THE COURT OF APPEAL

Peart J.
Hogan J.
Whelan J.

Neutral Citation Number: [2018] IECA 98

Appeal Number [2016/468]

Castlelyons Enterprises Limited

Plaintiff/

Respondent

And

EUKOR Car Carriers Inc.

Defendant

And

NMT Shipping UK Limited

Second defendant/

Appellant

JUDGMENT of Ms Justice Máire Whelan delivered on the 21st day of March 2018

1. This is the second named defendant/appellant's (hereinafter "NMT Shipping") appeal against the refusal of its application in the High Court for a declaration that that Court has no jurisdiction to hear and determine the respondent's claim against NMT Shipping for;

> (a) damages for breaches of contract or
>
> (b) damages for negligence and/or breach of duty (including breach of duty as bailee) and/or fraud and/or wrongful delivery and/or conversion.

2. The appellant's motion came on for hearing on 10th October 2016 and at the conclusion of same, in an *ex tempore* judgment, Stewart J. refused NMT Shipping's application for an order declaring that the Irish courts had no jurisdiction to hear and determine the respondent's claims against NMT Shipping. The order of the High Court was perfected on 11th October 2016.

The parties
3. The respondent is an Irish-based limited liability company (hereinafter "Castlelyons"). The first named defendant (hereinafter "EUKOR") is a shipping company registered in Seoul in South Korea which was not a party to the application. NMT is a UK company with its registered office situate at Southampton, England.

The claim
4. The plenary summons which issued on 16th October 2015. It pleads a claim sounding in damages for breach of contract and for negligence and breach of duty "in or about the carriage of a cargo of plant machinery under bill of lading… from Dublin, Ireland, to Jebel Ali, the United Arab Emirates, in or about February 2009." The summons contains an indorsement pursuant to Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (hereinafter "the Brussels Regulation") which provides as follows:

> "(i) The High Court has the power under Regulation No. 1215/2012 to hear and determine the claim and specifying the particular provision(s) of Regulation No. 1215/2012 under which the High Court should assume jurisdiction";

5. It is further indorsed that:

> "(a) The defendant has the right to contest the jurisdiction of the High Court and if he or she wishes to do so, he or she should enter an appearance to contest jurisdiction in accordance with O. 11A, r. 8 of the Rules of the Superior Courts (RSC)."

6. NMT entered a conditional appearance in the proceedings and thereafter on 13th April 2016 issued a motion seeking a declaration that the High Court has no jurisdiction to determine the issues between the parties.

The issue
7. Castlelyons' contention, as argued before the High Court and in this Court, is that the Irish courts have jurisdiction to hear and determine its claims pursuant to the Brussels Regulation. NMT is domiciled in the United Kingdom. Accordingly, pursuant to Article 4 of the Brussels Regulation, Chapter 2, Section 1 which governs jurisdiction, it must be sued in the courts of that state unless Castlelyons can satisfy the court that it is entitled to invoke the special jurisdiction clauses contained in Chapter 2, section 2 of the Brussels Regulation and, in particular, Article 7 thereof to bring its claim for breach of contract under Article 7(1)(a) and its claims for tort, negligence and breach of duty under Article 7(2) of the Brussels Regulation. In invoking the Court's jurisdiction in both contract and tort, Castlelyons is obliged to establish each jurisdiction separately and distinctly and is not permitted pursuant to the Brussels Regulation to invoke the Court's jurisdiction in tort merely because it has established jurisdiction in contract: see, for example, *Kalfelis v. Bankhaus Schroeder* (Case C-189/87) [1988] E.C.R. 5565. The obligation to establish jurisdiction separately places a burden on a

plaintiff in regard to aspects of the claim that fall under Article 7(2) to establish consequential physical loss, damage or injury, i.e., non-financial loss which must be clearly unrelated to the alleged breach of contract.

8. In reaching a determination as to what was the main place of provision of the services to be carried out between Castlelyons and NMT, in the light of how that concept has been construed, it is necessary to consider the factual background, including the position of Mr. Fran Coe. It is also necessary to consider the nature and extent of the services agreed to be provided by NMT Shipping for the benefit of Castlelyons for the purposes of identifying in particular which *locus* has the closest link of proximity to the material elements of the dispute that subsists between the parties as identified in the originating summons.

9. In determining what were the services agreed to be provided and the locus with the closest links to the performance of same it is necessary to consider the affidavit evidence advanced on behalf of the parties.

Position of NMT Shipping
10. The affidavit on behalf of NMT was sworn on 5th April 2016 by Shaun Dunning, Global Sales Director of the company. Mr. Dunning asserts that NMT Shipping performed its obligations under the contract between the parties at its place of business in Southampton, England. NMT Shipping did not have a branch or agency in Dublin. It carried on business as a freight forwarder and shipbroker in Southampton. The role of NMT Shipping was simply that of a booking agent on behalf of the owner of cargo and the contract of carriage was concluded separately between the cargo owner and the carrier. The contract of carriage as evidenced in the bill of lading was between Castlelyons as the cargo owner and EUKOR as the carrier.

