Neutral Citation: [2014] IEHC 421

THE HIGH COURT

[2009 No. 3075 P]

BETWEEN

CELTIC ATLANTIC SALMON (KILLARY) LIMITED (IN VOLUNTARY LIQUIDATION)

PLAINTIFF

AND

ALLER ACQUA (IRELAND) LIMITED AND (BY ORDER) ALLER ACQUA A/S

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 31st July, 2014

1. Where a defendant in foreign proceedings governed by the Brussels Regulation (Council Regulation No. 44/2001EC) fails to advance and maintain a counter-claim for damages for in those proceedings, is that party then barred by the doctrine of *res judicata* or by the provisions of the Brussels Regulation itself from re-litigating that counterclaim for damages for breach of contract and negligence in existing proceedings in this jurisdiction where it sues as plaintiff? This, in essence, is the difficult issue of conflict of laws which arise in the present proceedings.

PART I - INTRODUCTION

2. The plaintiff ("Celtic Atlantic") is an Irish company which carried on the business of fish farming before it went into voluntary liquidation in November, 2008. The first defendant ("Aller Ireland") is the Irish subsidiary of its Danish parent ("Aller Denmark"). On 21st October, 2013, I made an order joining Aller Denmark to the proceedings, but this, of course, was without prejudice to its right to contest the jurisdiction of the Court. Aller Denmark has since issued a motion contesting that jurisdiction. While the motion in form principally seeks relief as against Aller Denmark, in practice the question has long since become whether the entire action (whether as against Aller Ireland or Aller Denmark or both) is barred by reason of doctrines such as *res judicata*, issue estoppel and the operation of the Brussels Regulation.

3. The defendants carry on the business of sale and supply of fish feed. The present proceedings were commenced in this jurisdiction in 2009 and in those proceedings Celtic Atlantic claims that the Aller Ireland sold and supplied fish feed which did not have contain an appropriate phosphorous content. It further contends that, as a result, its fish failed to thrive and they developed feed related dystrophy. It claims that it suffered very significant financial loss (estimated at over €2m.) by reason of this alleged breach of contract and negligence.

4. In July, 2008 Celtic Atlantic had commissioned a report from a specialist veterinarian, Hamish Rodger. According to his report ("the Rodger report"), 209 fish were caught in cages and drugged. Of these it is said that between 49% to 80% of them had obvious defects and had developed obvious deformities and nutritional disorders. Mr. Rodger attributed this unusual state of affairs to a phosphorous deficiency. Having examined the labelling on the boxes of feed, Mr. Rodger noted that the phosphorous level was 0.8% which was below the recommended level for growing juvenile Atlantic salmon, as the figure ought to have been 1.1%. Mr. Rodger commented that on a previous visit in June, 2008:

> "….a new diet had been supplied by Aller that was reported to have 1.2% phosphorus present, however, feed labels in the feed shed on the Aller feed state only 0.8% phosphorus…that is below recommended levels."

5. A further veterinary report was supplied a Kevin Murphy based on a site visit of 17th July 2008 who concluded that the problem was the level of phosphorous in the Aller feed:

> "Given that the performance of the stocks has not improved over the past couple of months (it may have deteriorated) and given that the Aller diet, as stated in the label, contains insufficient levels of phosphorous for salmon, I would recommend that no more Aller feed be given to these fish. I would recommend that these fish be harvested out as soon as possible."

6. The dispute between the parties then started with a letter sent by Celtic Atlantic's solicitors in July, 2008 claiming damages for the (allegedly) defective fish feed. Aller Denmark's solicitors responded by denying liability, but also claimed the sum of €834,000 for unpaid invoices in respect of the fish feed. Further correspondence between the parties later ensued.

7. On 6th November, 2008, Aller Denmark then commenced proceedings as plaintiff against Celtic Atlantic as defendant by writ of summons in the Civil Court at Kolding. The scope of these Danish proceedings is of some importance. There were, in fact, two separate claims. First, Aller Denmark claimed €58,655 plus interest in respect of certain unpaid invoices for the fish feed ("claim 1"). (It also reserved its position to make further claims in this regard.) Second, it sought an order that "Celtic be ordered to admit that the delivered feed on which Aller Acqua's claim is based is in conformity with the contract." ("claim 2").

8. Here it should be noted that there is general agreement that the feed supplied prior to 1st January 2008 was supplied by Aller Ireland, whereas the feed supplied after that date was supplied by Aller Denmark. The claim which was actually advanced by Aller Denmark in the Danish court was approximately 7% in value of the total unpaid invoices claimed (€58,655/€834,000) on behalf of the Aller companies. While a further exploration of this topic would require extensive discovery and an examination of the records of the parties, one may, I think, fairly surmise that the Danish proceedings and ultimate judgment of the Danish court related only to a fraction of the fish feed actually supplied by the Aller companies.

9. This is, perhaps, of some importance. From a reading of Mr. Rodger's report, it does not seem possible to ascertain whether the alleged deficiency stemmed from particular identifiable batches of feed. On the contrary, it seems that these deficiencies occurred

during the life cycle of the fish as they grew to maturity. The scope of the potential claim and defence in this regard is, moreover, not absolutely clear.

10. Assuming for the moment that the analysis conducted by Mr. Rodger and by Mr. Murphy analysis is correct, then the question which immediately arises is how this state of affairscame about. In other words, is this a defective products type case in the true sense of that term where the feed was simply inherently defective in that it contained insufficient phosphorous? Or is it the case that the feed was not defective *in itself*, but rather that the *wrong type of feed* was supplied for these particular fish (growing juvenile Atlantic salmon)? This is an issue which, as we shall presently see, has some implications in the context of the scope of the default judgment ultimately granted by the Danish courts.

11. In February, 2009 the solicitors for the liquidator, Lyons Kenny, instructed Danish lawyers, Maare Advockataktieslkab ("Maare") to act for the then liquidator, Kieran McCarthy, to act on behalf of Mr. McCarthy in the Danish proceedings. (Mr. McCarthy resigned as liquidator and was replaced by the present liquidator, Mr. Kieran Wallace, in February, 2012). Following discussions between the parties, Lyons Kenny advised that it would be unwise to bring a counter-claim in the Danish proceedings, because to do so "would preclude us from bringing proceedings in Ireland for damages for breach of contract."

12. Shortly afterwards a plenary summons was issued in Ireland claiming damages against Aller Ireland and this summons was served on Aller Ireland on 26th May, 2009. A conditional appearance was entered on behalf of Aller Ireland on 30th June, 2009. The proceedings were admitted into the Commercial Court on 27th July, 2009, and in the meantime a motion contesting the jurisdiction of this Court had been filed by Aller Ireland. The proceedings themselves amounted to a claim for damages for negligence and breach of contract by reason of the allegedly defective nature of the fish feed.

The proceedings in Denmark

13. Matters were also progressing apace in Denmark where the jurisdiction of the Danish courts had been challenged by Celtic Atlantic. So far as the jurisdiction of the Danish Court was concerned, Aller Denmark pointed to the separate statutory ratification by Denmark of the Brussels Regulation in December, 2006. As the claim was based on the obligation on Aller Denmark to deliver the fish feed "ex works" to Celtic, it was contended that the Danish court had jurisdiction pursuant to Article 5(1)(a) or Article 5(1)(b) of the Brussels Regulation as Denmark was place for the performance of the obligation in question.

14. The jurisdiction of the Danish court was challenged by Celtic Atlantic and in August, 2009 a motion contesting that jurisdiction was heard by the Kolding District Court. At the hearing of that jurisdictional motion, oral evidence was given by James Murray, the former general manager of Celtic Atlantic, stating that the parties had never considered the question of whether the contractual obligation regarding the delivery of the feed was ex works or whether it was an obligation to deliver the feed to Celtic Atlantic in Donegal. This view was disputed by the witnesses called by Aller Denmark. One of them, Svend Kristensen, gave evidence that the fish feed in this case came from Aller Denmark's factory in Christiansfeld rather than from the alternative source of supply, namely, Aller Denmark's factory in Golob-Dubryzn in Poland.

