of the local Court of Esslingen, Germany in terms of Section 8(3) of the German Insolvency Statute. The defender is Mrs Cornelia Irne Wittke. She is a German national. She resides at Cragganard, Abriachan, Invernesshire. She is domiciled there.
- [2] On or about 23 September 2002 Bluepool and the defender entered into a contract for the construction of a building consisting of a principal residence, two flats, an office wing, store rooms and a garage on land owned by the defender at Cragganard, Abriachan, Invernesshire (the "*Contract*"). A copy of the Contract is number 6/1 of process. The Contract is in German. It bears to have been signed on behalf of Bluepool at Heroldstatt in Germany. It was signed by the defender, using her usual signature "*C Wittke*" at Jagsthausen also in Germany, where the defender was resident. At clause 2 of the Contract there are listed a number of contract documents. Among these is a document which I shall refer to as the Bluepool Terms and Conditions and parts of a standard form German construction contract which I will refer to as the "*BOV*". It is a matter of agreement between the parties that the Contract is governed by the laws of Germany.
- [3] In the action the pursuer sues for a decree ordaining the defender to execute and deliver a standard security over the property at Cragganard pursuant on an alleged undertaking by the defender contained in a letter dated 5 January 2003. The pursuer also sues for payment of the sum of €2, 913, 382.97 as the sum due by the defender under the Contract. As I understand it, the defender would contend that she is not due to make payment of this sum, having regard to breaches of contract by Bluepool but such substantive defence as may be available to the defender is not developed in the pleadings. For present purposes this is not of importance.
- [4] The defender challenges the jurisdiction of the Court of Session. Her first plea in law is in these terms: "*The courts of Stuttgart having exclusive jurisdiction in terms of the Contract to deal with disputes arising under the Contract, this Court accordingly has no jurisdiction.*"

On the pleadings the issue of jurisdiction is raised under reference to clause 11 of the Contract, as follows. The jurisdiction of courts within the European Union is regulated by Council Regulation (EC) No 44/2001 (sometimes referred to as "*Brussels I*"). This Regulation applies in all civil and commercial matters whatever the nature of the court or tribunal. In terms of Article 2.1 of the Regulation, subject to the whole terms of the Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. An application of Article 2.1 in the present case would be to confer jurisdiction on the Court of Session. However, Article 23 of the regulation permits parties, one or more of whom is domiciled in a Member State to prorogate the jurisdiction of a particular court or courts in connection with a particular legal relationship provided that such an agreement is in writing or evidenced in writing, or certain alternative requirements are met. Such jurisdiction shall be exclusive unless parties have agreed otherwise. On the pleadings it is the defender's contention that clause 11 of the Contract is such an agreement in writing and that its effect is to confer exclusive jurisdiction in disputes arising under the Contract to the courts of Stuttgart. In the German text clause 11 is as follows:

"11 *Streitigkeiten (zu § 18 VOB/B)*

Streitigkeiten entscheiden die ordentlichen Gerichte.

Im vollkaufmännischen Geschäftsverkehr wird als Gerichtsstand Stuttgart vereinbart."

An accurate translation of clause 11 into English would be as follows:

"11 *Disputes (with reference to section 18 VOB/B)*

Disputes shall be settled by the ordinary state courts. As concerns business dealings amongst full merchants, the place of jurisdiction shall be Stuttgart."

- [5] The meaning and effect of a contract governed by the laws of Germany is, in a Scottish court, a question of fact. Accordingly, a preliminary proof was allowed in order to determine the defender's first plea in law. I heard that proof on 22 September 2008 and the three subsequent days. The pursuer was represented by Miss Hamilton, Advocate. The defender represented herself with the assistance of her husband. The witnesses led on behalf of the pursuer were the defender, her husband, Mr Christian Andreas Wittke and two German lawyers, Miss Christine Gack of the firm of Gleiss Lutz who was instructed on behalf of the pursuer, and Dr Andreas Hacke, a specialist lawyer in commercial and corporate law of the firm of Zwanzig Hacke Meilke Debelius, as an independent expert. The defender led no further evidence. I found all four witnesses credible, and reliable in relation to matters of which they were qualified to speak. As the lawyer for the pursuer who had decided that proceedings should be brought in Scotland, Miss Gack has, to an extent, an interest in a favourable outcome for the pursuer in relation to the issue of jurisdiction, but I considered her evidence to be given fairly and with what I regarded as a proper professional detachment. Both in the thoroughness of his preparation and the care and precision with which he gave evidence, Dr Hacke was a model of what an expert witness should be. I had no difficulty in accepting his opinion as authoritative on all questions which purely related to what was the applicable German law. Mr and Mrs Wittke also clearly had an interest in the outcome. They do not wish the defender to be sued in Scotland, for reasons which the defender gave in evidence and during her final submissions. It may be that she is not eager to be sued in Germany either, given that, subsequent to the intimation of the pursuer's claim, she declined the invitation made by Gleiss Lutz, by

