THE HIGH COURT

[2014 No. 6746P]

BETWEEEN

PHILIP SMYTH

PLAINTIFF

AND

SAS SOGIMALP TARENTAISE

DEFENDANT

JUDGMENT of Mr Justice David Keane delivered on 25th July 2019

Introduction

1. The defendant moves for three interlocutory orders: first, one pursuant to Order 12, rule 26 of the Rules of the Superior Courts ('RSC') setting aside the service upon it of the plenary summons by which these proceedings were commenced; second, one declining jurisdiction under Regulation (EC) 44/2001 ('the Brussels I Regulation') and third, one striking out the proceedings as frivolous or vexatious (that is to say, bound to fail), pursuant to either O. 19, r. 28 of the RSC or the inherent jurisdiction of the court. Thus, for the purposes of this judgment, I will refer to the defendant as the applicant and to the plaintiff as the respondent.

The underlying proceedings

2. A plenary summons issued on 1 August 2014. The indorsement of claim identifies the respondent's claim as one 'for damages for malicious prosecution in an action brought against him by the defendant.' The reliefs sought are '€100,000 expended by him in legal costs in the said proceedings' and 'damages', together with interest and costs.

3. In accordance with the requirement under O. 4, r. 1A(1) of the RSC, as that rule then stood, to specify the particular provision or provisions of the Brussels I Regulation under which the Court has power to hear and determine the claim raised, the respondent invoked the special jurisdictional rules of Article 5(1) and (3). Article 5(1) deals with claims in contract. As counsel for the respondent acknowledged in the course of argument, it does not apply to the respondent's claim. Article 5(3) provides that a person domiciled in a Member State may be sued 'in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

4. It is not disputed that the applicant is a company domiciled in France.

5. The applicant entered a memorandum of appearance on 18 September 2014. It states on its face that it is 'without prejudice and solely to contest the jurisdiction of the court.'

6. The respondent delivered a statement of claim on 21 June 2016.

7. Although I have not seen the relevant motion papers or any order of the court, I am given to understand that, on 21 February 2017, the respondent issued or brought a motion for judgment in default of defence, in response to which the court directed the applicant to deliver a defence. The applicant did so on 9 October 2017, having first issued the present motion on 7 July 2017.

The claim in the underlying proceedings

8. In his statement of claim, the respondent pleads, broadly, as follows.

9. On an unspecified date in the early 1980s, the respondent purchased two apartments in an apartment building in France from the applicant. In 2004, the respondent carried out certain works to those apartments, including the enclosure of part of a balcony.

10. In 2005, the applicant instituted proceedings against the respondent before the Tribunal de Grande Instance in Albertville, France, to seek the remediation by him of certain works and the restoration of the balcony to its original condition. The case was appealed to the Court of Appeal in Chambéry and, from there, to the Court of Cassation in Paris, which gave judgment on 21 June 2011. In the words of the statement of claim, the judgment of the Court of Cassation, a court of last resort, was given 'in a manner adverse to' the respondent, who was required to carry out remediation works and to pay the costs of the proceedings, subject to a daily financial penalty in default.

11. The respondent did not comply with that order. After an unsuccessful application to the Enforcement Court of the Supreme Court in Albertville, the applicant obtained a judgment on appeal from the Court of Appeal in Chambéry on 4 September 2014, whereby the respondent was directed to pay a penalty of €15,000 and to carry out the remediation works within six months, subject to a daily fine in default of €100 per day thereafter.

12. The relevant decision and notification of penalty have not been served on the respondent. The respondent has not paid the penalty stipulated or the applicant's legal costs, nor has he carried out the remediation works.

13. After the decision of the Court of Appeal in Chambéry, the respondent came into possession of original plans for the apartment building that demonstrated that there was no planning permission for the balcony. The respondent showed those plans to the applicant's architect and general manager in late 2015 or early 2016. Either directly or through unspecified servant or agents, the applicant accepted that it had been aware at all material times that it was not possible for the respondent to comply with the orders that it sought against him but had gone ahead with, and persisted in, the prosecution of its legal proceedings, despite that knowledge.

