Neutral Citation: [2015] IEHC 721

THE HIGH COURT

[2013 No. 7065 P]

BETWEEN

C.J. GAFFNEY LTD.

PLAINTIFF

AND

GERMANISCHER LLOYD SE,

BERUFSGENOSSENSCHAFT FÜR TRANSPORT AND VERKEHRSWIRTSCHAFT (BG VERKEHR)

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 12th day of November, 2015

1. The defendants bring this motion pursuant to O. 12 r. 26 of the Rules of the Superior Courts setting aside service of the notice of the plenary summons for want of jurisdiction. This case raises the question of where the plaintiff may properly bring proceedings against the defendants arising from the purchase by the plaintiff of a shipping vessel purchased in the Netherlands in 2007, and which, it is claimed, is not suitable for fishing in Irish waters.

2. The plaintiff is a small family-owned limited liability company which carries on the business of fishing. For the purposes of that business in September 2007 it purchased in the Netherlands the motor fishing vessel *Mary Kate* (then named Everetjan), offered for sale through a Dutch broker. It was always intended that the vessel would be used to fish in Irish waters, or that the fish would be landed in an Irish port. The vessel was reflagged under the Irish flag. The plaintiff says that the vessel performed poorly in heavy beam seas, and almost capsized once in shallow fishing waters. The plaintiff sought to have the stability values of the vessel tested under a newly-introduced national testing mechanism and results of the inclining test furnished to the plaintiff in 2009 have shown that the stability values of the vessel are such that the vessel could not lawfully be fished. Certain stabilization works were carried out to the vessel at significant cost but the plaintiff alleges that the now stable vessel is not capable of being used to supply the Irish fish market as a result of its physical proportions and new quota requirements.

3. The plaintiff issued notice of plenary summons on the defendants on the 15th November, 2013 and each of the defendants entered a conditional appearance solely for the purpose of contesting jurisdiction. The defendants jointly bring the motion to set aside the plenary summons for want of jurisdiction.

The case as pleaded

4. The first defendant is a limited company incorporated under the laws of Germany, and carries out the business of, *inter alia*, the surveying of vessels and the certification of compliance of such vessels with certain technical standards.

5. The second defendant is a corporation also incorporated pursuant to the laws of Germany, and carries out the business of, inter alia, the supervision of the construction of sea-going vessels and their compliance and conformity with certain standards.

6. The hull of the fishing vessel is of a type known as a "Euro-cutter" and was sold to a shipyard in the Netherlands for fitting out and onward sale. The hull was launched under the German flag and fitted out and completed in Germany under the supervision of a German naval architect.

7. For the purpose of the initial registration of the vessel, inclining tests in accordance with the technical standards of the second defendant were carried out, and these were supervised by the first and second defendants. The vessel was issued with a certificate of stability by which it was certified that the vessel had certain stability characteristics and that it complied with German and EU stability requirements for fishing vessels. Compliance with such standards is a condition precedent for any fishing vessel to fish in the European Union.

8. The claim is made against each defendant that they, and each of them, by the endorsement on the stability certificate in September 1992 and November 1992 warranted and represented that they had supervised, inspected and approved the stability figures, but that the stability characteristics contained in the certificate were not correct. The plaintiff pleads that in making the decision to purchase the vessel it relied on the stability values and characteristics disclosed in the stability certificate and/or the warranties and representations made by the defendants and each of them therein contained.

9. It is specifically pleaded that the plaintiffs would not have purchased the vessel had the stability characteristics of same been properly represented by the aforesaid certificate.

10. The claim is made in negligent and fraudulent misrepresentation.

11. The plaintiff says that it was not until May 2009, when the plaintiff caused the vessel to be subjected to an inclining test in Ireland, and in anticipation of changing regulatory requirements relating to stability, that it learnt that the vessel did not have the stability values disclosed in the certificate, and that the certification made by each of the defendants was false.

The Brussels I Regulation

12. The plaintiff claims that the Irish courts have jurisdiction to hear and determine the claim by virtue of Article 5(3) of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, the Brussels I Regulation, and the plenary summons and statement of claim both contain the mandatory endorsement pursuant to O. 9 r. 3(a) of the Rules of the Superior Courts.

13. The material scope of the Regulation is dealt with in Article I which provides as follows:

> "This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters."

