QGB, Swansea District Registry before the Honourable Mr Justice Silber : 23rd February 2006.

JUDGMENT : The Honourable Mr Justice Silber:

I. Introduction:

2. Jani-King (GB) Limited ("the defendants") grants franchises of commercial cleaning services. The claimant, Anthony Snookes, became a franchisee of the defendants on 24 June 1999 and 18 October 2000 while his fellow-claimant, Stephen Little, became a franchisee of the defendants on 16 May 2001 in both cases pursuant to written agreements ("the agreements").

3. All the claimants' franchise agreements are in the defendants' standard form and clause 27.14 of both these agreements under the heading "***Interpretation***" provides that:- *"Save as provided herein any proceedings arising out of or in connection with this Agreement shall be brought in a court of competent jurisdiction in London".*

4. Both claimants commenced the present proceedings in the Swansea District Registry alleging misrepresentation and breach of contract against the defendants, who have now applied to strike out or stay each of the claims on the basis that because of the provisions of clause 27.14, "*Swansea District Registry does not have jurisdiction to hear this claim".* It is common ground that the claimants each have the same grounds for resisting the present applications and that the result of both the present applications against each claimant should be the same.

5. At the start of the hearing, I inquired why these applications were so keenly contested and I was told that if the defendant's applications were granted and if the claimants were then forced to commence proceedings afresh in London, the defendants might then be able to sustain a limitation argument against some part of the claim of Mr Snookes. I am still puzzled as to why Mr. Little is so concerned about whether his claims (which are independent of the claim of Mr Snookes) have to be bought in London or in Swansea bearing in mind that he, like Mr Snookes, lives in the Birmingham area and has it seems no connection with Swansea, except that he has instructed a firm of solicitors based there, who have instructed London counsel.

II. The Issues

6. It is common ground between counsel that:
   (a) the claims made by each claimant in the present action fall within clause 27.14 of their respective franchise agreements as *"arising out of or in connection with this agreement";*
   (b) there are no other contractual provisions on jurisdiction relevant to these claims brought by the franchisees and so in the light of the opening words in clause 27.14 *("save as provided herein"),* there was no other relevant provisions contained in the franchise agreements.

7. Mr Andrew Butler, counsel for the claimant, and Mr Jason Evans-Tovey, counsel for the defendants, agree that the issues remaining for resolution on these applications are:
   (a) Whether the claimants were obliged by clause 27.14 to institute those proceedings in a court of competent jurisdiction in London? ("The Proceeding Commencement Issue");
   (b) If so, whether clause 27.14 is enforceable ("The Enforceability Issue");
   (c) Whether Article 23 (1) of Council Regulation (EC) 44/2001("the Regulations") applies to clause 27.14 of the franchise agreements or Article 2 of those regulations or any other provision in the Regulations apply to clause 27.14 of the franchise agreements ("the Regulations Issue");
   (d) What is the significance of section 16 of Civil Jurisdictions and judgment Act 1982 ("the 1982 Act") and paragraph 12 of the Civil Jurisdiction and judgments Order 2001 ("the Order") to the present dispute ("the UK Legislation Issue") and
   (e) What remedies, if any, are the defendants entitled to ("The Remedy Issue")

III. The Proceeding Commencement Issue

8. In support of their summonses, the defendants contend that the wording of clause 27.14 means that the claimants should have brought their claim *"in a court of competent jurisdiction in London"* and not as they have done in Swansea District Registry.

9. Mr Butler submits that the words *"any proceedings shall be brought in a court of competent jurisdiction in London"* in clause 27.14 of the agreements refer to matters which occur *after* the issue of proceedings.

He contends that it is significant that whereas clause 27.14 refers to *"any proceedings should be brought"*, clause 24.2 of the same agreement states that *"the franchisor shall be entitled to institute proceedings"*. His submission is that whereas the words in clause 24.2 *("institute proceedings")* are appropriate to deal with the commencement of proceedings, the words in clause 27.14 *("any proceedings shall be brought")* must refer to something different and that must mean the post-issue stage.

10. In my view, I have to ascertain the ordinary meaning of the words used in clause 27.14 and that leads to the conclusion that proceedings are *"brought"* when they are actually *commenced*. Therefore the claimants were obliged by clause 27.14 to commence their present proceedings *"in a court of competent jurisdiction in London"*. I am fortified in reaching that conclusion by two matters of which the first is that in the Limitation Act 1980, there are repeated references to the date by which proceedings should be *"brought"* (see for example sections 2, 3, 4A, 5, 7, 8 and 9) and that date clearly means the date when they should have been commenced.

11. Second, this approach is supported by the fact when considering the Lugano Convention, Lord Steyn explained in **Canada Trust Co and others v Stolzenbeorg and others (No 2)** [2002] 1 AC 1,9, that:- *"the words "to bring proceedings" in the context of the Convention appear to point to the initiation of the proceedings"*

12. It is convenient at this stage to consider Mr Butler's submission that Swansea District Registry is first part of the High Court and second that it is to be regarded as part of the High Court in London. I am unable to accept the second part of that submission if it means that Swansea District Registry is in the words of clause 27.14 *" a court of competent jurisdiction in London"*. Mr Butler contends that the High Court is a single unified court, which has jurisdiction in this case and that means that this claim can be brought in any part of the High Court which is a unified court. This submission ignores the crucial factor that in this case the parties have not agreed that claims have to be brought in the Royal Courts of Justice but instead they have agreed in clause 27.14 that proceedings *"shall be brought in a court of competent jurisdiction in London"*.

13. It is clear that the terms of clause 27.14 are mandatory requiring that *"any proceedings shall be brought in "a court of competent jurisdiction in London"*. Accordingly, the claimants were obliged to issue proceedings in a court of competent jurisdiction in London unless they can succeed on any of the other issues to which I now turn.

