Neutral Citation Number: [2021] EWCA Civ 1558

Case No: A1/2021/0152

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
MR JUSTICE KERR
[2021] EWHC 19 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LORD JUSTICE BIRSS

- -

Between :

TRW LIMITED	**Appellant**
- and -	
PANASONIC INDUSTRY EUROPE GMBH **PANASONIC AUTOMOTIVE SYSTEMS EUROPE GMBH**	**Respondents**

- -
- -

David Caplan (instructed by **Oury Clark Solicitors**) for the **Appellant**
Andrew Legg (instructed by **McDermott Will & Emery UK LLP**) for the **Respondents**

Hearing Date : 6 October 2021

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Approved Judgment

LORD JUSTICE COULSON :

1. INTRODUCTION

1. This is a dispute about jurisdiction. The defendants/respondents ("Panasonic") sought a) to set aside service out of the jurisdiction, and b) a declaration that the courts of Hamburg, Germany, had exclusive jurisdiction over the claim brought by the claimants/appellants ("TRW"). Following a careful analysis of the evidence, Kerr J ("the judge") found that Panasonic had the better of the jurisdiction argument and granted their application. The appellants appeal with leave of the judge.

2. As is all too often the way with jurisdiction disputes, a wide range of issues was canvased before both the judge and this court involving, amongst other things, the scope of an appeal arising from an interlocutory hearing of this kind; the interpretation of the Recast Brussels 1 Regulation (Regulation (EU) 1254/2012) ("the Recast Brussels Regulation"); the correct approach to jurisdictional disputes generally, as most recently summarised in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] I WLR 3514 ("*Kaefer*"); and arguments about what is often called 'the last shot' doctrine in a 'battle of the forms' dispute. It was a pretty long list for what was a short point decided at an interlocutory hearing.

3. I address the issues that have arisen in the following way. In Section 2 below, I set out the factual background. In Section 3, I identify the relevant parts of the judge's judgment and consequential order. In Section 4, I identify the grounds of appeal and the points made in the respondent's notice. Having summarised the applicable principles of law in Section 5, and given an overview of the contractual position in Section 6, I then address the three grounds of appeal in Sections 7, 8, and 9 below, albeit in a different order to the way in which they have been set out in the Grounds themselves. Section 10 sets out my conclusions. I am very grateful to both counsel for their excellent written and oral submissions.

2 . THE FACTUAL BACKGROUND

4. TRW supply parking brakes and electronic stability control assemblies in the automotive industry. TRW's products include resistors made by (and therefore purchased from) Panasonic. In these proceedings, begun in the TCC in London on 22 January 2020, TRW allege that Panasonic's resistors were defective. In March 2020, Panasonic applied to set aside service, seeking a declaration that the English court had no jurisdiction over the claim. I do not, for the purposes of this judgment, distinguish between the different Panasonic companies.

5. There has been a commercial relationship between TRW and Panasonic for many years. During that period, as TRW well knew, Panasonic's customers were required to sign a "customer file" document. As the judge pointed out at [6] of his judgment ([2021] EWHC 19 (TCC)) there were copies of customer file documents relating to supplies by Panasonic to TRW companies in Italy, Poland, the Czech Republic and within Germany, as well as to TRW in Birmingham and County Durham.

6. The Panasonic customer file document relevant to the transistors in question was numbered FR009E. It was signed by Mr David Jones of TRW on 28 January 2011.

Below his signature, there were the words "legally binding signature of the Customer". The document stated:

> "We undertake to export goods obtained from the PANSONIC Industrial Europe GmbH only in compliance with all export rules valid in Germany or at our domicile. We herewith declare that we do not produce or develop weapons of mass destruction and do not sell any products for this purpose. In case of violation of these undertakings PANASONIC Industrial Europe GmbH shall be entitled to discontinue all business relations with us immediately and to cancel all delivery contracts already concluded.
>
> We shall inform PANASONIC Industrial Europe GmbH without undue delay about all changes of the board of management, address, ownership, company name.
>
> The submission of this customer file and the handing over of the General Conditions do not automatically constitute a supply claim. We have received and acknowledged the General Conditions of the PANASONIC Industrial Europe GmbH."

7. The Panasonic General Conditions were set out on the back of the customer file document. Relevant extracts are as follows:

> "1 Even if no reference is made to them in particular cases, the following terms and conditions shall apply exclusively to the entire business relation with us, particularly to all agreements for deliveries and services, unless different conditions, particularly conditions of purchase of the contracting party, have expressly been confirmed by us in writing.
>
> Conditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation.
>
> 2 All offers are made without engagement. Contracts shall become effective on our written confirmation only. If delivery is carried out without the buyer having received such confirmation, the contract shall become valid by acceptance of delivery and subject to these conditions…
>
> 12 For contracts with contractors for whom these general conditions apply, Hamburg is stipulated as place of performance and jurisdiction, also for action on a promissory note or cheque. Contracts concluded with us shall be governed by the law of the Federal Republic of Germany to the exclusion of UN Sales Convention as amended at any time…contracts concluded with us are subject to German law."