11. He deposes that in or around the month of January 2009 Mr. Fran Coe approached NMT Shipping on behalf of Castlelyons:

> ". . . at all times in the formation and carrying out of the contract between the plaintiff and the second named defendant, the plaintiff acted through Fran Coe. I say and believe and I was told by Mr. Coe that throughout this period Mr. Coe was receiving his instructions from Mr. Grimes who together with his wife were the directors of the plaintiff. Mr. Coe asked me to obtain a quotation for the shipping of plant machinery from Dublin to Dubai. I explained to him that it would be dearer to ship ex Dublin than Southampton and he instructed me to proceed on this basis. He asked me about the procedures for importing machines into Dubai and I explained that once we had booked the cargo with the shipping line and passed on the bill of lading to him we would have no further role in the delivery of the cargo. In answer to his query I explained that they would need a locally-registered company in the United Arab Emirates to import them into that country. I understood that Mr. Coe and Mr. Grimes would form a company in Dubai to take delivery of machines there."

12. On foot of the approach from Fran Coe, NMT Shipping obtained a quotation for the carriage from Wallenius Wilhelmsen Logistics (WWL) a company also based in Southampton who are the agents for EUKOR, the first named defendant. In a fax sent in February 2009 by NMT headed "Hi Fran" a quotation is given:

> "Quay Dublin to Quay Jebel All (C+F)"

Indorsed at the end of both pages of the fax is the following statement:

> "All our activities are subject to General Dutch Shipbrokers' Conditions and/or the Dutch Forwarding Conditions, as the case may be, latest editions."

13. Mr. Dunning deposes that the quotation was expressed to be "C + F" which did not include the cost of insuring the cargo. It had previously been agreed between Mr. Dunning and Mr. Fran Coe that Castlelyons would procure its own insurance and Fran Coe subsequently, as Mr. Dunning contends:

> "Acting as agent for the plaintiff, arranged insurance with Allianz effective from 16/02/2009."

14. Mr. Dunning deposes that Castlelyons was satisfied with the quotation obtained and thereafter Fran Coe instructed him to arrange the carriage and he concluded a contract of carriage with EUKOR on behalf of Castlelyons:

> "The carrier booked the cargo for loading by their Dublin Stevedores on the MV Morning Calm. I prepared a shipping/delivery note to this effect and I sent a copy by fax to Fran with the clear instructions, 'please deliver between 0800 – 1600 11th – 13th February and I attached a packing list of the cargo to the fax'."

An invoice exhibit SD 3 to the affidavit of Shaun Dunning of Marine and General Insurance Limited dated 17th February, 2009 is addressed "Mr. Fran Coe, Castlelyons Enterprises Limited, 16 St Brigid's Road, Clondalkin, Dublin 22."

15. On 13th February 2009 Fran Coe furnished by fax pro forma bill of lading instructions together with details which had been sought by NMT Shipping and the instructions given were that the consignee was "Castlelyons Dubai, Jebel Ali, UAE, c/o Fran Coe." Shaun Dunning deposes at para. 10 of his affidavit:

> "This was not an incorporated company and for this reason the "notified party" was described by Fran Coe as Sire Contracting, PO Box 77635, Dubai. I understand that Sire Contracting LLC was the United Arab Emirates company to which the plaintiff intended to rent the machinery plant when it arrived in Dubai. At this stage, as mentioned above, it was envisaged that Mr. Coe and Mr. Grimes would incorporate "Castlelyons Dubai as a United Arab Emirates company for importation purposes."

16. It appears MV Morning Calm was a feeder vessel which proceeded to collect the cargo at Dublin and deliver it to Bremerhaven in Germany where it was laden onto the ocean-going vessel MV Morning Courier for transhipment to Jebel Ali. On 22nd February 2009, EUKOR, through its own Southampton agent WWL, issued the bill of lading in accordance with the instructions which had been received from Fran Coe through NMT Shipping.

17. Mr. Dunning points out that in relation to the "freight and charge" the bill of lading was marked "as arranged" which signified that it would be treated as freight prepaid and would entitle the bearer to delivery of the cargo without further payment:

> "Therefore . . . it could only be transmitted to the plaintiff upon the payment by the plaintiff of the freight which the second named defendant had undertaken to the carrier in consideration of the carrier issuing the B/L. However, at this stage the plaintiff had not put the second named defendant in funds to pay the freight. In fact, the freight was not fully paid until 23rd March, 2009, when the plaintiff arranged for Sire Contracting LLC to pay the balance then outstanding on

the invoice sent to Fran Coe on 24/02/2009."

18. Mr Dunning deposes that in the normal course of business Castlelyons would have paid the freight due and owing on 24th February 2009 and the three original bills of lading would be transmitted to Castlelyons' agent, Fran Coe. This would have ended NMT Shipping's role in booking the carriage on behalf of Castlelyons. The plaintiff would then have been free to transmit an original B/L to its consignee in Dubai.

19. However, the failure of the plaintiff to pay the freight "as arranged" meant that the second named defendant had possession of the three original B/Ls when the cargo arrived at Jebel Ali on 23rd March 2009. In fact, not only had the plaintiff not paid the balance of the freight due but also had failed to incorporate its intended consignee "Castlelyons Dubai" as a new United Arab Emirates company for the purpose of complying with UAE law in importing the machines into Dubai.

20. At that time Fran Coe represented to Gary Calloway of NMT Shipping in Southampton that Castlelyons had arranged for Sire Contracting LLC to pay the outstanding balance on the freight. Further Fran Coe requested of NMT Shipping that the bill of lading would be amended to specify Sire Contracting LLC as a consignee and not just as the "notify party".

