Neutral Citation: [2015] IEHC 62

THE HIGH COURT

[2009 No. 19013 P.]

BETWEEN/

AIDAN MCDONALD

PLAINTIFF

AND

A.Z. SINT ELIZABETH HOSPITAL, DR. JOOST VAN DER SYPT AND NORTH WEST WALES NATIONAL HOSPITAL TRUST (NO.2)

DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on 22nd January 2015

1. Where a plaintiff travels from Ireland to Belgium for the purposes of medical treatment in response to a specific advertisement directed at (amongst others) Irish consumers, what is the proper law of that contract? This is the difficult question of private international law which now arises for determination as a preliminary issue.

2. The Irish rules of private international law relating to the proper law of a contract concluded prior to 17th December 2009 are largely governed by the Rome Convention on the Law applicable to Contractual Obligations 1980 (O.J. 1980, L 22, p.1)("the Rome Convention"). The Rome Convention is an intergovernmental agreement which was concluded pursuant to the provisions of the (then) Article 220 of the EC Treaty. The Rome Convention was given the force of law in the State for the purposes of Article 29.6 of the Constitution by s. 2(1) of the Contractual Obligations (Applicable Law) Act 1991("the 1991 Act"). (The provisions of the replacement Regulation, Regulation 593/2008 EC ("Rome II") apply only to contracts made after 17th December, 2009 whereas insofar as there was a contract in the present case, it is agreed that it dates from March 2007).

3. Section 3(2) of the 1991 Act provides that the report by Professor Mario Guiliano and Professor Paul Lagarde on the 1980 Convention (O.J. C 282/24) (1980) may be considered by any court when interpreting any provision of the Rome Convention and "shall be given such weight as is appropriate in the circumstances." I propose to have regard to the provisions of the Guiliano and Lagarde Report at various points in the course of this judgment.

4. Before examining this issue it is first necessary to rehearse the background to the present case. As originally formulated, the plaintiff's claim was a claim in negligence for personal injuries as against the first and second defendants and damages for breach of contract as against the first defendant only. The claim as against the third defendant has been compromised and does not require to be further addressed.

The present proceedings and the Brussels Regulation

5. The proceedings themselves arise from a gastric bypass procedure performed on the plaintiff, Mr. McDonald, at the AZ Sint Elisabeth Hospital, Zottegem in Eastern Flanders on 6th March 2007. Mr. McDonald travelled to Belgium for this purpose in response to specific advertising directed at the Irish and UK market by the defendant Hospital. This advertising invited such residents to make contact with the Hospital

6. The first issue which arose was the question of jurisdiction for the purposes of the Brussels Regulation No. 44/2001/EC. (The new recast version of the Brussels Regulation, Regulation 1215/12 EC, has since come into force on 10 January 2015). In the first judgment delivered in this matter, *McDonald v. A.Z. Sint Elizabeth Hospital* [2014] IEHC 88, I held that this Court had no jurisdiction to entertain an action in negligence against either the Hospital or the treating consultant (and second defendant), Dr. Van der Sypt. Both defendants were domiciled in Belgium for the purposes of Article 2 of the Brussels Regulation and there was no question of the harmful event (for the purposes of Article 5(3)) having taken place otherwise than in Belgium.

7. It was also clear from the evidence then put before me that the only contract between the parties was between the plaintiff and the first defendant hospital. (I will return presently to this issue). I further held that the plaintiff was a consumer for the purposes of Article 15 of the Brussels Regulation and that he could accordingly sue the Hospital in his place of domicile (*i.e.*, Ireland) by virtue of Article 15(1)(c) of that Regulation.

8. Article 15 of the Brussels Regulation (2001 version) provides:

> "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."

9. The reason for this conclusion was that it was plain from the evidence that the Hospital had directed its advertisements to Irish consumers and that it had invited persons with obesity problems resident here to travel to Belgium for the appropriate medical treatment.

10. In the wake of the delivery of the first judgment on the jurisdictional issue, Dr. Van der Sypt then swore a further affidavit on 17th December 2014 for the purposes of the contractual issue. In that affidavit Dr. Van der Sypt suggested that the Hospital had no contract with the plaintiff and that the plaintiff had paid him personally, rather than on account with the Hospital. I will merely say that these averments do not appear to be consistent with the evidence which was earlier put before the Court. In these circumstances, given that I have already adjudicated on the jurisdictional question on the basis of that earlier evidence, it does not appear to me that I can permit one of the parties – at least for the purposes of the Rome Convention issue – to advance a factual argument which is fundamentally different to that previously advanced at an earlier stage of the proceedings.

