OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 28 October 1987

My Lords,

Firma SAR Schotte GmbH ('Schotte') whose registered office is in the Federal Republic of Germany claims in the German courts from Parfums Rothschild SARL ('French Rothschild') whose registered office is in France, DM 55 507.04 as the price of atomizer pumps and caps for perfume containers sold and delivered to French Rothschild. The latter disputes the jurisdiction of the German courts since it is domiciled in France. Schotte relies on Article 5 (5) of the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which provides that:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

... as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated'.

The Landgericht (Regional Court) Düsseldorf held that it had no jurisdiction to hear the claim since Article 5 (5) of the Convention was not applicable. On appeal the Oberlandesgericht, Düsseldorf (which appeared more sympathetic to the claim that the German courts had jurisdiction) referred to this Court the question:

'Does the jurisdiction conferred by Article 5 (5) of the Convention in regard to a branch, agency or other establishment extend to the case where a legal entity recognized by French law (a "société à responsabilité limitée"), whose registered office is in Paris, maintains no dependent establishment in another Contracting State (in this case, the Federal Republic of Germany) but where there is in that other Contracting State an independent legal entity recognized by German law (a "Gesellschaft mit beschränkter Haftung") which has the same name and identical management, which negotiates and conducts business in the name of the French legal entity and which is used by the latter as an extension of itself?'

In the reference it is found that Rothschild GmbH, Düsseldorf, ('German Rothschild') conducted negotiations with Schotte in 1981 and 1982 for the manufacture and delivery of the atomizers. 'After the plaintiff's negotiations with Rothschild GmbH had come to a successful conclusion', French Rothschild placed orders with Schotte for the supply of different types of atomizers, delivery to be to Puteaux, France, where the containers were filled with perfume. Accounts were delivered by Schotte to French Rothschild in accordance with the agreement between them.

French Rothschild contended that it was a wholly-owned subsidiary of German Rothschild, both, it seems, formed in 1981. This is not found as a fact by the referring court but the claim has not been challenged. At any rate, at the material times the two Rothschild companies had one common director, a Mr Vehling; they also each had one other director, Mr Rothschild for the German company and Mrs Rodaks for the French company, though her domicile, like that of Mr Vehling, is said to be in the Federal Republic of Germany.

In 1983, German Rothschild complained to Schotte that it had received numerous complaints from customers that the atomizers were inefficient. Extensive correspondence followed between Schotte and German Rothschild on the latter's headed writing-paper though 'signed by one of the defendant's two directors'. Correspondence before the conclusion of each individual contract was apparently similarly conducted on German company headed paper, though similarly signed. Whether the common director signed and, if so, whether he signed on behalf of French or German Rothschild is not clear.

When sued, German Rothschild denied liability — it seems on the basis that it was not the contracting party ('disputed its capacity to be sued'). Hence the present proceedings were begun against French Rothschild.

It is clear that French Rothschild can only be sued in the Federal Republic under Article 5 (5) firstly if German Rothschild is 'a branch, agency or other establishment' of French Rothschild and (if it is), secondly, if the dispute with Schotte arises 'out of the operations of' German Rothschild.

The Court has considered the meaning of 'a branch, agency or other establishment'. In Case 14/76 *De Bloos* v *Bouyer* [1976] ECR 1497, at p. 1510, it ruled that 'one of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body' and that the concept of 'establishment' must be based on the same essential characteristics. 'Establishment' must, it seems, be read *ejusdem generis* branch and agency. In Case 33/78 *Somafer* v *Saar-Ferngas* [1978] ECR 2183, at p. 2193, it stressed that, since Article 5 (5) derogated from the principle of jurisdiction contained in Article 2 of the Convention, its interpretation must 'show without difficulty the special link justifying such derogation'. There must be material signs enabling the local entity to be easily recognized and a connection 'between the local entity and the claim directed against the parent body established in another Contracting State'. 'The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent

body but may transact business at the place of business constituting the extension'.