21. The dilemma then arising is identified at para. 12 of Shaun Dunning's affidavit in these terms:

> "However, this left the problem that the amended B/L would have to be transmitted through Fran Coe to the plaintiff and then on to Sire Contracting LLC and meanwhile the cargo would be held up. Fran Coe therefore requested that the cargo be released without presentation of the original bills of lading. The second named defendant agreed to do this and, accordingly, upon receipt of the NatWest payment credit advice referred to above, the second named defendant surrendered the three original B/Ls to the carrier, the first named defendant."

22. It is contended on behalf of NMT Shipping that the necessity to release the cargo without presenting an original bill of lading and thereby avoid the delay which awaiting the original bill of lading would cause, arose solely because of the failure on the part of Castlelyons to pay the freight in a timely manner "as arranged". Further, it is alleged that the change of name of the consignee on the bill of lading was necessitated;

> ". . . at the plaintiff's request through Fran Coe arose because of the plaintiff's failure to incorporate the original consignee as a United Arab Emirates registered company to comply with UAE import law."

NMT Shipping contends that throughout the dealings between the parties NMT Shipping dealt solely with Castlelyons through the agency of Fran Coe and at no stage did the plaintiff withdraw his ostensible authority to act for it.

> "It was in these circumstances and not otherwise, that the second named defendant surrendered the three original B/Ls back to the first named defendant and that the first named defendant being then in possession of all three original B/Ls released the cargo in the United Arab Emirates to Sire Contracting LLC on the instructions of Fran Coe. Fran Coe had ostensible authority to give these instructions on behalf of the plaintiff. The carrier being in possession of all three original bills of lading was perfectly entitled to deliver the cargo as delivered by Fran Coe, who, in the alternative was entitled to receive the B/L as the agent of the plaintiff and present it in Jebel Ali."

Position of Castlelyons

23. In an affidavit sworn 28th July 2016, Thomas Grimes outlines that the issues which give rise to these proceedings had their origin in the Great Economic Crisis when Castlelyons experienced a severe downturn after the collapse of the economy in 2009. Substantial sums were owed to Castlelyons and in the case of one construction company which had been its main customer a sum of approximately €600,000 unpaid was catastrophic to Castlelyons' business. Mr. Grimes deposes that it was Mr. Fran Coe who alerted Castlelyons to the possibility of a demand for construction plant equipment in the Middle East, particularly in the United Arab Emirates. Mr. Grimes confirms that Mr. Coe was instrumental in arranging a once-off offer for the shipment to the UAE for Castlelyons at a cost of €50,000 and also in relation to procuring marine insurance. It appears that Castlelyons paid Fran Coe €30,000 towards payment of the shipment of the cargo, the balance of €20,000 was sourced from a brother of Mr. Fran Coe and Castlelyons also discharged a sum of €2,500 in respect of the insurance. Mr. Grimes contends on behalf of Castlelyons that NMT Shipping had an extensive involvement in the shipment of the cargo of plant and machinery and that the said involvement took place at different locations, including:

> (a) In Dublin, where the cargo was loaded on board the feeder vessel MV Morning Calm for trans-shipment to the port of Bremerhaven in Germany.
>
> (b) In Bremerhaven, where NMT arranged for the cargo to be transferred from the feeder vessel MV Morning Calm to the ocean-going vessel MV Morning Courier for trans-shipment to the port of Jebel Ali in UAE.
>
> (c) In Jebel Ali where NMT authorised the release of Castlelyons cargo.
>
> (d) In Dublin, where NMT communicated by electronic communication with Castlelyons and "purported to obtain instructions by electronic communications from, the plaintiff and/or the plaintiff's agent to authorise the release of the plaintiff's cargo."

24. Castlelyons contends that it did not receive a copy of the bill of lading from NMT Shipping until 2010, over one year after the shipment. Also, that it was not informed of EUKOR's terms and conditions at the material time and that "those terms and conditions cannot be said to apply to the relationship between the plaintiff and the defendants." Castlelyons contends that the bill of lading was clear that the shipper is Castlelyons and the consignee is recorded as the Castlelyons UAE entity. NMT Shipping failed at any time to contact Castlelyons to ascertain instructions regarding the shipment when the goods arrived at Jebel Ali and were released without the presentation of the original bill of lading. Castlelyons contends that such conduct amounted to an unlawful release of its' cargo and that the events leading up to and resulting in this formed part of a "chain which clearly shows that the harmful events in respect of the plaintiff took place in Ireland".

Judgment

25. The *ex tempore* judgment of the trial judge refusing the relief sought notes that neither side had produced an affidavit from Fran Coe. The learned judge determined that Fran Coe was an agent of NMT.

