SHERIFF APPEAL COURT

[2021] SAC (Civ) 12
EDI-A487-19

Sheriff Principal AY Anwar
Appeal Sheriff HK Small
Appeal Sheriff W Holligan

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in the appeal by

HERIOT-WATT UNIVERSITY

Pursuers and Appellants

against

CHRISTIAN SCHLAMP

Defender and Respondent

Pursuers and Appellants: Pugh, Advocate; Clyde & Co
Defender and Respondent: McNairney, Advocate; Pollock Fairbridge Schiavone

22 February 2021

Introduction

[1] In this appeal, the pursuers and appellants ("the pursuers") seek payment from the defender and respondent ("the defender") of the sum of £7,000. The pursuers raised an action for payment against the defender in Edinburgh Sheriff Court. The defender resides in

Germany. The pursuers' cause of action is founded upon a contract whereby they provided educational services to the defender. The sum sued for relates to unpaid fees. The educational services provided by the pursuers to the defender led to the award of a doctorate in business administration ("DBA").

[2] The pursuers aver that the contract was a contract for services and that payment for the services was to be made to the pursuers by the defender at the pursuers' premises in Edinburgh. The pursuers also aver that the place of performance of the contract was at the pursuers' premises in Edinburgh. The defender avers that the contract was a consumer contract and that the court has no jurisdiction. He avers that the courts in Germany have jurisdiction.

[3] The action went to debate. The sheriff sustained the defender's plea of no jurisdiction and dismissed the action. Against that interlocutor the pursuers have appealed.

The record

[4] In article 3 and answer 3, the parties condescend in detail as to why they say the court does, or does not, have jurisdiction. Without setting out all of the averments in detail, most of the pursuers' averments are directed at refuting the defender's averments that the contract was a consumer contract. In support of their averment as to jurisdiction, the pursuers say little other than the place of performance of the contract was in Edinburgh and that payment was to be made in Edinburgh. Whether the place of performance relates to the provision of services, payment or both is not, as a matter of averment, entirely clear.

[5] In support of his proposition that the contract was a consumer contract, and paraphrasing the defender's averments, the defender says that he resides in Germany and undertook studies via the pursuers' distance-learning programme. The course was online

and not based at the pursuers' campus. The defender undertook his studies on a full-time basis. He did not have a career in economics or private equity nor is he now employed in such a field. He avers that he undertook his studies as a student and "not a professional". As an individual, he was self-funding. He avers that he worked occasionally as a self-employed consultant prior to the award of the DBA. His earnings were below the threshold which would attract the payment of taxation in Germany; he was latterly exempted from the payment of tax in Germany on account of his full-time studies with the pursuers. All the work which he undertook in relation to his studies was undertaken in Germany, including the sitting of exams. All written submissions, coursework and engagement of supervision was conducted online or by telephone. The defender's thesis was conducted by video conference. In short, the defender avers he was not acting in a professional capacity in relation to the subject matter of the dispute between the parties.

[6] In answer, the pursuers aver that the contract is not a consumer contract. They aver that the defender was employed in the fields of tax, audit accounting and financial control between 1993 and 2002. They aver that in 2003 he became self-employed in the fields of finance and business administration. In 2009, he completed a two year part-time Master's degree in business administration in Germany ("MBA"). The purpose of that qualification was to provide him with knowledge and skills to take on greater responsibility and obtain higher-level management positions. The pursuers aver that the MBA was a professional qualification which the defender intended to use to promote his business as a self-employed consultant. In particular, the pursuers aver that in his application he described himself as a "busy self-employed consultant". The pursuers offer to prove that the defender studied on a part-time basis while continuing to work. The subject matter of his chosen field of study was closely connected to his self-employment as a consultant in finance and business

administration. The defender's study had a business purpose, namely the furtherance of his career in business administration. The DBA was a professional qualification. The pursuers aver that the defender received income tax relief in Germany against his earnings as a self-employed consultant in respect of the fees he paid to the pursuers for the DBA course. In particular, the services provided by the pursuers to the defender were not outside the profession of the defender and were part of his professional activities. Accordingly, the defender was not a "consumer" for the purposes of determining jurisdiction. The pursuers also aver that the services provided to the defender were provided at the pursuers' university campus which is within the jurisdiction of the court.