In Case 139/80 *Blanckaert & Willems* v *Trost* [1981] ECR 819, at p. 829, it was ruled that an independent commercial agent, free to arrange his own time, and who 'merely transmits orders to the parent undertaking without being involved in either their terms or their execution' does not have the character of a branch, agency or other establishment.

Article 5 (5) is beneficial to plaintiffs in that it enables them to sue in the State where a defendant has a branch with which the plaintiff has conducted business, rather than in the State of domicile of the defendant. It is beneficial to defendants in that it confers jurisdiction only where there is a branch, agency or other establishment; jurisdiction is not conferred where there is merely a temporary presence or some connection with the State in which it is desired to bring proceedings more tenuous than the existence of a branch.

A branch (as equally I understand to be a 'succursale' and a 'Zweigniederlassung') is as I see it an outpost of the main business (be it owned by a company or an individual) carrying out the affairs of the main business for the latter's benefit on a continuing basis and subject to the control of the main business. 'Agency' and 'establishment' I read in very much the same sense as indicating a place of business subsidiary to the business of the main business, though 'establishment' may be somewhat wider than 'branch'. I do not read 'agency' as covering simply the place where an agent acts for a principal.

As a matter of ordinary usage, 'branch' normally connotes, it seems to me, a place belonging to the proprietor of a larger business. If these words in Article 5 (5) are taken literally, it can be said that the branch, agency or establishment must be in law and in fact the property of the owner of the main business. *Per contra*, if the place of business in question belongs to another, it cannot be said that the place of business is the branch of the proprietor of the main business, even if that other may be his agent, representative or business partner.

Such a result would give the maximum protection to potential defendants and constitute the more restrictive interpretation of Article 5 (5), thus making the least inroad into the principle enshrined in Article 2. It is an attractive result in that it is relatively simple to operate.

However, the position of plaintiffs must also be taken into account. If proprietors of a business set up in one State can avoid having what is technically their branch, agency or establishment in another Member State by creating a company there as, in fact if not in law, a complete *alter ego*, it can be said with no less force that the object of Article 5 (5) is frustrated. The person dealing through that other company with the main business is deprived of the right to sue, which he would have had if an office or other establishment had been opened by the main proprietor as his own property and in his own name. Yet the position of the two in reality is very similar.

Since it seems to me that Article 5 (5) was drafted with the interests of both plaintiffs and defendants in mind, these divergent interests have, if possible, to be reconciled.

In *Somafer* the Court saw two elements as being necessary to create a branch, agency or other establishment — first, there must be a place of business with an appearance of permanency and a management which is equipped to conduct business (thus protecting defendants from suit as a result of transient or temporary presence) and, secondly, there must be awareness on the part of third parties that they do not have to deal directly with the parent body but may transact business at the place constituting the extension.

In the ordinary way it seems to me that this second test will normally be satisfied where the branch or other establishment is owned by (and perhaps bears the name of) the proprietor of the main business. On the other hand, if the proprietor causes another person or company to act in such a way that third parties are led to believe that they may deal with that other person or company as an extension or outpost of the proprietor, 'knowing that there will if necessary be a legal link with the parent body', then it seems to me that the place of business of that other person or company is capable of being a branch, agency or other establishment of the proprietor with whom the contract is made, who may be sued pursuant to Article 5 (5) in the State where that place of business is to be found.

This kind of situation may well arise where a company sets up for whatever reason a wholly-owned subsidiary in another Contracting State. I do not, however, consider that the concept of 'branch' or 'establishment' is to be looked at in terms of formal company structure or shareholding. It depends on whether the owner of the main business has held out the place of business of the other company to be a place at which third parties can deal with the owner of the main business, and third parties have relied on that.

This could readily happen not only with a wholly-owned subsidiary but also with an associated company; it could happen, though no doubt more rarely, where the parent company dealt on behalf of the subsidiary (as, for example, where they were principally engaged in the production of different items, each dealing for the other to a small degree in respect of the other's major product). If the test is 'holding out' rather than 'shareholding' there is nothing unduly disturbing about such a consequence. The principle cannot, however, be limited to the situation where companies are involved. It must be capable of applying, if it applies at all, to individuals; the degree of factual control of one proprietor over an individual may indeed be no less than that exercised by a parent over a wholly-owned subsidiary.