Article 5 is a rule of special jurisdiction and the relevant provision is Article 5(3) which confers special jurisdiction in matters of tort, such that a person may sue in "the place where the harmful event occurred". It provides as follows:

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

14. The defendants claim that the Irish courts do not have jurisdiction on two grounds: that the claim is not a civil or commercial claim for the purposes of the Regulation; and that the harmful event, if there was one, occurred either in Germany where the certification was done, or in the Netherlands where the contract to purchase the vessel was made.

The first ground of the challenge: not a civil or commercial matter

15. The defendants argue that the second defendant was acting as a public authority in the exercise of public law functions, namely the classification of seagoing vessels to ensure compliance with German and/or European law. The grounding affidavit of Helen Noble, the solicitor for the defendants, avers that each of the two defendants has their registered office in Germany and that she is instructed that the second defendant is a "public German authority" and not a private corporation, and that employees of the second defendant are civil servants. She avers that in exercising the duties of certification the second defendant was "exercising public duties of a public authority". She exhibits a translation of an extract from the Federal Maritime Responsibilities Act of 24th May, 1965, and pointed to the fact that s. 6(3) of that Act specifically provided that the second defendant "performed the tasks of the Federal Government".

16. In the course of argument the plaintiff made the point, which I accept, that no evidence of foreign law was brought before me for the purposes of the application, that no authenticated version of the German legislation was provided, that there is no admissible evidence before me on which I can make a determination as to the status of the second defendant as a public authority. Not only is the exhibited German legislation not authenticated, the legal significance of the provisions are not explained or supported by any affidavit of foreign laws. Furthermore I accept counsel's argument that the excerpt from the German legislation, while it shows the transfer of certain powers to the second defendant from another German state authority, does not constitute evidence that would show that the preparation of a certificate of seaworthiness was one of the "tasks of Federal Government" alleged to have been assigned to the second defendant.

17. Thus I accept that there is insufficient evidence before me on which I might make a determination that the second defendant was acting as a public authority in the preparation and issuing of the certificates.

18. Even if I am wrong in this, I also accept the argument of counsel for the plaintiff as to the true extent of the exclusion from the Regulation of administrative acts by a public authority in a sovereign state. The claim that the plaintiff makes is not one equivalent to a public law claim, and the claim may not be characterised as the action against a "public authority acting in the exercise of its public powers" within the meaning of Article 1. The CJEU in *Netherlands State v. Ruffer* (Case 814/79) [1980] ECR 3807 at para. 8 of the judgment, said the following:

> *"In the light of those considerations the Court has specifically held in that same case-law that whilst certain judgments given in an action between a public authority and a person governed by private law may come within the area of application of the convention that is not the case if the public authority is acting in the exercise of its public authority powers."*

More recently the CJEU, in Apostolides v. Orams Case C-420/07 [2009] ECR I-35715 stated the following summary of the approach of the Court to this question:

> *"44 The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 44/2001"*

19. An action against a public authority *per se* is not excluded from the special jurisdictional provisions in the Regulation, but only those actions against that authority when in the claim arises from the exercise of its public powers, and where the claim does not fall within the scope of ordinary legal rules of private litigation.

20. The claim made by the plaintiff is that the defendants negligently and/or fraudulently misrepresented the stability factor or seaworthiness of the vessel. The claim is a claim arising from a private law duty of care, and it is incidental to the claim as pleaded that the defendants made the representations in the exercise of a statutory function. The plaintiff does not bring the claim arising from any rights or duties which the plaintiff alleges are vested in it against the defendants by virtue of the legislation, nor is the claim made that the position of the defendants is uniquely one giving rise to the claim. I accept the argument made by counsel for the plaintiff that it is relevant in that context that no claim is made that the defendants breached any German statutory framework, but rather that the claim is made for breach of private law rights in tort, collateral to the rights and duties inherent in the exercise by the second defendant of what are asserted to be public law functions.

21. Furthermore the plaintiff makes no claim akin to a claim in public law seeking directions to the second defendant that it perform its functions, or seeking to quash any decision that it made in the exercise of an asserted public power.

22. For these reasons I consider that the defendants have not made out an argument that the proceedings may not be maintained in this jurisdiction as the claim is not a civil or a commercial matter to which the Brussels I Regulation applies.