[7] In article 5, the contract between the parties is described as a "DBA agreement". The contract is not produced. The remainder of the averments relate to the calculation of the unpaid fees for which the defender is said to be liable.

[8] As for the legal basis for the respective averments as to jurisdiction, both parties rely upon the EU Regulation No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ("the 2012 Regulation"). The pursuers rely upon article 7; the defender upon article 18(2). We will return to these in more detail.

The sheriff's judgment

[9] The sheriff was referred to a number of authorities as to the interpretation of the 2012 Regulation, the majority of which are decisions of the European Court of Justice. In paragraphs 15-24, the sheriff set out his analysis of the various authorities and the principles which he derived from them. The pursuers take no issue with the sheriff's analysis in paragraphs 17-23. The pursuers do challenge the sheriff's opinion at paragraph 24 and his

subsequent observations. In short, at paragraph 24 the sheriff concluded that if the national court found that it is not established that a contract was concluded exclusively with either a private purpose, or a trade or professional purpose, the contracting party in question must be regarded as a consumer if the trade or professional purpose is not predominant. In the sheriff's opinion, it was previously the law that a minor ("not negligible") trade purpose would remove the status as a consumer but the current state of law requires that a contract will be held to be a consumer contract so long as the trade purpose is "not predominant". His conclusion was based on an analysis of a number of authorities to which we will later refer.

[10] The sheriff went on to pose the question whether the pursuers had made sufficient averments to prove that the defender was not acting "outside his trade or profession". In the sheriff's opinion, the pursuers had not. The sheriff concluded that the pursuers' averments were irrelevant. He did so for five reasons. Firstly, looking at the matter as one of the capacity in which the defender contracted, there were no averments to show that it was anything other than in a personal capacity. The pleadings identified no employer or third party interest in the contract. The defender applied to the pursuers personally, not in any other capacity. He was not sent or sponsored by, and did not represent, any third party business, trade or profession. There were no averments that any business had an interest of any sort in whether the defender completed his studies. Secondly, the averments support a case based on personal needs for private consumption. Averments about the defender's past career did not inform his current intentions and the averments about his future career are vague. No specific or generic trade or profession was averred. Thirdly, the contract was one for provision of educational services. There was no averment about a negotiation of terms or the opportunity to do so. The defender was in a weaker bargaining position and as

such fell into the category of persons protected by the 2012 Regulation. Being an experienced businessman did not remove his consumer status. There was no averment that the terms of contract were other than imposed on the defender, or that he had any influence or negotiating power. Fourthly, the status as a consumer contract depends on all the circumstances, and particular importance is attached as to the terms of the contract and the nature of the goods or services covered. There was no averment that the pursuers had any stake, influence or even interest in the defender's trade or profession. What he did with his qualification was of no contractual relevance to either party. His services did not depend on the existence of any business and were not related to any particular business need. The averments were consistent with the defender simply educating himself. The contract was to provide education, not to assist any commercial operation, or to promote the defender's business, trade or profession. Fifthly, if a stateable case had been pled there was no basis to prefer the pursuers' case over that of the defender. The case law directs that the onus is on the pursuers to show that the trade purpose was not predominant. Article 17 of the 2012 Regulation starts from a position that if the contract "can be regarded" as outside a trade or profession then it is a consumer contract. When it is not clear whether the predominant purpose of the contract was for consumer services, or for the purposes of a trade or profession, the court must regard the contracting party as the consumer. There is no onus on the defender to prove that he is a consumer. The sheriff went on to hold that, if he were wrong as to the predominant purpose test, the pleadings were consistent with the purposes of any business being a negligible consideration under the contract.

