[2005–06 Gib LR 77]

BOLS DISTILLERIES B.V. (trading as BOLS ROYAL DISTILLERIES) and UNICOM BOLS GROUP SP. Z.O.O. v. SUPERIOR YACHT SERVICES LIMITED

COURT OF APPEAL (Staughton, P., Stuart-Smith and Aldous, JJ.A.): September 16th, 2005

Contract—offer and acceptance—consensus ad idem—may have regard to conduct of parties to determine whether contract exists, especially conduct only explicable by reference to binding contract—one party's actions, including authorization of work by third party in expectation of payment by other, may be evidence of binding agreement

Conflict of Laws—contracts—exclusive jurisdiction clause—jurisdiction to hear civil action by Gibraltar company against foreign companies if acceptance of contract refers indirectly to written agreement for exclusive jurisdiction of Gibraltar courts—by Council Regulation (EC) 44/2001, art. 23.1, requirement of writing also satisfied by written confirmation of express oral agreement or written clause stating factors that enable court to determine jurisdiction

The respondent brought an action against the appellants in the Supreme Courts seeking a declaration that a contract existed between them and claiming damages for its breach.

The respondent was a Gibraltar company through which K, a professional yachtsman, raced yachts on behalf of the appellants in order to promote their products. It put forward a proposal to procure the design and construction of a new yacht and submitted a draft sponsorship

agreement to L, president of Unicom Bols Group, and O'C, a director of Bols Distilleries. The terms were, *inter alia*, that the respondent would retain ownership of the yacht whilst "the company" (which was not identified) would finance the project and make payments in accordance with a separate schedule, including non-recoverable "pre-commitment fees," of which $95,000 were paid to the respondent by Unicom Bols. The agreement contained a clause submitting to the jurisdiction of the Gibraltar courts.

During the discussions that followed, L expressed concern that the appellants would not own the yacht. That issue was not resolved but nevertheless, on January 3rd, 2002, O'C emailed K enclosing a letter, described as a "draft," confirming "Bols' commitment to proceeding with the project." K then instructed the boat builder to commence construction. In February, there was an exchange of emails between L and the legal adviser to Remy Cointreau (the parent company of Bols Distilleries), in which the question of ownership was again discussed. They met with K, who agreed that the respondent would forgo its ownership of the yacht in return for performance bonuses, though the details of these were not finalized. Further payments were made by Bols Distilleries directly to the boat builder and in due course the construction was completed.

The respondent operated the yacht until given notice of termination of its appointment by Bols Distilleries, when it commenced the present proceedings. It alleged that a contract was concluded on or shortly after January 3rd, 2002, consisting of the sponsorship agreement, the payment schedule and the letter of January 3rd. The appellants responded that there was no contract, and even if there were, it did not incorporate the jurisdiction clause because the letter relied on as acceptance made no express reference to it. They accordingly applied for an order that the court did not have jurisdiction to hear the suit, since the appellant companies were domiciled in the Netherlands and Poland respectively. The Supreme Court (Schofield, C.J.) dismissed their application.

On appeal, the appellants submitted that (a) they were not identified as parties to the alleged contract, since the agreement only referred to "the company"; (b) the respondent's case was inconsistent with the pleadings, which did not make clear with which of the two appellants the respondent alleged it had contracted; (c) the agreement was incomplete in that the schedule of events that the yacht was to enter had been left blank; (d) the ownership issue had never been resolved, but if there were agreement, it was that the appellants would own the yacht, which was inconsistent with the sponsorship agreement; (e) the wording of the letter of January 3rd was not consistent with the acceptance of a legally binding contract; (f) moreover, it was expressed to be a draft; (g) the Chief Justice had wrongly taken account of the respondent's behaviour after January 3rd in placing the contract for construction and supervising the building of the yacht; and (h) if there were a contract, it did not incorporate the jurisdiction clause, which was not in or evidenced in writing so as to

satisfy Council Regulation (EC) 44/2001, art. 23.1.

The respondent submitted in reply that (a) L and O'C were clearly negotiating on behalf of their respective companies, whose names could have been inserted into the contract at a later stage; (b) it was evident from the pleadings as a whole that the respondent was suing both appellants and any defect could have been remedied by amendment; (c) alternative schedules, discussed with, and sent to, the appellants, completed the agreement; (d) the parties anticipated no difficulty in modifying the contract to reflect a change in ownership; (e) since the project referred to in the letter of January 3rd was that in the sponsorship agreement, commitment to the project implied acceptance of its terms; (f) the letter was, in terms, a letter of intent that became effective following discussions with L and O'C in which they expressed no disagreement; (g) the respondent's actions after January 3rd, done with the appellants' knowledge, were relevant since they were consistent with its fulfilling its obligations under the contract; and (h) that the letter referred to the payment schedule, which referred to the sponsorship agreement containing the clause, was sufficient to incorporate it into the contract and amounted to an agreement in writing on jurisdiction.

