Neutral Citation Number: [2011] EWHC 2565 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Claim No: HC11C00303

Royal Courts of Justice, Strand
London, WC2A 2LL

MR EDWARD BARTLEY JONES Q.C (sitting as a Deputy High Court Judge)
Monday 10 October 2011

BETWEEN:

CUBE LIGHTING AND INDUSTRIAL DESIGN LIMITED

Claimant

and

AFCON ELECTRA ROMANIA SA

Defendant

Miss Camilla Bingham (instructed by SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE) for the Defendant
Mr Christopher Boardman (instructed by Darlingtons Solicitors, 48 High Street, Edgware HA8 7EQ) for the Claimant

Hearing Date: Friday 22 July 2011.

APPROVED JUDGMENT

I direct that no official shorthand note should be taken of this Judgment and that copies of this version is handed down may be treated as authentic.

EDWARD BARTLEY JONES Q.C

INTRODUCTION

1. The issue before me is whether the English courts have jurisdiction to hear this claim under and in accordance with the terms of Council Regulation (EC) No. 44/2001 of 22 December 2000 ("the Regulation").

2. The claim was commenced by Claim Form issued on 14 February 2011 out of the High Court of Justice, Chancery Division. The claimant is Cube Lighting and Industrial Design Limited ("Cube"). Cube is an English company undoubtedly domiciled in England and Wales under the terms of Article 60 of the Regulation. The defendant is Afcon Electra Romania SA ("Afcon"). Afcon is a Romanian company and it is common ground that, under Article 60, it is domiciled in Romania.

3. It is also common ground that the claim is a "civil and commercial matter" within the meaning of Article 1.1 of the Regulation.

4. Article 2.1 of the Regulation provides (subject to the other provisions of the Regulation) that a person domiciled in a Member State shall be sued in the courts of that Member State (in this case Romania). This domiciliary rule has been expressed as being the "basic philosophy" of the 1968

Brussels Convention and such a description is equally applicable to the Regulation which has superceded the Convention. As Henry LJ remarked in Knauf v. Peters [2002] 1 Lloyd's Rep 199 at [49] :-

> *"It is not merely that a claimant is entitled to sue his defendant where he is domiciled ; the defendant is entitled to be sued there".*

5. Cube's contentions as to why this basic domiciliary rule should be displaced have varied from time to time. It will be necessary for me to identify how Cube's contentions have changed and how the evidence filed on behalf of Cube has developed. But as advanced at the hearing before me Cube's case was that this was a case falling within Article 23 of the Regulation. The basic domiciliary rule was displaced because Cube and Afcon had agreed that the courts of England and Wales would have jurisdiction over this matter and the requisite formalities (as required by Article 23) had been complied with.

THE BACKGROUND FACTS

6. Afcon was the sub-contractor retained to effect certain electrical and lighting works as part of the fitting out of a shopping mall which was

being built at Cotroceni Park, Bucharest. The mall was scheduled for opening in October 2009.

7. The Particulars of Claim describe Cube as carrying on business in the design, construction and supply of lights and light fittings. Cube is said not to involve itself in the installation of lights and light fittings, save in respect of cold cathode lamps which it did install.

8. Negotiations commenced between Afcon and Cube for the supply of various lights and light fittings in the Bucharest mall. Clearly those negotiations contemplated, at least at one point, the installation by Cube of cold cathode lamps (see the terms of Contract "A" to which I shall refer). Ultimately, however, I am somewhat unclear as to how much installation work Cube actually undertook. Nothing turns on this. It is quite clear that the vast bulk of Cube's present claims against Afcon relate to the purchase costs of lights and light fittings supplied by Cube to Afcon and delivered to Bucharest.

9. A meeting occurred in Bucharest on 29 April 2009 between (1) Mr Simon Rosenberg (a director of Cube) and a Mr David Clarke on behalf of Cube

and (2) a Mr Mordechai Kremer and a Mr Avi Ophir on behalf of Afcon. Mr Kremer was, at the time, the general manager of Afcon and it is clear that he would have had authority to enter into contracts on Afcon's behalf. Mr Ophir was Afcon's Electrical Projects Manager.

10. On 28 April 2009 Mr Rosenberg e-mailed to Mr Kremer and Mr Ophir three draft contracts for discussion "in tomorrow's meeting".

11. The first of those draft contracts (Contract "A") was for the manufacture, delivery and installation of cold cathode lamps at the mall. It was a fixed price contract – the contract price being €171,758. The goods/works were identified by reference to Quotation 13482 issued by Cube on 8 April 2009. Of particular note in Contract "A" were the following clauses :-

(1) clause 5.1 provided for Cube to give a warranty for a term of 2 years from the date of completion ; and

(2) clause 6 provided for payment. 50% of the contract price (€85,879) was to be paid within 7 days of the date of the signing of the contract. 40% (€68,703) was payable on sign

off by Afcon of goods at Cube's bonded warehouse facility. And the remaining 10% was to be released within 60 days from "Acceptance" as defined.

12. Clause 12.1 of Contract "A" was in the following terms :-

> *"This contract shall be Governed by and construed in accordance with English Law and any proceeding [sic] litigation will be undertaken within the United Kingdom".*

13. Clause 13.1 of Contract "A" contained an arbitration clause. This provided that *"The place of disputes shall be in the UK the language of the dispute shall be the English language".* In addition clause 13.3 provided as follows :-

> *"In the event that the dispute is not capable of being referred to arbitration, each of the parties hereto irrevocably agrees that the courts of the United Kingdom are to have jurisdiction to hear and determine any such suit, action or proceeding and to settle any such disputes which may*

arise out of or in connection with this contract and, for such purposes, irrevocably submits to the jurisdiction of such courts".

14. Contracts "B" and "C" were in broadly similar terms. Both provided for identical warranty and payment terms as Contract "A" and both contained clauses identical to clauses 12.1, 13.1 and 13.3 of Contract "A". Contract "B" was a fixed price contract in the sum of €128,638 based on Cube's Quotation 13481 dated 20 March 2009 for the manufacture, delivery and supervision of the installation of Type "K" special luminaries. Contract "C" was a fixed price contract in the sum of €708,938 based on Cube's Quotation 13483 dated 27 April 2009 for the manufacture, delivery and supervision of the installation of standard and special luminaries in the mall.

15. Copies of these three draft Contracts are before me. In clause 1 of each the company registration number and Romanian VAT registration number of Afcon has not been completed. But each bear the signature of Mr Rosenberg and the date 29 April 2009. There was a space for Mr Kremer to sign under an indent which started with the heading "**BUYER**" and which then set out Afcon's name and details with, at the bottom, the words *"Mr*

Moti Kremer (General Manager)". Mr Kremer signed none of the three Contracts.