8. In February 2013 the parties discussed by e-mail the supply of the resistors which are the subject of this action. This led to two "blanket orders" issued by TRW, the first dated 10 March 2015 and the second dated 25 January 2016. Neither order identified the quantities of resistors that TRW wished to purchase, or when they were to be supplied.

9. The 2015 order asked for the resistors to be delivered "in accordance with [TRW's conditions of] purchase." There was a website reference as to where those terms and conditions might be found. The order stated that "in case of discrepancy between these terms and conditions of purchase and any other terms and conditions – the terms and conditions on the web shall prevail." It went on:

> "Commencement of any work or delivery of any goods or services under this order or delivery schedules or releases shall constitute your confirmation [that you] are aware of and accept such terms, conditions and requirements."

10. The 2016 order stated:

> "This order shall form a contract accepted by Seller based exclusively on, and limited to the terms of, this Order when Seller does any of the following: i) begins performance under the Order; or ii) acknowledges the order; or iii) Engages in any other conduct that recognises the existence of a contract with respect to the subject matter of the Order. Buyer hereby objects to and rejects any proposal by Seller for additional or different terms…"

The 2016 TRW purchase order then repeated the wording of the previous order to the effect that commencement of work or delivery of goods "shall constitute your confirmation [that you] are aware of and accept such terms, conditions and requirements."

11. The TRW terms and conditions on the website were much longer than the Panasonic General Conditions. Clause 32 provided that the order "will be governed by the laws of the state or country shown in Buyer's address on the Order, and the Convention on Contracts for International Sale of Goods shall not apply."

12. As the judge noted at [18], Panasonic were not asked to sign and return the orders, and were not asked to confirm in writing their agreement to the TRW terms. The judge described how the resistors were called off at [19]-[20] of his judgment. He found that Panasonic acted on the blanket orders, by delivering the resistors to TRW's premises in Birmingham.

13. I note in passing that the judge also dealt with the separate discussions taking place in the USA both as to prices and as to amendments to TRW's terms and conditions, although neither of those elements of the story appears to have made any difference to the judge's reasoning and conclusions for the purposes of this appeal.

3. THE JUDGMENT AND ORDER

14. The judge summarised the law at [27]-[40]. No issue arose, then or now, as to the applicable principles. The parties were and remain at odds as to how those principles should be applied to the facts of this case. The judge summarised the parties' arguments between [41]-[51]. At that point, each side was arguing that their own terms and conditions applied and that they satisfied the test under Article 25 of the Recast Brussels Regulation. On appeal, Mr Caplan did not now suggest that TRW can establish under Article 25 that there was a clear consensus that the English courts had jurisdiction but, for the reasons noted in greater detail below, he said that they did not need to, and that all that mattered for jurisdictional purposes was whether Panasonic could make out their case that the Hamburg courts had exclusive jurisdiction.

15. The judge identified the three limbs of the test to be applied in jurisdiction disputes at [52]-[56]. At [57]-[59] he raised, and then dismissed, the possibility of concluding that each side's argument on jurisdiction was of equal weight so that the result was a dead heat with no winner. He was equally dismissive of the possibility that there was no consensus between the parties as to the applicable terms and conditions, such that there was no contract at all. The judge said at [59] that he did not think that either of those possibilities was satisfactory or the right outcome. Furthermore at [60] he said that the outcome that there was no contract at all "seems objectively unlikely in the context of commercial trading such as this." He noted that each side said that there was a contract but on their terms, and not on those of the other side. The judge concluded that "both analyses are more commercially plausible than neither being correct." I agree, and Mr Caplan did not argue otherwise on appeal.

16. The judge then concluded that Panasonic had the better of the jurisdictional argument "by a comfortable margin": see [64]. The judge summarised his reasons as follows:

> "65. First, the PIEU General Conditions and the practice of signing a "customer file" document accompanied by the General Conditions, were a familiar feature in the trade done over the years between Panasonic entities and TRW entities in Europe. *It is a reasonable inference from the practice of signing the customer file that the various TRW companies in Europe that did so from 1998 to 2019, including in England, regularly contracted on PIEU General Conditions terms, including German law and jurisdiction, with PIEU or other Panasonic entities.* (Italics added)
>
> 66. Next, TRW's Mr Jones signed a customer file acknowledgment in January 2011. The surrounding evidence shows that this was not unusual for TRW companies buying supplies from Panasonic in Germany. His signature clearly acknowledged the General Conditions and, in my judgment, their applicability to any subsequent supply contract. I reject Mr Caplan's suggestion that Mr Jones' signature was acknowledging only their existence and not their applicability. His signature would have been pointless if that were the position.
>
> 67. Next, I accept that the signing of the customer file document with the General Conditions did not, of themselves, create any obligation on the parties to buy or sell Panasonic products. But the signing of that document was not wholly devoid of contractual effect. It placed the parties under an obligation, if they later chose to enter into supply contracts, to do so on PIEU General Conditions terms unless PIEU should agree otherwise in writing.