Held, dismissing the appeal:

(1) There was a good arguable case that there was a contract between the appellants and the respondent. That some issues, including ownership of the yacht and the payment of performance bonuses, remained undecided was not necessarily inconsistent with the existence of a contract, albeit one that required modification at a later date. It could be argued that the letter of January 3rd became binding on the parties when L failed to raise any objections during the discussions that followed, and the events that took place shortly afterwards were consistent with the existence of a contract that both sides considered to be binding. In authorizing and supervising the construction of the yacht, the respondent was acting in accordance with the sponsorship agreement and it would have been acting in bad faith for the appellants to deny their corresponding obligation to make payments as scheduled. Furthermore, the content of the emails exchanged between L and the legal adviser in February 2002 was consistent with their recognition that they had a contract with the respondent (paras. 31–32).

(2) If there were a contract, it incorporated the jurisdiction clause, which satisfied the requirement in Council Regulation (EC) 44/2001, art. 23.1 that it be in or evidenced in writing. The clause was incorporated since the letter of January 3rd referred to the payment schedule which in turn made reference to the sponsorship agreement that contained it, and L was aware of the clause and had failed to raise any objection. For a jurisdiction clause to be operative, it was not necessary to refer directly to it when accepting an agreement. The requirement of art. 23.1 would also

be met by an express oral agreement, confirmed in writing, to which the other party did not object, or by any clause stating with sufficient precision those factors that enabled the court to determine whether it had jurisdiction (paras. 28–30; para. 32).

Cases cited:
(1) *Berghoefer GmbH* v. *ASA S.A.* (Case 221/84), [1985] E.C.R. 2699; [1986] 1 C.M.L.R. 13, followed.
(2) *Canada Trust Co.* v. *Stolzenberg (No. 2)*, [1998] 1 W.L.R. 547; [1998] 1 All E.R. 318; [1998] C.L.C. 23; [1998] I.L. Pr. 290, applied.
(3) *Coreck Maritime GmbH* v. *Handelsveem B.V.* (Case C–387/98), [2000] E.C.R. I-9337; [2001] C.L.C. 550; [2001] I.L. Pr. 39, followed.
(4) *Estasis Salotti di Colzani Aimo* v. *RÜWA Polstereimaschinen GmbH* (Case 24/76), [1976] E.C.R. 1831; [1977] 1 C.M.L.R. 345, not followed.
(5) *Galeries Segoura S.p.r.l.* v. *Rahim Bonakdarian* (Case 25/76), [1976] E.C.R. 1851; [1977] 1 C.M.L.R. 361, not followed.
(6) *Partenreederei M.S. Tilly Russ* v. *Haven & Vervoerbedrijf Nova N.V.* (Case 71/83), [1985] Q.B. 931; [1984] E.C.R. 2417; [1984] 3 C.M.L.R. 499, followed.

Legislation construed:
Council Regulation (EC) No. 44/2001 of December 22nd, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Preamble, para. 2: The relevant terms of this paragraph are set out at para. 20.
Preamble, para. 11: The relevant terms of this paragraph are set out at para. 20.
art. 2: The relevant terms of this article are set out at para. 20.
art. 23: The relevant terms of this article are set out at para. 20.

T.N. Young, Q.C. for the appellant;
J. Dingemans, Q.C. and *R.A. Triay* for the respondent.

1 **STUART-SMITH, J.A.:**

Introduction

This is an appeal, pursuant to permission granted by this court, from an order made by Schofield, C.J. on March 9th, 2005, by which he held that the Supreme Court of Gibraltar had jurisdiction to hear the suit between the claimants, Superior Yacht Services Ltd., and Bols Distilleries B.V. (trading as Bols Royal Distilleries), the first defendant, and Unicom Bols Group Sp. z.o.o., the second defendant. The defendants had made an application for an order that the Gibraltar court had no jurisdiction to hear the suit; the judge dismissed this application. The defendants now appeal.