14. The respondent wrote formally to the applicant on 8 April 2016, drawing those facts to its attention and requesting that it apply to the appropriate French court to strike out the proceedings and vacate the orders that had been made. The applicant has declined to so.

15. The actions of the applicant caused loss and damage to the respondent because, at considerable cost and inconvenience, he was forced to defend proceedings that, at all material times, the applicant knew or should have known, were fundamentally flawed, and because the applicant has refused to apply to set aside the judgment in its favour and to have the orders it obtained against the

respondent vacated.

16. The respondent provided the following particulars of loss and damage:

(a) legal fees incurred in defending the proceedings from 2005 to date;

(b) reputational damage and damage to his good name; and

(c) inconvenience and distress.

17. The respondent provided the following particulars of the tortious conduct of the applicant:

(a) Instituting proceedings that it knew or should have known were fundamentally flawed;

(b) maintaining those proceedings and refusing to apply to vacate the orders made in them when placed on notice that the proceedings were fundamentally flawed;

(c) misleading the French courts;

(d) engaging in abuse of process;

(e) engaging in the malicious prosecution of the respondent; and

(f) acting in bad faith, oppressively and prejudicially towards the respondent.

18. The respondent claims the following principal reliefs, together with interest and costs:

1. An order for the recovery of his legal costs of the French proceedings;

2. A declaration, if necessary, that the French proceedings were an abuse of process.

3. A declaration that the French proceedings constituted a malicious prosecution of the respondent.

4. Damages, to include aggravated and exemplary damages.

The defence in the underlying proceedings

19. The applicant's defence commences by raising several preliminary objections, including the three that are the subject of the present application: first, that the applicant was not properly served with the proceedings; second, that the court lacks jurisdiction under the Brussels I Regulation to deal with the respondent's claim; and third, that the claim should be dismissed as bound to fail.

20. Addressing the substance of the respondent's claim, the applicant pleads broadly as follows.

21. It was not a party to the contract for the purchase by the respondent of the two apartments concerned.

22. The French proceedings occurred much as described by the respondent.

23. The respondent's allegations concerning the status of the balcony and any flaw in the proceedings referable to the status of the balcony are denied. The acknowledgment of any such flaw by the applicant's architect is denied. The inability of the respondent to comply with the orders of the courts in the French proceedings is denied. The failure of the respondent to comply with those orders is acknowledged or admitted. The entitlement of the respondent to the reliefs claimed in these proceedings, or any relief, is denied.

Analysis

i. should service of the plenary summons be set aside?

24. The applicant submits that service of the plenary summons should be set aside because it was not properly effected in accordance with the RSC.

25. Under O. 11A, r. 6 of the RSC, as that rule stood at the material time, in effecting service out of the jurisdiction, the respondent was required to serve notice of the summons and not the summons upon the applicant, which is domiciled in France and, it need hardly be said, is not a citizen of Ireland. It is common case that the respondent wrongly served the latter, and not the former, on the applicant in France.

26. As explained in *Delany and McGrath on Civil Procedure*, 4th ed (2018) (at para. 1-34), the reason for the rule is that, historically, service of proceedings in another jurisdiction on a citizen of another state was seen as an infringement of the sovereignty of the state of citizenship of the individual. It is settled law that service of a summons may be set aside if effected in breach of that rule; *O'Connor v Commercial Glass and Marine Ltd* [1996] 2 ILRM 291, *Short v Ireland* [1996] 2 IR 188 and *Castlelyons Enterprises v Eukor Car-Carriers Inc* [2016] IEHC 794.

27. To that it might be added that I rather doubt that the applicant was served in accordance with the Requirements of Regulation (EC) 1393/2007 ('the Service Regulation'), as there was no evidence before me concerning the manner in which service of the summons was effected upon the respondent, but there was some suggestion that the respondent in person had purported to serve the summons on the applicant in France.

