OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN delivered on 23 October 1984

My Lords,

Article 16 (1) of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters provides that 'in proceedings which have as their object rights in, or tenancies of, immovable property' the Courts of the Contracting State in which the property is situated shall have exclusive jurisdiction regardless of domicile. Article 19 requires the Court of any other Contracting State which is seized of a claim which is principally concerned with such a matter to declare of its own motion that it has no jurisdiction.

Mr Rottwinkel and Mr Rösler both live in Germany.

By a contract dated 19 January 1980, Mr Rottwinkel let to Mr Rösler for three weeks from 12 July 1980 certain parts of a holiday villa in Italy which was furnished though not provided with linen. Mr Rösler undertook to pay a rent of DM 2625 for four persons to stay at the house, it being agreed that visitors were not permitted to stay overnight. In addition Mr Rösler undertook to pay charges of DM 295 and a final charge for cleaning at the end of the letting together with the costs of gas, water, electricity and heating. It was stipulated that Mr Rösler should comply with the agent's instructions, use the property and the furnishings carefully and pay the costs of any damage. German law was declared to be the law governing the contract, which was executed in Bielefeld whose courts were chosen as having jurisdiction.

Mr Rottwinkel stayed in the house for his holiday at the same time as Mr Rösler. As a result of what he alleges happened, Mr Rottwinkel brought an action in the Landgericht, Berlin, claiming that the terms of the lease had been broken in that more than four people stayed in the property, causing a great deal of noise. They also proved too much for the cesspool which overran causing a nuisance. In the result, Mr Rottwinkel's own holiday was spoiled and he claims that the cost of it is recoverable as damages for breach of the agreement. Secondly, Mr Rottwinkel alleges that some articles were damaged or missing at the end of the period of the letting and thirdly, he claims under the terms of the lease, monies due for gas, electricity, water and for the cleaning of the property.

The Landgericht considered that the action could only be brought in Italy because of the provisions of Article 16 of the Convention; the Kammergericht took the opposite view; on appeal by way of revision, the Bundesgerichtshof was inclined to think that proceedings could be brought in Germany, but asks two questions of this Court pursuant to the Protocol of 3 June 1971 on the interpretation of the Convention by the Court of Justice:

'(1) Is Article 16 (1) of the Convention applicable if a lease concluded between persons resident in the Federal Republic of Germany is for the short

letting only of a holiday home located in Italy and the parties to the lease have agreed that German law is to apply?

(2) If Article 16 (1) is applicable, does it also apply to actions for damages for breach of the lease, particularly for compensation for lost holiday enjoyment and for the recovery of supplementary costs payable under the lease?'

At first sight it might seem astonishing that such a dispute as exists here could not be litigated in the Federal Republic; the varying reasons suggested by the parties why it is not caught by Article 16, however, only serve to show that on the present wording of the Article, the question is not so simple.

The German Government and the Commission support the plaintiff in the main action in saying that as a matter of interpretation Article 16 (1) does not apply to short holiday lets at all. In the alternative, the German Government contends that, if Article 16 does cover such lettings, it only covers claims for damage to the property let and does not include claims for personal inconvenience suffered as the result of a breach of the contract, nor does it cover a claim for letting charges. The Commission argues, again in the alternative, that, if such lettings do fall within Article 16 (1), the only litigation which must go before the court of the situs of the land is that which directly concerns the lettings, such as questions as to the existence or termination of the lease, or defects in or damage to the property let, but does not include claims for damages for loss of a holiday or for supplementary charges.

On the other hand the United Kingdom Government and the Italian Government consider that it is not possible to distinguish tenancies by their length or purpose; they accept that, as a matter of interpretation, short-term holiday lettings do fall within Article 16.

To avoid the result for which the defendant contends, the United Kingdom Government, however, says that the proper course is to consider not the type of lease but the type of proceedings. The only proceedings covered by Article 16 are those which concern the determination, enforcement, or giving effect to, or the termination of, rights of possession. In this case it is said that the claims are like other claims for damages for breach of contract or for a debt, and bear little direct relationship to the property let. The proper administration of justice does not require that they should be exclusively the province of the courts of the situs.