Mr. Fran Coe

26. At no time has Castlelyons contended that Fran Coe was the agent of NMT Shipping. I am satisfied that the conduct of Castlelyons regarding Fran Coe is only consistent with him being constituted their agent in respect of the acts which Castlelyons assented to. It is clear that the authority afforded to Fran Coe included a power to effect on behalf of Castlelyons' legal relations with third parties and they based this, inter alia, upon the following factors:

> (a) The manner and circumstances in which Fran Coe negotiated the terms and price of the trans-shipment with NMT.
>
> (b) The e-mail communications emanating from Castlelyons' Dublin address to NMT at Southampton over the relevant period from the commencement of negotiations to the delivery of the shipment to Jebel Ali.
>
> (c) In all aspects of the formation and carrying into effect of the terms of the contract between Castlelyons and NMT, Castlelyons acted only through Fran Coe.
>
> (d) Thomas Grimes, a director of Castlelyons, drew up the inventory of plant in his own handwriting which was faxed from Castlelyons' office fax to NMT for the purpose of procuring a quotation for the carriage of the machinery from Dublin to Jebel Ali.
>
> (d) The fact that Castlelyons put Fran Coe in funds for the purposes of procuring insurance through Marine & General Insurance on 17th February 2009 in connection with the plant in question as evidenced by the invoice of the said date.
>
> (e) Almost a year following the shipment, on or about 17th March 2010, Veronica K. Grimes, a director of Castlelyons contacted NMT seeking the bill of lading and all shipping documents relating "to the transit of our machines from Dublin to Jebel Ali port in February 2009". She asserts in that e-mail that the equipment "in total is belonging to my husband Thomas Grimes and I, Veronica K. Grimes of Castlelyons Enterprise Limited." Nowhere does she articulate any complaint against NMT with regard to the course of dealings between NMT and Castlelyons' agent Fran Coe.
>
> (f) It is noteworthy that no complaint of wrongful delivery or of breach of contract or tort or *delict* was made by Castlelyons against NMT at any time between February/March 2009 and the year 2015, a period of approximately six years.

27. I am satisfied accordingly that the involvement and conduct of Fran Coe throughout the course of dealings in the year 2009 is consistent only with the subsistence of an agency between Castlelyons and him and that he had authority to act for, represent and bind Castlelyons in relation to this transaction. NMT were at all material times entitled to treat with Fran Coe as a duly authorised agent of Castlelyons.

28. There was no evidence before the Court that Fran Coe was an agent of NMT. It is noteworthy that Mr. Thomas Grimes' description of the involvement of Fran Coe with the process of engagement of the services of NMT Shipping are consistent only with Fran Coe being an agent for a disclosed principal, namely an agent for Castlelyons from the beginning to the end of this transaction. There is no evidence to support the trial judge's determination to the contrary.

Jurisdiction

29. Where a case presenting an international element falls within the scope *ratione materie* of the Brussels Regulation and the party against which the proceedings are brought is domiciled in an EU member state, the rules of jurisdiction laid down by the Brussels Regulation must to be applied and prevail over national rules of jurisdiction. Accordingly, where the party against whom the proceedings are brought is domiciled in a member state other than that in which the court seised is situate, Article 4 precludes the application of a national rule of jurisdiction. There was no evidence before the Court that Fran Coe was an agent of NMT. It is noteworthy that Mr. Thomas Grimes' description of the involvement of Fran Coe with the process of engagement of the services of NMT Shipping are consistent only with Fran Coe being an agent for a disclosed principal, namely an agent for Castlelyons from the beginning to the end of this transaction. There is no evidence to support the trial judge's determination to the contrary.

30. The special rule of jurisdiction in Article 7(1)(b) is applicable to an action by which a party established in one member state claims against a party established in another member state rights arising from such an exclusive distribution agreement.

31. NTM challenges the territorial jurisdiction of the Irish courts to hear and determine these proceedings.

32. In the light of the primacy of EU law and the provisions of the Brussels Regulation which is applicable both *ratione loci* and *ratione materie* under Article 4 of the Regulation the UK courts should have jurisdiction unless Castlelyons can establish that the special rules of jurisdiction in Article 7 of the Regulation are engaged.

33. For the purposes of construing the Brussels Regulation the case law of the Court of Justice relating to the Brussels Convention is relevant where the provisions of those instruments may be regarded as equivalent since the Brussles Regulation has replaced that convention in the relations between member states.

34. Both the Brussels Convention and the subsequent Regulations recognise the possibility that there may be more than one eligible jurisdiction for a given dispute. They constitute a code for allocating jurisdiction between EU member states.

35. From a contractual perspective in the instant case we are dealing with the provision of services. Accordingly, it is the second indent of Article 7(1)(b) that applies.

Brussels Regulation

36. The Brussels Regulation came into force in this jurisdiction on 10th January 2015 and is operative in respect of all proceedings on or after that date. It replaced the Judgment Regulation ((EC) No 44/2001). In the instant case the within proceedings were instituted on 16th October 2015.

37. Recital 13 provides:

> "There most be a connection between proceedings to which this Regulation applies and the territory of the member state. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a member state."

38. Recital 14 reflects Article 4(1) of the Brussels Regulation and provides:

"A defendant not domiciled in a member state should in general be subject to the national rules of jurisdiction applicable in the territory of the member state of the court seised."

39. Recital 15 provides:

"The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground, save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction."

Recital 16 provides:

"In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or an order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a member state which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."

Article 4

40. The primary rule of jurisdiction is articulated in Article 4 which provides as follows:

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

Thus the defendant should be sued in the country where it is domiciled. Article 4 of the Brussels Regulation constitutes the primary rule of jurisdiction and the burden rests on Castlelyons to establish that it is entitled to invoke the special jurisdiction by way of exception to Article 4.

41. Insofar as the plaintiff contends that the primary rule of jurisdiction does not apply and seeks to invoke the special jurisdiction to be found in Section 2 of the Brussels Regulation, the onus rests with the plaintiff to establish that its claim falls within the special jurisdiction of either Article 7(1) or 7(2) of the Brussels Regulation.