2 Bols is a brand of vodka and the manufacturers and distributors of it have sought to promote the drink by operating ocean-going yachts which take part in high-profile yacht races and other events. Gordon James Wallace Kay is a professional yachtsman and, through Superior Yacht, has managed two yachts on behalf of the manufacturers and distributors of Bols products. Superior Yacht is registered in Gibraltar. Bols Distilleries is a Dutch company; Unicom Bols is a Polish company and is the Polish division of Bols Distilleries. Superior Yacht claims that Bols Distilleries and Unicom Bols are in breach of a contract entered into in late 2001 and early 2002. It seeks declarations as to the existence of the contract between the parties, damages for its breach and other relief. There were originally two other defendants before the court, one being Remy Cointreau S.A., which acquired Bols Distilleries and accordingly is its parent company, but the claims against these two defendants have been withdrawn.

The facts

3 In 1998 and into 1999, Kay was personally responsible for the operation and management of the first yacht, called *Lodka Bols*, on behalf of Unicom Bols. On January 5th, 1999, Superior Yacht was incorporated, with the encouragement of Unicom Bols and Bols Distilleries, because it was more expedient for the business of managing and operating the yacht to be arranged through a corporate entity rather than Kay and his crew being employed directly. The first yacht was so operated until it was sold in July 2002.

4 Stephen Laux was the president of Unicom Bols. He had approached Superior Yacht concerning the future of the advertising campaign and it conceived a new project, which it offered to Laux and a competitor of Unicom Bols, with Unicom Bols having the right of first refusal. The project involved a sponsorship programme offering the Bols brand international exposure through a three-year campaign based on the construction of a new state-of-the-art yacht, the *Lodka II*, to a unique design initiated by Superior Yacht. The new project differed from the first project in that it would be on the basis of Superior Yacht retaining ownership of the yacht with Unicom Bols and Bols Distilleries putting up the sponsorship funds. It was envisaged that the *Lodka II* would obtain substantial publicity.

5 A formal written proposal was submitted by Superior Yacht to Unicom Bols in November 2000. Budget projections were submitted, which included design and construction costs for the first year and operation costs for the following three years. Although the project received a positive response from Unicom Bols and Bols Distilleries, it was shelved for a year due to the takeover of the Bols Group by Remy Cointreau.

6 In September 2001, at the request of Bols Distilleries, the project was re-presented to Laux and the person responsible for the marketing of the Bols brand internationally, Mr. Peter O'Connell, a director of Bols Distilleries, and further discussions took place. A draft sponsorship agreement was submitted to Laux and O'Connell on September 19th, 2001. Paragraph 15 of that draft agreement reads: "This agreement shall be governed by the laws of Gibraltar and the parties hereby submit to the jurisdiction of the courts of Gibraltar."

7 On October 4th, 2001, Kay presented a payment schedule to Laux, which included management fees as well as "pre-commitment fees," which were specifically stated to be non-recoverable. On October 19th, 2001, Unicom Bols paid Superior Yacht $95,000 in respect of the pre-commitment fees. On October 28th, 2001, a new draft sponsorship agreement was submitted to Laux to reflect the new set of figures which had been agreed between the parties. I shall refer to this document as "the sponsorship agreement." In the sponsorship agreement the jurisdiction clause remained intact; it was submitted with an invoice for $50,000 for the remainder of the pre-commitment fees.

8 Throughout all this period, emails were being exchanged between the various individuals involved and Kay was concerned that he had no firm commitment from Unicom Bols and Bols Distilleries. In an email of November 6th, Laux expressed concern that the ownership of the vessel should be that of Superior Yacht while the defendants were providing the funds and indicated that further discussion was needed. On November 19th, 2001, Kay attended a meeting in Warsaw with, amongst others, Laux and O'Connell. Kay, whose witness statement is before the court, recalled that the participants at that meeting said that they would have a final decision on the project within two weeks. The question of who would own the *Lodka II* was discussed. It was Superior Yacht's case that although the draft agreement put it as the owner of the *Lodka II*, it would not allow the project to fail if ownership of the yacht was the only impediment. However, if ownership of the *Lodka II* were to be transferred to the Bols Group, Superior Yacht would seek an appropriate form of compensation for its loss in being unable to sell the yacht. At the meeting of November 19th, 2001, questions of funding were also discussed. Superior Yacht needed the second pre-commitment fee to keep the project on track and Laux was anxious to defer as many costs as possible. Over a period this involved Superior Yacht re-shuffling the costs within the programme. However, it is Superior Yacht's case that the overall budget remained constant, subject to the question of ownership of the *Lodka II*.