Preliminary issue as to EU Law

[11] As will become apparent, resolution of this matter involves consideration of both the 2012 Regulation and also a number of decisions of the European Court of Justice. The action was warranted on 11 July 2019 and a notice of intention to defend lodged on 27 August 2019. The debate took place on 21 January 2020. The judgment was issued on 24 February 2020 and expenses dealt with on 16 June 2020. The appeal was marked in or about June 2020 and heard on 19 January 2021. During the above, the United Kingdom ceased to be a member of the European Union. There was a transitional period during 2020 ending at 11.00pm on 31 December 2020 and is referred to in the relevant legislation giving effect to withdrawal as the "IP completion day". We raised with parties what, if any, effect the foregoing might have upon resolution of this matter. Counsel lodged supplementary submissions for which the court is grateful.

[12] Although there were some differences between counsel as to the detail, both parties are in agreement as to the outcome. The matter is governed by the European Union Withdrawal Act 2018 ("the 2018 Act") (as amended by the European Union (Withdrawal Agreement) Act 2020); the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement") and the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) ("the 2019 Regulations"). Put shortly, Article 67(1)(a) of the Withdrawal Agreement provides that, for legal proceedings instituted before the end of the transitional period (2020), the 2012 Regulations will continue to apply (we do not consider that, as the defender argues, article 67 is limited to the application of *lis alibi pendens*). The terms of Article 67 are given effect to in UK legislation. In terms of section 3(2) of the 2018 Act, the 2012 Regulation is what is described as "retained law" and continues in force. However, the 2019 Regulations revoked the 2012 Regulation

but did so subject to certain transitional provisions set out in regulations 92 and 93A. The transitional provisions provide where a court is "seised" of proceedings before 31 December 2020 and the proceedings are not concluded before 31 December 2020 then the 2012 Regulation continues to apply. Edinburgh Sheriff Court was "seised" of these proceedings within the meaning of article 92. The proceedings were commenced well before the end of the transitional period and have not been concluded. The result is that the 2012 Regulation continues in force in relation to this appeal. As we read the 2018 Act, and in particular sections 5 and 6, in so far as interpretation of the 2012 Regulation is concerned, EU law continues to apply. A reference to the European Court of Justice is no longer available.

[13] Before turning to the (mainly written) submissions of counsel we note the following authorities to which reference was made:

1. *Benincasa* v *Dentalkit Srl* [1997] ECR I-3767;
2. *Gruber* v *BayWa AG* [2006] QB 204;
3. *Costea* v *SC Volksbank Romania SA* [2016] 1 WLR 814;
4. *Schrems* v *Facebook Ireland Limited* [2018] 1 WLR 4343;
5. *Weco Projects ApS* v *Loro Piana* [2020] EWHC 2150 (Comm);
6. Briggs, *Civil Jurisdiction and Judgments* 6th Edition, 2015;
7. Chitty on *Contracts*, (3rd Edition) 2018;
8. Hartley, *Civil Jurisdiction and Judgments in Europe* 2017.

Submissions for the pursuers

[14] The sheriff found that the contract was a consumer contract because the pursuers could not show that the predominant purpose was concerned with the defender's profession. The search for a predominant purpose is an error in law. The sheriff ought to have asked whether the connection to the defender's profession was more than negligible.

Had the sheriff asked the correct question, it would not have been possible to dismiss the action on the pleadings given what the pursuers offer to prove. The sheriff having erred the matter it is open to this court to consider the correct disposal.

[15] The parties agree that the contract between the pursuers and the defender would, ordinarily, be subject to the jurisdiction of the Scottish Courts. That is because the place of performance of the contract was in Scotland. Secondly, parties also agree that because of the terms of Article 7 of the 2012 Regulation, if the defender was acting for purposes outside his trade or profession, he is a consumer and would therefore have to be sued in the courts of his domicile, namely Germany. That is a reversal of the rule set out above. Thirdly, parties agreed that the defender's status is a question of fact, to be answered on the basis of the terms of the agreement and the circumstances of the parties, considered objectively. Fourthly, the pursuers recognise that the reason for the rule regarding consumer status is that consumers are in a weaker bargaining position relative to those with whom they contract. The purpose is therefore to protect the weaker party to the contract.