IV. The Enforceability Issue

(i) Introduction

14. Mr Butler contends that clause 27.14 is unenforceable because of the terms of the Unfair Contract Terms Act 1977 ("the 1977 Act") as it purports to limit the geographical area in which a contract breaker can be sued and he relies on sections 3 of the 1977 Act and section 13 of the 1977 Act as a gloss on it. He also submits that clause 27.14 is too uncertain to be enforceable. Mr Evans- Tovey contends that neither sections 3 nor 13 of the 1977 Act are relevant to clause 27.14 but that in any event, clause 27.14 *"satisfies the requirement of reasonableness"*. He also contends that clause 27.14 is sufficiently certain as to be enforceable.

(ii) Section 3 of the 1977 Act

15. Mr Butler bases his claim first on section 3 of the 1977 Act, which provides that:

"(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term-

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled-

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness".

16. It is common ground the agreements were entered into on the defendants' *"written standard terms of business"* and so section 3 is relevant.

17. Section 3 of the 1977 Act however does not help the claimants because clause 27.14 *"satisfies the requirement of reasonableness"* referred to in section 3(2) of the 1977 Act.

18. Section 11 of the 1977 Act explains the requirement of reasonableness in this way:
"(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made …...
(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does"

19. The requirement of reasonableness is dealt with in Schedule 2 of the 1977 Act which is headed "'***Guidelines"*** for application of reasonableness test' but which deals "***in particular***" with contracts for the sale or hire purchase of goods but it is common ground that these guidelines are also applicable to section 3 of the 1977 Act . The relevant part of that Schedule provides that: *"the matters to which regard is to be had …are any of the following which appear to be relevant-*
(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) whether the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable:
(e) whether the goods were manufactured, processed or adapted to the special order of the customer."

20. There is little evidence adduced by the parties on the matters set out in Schedule 2 but it is clear that the claimants were given a substantial period in which to consider the terms of the agreements. Mr. Snooks said that he was given a copy of the franchise agreement on 18 May 1999 and that it was only signed on 24 June 1999 while paragraph 29 of the Particulars of Claim states that Mr Snookes entered into the agreement of 18 October 2000 "*having considered the matter at length*" and he signed a statement of truth in respect of this pleading. Mr. Little was given a copy of the franchise agreement on 27 April 2001 and it was not signed until 16 May 2001. I reject the submission that the claimants in the words of their written skeleton argument *"both to some extent felt pressurised into signing the contract*" as they had adequate time to consider the terms and there is no evidence that they could not have looked elsewhere in order to earn their living. The mere fact that in the words of the claimant's written skeleton argument that *"the [defendants] enjoy a stronger bargaining position, as reflected in fact that standard terms are not negotiable*" does not mean the terms are automatically unfair but I will take it into account in the claimants' favour

21. In my view, the other countervailing critical factors on the reasonableness of clause 27.14 were first that it did not limit the defendants' obligations to perform their contractual obligations, second that it did not increase the rights of the defendants, who were also bound by clause 27.14 although clause 24.2 gives the defendant the right to bring proceedings elswehere and third, that at the time when the agreements were made, clause 27.14 could not have been regarded by the claimants (who both lived and worked in the Midlands) as unfair or unreasonable because there were no obvious disadvantages to either of them of having to commence proceedings in London. Fourth, neither claimant says that if clause 27.14 had been drawn to his attention before he entered into the agreement, he would have refrained from entering into the agreements or been concerned about it. Finally, there is no evidence to suggest that the provisions of clause 27.14 would be onerous for the claimants (who lived in Birmingham) as it could not have been envisaged that it would have been in any way onerous or

unreasonable for the claimants to have to commence proceedings in London. Thus I am satisfied that the defendants have discharged the onus imposed on them of satisfying the *"requirement of reasonableness"* specified in the 1977 Act. In reaching that conclusion, I have not overlooked the point made by the claimants' solicitors that in previous proceedings brought by other claimants, the defendants have not sought to invoke clause 27 .14 but that does not assist the claimants on the issue of reasonableness. In conclusion, I reject the argument that clause 27.14 is unenforceable because of section 3 of the 1977 Act.

(iii) Section 13 of the 1977 Act

22. Mr Butler also seeks to rely on section 13 of the 1977 Act, the material parts of which provide that:

"(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure;

and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability".

23. Mr Butler contends that section 13 is relevant in two ways of which the first is that clause 27.14 in the words of section 13(1) (a) makes the *"enforcement [of the claimant's contractual rights] subject to restrictive or onerous conditions".* He submits that by making the claimants start proceedings in London, clause 27.14 constitutes such a condition. Mr Evans Tovey disagrees and therefore it is necessary to ascertain whether what is entailed in bringing proceedings in London is *"restrictive or onerous".*

24. The process of issuing proceedings could at all times be achieved in London comparatively easily by the claimants' Swansea solicitors either through agents in London or merely by sending all the relevant documents by post to London. No cogent evidence has been adduced by the claimants explaining how and why clause 27.14 *"would be restrictive or onerous".* Even assuming that this clause requires all proceedings up to and including trial to be brought in London, there is no evidential basis for concluding in this case that this requirement is in any way *"onerous or restrictive"* for the claimants, who do not live in Swansea where this claim was brought but reside in Birmingham. Their only connection with Swansea is that the claimants have instructed a firm of solicitors who practice in that town but who has instructed London based counsel. The claimants and their solicitor have filed carefully drafted and lengthy witness statements but significantly they fail to explain in them why clause 27.14 is "*restrictive or onerous*" for them.

25. So if clause 27.14 requires proceedings to be instituted in London, it is very difficult to see why that obligation would be more *"onerous*" or "*restrictive"* for the claimants when compared with the task of bringing the claim in Birmingham or Swansea. Even bearing in mind that their solicitors practiced in Swansea Mr Butler was unable to provide any cogent reason why this approach is wrong.