42. Article 7 provides:

"A person domiciled in a member state may be sued in another member state;

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 . . .

- 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;

(c) If point (b) does not apply then point (a) applies;

(2) In matters relating to tort delict or quasi-delict in courts for the place where the harmful event occurred or may occur;"

Special grounds of jurisdiction being exceptions to the general principles of the Brussels Regulation are to be considered derogations and accordingly are to be interpreted restrictively.

43. Article 7 derives from the landscape of Article 5 of the Brussels I Regulation concerning the allocation of jurisdiction within the EU. The original measure had provided that in a matter relating to a contract, the courts of "the place of performance of the obligation in question" could take jurisdiction. The original wording of Article 5 of the Brussels Convention 1968 led to a series of cases which sought to identify the obligation in question and its place of performance. When concerns developed around the approach to the locating of the obligation in question by certain states in order to obtain jurisdiction, a more strict rule was subsequently inserted by Article 5(1)(b) of the Brussels I Regulation. In the Brussels Regulation, Article 5(1)(b) now finds its reiteration in Article 7.

44. The wording of Article 7(1)(a) of the Brussels Regulation and that of the first sentence of Article 7(1) of the Brussels Convention are identical in every respect. Thus continuity of interpretation between those instruments is not only expressly intended by the Community legislature in the preamble but also in accordance with the principle of legal certainty from which it follows that those provisions must be given identical scope.

45. As regards Article 7(1)(b) of the Brussels Regulation, the lessons to be learned from the judgments which have interpreted the Brussels Convention are less direct since the rules of jurisdiction contained in Article 7(1)(b) are new. It appears that the intention of the Union legislator was that Article 7(1)(b) should be interpreted more broadly than Article 7(1)(a) owing to the aim of the Brussels Regulation and Regulation 44/2001 of simplifying the provisions contained in the Brussels Convention. It is apparent from the preparatory works of that Regulation and from Prof. Pocar's report on the Lugano BIS Convention that the specific rules of Article 7(1)(b) were established in order to avoid difficulties in applying the rules in Article 7(1)(a) stemming from the case law. This in part resulted from the judgment in De Bloos v. Bouyer (Case C-14/76) [1976] E.C.R. 1497.

The rules of special jurisdiction

46. The general principle derived from the jurisprudence, including *Industrie Tessili Italiana v. Dunlop AG* (Case C-12/76) [1976] E.C.R. 1473, is that in any case involving breach of contract and whether the claim lies in damages or for a negative declaration, all matters

shall be referred to the courts of the place of delivery or provision of the services in question. It is the place of performance of the specific obligation in question and which is the subject matter of the claim rather than the place of performance of the contract which forms the basis of jurisdiction. Where a contract encompasses a complex suite of obligations the court must identify which specific obligations can be said to form the basis of the proceedings having regard to the maxim accessorium sequitur principale, in other words where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction.

47. In *Color Drack GmbH v. Lexx International Vertriebes GmbH* (Case C-386/05) [2007] ECHR 1-3699 the Court of Justice held that this place is an autonomous linking factor providing a close link to the contract. It is referable neither to the domestic law of that State or its own conflict of law rules. One justification is that those courts are particularly well placed to determine any claim arising out of the contract. Alternatively, the rule is certain and predictable.

48. Considering the case law including *Wood Floor Solutions Andreas Doomberger GmbH v. Silva Trade S.A.*, *Color Drack* and *Rehder*, it is clear that the jurisprudence has developed to cover the case where the places of delivery or provision of services are in several member states.

Wood Floor Solutions v. Silva Trade SA
49. In *Wood Floor Solutions* the claimant sought damages for termination of a commercial agency contract. It had provided the agency services (including negotiating and concluding contracts, communicating with the principal and complying with instructions) in a number of states but its business activity was largely conducted in Austria. The ECJ identified the place of provision of services as "the place of the main provision of services by the agent."

50. It is clear that this place must be deduced from the provisions of the contract itself, or if that is not possible, by the actual performance of the contract. That is a question of fact for the national court. In the judgment of the Court delivered on 11th March 2010, at para. 40 it states:

> "If the provisions of a contract do not enable the place of the main provision of services to be determined, either because they provide for several places where services are provided, or because they do not expressly provide for any specific place where services are to be provided, but the agent has already provided such services, it is appropriate, in the alternative, to take account of the place where he has in fact for the most part carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as it appears from the provisions of the contract. For that purpose, the factual aspects of the case may be taken into consideration, in particular, the time spent in those places and the importance of the activities carried out there. It is for the national court seised to determine whether it has jurisdiction in the light of the evidence submitted to it (*Color Drack*, para. 41)."

51. In the textbook "*Civil Jurisdiction and Judgments*" by Adrian Briggs, 6th Ed., 2015, at para 2.180 there is the following excerpt:

> "The jurisprudence of the courts suggests that a national court should try to find a single place as the place for the provision of the service by looking at the contract and the manner in which the services have been provided. It should generally look for the centre of gravity of the obligation in question, but if that does not yield a solution, an alternative place – or even places – of provision may be found. It may be thought at this point that the ends are being allowed to justify the means, but that may be no bad thing if the end is irrational and the means are comprehensible."