16. Miss Bingham (who appears for Afcon) did not accept that Mr Rosenberg's signature went on to any of these Contracts on the 29 April 2009. Her submission was that, in the context of what subsequently occurred, I should regard Mr Rosenberg's signature as having been appended to these three Contracts on, or after, 31 March 2011. This was part of the submission she made in paragraph 30 of her written Skeleton Argument namely that Cube's contentions were a "crude, cynical and misguided attempt to hoodwink the English courts into accepting jurisdiction". Whilst Miss Bingham is justified in criticising the way that Cube's case has developed before the English courts, I can see no justification whatsoever for reaching the conclusion that in a cynical, indeed fraudulent, attempt to mislead me Mr Rosenberg appended his signature to these three draft contacts after 31 March 2011. I can see a whole gamut of factual possibilities as to how Mr Rosenberg's signature went on to all three Contracts on or about 29 April 2009 which are consistent with (a) Afcon never having entered into a contractual relationship with Cube on the terms of the three draft Contracts and (b)

my conclusions below. Indeed, I fail entirely to see what evidence there is in support of any suggestion that Mr Rosenberg signed and dated these three Contracts on or after 31 March 2011, save for some generalised suspicion arising out of the manner in which Cube has conducted its case.

17. Mr Boardman, in his oral submissions to me on behalf of Cube, did not contend that Afcon had entered into Contracts "A", "B" and "C" according to all their terms. His point on Article 23, as will be seen below, was far more subtle – namely that the parties had merely entered into a jurisdiction agreement – on the terms set out in clauses 12 and 13 of Contracts "A", "B" and "C" - which would govern any subsequent contracts which they entered into for the purchase or installation of light fittings at the mall.

18. Whilst I am conscious that on a jurisdiction issue such as the one before me I should refrain, so far as possible, from expressing any concluded view I think I can, in the light of Mr Boardman's submissions, say that Mr Boardman was very wise to accept that Contracts "A", "B" and "C" were not entered into as such. Thus, and by way of non-exhaustive illustration,

not merely do the three Contracts not bear any signature on behalf of Afcon but also :-

(1) virtually immediately following his return to England on 30 April 2009 Mr Rosenberg e-mailed Mr Kremer and Mr Ophir thanking them for their hospitality and recording that it was unfortunate that *"the meeting failed to resolve the issues we believed we were there to discuss"*. The first of those issues was then identified in the e-mail as being *"The content and wording of the contracts"*. It is clear from the remainder of this e-mail that the parties were left with much to discuss not merely as to issues such as warranty term, price and payment terms but also as to the very scope of the goods to be purchased and the works to be effected ;

(2) thereafter the parties continued to negotiate (it would seem primarily by e-mail) over these issues. During the course of these negotiations the original fixed prices in Contracts "A", "B" and "C" (as based on the original Quotations) got left far behind. And never did Afcon pay (nor Cube demand

payment of) the 50% of the fixed prices under Contracts "A", "B" and "C" which should have been payable within 7 days from the signing of these Contracts ;

(3) indeed new issues began to raise their head during the course of these negotiations. Afcon was anxious for Cube to provide a bank guarantee as security against any down payment which Afcon might make. Cube was not in a position to supply that bank guarantee ;

(4) in an e-mail of 11 June 2009 Mr Rosenberg asked Mr Ophir to *"Please comment on our draft contract"*. On 22 June 2009 Mr Rosenberg e-mailed Mr Kremer and Mr Ophir indicating *"We believe you will potentially be placing three orders ?"*. Mr Rosenberg then referred to three updated Quotations and identified the total price as being approximately €1,018,000. That differs from the fixed prices under Contracts "A", "B" and "C" (€1,081,334). In respect of payment terms Mr Rosenberg sought, now, only an advance payment of €30,000 per order ;

(5) from the documents before me it is clear that Afcon certainly made two advance payments of €30,000 (on 15 and 22 July 2009) in respect of two Purchase Orders which it submitted to Cube. The first was dated 8 July 2009 in the fixed price of €337,729. This purchase order required a 5 year warranty. The second was dated 15 July 2009 in the fixed price of €820,014 and required a 3 year warranty ;

(6) on 28 July 2009 Mr Rosenberg e-mailed Mr Kremer and Mr Ophir to confirm "our agreement terms". What he there set out appears to relate to the two Afcon Purchase Orders to which I have just referred. The documents before me thereafter contain two further Afcon Purchase Orders (albeit in far more modest sums). The first is dated 16 September 2009 in the sum of €12,106. The second is dated 30 September 2009 in the sum of €30,378.

19. Whilst it is clear that there must have been some contract, or contracts, between Cube and Afcon the identification of those contracts may not, I think, necessarily prove an easy task for any court seized of the issue.

There may well have been something of a "battle of the forms" in the context of constantly moving negotiations and the changing requirements of Afcon. What can be said with certainty, however, is that contracts were never entered into in the form of Contracts "A", "B" and "C" as such.

20. A further meeting between the parties had taken place in Bucharest on 18 June 2009. Mr Kremer and Mr Ophir attended on behalf of Afcon. Mr Rosenberg was accompanied by Mr Adrian Webber, a consultant retained by Cube. I must refer further to this meeting in due course but it will be noted, immediately, that this meeting ante-dated the e-mail of 22 June 2009 referred to in paragraph 18(4) above and all events subsequent thereto.

THE ROMANIAN PROCEEDINGS

21. As might have been anticipated from the above story, disputes soon arose between Cube and Afcon over Invoices raised by Cube for goods supplied for installation at, or installed at, the mall. Notwithstanding its present contentions, Cube commenced three sets of proceedings against Afcon in Romania. Those proceedings have generated more heat than light so far as they impact on the issues before me.

22. In the first set of proceedings Cube availed itself of a Romanian procedure which it was a common ground before me was broadly akin to the summary judgment procedure under CPR Part 24. The Romanian court looked at the allegedly unpaid Invoices and decided whether there was any triable issue thereon. For whatever reason the Romanian court decided that there was, indeed, a triable issue. In the second set of proceedings Cube sought some form of insolvency order as against Afcon and failed. In the third set of proceedings Cube sought some form of relief which, again as common ground before me, was akin to a freezing injunction in England and Wales. Again Cube was unsuccessful.

23. It is not suggested before me by Afcon that through its activities in the Romanian courts Cube has lost the right to rely on the jurisdiction agreement it now claims. It is, however, pointed out by Miss Bingham that during the course of the Romanian proceedings no mention appears to have been made by Cube of this jurisdiction agreement. In context, that is hardly surprising and does not, to my mind, go to inform my present decision. Perhaps more surprising is a suggestion that during the course of the Romanian proceedings Cube argued that the contracts between itself and Afcon were governed by Cube's own standard Terms and

Conditions. But no reliance was placed by Cube on its own standard Terms and Conditions before me. And I remain sufficiently unclear as to precisely what happened before the Romanian Courts as to attach no importance whatsoever to this suggestion when reaching my decision on jurisdiction.

24. At the hearing I allowed Cube to rely on three extremely late served witness statements. I did so because Miss Bingham could identify no forensic prejudice Afcon would suffer thereby. And Miss Bingham expressly disclaimed any wish for an adjournment in order to deal with these witness statements. One of these witness statements was from a Ms Gabriela Bucurenciu, an Advocat of Bucharest who had acted for Cube in the Romanian proceedings. In paragraph 5 of her witness statement she suggests that Afcon's Romanian lawyer made open submissions to the Romanian court in April 2010 that the proper place for the dispute to be heard was England, because English law was applicable according to the terms of the contracts.