[16] In paragraph 24, the sheriff held that if the national court finds that it is not established that the contract is concluded exclusively with either a private purpose or a trade or professional purpose the contracting party in question must be regarded as a consumer if the trade or professional purpose is not predominant. The pursuers submitted that the contract could only be a consumer contract if the trade or professional aspect was "negligible". The sheriff rejected that submission upon the basis that the case of *Costea* post-dated *Gruber* and accordingly there had been a change as to the appropriate test, moving from "not negligible" to "not predominant". On this point, the pursuers submit the sheriff was in error. As to the correct test, the authorities begin with the case of *Benincasa* followed by *Gruber*. *Gruber* was analysed and followed in England in 2015 in the case of *RTA*

(Business Consultants) Ltd v *Bracewell* [2015] Bus LR 800. The leading practitioner text books on Civil Jurisdiction in EU Law (Hartley and Briggs) rely on *Gruber* for their advice on contracts with a mixed purpose. They state that the test is described as "more than negligible". Counsel submitted that the sheriff had erred in his analysis of *Costea*. The law remains as stated in *Gruber*, namely that in a contract with a mixed purpose the relevant test for whether it is a consumer contract is whether the connection to a trade or profession is "more than negligible".

[17] Returning to the record, the pursuers offer to prove a number of matters set out in article 3. The sheriff considered the pursuers' averments to be insufficient because he was applying the wrong test. The wrong test having been applied the reasoning that followed was an error. The correct analysis is that this was a contract with a mixed purpose. Whilst accepting that further education has, as part of its purpose, personal development, the connection to the defender's professional role is plain from the averments. There was no need for the sheriff to search for an employer or a third party interest. A self-employed person can undertake training as part of their professional role. The test was whether the connection to the defender's professional role was "more than negligible". It was open to the sheriff to hold that a more than negligible connection was apparent on the averments and, had he done so, the plea of no jurisdiction would have failed. It was not open to the sheriff to hold on the averments that the connection was not more than negligible. The pursuers' averments at article 3 were fit for enquiry and, taken *pro veritate*, are sufficient to show a more than negligible connection. On that basis, the plea could have been reserved for a proof before answer and not dealt with at debate.

[18] The sheriff also made the following further errors. At paragraph 28, by searching for an employer of third party interest: the absence of an employer of a third party is irrelevant.

At paragraph 29 by searching for a specific trade or profession: the thrust of the pursuers' case is that the defender's professional interests and his interest in studying for a DBA coincide. There is no need for these purposes to fall within specific trades or professions. The pursuers ought to have been given the opportunity to prove their averments. If proved, they support either the trade or professional element as being more than negligible. At paragraph 30, the issue of a weaker bargaining position is essentially irrelevant. It was never argued that the defender's status as a businessman removed his consumer status. The sheriff also erred in paragraph 31 by searching for a "stake" or "interest" in the defender's trade or profession on the part of the pursuers. At paragraph 32, the sheriff sought to prefer the pursuers' case over that of the defender. It was the defender who elected to debate the pleadings as a matter of relevancy. It was the pursuers' averments that were to be taken *pro veritate,* not those of the defender. The sheriff's formulation appears to suggest that he considered that onus lay with the pursuers (see also paragraph 15).

[19] In amplifying his written submissions, counsel for the pursuers submitted that the test set out in *Gruber* remains the correct test. Firstly, *Gruber* deals specifically with the issue of civil jurisdiction and not of consumer legislation in a substantive context. The test is set out in clear terms. The "predominant purpose" test comes from *Costea*, decided some 10 years after *Gruber*. It concerned the Distance Selling Directive and was not concerned with jurisdiction. The matter is dealt with by the Advocate General only. It was not taken up in the opinion of the European Court of Justice. *Costea* recognises the different contexts in which the definition of consumer appears. It also recognises the different bases for interpreting the concept of a consumer. The Advocate General was careful to limit himself to consumer protection. The case of *Gruber* was mentioned by the Advocate General (at paragraph 40). Subsequent cases have applied the *Gruber* test including *Schrems*. *Schrems*

goes no further than *Gruber* and postdates it. If the sheriff was correct about a shift in the test since *Costea* it is not recognised in *Schrems*. The passages referred to in *Chitt*y do not suggest that the test has changed. Counsel accepted that in *Schrems* (paragraph 38) there is a reference to predominant purpose. However it is clear the European Court of Justice did not intend to depart from *Gruber*.