15. In the light of this latter evidence the Kolding District Court held that the trading relationship between the parties was governed by the Aller Denmark's conditions of trade and that the obligation in question was to supply the feed ex works in Christiansfeld. The presiding judge, Judge Andersen, then ruled that Celtic Atlantic:

> "had not established that other conditions of sale than the plaintiff's general terms of trades should apply. Therefore, the court also finds that the shipments pertaining to this case were made ex works in Christiansfeld, Denmark. That is supported by the invoices issued by Aller [Denmark] on which indications 'ex factory' are stated. Thereby, the plaintiff [Aller Denmark] was under an obligation to deliver the fish fodder at the plaintiff's factory in Christiansfeld. In pursuance of Article 5(1)(a) and (b) of the Brussels Regulation….a plaintiff may bring a case before the court where the obligation being the basis of such a case is performed or is to be performed. Seeing that the obligation has been performed or is to be performed in Christiansfeld, which is situated in the judicial district of Kolding, the case may, therefore, be brought before the District Court of Kolding…"

16. An appeal against this decision on the jurisdictional question was dismissed by the Danish Western High Court in November, 2009.

17. In the wake of that decision the parties appear to have understood that the proceedings would be determined exclusively by the Danish courts. The Irish proceedings had already been admitted to the Commercial Court list and a date had been fixed for hearing on 5th March, 2010. However, on 25th February, 2010, Kelly J. made an order by consent staying the Irish proceedings pursuant to Article 28 of the Brussels Regulation and/or the inherent jurisdiction of the Court. The order further recited that "the substantive action is now going for trial in Denmark and that these proceedings are at an end in this jurisdiction."

Would the Rodger report have been admissible or, if admissible, would it have had any value before the Danish courts?

18. It was about this time that the Irish lawyers advising the liquidator then encountered what (for them) must have been an unusual problem of a kind they could not have foreseen. The Rodger report was supplied to Maare in January, 2010, but Mr. Rune Moefelt of Maare then gave advice on 11th February, 2010, to the effect that it was most unlikely that this expert report could be admitted in a Danish court having regard to the provisions of the (Danish) Administration of Justice Act:

> "During court proceedings in Denmark the parties will, as an almost absolute rule, have to comply with the provisions of the Administration of Justice Act regarding expert evidence when a party submits a claim for damages etc….The provisions under the Administration of Justice regarding expert investigation set forth in Chapter 19…contains conditions which a person acting as expert witness will have to fulfil in order to be an expert witness appointed by the Court. Expert witness can therefore not be random experts but must, among other things, be court appointed. This is a crucial issue as Hamish Rodger, who conducted the veterinary reports and site visit, has not been a Court appointed expert witness."

19. Mr. Moefelt then continued by detailing the procedures contained in the Administration of Justice Act, none of which had been followed in this case:

> "If and when the provisions in the Administration of Justice Act and procedures regarding expert evidence [have] not been complied with, the documents, in this case the veterinary reports, will be considered bias[ed] and one-sided evidence and there are clear court practice[s] that if a counterpart contests the submission of such bias and one-sided evidence, that this will be dismissed from the Court proceedings so that the plaintiff cannot rely on this evidence."

20. Mr. Moefelt then concluded:

> "There is, in my opinion, a significant risk that the Court will not allow the veterinary reports as evidence in the matter and if the Court allows the veterinary reports, the reports are of little value as evidence. It is my opinion that a judge will not rely on the reports as the counterpart has not had the opportunity to comment or to submit questions to Hamish Rodger during his completion of the report.
>
> This [is] due to the fact that the procedure regarding expert investigation under Danish law has not been complied with, and the fact that neither the fish nor the fish feed [can] be re-examined by a court appointed expert witness as they are no longer present.
>
> It is my opinion that claim for damages etc. for the defective fish feed due to the above-mentioned [law] will have little or no chance of success under court proceedings in Denmark. It is my opinion that the counterpart in the matter, Aller Aqua, is fully aware of this fact and that this is the reason they contest venue in Ireland."

21. Having originally reserved my judgment, I then subsequently put a set of questions to the parties, one of which concerned the operation of Danish Administration of Justice Act:

> "Is it accepted that only evidence obtained from a court-sanctioned expert under the Danish Administration of Justice Act is admissible or otherwise has any value before a Danish court? If that is so, would the report of Hamish Rodger have been admissible before the Danish courts?"

22. On this point Mr. Henrik Benjaminsen, the Danish legal expert retained by Celtic Atlantic, stated:

> "Evidence obtained from one party alone is only inadmissible if the other party objects and the court rules in favour of the other party, but in any event the evidence would have little or no value before a Danish court if admissible, as it is not evidence from a court-appointed expert."

23. The legal expert retained by Aller Denmark, Mr. Kenneth Cramer, disputed this view. He did accept, however, that:

> "the courts in Denmark have been reluctant to admit evidence from experts that have been appointed by only one of the parties, and therefore not in accordance with the rules concerning court appointed experts, but the Danish Supreme Court made two rulings in 2008…in which expert evidence gathered by one of the parties before the court case was initiated, was admitted as evidence. The reason behind the Supreme Court rulings is that the parties are free to present evidence (therefore also one-sided evidence), but after court proceedings are initiated, the parties are bound by the rules in the Administration of Justice Act – which states that expert evidence are subject to the courts' prior approval and appointment. If the evidence is obtained before courts proceedings are initiated, the parties are not bound by these rules, and the evidence is therefore admissible."

24. Mr. Cramer further noted that Mr. Rodger's report was based on a site visit in July 2008 in advance of the commencement of the court proceedings and "therefore the findings should be admissible."

25. It would, of course, be presumptuous for this court to rule on what appears to be a difficult and possibly evolving aspect of Danish law. Nevertheless, having regard to the comments of the two experts, it seems clear that the admissibility of the Rodger report before a Danish court would not have been straightforward. It is true that, as Mr. Cramer notes, Celtic Atlantic did refer to the Rodger report in its Danish pleadings and it may even have been formally presented as evidence to the Danish courts without any formal adverse ruling on admissibility. Yet irrespective of any question of formal admissibility before the Danish courts, the question as to whether a Danish court would attribute any *weight* to such a report is just as important.

26. The preponderance of the evidence from these experts suggests that a Danish court probably would not attribute any real weight or value to a report which was not sanctioned under the Danish Administration of Justice Act. There was, at the very least, a real doubt on the issue and had the question been presented, it would have raised a *dubium* which would probably have required an authoritative determination from the Danish courts.

27. It is true that, as Mr. Cramer observes, Celtic Atlantic could have produced other evidence and could also have asked the District Court at Kolding "to appoint an expert to investigate the fish feed." The difficulty, of course, here is that both the feed and the fish were no more.

28. These views regarding Danish law must have presented Celtic Atlantic with considerable difficulties. It meant that even if Celtic Atlantic's substantive claims regarding the defective feed were correct, then it had proceeded to gather the most vital item of evidence – namely, the preparation of a report from an expert witness - in order to base a claim for breach of contract and negligence in respect of loss and damage which occurred in Ireland which was (apparently) of little value in a Danish court. Yet by arranging for the preparation of such a report, the Irish legal advisers naturally followed the time-honoured law and practice of the requirements of Irish law and judicial practice. Against the background, how, it might be asked, could they have known that in this respect it would have been necessary for them to make an application in the first instance to a Danish court for an order under the Danish Administration of Justice Act to have a court appointed expert investigate the gathering of evidence in Ireland?

29. In the light of these advices it is scarcely a surprise that Celtic Atlantic elected not to pursue the counterclaim in respect of the defective feed. While there was some dispute between the Danish lawyers as to what actually happened at the Kolding court, it would seem that, according to the defence filed in the Danish proceedings that Celtic Atlantic set up the claim "as a counterclaim for compensation in support of the denial of liability. [Celtic Atlantic] reserves the right to set up a counterclaim for payment of damages."