28. On the other side of the scales, as Binchy J more recently observed in *Grovit v Jansen* [2018] IEHC 22, (Unreported, High Court, 17th January, 2018) (at para. 57), in the closely related context of the enforcement of foreign judgments:

'In an era in which so many nations are parties to conventions on enforcement of foreign judgments and, in the EU context, where there is express provision by an EU Regulation for service of documents within the EU, it seems to me that the requirement to serve a notice of summons, rather than the summons itself, is anachronistic and could hardly be

necessary in cases involving jurisdictions which are a party to such conventions or, by reason of membership of the EU, are subject to the same rules as to service of documents within the EU.'

29. On the facts of this case, in the exercise of the Court's inherent jurisdiction and of the power conferred by O. 124, r. 1 of the RSC, I do not propose to set aside the service of the summons because it is clear that the applicant was effectively put on notice of the proceedings, although the proceedings were not properly served on it as a matter of law, and because the applicant has suffered no prejudice in seeking to challenge jurisdiction.

ii. does the court have jurisdiction under Article 5(3) of the Brussels I Regulation?

30. At the material time, Regulation (EC) 44/2001, the Brussels I Regulation, represented the applicable law. Regulation (EU) 1215/2012 ('the Brussels I Regulation recast') applies only to proceedings instituted on or after 10 January 2015. These proceedings issued on 1 August 2014.

31. The fundamental jurisdictional rule of the Brussels I Regulation is that those with a domicile in a Member State may expect to be sued and defend claims against them in their home courts. Article 2 provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

32. In this case, the respondent relies on the special jurisdictional rule of Art. 5(3) whereby a person domiciled in a Member State may be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur, as an exception to the general jurisdictional rule.

33. The Court of Appeal has made clear in *Castlelyons Enterprises Limited v Eukor Car Carriers Inc & Anor*. [2018] IECA 98, (Unreported, Court of Appeal, 21st March, 2018) (at paras. 41 and 70), that the burden of proof rests on the party invoking a special jurisdictional rule to establish that the claim concerned falls within it.

34. In attempting to establish that the present claim falls within Art. 5(3), the respondent relies on Case C-21/76 *Handelskwekerij G.J. Bier v. Mines de Potasse d'Alsace* [1976] E.C.R. 1-1735 in which (at para. 24) the European Court of Justice ('ECJ') interpreted 'the place where the harmful event occurred' in Art. 5(3) of the Brussels Convention, the predecessor of the Brussels I Regulation, as either the place where the damage occurred or the place of the event giving rise to the damage, allowing proceedings to be brought in either place at the election of the plaintiff.

35. The respondent argues that from the terms of his pleadings, already summarised, and from the address in Ireland that he provided on the plenary summons issued on his behalf, it should be inferred that he has suffered reputational damage and financial loss in Ireland, arising from the events in France that he claims gave rise to it.

36. It is an unusual feature of this case that the respondent did not adduce any evidence of financial or reputational damage in Ireland in opposition to the applicant's jurisdictional challenge. I am not satisfied that it is appropriate to draw any inference that the respondent has suffered, or is likely to have suffered, such damage in Ireland arising from his unsuccessful defence of the legal proceedings against him in France, in the absence of – at least some – actual evidence to that effect. In that regard, I would make the same observation as Shanley J did in *Casey v Ingersoll-Rand Sales Company Ltd* [1997] 2 IR 115 (at 119), which is that if pecuniary damage (to which I would add, 'or reputational damage') had occurred in this jurisdiction, the respondent should not have had any difficulty in satisfying the court of that fact on affidavit.

37. Even if such an inference could be drawn in the absence of evidence, it would still be necessary to consider the subsequent refinement by the ECJ of the principles governing the identification of the place where the harmful event occurred.

38. In Case C-220/88 *Dumez v Hessische Landesbank* [1990] ECR I-00049, the ECJ clarified (at para. 20) that the concept of 'the place where the damage occurred' can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event. While the respondent in this case claims to be the immediate victim of a malicious prosecution in France, there is no basis to conclude that the harmful effects of that prosecution were directly produced upon him in Ireland, rather than *solely* in France, if anywhere.