letter of 5 December 2006, to enter into an agreement prorogating jurisdiction to a court in Stuttgart. I attach no importance to that fact, if it be a fact. In the same letter Gleiss Lutz invited the defender to waive a possible limitation defence. The defender explained that her then Scottish solicitors advised her not to sign the agreement for the prorogation of jurisdiction. The pursuer does not aver that in the circumstances the defender is personally barred from contending that the courts in Stuttgart had jurisdiction and, despite Miss Hamilton's invitation to do so, I have drawn no inference adverse to the credibility of the defender from the fact that she insists in her challenge to the jurisdiction of the Scottish courts on the basis that it is the Stuttgart court that has jurisdiction, notwithstanding her refusal to enter into an agreement expressly providing for that. In any event, in addressing me on the evidence, it did not appear to me that Miss Hamilton was seeking to impugn the defender's credibility. Rather, it was the reliability of the defender's assertion that when she signed the Contract she fell to be regarded as a "Vollkaufmann" or merchant that Miss Hamilton sought to challenge.

The meaning and effect of Clause 11 as a matter of German law

[6] Dr Hacke's written opinion is 6/22 of process. Dr Hacke's evidence as to what was the applicable German law was not challenged by the defender. As I have already indicated, I found Dr Hacke to be a very impressive witness. I accept the statement of the applicable law which appears in his opinion as accurate. In that opinion he identifies three relevant statutes: the German Civil Code (the "*Bürgerliches Gesetzbuch*" which may be abbreviated as the "BGB"), the German Code of Civil Procedure (the "*Zivilprozessordnung*", which may be abbreviated as the "ZPO"), and the German Commercial Code (the "*Handelsgesetzbuch*", which may be abbreviated as the "HGB"). Section 133 of the BGB provides that the object of contractual interpretation is to find the real intention of the parties rather than the mere literal meaning of the words. Section 157 of the BGB provides that contracts must be interpreted in accordance with good faith. Within this statutory framework, it is generally accepted that a contract is to be interpreted by reference to the wording as it is to be understood in accordance with common usage, the assumed interests and intention of the parties in so far as they are not in conflict with the wording and in the light of any concomitant circumstances. As I have already indicated, the English text of clause 11 is to be translated as follows:

"Disputes (with reference to section 18 VOB/B)

Disputes shall be settled by the ordinary state courts. As concerns business dealings amongst full merchants, the place of jurisdiction shall be Stuttgart"