> 68. Furthermore, the PIEU General Conditions crucially protected PIEU against falling victim to what in English law is called the last shot doctrine. The words used were "[c]onditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation". I can see no reason why those words should not mean exactly what they say. Their meaning is clear and in no way ambiguous.
>
> 69. There is some analogy, albeit approximate, between the PIEU General Conditions and the practice of "calling off" goods in a public procurement framework agreement. The customer (a public body) appoints a panel of suppliers of particular types of goods. A supplier wins a place on the panel. The customer may not be obliged to buy any supplies from the supplier but may choose to do so. If the supplier is selected on a particular occasion, the terms of the supply are pre-ordained in the framework agreement, to which the parties have earlier committed themselves, if supply contracts should later be entered into. Goods from the supplier may be "called off" by specific purchase orders.
>
> 70. Similarly, applying the autonomous EU standard and English law, I see no reason why parties may not agree binding terms of future trades that may or may not occur. The buyer gains access to the seller's goods and the likelihood of being able to buy them if it wishes. In return, the buyer agrees to the seller's conditions. The seller says, in effect: "I may or may not sell to you but if I do it will be on the following terms even if you later say otherwise and we do not contradict you, unless we confirm in writing that we agree to different terms.""

17. In consequence of this, in his order the judge declared that "the courts of Hamburg Germany, have exclusive jurisdiction over the claim made by the claimant in these proceedings." He said that he granted permission to appeal "with little enthusiasm". He did so on the basis that this court "could decide that the last shot did hit the target and trumped the Panasonic General Conditions. I regard that argument as weak for the reasons given in the judgment, but the Court of Appeal might view it more favourably then I do." For the reasons outlined below, I don't.

4. THE GROUNDS OF APPEAL AND THE RESPONDENT'S NOTICE

18. TRW raise three grounds of appeal. The first is to contend that the judge was wrong to conclude that the Panasonic customer file had contractual effect. Ground 2 asserts that the judge failed to focus on the key question, namely whether Panasonic had demonstrated to the requisite standard mandated by Article 25 of the Recast Brussels Regulation that TRW had consented to the Hamburg jurisdiction. TRW maintained that there was no agreement, at least to the requisite standard, to the Hamburg jurisdiction. Ground 3, which is accepted to be a subsidiary point, concerned the inference drawn by the judge at [65], as set out in italics at paragraph 16 above. TRW maintain that there was no evidence to support this inference.

19. The respondent's notice is concerned with findings made by the judge in relation to the discussions in the USA, to which I have referred briefly at paragraph 13 above. Since those passages were irrelevant to the judge's conclusions for the purposes of this appeal, Mr Legg did not pursue these points further and I say no more about them.

5. THE APPLICABLE PRINCIPLES OF LAW

5.1 The Scope of the Appeal

20. There was some debate as to the scope of this appeal, and the approach which this court should adopt when considering it. Mr Caplan suggested that there could only be one answer to the jurisdictional dispute in this case, and that therefore there was no real margin of error to be afforded to the judge. That had the effect of treating the appeal as a complete rehearing of the original application. Mr Legg disagreed with that, and argued that this was the sort of evaluative exercise in respect of which this court should not lightly interfere with the judge's decision.

21. I have concluded that, as a matter of law, Mr Legg's submissions are to be preferred. In *Kaefer*, Green LJ said:

> "95. In my judgment in a case involving a close evaluative exercise performed by the Judge on the evidence, this Court must exercise reticence in second-guessing that exercise. Although Mr Nolan QC did not advance his argument in this way, it is worth saying that it is not open to an appellant to invite the Court to re-perform the analysis of the evidence to see whether it agrees with the Judge simply because the Court of Appeal is said to be in the same position as the High Court. It might be different if the issue arising is essentially one of law. But that is not the case here where the Judge addressed complex facts in close detail."

Green LJ also referred to the judgment of Mance LJ in *Todd v Adams and Chope (Trading as Trelawny Fishing Co)*[2002] 2 All ER (Comm) 97 at paragraph 129, where he reminded himself that "so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible."

22. In my view, the correct approach is neatly summarised by Davis LJ in his own short judgment in *Kaefer*. He said at [123]:

> "123. There is no proper basis for the appellate court interfering with the judge's appraisal of the evidence on such an issue. In the ordinary way, the appellate court in cases of this kind will not interfere with a judge's decision on such an issue unless there has been a material error in the legal approach adopted, or a failure to take into account material facts, or a taking into account of immaterial facts, or a demonstrable misunderstanding, or an evaluation of the evidence which is so unreasonable as to transcend the ordinary margin of appreciation available to a first instance judge evaluating evidence. There was, ultimately, no such error here."