25. Miss Bingham was very critical of this witness statement but I think that she is being far too hard on Ms Bucurenciu. Paragraph 5 establishes no

more than that Ms Bucurenciu's recollection was that the submission from Afcon was that English law was applicable. For that reason, according to paragraph 5, the submission was then made that the proper place for the matter to be heard was England. English Law could have been applicable for all kinds of reasons and nothing in paragraph 5 suggests that Afcon's Romanian lawyer made any submission that there was a jurisdiction agreement in place which engaged Article 23.

26. In any event, in paragraph 6 Ms Bucurenciu goes on to exhibit a translation of her note of Afcon's Romanian lawyer *"confirming representations that this should be heard in England according to the terms of the Contract"*. Ms Bucurenciu's note is in the following terms :-

> *"Afcon's lawyer stated that first we have to discuss the matter of the competent court before any other preliminary discussions. On his opinion the Romanian court is not competent but English court is. so the first thing to discuss is the competent court".*

27. Taking all this together, and allowing for the fact that Ms Bucurenciu produced a witness statement in what was not her first language and, I

strongly suspect, under circumstances of considerable haste, all that seems in truth to have occurred is that Afcon's Romanian lawyer expressed his opinion on the jurisdiction of the Romanian court as a prelude to indicating that jurisdiction would have to be the first thing addressed. This is very far removed from any suggestion that Afcon sought to rely on any such a jurisdiction agreement as that for which Cube now contends. In any event, the Romanian court did in fact go on to consider the applications before it.

28. It is common ground that all proceedings in Romania have been discontinued. Therefore no issues as to priority of seisin as between Romania and England arise. Article 27 of the Regulations is inapplicable (see Internationale Nederlanden Aviation Lease B.V. v. Civil Aviation Authority [1997] 1 Lloyds Rep 80 at 93 – 94).

29. For these reasons I do not consider that the Romanian proceedings (and what occurred therein) have any relevance to my decision.

THE ENGLISH CLAIM

30. Facing disappointment in Romania, Cube instructed English solicitors (Darlingtons). On 1 September 2010 Darlingtons wrote a letter before action to Afcon. One of the contentions was that the English court had jurisdiction to hear Cube's claims against Afcon. Neither in this, nor in subsequent, letters did Darlingtons refer to the jurisdiction agreement on which Mr Boardman now relies on Cube's behalf. This is at first less surprising than it subsequently becomes because it seems clear that Darlingtons had a misunderstanding of the operation of the Regulation and thought that (as had been the case under the 1968 Brussels Convention) jurisdiction was conferred on the English court because the place of performance of the payment obligation was England. Nevertheless, it is still slightly surprising that Darlingtons did not bolster the argument under Article 5 of the Regulation with an additional jurisdiction agreement claim under Article 23. As time goes on however, with Darlingtons being forced specifically to address jurisdiction and the defects in their perception of the workings of Article 5, it becomes increasingly strange that Darlingtons do not address or refer to the jurisdiction agreement on which Mr Boardman relied before me. The very

first mention of a jurisdiction agreement in the form relied upon before me comes at the hearing before me.

31. The Claim Form had attached thereto Particulars of Claim. The primary claim was for €493,699 being the sums unpaid on twenty two invoices issued by Cube to Afcon and detailed in a Schedule set out in paragraph 7 of the Particulars of Claim.

32. As formulated, the claim appears to be nothing more than a simple debt claim for unpaid Invoices. There is no mention whatsoever of Contracts "A", "B" or "C". The only thing which is said about contract formation is as follows :-

> *"3. In or around March 2009, and as evidenced in a chain of emails between the parties, Afcon agreed to employ the services of Cube for their specialised technical assistance, and design capabilities".*

33. Paragraphs 9 and 10 of the Particulars of Claim identified, correctly, that the Romanian courts had not made a decision on the substantive merits of Cube's claims and that all proceedings in Romania had been discontinued.

Paragraph 8 of the Particulars of Claim alleges merely that for the purposes of Article 5.1(a) of the Regulation the place of performance of the obligation for payment was the United Kingdom and that the obligation for payment was the obligation in question for the purposes of Article 5.1(a) of the Regulation and that accordingly the English court had jurisdiction.

34. Analysing the twenty two Invoices in issue (copies of which were attached to the Particulars of Claim) all appear to be for the supply of goods (save for 11036 in the sum of €10,000 and for two items on 11463 in the total of €23,250 which refer to both supply and installation – albeit installation not apparently by Cube but by Kemp Neon). As well as mounting a claim for interest on the unpaid Invoices, the Particulars of Claim also :-

(1) seek by way of damages, rather than costs, expenses incurred by Cube in attempting to resolve the dispute between itself and Afcon ;

(2) seek damages for lost profit due to a fall in the value of the €Euro against the £Sterling ; and

(3) seek damages for consequential loss as a result of Afcon's failure to pay the Invoices. It is said that, thereby, Cube has suffered substantial cash-flow losses, was unable to purchase new stock or launch new products and was forced to down-size and to make ten staff redundant.

All these are claims, however, which arise out of the alleged breach of contract by Afcon in failing to pay.

35. The Claim Form was endorsed as follows :-

> *"Article 5(1)(a) of the Judgments Regulation (EC) No. 44/2001 and Article 5(2) of the Brussels Convention apply.*
>
> *There are no proceedings in the United Kingdom or any other Member State, pending or otherwise, therefore CPR Part 6.33(2)".*

36. This endorsement gave rise to the following difficulties for Cube :-

(1) it entirely overlooked the amendments which had been made to CPR Part 6 as from 1 October 2008. As from that date the new CPR Part 6.34 requires a claimant intending to serve a claim form out of the United Kingdom under rule 6.33 to file with the claim form a notice containing a statement of the grounds on which the claimant is so entitled and to serve a copy of that notice together with the claim form. Further, rule 6.34(2) provides that where the claimant fails to file such a notice with the claim form then the claim form may only be served (a) once the claimant files the notice or (b) if the court gives permission. For this, and other, reasons it is now common ground that the Claim Form in this Action has never been validly served on Afcon ;

(2) the reference to Article 5(2) of the 1968 Brussels Convention was misconceived as the same had been superceded by the Regulation (Article 68(1) of the Regulation) ;

(3) the purported reliance on Article 5.1(a) of the Regulation was misconceived for the very reason that the 1968 Brussels Convention had been superceded by the Regulation.

ARTICLE 5

37. Before me Mr Boardman disclaimed any reliance on Article 5. But as Article 5 forms part of Cube's developing case before the English courts I should set out briefly why he was wise to do so.

38. Had the 1968 Brussels Convention still been in force then Cube's contentions would have been justifiable. Article 5.1 of the 1968 Brussels Convention provided that a person domiciled in a Contracting State might, in another Contracting state, be sued *"In matters relating to a contract, in the courts for the place of performance of the obligation in question"*. (This is repeated at Article 5.1(a) of the Regulation). Where the issue was the non-payment of a contractual sum the authorities established that if the place of payment were the United Kingdom then it was the payment obligation which was the "obligation in question" for the purposes of conferring jurisdiction on the United Kingdom courts. (See, eg, Royal &

Sun Alliance Insurance Plc v. MK Digital FZE (Cyrus) Ltd [2006] EWCA Civ 629).