30. Celtic Atlantic pleaded in that defence that "the feed which had been delivered to [Celtic Atlantic] was defective and as a result the fish growth was not as expected and [Celtic Altantic's] sales were ruined." It also reserved the right to appoint an expert under the Danish Administration of Justice Act and to counterclaim for general damages. It also made extensive reference to the report of Hamish Rodger in that defence.

31. It would seem, therefore, that there was no true general counterclaim for damages in the sense which Irish procedural law would understand that phrase. There was rather a counterclaim by way of defence. This was really a defence on the merits – rather than a counterclaim in the true sense of the term - since Celtic Atlantic set up the (allegedly) defective nature of the product as a defence to the non-payment of the invoices, but did not file a general counterclaim for damages for breach for contract or for negligence.

32. This decision not to proceed with a general counterclaim to have been arrived in consideration of Mr. Moefelt's report, but it was made sometime after Kelly J. had been informed in February 2010 that these proceedings would ultimately be determined by the Danish courts. An email sent by the plaintiff's solicitors on 10th May 2010 records that it was agreed that the Irish proceedings would be stayed pending the outcome of the Danish proceedings. The writer, Barry Kenny, added:

> "Given the evidentiary difficulties in prosecuting the counterclaim against Aller [Denmark] for the defective feed, the Danish proceedings are simply being defended (as opposed to filing a counterclaim).
>
> Once the Danish proceedings are complete….we can revisit the proceedings in the [Irish] High Court."

33. The Danish proceedings ultimately culminated in a judgment delivered by the Kolding Court on 12th January, 2011 at which Celtic Atlantic did not appear. That order directed Celtic Atlantic to pay Aller Denmark the sum of €58,655, plus interest. The Court further stated that Celtic Atlantic:

> "is held liable to accept the grounds for Aller [Denmark's] claim is that the delivered feed is contractual….During the preparation [for the hearing] the defendant [Celtic Atlantic] asked for acquittal. The defendant has not submitted a claim document and has failed to appear during the main proceedings."

34. So far as can be ascertained, this judgment was based on two unpaid invoices from Aller Denmark in respect of fish feed which – since it was the plaintiff – must have been supplied by it after January 2008.

35. As far as the effect of this judgment is concerned, this Court has had the benefit of opinions offered by the two Danish legal experts, Mr. Henrik Benjaminsen (for Celtic Atlantic) and Mr. Kenneth Cramer (for Aller Denmark). There is in truth little difference between these two distinguished experts on many issues. Both agree that the judgment is a default judgment which is final and conclusive and is no longer appealable. Both further agree that the default judgment is not a judgment on the merits, but rather a judgment on the pleadings. Thus, Mr. Benjaminsen states:

> "it is my opinion that the default judgment for the claim for defective fish feed is not based on an assessment on the merits, [but] merely on the presentation of the case and what else has been set forth during the case."

36. Mr. Kramer took a similar view, adding in his affidavit of 6th February 2014 that:

> "No decision was made other than the feed delivered according to the invoices produced during the proceedings was conforming to the contract."

37. As no suggestion, however, has been made that the fish feed was supplied pursuant other than to pursuant to the invoices which were the subject of the judgment, the essential question, therefore, is whether that Danish default judgment operates either as an estoppel or as a *res judicata* so as to preclude the present action by Celtic Atlantic for damages for breach of contract and for negligence. Having regard, however, to the special features of this case, a declaration that the fish feed was supplied in conformity with the contract would not necessarily preclude an action for negligence. It may be, for example, that the parties actually agreed that the fish feed would have a phosphorous content of 0.8%. But this would not necessarily prevent an action for negligence where, for example, the basis of the claim was that the supplier ought to have known that this particular product was quite unsuitable for its stated purpose for fish of this kind.

38. Returning to the wider questions, perhaps the easiest point of departure is to consider, first, what the position would have been at common law and then, second, then to consider whether the common law has been altered by reason of the entry into force of the Brussels Regulation. We can now turn to consider these issues.

PART II: THE POSITION AT COMMON LAW

Recognition of foreign default judgments: the position at common law

39. The position at common law regarding estoppel by *res judicata* was well summed up in the following terms by Girvan J. in *Lough Neagh Exploration Co. Ltd. v. Morrice* [1999] N.I. 258, 274:

> "At common law ….an estoppel by *res judicata* necessitates proof that the previous decision was a final and conclusive decision on the merits, that the parties were the same and that the cause of action or issue before the court was identical with that previously determined."

40. We may now examine these separate requirements.

"Final and conclusive"

41. It is not in dispute but that the Danish judgment of January 2011 was final and conclusive and that the time for appealing that judgment has long since expired.

"On the merits"

42. At common law, default judgments (and, *a fortiori*, foreign default judgments) could only give rise to a true *res judicata* in limited circumstance: see *Kok Hoong v. Leong Choong Kweng Mines Ltd.* [1964] A.C. 993.Depending, however, on the circumstances, it might amount to an abuse of process for the losing party to re-litigate the matter even if the default judgment did not give rise to a *res judicata*. In the case of foreign judgments, the requirement for the recognition of the foreign judgment as *res judicata* was that the judgment must have been on the merits: see Spencer, Bower, Turner and Hadley, *The Law of Res Judicata* (London, 1996) at 84. This may beg the question as to what is meant by a judgment on the merits. In *The Sennar (No.2)* [1985] 1 W.L.R. 490, 499 Lord Brandon stated:

> "Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."

43. This matter was further considered by Clarke J. in *Moffitt v. Agricultural Credit Corporation PLC* [2007] IEHC 245, [2008] 1 I.L.R.M. 416. In that case the plaintiff had previously commenced proceedings which were struck out by Murphy J. in the High Court

as frivolous and vexatious. He then commenced a further set of proceedings which the defendant contended should be struck out as *res judicata*.

44. Clarke J. first articulated the general principle:

> "It is well settled that in order for a plea of *res judicata* to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits. There is no doubt but that the judgment of Murphy J. is a final judgment (at least since any prospect of an appeal from that judgment has disappeared by virtue of the order of the Supreme Court made in October, 2006). There is, however, an issue between the parties as to whether it can properly be said that the judgment of Murphy J. in the previous proceedings is a judgment on the merits. In that context, it is clear that the dismissal of proceedings for want of prosecution (see for example *Pople v. Evans* [1969] 2 Ch. 255) or by virtue of prematurity (see *Barber v. McQuaig* [1900] 31 OR 593) do not give rise to a bar to future proceedings."

45. Clarke J. then referred to the judgment of Laffoy J. in *Dalton v. Flynn*, High Court, 20th May, 2004. In *Dalton* the issue was whether the fact that a defendant had brought a counterclaim in earlier proceedings which was struck out amounted to a *res judicata* which barred that defendant bringing a fresh action qua plaintiff. It seems – although it is not entirely clear - that the counterclaim had been struck out as frivolous and vexatious. Laffoy J. held that the dismissal of the counterclaim on this ground did not amount to a judgment on the merits and it accordingly created no *res judicata* to bar the second set of proceedings.

46. However, Clarke J. rejected the argument that *Dalton v. Flynn* is authority for the proposition that a dismissal on the basis that an action is bound to fail does not amount to a dismissal on the merits such as would necessarily give rise to a bar to the same issue being raised again:

> "There may well be cases where the fact that proceedings are dismissed as being frivolous or vexatious may not give rise to a bar to further proceedings. However it seems to me that where proceedings are dismissed as being bound to fail following on from a hearing in which the court considered the merits of the case for the purposes of determining whether the case had any chance of success, then it follows that fresh proceedings on the same basis are barred. In order to determine that proceedings are bound to fail, the court must enter into a consideration of the merits. Indeed it does so on the basis of allowing the benefit of the doubt concerning any factual or complex legal issues to be determined in favour of the plaintiff. The proceedings will only be dismissed, …where the court is satisfied that there is no prospect of success on the merits. Such a hearing can, in my view, be properly described as a hearing on the merits.
>
> There may, of course, be other reasons why proceedings may be dismissed as being frivolous or vexatious which would not require the court to go fully into the merits of the case. In those circumstances a dismissal may not amount to a bar to future proceedings.
>
> I am, therefore, satisfied that where a court enters into a consideration of the merits of a plaintiff's claim on a motion to dismiss as being bound to fail and comes to the conclusion, on the merits, that the proceedings are bound to fail, that it follows that the same proceedings cannot be recommenced without infringing the doctrine of *res judicata*."