[20] Paragraph 33 of *Schrems* takes *Gruber* as constituting the test. Furthermore, *Schrems* was not relied upon by the sheriff. He said it was *Costea* which indicated the move from *Gruber*. Furthermore, because the jurisdiction in relation to consumer contracts is a derogation from the general rule of domicile it should be strictly construed: that is made clear in the cases of *Benincasa* and *Gruber*. It is for the claimant who asserts that there is a consumer contract to satisfy the court on that point (paragraph 46 of *Gruber*). There ought to have been a proof on this matter: applying a predominant purpose test is a different exercise from the non-negligible test. There was more than sufficient to go to proof. So far as disposal of the appeal is concerned, the court should either repel the plea of no jurisdiction and allow parties a proof on remaining matters or, in the alternative, allow a proof before answer, leaving all pleas standing.

Submissions for the defender

[21] It was submitted that the (not negligible) test in *Gruber* (followed in the English case of *RTA (Business Consultants) Ltd v Bracewell)* is no longer the test. The correct test is that a party who enters into a contract, which is partly for business and partly for personal purposes, must be regarded as a consumer if the trade or professional purpose is not predominant. Counsel relied upon extracts from *Chitty* at paragraphs 38-036 to 38-037 which considered the question of a contract for mixed purposes. The authors took the view

that the European Court of Justice had moved its position towards a test of predominant purpose. The Consumer Directive 2011/83/EU at Recital 17 set out a test of predominant purpose. The same approach was adopted when the United Kingdom implemented the 2011 Consumer Rights Directive, as does section 2(3) of the Consumer Rights Act 2015. It was open to the court to have regard to United Kingdom legislation when interpreting the 2012 Regulation. Counsel did not accept that there was an onus upon the defender to prove that the contract was a consumer contract: to the extent that *Weco* and *Gruber* said there was, they were wrong. The sheriff was correct in setting out the test as he did then considering whether the pursuers' averments were relevant. He was also correct in holding that the pursuers had failed to make any relevant averments that, for the purposes of the contract, the defender's trade or business purpose was predominant; that there were no averments about the defender's intentions when he entered into the contract; and in holding that the averments about the defender's future career are entirely vague. The sheriff was entitled to take into account all the circumstances of the case. The sheriff did not err in holding that the contract was concluded for the purpose of satisfying the defender's own needs in terms of private consumption. Such a person is, as a matter of EU law, automatically deemed to be the weaker party (*Benincasa*). The sheriff was correct to hold that the onus was on the pursuers to show whether the trade purpose was predominant or not. The sheriff was correct in his approach and the appeal should be refused. If the appeal were to be allowed there would require to be a preliminary proof.

Decision

[22] The relevant parts of the 2012 Regulation are as follows:

> "Article 7

A person domiciled in a Member State may be sued in another Member State:
1(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
…
Article 17
1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section…

Article 18
…
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled".

[23] If a court has no jurisdiction, it cannot proceed to determine the dispute between the parties. Accordingly, as much a matter of logic as much as practice, a plea of no jurisdiction requires to be dealt with first (*McLeod* v *Tancred Arrol & Co* (1890) 17R 514). The conventional practice is for a party challenging jurisdiction to plead only to the issue of jurisdiction. If the plea of no jurisdiction was repelled, the party would then be given an opportunity to condescend upon the merits. In some cases, it may be possible to decide a plea of no jurisdiction on the basis of the pleadings, without the necessity for a proof. In other cases, a proof on that point may be necessary. In the present case both parties advance arguments as to jurisdiction: the pursuers rely upon the place of performance of the obligation in question; the defender relies upon the contract being a consumer contract. In the case of the former, the courts in Scotland have jurisdiction; in the case of the latter the courts in Germany have jurisdiction. There is a measure of agreement between parties that the present contract can be described as a "mixed contract" in the sense that it has both a consumer element and a non-consumer element.