The second ground of objection: the harmful events did not occur in Ireland

23. The plaintiff asserts that the claim is one that comes within the special jurisdictional rules found in Article 5(3) of the Regulation. It is asserted in particular for that purpose that the harmful event occurred in Ireland.

24. The defendant asserts that the alleged harmful event could only be said to have taken place in Germany in 1992, namely the time and the place when the certification issued. As an alternative plea the defendants argue that the alleged damage occurred in the Netherlands in 2007, the place and time when the plaintiff entered into a contract to purchase the vessel in purported reliance on the representations or warranties.

25. The plaintiff says the harmful event occurred in Ireland where it discovered that the vessel was not sea worthy and that it is in Ireland where it suffered loss.

Onus of proof
26. The defendants argue that it is for the plaintiff to establish jurisdiction and rely on the judgment of the Supreme Court in the case of *Handbridge Ltd. v. British Aerospace Communications Ltd.* [1993] 3 IR 342 where Finlay CJ held that a plaintiff had to establish that the claim "unequivocally" comes within the relevant exception.

27. Article 5(3) provides a special rule of jurisdiction and the general rule remains articulated in Article 2(1) that a person domiciled in a Member State shall be sued in the courts of that Member State. This jurisdictional point of departure admits of the various exceptions set out in the Regulation and includes the provisions of Article 5(3) which permits a person domiciled in one Member State to be sued in another Member State in relation to tort provided it is shown that the "harmful event occurred" in that other Member State. Thus the plaintiff must establish for the purposes of establishing jurisdiction that the harmful event of which it complains occurred in Ireland.

28. I accept that the authorities are clear and that the onus is on the plaintiff to establish that the litigation comes within the special rules of jurisdiction under Article 5(3).

The characterisation of the harmful event
29. This case raises the question of how to characterise the jurisdictionally significant damage for the purposes of the Regulation, and how in particular the jurisdictional rules relate to latent or unknown damage which manifests in a place and at a time other than the place where a tortious event is alleged too have happened.

30. The plaintiff argues that the harmful event occurred when it discovered in 2009 that the contents of the stability certificate were erroneous and that this was the time and place where the damage was suffered, or where its loss became manifest. Thus the question engaged is what is the "harmful event". The plaintiff argues that the harmful event is the happening of a financial loss to the plaintiff by virtue of the asserted loss of the ability to fish. The defendants say the harmful event occurred when the vessel was purchased.

The jurisprudence of the European Court of Justice:
31. It is clear from the case law that in determining jurisdiction significant connecting factors can result in a determination that more than one jurisdiction is appropriate. It is well-established that the question of whether the jurisdiction is established engages the question of whether the chosen jurisdiction has a "close connection" with the facts giving rise to the dispute. *Bier BV v. Mines de Potasse d'Alsace SA* (Case 21/76) [1976] ECR 1735 is one of the earliest and most important authorities. The defendant discharged a large quantity of salt into the river Rhine. Water from the river was used to irrigate the plaintiff's seed beds in the Netherlands and the increased salt levels in the water were alleged to cause damage to the seed beds. The plaintiff brought an action before the court in the Netherlands which held that it had no jurisdiction because the place where the harmful event had occurred was France. The Court of Justice of the European Union (CJEU) accepted that the question was one of some difficulty and at para. 14 of the judgment made the following observation:

> *"The form of words 'place where the harmful event occurred' , used in all the language versions of the Convention, leaves open the question whether, in the situation described, it is necessary, in determining jurisdiction, to choose as the connecting factor the place of the event giving rise to the damage, or the place where the damage occurred, or to accept that the plaintiff has an option between the one and the other of those two connecting factors ."*

32. The Court held that the plaintiff had the option of suing the defendant either in the place where the tortuous act occurred, France, or the place where the damage occurred, the Netherlands, and the option was one for the plaintiff, provided a "significant connecting factor" from the point of view of jurisdiction was established.

33. *Bier BV v. Mines de Potasse d'Alsace SA* is regarded as establishing two limbs of the test to identify the place where the harmful event occurred

> (a) the place of the event giving rise to the damage and
>
> (b) the place where the damage occurred.

The plaintiff argues that the second limb is engaged in this case and gives jurisdiction to the Irish courts as the damage occurred in Ireland where it became manifest or crystallised.