Applying the principles of interpretation derived from the BGB to clause 11, Dr Hacke explained that section 18 of the VOB makes provision for jurisdiction. Accordingly, the headline of clause 11 with its reference to section 18 of the VOB indicated that clause 11 was intended to alter or deviate from what was provided by the VOB. The headline had no further significance. The first sentence: "*disputes shall be settled by the ordinary state courts*" indicated that the ordinary courts, other than, for example, an arbitration tribunal were to have jurisdiction. What followed was a choice of jurisdiction in favour of the Stuttgart courts but the application of the clause was expressly limited to "*business dealings amongst full merchants*". The German adjective "*vollkaufmannischer*", translated as "*among full merchants*", required particular notice in the context of a consideration of the assumed interests and intentions of the parties to the Contract. The validity of choice of jurisdiction clauses under German law is regulated by section 38 of the ZPO. Section 38 paragraph (1) was relevant for present purposes. This provision was last amended with effect from 1 July 1998. Prior to amendment section 38 paragraph (1) stipulated that any contractual choice of jurisdiction clause between legal persons having their natural forum in Germany was only valid and therefore enforceable under German law if both parties to the contract were "*merchants*" (in German "*Kaufleute*", the plural of "*Kaufmann*") as defined in the HGB. However this provision explicitly excluded certain merchants, referred to as "*minor merchants*" (in German "*Minderkaufleute*") as opposed to the merchants who were subject to all commercial law provisions and were therefore called "*full merchants*" (in German "*Vollkaufleute*" the plural of "*Vollkaufmann*"). Thus, under section 38, paragraph (1) of the ZPO before amendment in 1998, contractual choice of jurisdiction clauses were only valid and enforceable if each of the parties was a "*full merchant*" ("*Vollkaufmann*"). "*Minor merchants*" could not validly agree on a choice of jurisdiction clause. However, the legal differentiation between "*full merchants*" and "*minor merchants*" was abolished by the 1998 amendment. Since then, German law only differentiates between "*merchants*" and "*non merchants*". Accordingly, in its amended form section 38, paragraph (1) of the ZPO allows for choice of jurisdiction clauses only if both parties to the contract are merchants. "*Non merchants*" may not agree on a choice of jurisdiction clause. Given this statutory history, it was Dr Hacke's view that the wording of clause 11 of the Contract stemmed from what he described as a standard template for choice of jurisdiction clauses from the time prior to the 1998 amendment of the ZPO when the law still used the terminology of "*full merchants*" and only allowed choice of jurisdiction clauses amongst them as opposed to minor merchants or other persons. In Dr Hacke's opinion the clause was to be read as a template clause attempting to safeguard its own validity irrespective of whether the Contract would have been entered into with a "*full merchant*" or not. The Contract was signed in 2002, after the distinction between "*full merchants*" and "*minor merchants*" had been replaced by the concept of "*merchants*" as opposed to "*non merchants*". Therefore the intention of the parties was to be presumed to limit the applicability of the choice of jurisdiction clause to these situations permitted under section 38 of the ZPO as amended. Accordingly, the parties were to be presumed to have intended to limit the applicability of the clause to those situations in which the Contract would have been concluded between "*merchants*". Therefore clause 11 of the Contract must be read to mean "*only if and when this contract is concluded amongst merchants, the place of jurisdiction shall be Stuttgart*". If one of the parties to the Contract is not a merchant no choice of jurisdiction has been made.

Condition 12 of the Bluepool Terms and Conditions

- [7] When she came to address me the defender did not challenge Dr Hacke's exposition of the relevant German law nor did she dispute that clause 11 of the Contract provided for the exclusive jurisdiction of the Stuttgart courts only in the case of dealings between merchants. However, pointing to condition 12 of the Terms and Conditions, number 7/2 of process, she argued that the agreement between her and Bluepool contained two parallel jurisdiction provisions: clause 11 conferring jurisdiction on the Stuttgart courts where Bluepool's customer was a merchant and condition 12 of the Terms and Conditions conferring jurisdiction on the courts of Ulm/Domau (a city some 60 kilometres from Stuttgart) where the customer was a non merchant.
- [8] As was explained by Dr Hacke in German law the incorporation of standard business terms into a contract is governed by section 305 of the BGB. Putting it shortly, standard business terms only become part of a contract if the user, when entering into the contract, refers the other party to them explicitly and gives the other party the opportunity to take notice of their contents. Accepting the evidence of Mr Wittke that the requirements for incorporation were met in the present case in respect of the Terms and Conditions, in that they were referred to in clause 2 of the Contract as annex number 4 and a copy was provided as part of a bundle of contract documents at the time the defender signed the Contract, subject to questions as to their effect and whether it is open to the defender to rely on condition 12 in this litigation, I take the Terms and Conditions to be part of the agreement between the defender and Bluepool. However, there remain difficulties with the defender's argument. First, in contrast to clause 11 of the Contract, there is no mention of condition 12 in the pleadings. The matter goes beyond that in that both in terms of her averments and in terms of her first plea in law, the defender contends that the courts of Stuttgart have exclusive jurisdiction. She does not contend that courts of Ulm have jurisdiction, even on an alternative basis. On this ground alone I hold that it is not open to Mrs Wittke to rely on condition 12 as conferring exclusive jurisdiction on the courts of Ulm. However, even had the pleadings allowed that contention to be put forward, I would not have upheld it. Accepting what was said on the point by Dr Hacke, I take clause 11 and condition 12 to be mutually contradictory and, accordingly, in conflict. The defender's suggestion of allocation of jurisdiction as between Stuttgart and Ulm depending upon whether the customer Bluepool was or was not a merchant is not supported by the respective terms of the two provisions. Each bears to be an exclusive jurisdiction clause. Dr Hacke explained that in German law where there is such a conflict as between contractual terms, section 305b of the BGB provides that individually agreed terms take priority over standard business terms. The principle was that one must look to the level of individual agreement and give priority to what had been agreed at that level. In his opinion, clause 11, which appeared on the face of the Contract which had been signed by the parties fell to be regarded as being at a higher level of individual agreement than condition 12 which was a standard business term found in an annex to the Contract. Accordingly, had a case been made on the pleadings that the courts of Ulm had exclusive jurisdiction I would not have upheld it because, accepting Dr Hacke's exposition of the relevant German law, I would have held clause 11 which confers exclusive jurisdiction to the courts of Stuttgart in certain circumstances, to have priority over condition 12 which seeks to confer exclusive jurisdiction on the courts of Ulm.