39. This was capable of giving rise (and continues to give rise where Article 5.1(b) of the Regulation does not apply) to practical and jurisprudential difficulties of some complexities. Accordingly Article 5.1(b) was introduced into the Regulation to alter the position which had previously subsisted under the 1968 Brussels Convention. Article 5.1(b) is in the following terms :-

> *"(b) for the purpose of this provision and unless otherwise agreed the place of performance of the obligation in question shall be :-*
>
> - *in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
>
> - *in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided".*

40. As the European Court of Justice (Fourth Chamber) made clear in Color Drack GmbH v. Lexx International Vertriebs GmbH [2010] 1 WLR 1909 Article 5(1)(b) is a rule of special jurisdiction establishing the place of delivery as the autonomous linking factor to apply to all claims founded on a contract for the sale of goods – paragraph 26. The purpose of Article 5(1)(b) is to unify the rules of conflict of jurisdiction and, accordingly, to designate the court having jurisdiction directly, without reference to the domestic rules of the member states – paragraph 30. At para 39 the European Court of Justice said this :-

> *"... it is appropriate to take into consideration the origins of the provision under consideration. By that provision, the Community legislature intended, in respect of sales contracts, expressly to break with the earlier solution under which the place of performance was determined, for each of the obligations in question, in accordance with the private international rules of the court seised of the dispute. By designating autonomously as "the place of performance" the place where the obligation which characterises the contract is to be performed, the Community legislature sought to centralise at its place of performance jurisdiction over disputes*

concerning all the contractual obligations and to determine sole jurisdiction for all claims arising out of the contract".

41. The wording of Article 5.1(b) could not be clearer. It does not say that the place of delivery will be the place of performance only when it is the delivery obligation which is in issue in a claim arising out of a contract for the sale of goods. The place of delivery will always be the place for performance where the claim arises out of a contract for the sale of goods – unless the parties *"otherwise agreed"*.

42. But what of "otherwise agreed" ? At one point Cube sought to disapply Article 5.1(b) by contending that it and Afcon had "otherwise agreed" within the meaning of Article 5.1(b). In Zelger v. Salinitri (No 1) [1980] E.C.R. 89 the European Court considered the inter-relationship between Article 17 of the 1968 Brussels Convention (the then counterpart of Article 23) and Article 5 in respect of (a) agreements on jurisdiction under Article 17 and (b) agreements as to place of performance under Article 5. The fundamental distinction between the two types of agreements was identified. The Article 17 agreement has a purely procedural purpose ; the Article 5 agreement a substantive purpose accompanied by a procedural

result. An Article 5 agreement is not, in itself, directed towards the conferment of jurisdiction. It is directed to a contractual consensus as to the place of performance. An Article 17 agreement does not direct itself, at all, to the place of contractual performance. Whilst, therefore, the parties can agree that the place of performance under a contract for the sale of goods shall, for example, be the vendor's place of business (rather than the place of delivery) a crude attempt to designate as the place of performance a place which has no real connection with the contract will be struck down if its purpose is to circumvent the formality requirements of Articles 17 or 23 (see Mainschiffahrts – Genossenschaft v. Les Gravieres Rhenanes Sarl [1997] Q.B. 731).

43. In the present case, there is no evidence whatsoever to suggest that Cube and Afcon ever entered into any agreement to the effect that the place of performance of the contract should be anywhere other than the place of delivery. Thus, for example, there is nothing in clauses 12 and 13 (or, indeed, any other clause) of the "A", "B" and "C" Contracts which even begins to approach an agreement as to the place of performance. Hence the ultimate abandonment by Mr Boardman of any "otherwise agreed" argument under Article 5.1(b).

EVENTS AFTER ISSUE CLAIM FORM

44. Although not validly served, the Claim Form and Particulars of Claim were provided by Darlingtons to Afcon. Afcon instructed SJ Berwin who on 14 March 2011 wrote to Darlingtons pointing out that the English courts did not have jurisdiction. Darlingtons responded by letter of 15 March 2011. The sole argument advanced by Darlingtons in response was that the relevant obligation was the obligation to pay and that the place of that obligation had always been England. Accordingly, and having filed an acknowledgment of service, Afcon on 24 March 2011 issued an Application Notice under CPR Part 11 seeking a declaration (inter alia) that the courts of England and Wales had no jurisdiction to try the claim as commenced by the Claim Form. This Application was listed for its first hearing before Kitchin J on 1 April 2011. It is this Application which is now before me.

45. On 31 March 2011 Cube served Amended Particulars of Claim. These added an allegation (paragraph 4) that the terms of Cube's employment by Afcon were *"partly"* set out in Contracts "A", "B" and "C".

46. Paragraph 5, 6 and 7 of the Amended Particulars of Claim were in the following terms :-

> *"5. At a meeting on 29 April 2009 at the Defendant's offices in Bucharest, Romania, the terms of the Contracts ["A", "B" and "C"] were reviewed by and agreed by Simon Rosenberg and David Clarke on behalf of Cube and Moti Kramer and Avi Ophir on behalf of Afcon.*
>
> *6. At a meeting on 18 June 2009 at the Baneasa Shopping Centre, Romania, new payment terms were agreed between Moti Kramer and Avi Ophir of Afcon and Simon Rosenberg and Adrian Webber of Cube ; however it was confirmed that save as subsequently amended the terms of the Contracts were still agreed.*
>
> *7. It was an express term of the Contracts that they would be governed by English law and that any litigation would be undertaken within the United Kingdom".*

47. Paragraph 12 of the Amended Particulars of Claim contained an addition to the effect that the parties had agreed to submit to the jurisdiction of the English courts under Article 23 as well as Article 5(1)(a) of the Regulation.

48. Mr Boardman's Skeleton Argument for the hearing on 1 April 2011 made it clear that Cube was relying not merely on a jurisdiction agreement under Article 23 but, also, on the parties having "otherwise agreed" within the meaning of Article 5.1(b). Clearly these arguments were dependent on Contracts "A", "B" and "C" but his Skeleton Argument was somewhat vague about what had occurred factually. Paragraph 7 indicated that "some" of the terms of the parties' agreement had been set out in Contracts "A", "B" and "C". It is unclear, at this point, if what is being alleged is that there was an oral agreement whose terms were reflected in some of the provisions in Contracts "A", "B" and "C" or whether what was being alleged was that some of the provisions (but not others) of Contracts "A", "B" and "C" had been specifically agreed. No further particulars were provided in the Skeleton Argument and paragraphs 5 and 6 of the Amended Particulars of Claim would seem to allege that what had been agreed was the <u>whole</u> of Contracts "A", "B" and "C" themselves (subject to a variation as to payment terms at the

meeting on 18 June 2009). All this hardly, however, squares with the allegation in paragraph 4 of the Amended Particulars of Claim that the terms of Cube's employment were only "partly" set out in the three Contracts. But in paragraph 9 of his Skeleton Argument Mr Boardman appears to present a slightly different case. He says that the parties expressly agreed the terms of the three Contracts at their meetings on 29 April 2009 and 18 June 2009. The Contracts, he says, evidenced that agreement and Article 23 is, therefore, engaged. This appears to be a submission that the parties orally agreed the whole of the three Contracts according to all their terms (subject to agreed amendment on 18 June 2009).