52. It is my view that the most cogent assistance in resiliently ascertaining the" centre of gravity" of the obligations arising in the contract between Castlelyons and NMT may be found in the decision of the ECJ in *Wood Floor Solutions*. In that case the Austrian referring court was, *inter alia*, unsure whether Article 7(1)(a) of the Regulation would apply if the court were to hold that the second indent of Article 7(1)(b) was inapplicable where services are provided in several member states. In regard to the issue whether the second indent of Article 7(1)(b) is applicable where services are provided in several member states the ECJ held:

> "In that connection, it should be noted, first of all, that in the judgment in *Color Drack*, cited above, the Court held that the rule of special jurisdiction set out in [Article 7(1)] of the regulation in matters relating to a contract, which complements the rule that jurisdiction is generally based on the defendant's domicile, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case (*Color Drack*, para. 22; and *Rehder*, para. 32)."

53. The Court secondly held at para. 25 that:

> ". . . the factors which it took as a basis in order to arrive at the interpretation set out in *Color Drack*, cited above, are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in a single member state.
>
> "26. The rules of special jurisdiction provided for by the regulation for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation."
>
> "27. Where the services in question are provided at several places in different member states, a differentiated approach cannot be applied to the objectives of proximity and predictability, which are pursued by the centralisation of jurisdiction in the place of the provision of services under the contract at issue and by the determination of sole jurisdiction for all claims arising out of that contract."

54. The following excerpt from *Wood Floor Solutions* is also germane:

> "37. . . . it is necessary to indicate the criteria according to which the place of the main provision of services must be determined, when those services are provided in different member states.
>
> 38. Having regard to the objective of predictability laid down by the legislature in recital 11 in the preamble to the regulation, and taking account of the wording of the second indent of [Article 7(1)(b)], according to which it is the place in a member state where, under the contract, the services were provided or should have been provided which is decisive, the place of the main provision of services must be deduced, in so far as possible, from the provisions of the contract itself. Thus, in the context of a commercial agency contract, the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and, where appropriate, concluding the

transactions for which he has authority has to be identified, on the basis of that contract.

39. The determination of the place of the main provision of services according to the contractual choice of the parties meets the objective of proximity, since that place has, by its very nature, a link with the substance of the dispute.

40. If the provisions of a contract do not enable the place of the main provision of services to be determined, either because they provide for several places where services are provided, or because they do not expressly provide for any specific place where services are to be provided, but the agent has already provided such services, it is appropriate, in the alternative, to take account of the place where he has in fact for the most part carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as it appears from the provisions of the contract. For that purpose, the factual aspects of the case may be taken into consideration, in particular, the time spent in those places and the importance of the activities carried out there. It is for the national court seised to determine whether it has jurisdiction in the light of the evidence submitted to it: (*Color Drack*, para. 41).

41. Fourth, if the place of the main provision of services cannot be determined on the basis of the provisions of the contract itself or its actual performance, the place must be identified by another means which respects the objectives of predictability and proximity pursued by the legislature.

42. For that purpose, it will be necessary for the purposes of the application of the second indent of [Article 7(1)(b)] to consider, as the place of the main provision of the services provided by a commercial agent, the place where that agent is domiciled. That place can always be identified with certainty and is therefore predictable. Moreover, it has a link of proximity with the dispute since the agent will in all likelihood provide a substantial part of his services there.

43. . . . the second indent of [Article 7(1)(b)] of the regulation must be interpreted as meaning that where services are provided in several Member States, the court having jurisdiction to hear and determine all the claims based on the contract is the court within whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be determined on that basis, the place where the agent is domiciled."

55. In *Color Drack* the Court of Justice held that Article 7(1) is intended to compliment the general principle that jurisdiction is generally based on the defendant's domicile by a rule of special jurisdiction in matters related to a contract. It went on to state that:

". . . The reason for that rule, which reflects an objective of proximity, is the existence of a close link between the contract and the court called upon to hear and determine the case." (para. 21).

56. Of relevance also is the decision of the Court of Justice in *Rehder v. Air Baltic* (Case C-204/08) [2009] E.C.R. 1-6073. In Rehder the Court had to consider the relative scope of the Brussels I Regulation and the objectives of the special jurisdiction articles. The court found that:

"The factors on which the Court based itself in order to arrive at the interpretation set out in *Color Drack* are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in one single Member State. The rules of special jurisdiction provided for by Regulation No 44/2001 for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation." (para. 36 of judgment)

57. The central facts in that case concerned a contract for air transport of passengers which is fundamentally and materially distinguishable from the facts in the instant case where at all material times NMT was a freight forwarder and shipbroker and, in effect, acted as agent for *Castlelyons*. In *Rehder* the Court found that in respect of the state of departure and the state of arrival,

"Each of those two places has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, the close connection required by the rules of special jurisdiction set out in the regulation."

Tort - Article 7(2) of the Brussels Regulation

58. Historically the common law position was that the gateway to jurisdiction for claims in tort was based generally on wrongful acts committed within the state. That common law gateway to jurisdiction was broadened in some respects by the original Brussels Convention, but in other respects certain exorbitant aspects of the common law rules as to jurisdiction in tort were also excluded by the Convention.