Rome Convention
11. It is against this background that I am required to consider what the proper law of this contract actually was. In principle and subject to certain protections in favour of consumers contained in Article 5(2), the parties are permitted by Article 3 of the Rome Convention to choose the applicable law, but this did not occur in the present case. In the absence of choice, Article 4 and Article 5 then come into play.

12. Article 4(1) provides that the basic rule is that the proper law shall be that the law of the contract "with which it is most closely connected." The remainder of Article 4 contains certain presumptions as to what that law actually is. Article 5 of the Convention deals with consumer contracts. It may be convenient to consider this provision after having first considered Article 4.

Article 4 of the Rome Convention
13. Article 4(1) prescribes a general rule that the law of the country with which the contract is most closely connected should be the governing law. The remainder of Article 4 contains supplementary presumptions and a further rule. Neither Article 4(3)(immoveable property) nor Article 4(4)(carriage of goods) have any relevance for the present case. It may be convenient at this juncture to set out the text of Article 4(1), Article 4(2) and Article 4(5).

14. Article 4(1) provides:

> "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country."

15. Article 4(2) provides:

> "Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated."

16. Article 4(5) provides:

> "5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3, and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."

17. In the absence of an express choice of law, Article 4(1) provides that the contract "shall be governed by the law of the country with which it is most closely connected." Article 4(2) creates the presumption that in the case of a body corporate or unincorporate the contract is most closely connected "where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract …its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated."

18. The first defendant was clearly the party who was to effect the performance which was characteristic of the contract, namely, the gastric by-pass procedure. A.Z. Sint Elizabeth Hospital is a University Hospital which is either a body corporate or unincorporated. The contract was entered into in the course of its trade or profession, so that its principal place of business was Belgium.

19. This, moreover, is not a case where Article 4(5) should apply. Unlike some contracts, the characteristic performance of this particular contract can readily be determined. Nor can it be said that this contract was more closely connected with the Belgium rather than Ireland. The contract was concluded in Belgium, it was paid for by the plaintiff in Belgium and the contract was performed in Belgium. These factors plainly outweigh any countervailing argument which point to Ireland such as the fact that the plaintiff first saw the defendant's advertisements in Ireland or that he had preliminary discussions regarding the proposed operation with Dr. Van der Sypt by telephone prior to travelling to Belgium.

Article 5 of the Rome Convention
20. The principal focus of the argument in this case centred, however, on the provisions of Article 5, which deals with certain consumer contracts. Article 5 contains a series of interlocking rules which are themselves subject to a number of exceptions and counter-exceptions.

21. Article 5 provides:

> 1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
>
> 2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
>
> - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by

advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

- if the other party or his agent received the consumer's order in that country, or

- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

22. In view of the provisions of Article 5(1) it is clear that the services supplied in the present case were medical services which were outside Mr. McDonald's trade or profession and did not concern the provision of credit. Mr. McDonald is accordingly a "consumer" for this purpose.

23. It should next be noted that Article 5(2) provides that any choice of law made by the parties in accordance with Article 3 shall not have the effect of depriving the consumer "of the protection afforded to him by the mandatory rules of the law of the country in which he has his principal residence" where, *inter alia*, if:

> "…in that country the conclusion of the contract was preceded by a specific invitation or by advertising, and he had taken in that country all the steps necessary for the conclusion of that contract."

24. As we have already observed, the defendant Hospital specifically advertised its services in Ireland to Irish customers (so, for example, the advertising literature included an Irish telephone number for Irish patients). Mr. McDonald then contacted the Hospital in response to the advertisement where he was put through to speak with Dr. van der Sypt. But can it be said that Mr. McDonald had "taken all the steps necessary for the conclusion of that contract" *in Ireland?*

25. It is clear from the evidence filed that Mr. McDonald twice spoke with Dr. van der Sypt, having telephoned him from Ireland for this purpose. The parties discussed the options of surgical treatment for his obesity and made the appropriate arrangements for Mr. McDonald to travel from Ireland to Belgium. It is also clear that Mr. McDonald then travelled to Belgium where he signed the necessary consent form on the 7th March 2007 and discharged the appropriate fee prior to undergoing surgery.

26. Some assistance on this question is given by the Guiliano/Lagarde Report which states (at pp. 23-24):

> "The first indent relates to situations where the trader has taken steps to market his goods or services in the country where the consumer resides. It is intended to cover, *inter alia*, mail order and door-step selling. Thus, the trader must have done certain acts such as advertising in the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing… The Group expressly adopted the words 'steps necessary on his part' in order to avoid the classic problem of determining the place where the contract was concluded. This is a particularly delicate matter in the situations referred to, because it involves international contracts normally concluded by correspondence. The words 'steps' includes, *inter alia*, writing or any action taken in consequence of an offer or advertisement."

