

## THE HIGH COURT

[2015 No. 8402P]

BETWEEN

CASTLELYONS ENTERPRISES LIMITED

PLAINTIFF

AND

EUKOR CAR CARRIERS INC.

AND

NMT SHPPING UK LIMITED

DEFENDANTS

**JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of October, 2016**

1. This application is brought by the first defendant ("Eukor") for an order pursuant to O. 12, r. 26 and the inherent jurisdiction of the court setting aside the service of the summons herein and dismissing the claim as against Eukor.

**Background**

2. In 2009, the plaintiff was desirous of transporting a cargo of construction machinery to the United Arab Emirates. It engaged an English shipping agent, the second defendant ("NMT") to make the necessary arrangements. NMT contacted Wallenius Wilhelmsen Logistics ("WWL"), Eukor's agents for the purpose of making the necessary arrangements. Eukor is a shipping company registered and having its principle place of business in Seoul, South Korea. On 13th February, 2009, NMT booked carriage of the goods through WWL from Dublin to Jebel Ali on Eukor's vessel. On 22nd February, 2009, Eukor issued the original bill of lading for the cargo and on 4th March, 2009, WWL in turn provided three original bills of lading to NMT in respect of the cargo. The original bill of lading had appended to it general terms which included at clause 25, the following:

"Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise should be brought before the Seoul Civil District Court in Korea ... Claims arising from or in connection with or relating to this bill of lading shall be exclusively governed by the law of Korea except otherwise provided in this Bill of Lading".

3. The plaintiff alleges that it did not receive the bill of lading until 2010, after the events complained of by the plaintiff. The uncontroverted evidence of Eukor's deponent, Chan-Doo Park, is that on 10th March, 2009, NMT requested WWL to amend the original bill of lading by changing the consignee of the shipment from Castlelyons Dubai to Sire Contracting LLC ("Sire"). NMT told WWL that the reason for the change of name of consignee was necessitated because Castlelyons Dubai, the original consignee, was not set up to conduct any business transactions in Dubai. At the same time NMT confirmed that it would surrender the original bill of lading to WWL for the change of consignee to be executed. On 20th March, 2009, the cargo arrived in Jebel Ali aboard Eukor's vessel. On 23rd March, 2009, NMT requested WWL to release the cargo to Sire without presenting the original bill of lading, stating that the originals would be with WWL shortly. The original bill of lading was in fact subsequently surrendered to WWL. Accordingly WWL instructed its agents to release the cargo without presentation of the amended bill of lading as requested by NMT. The cargo was duly released.

4. Eukor heard nothing further about the matter for five years when a letter dated 12th February, 2014, was received from the plaintiff's solicitors. The caption to this letter refers to the bill of lading by its number and alleges that the plaintiff's goods were delivered on arrival in Jebel Ali to an unknown third party resulting in a loss of the goods. The correspondence essentially alleges that the goods were released without authority and accordingly Eukor and NMT are guilty of the tort of conversion. The letter goes on to state that the value of the cargo at the time of shipping was €989,000 but the loss claimed by the plaintiff now stands at €16.5 million.

5. The plenary summons herein was issued on 16th October, 2015, over six and half years after the events complained of. It claims damages for breach of contract and/or negligence and/or breach of duty (including breach of duty as bailee) and/or fraud and/or wrongful delivery and/or conversion in and about the carriage of a cargo of plant machinery under Bill of Lading Number EUKODEAE 948027. The summons originally appears to have contained an endorsement pursuant to Articles 5.1 and 5.3 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 but that has been struck out. The second page of the endorsement on the summons contains the following wording:

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

**The Endorsement on the Summons**

6. As indicated above, the summons initially appeared to indicate that the court had jurisdiction under Articles 5(1) and (3) of Council Regulation (EC) No. 14/2001 ("the Brussels I Regulations"). Even if this had not been struck through on the endorsement, it is inapplicable in any event since the Brussels I Regulation was replaced by Regulation (EU) No. 1215/2012 ("the Recast Regulation") which came into effect on 10th January, 2015. Order 4, rule 1A (1) requires that the summons be endorsed with the statement that the court has power under the relevant Regulation to hear and determine the matter and shall specify the particular provision or provisions concerned. Rather than specifying the provision upon which the plaintiff purportedly relies, the second page of the endorsement in fact merely appears to be a recital of the content of O. 4, r. 1A. The failure to state the precise basis upon which the court should assume jurisdiction in the endorsement on the summons is fatal to it – see *Spielberg v. Rowley* [2004] IEHC 384 and *Schmidt v. Home Secretary* [1995] 1 ILRM 301.

7. Quite apart from that fundamental deficiency in the summons, the plaintiff served the original plenary summons rather than notice of the summons on Eukor, which is not an Irish citizen, contrary to O.11, r. 8 of the Rules of the Superior Courts. Order 11(A) rule 6 contains the same requirement insofar as proceedings based on the Recast Regulation are concerned. This is also a basis for setting aside the summons – see *O'Connor v. Commercial General* [1996] 1 I.R. 68.

### **Application of the Brussels Recast Regulation**

8. In the course of argument in this application, Counsel for the plaintiff conceded that the court's jurisdiction was not grounded on O. 11 but rather O.11A and thus the Recast Regulation. Eukor is domiciled in South Korea. Recitals 13 and 14 of the Recast Regulation provide:-

"(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

(14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised."

9. This clearly suggests that the Recast Regulation applies only to defendants domiciled in the European Union. This is further evident from the terms of Article 6(1):

"[1.] If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State."

10. Accordingly where the defendant is not domiciled in a Member State, the private international law rules of the jurisdiction of the court seised apply. In the present case that would mean O. 11, and as I have said, the plaintiff concedes that this order is not applicable.

11. In argument, Counsel for the plaintiff relied upon Article 7 of the Recast Regulation dealing with special jurisdiction and in particular Article 7(2) which provides:

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

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

It will be immediately seen that Article 7 can only apply to a defendant domiciled in a Member State. There is no dispute in the affidavits before the court that Eukor is domiciled in South Korea.

12. Although a number of arguments were advanced to the court in relation to whether Article 7(2) could in any event apply as Ireland was not "the place where the harmful event occurred" nor was it "the place of the performance of the obligation in question", I find it unnecessary to consider these because it seems to me clear beyond doubt that the Recast Regulation cannot apply to Eukor.

13. Although strictly not necessary for the purposes of my conclusion, I would add that it is not in dispute that the bill of lading was subject to a choice of jurisdiction clause which would in any event oust the jurisdiction of the Irish court. I do not see how it could be said, as the plaintiff sought to argue, that it can rely on a breach of the terms of the bill of lading on the one hand but on the other hand disregard those terms where jurisdiction is concerned.

### **Conclusion**

14. For these reasons therefore, I am satisfied that this court has no jurisdiction to hear this matter and I will therefore set aside the summons and dismiss the plaintiff's claim as against Eukor.