The Italian Government considers that once it is accepted that short holiday lettings do fall within the Article, claims for charges, even supplementary charges, included in the terms of the lease, fall within Article 16, though it is recognized that a claim for damages for loss of a holiday may be outside the Article.

Although it is clear that Article 16 is a mandatory rule (Case 288/82 *Duijnstee* v *Goderbauer*, 15 November 1983, paragraph 15) the Court has already held that, since it deprives the parties of the choice of forum which would otherwise be theirs, and may even require them to litigate in a court which is not that of the domicile of any of them, its provisions 'must not be given a wider interpretation than is required by their objective'. (See Case 73/77 *Sanders* v *van der Putte* [1977] ECR 2383, where the Court held that Article 16 (1) must not be interpreted as including an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented from a third person by the lessor.)

In the Jenard report on the Convention, the explanation given for adopting an exclusivity rule in relation to disputes regarding immovable property is, partly, that in Germany and Italy the exclusive jurisdiction of the courts of the situs is regarded as a matter of public policy, so that rulings by other courts would neither be recognized nor enforced there, and partly that the interests of the proper administration of justice were thought to be better served by adopting such a rule. The fact that checks and expert enquiries might have to be carried out on the spot, entries have to be made in land registries, and special customary rules be applicable, it was said, makes it much more convenient for the court of the situs to be seized of the case. Tenancies of immovable property in particular are 'usually governed by special legislation' which should preferably be administered only by the courts of the country where it is in force. Moreover 'several States' provide for exclusive jurisdiction in such proceedings. The Committee, therefore, intended Article 16 to 'cover disputes between landlord and tenant over the existence or interpretation of tenancy agreements, compensation for damage caused by the tenant, eviction etc.' but not claims for rent of the property leased.

That difficulties might arise in cases of short lettings or involving claims for damages arising from obligations included in tenancy agreements was recognized by the time that the accession of Denmark, Ireland and the United Kingdom to the Convention was being considered. However, a majority of Member States, it is said, opposed a proposal put forward by the United Kingdom that the Article should be altered so that jurisdiction was not exclusive where litigation involved personal obligations contained in tenancies of immovable property, or where agreements granted a right of possession for a limited period, as where holiday accommodation was the subject matter of a letting. Professor Schlosser's report, on the questions arising on the accession of the three new Member States, shows that the Committee considering the question was not of the same view as the Jenard report as to whether claims for rent were within Article 16 (1). It does, however, state that 'the underlying principle of the provision quite clearly does not require its application to short-term agreements for use and occupation such as, for example, holiday accommodation'.

It seems that in many Member States rules of social policy adopted in respect of lettings or accommodation (such as fair rents, periods of notice, supervision by

special tribunals) do not apply to short lettings of holiday accommodation. Since special rules and registers may not exist in respect of such lettings and detailed site inspections may not be needed, it can be said, also, that the administration of justice does not necessarily require that such lettings be dealt with by the courts of the country where the property is situated.

Moreover, the convenience of the parties may not necessarily be best served by requiring that the courts of the situs should have exclusive jurisdiction in repect of short holiday lettings, if both parties live in another country. To this extent the principles which generally led the Committee to propose exclusive jurisdiction for disputes as to tenancies of immovable property and rights *in rem* do not seem to apply to short holiday lettings.

On the other hand, it is clear that the intention, when the Convention was made, was not to confer exclusive jurisdiction in respect of disputes as to rights *in rem,* or tenancies of immovable property, only for those countries which recognized exclusive jurisdiction as a matter of public order, nor for those countries which have special legislation dealing with the kind of tenancies in question. The rule adopted was to be uniformly applied; it was not to depend on whether the administration of justice in any particular case required that the courts of the situs should have exclusive jurisdiction. Nor does it seem to me that the question was to depend in each case on an assessment of the convenience of the parties, nor an assessment of the risk that injustice might arise in exceptional cases because of the distance of the parties from the courts of the situs and the consequent difficulty and cost of litigation.