26. Mr Butler also contends that section 13(1) (a) applies to clauses, which purport to limit the geographical area in which proceedings may be brought. He relies by analogy on cases in which clauses limiting the time in which litigation may be commenced, have been regarded as falling within section 13(1) (a). In **BHP Petroleum and others v British Steel Plc** [1999] 2 Lloyds Law Reports 583, Rix J (as he then was) noted that he had received no submissions that a time-limitation clause, which limited the period during which a party was to be liable for a breach, did not fall within section 13(1) and he considered that it did (see page 592).

27. In **Granville Oil and Chemicals Ltd v Davis Turner and Co Ltd** [2003] 2 Lloyds Rep 356, the Court of Appeal proceeded on the basis that a similar time-limitation clause fell within section 13 (1) (a) of the 1977 Act.

28. In my view, there are fundamental differences between time-limitation clauses considered in these two cases and clause 27.14 because the latter clause does not restrict enforcement but it only identifies

the courts in which the proceedings were to be commenced. It is important to consider the effect of a particular clause in order to determine if it constitutes a *"restrictive or onerous condition"*. Thus, if an agreement between, say, two North European companies contained a provision that it could only be enforced in, say, a particular court in South America, then s13 (1) (a) might well have applied but that would not have been the case if the clause had merely said only that the contract could be enforced anywhere but in that particular court in South America. In the present case, there is no cogent evidence that by requiring proceedings to be brought in London clause, 27.14 is "*restrictive or onerous*" either for reason of cost or for any other reason. Thus I am unable to accept the contention that clause 27.14 is *"restrictive or onerous"*.

29. The second way in which section 13 is relied upon by the claimants is to contend that clause 27.14 has the effect of *"excluding or restricting rules of evidence or procedure"* as specified in section 13 (1)(c) of the 1977 Act . I am unable to agree because clause 27.14 does not exclude or restrict *"rules of procedure"* merely by specifying where the proceedings must be brought nor does it exclude or restrict any *"rules of evidence"* in the way that, for example, an arbitration clause might, although in that event section 11(2) of the 1997 Act would then be relevant. Thus I do not consider that section 13 renders clause 27.14 unenforceable, but there is an additional reason why I cannot accept the submission that section 13 of the 1997 Act assists the claimants.

30. Even if clause 27.14 has the effect of *"making the liability or its enforcement subject to restrictive or onerous conditions"* or of *"making the liability or its enforcement subject to restrictive or onerous conditions"*, it would still satisfy the reasonableness test. In **Granville Oil** (supra), Tuckey LJ pointed out at page 358 that first the reasonableness provisions in Schedule 2 of the 1977 Act ought to be taken into account in a case, such as the present one, in which section 13 of the 1977Act is being invoked and second that approach was advocated by the Court of Appeal in **Stewart Gill Ltd v Horatio Myer and Co Ltd** [1992] QB 600 especially at pages 606 and 608.

31. For the reasons set out in paragraphs 19 and 20 above, I have concluded that the defendants can discharge the burden of showing that that clause 27.14 satisfies the "reasonableness" test

(vi) Lack of Certainty

32. Mr Butler contends that the use of the word "*London"* in clause 27.14 creates uncertainty because there is uncertainty, in the words of his skeleton argument, as to "*whether any given court qualifies"*. He did not give any examples of this uncertainty and I consider that the geographical area covered by the term *"London"* is clear. I am unable to understand or accept Mr. Butler's submission as I consider that clause 27.14 is certain enough to be enforceable.

33. Thus I reject the submissions of Mr. Butler that clause 27.14 is unenforceable and I turn to consider its effect.

V. The Regulations Issue

(i) Introduction

34. It is now common ground between the parties that the Regulations apply to clause 27.14 but there is a dispute as to which article of the Regulations is applicable to clause 27.14. Mr Evans-Tovey contends that clause 27.14 falls within article 23 (1) of the Regulations which provide that: *"If the parties, one or more who 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 the particular legal relationship, that court or those courts shall still have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement shall be either;*
(a) in writing or evidence in writing…"

35. He stresses that where article 23 applies, then jurisdiction under article 2 (1) of the Regulations is excluded. Article 2 states that: *"1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".*

36. Mr Butler's primary submission is that article 2.1 is applicable with the result that the defendants can be sued anywhere in England and Wales. Mr Butler contends that first the general rule in respect of jurisdiction is set out in article 2 of the Regulations with the situations described in articles 5 to 24 of

the Regulations constituting exceptions to this general rule, second that article 23 is not applicable to the claimants' agreements as it only applies to contracts with an international flavour, third that clause 27.14 is not sufficiently wide to fall within article 23(1), and fourth, that Article 23 only applies if jurisdiction is conferred by the contractual provision on a "court or courts of a Member State" while clause 27.14 does not comply as it only confirms jurisdiction on the courts of a particular geographical area. His alternative case is that if article 2 does not apply, then the common law applies.

37. The alternative submission of Mr. Evans Tovey is that if Article 23 does not apply because for example, it requires an international element, then he contends that irrespective of whether article 2 or the common law applies, then these proceedings should have been issued in London because of section 16 of Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"), which allocates proceedings within the United Kingdom of jurisdiction in certain civil proceedings as amended by The Civil Jurisdiction and Judgments Order 2001 ("the Order"). He submits that the effect of those provisions means that clause 27.14 must be enforced. Section 16 provides that:

"(1) The provisions set out in Schedule 4 (which contains a modified version of Title II of the 1968 Convention) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where-

(a) the subject- matter of the proceedings is within the scope of the 1968 Convention as determined by Article 1(whether or not[that or any other Convention] has effect in relation to the proceedings); and

(b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 16 [of the 1968 Convention] (exclusive jurisdiction regardless of domicile)".