39. Similarly, in Case C-364/93 *Marinari v Lloyds Bank* [19995] ECR I-2719, the ECJ explained (at para. 13) that the choice available to the plaintiff between the place where the damage occurred or the place of the event giving rise to the damage cannot be extended beyond the particular circumstances which justify it, since that would negate the general principle laid down in the first paragraph of Art. 2 that the courts of the Member State where the defendant is domiciled are to have jurisdiction. The ECJ then continued:

> '14 Whilst it has thus been recognised that that the term "place where the harmful event occurred" within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused actual damage arising elsewhere.
>
> 15 Consequently that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.'

40. In my judgment, if the respondent's claim had been pleaded by reference to financial or reputational damage in Ireland, it would, at best, be damage following upon initial damage arising, and suffered by him, in France. Counsel for the applicant submitted that, because the enforcement order of the relevant French court has not yet been served upon him and because he has not yet carried out the remediation works directed by the court, or paid the penalty imposed by it, or discharged the applicant's legal costs as directed by it, he has not suffered any initial damage in France. However, it seems to me that the imposition of a liability to carry out remediation works; to pay a stipulated financial penalty; and to discharge the applicant's costs, each represent part of the initial damage the respondent claims to have suffered. Moreover, the three heads of specific damage identified by the plaintiff – his legal fees incurred in the French proceedings to date, reputational damage, and inconvenience and distress – each relate to forms of damage likely to have been suffered by him initially, if not exclusively, in France.

41. In *Castlelyons* (at para. 64), the Court of Appeal (per Whelan J; Peart and Hogan JJ concurring) described the *Marinari* decision as the current authoritative interpretation of 'where the harmful event occurred' in EU law.

42. In Case C-168-02 *Kronhofer v Maier* [2004] ECR I-6009, ECLI:EU:C:2004:364, the ECJ further clarified that Art. 5(3) of the Convention (later Art. 5(3) of the Brussels I Regulation) must be interpreted as meaning that the expression 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting – now, Member – State.

43. In Case C-12/15 *Universal Music Holding BV v Schilling & Ors* ECLI:EU:C:2016:450, the ECJ reiterated its explanation of the rationale underpinning the relevant jurisdictional rules in the following way:

> '25 …[I]t is only by way of derogation from the general principle laid down in Article 2(1) of Regulation No. 44/2001, attributing jurisdiction to the courts of the Member State in which the defendant is domiciled, that Section 2 of Chapter II of that regulations makes provision for certain special jurisdictional rules, such as the rule laid down in Article 5(3) of that regulation. Insofar as the jurisdiction of the courts for the place where the harmful event occurred constitutes a rule of special jurisdiction, it must be interpreted independently and strictly, which does not permit an interpretation going beyond the cases expressly envisaged by that regulation (see, to that effect, judgments of 5 June 2014 in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraphs 43 to 45 and of 10 September 2015 in *Holterman Ferho Exploitatie and Others*, C-47/14, EU:C:2015:574, paragraph 72 and case law cited).
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> 26 According to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of that regulation is based on the existence of a particularly close connecting factor between the dispute and the courts for the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings (judgments of 5 June 2014 in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 47 and of 10 September 2015 in *Holterman Ferho Exploitatie and Others,* C-47/14, EU:C:2015:574, paragraph 73 and case law cited).
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> 27 In matters relating to tort, delict or quasi-delict, the courts for the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on the grounds of proximity of the dispute and ease of taking evidence (judgments of 21 May 2015 in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 40 and of 10 September 2015 in *Holterman Ferho Exploitatie and Others,* C-47/14, EU:C:2015:574, paragraph 74).'

44. Later in the same judgment, the ECJ reiterated the following principles:

> '34 …[I]t should be noted that the term 'place where the harmful event occurred' may not be construed so extensively as to encompass any place where the adverse consequences of an event, which has already caused damage actually arising elsewhere, can be felt (judgment of 19 September 1995 in *Marinari*, C-364/93, EU:C:1995:289, paragraph 14).
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> 35 In the wake of that case-law, the Court has also held that the expression does not refer to the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State (judgment of 10 June 2004 in *Kronhofer*, C-168/02, EU:C:2004:364, paragraph 21).'