5.2 Jurisdiction

23. There have been a number of cases in the last twenty years in which the House of Lords and the Supreme Court have addressed the approach the court should adopt to jurisdiction disputes: see *Canada Trust Co v Stolzenberg (no.2)* [2002] 1 AC 1; *Brownlie v Four Seasons Holding Inc*. [2017] UKSC 80*;* and *Goldman Sachs*

International v Novo Banko SA [2018] UKSC 34. In particular, Lord Sumption in *Brownlie* identified at [7] the three limbs of the relevant test as follows:

> "What is meant is i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

He reiterated that test in *Goldman Sachs*, although in neither case did the Supreme Court provide any practical guidance as to how the limbs might work in practice and/or together.

24. The practical implications of the test were, however, clearly set out by Green LJ in *Kaefer* at [72]-[80]. They do not need to be repeated here. That was the test that the judge applied in the present case.

5.3 Article 25

25. Article 7 of the Recast Brussels Regulation states that, in relation to a contract for a sale of goods, jurisdiction will reside in the court for the place where the goods were delivered. In the present case, that would be England. That explains why Mr Caplan does not need to maintain the argument he ran before the judge that TRW could show an express agreement to the English court having exclusive jurisdiction; if Panasonic cannot show an express agreement to Hamburg, the default position under Article 7 would apply and the English court would have jurisdiction.

26. Article 25 provides:

> "1. If the parties, regardless of their domicile, 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 particularly legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
>
> a) In writing or evidenced in writing;…"

27. The ECJ (now the CJEU) has made it plain that an agreement conferring jurisdiction under Article 25 is not a matter of national law but an independent concept: see *Powell Duffryn PLC v Wolfgang Petereit* (case C-214/89) [1992] ECR1-1745. Furthermore, the ECJ has said that the clause conferring jurisdiction must be the subject of a consensus between the parties, which must be "clearly and precisely"

demonstrated: see *Estasis Salotti di Colzani Aimo v Gianmario Colzani v Ruwa Polstereimaschinen GmbH* (case C-24/76) [1976] ECR 1832 ("*Salotti*"). But, as the ECJ also made plain in *Coreck Maritime GmbH v Handelsveem BV* (Case C-387/98) [200] ECR1-9337:

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

28. Green LJ addressed the relationship between the three limbs of the test in *Brownlie/Goldman Sachs*, on the one hand, and Article 25, on the other, at paragraphs [81]-[83] of his judgment in *Kaefer*. He referred to the Privy Council decision in *Bols* [2007] 1WLR 12, which reiterated that the purpose of Article 25 was to ensure that the 'consensus' between the parties was 'in fact' established. He said that the ECJ recognised that the manner of this proof was essentially an issue for the national laws of the member states, subject to an overriding duty to ensure that those laws were consistent with the aims and objectives of the Regulation. Green LJ summarised the position as follows:

> "83. The Supreme Court in *Brownlie* and in *Goldman Sachs* seemingly approved *Bols* but did not address how the new three-limbed formulation took into account the provisions of the Recast Brussels Regulation, no doubt because it did not specifically arise on the facts of those cases. I agree with the analysis of Mr Cooper QC on this. I consider that in a case such as the present where the background legal context is Article 25 some regard must be paid to the fact that, as was held in *Bols*, the "*clear and precise*" test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the Regulation. As with so much of the language used in this context, that which is "*clear and precise*" is not easy to define with precision. But I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the *prima facie* test (in limbs (i) and (ii)) is a *relative* one; and in so far as the court cannot resolve outstanding material disputes (limb (iii)) it affords an indication as to the sort of evidence that a Court will seek. I would not go much beyond this though."

5.4 'Battle of the Forms'

29. Disputes where each party is seeking to rely on its own terms and conditions, to the exclusion of the other side's terms and conditions, have long been known as the 'battle of the forms'. In such cases the courts have endeavoured to apply the traditional concepts of offer and acceptance. This has led to what is sometimes called the 'last shot' doctrine: in other words, the party whose terms and conditions are in play and unanswered at the time that the work is done or the goods delivered is often

said to have fired the last shot, with its terms and conditions found to have been accepted by the fulfilment of the substantive contract.

30. An example of this traditional approach can be seen in *B.R.S. v Arthur Crutchley Limited* [1968] 1 All ER 811. The claimants delivered a consignment of whisky for storage by the defendant. When the whisky was delivered, the claimant's driver handed over a delivery note purporting to incorporate the claimant's conditions of carriage into the contract. However the note was stamped by the defendant: 'received under [the defendant's] conditions'. The stamp was found to amount to a counter-offer by the defendant, which the claimants had accepted by conduct when they handed over the whisky. The defendant therefore fired the last shot and its terms were incorporated.

31. A more recent example of the 'last shot' doctrine is *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209. There the buyer sent a purchase order on its terms and conditions and the seller sent an acknowledgment on its own terms to the buyer, who then received the goods. The judge at first instance had found that the contract was on the buyer's terms and conditions because of the commercial history between the parties. The Court of Appeal rejected that analysis and found that the contract was on the seller's terms. The evidence of commercial history was not strong enough to displace the traditional analysis that the seller's acknowledgment incorporating its own terms (and the subsequent receipt of goods by the buyer thereafter) was the last shot.