38. Paragraph 12 of the Order introduces new provisions for Schedule 4 to the 1982 Act and it states that:

"1. If the parties have agreed that a court or the courts of a part of the United Kingdom are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, and, apart from this Schedule, the agreement would be effective to confer jurisdiction under the law of that part, that court or those courts shall have jurisdiction"

39. Mr Butler contends that neither article 23 nor paragraph 10 is applicable. Before I consider each of these issues in turn, I should stress that my conclusion is that even if Mr Butler is correct and that article 2 (but not article 23) applies to clause 27.14, or that none of the regulations apply, then it is still necessary to apply section 16 of the 1982 Act and paragraph 12 of the Order with the result that clause 27.14 will be upheld so that these proceedings would be held to have been wrongly instituted. In other words, the outcome of this application will be the same irrespective of whether the defendant establishes that article 23 applies or whether the claimant satisfies me that article 2 is the applicable provision or that none of the regulations apply.

(ii) Does Article 23 apply to dealings between an English individual and English Company?

40. Mr Evans-Tovey contends that article 23 applies to clause 27.14 as it is not necessary for there to be an international aspect of the contractual relationship between the parties. He relies first on the approach of Aikens J in **Provimi v Aventis Animal Nutrition SA** [2003] EWHC 961 Comm. in which after there was discussion about the effect of jurisdiction clauses in contracts between German companies. Aikens J explained that:

"74. In his first report for both groups of actions Professor Wolf raised a further argument. This is that because the contracts were between German companies, the jurisdiction clause is confined to where, as between possible German courts, disputes should be heard. He argued that the clause does not determine issues of international jurisdiction, e.g. between English and German courts. Therefore, he submitted, article 23 of regulation 44 does not apply at all. So, issues of the validity and scope of the clauses must be dealt with exclusively by German law. Dr Seiler and Professor Welter responded to this in detail and Professor Wolf returned to the matter in his second reports.

75. In his oral submissions Mr Carr did not take up the arguments of Professor Wolf that the clauses dealt only with national jurisdiction issues, so that article 23 was irrelevant. He was, in my view, correct not to do so. First, article 23 of regulation 44 does not contain a requirement that the "agreement conferring jurisdiction" should expressly relate to international jurisdiction issues. Nor is there any case law of the E.C.J that has held that article 23 (or its predecessor article 17) only applies to jurisdiction clauses that refer expressly to

international jurisdiction issues. In my view the wording of article 23 is sufficiently broad to apply to all jurisdiction agreements. It would be contrary to the objective of providing legal certainty if some jurisdiction agreements were within article 23 but some fell outside of its scope and their validity were to be determined by national laws. Therefore, secondly, all issue of formal validity and, I think, material validity of the jurisdiction clauses, must be dealt with by reference only to the requirements of article 23, rather that the requirements of any system of national law. Therefore secondly, all issues of formal validity and, I think material validity of the jurisdiction clauses, must be dealt with by reference only to the requirements of article 23, rather than the requirements of any system of national law".

41. There are contrary arguments which were put forward by Mr Butler, who points out that Judge Richard Seymour QC sitting in the Technology and Construction Court had to decide in **British Sugar plc v Fratelli Babbini di Lionello Babbini and Co** [2005] 1 Lloyd Law Reports 332 whether Article 23 had any application to the contract with which he was concerned but which had no international element in it. He referred to Aikens J's statement in **Provimi** before concluding that:

"34. It seems to me that it is important to be clear what one is concerned with in considering whether an international element is necessary before the regulation can apply and, if so, what sort of international element is required. It is manifestly not the case that no provision of the regulation is of any relevance unless there is an international element, because art 2 (1) in terms set out the general rule that, subject to the provision made by the regulation, persons domiciled. In that sense all of the provisions which set out the circumstances in which a person can be sued in a Member State other than the Member State in which he is domiciled have an international dimension, it seems to me that if a Member State are to be sued in that state. In other words, it is prescribing what is to happen internally within a Member State. Other provisions of the regulations are concerned with exceptions to that general rule, that is to say, circumstances in which a person can be sued other than an in a Member State in which he is domiciled in the sense all of the provisions which set out the circumstances in which a person can be sued in a Member State other than the Member State in which he is domiciled have an international dimension to them. It seems to me that it is essentially only in that sense that M. Jenard and Professor Schlosser were envisaging that there should be an international element before there could be any question of the Brussels Convention applying. Quite simply, without some issue arising in a given case of someone being sued in a jurisdiction other than the state in which he was domiciled there was nothing upon which the provisions of the Brussels Convention, other than Article 2 could bite. If that is the correct understanding of what was meant, the debate as to whether the omission from the recitals to the regulation of the reference to the international jurisdiction of the courts of Member States and the substitution of references to the sound operation of the internal market is rather sterile. The substance of the matter appears to be that what is relevant to the application of most of the provisions of the regulation or the Brussels Convention is whether whatever conditions are prescribed for a person to be liable to suit in a state other than that in which he is domiciled are met ".

42. Mr Butler also relies on the important views expressed by two academic writers. First, the Jennard Report says that the Convention would not apply if two parties in the same Brussels-Lugano State enter into an agreement conferring jurisdiction on the courts of that state (See section on Article 17). I should explain, however, that the preamble to those conventions is different from that of the Regulations. Second, Professor Briggs and Mr Peter Rees state that Regulation 23 only applies to international jurisdiction cases and that it does not apply when both parties are English **(Civil Jurisdiction and Judgments**- 4th Edition (2005) paragraph 2-232). Their reasoning appears to be first that this position was "expressly true" of the Brussels Convention and second, that they suppose it also to be true of the Regulations although they expressly recognise that they lack "the same textual basis to support it" (page 270 footnote 1327).