The Commission, though in the end supporting the plaintiffs in the main action, clearly recognizes the difficulties of creating exceptions to the general words used in the Article. The Commission considers, however, that, since the Member States were not able to agree which leases and claims were covered by Article 16 (1), the uncertainty must be removed. It proposes as a guide that the purpose of Article 16 is to protect a specific group of persons, namely tenants of immovable property for whom such property forms an essential part of their livelihood and accordingly, that the letting of accommodation for consideration, particularly furnished holiday accommodation, does not fall within the scope of Article 16 (1).

There seems to me very great force in the arguments that short holiday lettings of furnished property should not be the exclusive province of the courts of the situs, particularly if both parties reside in another country, though in some cases even if only one of them does so. The question, however, is not what the Member States could have agreed but what they did agree.

It is possible on a fair reading of the Article to say that some tenancies, in this case short holiday lettings, are excluded?

The Jenard Report says that the Article 'will include tenancies of dwellings and of premises for professional or commercial use, and agricultural holdings'.

It does not seem to me possible to adopt a clear-cut distinction between tenancies of furnished and tenancies of unfurnished accommodation. Both are of immovable property and usually primarily of immovable property. Nor do I think that the suggested test as to whether a letting is an essential part of a tenant's livelihood is an acceptable one for the purpose of introducing exceptions to the Article. I cannot see as a matter of interpretation of the Article any justification for saying that holiday lettings are excluded, but only holiday lettings. There is no real difference between a short letting to a man on holiday or to one attending a conference or undertaking a short course of study.

Nor does it seem to me that on the present Article there can be fairly read in a distinction between 'short lettings' and 'long lettings', whatever 'short' may mean in this context.

If it were possible to distinguish between a tenancy properly understood and an agreement which only grants a licence to use and occupy property, which is not itself a tenancy, then there would of course be no difficulty about categorizing holiday accommodation agreements as being such licences.

However, if, as the Schlosser Report considered, rights *in rem* have to be defined by the law of the situs, then equally it would seem that what is a tenancy must be decided by the law of the situs (paragraph 168). In the present case it seems that no distinction is drawn in German law between a tenancy and such a licence. The agreement has to be treated as a tenancy and the question proceeds on the basis that there is a tenancy or lease of the accommodation.

Conversely, if 'tenancy' has to be defined as a matter of Community law, it seems difficult to introduce as a matter of interpretation and without clearly expressed words, such a distinction between a licence (which is outside Article 16) and a tenancy, when such a distinction may not exist in the law of several Member States.

Moreover, it is clearly not possible in my view to create an exception, for the purposes of Article 16, by reason of the fact that both parties to the contract were resident or domiciled in a Member State other than that of the situs, that they have specified the forum as being in their own country or specifically agreed that a particular system of law is to govern the contract. Those matters do not seem to me in any way to affect the question as to whether the courts of the situs have exclusive jurisdiction.

In my view, the wording of the Article requires clearly that the first question must be answered in the affirmative.

As to the second question, it is to be noted that exclusive jurisdiction is granted 'in proceedings which have as their object tenancies of immovable property' (in French 'de baux d'immeubles'; in Italian 'di contratti di affitto d'immobili'; in German 'die Miete oder Pacht von unbeweglichen Sachen'). The other language versions seem to indicate that what is covered is litigation the subject matter (rather than 'the object') of which is a tenancy agreement of immovable property rather than one which concerns simply the immovable property itself. In *Sanders* v *van der Putte*, the Court recognized this when adopting some of the examples of disputes given in the Jenard Report as falling within Article 16 — 'in

particular, disputes between lessors and tenants as to the existence or interpretation of leases or to compensation for damage caused by the tenant and to giving up possession of the premises'. Accordingly it seems to me that the argument of the United Kingdom that Article 16 (1) does not apply to actions for damages for breach of the lease, but only to proceedings whose objective is 'the determination, enforcement or giving effect to, or the termination of, rights of possession' is too narrow.

I consider that the answer to the first part of the second question is, therefore, that actions for damages for breach of a term of a tenancy agreement can fall within Article 16.