9 On December 13th, Kay wrote to O'Connell pressing for a decision, otherwise they might lose the slot with the boatyard. By email of December 15th, O'Connell said: "Both Stephane and I have discussed

Lodka II today, the decision is 'Go.'" By an email sent later the same day Kay said, *inter alia*: "We still need to resolve a few issues, such as a contract and the bonus issues we have discussed reference boat ownership."

10 On December 16th, 2001, Kay sent to O'Connell, with copies to Laux, a payment schedule dated December 17th "for the agreed project" and Superior Yacht's bank details. Under the heading "Additional Costs," it was stated: "As in contract," and certain matters were then set out. This section concluded with the words: "Full details are in the contract." Under the heading "Ownership and Registry," Kay wrote:

> "As owners of the vessel you will need to address the issue of port of registry . . . The issues of ownership and performance bonus are potentially linked as we discussed, there are several options here which need to be discussed and resolved, I look forward to your input."

A further copy of the sponsorship agreement was sent. I think it is clear that this is the document referred to in the payment schedule as "the contract." This copy reflected the fact that Mr. Weldon had been appointed designer and contained the latest adjustment of the figures.

11 It is necessary to summarize some of the salient features of the sponsorship agreement. It is expressed to be made between Superior Yacht and "the company," which is not identified in the document. The recitals state that Superior Yacht intended to procure the design and construction of a high-performance racing yacht and relied on the company to enter into this agreement for the financing of the design and construction of the vessel. It is said that Superior Yacht intended to appoint Mr. Weldon as designer and Boatspeed Ltd. (Australia) as builders. The third recital reads:

> "Superior Yacht will during the currency of this agreement and upon completion of the construction of the vessel manage the vessel in consultation with and at the direction of the company and enter the vessel for participation in various specified yachting events and regattas with a view to providing the company with a platform for the promotion of the company . . ."

The term of the agreement was from the date thereof until November 14th, 2004 or earlier determination as provided for. Sponsorship money was to be paid in accordance with the schedule. Superior Yacht's obligations, set out in Schedule 4, were, amongst others, "to oversee the design and construction of the vessel. Following commissioning and handover of the yacht, Superior Yacht shall at its own expense manage, maintain and insure the yacht and her equipment." The company was granted certain rights in relation to the advertising and participation in the

events. The jurisdiction clause was as before. The schedule of events for which the vessel was to be entered was left blank in Schedule 6.

12 By January 3rd, 2002, Superior Yacht still had not authorized commencement of construction of the vessel and Kay was getting anxious about delays in payment. In response to an email of that date from Kay, O'Connell on January 3rd, 2002 sent an email enclosing a letter described as "a draft, and I have also copied Stephen (Laux) for any input he wishes to add." The letter, later described by Kay as "a letter of intent," though not so entitled on its face, was in these terms:

> "As per our telephone conversation of earlier today, I wish to confirm the decision that we have spoken of in relation to the further development of the Bols *Lodka II* project.
>
> Thus, by way of this letter, I wish to confirm Bols' commitment to proceeding with the project, as we discussed in Warsaw, and to the project schedule as forwarded by you on December 17th, 2001.
>
> With specific reference to the project payment schedule, I will confirm the transfer details and timings (in line with your project schedule) by Tuesday of next week, January 8th, 2002, following discussions with Unicom Bols Poland. I wish you the best of success with the project and look forward to continuing success in the future."

13 In his witness statement, Kay says that he forwarded a copy of O'Connell's letter to Laux and had a telephone discussion with both men about it. Laux never added to what O'Connell had said. As a result of the commitment in the letter of January 3rd, 2002, Kay instructed Boatspeed to commence construction of the *Lodka II* and a company called Southern Spars to supply equipment essential for the construction.

14 An agreement dated January 8th, 2002 between Superior Yacht and Boatspeed was entered into. There are two versions of this contract bearing the same date. In one, Superior Yacht is described as "the purchasing agent," in the second, as "the purchaser." It is not clear which is the relevant contract; neither copy is signed by Superior Yacht; the second is signed by Boatspeed. Perhaps it is immaterial, since in the first the principal is not disclosed, so Superior Yacht would be personally liable whichever version applies.

15 On January 10th, Kay sent a further update of the figures to O'Connell; in other respects, the letter is in substantially the same terms as that of December 17th, 2001. Details of the necessary invoicing, which were to be addressed to "Lodka Sport B.V." (a subsidiary of Bols Distilleries) and copies of the payment schedule and the sponsorship agreement, described as "the contract," were sent to a Mr. Kuit of that company on January 23rd.

