

THE HIGH COURT**[2011 No. 6333P]****BETWEEN****MARY-ROSE HARKIN****PLAINTIFF****AND****EDWARD TOWPIK, KLINIKA IATROS & DENISE BIRD****DEFENDANTS****JUDGMENT of Kearns P. delivered on the 22nd day of July, 2013.**

This is an application brought by the defendants herein by way of notice of motion dated 7th March, 2013 for an order striking out the above medical negligence proceedings for want of jurisdiction. The case concerns a cosmetic surgery procedure that was performed in Poland by the first named defendant at the second named defendant's clinic. The third named defendant is based in the U.K and at all material times acted as an agent of the first and second named defendant and liaised with the plaintiff in that capacity.

More specifically, the defendants are seeking an order pursuant to the inherent jurisdiction of the Court striking out the proceedings against the said defendants for want of jurisdiction or, in the alternative, an order setting aside the service of the summons herein upon those defendants on the grounds that this Honourable Court does not have jurisdiction to hear and determine the plaintiff's claim against those defendants, as claimed under the provisions of Council Regulation (EC) No. 44/2001 or the provisions of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters.

FACTUAL BACKGROUND

In June of 2009, the plaintiff had saved a sum of money and was considering having a breast reduction procedure in central Europe. The plaintiff searched the worldwide web with her friend Patricia Peoples whose e-mail account was used for this purpose. They came across the UK based website of the third named defendant (Ms. Bird) www.reviveinpoland.co.uk which advertised the availability of cosmetic medical procedures in Poland. It is uncontroverted that none of the defendants or their representatives came to Ireland to offer or explain the procedures.

Ms. Bird received Stg£283 in the UK from the plaintiff on Monday 13th July, 2009.

The plaintiff made her own arrangements directly with Aer Lingus to fly Dublin-Warsaw on Tuesday 14th July, 2009. On that date she arrived to meet the first named defendant (Prof. Towpik) at the clinic of the second named defendant. The plaintiff was assessed for her suitability for the procedure followed by an explanation of risks and likely outcomes.

On 14th July, 2009 the plaintiff paid for the procedure. The following day, Wednesday 15th July, she signed a consent to the procedure in the presence of Prof. Towpik who further examined and operated upon the plaintiff that day. The plaintiff had two check-ups with Prof. Towpik before returning to Dublin as she had arranged.

Some 21 months later, the plaintiff through her own recently acquired e-mail address, e-mailed Ms. Bird about her concern in relation to the outcome of the procedure with specific reference to the post-operation position of her nipples. Ms. Bird received in the UK photographs which she passed to Prof. Towpik. The plaintiff was informed by e-mail on 18th May, 2011 that Prof. Towpik and two other surgeons did "not see a considerable dislocation of the nipple areola complexes" but suggested a resection might be considered after a further consultation.

Almost two years after the procedure an "O'Byrne" type letter dated 12th July, 2011 alleging negligence and breach of duty only was written to all three of the defendants in which (without reference to any independent expert's report) an admission of liability was sought.

The plaintiff's solicitor issued a personal injuries summons ("the summons") on 13th July, 2011 just before the expiration of the two year limitation period from the date of the procedure. The summons - although it contained a reference to an alleged breach of contract - only claimed "damages for personal injury arising out of negligence and breach of duty". The plaintiff has made no averment about any consideration of claiming in Poland other than the statement at the end of the summons that no proceedings have been commenced in any other jurisdiction.

Following notification by e-mail from the defendants' solicitors on 31st July, 2012 that the jurisdiction of the Irish courts would be challenged and following a conditional appearance for the Polish defendants only on 15th July, 2012 the plaintiff's solicitors sent notices of "further particulars of negligence, breach of duty and breach of contract" and "personal injury" dated 20th July, 2012. The latter referred to a report for the first time from a Mr. Cronin, consultant plastic, reconstructive and hand surgeon dated 27th April, 2012. More significantly, the plaintiff's solicitors furnished separate allegations of breaches of duty and contract against Prof. Towpik and the other defendants in this notice of further particulars.

BRUSSELS I REGULATION

Under Council Regulation (EC) No. 44/2001 of 22nd December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, more commonly known as the Brussels I Regulation (and hereinafter referred to as "the Regulation"), the provision concerning the Member State in which a defendant may be sued is provided for in Section 1, Chapter II of the Regulation which outlines the general provisions governing jurisdiction. The general rule as set out in Article 2 of Section 1 of the Regulation is that jurisdiction lies with the courts of the Member State of the defendant's domicile.

Article 2 states that:

"1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State..."

Persons domiciled in a Member State may be sued in the courts of another Member State on the strict condition that the Regulation so provides, as stated at Article 3, section 1 of the Regulation.

Article 3 provides that:

"1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter."