34. Restrictions in the level of discretion available to a plaintiff to choose jurisdiction were however identified in a later judgment of the CJEU on a reference from an English court in *Marinari v. Lloyds Bank Plc.* [1996] QB 217. The plaintiff, who was domiciled in Italy, issued promissory notes with a Manchester branch of a UK bank. The bank's staff took the view that the notes were of dubious origin and contacted the police who sequestered the notes and arrested the plaintiff. The plaintiff brought proceedings in Italy against the UK bank for reputational damage, and the UK bank objected to jurisdiction.

35. The CJEU in its judgment, while accepting that the connecting factor could result in the plaintiff having the option to elect to sue in more than one Member State, considered that the choice was not one to be unnecessarily extended, and that the court considering the question of jurisdiction had to bear in mind the first principles laid down in Article 2 of the Convention, namely that the court of the contracting state where a defendant is domiciled is to have jurisdiction. Essentially then, because Article 5 (3) confers a special derogation from that general rule, any approach to the question as to the application of Article 5 (3) ought not to "negate" those general principles. At para. 14 the CJEU said that the interpretation of the term "place where the harmful event occurred"

> *"14 …cannot, however, be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually 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. …"*

36. The Court did not consider as jurisdictionally relevant the financial loss or consequential loss which was alleged to have been suffered in Italy, and suggests that the jurisdictionally relevant connecting factor is the "initial damage". The domicile or place of

business of a plaintiff was rejected as a connecting factor.

37. *Marinari v. Lloyds Bank Plc.* rejects an overly liberal interpretation of the extent of the choice available to a plaintiff with regard to where an action is commenced. The Court expressed a view that the place where the "initial damage" occurred identifies the relevant connecting factor, and the court rejected the proposition that any place where any adverse consequence was suffered could be identified as an appropriate jurisdiction. At para. 21 it answered the question as follows:

> *"The answer to the national court's question should therefore be that the term 'place where the harmful event occurred' in Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State."*

38. Thus one must look to ascertain where initial damage arose or where initial damage was suffered, and loss subsequent to that or ancillary does not found jurisdiction.

39. The approach of the European Court is echoed in the judgment of the English High Court on which the defendants rely, *London Helicopters Ltd. v. Heliportugal LDA-INAC* [2006] EWHC 108, and in the judgment of Fennelly J. in *Leo Laboratories Ltd. v. Crompton BV* [2005] 2 IR 225. The phrase "consequential loss" in *Marinari v. Lloyds Bank Plc*. May not be interpreted in the context of domestic legal concepts, and I do not consider that that case is authority for the proposition that jurisdiction can be found in a place where loss consequent upon an initial damage is suffered. Rather it is more appropriate to refer to the location where the *immediate, direct or initial* damage was suffered. Furthermore, damage ought not always to be equated with the suffering of loss. The opinion of the Advocate General in Dumez France SA v. Hessische Landesbank (Case C-220/88) [1990] ECR 1-49 was that jurisdiction lies where what he termed *"ricochet"* damage occurs is not supported by the judgment in *Bier BV v. Mines de Potasse d'Alsace SA* and rejected a general proposition that the domicile of a plaintiff, or a place where the plaintiff conducts business and where it could be said that economic or financial loss was suffered by that plaintiff ought to confer jurisdiction. He coined the expression *"the place where the initial damage manifested itself"* or the "place where the damage to the direct victim occurred" as being the appropriately identified place where the damage occurs. While the Advocate General was considering the question of how to deal with remote or indirect victims who asserted a cause of action based on their own independent loss, the language that he used has been taken up by subsequent decisions and the academic writers. I consider that the matter is correctly stated in *Briggs & Rees Civil Jurisdiction and Judgement* [2009] 5th ed. at p. 269 in analysing the decision in *Marinari v. Lloyds Bank Plc*. argued that the jurisdictionally significant damage to it was caused in Italy, went on to say:

> *"The court rejected the relevance of the argument, concluding that where damage had been directly done in a particular place, the later financial consequences of it were not capable of being seen as the damage which was relevant for the purposes of Article 5(3)."*

40. *Marinari v. Lloyds Bank Plc*. must be read in the light of the later judgment of the Court in *Zuid-Chemie BV v. Philippo's Mineralenfabriek NV/SA* (Case C-189/08) [2009] ECR 1-000. That case concerned a Dutch fertilizer manufacturer which sued a Belgian company in the Netherlands in respect of a contaminated component product. The alleged connecting factor to the courts of the Netherlands was that the product was mixed in the plaintiff's manufacturing process in its factory in the Netherlands.