16 On January 24th, Kay sent Laux a copy of the boat-building contract and an up-to-date breakdown of the costs, with a further copy of the sponsorship agreement, again described as "the contract." On January 29th, Kay sent Laux a further copy of the boat-building contract, with Superior Yacht described as "purchasing agent." At the end of January and early February, Kay was pressing for payment in accordance with the payment schedule. In due course, invoices were sent to Lodka Sport B.V. requesting payment, in some cases direct to Boatspeed, in others to Superior Yacht, and these were paid.

17 In February, Stephane Laughery, who was group legal adviser to Remy Cointreau, came on the scene. He sent an email to Laux on February 12th, which read:

> "Further to last week's meetings, it seems like we have to deal quickly with the contract for the construction of the boat. Following the reading of the contract with Superior Yacht, it appears that quite a lot of things have to be modified with regard to the structure of this contract; mainly, we should be the ones contracting for the construction of the boat and not Superior Yacht. How can we manage to deal with that quickly!? Conference call!?"

In reply to this Laux the next day sent an email addressed to Laughery:

> "The contracts were done as proposal by Superior Yacht, they will agree to changes only if we bring them forward to R.C. as soon as possible. The ownership issue as well, I know the builders—visited them end last year—and to cancel the contract with Superior Yacht and replace by an agreement with R.C. for Lodka Sport will be easy. They are not focused on paperwork but are the best builders in the world. That's what they want to do and they are to build the boat, period! For whom, they don't care that much: if there is a requirement for a change, then there is. So let's identify the areas that need to be improved, tomorrow decide who will be the owning party and then let's get these changes done a.s.a.p. It is important to make sure the paperwork is in place so that the flow of funds can facilitate a conclusion of this tight project, with no delay and no extra costs, to allow for the Sydney–Hobart race next year and the launch schedule, as I mentioned in my write-up. I have full trust in Superior Yacht after three years of very smooth, reliable and honest operation.
>
> Thanks for your support."

Following this internal exchange of emails, Laughery emailed Kay on February 16th as follows:

> "I am now in charge of the legal aspects regarding the *Lodka II* project. I think it would be appropriate if we met in order to settle

> the different issues that need to be clarified. As such, would it be possible for you to come to Paris at the end of next week in order to have a meeting to settle those different issues for the construction of the boat?"

18 On March 4th, Kay attended a meeting at the offices of Remy Cointreau in Paris. Laux and Laughery were present. It is Superior Yacht's case that at this meeting it agreed to forgo its ownership of *Lodka II* in favour of Unicom Bols and Bols Distilleries on certain conditions; these proposals were a modification of the agreement which was already in existence. The project continued on its course in a stuttering manner because of difficulty in payment. In May, work stopped and Boatspeed instructed lawyers to sue Superior Yacht, Unicom Bols, Bols Distilleries and Remy Cointreau. This resulted in all payments being made direct by Bols Distilleries to Boatspeed, though no formal contract was entered into between them. In October 2002, negotiations between Superior Yacht and Laughery reached an impasse, which resulted in Superior Yacht advising that in the absence of an acceptable contract it would rely on the *de facto* agreement between the parties, being the sponsorship agreement as modified by the payment schedule and Superior Yacht's aquiescence in Bols Distilleries/Unicom Bols' ownership of the yacht. Laughery's response was to deny that there was a binding contract.

19 Nonetheless, construction of the *Lodka II* was completed in February 2003. Bols Distilleries determined to operate the yacht on the basis of annual budgets and Superior Yacht prepared an events programme from March 2003 to March 2004 with a budget of $1.678 million. It is the case for Superior Yacht that its operation and management of the yacht continued and the yacht was launched in a blaze of publicity. In July 2003, a draft management agreement was presented by Superior Yacht to Laughery, which he largely approved. However, he made amendments, including one as to jurisdiction, which were not acceptable to Superior Yacht. Further negotiations took place between the parties, including an arrangement for a refit of the yacht. But on February 17th, 2004, Bols Distilleries advised Superior Yacht of the termination of their appointment with effect from March 31st, 2004.

The law

20 The question of jurisdiction is governed by Council Regulation (EC) No. 44/2001. Paragraph 2 of the Preamble provides:

> "Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and

enforcement of judgments from Member States bound by this Regulation are essential."

Paragraph 11 provides:

"The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction."

Article 2.1 provides: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Article 23 provides:

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

(a) in writing or evidenced in writing . . ."

Sub-paragraphs (b) and (c) are not relevant. Paragraph (2) provides: "Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing.'"