59. The Convention was incorporated into Irish law by the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act, 1988. The 1988 Act was repealed by the Jurisdiction of Courts and Enforcement of Judgments Act 1998, s. 5 of which provides that the Brussels Convention shall have the force of law in the State and that judicial notice shall be taken of it. By virtue of s. 6 of the Act the Irish courts are also obliged to take judicial notice of a ruling, decision or expression of opinion by the Court of Justice on any questions about the meaning or effect of a provision of the Brussels Convention (s. 6 (1) (a)). The Brussels Convention provided a special jurisdiction rule found in Article 5.3 (i.e. 7(2) of Brussels Regulation), that a person domiciled in a contracting state could be sued in another contracting state in matters relating to tort, delict or quasi-delict "in the courts for the place where the harmful event occurred".

Special jurisdiction - tort

60. Article 7(2) is one of a number of provisions for special jurisdiction in the revised Brussels Regulation. It confers jurisdiction in relation to tort "in the courts for the place where the harmful event occurred or may occur", notwithstanding the general rule provided in Article 4 that the action must be brought in the jurisdiction of the defendant's domicile.

***Locus* of "harmful event"**

61. In *Bier v. Mines de Potasse de d'Alsace* (Case C-21/76) [1976] E.C.R. 1-1735 the ECJ had interpreted this phrase to refer both to the place where the damage occurred and the place of the event giving rise to it so that a claimant could elect between them. It has been suggested that the words "harmful event" were deliberately chosen in the drafting of the Convention because it was not considered appropriate for the Convention to be specific between the two. In *Bier* the damage was all sustained in one place where the discharge into the Rhine of saline waste from operations in France damaged horticultural nurseries in the Netherlands. The law

was further developed in *Dumez France SA v. Hessische Landesbank* (Case C-220/88) [1990] E.C.R. 1-49. In that case the ECJ pointed out that Article 5.3 (i.e. 7(2) of Brussels Regulation) constituted an exception to the general rule that the defendants were to be sued in their country of domicile. In Dumez the Court of Justice held on the particular facts of the case that the harm alleged to have occurred in France was "merely the indirect consequence of the financial losses initially suffered by their subsidiaries."

62. In *Marinari v. Lloyds Bank plc*. (Case C-364/93) [1995] E.C.R. 1-2719 the Court of Justice affirmed both *Bier* and *Dumez.* The claimant instituted proceedings in Italy alleging financial loss and reputational damage caused when the defendant bank being suspicious of a promissory note he had lodged with them contacted the police, which led to his arrest and the confiscation of the promissory notes. The Grand Chamber held that Article 5.3 [now Article 7(3)] did not cover every place where adverse consequences of an event which had already caused actual damage elsewhere could be felt.

63. The Court held that the "damage" under reference in Article 5.3 [now Article 7(2)] of the Brussels Regulation "cannot . . . be construed so extensively as to encompass any place where the adverse consequences of an event that has already caused actual damage elsewhere can be felt. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage consequential on initial damage arising and suffered by him in another contracting state." (paras. 14-15)

64. The Brussels Convention was replaced by Council Regulation (EC) No. 44/2001 (The Brussels I Regulation) which was in turn replaced by Regulation (EU) No. 1215/2012 (The Brussels Brussels I Regulation). Article 7(2) repeats the wording of Article 5.3 of the Convention. The Marinari decision accordingly represents the current authoritative interpretation of "where the harmful event occurred" in EU law.

Findings of fact
65. I am satisfied that as a matter of law NMT is domiciled within the jurisdiction of the United Kingdom and any action by Castlelyons against it is to be pursued within the courts of that member state unless Castlelyons can demonstrate special jurisdiction pursuant to Article 7.

66. In the instant case, all the evidence points in one direction and NMT Shipping carried out its functions as freight forwarders/ship brokers during its course of dealings with Castle Freight from its offices in Southampton in the United Kingdom. It is clear that its *locus* at Marsh Lane, Southampton, constituted the hub from which all key aspects of the freight forwarding and ship broking services supplied by NMT to Castlelyons were effectively actioned. Significant elements involved, *inter alia*, the engagement of third parties, be they WWL (who were agents for EUKOR) and EUKOR itself.

67. It cannot be reasonably asserted that the place where Shaun Dunning, Michael Pearson and Garry Calloway carried out their respective aspects of this agreement was anywhere other than Southampton.

Actual performance of contract

68. Whilst Castlelyons asserts that NMT had extensive involvement in the shipment at Dublin, Bremer Haven and Jebel Ali, in reality a close analysis demonstrates that its involvement did not go beyond that of agent for Castlelyons in procuring freight forwarding and the activities referred to as occurring in Dublin took place and were effected by EUKOR and its Stevedores. Likewise, at Bremerhaven the activities took place and were effected by EUKOR and its stevedores there. With regard to the events complained of as having occurred in Jebel Ali and Dublin in connection with the release of cargo on foot of the bill of lading there appears to be documentation emanating from Castlelyons' own agent Mr. Coe explicitly giving the said instructions. At no time in the immediate aftermath of delivery of the goods and cargo at Jebel Ali for a period of almost six years was it ever asserted that the release of the cargo was wrongful under the bill of lading or otherwise. Therefore, I am satisfied that the actual performance of each constituent element of this contract on the part of NMT Shipping was performed at Southampton in the United Kingdom.