32. However the Court of Appeal recognised that, although the last shot doctrine had been successful in that case, it could be displaced by evidence of the parties' objective intention that the last shot should *not* prevail. Thus Longmore LJ said at [1] that "if, however, it is clear that neither party ever intended the seller's terms to apply and always intended the purchaser's terms to apply, it is conceptually possible to arrive at the conclusion that the purchaser's terms are to apply." He also said at [11] that "the traditional offer and acceptance analysis must be adopted unless the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail".

33. In the same case, Dyson LJ summarised the legal position as follows:

> "25. In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the "traditional offer and acceptance analysis", ie that there is a contract on B's conditions. I accept that this analysis is not without its difficulties in circumstances of the kind to which Professor Treitel refers in the passage quoted at [20] above. But in the next sentence of that passage, Professor Treitel adds: "For this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance". I also accept the force of the criticisms made in *Anson*. But the rules which govern the formation of contracts have been long

> established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."

That it is quite possible for the last shot doctrine to be displaced is also acknowledged in the relevant passage of *Chitty on Contracts*, 33rd edition, at paragraph 2-036, where the learned editors make plain that it is possible by what they call "careful draftsmanship" to avoid losing the battle of the forms.

34. A battle of the forms case which was not decided by the last shot doctrine was *Butler Machine Tool Ltd v EX-CELL-O Corp (England) Ltd* [1979] 1WLR 401. There the sellers had offered to supply a machine subject to its terms and conditions, which included a price escalation clause. The buyers placed an order setting out its own terms and conditions, which contained no such clause. The buyers' order contained a tear-off slip to be signed by the sellers and returned to the buyers, stating that the sellers accepted the buyers' order on the buyers' terms and conditions. The sellers did sign the slip, but returned it with a letter saying they were "entering the order in accordance with" their original offer. The Court of Appeal held that the signed tear-off slip was an acceptance by the sellers of the buyers' counter-offer without the price escalation clause. The sellers' reply letter did not prevail, despite the fact that it was the last shot, because it was held as a matter of construction that the reference in the letter to the sellers' original offer was not made for the purpose of reiterating all its terms, but made simply to identify the subject matter.

35. Amongst other things, Lord Denning said that the analysis did not turn on a simple dispute as to who fired the last shot, but on the documents as a whole:

> "In the present case the judge thought that the sellers in their original quotation got their blow in first: especially by the provision that "these terms and conditions shall prevail over any terms and conditions in the buyer's order." It was so emphatic that the price variation clause continued through all the subsequent dealings and that the buyers must be taken to have agreed to it. I can understand that point of view. But I think that the documents have to be considered as a whole. And, as a matter of construction, I think the acknowledgment of June 5, 1969, is the decisive document. It makes it clear that the contract was on the buyers' terms and not on the sellers' terms: and the buyers' terms did not include a price variation clause."

6. OVERVIEW

36. As I have said, in a traditional battle of the forms dispute, the conventional analysis is that the terms and conditions of the party who fired the last shot (often, the sender of the last document in time) will usually be the terms and conditions which prevail. Here, the judge found that, for the reasons he gave, it was Panasonic's first shot which prevailed. TRW say that he was wrong to do so.

37. It is clear that, in reaching his conclusion, the judge had regard to all the documents (as per *Butler* and *Tekdata*) but concluded that the signing of the customer file by TRW was the key event. It was the cornerstone of his judgment. In my view, that is unsurprising. Mr Jones' signature was the only time that one party expressly signed something which referred to the other side's terms and conditions. It was the only overt sign of an agreement. To continue the warfare analogy commonly used in these cases, it was the only occasion when one side walked across no-man's land, and fraternised with the enemy.

38. Accordingly, in order to succeed on this appeal, TRW have to show, first, that, notwithstanding the margin that this court must afford to a judge reaching an interlocutory decision involving the evaluation of evidence and the application of law to the facts found, the judge was wrong to attach contractual significance to that event (ground 1). That is a high hurdle. If the judge was right to do so, TRW have to go on and persuade this court that Panasonic has not satisfied what they say is the higher EU test of clarity and precision required by Article 25, necessary to establish the exclusive jurisdiction of the Hamburg courts (ground 2). That too is a difficult task.

39. Although ground 3 is a subsidiary argument about an inference which, so TRW say, the judge was wrong to draw, it is the logical place to start because it is a part of the background which the judge took into account when reaching his conclusion as to the effect of the customer file.

7. GROUND 3: THE INFERENCE ABOUT OTHER CONTRACTS

40. This is a criticism of the inference set out in the second part of [65] which I have italicised in paragraph 16 above. The judge said that he inferred from all the evidence that various TRW companies in Europe, including in England, had contracted in the past on Panasonic's General Conditions. Mr Caplan said that the judge erred in drawing this inference.