[24] The issues here are how one determines the composition of the mixed elements and who, if anyone, has the onus of proving it. In our opinion, answering these questions requires an analysis of the four cases of *Benincasa* (1997) *Gruber* (2006), *Costea* (2016) and *Schrems* (2018). The decisions set out the approach of the European Court of Justice as to the correct application and interpretation of the 2012 Regulation. The 2012 Regulation is but the latest manifestation of various European instruments on jurisdiction, beginning with the Brussels Convention to which, in Scotland, effect was given by the Civil Jurisdiction and Judgements Act 1982. The jurisdiction instruments were amended over time and the cases to which we will refer deal with the instruments in force at the time but, for the purposes of the present case, there is no material difference in the various texts on the issues which arise in the present case. Neither party suggested that any material differences arose and none was apparent to us.

[25] *Benincasa* involved an action raised in Germany by an Italian citizen living in Germany against an Italian company; the action concerned a franchise contract which contained a clause prorogating the jurisdiction of the courts in Florence. In answer to a plea of no jurisdiction by the Italian company, the pursuer argued that the court in Munich had jurisdiction on the basis of the place of performance of the obligation in question and the fact that he was a consumer. The pursuer had purchased equipment to set up in a dental business, a business he had yet to begin. The question was whether the pursuer could be considered a consumer because his trade or profession was a future aspiration. The key passages are contained in paragraphs [13]-[18] of the opinion. Put briefly, the court held that the principal ground of jurisdiction under the Brussels Convention is one of domicile of the defender. Jurisdiction in favour of a pursuer by reason of being a consumer constitutes an

exception to that general rule. The Convention is "hostile towards the attribution of jurisdiction to the court of the plaintiff's domicile" (paragraph 14). The concept of a consumer is "strictly construed" (paragraph 16). Reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of the contract and not to the subjective situation of the person concerned. The court went on to hold that only contracts for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions which are designed to protect the consumer who is deemed economically to be the weaker party. It follows that the "specific protective rules" apply only to contracts concluded outside an independent trade or professional activity or purpose, whether present or future.

[26] As the case of *Gruber* was of significance both to the sheriff and to parties it is necessary to examine it more closely. The case involved an action brought by an Austrian farmer who bought tiles from a German company. The tiles were purchased with the purpose of re-roofing a farmhouse. The farmhouse was used partly for farming purposes and partly as a home. The tiles were said to be defective; the pursuer raised an action in Austria claiming that the contract was a consumer contract. The European Court of Justice referred with approval to *Benincasa* (paragraph 36). It went on to say:

> "39 In that regard, it is already clearly apparent from the purpose of articles 13-15, namely, properly to protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot as a manner of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.
> 40 As the Advocate General stated… in as much as a contract is entered into for the person's trade or professional purposes, he must be deemed to be on an equal footing with the other party to the contract, so that the special protection reserved by the Brussels Convention for consumers is not justified in such a case.

41 That is in no way altered by the fact that the contract at issue also has a private purpose, and it remains relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the private use is predominant, as long as the proportion of the professional usage is not negligible.
42 Accordingly, where a contract has a dual purpose, it is not necessary that the purpose of the goods or services for professional purposes be predominant for articles 13-15 of the Convention not to be applicable.
43 That interpretation is supported by the fact that the definition of the notion of consumer in the first paragraph of article 13 is worded in clearly restrictive terms, using a negative turn of phrase ("contract concluded… for a purpose… outside [the] trade or profession"). Moreover, the definition of a contract concluded by a consumer must be strictly interpreted as it constitutes a derogation from the basic rule of jurisdiction laid down in the first paragraph of article 2, and confers exceptional jurisdiction on the courts of the claimant's domicile…
45 An interpretation which denies the capacity of consumer, within the meaning of the first paragraph of article 13 of the Brussels Convention, if the link between the purpose to which the goods or services are used and the trade or profession of the person concerned is not negligible, is also that which is most consistent with the requirements of legal certainty and the requirement that a potential defendant should be able to know in advance the court before which he may be sued, which constitute the foundation of that Convention…
46 Having regard to the normal rules on the burden of proof, it is for the person wishing to rely on articles 13-15 to show that in a contract with a dual purpose the business use is only negligible, the opponent being entitled to adduce evidence to the contrary.
47 In the light of the evidence which has been submitted to it, it is therefore for the court seised to decide whether the contract was intended, to a non-negligible extent, to meet the needs of the trade or profession of the person concerned or whether, on the contrary, the business use was merely negligible. For that purpose, the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded.
…
50 If on the other hand, the objective evidence in the file is not sufficient to demonstrate that the supply in respect to which a contract with a dual purpose was concluded had a non-negligible business purpose, that contract should, in principle, be regarded as having been concluded by a consumer within the meaning of articles 13-15, in order not to deprive those provisions of their effectiveness.
…
54 In the light of all the foregoing considerations, the answer to the first three questions must be that the rules of jurisdiction laid down by the Brussels Convention are to be interpreted as follows:
(i) a person who concludes a contract relating to goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in articles 13-15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;