49. Mr Rosen, a solicitor-advocate with Darlingtons, produced a witness statement dated 31 March 2011 based on, he says, instructions from Mr Rosenberg and (interestingly enough granted his subsequent claims that ill health prevented him from giving more timely instructions) Mr Webber. I remain unclear as to what Mr Rosen is saying in paragraph 6 of that witness statement. He appears to vacillate between the parties having agreed the whole of the three Contracts at the two meetings on 29 April 2009 and 18 June 2009 and some other case. He refers to the terms of

the contract as being only "in part" set out in the three Contracts. And then he says that it is clear to him, from the documents which he has seen, that the terms [sic] were negotiated and agreed between the parties over a period of time during which voluminous numbers of e-mails passed between them. An agreement to be divined from a chain of e-mails does not equate to an express agreement in the terms of the whole (or some part) of the three Contracts.

50. As at 1 April 2011 I can well understand Afcon not having the slightest idea as to what the precise case against it was, save for the fact that it had something to do with Contracts "A", "B" and "C".

THE SUBSEQUENT EVIDENCE

51. On 1 April 2011 Kitchin J made directions, by consent, for the filing of further evidence. The first round of that evidence came from Afcon, primarily with a witness statement of Mr Kremer dated 16 May 2011. The essential thrust of what Mr Kremer had to say was that the parties had never entered into Contracts "A", "B" and "C". Rather, negotiations had continued after both the meetings of 29 April and 18 June 2009. Ultimately Purchase Orders (as I have identified above) were placed by

Afcon and these had nothing to do with, and were not on the basis of the terms contained in, Contracts "A", "B" and "C".

52. Mr Boardman in his submission to me was critical of Mr Kremer's evidence. This criticism was designed, as I understood it, to persuade me that only Cube's evidence could be relied upon because Mr Kremer was, at best, unreliable as a witness and, at worst, untruthful.

53. That Mr Kremer's recollection has, in certain respects, failed him is undoubted. Thus Mr Kremer recollects having dinner at the Radisson hotel in Bucharest with Mr Rosenberg on the evening of 28 April 2009. Documents before me clearly establish that Mr Rosenberg and Mr Clarke did not even land at Bucharest airport until 23:20 on 28 April 2009. Mr Boardman says that Mr Kremer is simply wrong when he says that Cube was engaged by Afcon as a supplier (rather than an installer) – the significance being that Mr Kremer had said that Afcon's policy was to have written contracts only with installers (due to the complexity of installation work). Suppliers were dealt with merely by the issue of Purchase Orders and not written contracts. I am by no means clear that Cube itself was engaged as an installer or actually effected installation

work. If Cube were, indeed, a contracted installer it was, even on Cube's own case, but a very small part of the job. But, for present purposes, I am content to give Mr Boardman the benefit of the doubt on this issue and to accept that Mr Kremer was wrong on this point. Mr Boardman suggests that Mr Kremer's evidence that he did not recollect seeing the e-mail of 28 April 2009 and that he did not recollect reading Contracts "A", "B" and "C" which were attached to it is, at the very least, surprising. I can understand that Mr Kremer may have forgotten actual receipt of the e-mail of 28 April 2009 but I think it more likely than not that Contracts "A", "B" and "C" were discussed in some detail at the meeting on 29 April 2009 which means that Mr Kremer must, to a degree, have studied them. It is, therefore, a little surprising that he could no longer recall reading these Contracts.

54. But no man's recollection is perfect. And whatever the inaccuracies in minor details the important point is that the basic thrust of Mr Kremer's evidence is correct – as Mr Boardman now accepts – namely that Contracts "A", "B" and "C" were not entered into at either of the meetings. True it is that Mr Kremer nowhere addresses the case now advanced on behalf of Cube as to what happened at the meetings. But he

can hardly be criticised for that because that case has appeared long after he made his witness statement. Ultimately, any minor defects in Mr Kremer's recollection are of no relevance to the issues I now have to address. What primarily matters is what evidence, if any, Cube has produced to support the case which it now advances and what is the quality of that evidence.

55. Cube's evidence in response consisted of a witness statement from Mr Rosenberg dated 15 June 2011. This was an important witness statement because :-

(1) it was Mr Rosenberg's own direct evidence. He had been present at both meetings. As it was his witness statement there could be no question of his evidence being misunderstood, or misrepresented, through being reproduced in hearsay by, for example, a witness statement from his legal team ;

(2) the issues on jurisdiction now facing Cube were stark and clear.

56. It might therefore be expected that Mr Rosenberg's witness statement would contain a clear, and detailed, recitation of all facts and evidence on which Cube wished to rely.

57. Mr Rosenberg starts by criticising certain aspects of the evidence of Mr Kremer. He does so because (paragraph 4) he says that where matters have been stated incorrectly by Mr Kremer then the credibility of Afcon's evidence and the degree of reliance to be placed on it must be questionable. On the way this case has developed this entirely misses the point. The important point is what evidence Cube itself advances.

58. As to Cube's positive case, Mr Rosenberg says that the three Contracts were discussed in detail at the meeting on 29 April 2009. He says that two copies of each of Contracts "A", "B" and "C" were signed on 29 April 2009 (although he is a little unclear it is apparent, in context, that he means signed by him). One signed copy of each of Contracts "A", "B" and "C" were retained by him, the other three signed copies were left with Mr Kremer. This was because Mr Kremer said that these three copies had to be sent to Israel for signature (the evidence establishes that Afcon,

although a Romanian company, had been established as a joint venture between two Israeli companies listed on the Tel Aviv stock exchange).

59. The logic of this would appear to be that Contracts "A", "B" and "C" were not entered into at the meeting of 29 April 2009 – since otherwise why would copies thereof (as signed by Mr Rosenberg) be sent to Israel for signature? Significantly, Mr Rosenberg does not state, in terms, that the three Contracts were entered into orally at the meeting on 29 April 2009. Nor does Mr Rosenberg produce any coherent explanation of his e-mail of 30 April 2009 (which is inconsistent with <u>any</u> contract having been entered into on 29 April 2009). He simply says (paragraph 19) that this e-mail voiced his frustration at not resolving all issues that he went to Bucharest to resolve. Nowhere does he say that <u>some</u> issues were resolved and agreed as a contract.

60. It seems to me, therefore, that on his evidence Mr Rosenberg does not say that <u>any</u> contract was entered into at the meeting on 29 April 2009.