47. So far as the present case is concerned, it is clear, however, that the Danish court gave a default judgment in respect of claim 1 which held, in line with the earlier findings on the jurisdictional motion, that the goods were to be supplied by Aller Denmark ex works at Christiansfeld. *To that extent and in that respect* it was a final judgment on the merits inasmuch as there had been an earlier ruling on the merits of the place of the obligation in question in the course of the judgment which had been delivered in respect of the jurisdictional motion. Insofar as the court went further and awarded Aller Denmark a monetary award in respect of claim 1, it was not a judgment on the pleadings and not on the merits.

48. Inasmuch as the Court granted Aller Denmark a negative declaration in a default judgment in claim 2 to the effect that the goods were delivered in accordance with the contract, that declaration would not be recognised by an Irish court on the application of Irish conflict of law rules since it was a form of exorbitant jurisdiction which deprived the true plaintiff (*i.e.*, Celtic Atlantic) the right to sue in Ireland in respect of (allegedly) defective goods which caused loss and damage here. (The position under the Brussels Regulation is, as we shall, see, quite different).

49. It is also important to recall that the Danish court never adjudicated on the actual merits of any Celtic Atlantic's counterclaim, since such a claim (as we would recognise it) was never presented (or, indeed, even lodged) before that court. It never even adjudicated on the merits of the defence set up by Celtic Atlantic which had pleaded the defective nature of the feed by way of defence.

50. It follows that so far, at any rate, as Irish domestic law is concerned, the decision of the Danish court in January, 2011 in respect of claim 2 does not give rise to a *res judicata*.

"Between the same parties"

51. The Danish proceedings concerned Aller Denmark and Celtic Atlantic only, whereas, as originally constituted, the Irish claim was against Aller Ireland only. Yet it is clear that Aller Ireland was a wholly owned subsidiary of its Danish parent and was the corporate entity used by Aller Denmark for distribution purposes in Ireland. In these circumstances, there is accordingly "a sufficient degree of identification between the two to make it just that the decision to hold that the decision to which one was party should be binding in proceedings to which the other is party": see *Gleeson v. J. Wippell & Co.* [1977] 1 W.L.R. 510, 515, *per* Megarry V.C.

52. It follows, therefore, that this requirement of the identity of the parties is satisfied, at least so far as the common law's requirements for an estoppel *per rem judicatam* are concerned. It is also important to observe that the Danish court expressly found in the jurisdictional judgment in August, 2009 (and confirmed on appeal in November, 2009) and by necessary implication in respect of the judgment for debt in January, 2011 that the terms of and conditions regarding the supply of the fish feed were those of Aller Denmark, irrespective of which subsidiary or associate company actually supplied the fish feed at any given time.

Involving the same cause of action

53. As we have noted, the Danish proceedings brought by Aller Denmark consisted of two principal claims. First, there was a claim ("claim 1") for debt in respect of the two unpaid invoices in the sum €58,655 plus interest. Second, there was a claim ("claim 2") that "Celtic [Atlantic] be ordered to admit that the delivered feed on which Aller [Denmark]'s claim is based is in conformity with the contract."

54. Viewing the matter exclusively from the perspective of the common law and postponing for the moment any consideration of the

Brussels Regulation, it can be said that the Irish claims for damages for breach of contract and for negligence are certainly closely related to the Danish claims. Nevertheless, it cannot be stated that the claims are in every respect identical, even so far as the claims between Celtic Atlantic and Aller Denmark is concerned.

55. First, the judgments in respect of both claim 1 and claim 2 only concerned the fish feed supplied by Aller Denmark after January, 2008 and represents, as we have already seen, approximately 7% of the fish feed supplied in total by the Aller companies. The position in respect of the much larger bulk of feed which had been supplied by Aller Ireland prior to January, 2008 is simply not addressed - even by implication - in this judgment. There might, in any event, be a claim for negligence over and above the terms of the contract on the basis that the product contained phosphorous levels which were inadequate for juvenile Atlantic salmon.

56. Of course, at one level it might be said that the very fact that the Danish courts gave judgment in respect of the claim 1 in respect of the invoices necessarily implies that the subject matter of the claim (namely the fish feed) was fit for purpose and of merchantable quality. Yet here – again, so far as Irish law, at any rate is concerned – there is a fundamental distinction between an action for a liquidated debt and a counter-claim for damages for breach of contract: see, *e.g., Prendergast v. Biddle*, Supreme Court, 31st July 1957), *Walek & Co. K.G. v. Seafield Gentex Ltd.* [1978] I.R. 167.

57. It accordingly does not follow that the claim for unliquidated damages for breach of contract and for negligence is inconsistent with an award for debt for a liquidated sum, since the claims relate to two different contractual obligations. Irish courts – and, for that matter, courts elsewhere within the European Union – frequently give judgment in favour of a plaintiff for debt while awarding the defendant damages for an unliquidated sum by way of counterclaim. Or, as Dicey, Morris & Collins, *The Conflict of Laws* (15th Ed., 2012) put the matter (at 778), "a judgment awarding an unpaid seller the price would not be irreconcilable with a judgment awarding damages to the buyer for breach of contract."

58. The situation with regard to claim 2 is more complex, because the Danish court granted what amounts to a negative declaration to Aller Denmark that "the delivered feed on which Aller Acqua's claim is based is in conformity with the contract." This is, in effect, a declaration that Celtic Atlantic has no claim for damages for breach of contract in respect of the (allegedly defective) fish feed. Yet it must nevertheless be acknowledged that having regard to the special features of this case, a declaration that the fish feed was supplied in conformity with the contract would not necessarily preclude an action for negligence. It may be, for example, that the parties actually agreed that the fish feed would have a phosphorous content of 0.8%. But this would not necessarily prevent an action for negligence where the basis of the claim was that the supplier ought to have known that this product was quite unsuitable for its stated purpose, even if it were delivered in accordance with the contract.

59. In any event, I do not think that at common law an Irish court would have necessarily recognised a negative declaration of this kind which was granted in respect of claim 2. The common law tends to view negative declarations with some circumspection, albeit that they are by no means excluded on *a priori* basis. But there is a general "wariness about granting such relief in the case of transnational disputes out of a fear of encouraging forum shopping": see Zamir and Woolf, *The Declaratory Judgment* (3rd.ed., 2002) at 118. Indeed, that very wariness can be detected in *Websense International Technology Ltd. v. ITWAY SpA* [2014] IESC 5, [2014] 2 I.L.R.M. 81 where MacMenamin J. suggested that "careful scrutiny might possibly be warranted" of applications for negative declarations which were brought as part of a strategy to choose a favourite jurisdiction, although he recognised that the potential for such arguments were strictly limited within the confines of the Brussels Regulations regime having regard to the judgment of the Court of Justice in Case C-116/02 *Erich Gasser GmbH* [2003] E.C.R. I-14721.

60. In the present case, however, an Irish court would not have recognised such a negative declaration, largely because it ousted the right of a plaintiff to bring an action in the Irish courts in respect of damage which – if the plaintiff is correct – occurred wholly within Ireland. That right is a central feature of our domestic rules of private international law, at least where case has more than a "tenuous" connection with this jurisdiction: see, *e.g.*, the judgment of Walsh J. for the Supreme Court in *Grehan v. Medical Inc.* [1986] I.R. 528, 542 An Irish court would not accordingly recognise a negative declaration granted by a foreign court which effectively extinguished a true plaintiff's right (*i.e.*, the person claiming to have suffered loss and damage in Ireland by reason of a wrongful act) to sue in this jurisdiction in respect of such loss and damage.

The rule in Henderson v. Henderson

61. In addition to the principle of *res judicata*, there is, of course, a separate – if closely related – principle, namely, the rule in *Henderson v. Henderson* (1843) 3 Hare 100. This rule applies where, as Clarke J. put it in *Moffitt*, a new issue is raised which "could and should have been brought forward in the previous proceedings."