An alternative to the general rule that the defendant's domicile in a Member State determines that jurisdiction lies with that State's courts, is set out in Articles 5-7 of Section 2 of Chapter II of the Regulation. These articles confer special jurisdiction on a plaintiff to bring an action in another Member State. In matters relating to tort, a person domiciled in a Member State may be sued in another Member State, in circumstances provided for in article 5(3) of the Regulation which states that, "in matters relating to tort, *delict or quasi delict*, in the courts for the place where the harmful event occurred or may occur".

Matters pertaining to contract are dealt with under article 5(1) of the Regulation which states that:

"A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided..."

Notwithstanding the above provisions, the Regulation affords "protective" jurisdiction in respect of certain parties, identified as the weaker party in the case of a contract. Recital 13 of the preamble to the Regulation provides that in relation to "insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for".

In that regard, Section 4 of Chapter II of the Regulation sets out particular jurisdiction rules pertaining to consumer contracts. This section permits a consumer to bring proceedings in her own Member State against a party domiciled in another Member State, subject to certain conditions being met. It is this section that the plaintiff seeks to rely on, especially article 15(1) and article 16.

Article 15(1) states that:

"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, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment or credit terms; or

(b) it is a contract for a loan repayable in instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities."

Article 16 of the regulation also affords a consumer a choice of jurisdiction to bring proceedings against another party and provides, *inter alia*, the following:

"1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

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."

The plaintiff claims she is entitled to sue in this jurisdiction because (a) she is a consumer and (b) she entered a contract for services with persons providing professional services who had "directed" their activities to this State.

DECISION

The meaning of the term "consumer" was discussed in *Benincasa v. Dentalkit Srl*, Case 269/95 [1997] ECR I-03767. In determining whether the contract at issue involved a consumer, the court held that in accordance with Article 13 of the Brussels Convention 1968, the predecessor to the Regulation, a person was a consumer if they were acting outside their trade or profession. The court thus stated the following:

"[12] ...regard should be had to the principle laid down by the case-law (see, in particular, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15, 16 and 19, and Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13) according to which the concepts used in the Convention, which may have a different content depending on the national law of the Contracting States, must be interpreted independently, by reference principally to the system and objectives of the Convention, in order to ensure that the Convention is uniformly applied in all the Contracting States. This must

apply in particular to the concept of 'consumer' within the meaning of Article 13 et seq. of the Convention, in so far as it determines the rules governing jurisdiction. [...]

[15] As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities (Shearson Lehman Hutton, paragraphs 20 and 22).

[17] Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically..."

As stated previously, the special protection afforded to consumers only arises where the party contracting with a consumer pursues commercial or professional activities in the Member State of the consumer's domicile or directs such activities to that State "by any means" within the meaning of Article 15(1)(c) of the Regulation. (Emphasis added)

The application of Article 15(1)(c) of the Regulation arose for determination in the joint cases of *C-585/08 and C-144/09, Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v. Oliver Heller* [2010] ECR I-12527.

Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG (C-585/08) concerned a contract involving a voyage by freighter. *Hotel Alpenhof GesmbH v. Oliver Heller* (C-144/09), involved the non-payment of a hotel bill for a stay booked by a German national in Austria on the internet, in which the Austrian national court asked the European Court of Justice to determine whether the fact that a website of the party with whom a consumer concluded a contract can be consulted on the internet was sufficient to warrant a finding that an activity was being "directed" within the meaning of article 15(1)(c).

In holding that it was not the court opined that the notion in article 15(1)(c) of activity "directed to" the Member State of the consumer's domicile is not defined in the Regulation and, as such, "must be interpreted independently by reference to principally to the system and objectives of the Regulation, in order to ensure it is fully effective".

The court further stated that whilst there is no doubt that the aim of articles 15(1)(c) and 16 of the Regulation is to protect consumers,

"[70]-[71] that does not imply that that protection is absolute...if that had been the intention of the European Union legislature, it would have laid down as a condition for the application of the rules relating to consumer contracts not the 'directing of activities to a Member State' but the mere existence of the website."

The court found that in order for article 15(1)(c) to apply,

"[75]...the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile.

[76] It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers."

The court then held that evidence demonstrating the above did not include,

"[77]...mention on a website of the trader's email address or geographical address, or of its telephone number without an international code. Mention of such information does not indicate that the trader is directing its activity to one or more other Member States, since that type of information is, in any event, necessary to enable a consumer domiciled in the Member State in which the trader is established to make contact with it."

In considering what criteria must be met by a website in order for the activities engaged in by the trader to be capable of being regarded as 'directed to' the Member State of the consumer, the Court, made the following finding:

"[80] Among the evidence establishing whether an activity is directed to the Member State of the consumer's domicile are all clear expressions of the intention to solicit the custom of that State's consumers.

[81] Clear expressions of such an intention on the part of the trader include mention that it is offering its services or its goods in one or more Member State designated by name. The same is true of the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various Member States, which likewise demonstrates the existence of such an intention.