61. In paragraph 20 Mr Rosenberg deals briefly with the meeting at the Baneasa shopping centre on 18 June 2009. He says that "terms were re-

negotiated" – which is not the same thing as saying that a contract was entered into. He says that those terms were confirmed in writing within his e-mail of 22 June 2009. But that e-mail raised the question *"We believe you will potentially be placing three orders ?"* and made what was expressly described as an amended offer in respect of payment terms. This e-mail is entirely inconsistent with any contract having been entered into on 18 June 2009. It is consistent only with ongoing negotiations. But the logic of paragraph 20 of Mr Rosenberg's witness statement is that if a contract had been entered into it would, presumably, be Contracts "A", "B" and "C" (as varied by what was set out in the subsequent e-mail of 22 June 2009).

62. And that is the extent of Cube's evidence on contract formation - or at least was the extent of Cube's evidence on contract formation until this case entered its listing window. The matter came on for hearing before me on Friday 22 July 2011 at the end of a listing window which commenced on Wednesday 20 July 2011. On Wednesday and Thursday 20 and 21 July 2011 Cube served three further witness statements. The first was dated 19 July 2011 from Ms Bucurenciu and I have dealt with it above. The second was dated 21 July 2011 and was from Mr Rosenberg. He made two points:-

(1) at the meeting on 29 April 2009 there had been a specific discussion and agreement on clause 12 of Contracts "A", "B" and "C" ;

(2) at the meeting on 17 June 2009 (the date of the meeting is here different from that set out in the Amended Particulars of Claim) Mr Kremer had not merely confirmed that a clause such as clause 12 was accepted and approved by the directors of Afcon but, also, had said that the three Contracts had in any event been signed by Afcon thus specifically approving the same.

63. Mr Rosenberg gives no explanation whatsoever as to why he has first "recollected" these matters after Afcon's application was first listed to be heard.

64. Mr Rosenberg's version of events as to what occurred on 17 June 2009 is supported by a witness statement of Mr Webber. He, at least, gives an explanation as to why he did not make his witness statement earlier. He says that he suffers from an unusual illness (Achalasia) and, accordingly,

he had been unable to make a witness statement because of ill health at any earlier time. At the hearing, and now, I approach that claim with a considerable degree of scepticism. I have already pointed out that Mr Rosen, in his witness statement of 31 March 2011, had indicated that he had received instructions not merely from Mr Rosenberg but also from Mr Webber. Whilst I do not doubt that Mr Webber's suffers from an unusual and difficult medical condition, no medical evidence was produced by him to show that he had been unable from 31 March 2011 to 21 July 2011 to give instructions to anyone.

65. Mr Webber begins by confirming that Contracts "A", "B" and "C" were discussed at the meeting on 17 June 2009 (he too now dates the meeting as having occurred on the 17th not the 18th). Mr Webber says that Mr Kremer confirmed that the three Contracts had already been considered by the directors of Afcon in Israel and that the same had been approved and signed. But in the next sentence Mr Webber then goes on to negate his own evidence because he says that Mr Kremer then said that he (Mr Kremer) was not authorised to sign for anything over €30,000. (Two tranches of €30,000 were the advance payments ultimately made by Afcon and accepted by Cube. As advance payments, these two sums bore

no resemblance whatsoever to the 50% of the total contract sums due 7 days after signing under the terms of Contracts "A", "B" and "C").

66. Mr Webber goes on to say that being concerned about Afcon's reputation for being "messy in payment" he wanted to re-clarify that English jurisdiction applied. He says that both Mr Kremer and Mr Ophir confirmed their understanding that Afcon would submit to English Jurisdiction in the event of a dispute arising, but then said that Mr Webber's concerns were unfounded and, in any event, the Contracts had been signed so the point on jurisdiction was agreed. Thereafter, on Mr Webber's evidence, the parties continued to negotiate (which is a little surprising if the three Contracts had been entered into). There was obviously much discussion as to when payment would occur and, ultimately, a compromise was reached that two Invoices for €30,000 would be raised by way of advance payments.

67. I allowed in all three witness statements because Ms Bingham identified no forensic prejudice which she suffered through their admission and did not wish for an adjournment to deal with these witness statements.

68. One point arising on these witness statements I can deal with immediately. It is no part of Cube's case before me that Contracts "A", "B" and "C" had been entered into because sometime between 28 April 2009 and 17 June 2009 the same were signed on Afcon's behalf in Israel. Mr Boardman disclaims reliance on the three Contracts as such.

CUBE'S CASE - JURISDICTION

69. Mr Boardman's Skeleton Argument for the hearing before me (prepared on 19 July 2011) submitted :-

(1) that the parties had "otherwise agreed" within the meaning of Article 5(1)(b)" ;

(2) that the parties had expressly agreed the terms of the three Contracts at their meetings on 29 April 2009 and 18 June 2009. The three Contracts evidenced that agreement. Article 23 was, therefore, engaged. Thus, what Mr Boardman was then arguing for was, clearly, that the three Contracts had been entered into in accordance with all their terms.

70. Before me Mr Boardman argued matters very differently. He abandoned his argument under Article 5(1)(b) and abandoned any claim that Contracts "A", "B" and "C" had been entered into as such. What he submitted had occurred was that the parties at one or other, or both, of the two meetings had entered into a free-standing oral agreement that any subsequent contracts entered into between them (by which he meant, I think, orders placed and accepted) would be subject to the exclusive jurisdiction of the courts of England and Wales. This was evidenced by the terms of clauses 12 and 13 of the three Contracts. This is a claim to a free-standing pure jurisdiction agreement orally made either on the terms of clauses 12 and 13 of the three Contracts or evidenced by clauses 12 and 13 of the three Contracts.

71. The first time that Afcon ever heard of this argument was at, or shortly before, the hearing before me. The first time anything to support it is addressed in Cube's evidence comes with the two witness statements of Mr Rosenberg and Mr Webber dated 21 July 2011.

THE TEST

72. Before considering this submission I must identify the test which I must apply.

73. In Canada Trust Co v. Stolzenberg [1998] 1 WLR 547 the Court of Appeal held that what had to be shown by a person claiming that the England courts had jurisdiction was a "good arguable case" that the relevant requirements had been satisfied. Canada Trust was a case on Article 6(1) of the Lugano Convention but the same test clearly applies to the requirements of Article 23 of the Regulation (see the decision of the Privy Council in Bols Distilleries BV v. Superior Yacht Services Limited [2006] UKPC 45).

74. "Good arguable case" in this context requires more than merely the establishment of a serious issue to be tried. But it does not require proof as high as the civil standard of the balance of probabilities. What is required to establish a "good arguable case" is a "much better argument on the material available" (see per Waller LJ at 555 F-G). There is no different standard of proof depending on whether or not a point will arise only at the jurisdiction stage (Waller LJ at 555A).