43. It is noteworthy that Professor Briggs and Mr Rees do not refer to the **British Sugar** or **Provimi** cases even though they were both decided before 24 June 2005, which was the date on which the book of Professor Briggs and Mr Rees stated the law and:

(i) their view does not accord with what seems to be common ground, namely that at least some of the Regulations (such as Article 2) apply even if there is not an international element (see **British Sugar** [34]).

(ii) their view might have failed to take into account important changes and differences between the preamble to the Brussels Convention and the recitals to the Regulation. The reference in the preamble of the Brussels Convention to the purpose of the Convention being to determine "international jurisdiction" does not appear in the Regulations. The recitals of the Regulations focus more on removing differences between and harmonising national rules governing jurisdiction and it is noteworthy that:

(a) Recital (7), which emphasises the intended mandatory nature of the Regulation, by providing with emphasis added that they *"**must cover all the main civil and commercial matters** apart from certain well-defined matters"* that indicates the Regulations scope is greater than just cases with an international element;

(b) The only prerequisites for the Regulations are set out in Recital (8) which states with emphasis added, that "***Common rules of jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States*".** There is no express requirement or pre-condition for an international element to be present for the Regulations to apply and

(c) Recital 14 gives the parties autonomy as it states that *"the autonomy of the parties to a contract (other than contracts not relevant to this dispute) must be respected subject to the exclusive grounds of jurisdiction laid down in the Regulations"*

44. Mr Butler relies on the statement of the European Court of Justice in **Benincasa v Dentalkit SRL** Case C-269/95 [1997] 1 ECJ 3767 at paragraph 13 where it is stated that *" ..it must next be observed, as the Court has consistently held, under the system of the Convention the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is the only by way of derogation from the principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must depending on that case, be sued in the courts of another Contracting State. Consequently the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention".*

45. In my view, there are however strong arguments for contending that there is no need for an international element for article 23 to apply. These arguments include contentions that:

(a) as Aikens J explained, the width of article 23 and the absence of any requirement in it for an international element to be involved is an important factor;

(b)if Mr Butler was right, it would mean rewriting article 23 to introduce the word "international" in it. By way of contrast, if the draftsman of Article 23 had intended it to apply to contracts both with and without an international flavour, he would have used the wording of article 23 which he actually did adopt;

(c) recitals (7), (8), and (14) of the Regulations show that all that is required for the Regulations to operate is the commencement of proceedings in the courts of one of the Member State and it is noteworthy that there is no suggestion of the need for further requirement or for an *international* element for the Regulations or for Article 23 to apply.

(d) there is no reason for Mr Butler's approach which is that Article 2 is of general application but Article 23 applies only to i*nternational* contracts It is reasonable to conclude in the absence of any contrary words that Article 23 has the similar national and international scope to that of Article 2 .

(e) there is as Aikens J explains no case law of the European Court of Justice which decides that Article 23 or its predecessor Article 7 only apply to *international* disputes.

(f) the view expressed in **Dicey and Morris** that *"it is unlikely that the application of the [regulations] is restricted to cases with an 'international character'".* [Fourth Supplement (2004) to Thirteenth Edition paragraph 12-089]

(g) it is not easy to understand how any requirement for an international requirement in Article 23 is to apply in practice. In particular I am not sure if the international element should be present in the jurisdiction clause or in the proceedings. If it is the former, then bearing in mind that party's domicile has to be ascertained at the commencement of proceedings , then over a period of time , the jurisdiction clause can at different times be covered by Article 23 while at other times, it can be outside it. If,on the other hand, the proceedings themselves require an international element, before Article 23 is to apply, that would mean that its application would depend on ad hoc factors

arising after the clause was agreed and that is not a satisfactory result in relation to a clause based on the intention of the parties.

46. Although my provisional view is that Article 23 applies where there is no international element. I am not prepared to give a definite and concluded view for two reasons. First, as I have explained in paragraph 38 above, the outcome of these summonses does not depend whether Article 23 applies to clause 27.14 because even if it does not apply, this application must succeed because of the operation of section 16 of the 1982 Act and paragraph 14 of the Order, and so this issue is academic. Second, the majority of the submissions on this issue were made by written submissions after the conclusion of the oral hearing and admirable though they were, I was conscious that I could not test them in the way I could with oral submissions. In the light of the adverse financial circumstances of the claimants as explained in their evidence, I did not want to increase costs by having a further oral hearing, especially as this issue is academic for the reasons, which I have explained.

(iii) Does clause 27.14 fall outside Article 23 as it only confers jurisdiction on the courts of a particular geographical area while Article 23 only applies if jurisdiction is conferred on "a court or the courts of a Member State"?

47. Mr. Butler contends that clause 27.14 falls outside Article 23 as it only confers jurisdiction on the courts of a particular geographical area while Article 23 only applies if jurisdiction is conferred on *"a court or the courts of a Member State"*. He bases this contention on the fact that clause 27.14 provides that proceedings *"shall be brought in a court of competent jurisdiction in London"*.

48. In support of his contention that clause 27.14 does not purport to confer jurisdiction on specific court or the courts of England or Wales in general but on the courts of a particular geographical area, Mr Butler relies on the decision of the European Court of Justice in **Coreck Maritime Gmbh v. Handelsveen and others** case c-387/98 (2000) 1 ECJ 9337 in which it held that a clause specified that disputes would be resolved *"in the country where the carrier has his principle place of business*" satisfied the requirement of certainty. Mr Butler says however the reference to *"a court of competent jurisdiction*" in clause 27.14 does not satisfy the requirement as there is no certainty as to which courts fall within this definition and which do not.