41. The plaintiff sued in the Netherlands and the court of first instance declined jurisdiction on the grounds that the damage had occurred in Belgium where the plaintiff had taken delivery of the contaminated product and where the contaminated micro mix had been manufactured. The parties accepted that the plaintiff took delivery of the product in Belgium where the micro mix had been manufactured and that this could establish jurisdiction in the Belgian court. However the question was whether jurisdiction lay in the court of the Netherlands. After an unsuccessful appeal to the Court of Appeal, Zuid-Chemie appealed on a point of law to the Supreme Court of the Netherlands which referred a question to the CJEU for a preliminary ruling on two questions as follows:

> a. Whether the place where the harmful event occurred designates the place where the defective product was delivered to the purchaser, or whether it refers to the place where the initial damage occurred following normal use of the product for the purpose for which it was intended.
>
> b. If the phrase designates the place where normal use is made of the product can it be said that the damage must consist of physical damage to personal goods or can the place where the damage occurs also be the place where financial damage only has occurred.

The Court did not reply to the second question, the question of "pure financial loss", but did deliver a considered judgment on the first question in which it held that the place where the harmful event occurred for the purposes of Article 5(3) could designate.

> *"the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended."*

42. The Court again stressed the need to establish what it called, a "particularly close connecting factor" between the dispute and the courts of the place where the harmful event occurred, as such a forum would be the most appropriate for deciding the case on the grounds of proximity and ease of taking evidence.

43. The exercise in identifying the place where the damage occurred involves the court assessing where the event resulted in damage. Counsel for the plaintiff relies heavily on the dicta at para. 27 of the judgment as follows:

> *"The place where the damage occurred must not, however, be confused with the place where the event which damaged the product itself occurred, the latter being the place of the event giving rise to the damage. By contrast, the 'place where the damage occurred' (see Mines de Potasse d'Alsace, paragraph 15, and Shevill and Others, paragraph 21) is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself."*

44. The CJEU pointed to the need to establish a sufficiently significant connecting factor to the place where the damage actually manifested and took the view that this pointed to the conclusion that the Zuid-Chemie factory in the Netherlands where the micro mix came to be processed into fertilizer established the link, such that the choice of the Netherlands court was available to the plaintiff. It made the distinction already made in *Bier BV v. Mines de Potasse d'Alsace SA* between the place of the event giving rise to the damage (in this case the place where the faulty component was manufactured), and the place where the damage occurred (the place where that defective product was processed) and that an approach which admitted the significance of each of these places

would most properly give effect to Article 5(3).

45. The plaintiff relies heavily on this case as authority for the proposition that a claim in tort can be brought in a place where damage caused by a defective product "actually manifests itself", and seeks to argue that this identifies a test of crystallisation, a test in other words which can locate jurisdiction where the damage became manifest or crystallised in the hands of a plaintiff.

46. Certain factors should be noted however in this decision. At the time of the manufacture of the final product in the Zuid-Chemie factory in the Netherlands, where the micro mix was processed into fertilizer, the plaintiff did not know the micro mix was defective. Thus it does not seem to me that the judgment of the CJEU in that case does establish what I might call a "pure" discoverability rule, namely a rule that jurisdiction will lie in whatever place damage actually manifests itself. I consider that it could be said that *Zuid-Chemie BV v. Philippo's Mineralenfabriek NV/SA* points to a conclusion that the significant connecting factor was the place where the product was used in the normal way, and that the judgment is not authority for the proposition that the test in Article 5(3) can designate the place where damage manifests.

47. It must be noted also that the CJEU has stressed in a number of cases and most recently in the decision of *Kainz v. Pantherwerke AG* (Case C-45/13), a judgement delivered on the 16th January 2014, that the identification of the connecting factor requires the court to "objectively" determine whether the connecting elements are sufficient, and the need to restrictively interpret the rules of special jurisdiction contained in Article 5(3) and also the need to attribute jurisdiction in accordance with rules which are predictable and established pursuant to objective criteria.