27. I think it fair to say that the authors of the Guiliano/Lagarde Report probably did not have the present type of case in mind when preparing the Report. They seemed to have envisaged the classic type of mail order case where the customer resident in Member State A completes in that State an order for goods or services which is to be provided in that State and dispatches that order to the trader based in Member State B. This nevertheless was the type of case which the Guiliano/Lagarde Report envisaged would come within the first indent of Article 5(2), even if, for example, the substantive law of Member State B provided that there was no concluded contract until the order was actually received by the trader in question.

28. The plaintiff clearly took action on foot of the advertisement, since he telephoned the Hospital and discussed his option with Dr. van der Sypt. In the light of the Guiliano/Lagarde Report, therefore, he obviously took "steps" to conclude the contract within the meaning of Article 5(2). But did he take "all" the steps necessary for this purpose?

29. Here it may be noted that Article 13(3)(b) of the Brussels Convention contained a similar clause in relation to the special jurisdiction provisions relating to consumer contracts. This matter was considered by the Court of Justice in Case C-96/00 *Rudolf Gabriel* [2002] E.C.R. I – 6367. In this case an Austrian consumer received a communication from a German mail order firm to the effect that he had won almost 50,000 Austrian Shillings subject only to placing an order of goods for a minimum of 200 Austrian Shillings.

30. The Austrian company duly delivered the goods in question, but refused to pay the further sums, claiming that there was no binding promise. The plaintiff then commenced proceedings in the Austrian courts seeking damages for breach of contract. The question of whether the case came within Article 13(3) of the Brussels Convention was then referred by the Austrian courts to the Court of Justice.

31. That Court noted that these provisions had a direct counterpart to the provisions of Article 5(2) of the Rome Convention as what

it described (at para. 40) as "the concurrent conditions" of direct advertising and taking the necessary steps to conclude the contract "are designed to ensure that there are close connections between the contract at issue and the State in which the consumer is domiciled." The Court of Justice found that the "necessary steps" condition had been satisfied in the present case because the consumer and the mail order firm had been "indubitably linked" once the order had been placed, "thereby demonstrating his acceptance of the offer – including all conditions attaching thereto – which that company had sent to him in person."

32. There are, however, some important differences between *Gabriel* and the present case. First, Article 13(3)(b) of the Brussels Convention simply requires a showing that "the consumer took in that State the steps necessary for the conclusion of the contract", whereas Article 5(2) of the Rome Convention requires proof that the consumer "had taken in that country all the steps necessary on his part for the conclusion of the contract." (emphasis supplied). The word "all" is accordingly present in the Rome Convention but is *not* present in the corresponding provisions of the Brussels Convention and the presence or absence of this word is apt to have important consequences for the scope of application of the respective provisions.

33. Second, it is accordingly important to recognise that in *Gabriel* the Court of Justice was simply required to consider whether the plaintiff had taken the necessary steps and not "all" the necessary steps. Moreover, the issue in *Gabriel* was a straightforward consumer contract claim where the plaintiff had actually ordered and paid for the goods in Austria from the German mail order firm. It is thus clear that there was an "indubitable" contractual nexus between the parties by virtue of that order.

34. The present case, by contrast, is different. It cannot be said that Mr. McDonald took *all* the steps *necessary* for the conclusion of the contract *within Ireland*. Here it is critical to note that the consent to medical treatment form was signed on 7th March 2007 by the plaintiff upon his arrival in *Belgium*. This was surely a necessary precursor to the completion of the contract, since, as counsel for the Hospital, Mr. Reidy S.C., observed, the operation could not have been lawfully performed otherwise. Likewise, the payment was effected only after the plaintiff arrived in Belgium. This was also unlike the position in *Gabriel* where the consumer had already paid for the goods in his country of domicile.

35. In these circumstances I find myself coerced to the conclusion that the plaintiff cannot bring himself within Article 5(2), first indent. The language of this provision is very specific ("…all the steps necessary on his part for the conclusion of the contract…"). While the plaintiff can show that he took important steps in Ireland to complete the contract, I do not think that he can demonstrate that he took "all" the steps which were necessary for this purpose in this country.

36. What, then, are the consequences of this conclusion? The most immediate consequence is that the plaintiff is denied the benefit of Article 5(3) which, subject to one exception (which I will next address), provides that in such cases the law of the country where the consumer has his or her habitual residence shall apply, save where the parties have expressly chosen a particular law for the purposes of Article 3. Given my conclusion that the plaintiff cannot obtain the benefit of the Article 5(3), it is not probably strictly necessary to express a view on this question, but for completeness and given that the matter was fully argued before me, I will now address this question.