62. The courts have nevertheless stressed that the rule in *Henderson v. Henderson* should not be applied in some automatic fashion. As Clarke J. observed in *Mount Kennett Investment Co. v. O'Meara* [2010] IEHC 216, [2011] 3 I.R. 547, 559 there is, therefore, a "material difference between a strict res judicata where the court has no discretion and the *Henderson v. Henderson* abuse where the court has some discretion."

63. As I stated in *Re Ashcoin Ltd. (No.2)* [2013] IEHC 8:

> "…it is clear from the authorities that the rule in *Henderson v. Henderson* should not be applied with remorseless severity, as if indeed it were otherwise, the rule could then often apply so as to preclude even the routine amendment of pleadings since it might be plausibly contended that the rule precluded the plaintiff from now advancing the amended case."

64. Noting the comments of Lord Bingham in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1, 31 (who argued for "a broad, merits-based judgment" which focused "attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before) and those of Kearns J. in *SM v. Ireland (No.1)* [2007] IESC 11, [2007] 3 I.R. 283 (who stated that the rule in Henderson v. Henderson must not be "applied in a rigid or mechanical manner so as to deprive the court of any discretion to hold otherwise in an appropriate case") I went on to say that:

> 'This case-law therefore mandates an approach towards the *Henderson v. Henderson* which is discretionary in nature and which, above all, seeks to protect a defendant from harassment or abusive conduct.'"

65. In *Ashcoin Holdings Ltd. (No.1)* I held that the proceedings had been improperly constituted inasmuch as I held that a receiver had no entitlement to sue the defendant in respect of certain invoices which I held to be book debts, since such debts had been expressly excluded by the terms of the debenture under he had been appointed. The receiver then subsequently sought to reconstitute the proceedings and in *Ashcoin Holdings Ltd. (No.2)* I held that in the circumstances this re-constitution of the proceedings was not barred by the rule in *Henderson v. Henderson*:

> "While acknowledging, therefore, that Ashcoin's application potentially comes within the scope of the rule in *Henderson v. Henderson*, given that there was no intention on the part of the receiver to overreach and that the necessity to reconstitute the proceedings stems from the fact that it took a legitimate (if erroneous) view of the scope of a legal instrument, it would be oppressive and dogmatic in these circumstances to utilise the rule to bar the reconstitution of these proceedings. This would be especially so where there has as yet been no adjudication on the legal merits of the claim."

66. I take a similar view in the present case. The fact that the plaintiff did not pursue the counter-claim in the Danish courts when they might have done so certainly engages the rule in *Henderson v. Henderson*. This is especially so when there was a recognition on the part of the plaintiff's Irish legal advisors that the pursuit of the Danish counter-claim would bar any action for damages for breach of contract and negligence.

67. Yet, having regard to the particular circumstances of the present case, it would nonetheless be unfair to bar the plaintiff on *Henderson v. Henderson* grounds. The fundamental reason why the plaintiff could not pursue the counter-claim was because it could not lead expert evidence on the allegedly defective nature of the fish feed. It could not have been foreseen when Mr. Rodger was retained to produce his expert report in July 2008 that it might also have been necessary to comply with the rather specific – and, viewed from an Irish perspective, quite unusual - requirements of Danish law which required the sanction of a Danish court under the Danish Administration of Justice Act before such an expert report might be even admissible or have any value in the Danish proceedings. Even if Celtic Atlantic were now to seek to obtain the sanction of the Danish courts under the Administration of Justice Act, the report of Mr. Rodger cannot now be replicated since, for obvious reasons, both the fish and the fish feed are no more.

Conclusions on the common law question is concerned

68. In summary, therefore, so far as the common law is concerned, the only judgment which was delivered on the merits was that based on the findings of the Danish courts on the jurisdictional motion to the effect that the feed which was the subject of the two disputed invoices was supplied ex works at Aller Demark's factory at Christiansfeld. No Irish court could give a judgment which was inconsistent with these findings. Yet the other judgments which were pronounced by the Danish courts in January 2011 in respect of claim 1 and claim 2 were in the nature of default judgments which were not on the merits. These judgments would not, accordingly, have been entitled to recognition under Irish conflict of law rules and there is thus no *res judicata*.

69. It is true that the very existence of the Danish proceedings engages the rule in *Henderson v. Henderson* since, on one view, Celtic Atlantic had been presented with an opportunity to advance a counter-claim to those proceedings which they spurned. It would nonetheless have been unfair to require or expect Celtic Atlantic to pursue a counter-claim in circumstances where the admissibility of a critical expert report was at best doubtful, so that the having regard to the discretionary nature of the *Henderson v. Henderson* jurisprudence, it would be unfair to bar the claim on these grounds.

70. We can now proceed to consider whether and, to what extent, this has been changed by the Brussels Regulation.

PART III: THE IMPACT OF THE BRUSSELS REGULATION

71. There no doubt but that, as a matter of general principle, the courts in one Member State have a duty to ensure that, where at all possible, they do not render a judgment which is inconsistent with an earlier judgment in another Member State. As Recital 15 to the Brussels Regulation states:

> "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States."

72. The question which arises is whether this duty extends to striking out the present proceedings on the ground that, if permitted to proceed to judgment in Ireland, they would create an inconsistency with the earlier Danish judgment. This general question can, however, be broken down into a number of separate components.

73. First, does Article 27 of the Brussels Regulation apply in the present case?

74. Second, even if it does not, is the obligation of this Court to ensure that the creation of potentially inconsistent judgments is avoided confined to those cases where the foreign judgment would itself have been entitled to recognition under Chapter III of the Brussels Regulation.

75. Third, if the answer to the second question is in the affirmative, would the Danish judgments themselves be entitled to recognition in this State?

76. We may now consider these questions in turn.

Does Article 27 of the Brussels Regulation apply in the present case?

77. So far as the Brussels Regulation is concerned, one of the fundamental questions is whether the exercise of my jurisdiction is governed by the *lis alibi pendens* provisions of Article 27 of the Brussels Regulation. This provides:

> "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member State, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

78. For so long as the Danish proceedings were pending, it is plain that this Court could not exercise jurisdiction in respect of at least certain aspects of these present proceedings. But what of the situation now that those proceedings finally culminated with the judgment of the Danish court in January, 2011?

79. This matter was considered by the English High Court. in *Tavoulareas v. Tsavliris (No.2)* [2005] EWHC 2643, [2006] 1 All E.R. (Comm)130. In that case it was accepted that an English court was bound to stay proceedings under Article 27 pending the determination of Greek proceedings involving the same object and cause of action. Once, however, the Greek court delivered its judgment in October 2004, the question then arose as to whether Article 27 continued to apply.

80. Andrew Smith J. concluded that it did because, he argued, if it were otherwise ([2006] 1 All E.R. 130, 133):

> "…the court would be obliged to decline jurisdiction in the proceedings before it, notwithstanding it would be open to the claimants to start new and identical proceedings. It would be a pointless exercise for the court to decline jurisdiction unless it be suggested that there is merit in an inflexible rule that claimants should be required to waste time and costs in this way, in order to mark the fact that they should not be required to have brought the proceedings. After all, if there were such a rule, it would operate even if the claimants were unaware of the proceedings in the court first seised when they brought their proceedings elsewhere. I decline so to interpret Article 27."

81. I find myself arriving at a different conclusion mainly because the conclusion reached in *Tavoulareas* does not, with respect, seem to be supported by the actual language of Article 27. It is also implicit in the style, structure and language of Article 27 that litigation in the courts of the first Member State is, in fact, pending. Viewed thus, the provision simply contains a rule whereby that conflict of jurisdiction in respect of the pending litigation can be resolved. But if, as here, the court of the other Member State has proceeded to judgment, then the rationale for the continue application of Article 27 simply disappears, if only because there is no further pending *lis*. Indeed, it may be noted that in *Lough Neagh Exploration Ltd. v. Morrice* [1999] N.I. 258, 284 Carswell L.C.J. doubted whether Article 21 of the Brussels Convention (which corresponds to Article 27 of the Brussels Regulation) applied to foreign proceedings (which, as it happens, were in this jurisdiction) which had been struck out.