45. Applying those principles to the evidence, such as it is, I conclude that the respondent has failed to establish that the Court has jurisdiction to hear and determine his claims under the special jurisdictional rule of Art. 5(3) of the Brussels I Regulation.

iii. does the Court have jurisdiction under Article 24 of the Brussels I Regulation?

46. The respondent argued that the Court should nonetheless assert jurisdiction to hear these proceedings on the basis of the applicant's effective submission to the jurisdiction of the Irish courts in two ways: first, by entering an appearance and delivering a defence; and second, by its alleged delay in bringing the present application.

47. I do not accept either of those arguments.

48. First, as *Delany and McGrath on Civil Procedure*, already cited, points out (at para. 3– 96), despite the wording of O. 12, r. 26 of the RSC, which envisages an application to set aside service before the entry of an appearance, the entry of a conditional appearance will preserve a challenge to service, at least where that challenge relates to the jurisdiction of the court to hear and determine the proceedings.

49. Article 24 of the Brussels I Regulation provides that the rule that a court of a Member State before which a defendant enters an appearance shall have jurisdiction does not apply where an appearance is entered to contest the jurisdiction. That determines the matter under the doctrine of the Supremacy of EU law. In any event, O. 11A, r. 8 of the RSC, as it stood at the material time, stipulated that, where a defendant wished to enter an appearance to contest the jurisdiction of the Court for the purposes of Art. 24 of the Brussels I Regulation, he could do so by entering an appearance in Form No. 6 in Appendix A, Part II of those Rules. The appearance entered on behalf of the applicant on 18 September 2014 is in that form. The practice of entering a conditional appearance to challenge jurisdiction, notwithstanding the express words of O. 12, r. 26 of the RSC, was permitted without comment by the Supreme Court in *Kutchera v Buckingham International Holdings Limited* [1988] 1 IR 61 and approved by that Court in *Minister for Agriculture v Alpe Leipziger A.G.* [2000] 4 IR 32.

50. As regards the delivery of a defence, it is common case that the applicant was directed by the High Court to deliver a defence when presented with the respondent's application for judgment in default of defence; that before doing so, the applicant issued the present motion, having already entered a conditional appearance *solely* to contest jurisdiction; and that the defence delivered raises the applicant's challenge to the jurisdiction of the court as a preliminary objection.

51. Briggs, *Civil Jurisdiction and Judgments*, 6th ed. (2013), deals with the respondent's argument concisely in the following way (at pp. 123-4):

> 'If the purpose of the appearance is to contest the jurisdiction of the court, the defendant's appearance does not confer jurisdiction upon it. In some systems, however, it is inadvisable to object to the jurisdiction of the court without also putting forward the substantive defences upon which the defendant will rely if the jurisdictional point is lost. If the defendant, heeding this advice, files a defence by way of objection to the jurisdiction as well as answering the merits of the claim against him, it could be said that the purpose of the defendant's appearance was not *solely* to contest the jurisdiction. When the provision which is now Article 26 first appeared, as Article 18 of the Brussels Convention, the

> English-language version of the rule did indeed require that the appearance of the defendant be *solely* for the purpose of contesting the jurisdiction: a fact which created a problem for a defendant whose initial pleading both contested the jurisdiction and set out his defence on the merits. To have held that he had forfeited the protection of the Article would have been unacceptable, for it would have put in jeopardy the right of a defendant to ensure that the Convention was being interpreted and applied correctly in relation to him.