The defender's status as a merchant

- [9] Both Mr and Mrs Wittke asserted that when she entered into the Contract, Mrs Wittke fell to be regarded as a "Kaufmann" with the result that her contracting with Bluepool was an example of "Vollkaufmannesch Geschäftsverkehr". In their evidence they explained that in modern German usage the word "Kaufmann" is used to describe quite modest businessmen or traders. They gave the example of someone selling French fries or sausages on the street. I accept that evidence but I must also have regard to the unchallenged evidence of Dr Hacke that the word "Kaufmann" as a legal term of art is authoritatively defined in provisions of the HGB. Only those natural or legal persons falling under at least one of the definitions of "Kaufmann" within these provisions are to be treated as merchants. If no such definition applies to a person, that person is not a merchant under German law. Certain sorts of legal person are merchants: HGB section 6. Any trade or business which is registered in the Company register (in German the "Handelsregister") shall always be considered a merchant: HGB sections 2 and 5. Someone operating a trade business (in German "Betrieb Eines Handelsgewerbes") is a merchant: HGB section 1. A person who did not fit into one of these three categories is not a merchant according to German law. The defender is a natural not a legal person. I have to confess that I am not entirely clear whether the Handelsregister referred to by Dr Hacke in his opinion under reference to HGB sections 2 and 5 is the same register as that which is maintained by the Industrie und Handelskammer (the "IHK" or Chamber of Commerce) of Heilbronn - Franken which was referred to by Miss Gack. The evidence of Miss Gack was that under German law anyone who conducts a business must be a member of an IHK for the relevant area. Anyone who is liable to trade tax must register. As soon as someone is no longer liable for trade tax he will probably deregister. I do not see the question as to whether there is one or two registers in which a German merchant who is a natural person may record his business status to be critical. For her part, the defender did not claim to know whether she had been registered with the IHK: "my husband, he would do it". When Mr Wittke came to give evidence he did not claim to have registered his wife as a merchant. Rather, when asked why he considered her to be a merchant he said that it was because she was the managing director of a German limited liability company, amcom: CI Wittke gmbh ("amcom"). Gleiss Lutz had made enquiry of the IHK Heilbronn - Franken as to whether the defender had registered with it and received a negative response. There was no evidence to indicate that the defender was registered in the Handelsregister (if that register is different from the register maintained by the IHK). Accordingly, it would appear that the defender cannot be regarded as a merchant by virtue of registration as provided by HGB sections 2 and 5. The question therefore comes to be as to whether the

defender was to be regarded, as at the date of entering into the Contract, as a merchant by virtue of her operating a trade business ("*Betrieb Eines Handelsgewerbes*") in terms of HGB section 1.