This test is not lightly satisfied. There must be 'material signs enabling the existence of the branch . . . to be easily recognized' (*Somafer*, p. 2193). It must 'appear to third parties as an easily discernable extension of the parent body' (*Blanckaert*, p. 829). It is obviously more difficult for a national court to resolve this question than mere legal

ownership of the place of business, but it is not an impossible task. The national court has to decide on the facts whether there is such a holding out and whether it was relied on by the other contracting party. It will be relevant to take into account such matters as identity of name and management, the way in which the business is conducted, the degree of control exercised, whether one acts for the benefit and on behalf of the other, the way in which the alleged main business and branch recognize each other *vis-à-vis* third parties.

Despite the force and attraction of the contrary arguments (which unfortunately have not been developed before the Court) in favour of adopting the more limited view that the status of a 'branch, agency or other establishment' depends on ownership, I would accordingly take the view that if a place of business in one Member State is treated by the owner of a business who is domiciled in another Member State as if it were an integral part of his business under his direction and control, and is clearly seen to be so treated by third parties, then that place of business is capable of being a branch, agency or other establishment for the purposes of Article 5 (5) even if it is owned and managed by another person or company. This seems to me not to be in conflict with, indeed to be closer in principle to, the statement in the Jenard Report that 'adoption of the "special" rules of jurisdiction is also justified by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it'.

French Rothschild's second argument is that the dispute does not arise out of 'the operations' of German Rothschild since the contracts at issue were concluded exclusively with French Rothschild. The referring court does not seek a preliminary ruling on this question but quotes *Somafer* to the effect that 'operations' include actions 'relating to undertakings which have been entered into at the abovementioned place of business in the name of the parent body and which must be performed in the Contracting State where the place of business is established'.

Since a ruling is not requested on it, it is perhaps better not to deal with the question. In case the Court takes the other view I comment briefly.

The concept of 'a dispute arising out of the operations of' a branch, etc. has not been investigated, save in *Somafer*. The words used in the judgment appear to indicate that the contractual undertaking must have been entered into at the branch in the name of the parent company. That would seem to exclude a case where the branch conducts all the negotiations but the final contract is signed by the parent company. But for that passage I would have read the preceding paragraph of the judgment, paragraph 12, as wide enough to cover the case where all negotiations were fully conducted by the branch on behalf of the parent body but the final contract ('if necessary a legal link') was signed by the latter. For my part, but for

paragraph 13 of the judgment, I would have given 'dispute arising out of the operations of a branch' a wider meaning. Equally, but for that paragraph, I would find it difficult to spell out of Article 5 (5) the limitation that undertakings entered into 'must be performed in the Contracting State where the place of business is established'. If here the contract had been signed by a German branch in the name of French Rothschild but stipulated delivery of the goods in Puteaux, France, it seems to me that the intention of Article 5 (5) would be to enable Schotte to sue French Rothschild in Germany.

However, I do not deal with these matters in any further detail since they are not the object of a specific question. They may need to be considered by the national court if it is satisfied that there was here a branch, agency or other establishment of French Rothschild in the Federal Republic of Germany.

Accordingly, it seems to me that the question referred should be answered along the following lines:

'The jurisdiction conferred by Article 5 (5) of the Convention in regard to a branch, agency or other establishment may extend to the case where a legal entity recognized by the law of one Contracting State and having its registered office in that State and an independent legal entity recognized by the law of another Contracting State and having its registered office there, have the same name and identical management, if in fact the latter carries out operations under the direction and control of the former and is held out to third parties as being an extension of, or as conducting a place of business of, the former and third parties have dealt with the latter on that basis.'

The costs of the Commission and of the German Government are not recoverable. The costs of the parties to the main action fall to be dealt with by the national court.