(ii) it is for the court seised to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, [the] needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;
(iii) to that end, that court must take account of all the relevant factual evidence objectively contained in the file…"

[27] Three key principles can be extracted from the passages referred to above. Firstly, what we may describe as the consumer jurisdiction in Section 4 of the 2012 Regulation is a derogation from the general rule that a party should be sued in the courts of their domicile and, as such, "consumer contract" must be strictly construed. Secondly, in the case of a mixed contract, namely where there is both private use and use as part of a trade or profession, so long as the trade or professional aspect is negligible or marginal then the contract is a consumer contract. Thirdly, the burden of proof rests with the party invoking the consumer jurisdiction: the opponent having the right to lead evidence to the contrary.

[28] The case of *Schrems* was referred to by the pursuers but it does not appear to have been cited to the sheriff – it is not referred to in his judgement. Chronologically, it is the most recent of the authorities dealing specifically with the jurisdiction issue. The matter involved a claim by a person domiciled in Austria against a defendant (Facebook) domiciled in Ireland. It was accepted that when he began use of the online social network Facebook the claimant did so for solely private purposes. However, with the passage of time he began to pursue a number of claims against the defendant for alleged data protection infringements; he also began to publish books and engage in lectures and media appearances on the subject of data protection and other cognate matters. He set up an organisation to advance his views. In answer to the claim, the defendant argued that the proceedings against it could not be based upon a consumer contract (another issue, not relevant to this matter, was whether there was more than one contract). Put broadly, one of

the arguments was whether a party could lose the status of consumer over the passage of time. In our opinion, it is important to note that in its opinion, the European Court of Justice endorsed the three principles which we have set out above and referred, with approval, to the cases of *Benincasa* and *Gruber* (paragraphs 29-33). That is particularly so, at paragraph 32, where it endorsed the "negligible role" test. The problem comes in relation to paragraph 38 in which the court said as follows:

> "38 This interpretation implies, in particular, that a user of such services may, in bringing an action, rely on his status as a consumer only if the predominantly non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominantly professional".

[29] It is difficult to reconcile that statement with paragraph 32, which endorses the *Gruber* tests. There is nothing in the opinion of the court nor, for that matter in the opinion of the Advocate General, which would suggest an intention to depart from the *Gruber* test (see in particular paragraph 34 of the Advocate General's opinion). Had there been an intention to depart from the tests set out in the earlier cases we would have expected an express statement to that effect and an explanation as to why that was appropriate. Instead, there is an express affirmation of the existing orthodoxy contained in *Benincasa* and *Gruber*. It would be difficult to uphold orthodoxy whilst in the same opinion to depart from it. It may be said that the apparent dissonance is explicable because it arises out of two different scenarios. The *Gruber* case involved an analysis of the contract at the time at which it was entered into; there was no professional usage at that point. In the second case, the contract undoubtedly began as a consumer contract and it was only with the passage of time, and the activities of the claimant, that a professional or trade purpose emerged. The court held that it was legitimate to take into account the change of circumstances (paragraph 42 of the Advocate General's opinion – "the status of one of the parties may shift over time"). Put

another way, the party who had the status of having entered into a consumer contract at the beginning of the contract should only lose that status where the professional or trade use becomes, at a later point, predominant.