49. I am unable to accept this submission because in paragraph 15 of **Coreck** it is stated that it is sufficient for the purposes of Article 23 if the agreement conferring jurisdiction states objective factors which enable a court seized of the dispute to ascertain whether it has jurisdiction. In my view clause 27.14 complies with these requirements because the courts which do have jurisdiction must be in London (which is a clear geographical area) and are *"competent"*, which is a simple matter ascertaining the powers of the particular court.

50. I am unable to accept that Mr Butler's submission as in my view the words *"a court of competent jurisdiction in London*" as specified in Clause 27.14 falls within article 23 as being a reference to *"a court of a Member State"*.

(iv) Is the scope of disputes covered by clause 27.14 within Article 23 of the Regulations?

51. I am unable to accept the contention of Mr Butler that clause 27.14 does not fall within Article 23 as it does not satisfy the requirement of Article 23 in that it does not state the courts shall have jurisdiction "*to settle any disputes which have arisen or which may arise in connection with the particular legal relationship*". The critical feature of clause 27.14 is its mandatory nature requiring with emphasis added that *"**any** proceedings arising out of or in connection with this agreement shall be brought in a court of competent jurisdiction in London"*.

52. It is noteworthy that in the **Provimi** case, the jurisdiction clause (clause 9(b)) was very similar to clause 27.14 because it provided that *"any controversies which cannot be settled amicably between the parties shall be brought before the competent courts of Arlesheim/Switzerland"*. This provision was regarded as conferring exclusive jurisdiction and falling within Article 23 as appears from paragraphs 54 (3), 54 (2) and 68 of Aikens J's judgment.

53. In **Powell Duffryn Plc v Wolfgang Peterit** [1992] ECR 1-745, the European Court of Justice held that the phrase "*agreement conferring jurisdiction*" had an autonomous meaning and so it was not to be

interpreted according to national laws. In this case, there is no evidence that any foreign applicable law is different from English law. Nevertheless as Aikens J explained in paragraph 83 of **Provimi,** the **Powell Duffryn** case established that the relevant national laws will determine first, whether the dispute concerns arising out of a legal relationship in connection with which the jurisdiction agreement was made. The second matter in which national law is relevant according to the **Powell Duffryn** case is whether the scope of the jurisdiction when applied to the dispute before the courts. No evidence has been adduced that any foreign law is different from English law and so it must be presumed to be the same as English law.

54. In my view, on the evidence before me, whatever law is applied, the wording of clause 27.14 is sufficiently clear and the words "*any proceedings arising out of or in connection with this agreement*" fall clearly within the requirement of Article 23 of an agreement "*to settle any disputes which may have arisen or which may arise in connection with a particular relationship*"

(v) Conclusion

55. As I have explained, I am only giving provisional views on the relevance of Article 23 but that provisional view is that Article 23 applies to clause 27.14 with the result that the present claims should have been brought in courts of competent jurisdiction in London and not in Swansea.

56. Mr Evans-Tovey submits correctly in my view that if Article 23 applies, this would mean that Article 23 confers *exclusive* jurisdiction on "*a court of competent jurisdiction in London*". In **Kurz v Stella Musical** [1992] Ch 196, Hoffman J (as he then was) was considering Article 17 of the Brussels Convention, which is in this respect the equivalent of Article 23, and he said with emphasis added that: "*It means only that their choice, whatever it is, shall (subject to exceptions in the fifth sentence) have effect to* ***the exclusions*** *of the jurisdictions which would otherwise be imposed on the parties by the earlier articles of the Convention. Once the parties have availed themselves of Article 17 by the prescribed method, jurisdiction becomes a question of the intention of the parties*".

VII. The UK Legislation Issue

57. If Article 23 of the Regulation does not apply to clause 27.14, then the next basis of jurisdiction to be considered would be article 2 of the Regulations but that provision does not specifically confer jurisdiction on the courts in London but only on the courts of the Member State in which the defendant is domiciled, which in this case is the United Kingdom. Thus it becomes necessary to consider if there is any reason why the claimants should not have been entitled to bring proceedings in Swansea.

58. Mr Evans Tovey contends that these claims should have been brought in London because this court is obliged to enforce clause 27.14 because of section 16 of the 1982 Act, which together with paragraph 12 of the Order allocates proceedings within the United Kingdom. I have set out those provisions in paragraphs 36 and 37 above.

59. Mr Evans Tovey contends that the effect of these provisions is that the courts of London (and not that of Swansea) have jurisdiction to hear this dispute and because the parties have agreed that "*courts of a part of the United Kingdom are to have jurisdiction to settle all disputes*".

60. Mr Butler disagrees and he submits that paragraph 12 is of no application because no attempt is being made to sue the defendant in "*a part of the United Kingdom*" in which it is not domiciled, but that is not a requirement of paragraph 12. Contrary to Mr Butler's submissions I regard paragraph 12 as being relevant, but as I will explain even if it is not relevant, the courts should enforce the intention of the parties set out in clause 27.14 that the present proceedings should have been "*brought in a court of competent jurisdiction in London*".

61. Mr Evans Tovey responds by contending that:
    (a) there is a close relationship between the Regulations and the UK legislation. A relationship between the two is plain from the 1982 Act itself. For example, the 1982 Act refers to the Regulations and indeed it was amended to take account of its provisions;
    (b) there is a close relationship between the Regulations and section 16 and the Order. In broad terms, for civil and commercial matters the Regulations determines which courts of which Member States

have jurisdiction to hear a dispute such as, for example, France, Germany or the United Kingdom. The questions which need to be considered are first whether under the Regulations, the courts of the United Kingdom are given jurisdiction and then second, section 16 and the Order have to be considered to enable a court to determine which courts of which part of the United Kingdom would have jurisdiction;

(c) therefore it is often necessary to undertake a two stage enquiry by applying firstly the Regulation and secondly section 16 and the Order. This is because in most circumstances, the Regulations only give jurisdiction to the courts of the United Kingdom and they are not more specific and;

(d) while it is often necessary to undertake a two stage enquiry (applying first the Regulation and secondly section 16/sch 4), it is not invariably necessary to undertake the second stage and apply s16/sch 4 where for example Article 23 provides the answer.