21 In my view, to succeed, the claimant must show that it has "a good arguable case" that the parties have agreed to Gibraltarian jurisdiction and that the agreement is in writing or evidenced in writing. Some assistance as to what is meant by a good arguable case is to be derived from the judgment of Waller, L.J. in *Canada Trust Co.* v. *Stolzenberg (No. 2)* (2). He said ([1998] 1 W.L.R. at 555):

"It is I believe important to recognise, as the language of their Lordships in *Korner*'s case [1951] A.C. 869 demonstrated, that what the court is endeavouring to do is to find a concept not capable of very precise definition which reflects that the plaintiff must properly satisfy the court that it is right for the court to take jurisdiction. That may involve in some cases considering matters which go both to jurisdiction and to the very matter to be argued at the trial, e.g. the existence of a contract, but in other cases a matter which goes purely to jurisdiction, e.g. the domicile of a defendant. The concept also reflects that the question before the court is one which should be

> decided on affidavits from both sides and without full discovery and/or cross-examination, and in relation to which therefore to apply the language of the civil burden of proof applicable to issues after full trial is inapposite . . . 'Good arguable case' reflects in that context that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. 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."

22 It is the respondent's case that a contract was made between the parties on or shortly after January 3rd, 2002 and that this incorporated the sponsorship agreement which contained in clear terms the Gibraltarian jurisdiction clause. The contract consisted of the sponsorship agreement, the payments schedule and the letter of January 3rd, 2002, which, although expressed to be in draft, became a binding contract when the condition precedent was fulfilled, namely that Laux expressed his approval of it and made no further or additional comment. Superior Yacht expressed at this time, as it had done earlier, a willingness to negotiate a modification of the contract so as to provide the ownership of the vessel to be with Bols Distilleries/Unicom Bols, provided suitable arrangements could be made to compensate Superior Yacht. But these negotiations never reached fruition.

23 The appellant's case is, first, that there never was a concluded contract at the beginning of January 2002 or at all, and secondly, that, even if there were, the agreement as to Gibraltarian jurisdiction was not in writing or evidenced in writing so as to satisfy the requirements of art. 23.

24 In the end, the difference on the law came down to a very narrow point. Mr. Young, Q.C., on behalf of the appellants, submitted that even if the contract came into existence as the respondent contends, it did not satisfy the strict requirements of art. 23, because the letter of January 3rd, which is relied upon as the acceptance, did not expressly refer to the sponsorship agreement. It did in terms refer to the project payment schedule forwarded on December 17th, 2001, which itself referred to "the contract," clearly a reference to the sponsorship agreement. But that, says Mr. Young, is not enough.

25 It is necessary to consider the jurisprudence of the European Court to see whether this very strict position submitted by Mr. Young is correct. At one time, it seemed that he was submitting that in the interest of a simple and quick decision, as advocated in the Preamble to the Regulation, the court should only look at the documentary evidence. But that is plainly not so, as Mr. Young accepted. The starting point is the case

of *Estasis Salotti* v. *RÜWA* (4). RÜWA, a company based in Cologne, sent Colzani, an undertaking based in Milan, written offers for the supply of machines for the manufacture of upholstered furniture, which stated ". . . subject to the general conditions of sale . . . overleaf . . . I offer to supply you as follows." Those written conditions included a jurisdiction clause conferring jurisdiction on the court in Cologne. A contract was entered into in Milan written on RÜWA's business stationery, bearing their letterhead and with their standard conditions on the back. It did not expressly refer to the conditions but it did expressly refer to the written offers. Colzani refused to take delivery and RÜWA sued for damages in the Landgericht in Cologne, which declined jurisdiction on the ground that the parties had not validly agreed on the jurisdiction of the court. That decision was overturned on appeal, but two questions were referred to the European Court of Justice. The European Court answered the questions as follows ([1976] E.C.R. at 1843):

> "Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.
>
> In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing under the first paragraph of Article 17 of the Convention is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care."

In the course of its judgment, the court said (*ibid*., at 1842):

> "But the requirement of a writing in Article 17 would not be fulfilled in the case of indirect or implied references to earlier correspondence, for that would not yield any certainty that the clause conferring jurisdiction was in fact part of the subject-matter of the contract properly so-called."

In *Galeries Segoura* v. *Rahim Bonakdarian* (5), a judgment delivered on the same day as the *Estasis* case, which was another case of general conditions of sale containing a jurisdiction clause, the European Court held ([1976] E.C.R. at 1863):

> "In the case of an orally concluded contract, the requirements of the first paragraph of Article 17 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and

> Commercial Matters as to form are satisfied only if the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.
>
> The fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction."