[30] The last case is that of *Costea*. Firstly, as counsel for the pursuers submitted, this case did not deal with the definition of consumer in the context of jurisdiction, rather, it related to a claim brought in terms of the Unfair Contract Terms Directive. Consumer in the context of jurisdiction is strictly construed because it is a departure from what should be the norm, namely the domicile of the defender. The same constraints do not apply to the definition of consumer in the context of substantive law of which *Costea* is a good example. Secondly, although the opinion of the Advocate General is of some length, the opinion of the European Court of Justice is relatively short. The question in that case is whether a lawyer who concluded a credit agreement concerning himself with a bank could be considered to be a consumer. The court held that the lawyer could be held to be a consumer, where the agreement was not linked to his profession. It is of note that at paragraph 18, the Advocate General explained that the notion of consumer is not defined uniformly throughout the various legal instruments of the European Union but he described it as a "working, dynamic notion" which is defined by reference to the subject matter of the legislative act concerned. The Advocate General also noted that the approach in *Gruber* was very different to the definition of consumer in the Directive under consideration. There is nothing in the opinion of the Court of Justice which seems to us to be relevant to the present case. Its focus was clearly upon the interpretation of the Unfair Contract Terms Directive.

[31] We were also referred to the case of *Weco Projects* (2020). No reference to that case was made in submissions before the sheriff. That case is a decision of the High Court of Justice in England. It involved the application of Article 18(2). It is sufficient for us to say

that, in cases involving mixed contracts, the court considered that the test (post *Schrem*) as to jurisdiction remains as set down in *Gruber* namely whether business use was negligible and that the burden of establishing this lies on the party claiming to be a consumer.

[32] Two of the textbooks to which we were referred (Hartley and Briggs) both predate the decision in *Schrem*s. Both state the law as being as set out in *Gruber*. In relation to *Chitt*y, the text takes into account *Schrems* but describes the position of the European Court of Justice on the question of mixed purpose contracts as being "uncertain" (paragraph 38-037). That conclusion is reached because of the passages in *Schrems* referred to above. Counsel for the defender submitted that *Schrems* appeared to represent the beginning of a "movement" towards a test of predominance. We do not accept that the passages in *Schrems* referred to justify that conclusion. We must apply the law as we understand it to be. Counsel for the defender also, at one stage, suggested that it would be open to us to take into account United Kingdom legislation concerning the definition of consumer for the purposes of interpreting the 2012 Regulation. We do not agree. It has long been held that the definition of consumer in European legislation has an autonomous European wide meaning and is neither interpreted nor defined by reference to national law.

[33] Having regard to the foregoing we have reached the conclusion that in dismissing the action the sheriff has erred. The principal difficulty is the sheriff held that there is no onus upon the defender to establish that he is a consumer (paragraph 23). The sheriff approached the issue from the perspective of the adequacy of the pursuers' averments (paragraph 25). From the authorities referred to above it is clear that there is an onus on a party invoking the special jurisdiction as a consumer to establish that status. In this case that party is the defender. It also follows from the authorities that the pursuers had an opportunity to respond to any material submitted by the defender. It is therefore not correct

to approach the issue with regard to the adequacy of the pursuers' averments. The case of *de Grote* to which the sheriff was referred (paragraph 23 – we were not referred to it) is not relevant because it involved the interpretation of a Directive, not concerned with jurisdiction, but a very different issue as to whether the court had an obligation to have regard to substantive consumer legislation in the case of an undefended decree. The sheriff appears not to have been referred directly to *Gruber* nor to *Schrems*. Had he been referred to them he might well have reached a different view. For the reasons we have given we do not consider the case of *Costea* to be of assistance, particularly in view of the limited scope of the judgment of the European Court of Justice. Although we accept that the matter is not free from doubt, on balance, having regard to weight of authority, we are of the view that the correct test in this matter remains the non-negligible test and not the predominant purpose test. Accordingly, it follows that in applying the latter and not the former the sheriff was in error.

[34] Accordingly, it follows that the appeal will be allowed and the interlocutor of the sheriff recalled. Given our conclusion as to onus and the right of reply, in our opinion, the most appropriate disposal would be a preliminary proof on the defender's first plea in law. Expenses will follow success.