75. The concept of "good arguable case" in this context is not capable of very precise definition, for the simple reason that it reflects the fact that the claimant must properly satisfy the court in the particular circumstances of any given case that it is right for the court to take jurisdiction. In some cases the court will have to consider matters which go both to jurisdiction and to the very matter to be argued at trial, e.g the existence of a contract. (I pause to say that the present is not now such a case, since Cube's case as now formulated by Mr Boardman directs itself merely to a free-standing jurisdiction agreement under Article 23). The concept of good arguable case also reflects the fact that the question before the court is one which has to be decided on witness statements without discovery and cross-examination. For that reason alone the civil burden of proof applicable to issues decided after full trial is inapposite. Where an issue goes both to jurisdiction and also to the issues to be decided at trial (e.g the existence of a contract) then, as I understand the position, the court must be concerned not to express any concluded view as to the merits. I do not understand that injunction, as formulated by Waller LJ at 555 F, to extend to prevent the court expressing at the very least strong views on an issue which goes merely to jurisdiction (albeit a concluded view could never be expressed other than on the basis of the material available which, by definition, does

not involve disclosure or cross-examination). Ultimately, the concept which the phrase "good arguable case" reflects and on which it is important for the court to concentrate is that of the court being 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 (on all the above see Waller LJ at 555A-G).

76. That there are degrees of flexibility and nuances within the concept of "good arguable case" depending on the issues which arise in any given set of circumstances is undoubted (see, e.g., Waller LJ at 558E-F). Fortunately, in the present matter I do not have to concern myself with such nuanced subtleties.

ARTICLE 23

77. One of the contexts in which this test has to be applied is the jurisprudence on Article 23. The relevant parts of Article 23 read as follows :-

> *"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

..."

Article 23.2 provides that any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

78. In Estasis Salotti di Colzani Aimo e Gianmario Colzani v. RUWA Polstereimaschinen GmbH (Case 24/76) [1976] ECR 1831 the European Court of Justice considered the true interpretation of Article 17 of the 1968 Brussels Conventions. Although there are some differences in wording between Article 17 of the Convention and Article 23 of the Regulation, for present purposes there are no material distinctions between these two provisions and the strict Salotti approach remains good law. Subsequent amendments to Article 17 and the changes introduced by Article 23 do not

signify any relaxation of the Salotti requirements on consensus (see per Gross J in Siboti K/S v. B.P France S.A [2003] 2 Lloyd's Rep. 364 at paragraph 39). The Court of Justice emphasised that in view of the consequences of Article 17 (in displacing the basic domiciliary position on jurisdiction) then the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. 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. That consensus must be clearly and precisely demonstrated. Further, the purpose of the formal requirements imposed by Article 17 was to ensure that the consensus between the parties was in fact established. The degree of rigour to be applied by the national courts is well illustrated by the facts of Salotti. There both parties signed a contract on the back of which were printed RUWA's general conditions of sale (which included a jurisdiction clause). It was held that it had not been established that the parties had agreed the jurisdiction clause. Moreover, it was held that even express incorporation by reference of the general conditions of sale would not be sufficient to establish consensus as to the jurisdiction clause unless it were

also established that the printed conditions had in fact been communicated to the other contracting party.

79. In Bols, Lord Rodger of Earlsferry, delivering the judgment of the Privy Council, emphasised the requirement that it should be "clearly and precisely demonstrated" that the parties had actually agreed to the clause conferring jurisdiction (paragraph 23). As Salotti requires, and as Lord Rodger emphasised, the fulfilment of the formality requirements of Article 17 will *"guarantee that the other party has actually consented to the clause derogating from the ordinary jurisdiction rules of the Convention"*.

80. The Privy Council in Bols endorsed the formulation of the test set out in the judgment of Waller LJ in Canada Trust (which I have summarised above) - Lord Rodger at paragraph 28. Intermeshing that test with the decided authority on Articles 17 and 23 Lord Rodger went on to say this [at 28] :-

> *"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".

81. Mr Boardman's submission to me was that the "clearly and precisely" requirement related only to the requirements of form set out in Article 23. I do not regard that submission as consistent either with what the Court of Justice had to say in Salotti (at paragraph [7]) or with what Lord Rodger had to say in Bols. What is required is "clear and precise" demonstration of consensus on the jurisdiction clause – the formalities are a means of guaranteeing that this consensus is demonstrated. I fail to see how it is possible to de-link the formalities in the manner suggested by Mr Boardman from the consensus itself so as to establish differential tests for the establishment of the consensus and the fulfilment of the formalities.

ANALYSIS

82. The first point to make is that the jurisdiction agreement now claimed by Cube is nowhere pleaded. Nor was any application made to me by Mr Boardman to further amend the Amended Particulars of Claim to plead the same. The pleaded claim under Article 23 (Contracts "A", "B" and "C") has been disclaimed by Mr Boardman.

83. Next, there is the manner in which Cube's case has developed. Miss Bingham submits that Cube's case is being made up as Cube goes along to meet the difficulties which Cube is encountering. Granted the history of this matter there is obviously force in this submission.

84. It seems surprising, indeed almost astounding, that Mr Rosenberg should have "remembered" the case now contended for only on 21 July 2011. And whilst I accept Mr Webber's illness I remain sceptical that he was unable to give instructions between 31 March 2011 and 21 July 2011. Before that date, as Mr Rosen confirms, he did give instructions and appears to have "forgotten" the evidence which he now gives. It might, perhaps, be said that both Mr Rosenberg and Mr Webber did not appreciate the significance of the evidence which they now give but I find

that very difficult to accept. What they now say was obviously important in mounting Cube's case on jurisdiction and ought, on any objective analysis, to have been raised far earlier.

85. But on a detailed analysis of the evidence of Mr Rosenberg and Mr Webber such evidence falls far short, on its express terms, of establishing any argument, let alone a much better argument, that there was such a consensus as is now alleged. Dealing first with the evidence of Mr Rosenberg in his witness statement of 21 July 2011 he makes the bold assertion that at the meeting on 29 April 2009 there was "specific discussion and agreement" on clause 12 of the three Contracts. Mr Kremer, he says, had no issue with such a clause and it was agreed that it should remain in place. There are two possible interpretations of this. The first is that, in discussions over the three Contracts, clause 12 was in principle acceptable. But this would have been in the context of the overall negotiations in respect of the Contracts and would have been dependent on the three Contracts being entered into – which they never were. The other possibility, which is what Cube is now contending for, is that the parties agreed, come what may in respect of the three Contracts, that clause 12 of the three Contracts would apply to any subsequent

contracts which the parties might enter into. Mr Rosenberg's witness statement does not say, in express terms, that this is what occurred. The fact that he does not is telling. Mr Kremer's response, as identified by Mr Rosenberg, is entirely consistent with the first of the two possibilities I have identified (namely that if the Contracts were entered into then clause 12 was not an issue). Mr Rosenberg's witness statement, on the most charitable interpretation thereof from Cube's point of view, merely hints at the jurisdiction agreement now alleged. And if there had been such a specific consensus as now alleged I find it nothing short of astounding that Mr Rosenberg should have written his e-mail of 30 April 2009 in the terms in which he did. This e-mail in express terms suggested that none of the contents and wording of the three Contracts had been "resolved". Had there been such a consensus as that now contended for at the meeting on 29 April 2009 it is impossible to see why Mr Rosenberg did not specifically refer thereto in his e-mail – both because of the importance he now says he attached to the issue at the time and as an express exception to the other failures he identifies over resolving the content and wording of the three Contracts. Nor is it easy to understand why, if there were any such consensus as that now alleged at the 29 April 2009 meeting, the

matter should have been re-addressed at the meeting of 17 or 18 June 2009.