26 Mr. Young relies on those decisions for the strict approach that he advocates. But we are not here dealing with general conditions often appearing in small print where there is a danger of the jurisdiction being imposed by stealth, but a clause contained in clear terms, in a document which had long been in the possession of the appellants and indeed had been sent on several occasions with exhortation to examine it carefully, and which, if there were a contract, could be described as "part of the subject-matter of the contract properly so-called." Mr. Young also submits that the long trawl through the documents, and to some extent the witness evidence, is inconsistent with the swift and simple resolution of the issue. But at the end of the day, there are only three potential contractual documents: the sponsorship agreement, the pricing schedule and the letter of January 3rd, 2002.

27 Mr. Dingemans, Q.C., for the respondent, submits that the subsequent cases show a somewhat more relaxed attitude, particularly where the jurisdiction clause is not contained in standard printed conditions. *Partenreederei M.S. Tilly Russ* v. *Haven & Vervoerbedrijf Nova N.V.* (6) was a case of printed conditions contained in the bill of lading. The court held ([1985] Q.B. at 953):

> ". . . [A] jurisdiction clause contained in the printed conditions on a bill of lading satisfies the conditions laid down by article 17 of the Convention: if the agreement of both parties to the conditions containing that clause has been expressed in writing; or if the jurisdiction clause has been the subject of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement; or if the bill of lading comes within the framework of a continuing business relationship between the parties, in so far as it is thereby established that that relationship is governed by general conditions containing the jurisdiction clause."

28 In *Berghoefer GmbH* v. *ASA S.A.* (1) the parties originally agreed jurisdiction in France. But the plaintiff alleged that, at a trade fair in

Milan, it was orally agreed that the courts of Mönchengladbach should have jurisdiction instead. The plaintiff claimed to have sent written confirmation of this oral agreement and that though they received the letter, the defendant never disputed it. The court held that this was sufficient to establish the German court's jurisdiction. In the course of the judgment, the court said ([1985] E.C.R. 2699, at para. 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 (see judgment of 19 June 1984, cited above), 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. It is not necessary in this case to decide the question of whether and to what extent objections raised by the other party to the written confirmation of an oral agreement could, in an appropriate case, be taken into consideration."

29 In *Coreck Maritime GmbH* v. *Handlesveen B.V.* (3), bills of lading contained a jurisdiction clause in the country "where the carrier has its principal place of business." The courts below held that this was not sufficiently clear on its face to comply with art. 17 (the precursor of art. 23) but the European Court reversed this. The court said ([2000] E.C.R. I-9337, at paras. 14–15):

> "14 However, if the purpose of Article 17 of the Convention is to protect the wishes of the parties concerned, it must be construed in a manner consistent with those wishes where they are established. Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the fourth paragraph of Article 17 (Case 23/78 *Meeth* v *Glacetal* [1978] ECR 2133, paragraph 5).
>
> 15 It follows that the words 'have agreed' in the first sentence of the first paragraph of Article 17 of the Convention cannot be interpreted as meaning that it is necessary for a jurisdiction clause to be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors,

> which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case."

30 *Berghoefer* (1) was a case of an oral contract where the jurisdiction was specifically agreed, which was evidenced in writing without dissent by the defendant. In my judgment, that case and the decision in *Coreck* support Mr. Dingeman's submission that if there were a contract made at the beginning of January 2002, which incorporated the sponsorship agreement, that is sufficient to satisfy art. 23, and specific reference to the sponsorship agreement in the letter of January 3rd was not necessary since this letter referred to the payment schedule, which itself expressly referred to that agreement. The real question, then, is whether there is a good arguable case that there was such a contract. The judge held in terms that there was such a contract. In doing so, he went further than he needed to.

31 Mr. Young has read a number of arguments in support of his contention that there was no concluded agreement.

(a) That the sponsorship agreement never identified the appellants as parties to the contract, merely referring to the other party as "the company." But the negotiations were being carried on with both O'Connell, a director of Bols Distilleries, and Laux, as president of Unicom Bols. It is plain that they were not acting personally but representing their companies. The letter of acceptance, if it were such, was clearly sent by O'Connell on behalf of Bols Distilleries and approved by Laux on behalf of Unicom Bols. I see no difficulty with the insertion of the appellants' names in the contract.