69. Castlelyons has accordingly failed to identify any close link of proximity between Ireland and the material elements of the particular dispute as pleaded in the writ delivered. Whereas the plant and machinery was delivered to the port of Dublin in February 2009, it was delivered by Castlelyons on foot of a contract of carriage concluded with EUKOR. EUKOR, as the carrier, had booked the cargo for loading by their Dublin stevedores on the vessel MV Morning Calm. Therefore I am satisfied that the decision in Rehder can be distinguished on that basis. In my view, it is also material that the Rehder decision concerned also the Montreal Convention for the Unification of Certain Rules for International Carriage by Air of May 1999, a convention which is not engaged in the instant case.

Burden of proof
70. On the basis of the evidence and the affidavits sworn in these proceedings, I am satisfied that Castlelyons has failed to discharge the burden of proof resting upon it for the invocation of the special jurisdiction to be found in Article 7 of the Brussels Regulation. The burden rests with the party seeking to invoke Article 7(1) or (2) of the Brussels Regulation to satisfy the Court that the special jurisdiction has been validly invoked. The plaintiff failed to satisfy the onus of proof in this regard.

71. The facts of this case demonstrate that the actual performance of the constituent elements of the contract on the part of NMT took place in Southampton within the jurisdiction of the United Kingdom which also coincides with the place of domicile of NMT. It is where all the agents and staff of NMT were at all material times based in performance of its contractual obligations to Castlelyons. NMT acted as agent for Castlelyons within the ambit of its ordinary line of business being freight forwarding and ships broker. In the language of Briggs, the "centre of gravity" of this contract is situate in the United Kingdom and, in my view, it would be artificial to argue otherwise. It is the actual place of performance by NMT of its obligations under its particular contract whereby it sourced freight forwarders at an agreed price at the behest of Castlelyons' agent Frank Coe. This conclusion also accords with the spirit and intendment of the Regulation which is to aim towards the establishment of a single place of provision of performance of the obligations in a contract insofar as practicable. All the facts lead inexorably to this outcome. I am satisfied that NMT delivered its services within the jurisdiction of the courts of the United Kingdom and there are no countervailing elements disclosed or established on the part of Castlelyons which would engage the special jurisdiction pursuant to Article 7(1)(b) as occurred in *Rehder v. Air Baltic Corp*.

Approach
72. What was required was a narrow focus on the ambit of the obligation assumed by NMT Shipping on foot of its contract with Castlelyons. The only matter of relevance was the place of performance of those narrow set of obligations. I am satisfied that the "centre of gravity" of the contract between the parties to this appeal is Southampton. This arises from the facts as disclosed in the pleadings and in the affidavits of the parties. This view is supported by the judgment of the ECJ in *Wood Floor Solutions*. When analysing the main provision of where the *locus* of the main provision of services was to be carried out by NMT having regard to the various individuals within that freight company and their activities as deposed to in the affidavit of Shaun Dunning, the locus in each case goes back to Southampton for the carrying-on of their work and inputs as the locus for the carrying out of the greater bulk of

NMT's activities in the performance of the contract.

Tort
73. The establishment of the claim in tort is a discrete matter having regard to Article 7(2) of the Brussels Regulation. Significant weight must be attached to the affidavit of Thomas Grimes and in particular paras. 9 and 10 thereof where he sets out that the tort alleged against NMT arises from the latter's authorisation of EUKOR to release Castlelyons cargo of plant in Jebel Ali without the original bills of lading or to release it to any party save the main shipper:

> "I say that in these circumstances the second named defendant's authorisation of the delivery of the plaintiff's cargo to any party other than the named shipper by the first named defendant amounted to a conversion of the plaintiff's cargo by the first named defendant and the second named defendant."

However the exhibits point to the fact that NMT received express authorisation to do so from Castlelyons' own agent by e-mail and telex sent to EUKOR's agent. Insofar as the basis of a claim exists for the benefit of Castlelyons in regard to same, jurisdiction must be established depending on the state from which the telex/e-mail was sent or the state where same was received, in neither case Ireland. It follows, accordingly, that the alleged wrongful acts did not occur within Ireland and as the decision of the Court of Justice in *Mariani* makes clear, the fact that the plaintiff may have suffered consequential economic loss in Ireland is not in itself enough to found jurisdiction in this State for the purposes of Article 7(2). .

74. I am satisfied that the "harmful event" complained of by Castlelyons did not originate in this jurisdiction. Such a conclusion is fundamentally inconsistent with the facts of this case and the jurisprudence of the ECJ and does not accord with the principles underpinning Article 7(2) of the Brussels Regulation. Accordingly, the harmful event contended for from a tortious point of view by Castlelyons has not been demonstrated to have occurred in Ireland as is a pre-requisite to the invocation of special jurisdiction pursuant to Article 7(2) of the Brussels Regulation.

Conclusions
75. In summary, therefore, I consider that the respondent has failed to discharge the onus of proof upon it to establish jurisdiction pursuant to the provisions of either Article 7(1) or (2) of the Brussels Regulation.

76. I would accordingly allow the appeal and against the decision of the High Court and set aside the orders of 10th October 2016. The Appellant is entitled to a declaration that the Court has no jurisdiction to hear and determine the claims of Castlelyons Enterprises Limited against NMT Shipping (UK) Limited for damages for breach of contract and further declaring that the Court has no jurisdiction to hear and determine the plaintiff's claim against the second named defendant for damages for negligence and/or breach of duty (including breach of duty as bailee) and/or fraud and/or wrongful delivery and/or conversion as indorsed on the plenary summons herein.