[82] However a finding that an activity is 'directed to' other Member States does not depend solely on the existence of such patent evidence. In this connection, it should be noted that, by its legislative resolution on the proposal for a regulation that is referred to in paragraph 43 of the present judgment (OJ 2001 C 146, p.101), the European Parliament rejected wording stating that the trader had to have 'purposefully directed his activity in a substantial way' to other Member States or to several countries, including the Member State of the consumer's domicile. Such wording would have resulted in a weakening of consumer protection by requiring proof of an intention on the part of the trader to develop activity of a certain scale with those other Member States."

The court then set out a non-exhaustive list of criteria from which it could be inferred that the trader's activity was directed to the Member State of the consumer:

"[93] [...] the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or of a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and

mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

[94] On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address or other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established."

The court thus concluded:-

"In order to determine whether a trader whose activity is presented on its website or that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them."

As is evident from the above, a number of features associated with the trader's online advertising activities may be sufficient to constitute a finding that an activity is directed to the consumer's Member State.

Significantly, the courts specifically held that it was for the national courts to determine whether such evidence as exists points to that conclusion. The conduct of this exercise may, in certain circumstances, require a determination of the facts at issue which may be pertinent to the question of jurisdiction.

As Clarke J. stated in *Ryanair Ltd v. Unister GmbH & Aeruni GmbH* [2013] IESC 14:

"8.6 As this Court is not currently called on to reach a view as to jurisdiction it is only necessary to indicate that it seems clear on the authorities that a court which is called on to consider whether it has jurisdiction will be required, at least in some cases, to determine questions of fact which may be material to the very question of jurisdiction even though some of the same questions of fact may also be material to the substantive issues which arise in the proceedings generally. To take but a simple example there might be a written document, purporting to be a contract between the parties, which contains a clear choice of jurisdiction clause which purported to confer jurisdiction on the courts of a member state other than those of the domicile of the defendant. However, the defendant might claim that its signature on the document was a forgery and that no agreement of any sort was ever entered into between the parties. In order to determine whether it had jurisdiction the courts of the Member States specified in the relevant choice of jurisdiction clause would need to determine, as a matter of fact, whether the defendant's contention that its signature was a forgery was correct for if that contention were true, and in the absence of any other facts which might allow for a finding that the parties had agreed a jurisdiction to determine disputes between them, then the court would clearly have no jurisdiction.

8.7 Likewise the guidance given by the ECJ in a number of the cases makes clear that inquiries into the facts may be necessary, at least in some cases, in order to decide jurisdiction. For example, some of the cases arise out of the provisions of the Regulation in its amended form which allow a choice of jurisdiction agreement to derive from a relevant usage in international trade or commerce of which the parties are or ought to have been aware and which is widely followed in the commercial area concerned (see Article 17(c)). In *Hugo Trumphy* the court determined that awareness of the relevant usage was to be assessed with respect to the original parties to the agreement allegedly conferring jurisdiction and in the light of whether a particular course of conduct is generally and regularly followed in the conclusion of the particular type of contract in question. The ECJ, therefore, clearly contemplated that a court would have to assess whether that test was met on the facts which assessment might well, at least in some cases, involve a consideration of conflicting evidence.

8.8 There may be some doubt as to the precise extent to which it is appropriate for a court, in considering whether it has jurisdiction, to enter into detailed and contested factual questions in order to reach a conclusion as to whether jurisdiction has been established. However, it seems to me that the position adopted on behalf of Unister, which is to the effect that if the matter is not very clear the default jurisdiction applies, is not consistent with the jurisprudence of the ECJ. It follows that there may well be cases where an Irish court will be required to enter into some consideration of contested facts in order to determine whether, in accordance with the Regulation, it has jurisdiction..."

Taking the facts of the present case into consideration, and assuming for the moment that this is a contractual claim rather than one which predominantly sounds in tort, it is difficult to conclude that the proceedings should be brought in this jurisdiction. There is no evidence before the court to indicate that the defendants directed their activities in any specific way to the Irish market. The defendants' website has a United Kingdom domain name, and the contact telephone number provided to the plaintiff by the third named defendant is an English telephone number. It is not preceded with an international dialling code. The currency dealt with was not Euro, but Sterling.

Furthermore, the plaintiff only met the first named defendant for the first time in Poland and was only examined for the first time in Poland, where she also underwent pre-operative tests for the first time. Significantly, it was in Poland that the breast reduction procedure was performed. Although she may have transferred monies constituting a deposit from her bank account in Ireland, this was only a nominal sum in relation to the total cost of the procedure, and the remaining cost of the surgery was paid in Poland. In addition, the plaintiff had signed a consent form while in Poland. All of these matters suggest that the defendants' activities were not directed to consumers within this jurisdiction.

Further, all of the discussion in this case is premised on the proposition that the plaintiff has a viable claim in contract which is highly questionable on the facts. The reality, of course, is that this is a claim for damages in tort, a clear case under national law of a medical negligence claim. In any compensation claim it would be treated as such, and only as such, in this jurisdiction.

I would therefore grant the relief sought in the defendants' motion.