(b) The case now made does not accord with the pleadings. In my judgment, the pleading in the particulars of claim leaves a good deal to be desired. It is very verbose and pleads a great deal of unnecessary background. Moreover, in the crucial paragraph, where the alleged contract is set out, it is said that "Superior Yacht claims the existence of a contract with Bols Distilleries," there being no mention of Unicom Bols. But earlier paragraphs make reference to both appellants together and the prayer seeks relief against both. It seems to me that any defect in the pleading can be cured by amendment, the necessary case being found in the pleadings.

(c) Schedule 6 of the sponsorship agreement, which related to the events for which the yacht would be entered, was never completed. But an email of December 17th, 2001 shows that this was discussed and outlined between the appellants and copies of alternative schedules were sent on or about January 23rd, 2002, outlining the events, together with an updated payment schedule and yet another copy of the sponsorship

agreement. It would have been quite inconsistent with the terms of the sponsorship agreement, both in their recitals and in Superior Yacht's obligations in Schedule 4, for Superior Yacht, once the vessel was completed, to say that it would not race it for the appellants or that it would do what it liked with it.

(d) That what was agreed, if anything, in January 2002 was that the boat should be owned by the appellants and not Superior Yacht; this is quite inconsistent with the sponsorship agreement. In this regard, Mr. Young relies heavily on what is said in the payment schedule sent on December 17th, 2001, which I have set out in para. 10. He submits that the issue of ownership and the related issue of performance bonus to compensate Superior Yacht for not being owners were never resolved. This is a formidable point. But it is clear that while the parties anticipated no difficulty in altering the situation so that the appellants or their nominee became the owner of the boat, the urgency was for a commitment of the project, which at that stage included the sponsorship agreement, so that Superior Yacht could enter into a construction contract with the builders and the suppliers. I think it is possible to read the part under the heading "Ownership and Registry" as looking forward to the time where an adjustment of the ownership might be made. In my judgment, it is not necessarily inconsistent with the respondent's case that it was essential to have in place a contract between Unicom Bols/Bols Distilleries and Superior Yacht before construction could start and that questions of ownership and bonus could be sorted out by modification. Had it not been for the appearance on the scene of Mr. Laughery, there seems every reason to suppose that this would happen.

(e) That the letter of January 3rd, 2002 is a somewhat curious way of accepting the offer contained in the sponsorship agreement and payment schedule. If it had been drafted by lawyers it might have been more explicit. But it seems to me that there is a good arguable case that all the parties knew that the project was that contained in the sponsorship agreement; moreover, the payment schedule specifically refers to this document as "the contract," and this is replicated each time the payment schedule is updated.

(f) That the letter of January 3rd was referred to as a draft. As such, it could not have had immediate binding effect; but the actions immediately following fulfilled the condition precedent, that it would be effective so long as Laux did not disagree. I think Mr. Young accepted this.

(g) Mr. Young submitted that the judge was wrong to have regard to what happened after January 3rd, 2002, in particular the placing of the contract for construction (and whichever version was the correct one, Superior Yacht was personally liable), the placing of contracts for the supply of equipment (where again it seems that Superior Yacht was

principal or at least personally liable) and the fact that Kay went to Australia and for weeks or months supervised the construction of the boat. All this was to the knowledge of the appellants. It seems to me inconceivable that they could have turned round and said: "We are under no obligation to pay because we have no contract with you," and the obligation to pay arises under cl. 4 of the sponsorship agreement, not the payment schedule, which merely itemized the amounts and times of payment. Everything that Superior Yacht did was in accordance with the obligations under the sponsorship agreement. Quite apart from anything else, such an attitude on the part of the appellants, had it been taken, would have demonstrated extreme bad faith.

32 In my judgment, Mr. Dingemans is right when he submits that there is at least a good arguable case that what took place after January 3rd, 2002 was referable only to a contract which both sides considered to be binding, and as such it must have incorporated the sponsorship agreement which incorporated the jurisdiction clause. Mr. Laux's evidence shows that he was well aware of this clause and was entirely content with it. Furthermore, although the emails exchanged between Laux and Laughery in February 2002, referred to in para. 17, are not contractual documents, they are more consistent, in my view, with the recognition that there was in existence a contract between Superior Yacht and the appellants, which needed to be modified by further negotiation, than that there was no such contract.

33 For these reasons, I would uphold the decision of the learned judge to the extent that the respondents have shown a good arguable case for Gibraltar jurisdiction which satisfies the provisions of art. 23 of the Regulation.

34 **STAUGHTON, P.** and **ALDOUS, J.A.** concurred.

Appeal dismissed.