- [10] According to Dr Hacke a trade business is any business unless it does not require to be managed "*in a merchant's manner*" due to its nature or size. The term "business" ("*Gewerbebetrieb*" or "*Gewerbe*") is not statutorily defined. However, in terms of precedent and legal literature a generally accepted definition has been developed. Under this definition a business requires to have the following characteristics: an active participation in market activity, which is visibly planned, undefined in duration, self employed and aiming at profits. A merchant is someone who is engaged in such activity. A single transaction did not make someone a merchant. Holding directorships in limited liability companies or being a shareholder in them did not amount to operating a trade business or being a merchant. Under German law, the person conducting a business is always only the natural or legal person in the name of whom or which the business is conducted.
- [11] From a consideration of the information and documents put before him (which did not include hearing the evidence of the defender and Mr Wittke), Dr Hacke concluded that the defender was not to be regarded as a "*Kaufmann*" according to German law. I have accepted Dr Hacke's evidence as authoritative in all matters of German law. However, in my opinion his view of a factual question, such as whether the defender was operating a trade business as at 23 September 2002 is not determinative. Rather, it is for this court to apply the German law as explained by Dr Hacke to the facts found by the court. I therefore had to have regard to what was said by the defender and Mr Wittke about the defender's activities as at 23 September 2002 before coming to a view as to whether she is to be regarded as having been a merchant. As I have already indicated, both the defender and her husband asserted that the defender was a merchant at the relevant time. The defender explained that she was a director of amcom, a company which carried on business importing electrical components for the motor industry. This involved carrying out quality control. She herself was one of the people responsible for this. The Contract was for a building which was to be used partly for residential and partly for business purposes. At the time of entering into the contract she had also been a director of a United Kingdom registered company, Elfin Europe Limited. She and her husband were in business together. They also had four children. Some days she would be more concerned with the business while on other days she would be more concerned with the children. Both the defender and Mr Wittke accepted that among the reasons why the Contract was in the defender's name was that Mr Wittke had been subject to bankruptcy proceedings in Germany in about 1995.
- [12] Whatever may have been the position of amcom or Elfin, I am not satisfied that the defender as an individual fell to be regarded as a merchant or "*Kaufmann*" by virtue of operating a trade business as at 23 September 2002. I would accept that the defender made her contribution to what might be described loosely as the family business. She gave the example of entertaining business guests but also of personally carrying out tasks of a technical nature. Despite her position as director of amcom and Elfin the defender did not appear to know very much about the business or how it was organised. She deferred to her husband who clearly was the person principally involved. She was managing director because he had been declared bankrupt. Moreover, although I have described this as a family business, it is clear from the evidence of both the defender and Mr Wittke that the business was carried out in the name of and therefore on behalf of limited companies albeit limited companies controlled by the defender and Mr Wittke. At the relevant time amcom and Elfin may have fallen to be regarded as merchants according to German law. As Dr Hacke explained it does not follow that their directors or shareholders fell to be regarded as merchants. I would ascribe such business activity as was spoken to by the defender and her husband to amcom or Elfin. To the extent that the defender participated in the activity I would regard her as acting for or otherwise assisting amcom or Elfin. I do not regard that activity as amounting to the defender operating a trade business in her own right as required by HGB section 1. I accordingly do not consider that at the relevant time, the defender fell to be regarded as a "*Vollkaufmann*" or merchant according to German law.

Summary and decision

- [13] The defender seeks to have this action dismissed on the ground that, the parties in terms of clause 11 of the Contract, having prorogated the exclusive jurisdiction of the courts of Stuttgart the Court of Session has no jurisdiction to determine the dispute between them. The Contract is governed by German law and accordingly its interpretation and effect are to be determined in terms of the applicable German law as to which I have heard evidence that I accept as authoritative. In German law other than in circumstances that do not obtain here an exclusive jurisdiction clause will only be valid where both parties to a bilateral contract have the status of "*Kaufmann*" (translated in the evidence before me as "merchant"). No doubt for that reason clause 11 expressly provides that only in the case of "*vollkaufmannischen Geschäftsverkehr*" (translated as "business dealings between merchants") were parties agreeing to the exclusive jurisdiction of the Stuttgart courts. On the evidence I have heard the Contract was not an instance of business dealings between merchants because the defender did not fall to be regarded as a merchant in terms of German law at the relevant time. Clause 11 therefore does not apply to the facts in this particular case. Notwithstanding the terms of the pleadings the defender argued that condition 12 of the Bluepool Terms and Conditions, which I accept had been incorporated into the Contract, had the effect of prorogating the jurisdiction of the courts of Ulm. I reject that argument. There is no basis in the pleadings upon which it can be advanced. In any event, although I accept that the Terms and Conditions were incorporated in the event of conflict between a condition in Terms and Conditions and a clause in the Contract the Contract is to be preferred for the reasons given in evidence.

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[14] I therefore conclude that the parties have not prorogated the exclusive jurisdiction of the courts of Stuttgart or any other court. The Court of Session has jurisdiction over the defender by virtue of her Scottish domicile. I shall therefore repel the first plea-in-law for the defender. I shall allow proof before answer. I reserve all questions of expenses

[15] I would add that if the defender proposes to insist on her defence to the action she may wish to consider whether her pleadings should be amplified in order to state her position more fully.

Pursuer: Miss Hamilton; Maclay Murray & Spens LLP
Defender: Party