82. This, in any event, is also the view expressed by some of the most distinguished commentators on the private international law. Thus, writing from an English perspective, Briggs and Rees, *Civil Jurisdiction and Judgments* (4th Ed., 2005) state (at 235-236):

> "Article 27 provides no express solution to the problems which may arise if one of the courts ceases to be seised, or decides to stay its proceedings….If the foreign court was seised first, but is no longer seised when the English proceedings are instituted, there appears to be no bar to the exercise of jurisdiction by the English court….If the foreign court was seised first but has given its judgment, and is *functus offico* by the time the English proceedings are instituted, there is also no bar to the exercise of jurisdiction by the English court, but the obligation under Chapter III of the Regulation to recognise the foreign judgment may affect the course of the English proceedings."

83. Dicey, Morris & Collins, *The Conflict of Laws* (15th Ed., 2012)(at 580-581) similarly state:

> "Article 27 of the Regulation and of the Lugano Convention requires that the action be still pending in the court first seised when the proceedings are commenced by the courts second seised. So if the proceedings in the first court have terminated by judgment and are no longer pending or if they have been discontinued or if they have been struck out on *forum non conveniens* grounds on the relevant date, Article 27 will be inapplicable."

84. Moreover, contrary to what appears to have been suggested in *Tavoulareas*, it does not at all follow that the courts in the second Member State are entitled to proceed as if the courts of the first Member State had not proceeded to judgment. Quite the contrary, since it is implicit in the entire scheme of the Regulation that, to the greatest extent possible and subject to the confines of the recognition and enforcement procedures of Title III, the judgment of the other Member State should be treated almost as if it were a judgment which had been delivered by the courts of the "home" Member State. In my view, once the Danish court delivered its final judgment in January 2011, Article 27 of the Brussels Regulation ceased to have any relevance.

The general duty of the courts not to permit inconsistent judgments within the Brussels Regulation system

85. The conclusion that the Article 27 is inapplicable is not, however, at all to imply that this court is entirely free to re-open matters already determined by the Danish court. Quite apart from the standard principle of comity of courts, there is the further important feature that the judgment was delivered by a court of competent jurisdiction in another EU Member State operating within the jurisdictional parameters of the Brussels Regulation. It is, accordingly, clear that the courts are under an obligation to ensure, where possible, that they do not render a judgment which is inconsistent with an earlier judgment delivered by the courts of another Member State.

86. This point was made in the context of the *lis alibi pendens* provisions (Article 21 and Article 22) of the Brussels Convention (and now Article 27 and Article 28 of the Brussels Regulation) by the Court of Justice in Case C-163/95 *Freifrau von Horn* [1997] ECR I-5451:

> "…the aims of the Brussels Convention as set out in its preamble,…are, in particular, to facilitate reciprocal recognition and enforcement of judgments of courts and tribunals and to strengthen the legal protection of persons established in the Community. With respect more particularly to Article 21, the Court has repeatedly observed that that provision, together with Article 22 on related actions, is contained in Section 8 of Title II of the Brussels Convention, a section which is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might arise therefrom. Those rules are therefore designed to preclude, in so far as possible and from the outset, a situation such as that referred to in Article 27(3), namely the non-recognition of a judgment on account of its irreconcilability with a judgment given between the same parties in the State addressed…"

87. Indeed, commenting on the decision of the Court of Justice in *Freifrau von Horn* in his judgment for the Supreme Court in *DT v. FL (No.2)* [2008] IESC 48, [2009] 1 I.R. 434, Fennelly J. stated ([2009] 1 I.R. 434, 447):

"Though decided in the context of the Brussels Convention, it may be assumed to be equally applicable to the Brussels Regulations. The underlying objective of the Convention is to avoid conflicts between judgments delivered in the courts of the Member States between the same parties and touching on the same subject-matter. It follows that the courts of the Member States must act so as to prevent conflicting judgments from arising…..The Court thus established the broad principle, mentioned above, that the courts of the contracting states should avoid the risk of giving irreconcilable judgments. Even in the absence of express provision for cases where judgment had already been given, it applied a purposive interpretation by building on the combined effect of Article 26 (recognition) and Article 21 (*lis pendens*) [of the Brussels Convention]. It follows that an Irish court may not entertain a claim in respect of a matter covered by the Brussels Convention where the court of another contracting state has given judgment between the same parties."

88. These comments of Fennelly J. make it plain that, *generally speaking*, the commencement of a second set of proceedings in respect of a judgment already given between the same parties, is *per se* abusive.

89. The decision of the Northern Irish High Court and that of the Northern Irish Court of Appeal in *Lough Neagh Exploration Co. Ltd. v.*

Morrice [1999] N.I. 258 is also to the same general effect. In that case the plaintiff company, LNE, had acquired seismic data in aid of its exploration activities in respect of an area which straddled the land border between Ireland and Northern Ireland. The defendant was a 50% shareholder in LNE and she had entered into a contract to provide consultancy advice to that company. After the expiry of that contract she announced that she now going to assist a US company, P. Ltd., in its endeavours to explore the oil and gas reserves of the region. In 1996 the (Irish) Minister for Transport, Energy and Communications announced that he proposed to grant a petroleum prospecting licence to P Ltd. and to S Morrice and Co. Ltd.

90. At that point LNE commenced proceedings in this State claiming damages for breach of contract and breach of fiduciary duty. LNE further claimed relief as against the Minister. An application for an interlocutory injunction was refused by Laffoy J. on 27th August, 1997, and the proceedings were ultimately struck out by the Supreme Court on 17th May, 1999. LNE had, however, commenced separate proceedings in Northern Ireland for breach of contract and breach of fiduciary duty against Ms. Morrice in April 1998. She then applied to have those proceedings struck out on the ground that they amounted to an abuse of process.

91. In the High Court Girvan J. concluded that the fresh Northern Irish proceedings constituted an abuse of process because there had been no insuperable procedural difficulties to the plaintiff maintaining its proceedings in this State. The attempt to re-litigate the matter in Northern Ireland was accordingly abusive. As Girvan J. put it ([1999] N.I. 258, 278):

> "Against the background of the increasing emphasis on judicial comity particularly within the European Union and between the Contracting States to the Brussels Convention, the principles relating to abuse of process are sufficiently wide and flexible to enable the court in this jurisdiction to prevent a party such as the plaintiff instituting fresh proceedings in circumstances such as prevail in the present case."

92. This view was upheld by the judgment of Carswell L.C.J. for the Northern Irish Court of Appeal.

93. It follows, therefore, that if the present proceedings were to lead to judgments in this jurisdiction which were inconsistent with the Danish judgment, they would in principle have to be regarded as abusive. Yet even if these proceedings lead to an inconsistency, this would not necessarily be abusive if it could be shown that the Danish judgments (or parts of them) would not be entitled to recognition under Chapter III of the Brussels Regulation.

Would the Irish proceedings be inconsistent with the earlier Danish judgments?
94. The first question, therefore, is whether the Irish proceedings would be inconsistent with the earlier Danish judgments. In this respect, provided that procedural due process is respected, it is immaterial under the Brussels system that these judgments were given in default or were not on the merits. This is because Article 34(2) provides that a default judgment should not be recognised:

> "...where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant fails to commence proceedings to challenge the judgment when it was possible for him to do so."

95. The converse, of course, is that default judgments *will be* recognised where due process is observed. There is no suggestion in the present case that Celtic Atlantic were not duly served with the Danish proceedings , so that this potential ground of objection disappears.

96. What, then, did the Danish judgments decide? It is clear that between the judgments on the jurisdictional motion in August 2009 and November 2009 and the default judgments of January 2011 in respect of claim 1 and claim 2, the Danish courts decided the following propositions.