41. The first point to make is that this is a limited attack; Mr Caplan called it "a subsidiary point". For example, he made no criticism of [66] (and the finding that it was not unusual for TRW companies to sign the customer files which referred to Panasonic General Conditions), nor the finding at [6] that there were numerous customer file documents relating to contracts between different Panasonic and different TRW companies.

42. In any event, I have concluded that this was the sort of inference which the judge was entitled to draw and with which, in accordance with the correct approach identified in *Kaefer*, set out at Section 5.1 above (paragraphs 20-22), this court should be very slow to interfere. On the basis of the information before him, the judge was entitled to infer that TRW companies had previously contracted with Panasonic on the Panasonic General Conditions. If it was TRW's case that, despite all these customer files, with all their references to the Panasonic General Conditions, they had never contracted on those terms, then I would have expected them to say so. That is a very unlikely proposition given the evidence; therefore it is one which, if it were right, TRW would have needed to have advanced expressly.

43. In all those circumstances, I reject ground 3 of the appeal.

8. GROUND 1: NO CONTRACTUAL EFFECT

44. The starting point is [65] and [66] of the judge's judgment, set out at above. There are three essential findings here. The first is that it was not unusual for TRW companies to sign Panasonic's customer file. That finding is not challenged on appeal. The second is the inference, identified above, which I consider that the judge was entitled to make, that there were other contracts between these two groups of companies, which incorporated the Panasonic General Conditions. So the signing of the customer file and its ramifications was not a one-off, but a process with which TRW were historically very familiar.

45. Thirdly, the judge found that, by signing the customer file, TRW were acknowledging that the Panasonic General Conditions would be incorporated into any subsequent supply contract between themselves and Panasonic. *Prima facie*, it appears unremarkable that the judge found that this was one of the principal purposes of Panasonic's requirement that their customers sign (with a "legally binding signature") the proffered customer file. In this court, Mr Caplan put forward two arguments to counter that conclusion: that the signature did not indicate acceptance of the Panasonic General Conditions, and that – if he was wrong about that - there was no consideration for any binding agreement.

46. As to the signature, Mr Caplan submitted that, by signing the customer file, Mr Jones was simply recording their receipt and acknowledging the existence of Panasonic's General Conditions. He said that the words "and acknowledged" were essentially redundant because they added nothing to "received" (paragraph 6 above).

47. I agree with the judge that this argument is wholly unrealistic. In the commercial world, one party does not sign a document acknowledging the other side's terms and conditions simply to note that those terms and conditions exist. It did not need Mr Jones' signature to acknowledge their existence: they were printed on the back of the form. The court therefore had to give some meaning and legal effect to the express acknowledgement of Panasonic's General Conditions and to Mr Jones' "legally binding" signature immediately below the reference to them.

48. The judge concluded, against the factual findings and inferences that he had set out, that the signing of the customer file meant that if, at a later date, TRW chose to buy resistors from Panasonic, they were committed to do so on Panasonic's General Conditions. In this way, the judge found that the Panasonic General Conditions were a binding element of the individual supply contracts, a mechanism expressly envisaged in condition 2 (see paragraph 7 above). That conclusion was plainly open to the judge, taking into account all the material before the court (including the history of the commercial relationship between the Panasonic and TRW organisations and the ubiquity of the customer file). It is not a conclusion that this court could conclude was wrong; on the contrary, it seems to me to be right.

49. The judge also pointed out the similarity between this arrangement and the calling off of goods in a public procurement framework agreement. I agree with the analogy. Indeed, in my view, there is a wider analogy, between this sort of arrangement and framework or 'master' contracts generally. In the construction industry, it is not uncommon for a main contractor to agree that a particular sub-contractor could be used for certain types of work or supply of certain type of materials. There may be no

minimum or maximum commitment by the main contractor, but by signing up to an umbrella arrangement (like the customer file in this case), the sub-contractor has cleared the first hurdle and is therefore a potential recipient of the main contractor's business.

50. Again, I do not consider that there is anything remarkable about any of that. Although Mr Caplan sought to argue that the public procurement process is different because it is subject to the Public Contract Regulations, that does not seem to me to make any difference to the applicability of the analogy; in one sense, the signing of the customer file was like a much speedier version of that often tortuous process.

51. Before this court, Mr Caplan's second submission in support of his case that the judge had reached a conclusion that was outside the bounds on which reasonable disagreement was possible, was that, even if his argument about the signature was wrong, the arrangement relied on by Panasonic and found by the judge, was not binding, because there was no consideration for it. That submission gave rise to a number of problematic issues.

52. The first difficulty was that the argument that there was no consideration was not raised before the judge. The points which were in issue were summarised by TRW's solicitor, Mr Pugh, at paragraph 9 of his statement. He said that TRW denied that the signature on the document:

> "i) created any particular contract of supply, ii) constituted an agreement to the application of Panasonic's terms and conditions to any particular contract of supply, iii) constituted an agreement to the application of Panasonic's terms and conditions to supplies that took place years later, including those that were subject to the Purchase Orders, and iv) constituted an agreement which would not have been superseded and displaced in any event by the terms and conditions in and incorporated into the Purchase orders."