The second part of the second question, dealing with claims for lost holiday enjoyment and the recovery of supplementary costs payable under the lease, raises, however, the more difficult issue as to whether distinctions are to be drawn between different claims for breaches of a tenancy agreement or for monies due under a tenancy agreement.

I read the reference as making it quite clear that the complaints made about the overcrowding, the cesspool and the noise, which it is said spoiled the claimant's holiday, are claims for breach of the lease and not otherwise. If the claim had been put on a basis that the applicant was simply a neighbouring user, not relying on the terms of the lease, then clearly the matter would not fall within Article 16 but that is not the case.

If my reading is correct, it seems to me that the arguments have concentrated too much on the type of damage claimed. It is not in my view possible simply to dismiss the question in issue by saying that the loss of a good holiday and the waste of travel costs by the landlord are so far removed from immovable property that they cannot be within Article 16. What matters, as I see it, is the nature of the breach alleged rather than the damage caused, some of which in the present case may in any event be too remote.

Here two breaches are alleged. The first is a breach of a clause as to the nature of the user of the property (the number of people to be admitted), the second, breach of a clause as to the care to be exercised in the use of the property referred to in the lease.

In my opinion it is not possible to say that proceedings alleging a breach of a clause in a lease specifying the user of immovable property are always outside Article 16. If a house is let as a dwelling, but used as a shop or a factory, or land is let for grazing which is used for arable purposes, proceedings alleging breach of the user clause in the tenancy would in my view be within Article 16 (1) and the courts of the situs would have exclusive jurisdiction. A distinction could be drawn between that kind of qualitative breach of user and the quantitative breach of user alleged here,

namely using the premises for more people than agreed. For my part, I would not introduce that distinction, firstly, because I do not think that there is a real distinction of principle and, secondly, because it seems to me undesirable to encourage distinctions to be drawn, through litigation, between different breaches of different user clauses.

If, here, as I understand it, the damage claimed under this head results wholly or primarily from the breach of user clause, I consider the proceedings to be within Article 16 of the Convention to that extent.

The second head of damages relates to the loss of or damage to property. If the damage is said to have been done to the immovable property, in breach of a term of the lease, the proceedings to that extent fall within Article 16. If the items lost or damaged are chattels provided with the immovable property under the lease the position is more difficult.

It is tempting, in the modest circumstances of this case, to construe Article 16 as being limited to claims for damages to the immovable property, and to accept that claims for damages to the movable property can be litigated elsewhere. If one were drafting a convention *de novo* there might be arguments for so providing. Such a result would be more convenient where both parties live in the same Member State but one different from that where the land is situated. It has, however, to be borne in mind that such a combination of facts may be less usual than where the owner lives in the same country as the property let. It is also important to bear in mind that claims for damages to property may arise in all types of letting and the issues involved may be more complex than in the present case. A tenancy, not only for residential but also for business, professional and agricultural uses, may well include the provision of movable chattels in respect of which specific obligations are set out in the tenancy agreement. Damage to expensive movable equipment included in a business or agricultural lease may be more conveniently dealt with in the courts of the situs of the immovable property.

On balance, it is my view that if a tenancy of immovable property provides for the supply and use of movables as a part of the letting, then the tenancy should be treated as one legal transaction, and as falling within Article 16 (1). It seems to me wrong to divide up the terms of the agreement between those concerned with immovables and those concerned with movables so long as the agreement provides for the letting of immovable property. It is artificial, for example, in a case like the present to say that a claim for damage to a door or a fixed bath falls within Article 16 (1) but that a claim for damage to a chair provided for use in the property falls outside it.