In the Regulation, the word *solely* does not appear. It is clear that the omission is deliberate. The law will remain as stated by the European Court in Case C-150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671 and Case C-27/81 *Rohr SA v Ossberger* [1981] ECR 2431. Both cases establish that the defendant, who wishes to contest the jurisdiction but to be guarded from having entered an appearance under what is now Article 26, may put forward his defence to the merits of the claim at the same time. What is required of him is that he make his contest to the jurisdiction at the first opportunity which is given to him under the procedural law of the court seised, and not, as happened in *Elefanten Schuh*, as a decidedly late afterthought. It is difficult to believe that this provision should now give rise to any practical difficulty. If the plea to object to the jurisdiction is made at the first practicable opportunity and no later than the time for filing the first defence, and in accordance with the procedural rules of the court or tribunal concerned, neither concurrently entering a defence upon the merits, nor taking procedural steps, such as applying for an extension of time to make the jurisdictional challenge, or seeking discovery of documents in order to demonstrate the facts which show the court not to have jurisdiction, in the course of the adjudication upon the jurisdictional plea, will prejudice the position of the defendant. By contrast, taking further voluntary steps, not themselves consistent with the original and continuing intention to challenge the jurisdiction, but which deal instead with the merits of the claim, will be liable to forfeit the protection of Article 26, and will amount to the entering of an appearance.'

(footnotes omitted)

52. I accept the foregoing principles as correct and, applying them to the circumstances of the present case, I conclude that the applicant has not entered an appearance for the purposes of Art. 24, other than to contest jurisdiction, and has not forfeited the protection of Art. 26 by delivering a defence.

53. Second, even assuming without deciding that subsequent delay might somehow deprive a defendant who has entered a conditional appearance of the protection of Art. 24 or Art. 26, I do not accept that there has been any such delay on the part of the applicant in this case. A plenary summons issued on behalf of the respondent on 1 August 2014. The applicant entered a conditional appearance on 18 September 2014. The respondent appears to have done nothing further before delivering a statement of claim on 16 June 2016, almost two years later. Having done so, the respondent issued or brought a motion for judgment in default of defence on 21 February 2017 (I have not seen those motion papers or any order of the court). The applicant issued the present motion on 5 July 2017, before delivering a defence in response to a direction of the court on 9 October 2017. Acknowledging that litigation is a two-party operation, I do not think that the applicant has delayed to a degree that should deprive it of the protection of Article 26, even if delay on its part were capable of having that effect, upon which I express no view.

54. Thus, I am satisfied that the applicant has not lost the protection of Art. 24 or Art. 26 of the Brussels I Regulation.

iv. conclusions on jurisdiction under the Brussels I Regulation

55. In summary, having considered the submissions of the parties, I conclude that: first, for the purpose of the general jurisdiction rule under Art. 2 in Section 1, the applicant is domiciled in France, and must be sued in the courts of that Member State; second, the special jurisdiction rule under Art. 5(3) in Section 2 does not apply because the respondent has failed to establish that Ireland is the place where the harmful event he alleges occurred; and third, the prorogation of jurisdiction rule under Art. 24 in Section 7 does not apply, because the appearance of the applicant was entered to contest the jurisdiction of the courts in Ireland. Thus, the courts of Ireland do not have the general, special or prorogated jurisdiction to hear or determine the respondent's claim,

56. Because of those conclusions, it is unnecessary to consider the applicant's alternative submission that the exclusive jurisdiction rules under Art. 22 in Section 6 apply because either: (a) the proceedings have as their object rights in rem in immoveable property situated in France (Art. 21(1)); or (b) the proceedings have as their object the validity of entries in public registers kept in France (Art. 21(3)), and I do not propose to do so.

v. should the proceedings otherwise be struck out as bound to fail?

57. Lest I am in error in the views I have expressed and the conclusions I have reached on the issue of jurisdiction, and to facilitate the resolution of as many relevant issues as possible in the event of an appeal, I propose to address the separate issue of whether these proceedings should be struck out as bound to fail or as taken for an improper collateral purpose, or both.