Those were the arguments, that the signature did not have contractual effect, that were then advanced to the judge, and which he rejected for the reasons set out in his judgment.

53. At no point was it suggested on behalf of TRW that there could not have been a contract on the basis of the customer file because there was no consideration. That is not, I hope, a nit-picking observation. Every contract lawyer knows that a 'no consideration' argument is a particular type of debate (and, moreover, one that is much less successful these days than it used to be). A 'no consideration' argument was not advertised here, so the judge said nothing about it in his judgment.

54. In consequence, Mr Legg objected to the 'no consideration' point being raised on appeal. He relied on [17] of the judgment of Haddon-Cave LJ in *Avta Singh v Roshan Dass* [2019] EWCA Civ 360 to say that, because he may well have wanted to adduce evidence to reply to such an argument (had it been raised), the court should not now entertain it. Mr Legg's principal argument was that, since his instructions were that consideration was not a concept known to German law (and on his analysis, German law applied as a result of the Panasonic General Conditions) the evidence and

arguments before the judge would or may well have been different if the 'no consideration' argument had been fairly and squarely raised.

55. I accept Mr Legg's submission. In my judgment, questions of consideration are a very specific aspect of English contract law. An argument that there was no consideration would have had to have been fairly and squarely raised for the parties, and thus the judge, to address it properly. That did not happen here. Accordingly I would not allow TRW to raise this issue for the first time on appeal.

56. I should say that I accept that the issue of consideration was expressly raised when TRW sought permission to appeal from the judge and set out an outline of their argument in an email to the other side. But that cannot affect the analysis set out above, as to what was and was not in issue before the judge.

57. Moreover, I should also say that, even if TRW had been permitted to raise the 'no consideration' argument on appeal, I was not persuaded by it. Consideration might be said to have arisen in a number of different ways. The signing of the customer file gave TRW something of value because they knew that, under their unique customer file number, they had officially become customers of Panasonic and would be able to purchase resistors from them without further screening or formalities. Indeed, as Mr Caplan accepted, Panasonic required TRW to sign the customer file in that form so that they could trade with them. On the other side, Panasonic knew that TRW met the necessary regulatory threshold (for instance, they were not making weapons of mass destruction) and were therefore a potential customer for their business. On the face of it, all these things were capable of amounting to consideration.

58. Secondly, there is the analogy with procurement contracts and framework agreements generally to which the judge referred at [70] and on which I have elaborated at paragraph 49 above. There has never been a suggestion that such contracts are invalid or that there was no consideration at the time of the framework agreement itself. On the contrary, contracts have been held to be subject to a 'master agreement' even though that agreement would not have been identified in the individual orders themselves: see *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 at 716.

59. Thirdly, there are other legal obstacles in the way of the 'no consideration' argument. Mr Caplan suggested that all the customer file amounted to was a discretionary promise on the part of Panasonic, that they would provide resistors "if they felt like it". He referred to paragraph 4-025 of *Chitty* to say that, in such circumstances, any consideration was "illusory". But even if that was a fair depiction of Panasonic's position (and I would say not, for the reasons that I have already given), the same passage in *Chitty* makes plain that this objection can be removed "if the promise is performed. Actual performance can constitute consideration even though the person who has rendered it is not legally obliged so to do." In reliance on that passage, Mr Legg said that, when the blanket orders were performed and the resistors were delivered by Panasonic, that would constitute consideration (if consideration had not been provided when the customer file was signed). There was nothing illusory about that because the promise was performed. Again, I agree.

60. This led to an even further refinement of Mr Caplan's position. He then wanted to argue that, if performance did amount to consideration, there was what he called "a

timing problem" because he said that, by the time the resistors were delivered, TRW had asserted their own terms and conditions, so that the delivery of the resistors could not be regarded as consideration for the framework contract (incorporating Panasonic's General Conditions) identified in the customer file.

61. In my judgment, this argument demonstrated, not only how far TRW had drifted from the arguments which they raised before the judge, but also an intrinsic artificiality. If, as the judge found, TRW had bound themselves in 2011 to Panasonic's General Conditions as and when resistors were ordered and supplied, then it seems to me that that constituted a binding agreement either in 2011, or at the latest when it was performed. The latter was what was expressly envisaged by clause 2 of the Panasonic General Conditions. In those circumstances, any later attempt to impose the TRW terms and conditions instead would have been of no legal effect. The resistors were sold on the basis that TRW had already agreed to the Panasonic General Conditions. They could not negate that consent by unilaterally changing their minds at a later date.

62. In short, there was nothing wrong or unusual about TRW agreeing that, if they purchased from Panasonic, the Panasonic General Conditions would apply. There was clear consideration for that agreement.