86. All that Mr Rosenberg has to say about the meeting of June 2009 is that Mr Webber raised the point again because Mr Webber was worried that Cube would be stuck in unfamiliar territory, with unfamiliar law, if there were a dispute. He says that Mr Kremer confirmed that such a clause was *"accepted and approved by the directors of Afcon and that the three Contracts had in any event been signed approving the same"*. Again, on proper analysis, Mr Rosenberg is not saying that a specific consensus was entered into at this meeting. He is not saying that the parties specifically agreed that, come what may, any contracts subsequently entered into would be governed by clause 12 of the three Contracts. As to Contracts "A", "B" and "C" themselves I do not understand how Mr Rosenberg could have thought that they would govern the position. They had already been superceded by negotiations which had continued since April 2009 and were superceded by negotiations not merely at the June meeting but by negotiations which occurred subsequently (e.g. as to payment terms).

87. Mr Webber puts matters slightly differently. He says that he wanted to re-clarify that English Jurisdiction applied and that Mr Kremer and Mr Ophir confirmed their understanding that Afcon would submit to English jurisdiction in the event of a dispute arising. But, and as the Contracts had been signed, the point on jurisdiction was already agreed.

88. Mr Webber exhibits notes which he says he took that day on his Apple iphone. Those notes do refer to Mr Kremer confirming that "Contracts in Israel, signed" but make no reference whatsoever to any discussion over submission to English Jurisdiction. A confirmation of understanding that Afcon would submit to English Jurisdiction is not the same thing as the entry into a contract to that effect. And such an understanding could, clearly, be overtaken by subsequent negotiations. As to the three Contracts being signed, that point is irrelevant because it is now accepted that they were not entered into. And jurisdiction could not be "agreed" unless the parties entered into a specific agreement to that effect.

89. Overall, I find it very difficult to accept any suggestion that these parties (who were heavily negotiating both before and after the April and June 2009 meetings) would have entered into a free-standing jurisdiction

agreement which would have overridden anything they subsequently discussed or agreed. I find it equally difficult to accept that they would have done so informally and orally at either the April or June meetings. It is much much more likely that if English Jurisdiction were discussed at either meeting it was discussed only as one of the many potential terms in an ongoing negotiation process.

90. Ultimately, therefore, I have little difficulty in concluding that Cube has failed to show that it has a much better argument than Afcon, on the material presently available, that it can be established, clearly and precisely, that the alleged jurisdiction agreement was the subject of consensus between the parties. Accordingly, and for that reason alone, the English court lacks jurisdiction under Article 23.

FORMALITIES

91. But even that is not the end of Cube's difficulties. Under Article 23.1 the jurisdiction agreement needs either to be in writing or evidenced in writing. Where a contract containing a choice of jurisdiction clause has been reduced to writing but has been signed by only one of the parties then the consent of the party to be bound by the jurisdiction clause has

ng, or evidenced in writing (:

European Court of Justice in The Tilly Russ (Case 71/83) [1984] ECR 2417 at para 16). Whilst The Tilly Russ dealt with Article 17 of the 1968 Brussels Convention I can see no reason whatsoever why it should not be equally applicable to Article 23 of the Regulation. Afcon never signed the three Contracts nor is there any other document in writing emanating from Afcon which contains, or evidences, Afcon's agreement to the jurisdiction agreements contained in clauses 12 and 13 of the three Contracts.

92. Where an oral jurisdiction agreement is relied on, the party to be bound must confirm, or at the very least evidence, the existence of the oral agreement by his writing (see the decision of the European Court of Justice in Galleries Segoura S.p.r.l v. Firma Rahim Bonakdarian [1977] 1 CMR 361 at para 8 (again a case on Article 17 but equally applicable to Article 23). Again there is no such writing emanating from Afcon.

93. To these principles there is one exception (considered by the Privy Council in Bols). Paragraphs 14 and 15 of the decision of the European Court of Justice in F Berghoefer GmbH & Co KG v. ASA SA (Case 221/84)

[1985] ECR 2699 at paragraphs 14 and 15 set out the following propositions :-

> *"14. It must be pointed out that article 17 of the Convention does not expressly require that the written confirmation of an oral agreement should be given by the party who is to be affected by the agreement. Moreover, as the various observations submitted to the Court have rightly emphasised it is sometimes difficult to determine the party for whose benefit a jurisdiction agreement has been concluded before proceedings have actually been instituted.*
>
> *15. If it is actually established that jurisdiction has been conferred by express oral agreement and if confirmation of that oral agreement by one of the parties has been received by the other and the latter has raised no objection to it within a reasonable time thereafter, the aforesaid literal interpretation of article 17 will also, as the Court has already decided in another context, be in accordance with the purpose of that article, which is to ensure that the parties have actually consented to the clause. It would therefore be a breach of good faith for a party who did not raise any objection subsequently to contest the application of the oral agreement.*

94. As I understand it, paragraph 15 of Berghoefer provides a limited exception to the basic proposition that an agreement must be contained in, or evidenced by, the writing of the party to be charged with it. If the writing is that of the party seeking to rely on the jurisdiction agreement but no objection is raised to such writing by the party to be charged then good faith prevents the party who did not raise objection from subsequently contesting the application of the oral agreement.

95. Miss Bingham submits to me that paragraph 15 of Berghoefer applies only where an express oral agreement is actually established or admitted. Whilst it is true that this appears to be the way in which the Court of Justice expressed itself I have the gravest doubts whether this submission is correct. To require the establishment, presumably on the balance of probabilities, of the express oral agreement and then, presumably, to consider the application of the remainder of paragraph 15 merely to the standard of "good arguable case" would, to my mind, be entirely contrary to the reasoning in Canada Trust. It would be to re-introduce the heresy of differential tests for different items within the issues which arise on jurisdiction. This was rejected by the House of Lords in Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438 and in

Canada Trust. Were it necessary for my decision I would, therefore, have rejected this particular submission.

96. I do not, however, have to reach a decision on this particular point because it is crystal clear that there is no writing emanating from Cube, and transmitted to Afcon, which contains confirmation of the oral agreement. There was, therefore, nothing for Afcon to object to within a reasonable time. Paragraph 15 of Berghoefer cannot apply in Cube's favour. To the extent that the jurisdiction clauses were contained in the three Contracts they were (as in Bols) merely terms in contracts to be agreed. They were not, and could not be, written confirmation of a prior specific oral agreement on jurisdiction.

97. Accordingly, I fail to see how Cube has any argument at all that the formalities required by Article 23 are satisfied. But even if it does have any such argument, Afcon clearly has a better argument, on the material available, that the formalities required by Article 23 have not been satisfied.

CONCLUSION

98. In the circumstances, it is clear to me that Afcon has a much better argument, on the material available, that Article 23 does not apply and that, accordingly, the English courts lack jurisdiction to hear this claim. Accordingly, I allow Afcon's Application under CPR Part 11 and will make a declaration that the Courts of England and Wales have no jurisdiction to try the claim as commenced by the Claim Form issued on 14 February 2011 under reference HC11C00303. Unless the parties are able to agree I will consider what further consequential directions and orders I should make on hand down.