58. While it is interesting to note that, in England and Wales, the existence of the tort of malicious prosecution of civil proceedings has only recently been recognised by the United Kingdom Supreme Court in *Willers v Joyce* [2016] UKSC 43; [2016] 3 W.L.R. 477, following the Privy Council in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] A.C. 366, and reversing the decision of its own previous incarnation as the House of Lords in *Gregory v Portsmouth* [2000] 1 A.C. 419 HL, the question had much earlier been resolved in this jurisdiction by Costello J, who stated in *Dorene Ltd v Suedes (Ireland) Ltd* [1981] IR 312 (at 314):

> 'I have no doubt that at common law an action lay for maliciously abusing the Courts' processes and that such an action is not limited to claims arising from the institution of a criminal prosecution and to bankruptcy and winding up proceedings. It is an action which has an ancient lineage.'

59. Costello J went on to describe the elements of the tort (at 316):

> 'It seems to me that the authorities establish that a claim for damages at common law will lie for the institution or maintenance of a civil action if it can be shown that the action was instituted or maintained (a) without reasonable or probable cause, (b) maliciously, and (c) that the claimant has suffered actual damage or that the impugned action was one which the law presumes will have caused the plaintiff damage.'

60. In *Murphy v Kirwan* [1993] 3 IR 501 (at 512), the Supreme Court (per Finlay CJ) made clear that:

'…[I]n a claim made that a person had, by the institution of proceedings, abused the processes of the courts or brought an action for a malicious or improper motive rather than to vindicate his or her rights, the first requirement, though not necessarily a proof in itself,

would be to establish either that the claim as brought has failed in its entirety or that it was bound to do so.'

61. *Clerk & Lindsell on Torts*, 22nd edn. (2018) (at para. 16-31) explains convincingly:

> 'The reason why a claimant cannot as a rule succeed if a prosecution, of which he complains, terminates adversely to himself is that otherwise there might be a conflict between civil and criminal justice, and all the issues, the conclusive determination of which belongs to the criminal court, might be tried over again by sort of informal appeal. Extended to malicious civil proceedings, there remains a need to avoid collateral attack on decisions.'
>
> (footnotes omitted)

62. In response to these authorities, the respondent relies on the dictum of Clarke J in *Independent Newspapers (Ireland) Ltd v Murphy* [2006] 3 IR 566 (at 569) that 'the precise parameters of the tort of the malicious prosecution of civil proceedings remain to be clearly defined' to argue that, since the parameters of the tort may be extended to remove the requirement to establish that the underlying prosecution or action failed or was bound to do so, it cannot be said that the respondent's action is bound to fail. I do not accept that argument.

63. It is true that, in *Independent Newspapers*, Clarke J identified the additional difficulties that arise where, unlike in *Dorene Ltd v Suedes (Ireland) Ltd*, the proceedings have already been concluded whether by compromise or by the determination of the court, without reference to the question of malicious prosecution. However, the judgment then continued (at 570):

> '14 In the latter case (and on the assumption the plaintiff succeeds), there will be a binding determination by the court to the effect that the facts are as contended for by the plaintiff. Such a finding could only be gone behind in the limited circumstances identified in the jurisprudence such as a case where it can be shown that the plaintiff's success was procured by a fraud on the court (see, for example, *House of Spring Gardens Ltd v Waite* [1991] Q.B. 241). In the absence of the defendant being in a position to have the original order set aside on such grounds, the court could not entertain a second set of proceedings which was predicated upon the fact that the original finding of the court was incorrect.'

64. It seems to me that that is precisely the position in which the respondent finds himself here. The court could not entertain the present action, predicated upon the assertion that the findings of the French courts were incorrect, unless and until the relevant orders of those courts were set aside. Counsel for the respondent confirmed that the respondent has made no such application in France but had no instructions concerning why not.

65. Thus, in the circumstances in which they have been brought, these proceedings represent an impermissible collateral attack upon the relevant decisions of the French courts and are, in any event, bound to fail, since the respondent cannot establish that the civil proceedings that he claims were maliciously instituted and maintained against him in France failed either entirely or at all. For those reasons, had it been necessary to do so, I would have struck out the respondent's action on those grounds also.

Conclusion

66. I will strike out the respondent's claim for want of jurisdiction.