Does the Article 5(4)(b) exception apply?

37. Article 5(4)(b) is itself a counter-exception to Article 5(3) in that it provides that Article 5 does not apply where the contract in question is a contract for the supply of services and "where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence." The contract in question undoubtedly involved the provision of medical services. But can it be said on the facts of the present case that the contract was to be "exclusively" performed in Belgium?

38. Counsel for the plaintiff, Ms. Dillon S.C., argued forcefully that Article 5(4)(b) did not apply, given that Dr. van der Sypt advised the plaintiff as to his options while he was still in Ireland and before he travelled to Belgium. Conversely, counsel for the Hospital, Mr. Reidy S.C., contended that the contract was not concluded until the consent form was signed and that thereafter the contractual services were to be performed entirely in Belgium.

39. In my view, for the reasons already stated with regard to Article 5(2), I think it clear on the facts that the contract was not concluded until the consent form was supplied by the plaintiff in Belgium. Thereafter, the contract was performed entirely in Belgium, so that the Article 5(4) counter-exception comes into play, negating the possible application of Article 5.

40. This conclusion also accords with the underlying policy of Article 5(4) which is explained thus in the Guiliano-Lagarde Report (at p. 24):

> "The exclusion of contracts of carriage is justified by the fact that the special protective measures for which provision is made in Article 5 are not appropriate for governing contracts of this type. Similarly, in the case of contracts relating to the supply of services (for example, accommodation in a hotel, or a language course) which are supplied exclusively outside the State in which the consumer is resident, the latter cannot reasonably expect the law of his State of origin to be applied in derogation from the general rules of Articles 3 and 4. In the cases referred to under (b) the contract is more closely connected with the State in which the other contracting party is resident, even if the latter has performed one of the acts described in paragraph 2 (advertising, for example) in the State in which the consumer is resident."

41. In the absence of an express choice of law, no one who travels to a foreign destination for the purpose of receiving medical treatment there could, I think, realistically suppose that Irish law should be deemed to govern the contract, save where the contract had been executed in Ireland in advance of travel, *i.e.,* the very circumstances envisaged by the "all necessary steps" requirement of Article 5(2), first indirect and, by extension, Article 5(3).. This is true even if the visitor has travelled to the foreign country for this purpose in response to a specific advertisement for this purpose.

42. In arriving at this view, I have not overlooked the argument advanced by Ms. Dillon S.C. to the effect that advices were tendered by Dr. Van der Sypt while the plaintiff was still in Ireland. That is undoubtedly so, but this does not mean that those advices were supplied pursuant to an actual contract of services. These advices were at best pre-contractual in nature. If the events complained of had occurred entirely within Ireland, then, looking at the matter through the narrow prism of Irish substantive law, if those pre-contractual advices had been given negligently, then the plaintiff's only remedy against Dr. van der Sypt would have been in tort rather than contract.

43. It follows, therefore, that Article 5 does not apply to the present case.

Article 2(1) of the Convention

44. Finally, I should note that Article 2(1)(f) of the Rome Convention provides that the Convention does not apply to the question of the capacity of an agent to bind his or principal. Although this matter was not argued before me and was only mentioned in passing, I

should nonetheless observe that the question of what law would govern that question - should it conceivably arise - would fall to be determined by the ordinary rules of our domestic private international law rather than the Rome Convention as such. In these circumstances, it would not be appropriate to express any further view on this issue.

Conclusions
45. Summing up, therefore, I would conclude as follows:

46. First, as the plaintiff cannot show that the contract was to be performed elsewhere than in Belgium and as he could not have had any realistic expectation that Irish law should govern the contract, this is a case which falls outside the scope of Article 5(2) and Article 5(3). Specifically, as the plaintiff cannot show that he took "all" the steps necessary for the conclusion of the contract in Ireland, the case falls outside the scope of Article 5(2), first indent, so that the special choice of law rule in Article 5(3) does not apply.

47. Second, this case actually falls within the counter-exception contained in Article 5(4), as the contract was to be performed exclusively in Belgium.

48. So far as Article 4 is concerned, it likewise follows that Belgium was the place of performance of the obligation which was characteristic of the contract (namely, medical services) for the purposes of Article 4(2). That presumption is not displaced by Article 4(5), since the contract was more closely connected with Belgium rather than Ireland.

49. It follows, therefore, that for those reasons the proper law of the contract for the purposes of Article 4(2) and Article 5(4) of the Rome Convention must be adjudged to be Belgian law.