Direct or immediate victim

48. The defendants argue that jurisdiction will be established only in the place where damage was done to the immediate victim of the harmful act. They rely on *Dumez France SA v. Hessische Landesbank* in support of that proposition. There a German bank had withdrawn its financial support from a German subsidiary of a French parent company. The French company sought to sue the German bank in France claiming it as a quasi-delicate claim for the financial loss it sustained. The CJEU held that only that damage done to the immediate victim of the wrongful act was damage to which the provisions of Article 5(3) applied. At para. 20 of the judgment it indicated that the relevant jurisdiction had to be the place where the events *"directly produced its harmful effects upon the person who is the immediate victim of that event".*

49. In reply to the question raised by the French Court, the CJEU at para. 22 said as follows:

> *"It must therefore be stated in reply to the question submitted by the national court that the rule on jurisdiction laid down in Article 5(3) of the Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets ."*

Some Irish authorities

50. There are relatively few Irish authorities on the application of Article 5(3) but the principles were clearly and succinctly outlined in the judgment of Shanley J. in *Casey t/a Casey International Plant Sales and Hire v. Ingersoll-Rand Sales Company Ltd* [1997] 2 IR 115. In that case, the plaintiff's claim was struck out for want of jurisdiction on the application of the defendant. The plaintiff had purchased a piling rig and claimed that, negligently and in breach of contract, it was sold a model with different characteristics from those agreed, and also that the defendant had breached various representations and warranties made negligently by it. The plaintiff asserted that the claim was one within Article 5(3) of the Convention and relied on the judgment of the CJEU in *Bier BV v. Mines de Potasse d'Alsace*, in respect of the tort claim. He identified the test as being one which required the plaintiff to establish that some *"significant elements"* of the alleged tort of negligence had occurred in Ireland and under the two limbs of the test expressed in *BV v. Mines Potasse d'Alsace*, the plaintiff must show either that the damage occurred in Ireland or that the event which gave rise to the damage (or the breach of the duty of care) occurred in Ireland. Shanley J. held on the facts that there was no evidence that the representations and/or misstatements were received by Mr. Casey while he was in Ireland. In other words, the breach of the duty of care had occurred other than in Ireland and no significant connecting factor was identified which would establish jurisdiction in Ireland.

51. This is case is authority for a number of propositions, the first of which is that the test for the court in ascertaining where the jurisdiction lies in Ireland is a test of EU law and that some significant element of connection must be established in Ireland for jurisdiction to be established here.

52. Second, and this is in my view critical in the case at hand, Shanley J. held that the connecting factor was found in the place the misrepresentations were received or relied on. Fennelly J. considered the application of Article 5(3) in giving the judgment of the Supreme Court in *Leo Laboratories Ltd. v. Crompton BV* where he suggested that, absent a choice of jurisdiction clause which he considered was determinative of the question before him, the facts pointed to jurisdiction lying in Ireland. The area of legal uncertainty that he considered might have persuaded him to make a ruling to the European Court, the question of "pure" economic loss outside the realm of misrepresentation, does not arise in this case which is pleaded in misrepresentation.

Authorities from the courts of England and Wales

53. That a domestic cannot rely on distinctions found in national law and the court must engage in an interpretation of an autonomous concept of European law was explained in the English High Court decision of *London Helicopters Limited v. Heliportugal LDA-INAC*. The claimant sought damages for negligent misstatement on a certificate issued in respect of a second helicopter engine in Portugal. The helicopter engine was sold to an English buyer and the helicopter was delivered to England. The first purchaser sold on the helicopter to another company which, in turn, sold it to the claimant who sold it on. The ultimate purchaser issued proceedings against the claimant arguing that the helicopter was not reasonably fit for purpose and those proceedings were compromised. The claimant then issued proceedings against the defendant seeking damages for negligent misstatement contained in the certificates.

54. Simon J accepted that the certificate had been *"launched into circulation"* in Portugal and that Portugal was the place of the event which gave rise to and was at the origin of the damage, but held that England was the place where significant damage had been done to the *"immediate victim of the harmful act",* and therefore, was the place where the damage had occurred for the purpose of jurisdiction. He said, , that the place where the damage occurs is not merely the place *"where a claimant simply suffers financial loss",* and that:

> *It is necessary to see where the events giving rise to the damage produced its 'initial', 'immediate' or 'physical' harmful effect*

This is the language in *Dumez France SA v. Hessische Landesbank* as noted above at para. 40.