97. First, they decided that Aller Denmark delivered the feed ex works at Christiansfeld, so that the Danish courts had jurisdiction for the purposes of Article 5(1)(a) and (b) in respect of the contractual claim. Second, it is clear from the judgment on the jurisdictional motion that the court looked to the trading history of the parties, so that the obligation to supply ex works applied to all supplies, irrespective of whether the supplier was Aller Denmark or its affiliates, such as Aller Ireland. Third, the court held that Celtic Atlantic had failed to pay for the fish feed supplied by Aller Denmark, so that Aller Denmark were entitled to judgment for €58,655 (plus interest) in respect of these two invoices. Finally, the court ruled, that Aller Denmark had delivered the fish feed which was the subject of the invoices "in conformity with the contract."

98. It is the latter finding that causes the most difficulties from a conflict of laws perspective. In principle, the Danish judgment amounts to a finding that the fish feed delivered according to the two invoices by Aller Denmark after January 2008 was in conformity with the contract. The corollary of this proposition is that it is not now open to Celtic Atlantic to argue in an Irish court that in respect of these *particular supplies by Aller Denmark* there was any breach of contract or that the products were defective in the sense that they did not conform to agreed specifications. This in turn means that the Celtic Atlantic cannot sue Aller Denmark in negligence, save insofar as it is alleged that Aller Denmark were negligent in supplying the wrong type of fish feed in the first place (*i.e.*, supplying fish feed with a phosphorous level of 0.8% to juvenile Atlantic salmon), even if the fish feed was in fact supplied in a manner which conformed to the contract.

99. But I do not think that the matter can be put any further from the perspective of the Aller companies or that any wider implications can be drawn from the Danish judgments. It is clear, for example, that the Danish judgments do not address issues arising from the supply of fish feed *prior* to January, 2008 by Aller Ireland, save that it is clear from the determination on the jurisdictional motion that the place of performance of the obligation in question for the purposes of jurisdiction in contract under Article 5(1) of the Brussels Regulation in that case as well was ex works Christiansfeld.

100. It is for these reasons that a claim in this jurisdiction against Aller Ireland for damages for breach of contract or negligence would not be inconsistent with the Danish judgments. An action for damages (whether in contract or negligence) against Aller Denmark in respect of the feed which was the subject of the two invoices is, however, barred by reason of the prior Danish judgments, save only (i) to the extent that those judgments would not be recognised in Irish court (a matter which is next addressed) and (ii) that an action for negligence alleging that Aller Denmark delivered fish feed which was inherently unsuitable for these particular fish in the conditions under which they were being farmed would not be barred.

101. In the latter case, an award of damages for negligence would not be inconsistent with the prior Danish judgment because it would be tantamount to saying not that the fish feed supplied was defective and contrary to the contractual specifications, but rather that *independent of the contractual specifications*, Aller Denmark supplied the wrong type of fish feed in this case and that it ought to have known this before supplying this type of feed for this type of fish (juvenile Atlantic salmon) which were being farmed

and harvested by Celtic Atlantic.

Would the Danish judgments be entitled to recognition under Chapter III of the Brussels Regulation?
102. There is no question but that the Danish judgment would be recognised under Chapter III of the Brussels Regulation insofar as it concerned claim 1, *i.e.*, the action for debt in respect of the unpaid invoices supplied by Aller Denmark. As we have already seen, when ruling on the jurisdictional question the Kolding District Court clearly founded its judgment on Article 5(1)(a) and Article 5(1)(b) of the Brussels Regulation in finding that the contractual obligation in question was on the obligation on the part of Aller Denmark to supply the fish feed ex works at Christiansfeld, so that the Danish courts thereby had jurisdiction in respect of this claim.

103. Different consideration arise in relation to the second claim which, as we have also seen, amounts to a negative declaration that Aller Denmark was not liable in respect of the claims for breach of contract. It is true that the determination was only to the effect that the feed had been supplied in a manner which conformed to the contract, but this also impliedly amounts to a declaration that there had been no breach of contract or even negligence on the part of Aller Denmark in the manner in which these goods had been supplied to Celtic Atlantic, *unless*, as we have seen, it is argued that these contractual specifications (*i.e.*, 0.8% phosphorous) were inherently unsuitable or defective in themselves.

104. The issue of negative declarations in the context of the special jurisdiction provisions of the Brussels Regulation was examined by the Court of Justice in Case C-133./11 *Folien Fischer AG* [2012] E.C.R. I- 000. In that case, an Italian company, Ritrama, had claimed in correspondence that the distribution policy operated by a Swiss company, Folien Fischer, was unlawful and contrary to competition law. Folien manufactures certain laminated paper goods which it distributes in Germany among other places.

105. Folien then brought an action in the German courts seeking in essence a negative declaration to the effect that that its distribution policy was not unlawful. The matter ultimately came before the Bundesgerichtshof which in turn referred the question of whether a negative declaration of this kind came within Article 5(3) of the Brussels Regulation to the Court of Justice under Article 267 TFEU. Article 5(3) is, of course, one of the special jurisdiction provisions of the Brussels Regulation which enables the courts of the place of the "harmful event" to assume jurisdiction in matters relating to tort, delict or quasi-delict.

106. While the Court of Justice acknowledged that an application for a negative declaration entailed "a reversal of the normal roles in matters relating to tort or delict", it nevertheless considered that such a jurisdiction to grant a negative declaration was not *ex ante* excluded by Article 5(3). Nor did Article 5(3) come within the special rules as to jurisdiction identified in Article 15 *et seq*. of the Brussels Regulation "which are designed to offer the weaker party stronger protection."

107. The Court concluded:

> "51. In those circumstances, the special nature of the action for a negative declaration…., has no bearing on the examination that the national court must carry out in order to determine whether it has jurisdiction in matters relating to tort, delict or quasi-delict, since the only matter to be established is whether there is a point of connection with the Member State in which the court seised is sitting.
>
> 52. If, therefore, the relevant elements in the action for a negative declaration can either show a connection with the State in which the damage occurred or may occur or show a connection with the State in which the causal event giving rise to that damage took place…..then the court in one of those two places, as the case may be, can claim jurisdiction to hear such an action, pursuant to point (3) of Article 5 of Regulation No 44/2001, irrespective of whether the action in question has been brought by a party whom a tort or delict may have adversely affected or by a party against whom a claim based on that tort or delict might be made.
>
> 53. Where, on the other hand, the court cannot identify, in the State in which that court is sitting, one of the two points of connection referred to in paragraph 39 above, it cannot claim jurisdiction without failing to have regard for the objectives of point (3) of Article 5 of Regulation No 44/2001."

108. The Court had earlier stated (at paragraph 39):

> "39. It should also be noted that the expression 'place where the harmful event occurred or may occur' in point (3) of Article 5 of Regulation No 44/2001 is intended to cover both the place where the damage occurred and the place of the event giving rise to that damage and, in consequence, the defendant may be sued, at the option of the applicant, in the courts of either of those places

109. In passing it may be observed that to the extent that an Irish court applying our own domestic rules of private international law would not have recognised a negative declaration granted by a foreign court on the ground that such a declaration facilitated the true defendant in ensuring that a claim concerning loss and damage which occurred in Ireland would not be litigated here, this must now be taken as having been superseded within the application of the Brussels Regulation system following the decision in *Folien Fischer*.

110. So far as the present case is concerned, it is clear that (assuming that the negligence claim of Celtic Atlantic is well founded) the physical damage occurred in Ireland, as this is the place where the fish were supplied the defective feed. Yet even on this hypothesis the defective feed was admittedly manufactured in Denmark. Can it nonetheless be said that Denmark was also a place "of the event giving rise to that damage" for the purposes of Article 5(3) in the sense envisaged in *Folien Fischer*?

111. This issue was considered by the Court of Justice in Case C-198/09 *Zuid-Chemie BV* [2009] E.C.R. I-6917. In that case a Dutch fertiliser company ("Zuid-Chemie") ordered a product called micromix from another company ("HCI") based in Rotterdam. HCI ordered the product from a Belgian company ("Phillippo"). Zuid-Chemie took delivery of the micromix from Philippo in Belgium and later processed the micromix at its factory in the Netherland in order to make fertiliser.

