JUDGMENT OF THE COURT

28 March 1995 *

In Case C-346/93,

REFERENCE to the Court under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters by the Court of Appeal for a preliminary ruling in the proceedings pending before that court between

Kleinwort Benson Ltd

and

City of Glasgow District Council,

on the interpretation of Article 5(1) and (3) of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — text of Convention as amended — p. 77),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn and C. Gulmann, Presidents of Chambers, G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward, J.-P. Puissochet and G. Hirsch, Judges,

Advocate General: G. Tesauro,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Kleinwort Benson Ltd, by T. Beazley, Barrister, instructed by R. Baggallay and K. Anderson, Solicitors,

— City of Glasgow District Council, by M. Burton QC and J. Tecks, Barrister, instructed by Lewis Silkin, Solicitors,

— the United Kingdom, by J. D. Colahan of the Treasury Solicitor's Department, acting as Agent, assisted by D. Lloyd Jones, Barrister,

— the German Government, by C. Böhmer, Ministerialrat in the Federal Ministry of Justice, acting as Agent,

— the Spanish Government, by A. J. Navarro González, Director General of Community legal and institutional coordination at the Ministry of Foreign Affairs, and by G. Calvo Díaz, State Advocate, of the State Legal Service for matters before the Court of Justice, acting as Agents,

— the French Government, by C. de Salins, Deputy Director of the Directorate of Legal Affairs in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by N. Khan and X. Lewis, both of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Kleinwort Benson Ltd, represented by T. Beazley, the City of Glasgow District Council, represented by M. Burton and J. Tecks, the United Kingdom, represented by S. Braviner, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Lloyd Jones, the Spanish Government, represented by G. Calvo Díaz, and of the Commission, represented by N. Khan and X. Lewis, at the hearing on 22 November 1994,

after hearing the Opinion of the Advocate General at the sitting on 31 January 1995,

gives the following

Judgment

1 By decision of 18 May 1993 received at the Court on 6 July 1993, the Court of Appeal referred to the Court for a preliminary ruling under the Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters a question on the interpretation of Article 5(1) and (3) of the abovementioned Convention of 27 September 1968 (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — text of the Convention as amended — p. 77, hereinafter 'the Convention').

2 That question was raised in the course of proceedings between Kleinwort Benson Ltd (hereinafter 'Kleinwort Benson'), a bank established in England, and the City of Glasgow District Council (hereinafter 'the District Council') concerning the determination of the court with jurisdiction to hear an action for restitution of sums of money paid in performance of contracts declared void.

3 It is apparent from the documents before the Court that as from 7 September 1982 Kleinwort Benson and the District Council entered into seven interest-rate swap contracts under which Kleinwort Benson, between 9 March 1983 and 10 September 1987, made payments to the District Council totalling £807 230.31.

4 On 24 January 1991 the House of Lords held in a test case that it was *ultra vires* local authorities such as the District Council to enter into contracts of that kind and that the contracts entered into were consequently void *ab initio* owing to the lack of capacity of one of the parties.

5 On 6 September 1991 Kleinwort Benson brought an action against the District Council founded on unjust enrichment before the Commercial Court of the Queen's Bench Division of the Court of Justice for restitution of sums of money paid in performance of contracts entered into between the parties.

6 The District Council challenged the jurisdiction of the English courts to determine Kleinwort Benson's claim arguing that the action for restitution had to be brought before the courts of the place of the defendant's domicile in Scotland.

7 On the other hand, Kleinwort Benson argued before the High Court that the District Council was being sued either 'in matters relating to a contract' or 'in matters relating to tort, delict or quasi-delict', and that the English courts therefore had

jurisdiction under either Article 5(1) or Article 5(3) of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 ('the 1982 Act').

8 The principal purpose of the 1982 Act is to render the Convention applicable in the United Kingdom, but it also provides for the allocation of civil jurisdiction as between the separate jurisdictions within the United Kingdom (England and Wales, Scotland, Northern Ireland).

9 To that end Schedule 4 to the 1982 Act contains certain provisions modelled on the Convention. Thus, Article 2 enshrines the principle that the courts of the defendant's domicile are to have jurisdiction. Article 5(1) and (3) respectively confer special jurisdiction in matters relating to a contract on the courts for the place of performance of the obligation in question and, in matters relating to tort, delict or quasi-delict, on the courts for the place where the harmful event occurred or in the case of a threatened wrong is likely to occur.

10 Section 16(3)(a) provides that, in determining any question as to the meaning or effect of any provision contained in Schedule 4, 'regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention and to any relevant decision of that court as to the meaning or effect of any provision of that Title.'