That leaves the claim for the supplementary charges. The argument that they fall outside Article 16 is based partly on the views of the Jenard Committee (though not the Schlosser Committee) that a claim for rent falls outside Article 16 (1). Whether that view is correct has not been fully argued, and since it may one day fall for decision,

it is perhaps undesirable to express a concluded view about it. On what has been argued in this case, I find it very difficult to accept that the Jenard Committee view is right on the present wording of Article 16 (1). Just as the primary obligation of the landlord is to make available the property, the primary obligation of the tenant is usually to pay the rent. Most disputes as to immovable property probably concern rent. To exclude rent disputes from Article 16 (1) would seem to take away much of its content. I find it difficult to accept that consequence when it is remembered that a primary reason for adopting Article 16 (1) was that special legislation in several Member States deals with the letting of immovable property, and that one of the most important aspects of that legislation usually concerns rents. Proceedings involving a dispute as to the liability for rent or for unpaid rent due under an agreement seem to me, on the arguments advanced here, essentially to have as their subject matter a tenancy of immovable property. In this respect I find persuasive a number of the comments made by Dr Droz in 'Compétence Judiciaire et effets des jugements dans le Marché Commun' Vol. XIII *Bibliothèque de droit international privé* at p. 101-103 and, in particular, para. 153.

It is, of course, possible to distinguish rent from other charges for such matters as gas, electricity and heating and for cleaning the premises, on the basis that these are not part of the property let but are provided for, or in respect of, the property. If these goods and services are provided as an integral part of the letting, I would again not draw a distinction between them. To introduce refinements between what proceedings concerning the different terms of the lease are within, and what are without, Article 16 (1) seems to me likely to increase and complicate rather than aid the solution of disputes. In such a case a dispute as to one overall rent for furnished accommodation, where the tenant holds back some rent because the furniture was not adequate, would lead to arguments as to which part of the rent fell within Article 16 (1); a claim for cleaning charges could lead to a dispute as to whether the part withheld related to the cleaning of the walls and floor or the brushing of the carpets and furniture.

Although fully conscious of the inconvenience in a small case of the conclusion I have reached as to the interpretation of Article 16 (1), it seems to me that such a result flows from a proper reading of the text, not least since the Member States were not able to reach agreement, at a later stage, that specific exceptions should be introduced in respect of what are called personal obligations or in respect of specific types of letting. The conclusion I have reached also, to my mind, produces a more consistent result overall.

I would accordingly read Article 16 as including all proceedings in respect of

tenancies of immovable property albeit those proceedings include or involve claims in respect of movable property included in the letting of immovable property, or charges relating to the use of that property.

It is of course possible that some claims for damages arising out of the use of the property may well fall outside Article 16 (1) as not arising under the tenancy agreement itself but under the general law, for example, of nuisance, negligence or malicious damage. In which case they are outside the Article because they are not part of the tenancy agreement. It does not, however, follow that, because claims under the lease are analogous to other claims under the general law of obligations, they cease to be within Article 16 (1) automatically for that reason.

It is also to be borne in mind that by virtue of Article 19 of the Convention a court faced with a claim involving a tenancy agreement is not bound to reject jurisdiction if that claim is not the principal claim in the proceedings, or, as the Jenard report puts it at p. 39, 'If an issue which comes within the exclusive jurisdiction of another court is raised only as a preliminary or incidental matter'. It might thus be that in a situation where a package holiday was arranged through a travel agent which included air transport and the use of furnished accommodation that the dispute as to the accommodation might only be an incidental part of the dispute. In such a situation a court would be entitled to rely upon Article 19 of the Convention.

The difficulties revealed by this case may lead the Member States, parties to the Convention, to reconsider whether it would not be desirable to make specific exceptions, e.g. for holiday lettings or other defined categories, to the provisions of Article 16 (1). That is not, however, a matter for the Court.

On the present Article, it seems to me that the questions put should be answered on the following lines:

(a) Article 16 (1) of the Convention of Brussels 1968 is applicable to a tenancy agreement concluded between persons resident in one Member State for the short letting of a holiday home located in another Member State, even if those persons have agreed that the law of their State of residence is to govern the tenancy agreement.

(b) Article 16 (1) applies to proceedings in which claims (i) for damages for breach of such a tenancy agreement and (ii) for the recovery of supplementary costs payable under the tenancy agreement are made.

The costs of the parties to the main proceedings fall to be dealt with by the national court. No order should be made as to the costs of the Federal Republic of Germany and of the United Kingdom and of the Commission.