63. I have spent some time on the arguments about consideration because they were so critical to Mr Caplan's oral analysis. For the reasons that I have set out, I do not consider that he should be permitted to raise the point at all, but I reject that new case in any event.

64. It is also necessary to stand back and consider the case in the round. I remind myself that this was a jurisdictional dispute where the judge had to evaluate the material before him at an interlocutory hearing and come to an answer, taking into account all of the relevant material. It is not suggested he left anything out that he should have considered, or considered any matters that were irrelevant. In consequence, he reached a conclusion that was clearly open to him. Applying the approach outlined in Section 5.1 above, it is just not possible to say that the judge's analysis of the evidence was wrong such that this court should interfere with it.

65. Once the judge's findings about the effect of TRW's signing of the customer file are properly understood, the rest of the dispute under ground 1 falls into place. If, as the judge found, the signing of the customer file had a significant contractual effect, and incorporated the Panasonic General Conditions into any subsequent contract between TRW and Panasonic then, inexorably, the Panasonic General Conditions applied. Accordingly, on any application of the three limb test (Section 5.2 above), Panasonic had the better of the jurisdictional argument, "by a comfortable margin".

66. As the judge pointed out at [68], those Conditions were deliberately and carefully drafted to protect Panasonic against the last shot doctrine. They said expressly that they would continue to apply even if Panasonic delivered the goods without reserving their position or referring back to their own General Conditions. Critically, there is no appeal by TRW against the judge's finding at [68] as to the sufficiency of Panasonic's drafting to achieve the effect they sought. As a result, it is not disputed that, as a matter of drafting, the Panasonic General Conditions protected them from all subsequent 'shots'. In accordance with the authorities summarised in Section 5.4

above, this is therefore one of those 'battle of the forms' cases where careful drafting has protected Panasonic against the 'last shot' doctrine.

67. For those reasons, I would reject ground 1 of the appeal.

9. GROUND 2: NO SUFFICIENT FOCUS ON THE HAMBURG JURISDICTION/WRONG ANSWER TO THE QUESTION

68. Mr Caplan's second ground of appeal is to complain that the judge did not properly address the Article 25 argument about the Hamburg jurisdiction. He argued that, on these facts, it was impossible for Panasonic to demonstrate clearly and precisely that there was in fact a consensus that disputes under this contract were to be referred to the Hamburg courts. Assuming that the judge was right about the binding nature of the Panasonic General Conditions, this second ground of appeal gave rise to the unattractive possibility (to me, anyway) that, whilst as a matter of domestic law the Panasonic General Conditions applied, as a matter of EU law, they did not.

69. The judge dealt with this point crisply, saying at [79]:

> "79. I therefore agree with the defendants' interpretation of the contractual position. In my judgment, it establishes with the necessary clarity and precision the consensus required for article 25 exclusive jurisdiction. The agreement conferring jurisdiction is, as article 25 requires, evidenced in writing by the PIEU General Conditions themselves and by Mr Jones' signature acknowledging them. The contract of supply is completed on confirmation of acceptance of an order or on delivery of goods."

70. In my view, in accordance with the authorities that I have summarised in Section 5.3 above, the judge was entitled to reach this conclusion. The fact of TRW's "legally binding signature" on the document referring to Panasonic's General Conditions provided the necessary clarity and precision as to the consensus reached. Indeed, that is what makes this case different to those, like *Salotti,* where at best the jurisdiction clause was incorporated by conduct and was not, as happened here, the subject of a clear and precise signed agreement.

71. Mr Caplan pointed to the time lapse between the signing of the customer file in January 2011 and the first order in 2015. But in the absence of any specific evidence about what was happening in that period, I reject the suggestion that, simply because of the effluxion of time, TRW's agreement to the customer file and the Panasonic General Conditions somehow became less clear or less precise. Sometimes it takes months, if not years, for commercial contracts to come to fruition. That does not somehow render the earlier agreed steps in the contractual arrangements unclear or imprecise. Furthermore, no authority was cited in which the effluxion of time was found to have had this effect. *Salotti* says no such thing.

72. For these reasons, I reject ground 2 of the appeal.

10. CONCLUSIONS

73. For the reason I have given, if my Lords agree, I would dismiss this appeal.

LORD JUSTICE BIRSS

74. I agree.

LORD JUSTICE PETER JACKSON

75. I agree that the appeal should be dismissed for the reasons given by Coulson LJ. Far from being shown to have been wrong, the judge made an unimpeachable decision and gave impeccable reasons for it. That being so, I consider that he took only one doubtful step, and that was in granting permission to appeal. His reasons for doing so (see paragraph 17 above) were in fact good reasons for refusal. The permission that was then granted was, as my Lord has said, a general permission that was not limited to any grounds that might be properly arguable, with the result that much of the hearing before us concerned the impermissible argument about consideration, which had by then evolved into TRW's core point. This could have been avoided had the question of permission to appeal been left to this court in the normal way. That apart, this was in my view a model decision.