62. I consider all these submissions to be well-founded and they show that even if Article 23 does not apply and that Article 2 is the governing provision, then Section 16 and the Order mean that these proceedings should have been issued in courts of competent jurisdiction in London because in the words of paragraph 12 of the Order*" the parties have agreed that the courts of a part of the United Kingdom are to have jurisdiction… the agreement would be effective to confer jurisdiction… that court shall have jurisdiction"*. I have not overlooked the fact the provisions of section 16 and the Order do not, unlike article 23, refer to exclusive jurisdiction but the wording of the paragraph indicates where a dispute should be resolved additionally within the United Kingdom. The significant feature is that the courts should if possible seek to implement and enforce contractually agreed terms such as clause 27.14, which would mean that the claimants could only seek to pursue their claims by instituting proceedings in a court of competent jurisdiction in London.

63. For the purpose of completeness, I add that if I am wrong and the Order (and in particular paragraph 12 of them) do not apply, then the United Kingdom legislation or the common law principles of enforcing contractual provisions such as those in clause 27.14 would be determinative. They would lead to the conclusion that the claim had to be commenced in accordance with clause 27.14 in courts of competent jurisdiction in London. Thus, the position is that whichever way the jurisdiction issue is considered, the conclusion reached is that these proceedings should have been commenced in London because if Article 23 applies, then those courts would have exclusive jurisdiction but if Article 23 is not applicable, then irrespective of whether Article 2 applies, section 16 of the 1982 Act and paragraph 12 of the order or alternatively common law principles would mean that clause 27.14 would be enforced.

VII. The Remedies Issue

(i) Introduction

64. Mr Evans Tovey submits that because Article 23 or Article 2 apply to clause 27.14 or alternatively because Section 16 of the 1982 Act together with paragraph 12 of the Order apply to it, the proper and appropriate remedy for the defendant is for a declaration that the court in Swansea has no jurisdiction in either action and that the present claim form should be set aside or the actions stayed.

65. Mr Butler accepts that if Mr Evans Tovey succeeds (as he has done) in showing that either Article 23 or section 16 and paragraph 12 apply with the result that the present proceedings should have been brought in London, then orders should be made declining jurisdiction but he submits that the appropriate additional remedy is not that the claim forms should be set aside or stayed but that instead they should be transferred to London.

66. The relevant provision is CPR Part 11.1 (6), which states that:
"An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including-
(a) setting aside the claim form;
(b) setting aside service of the claim form;
(c) discharging any order made before the claim was commenced or before the claim form was served; and
(d) staying the proceedings."

67. Mr Butler accepts that this provision does not contain any provision for making an order transferring the present proceedings to London if a declaration is made that the court has no jurisdiction but he

points out that the remedies set out in CPR Part 11.1(6) are prefixed by the word "*including*". He submits that this word shows that these remedies are not the only possible remedies. I am prepared to assume (without deciding the matter) that Mr Butler is correct and that this court could now, if it was appropriate and just, make an order transferring both actions to London.

(ii) Discussion

68. Neither counsel was able to provide any authority on how a court should deal with an unusual case such as the present one in which the dispute was not a choice between the jurisdiction of the English Courts and the jurisdiction of the courts of a foreign country but instead a choice between different courts in Great Britain. I agree with Mr Evans Tovey however, that in resolving this issue, it is possible to obtain some assistance from the principles applied by the courts in cases where a claimant sues in this country in breach of an agreement to refer the relevant disputes to a foreign court.

69. In those situations, it is settled law that a stay of such proceeding should be granted "*unless a strong case for not doing so is shown*" and the burden of proving such a strong case is on the claimants (per Brandon LJ in **The El Amria** [1981] 2 Lloyd's Reports 119 at 123 and **The Pioneer Container** [1994]) 2 AC 324, 347 (PC)). I did not understand Mr Butler to disagree with that approach in international situations, which I will apply to this case. In so far as Mr Butler submits that in domestic cases, these principles do not apply because of the existence of the power to transfer, I will bear in mind that power to which I will return in paragraph 74 below. The task of the courts is to enforce what these parties had agreed and intended, namely that these proceedings should be commenced in London in accordance with clause 27.14 but I will bear in mind the power to transfer to which I will return in paragraph 54 below.

70. He does, however, submit that he can establish a *"strong case"* that this court should not grant a stay of the present actions. Mr Evans Tovey disagrees and he contends that the claimant cannot establish such a strong case.

71. Mr Butler's case is that the claimants have a "*strong case"* so as to avoid having a stay imposed because the defendants have no genuine preference for litigation in London as is shown by the fact that the defendants had previously not contested in a different action a claim brought against them in Cardiff, notwithstanding the existence in the relevant agreement of clause 27.14. It is said by Mr Butler that in the present case, the defendants are trying to take advantage of a limitation point in Mr Snooke's case, as his claim may become partially statute-barred if jurisdiction in Swansea is declined. He also points out that in **The Burgen (No 2)** 2 Lloyd's Law 710, Clarke J (as he then was) indicated that a "strong case" is more easily shown in cases where standard terms are involved such as in the present case than in cases where the terms between the parties have been negotiated. I will regard that as a factor in the claimants' favour.