112. It later became clear that a batch of the micromix was contaminated with the result that the fertiliser was unusable. The Court of Justice held (at para. 32 of the judgment) that the Dutch courts had jurisdiction for the purposes of Article 5(3) as this was a place where the damage occurred "as a result of the normal use of the product for the purpose for which it was intended." What is significant for our purposes, however, is that the parties were agreed – with the evident approval of the Court of Justice – that Belgium was the place of the event giving rise to the damage as this was where the contaminated micromix had been manufactured : see para. 25 of the judgment.

113. This view was further confirmed by the Court of Justice in Case C-45/93 *Andreas Kainz* [2014] E.C.R. I-000 where the Court held

(at paragraph 29):

> "….in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured."

114. On this basis, therefore, Denmark is also the place of the event giving rise to the damage for the purposes of Article 5(3), since it was here - as the evidence before the Kolding court on the jurisdictional motion plainly attested – that the (allegedly) defective fish feed was manufactured.

115. Moreover, in the light of the earlier findings regarding the supply of the product *ex works*, the Danish courts likewise had a jurisdiction under Article 5(1) – applying here by analogy the reasoning in *Folien Fischer* to the claims in contract – to grant a negative declaration that Aller Denmark had supplied the feed in conformity with the contract. Such a declaration is tantamount to saying that the products in question are not defective, save where it was argued that the Aller companies were negligent in supplying fish feed of this agreed type in the first place. On that basis, therefore, the negligence would consist of the supply of fish feed which was inherently unsuitable in respect of this fish being farmed under these conditions.

116. It follows, therefore, that the Danish courts had jurisdiction to give judgment in the manner indicated. In principle, such a judgment would be entitled to recognition subject to the limitations of those judgments for the present proceedings in this State and also public policy issue which I will now consider.

Whether the Irish courts would refuse to recognise the Danish judgment on the grounds of public policy?
117. Article 34(1) of the Brussels Regulation provides that:

> "A judgment shall not be recognised:
>
> 1. If such recognition is manifestly contrary to public policy in the Member State in which recognition is sought….."

118. There is no question but the Court of Justice has held that the public policy exception must be interpreted strictly: see, e.g., Case C-414/92 *Solo Kleinmotoren* [1994] E.C.R. I-2237, para. 20 and Case C-7/98 *Krombach* [2000] E.C.R. I-1935, para. 21. It is also clear that recourse to the public policy clause is to be had only in exceptional cases: see, *e.g.*, Case 145/86 *Hoffmann* [1988] E.C.R. 645, para. 21 and *Krombach*, para. 21. These principles are underscored by the fact that Article 34(1) of the Brussels Regulation now requires that recognition must be "manifestly" contrary to public policy, whereas there was no such requirement in the corresponding public policy provisions of Article 27(1) of the Brussels Convention.

119. It is nevertheless clear, as the Court made clear in *Krombach* (at para. 42) that:

> "…observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed…."

120. This principle has, if anything, been strengthened following the entry into force of the EU Charter of Fundamental Rights as a justiciable legal instrument since 1st December 2009. The Charter applies in the present case in that this court is called upon to implement Union law for the purposes of Article 51 of the Charter by giving effect to the Brussels Regulation.

121. Article 41, Article 47 and Article 48 of the Charter all serve to guarantee the effective procedural rights of a party otherwise adversely affected by an administrative (and, by necessary extension, judicial) decision: see, *e.g.*, Case C-277/11 *MM* [2012] E.C.R. I-000, at paras. 81-85.

122. In the present case, I accordingly find myself coerced to the conclusion that, by reason of the manner in which the Danish Administration of Justice Act operated in this case, the effective procedural rights of Celtic Atlantic were violated so far as claim 2 is concerned

123. I must stress immediately that this is not a reflection in the slightest on the Court at Kolding or the Danish judicial system or Danish procedural law. It is rather that Danish Administration of Justice Act contains rules and procedure – specifically, the (apparent) requirement that only expert evidence obtained pursuant to an order made by the Danish courts under that legislation is admissible in evidence or, if admissible, has any value - which an Irish company such as Celtic Atlantic could not have effectively complied with so far as evidence-gathering within Ireland is concerned. This is particularly so given that it could not have been aware at the relevant time when the Rodger report was first commissioned (July 2008) that the substance of its claim might ultimately fall to be determined by a Danish court by means of a negative declaration granted at the suit in that jurisdiction of the putative defendant to any Irish proceedings brought for breach of contract and in negligence.

124. Yet without that expert evidence Celtic Atlantic could not effectively advance its case that the fish feed was intrinsically unsuitable for these particular type of fish. On the special and particular facts of this case, the existence and operation of the Danish law operated – to borrow the language of Girvan J. in *Lough Neagh Exploration* - as an "insuperable" procedural obstacle which barred the effective prosecution of its claim.

125. It is for these reasons that I must conclude that the judgment of the Danish court so far as it concerned claim 2 (*i.e.*, the negative declaration regarding the conformity of the fish feed to the contract) would not be entitled to recognition in this State on the ground that it would be manifestly contrary to public policy for the purposes of Article 34.1 of the Brussels Regulation. No such difficulties arise in relation to claim 1, this was a claim for debt on the invoices in respect of which the expert evidence was not required.

126. In these circumstances, it would not be contrary to the scheme of the Brussels Regulation to permit Celtic Atlantic to pursue its claim for breach of contract and negligence as against Aller Ireland in this jurisdiction and, where necessary, to sue Aller Denmark for negligence on the sole basis that the fish feed as so supplied was inherently unsuitable for fish of this nature, irrespective of contractual specifications.

PART IV - CONCLUSIONS

127. It remains only to sum up my overall conclusions.

128. First, the Danish judgment in respect of claim 1 in respect of the invoices rests on a finding that the fish feed which was

supplied by Aller Denmark after January 2008 as per the two invoices was in accordance with contractual specifications. That issue may not be re-litigated in Irish proceedings, since even though that judgment was a default judgment, it is nonetheless entitled to recognition in this State under the Brussels Regulation.

129. Second, it would not, however, be inconsistent with this judgment were Celtic Atlantic to sue Aller Ireland for breach of contract in respect of fish feed supplied *prior* to January 2008.

130. Third, the Danish courts had jurisdiction in principle to grant a negative declaration in favour of Aller Denmark in respect of claim 2 to the effect that the fish feed has been supplied in accordance with the contract. This impliedly amounts to a negative declaration that Celtic Atlantic could not succeed in a claim for either breach of contract or for negligence, save where it is contended that the negligence consists of acts over and above the contract by, *e.g.*, supplying fish feed which Aller Denmark ought to have known was unsuitable for this kind of fish.

131. Fourth, however, in the very special circumstances of this present case, recognition of the Danish judgment in respect of claim 2 would be manifestly contrary to public policy for the purposes of Article 34(1) of the Brussels Regulation. This is because the operation of the Danish Administration of Justice Act meant that the expert report prepared by Celtic Atlantic's expert would probably not be admissible in evidence or, if admissible, would not be given any weight. The practical consequence of this was that Celtic Atlantic could not effectively advance its claim that the fish feed was unsuitable for this type of fish, since the success of this claim was entirely contingent on the admissibility of an expert report. Celtic Atlantic could not have foreseen in June and July 2008 that it would have been necessary to apply to the Danish courts to have such a report commissioned. The tests which Mr. Rodger conducted in the early summer of 2008 could not now be readily duplicated, even if an application to the Danish courts for the appointment of an expert under the Danish Administration of Justice Act were to be successful.

132. Fifth, it follows that I will allow Celtic Atlantic to proceed in this action against Aller Ireland for breach of contract and for negligence. The claim for breach of contract must be confined to feed supplied prior to January 2008, as any other claim would be contrary to the terms of the Danish judgment in respect of claim 1.

133. Sixth, I would allow Celtic Atlantic to join Aller Denmark to these proceedings for the purposes of proceeding with a claim in negligence only, the contractual issue having already been determined by the Danish courts in respect of the judgment concerning claim 1.