11 Section 47(1) and (3) makes provision for amendments in particular of Schedule 4 'in view of any principle laid down by the European Court in connection with Title II of the 1968 Convention or of any decision of that court as to the meaning or effect of any provision of that Title', including 'modifications designed to produce divergence between any provision of Schedule 4 ... and a corresponding provision of Title II of the 1968 Convention.'

12 On 27 February 1992 the High Court ruled that it did not have jurisdiction to determine the action. On 26 March 1992 Kleinwort Benson appealed against that decision to the Court of Appeal.

13 Considering that the resolution of the dispute required a decision on the scope of Article 5(1) and (3) of Schedule 4 to the 1982 Act and on the interrelationship between those two provisions, whose wording was substantially the same as that of Article 5(1) and (3) of the Convention, and on whose interpretation the Court of Justice had not yet ruled, the Court of Appeal on 18 May 1993 decided to stay the proceedings and refer the following question to the Court for a preliminary ruling under Article 3 of the Protocol of 3 June 1971:

'Where proceedings are brought against a defendant for restitution in respect of a sum of money paid to that defendant by the plaintiff under a contract which is a nullity because one of the parties did not have capacity to enter into it,

(a) is the defendant being sued "in matters relating to a contract" within the meaning of Article 5(1) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed in Brussels on 27 September 1968 (as amended)?

or

(b) is the defendant being sued "in matters relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of the Convention?'

Jurisdiction of the Court

14 It is common ground that the purpose of the interpretation which the Court is asked to give of the Convention provisions at issue is to enable the national court to decide on the application not of the Convention but of the national law of the contracting state to which that court belongs.

15 Under those circumstances the question arises as to the jurisdiction of the Court to give a preliminary ruling on the question submitted by the Court of Appeal.

16 Far from containing a direct and unconditional *renvoi* to provisions of Community law so as to incorporate them into the domestic legal order, the 1982 Act takes the Convention as a model only, and does not wholly reproduce the terms thereof.

17 Though certain provisions of the 1982 Act are taken almost word for word from the Convention, others depart from the wording of the corresponding Convention provision. That is true in particular of Article 5(3).

18 Moreover, express provision is made in the 1982 Act for the authorities of the contracting state in question to adopt modifications 'designed to produce divergence' between any provision of Schedule 4 and a corresponding provision of the Convention, as interpreted by the Court.

19 Accordingly, the provisions of the Convention which the Court is asked to interpret cannot be regarded as having been rendered applicable as such, in cases outwith the scope of the Convention, by the law of the contracting state concerned.

20 The 1982 Act does not require the courts of the contracting state to decide disputes before them by applying absolutely and unconditionally the interpretation of the Convention provided to them by the Court.

21 Indeed, in terms of the 1982 Act, when national courts apply provisions modelled on those of the Convention, they are required only to have regard to the Court's case-law concerning the interpretation of the corresponding provisions of the Convention. In contrast, when the Convention applies to the dispute, Section 3(1) of the 1982 Act provides that 'any question as to the meaning or effect of any provision of the Convention shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court.'

22 In a case such as that in the main proceedings, where the Convention is not applicable, the court of the contracting state in question is therefore free to decide whether the interpretation given by the Court is equally valid for the purposes of the application of the national law based on the Convention.

13 Accordingly, if the Court were to declare that it had jurisdiction to give a ruling in regard to this question, its interpretation of the provisions of the Convention would not be binding on the national court which would be bound by the interpretation of the Court only if the Convention were applicable to the dispute.

14 It cannot be accepted that the replies given by the Court to the courts of the contracting states are to be purely advisory and without binding effect. That would be to alter the function of the Court, as envisaged in the Protocol of 3 June 1971, cited above, namely that of a court whose judgments are binding (see Opinion 1/91 [1991] ECR I-6079, paragraph 61).

15 In the light of all the foregoing considerations the Court does not have jurisdiction to give a preliminary ruling on the question submitted by the Court of Appeal.

Costs

The costs incurred by the United Kingdom, the German, Spanish and French Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Court of Appeal, by decision of 18 May 1993, hereby rules:

The Court does not have jurisdiction to give a preliminary ruling on the question submitted by the Court of Appeal.

Rodríguez Iglesias Schockweiler Kapteyn Gulmann

Mancini Kakouris Moitinho de Almeida Murray

Edward Puissochet Hirsch

Delivered in open court in Luxembourg on 28 March 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President