72. Mr Evans Tovey points out correctly that in the context of foreign jurisdiction clauses, the Court of Appeal has declined to allow claimants to invoke the jurisdiction of the English Court and has *granted a stay* of the English action when the claimant had failed to issue a protective writ in the agreed foreign jurisdiction with a result that if fresh proceedings were subsequently to be brought after the stay had been granted in accordance with the contractual jurisdiction clause, then those first proceedings would then be time-barred. Exceptionally, this course would not be followed if the claimant could show that he had acted *reasonably* in failing to issue protective proceedings in the foreign jurisdiction (see **Baghlaf Al Zafer Factory Co v Pakistan National Shipping Company and another** [1998] 2 Lloyd's Law Reports 229).

73. In my view, a similar approach should be adopted in a non- international cases, such as those of Mr Snookes and Mr Little, with the result that an issue that has now to be resolved is whether the claimants can show that they acted *reasonably* in not issuing proceedings in London to protect their position before the expiry of the primary limitation periods.

74. In my view, Mr Snookes and his advisors cannot show that they have acted reasonably in not issuing proceedings in London for the following six reasons which have individually and cumulatively led me to that conclusion and which I will now set out in no particular order of importance. First, Mr

Snookes only issued his claim against the defendants at or after the end of the limitation period for some of his causes of action with the result that he must therefore take the risk of limitation problems arising. Second, before the present proceedings were commenced, neither Mr Snookes nor his legal representatives asked the defendants whether they would waive clause 27.14. Third, it appears that the reason why proceedings were not issued in London is apparently that, at the time of their issue, clause 27.14 was not according to Mr Hitchcock, the claimants' solicitors, in "the forefront of his mind." No cogent explanation is given by Mr Hitchcock as to why he did not consider properly the impact of clause 27.14 before issuing the present claims. The mere fact that in a previous case the defendants have not relied on clause 27.14 does not mean that it would always take that stance; in any event, the defendants' solicitors could have been asked if they agreed to proceedings being commenced in Swansea. Fourth, the legal representatives for the claimant ought to have known from reading the agreements that by issuing proceedings in Swansea, they might be subject to an application for a stay and if this application was successful, new proceedings would then have to be issued in which the defendants would or could run a limitation defence against part of the claim. Fifth, there is no reason why it could be thought by the claimant or their solicitors that Swansea District Registry was an appropriate forum especially as neither party lives nor works in Swansea and Mr Snookes lives and works in Birmingham, which is closer to London than Swansea. Sixth, there are no obvious disadvantages to the claimants in *issuing* proceedings in London as compared with Swansea, because this application is only concerned with where proceedings should be instituted and not subsequential issues, such as where the claim should be heard.

75. In my view, this is a clear case in which there should be a stay of the present proceeding or the claims forms should be struck out. The claimants would then be obliged to comply with clause 27.14 which for the reasons I have sought to explain, required the present proceeding to have been brought in a court of competent jurisdiction in London and that this is contractual pre-condition with which the claimants had to comply in the absence of *"a strong case for doing so"* if they wished to sue the defendants. It would be wrong to permit the claimants to by-pass this requirement in the absence of *"a strong case for not doing so"*. In reaching that conclusion I have not over looked Mr Hitchcock's' contention that the defendants' application amounts to "procedural manoeuvring", but in my view, there is nothing improper or questionable about a party invoking a clear contractual provision such as clause 27.14 especially if the party complaining about its effect has not been able to state that he would not have entered the agreement if he had been aware of it.

76. So it would not be right to transfer the present proceedings to London because that would mean that the claimants would be placing themselves in the same position as if they had instituted proceedings in accordance with clause 27.14, which is a course which they could, and should in my view, have adopted but unfortunately they have not done so. I was told during the hearing that after the present applications had been brought or threatened, the claimants had offered to transfer the present claims to London, but as I have explained the defendants were entitled to have claims such as those now made *commenced* in London and the claimants had no right to avoid this requirement. The only basis on which an order could have been made transferring the claims to London would have been that this was required because of the overriding objective of the CPR of dealing with this case *"justly"* but in my view, this objective would not be met by transferring this case to London for two reasons. First, such a course might deprive the defendants of a limitation defence in the case of Mr Snookes. Second there is nothing unjust about requiring parties to comply with their contractual obligation set out in clause 27.14. Thus, the defendants are entitled for the reasons which I have set out to have the present claim forms set aside.

VII. Conclusions

77. At the end of the day, the position which emerges is that whichever way this case is looked at, the inevitable result for the reasons set out in paragraph 62 is that these proceedings should have been brought in *"a court of competent jurisdiction in London"*. I am not now concerned with the issue of whether the claim should thereafter be transferred or heard elsewhere.

78. For the reasons that I have set out, these applications must be allowed. Although I am grateful for the detailed and able submissions of the claimants' counsel, I am still at a loss to understand why the claimants have resisted this application as strenuously as they have done. The claimants have stated that they are hard-up as a result of the defendants' action. So it would seem that their interests might now be best served by starting their claims afresh in London and pressing on with them as speedily as possible.

Postscript

79. After I circulated the judgment, both counsel agreed that I should make consequential orders on the basis of written submissions without the need for a further oral hearing. In the light of those submissions, I order that in each case:
    (1) the claim forms should be set aside;
    (2) the claimants should pay to the defendants their costs of these actions which are to be subject to a detailed assessment if not agreed;
    (3) the claimants to pay to the defendants £3000 on account of their costs by 12 noon on 24 March 2006 but if by that time the claimant has applied to the Court of Appeal for permission to appeal, then the time for making that payment is postponed until 2 days after determination of that application for permission and
    (4) the application for permission to appeal is refused.

79. The reason why the defendants receive all their costs is that they were successful and they cannot be held responsible for any additional costs incurred by the subsequent written submissions. Permission to appeal has been refused for the reasons set out in the requisite form.

Andrew Butler (instructed by Douglas-Jones Mercer of Swansea) for the Claimant
Jason Evans-Tovey (instructed by Andrew Pena, Solicitor to Jani-King (GB) Limited) for the Defendant