The Principles
55. A number of general principles can be stated with regard to the ascertainment of where the jurisdictionally relevant damage may be said to occur:-

> (i) The same jurisdictional result must arise irrespective of where a claim is made.
>
> (ii) The suffering of financial loss is not always a sufficient jurisdictionally relevant factor and the test is rather to ask where a direct or immediate harmful effect occurred.
>
> (iii) Thus, causation or immediate causation is a factor in play.
>
> (iv) The application of the test ought not to be unduly restrictive and must bear in mind, in particular, that a claim may exist in tort on the part of a subsequent purchaser who has no contractual nexus with the party who commits the wrongful act.
>
> (v) The court should reject a liberal approach especially as this can lead to jurisdictional uncertainty.
>
> (vii) Domicile or the place where a claimant carries out business and actually suffers loss is not a sufficient connecting factor unless that place is the place where the initial damage or injury happened.
>
> (viii) The test in a claim in misrepresentation (following *Casey t/a Casey International Plant Sales and Hire v. Ingersoll-Rand Sales Company Ltd*) must involve looking at where a representation was received.

Application to the facts
56. The defendant argues that jurisdiction in this case is established either in Germany or the Netherlands. Jurisdiction is established in Germany in that it was in Germany in 1992 that the certificate issued in the first place. Jurisdiction might lie in Netherlands in that the plaintiff relied on the certificate in deciding to acquire the vessel and in taking possession of a vessel which was at that time a faulty vessel although the plaintiff did not know this. The representation, if there was one, was relied on in the Netherlands and a causative connection may be established between the representation and the decision to purchase the vessel.

57. The initial and direct damage to the plaintiff occurred when the plaintiff made the choice to purchase the vessel. It was at that time that the direct and immediate loss crystallised in that the plaintiff took possession of the vessel which on the plaintiff's case did not have the stability characteristics required to operate in Irish waters.

58. The statement of claim is pleaded in fraudulent and negligent misrepresentation and the elements of that tort are pleaded including the making of the statement, the reliance on the statement and the causative connection. Thus the connecting factor is the reliance and receipt of the representation.

59. It is also important in that context to note that there was no pleaded factor connecting the purchase of the vessel with Ireland at the time it was acquired.

60. *Casey t/a Casey International Plant Sales and Hire v. Ingersoll-Rand Sales Company Ltd* remains the leading Irish judgment and is remarkable for its clarity. It accepts the two limbs of the test as explained in *Bier BV v. Mines de Potasse d'Alsace SA* , the second of which is relevant in this case. It seems to me the decision of Shanley J. is on point and that the plaintiff must fail and that jurisdiction is not established in Ireland as the evidence points unequivocally to the fact that the representation or misstatement on which the plaintiff pleads that it relied took place in Netherlands before the contract was entered into.

61. An essential element of the tort of misrepresentation is that the plaintiff must establish a causative nexus between the alleged representations and the decision to enter into the contract and there is no factor connecting this to Ireland. There is not on affidavit or in the pleadings any proposition that supports an argument that the representations were received in Ireland, for example, that the plaintiff obtained a copy of the certificate in Ireland prior to making a decision to deal with the Dutch broker. The height of the plaintiff's case was that it was not until that the vessel was voluntarily submitted for a stability check under the then recently introduced Irish certification scheme that the vessel was found to be dangerously unstable. The pleadings clearly identify that the decision to purchase the vessel was made in reliance, inter alia, on the stability values and characteristics disclosed in the stability certificate and/or the warranties or representations alleged thereby to be made by the defendants. Thus, it seems to me that the causative connection as pleaded is one between an event that occurred in the Netherlands and a breach of duty either occurred in the Netherlands or in Germany. It was there that the initial or immediate damage occurred and there where the plaintiff took delivery of a defective vessel. The fact that the plaintiff claims that it suffered loss thereafter is a claim with respect of a subsequent and consequential loss, and as the immediate damage had been suffered in the Netherlands, the claim in respect of that loss cannot be said to have jurisdictionally significant link to Ireland. Thus under the test identified in *Marinari v. Lloyds Bank Plc*. and explained in *London Helicopters Ltd. v. Heliportugal* jurisdiction is not found in Ireland.

62. Further, the plaintiff has not established or pleaded any causative or other link to Ireland, save one which might be called an incidental connection, namely that the plaintiff after completing the purchase and preparing the vessel for use then brought the vessel to Ireland and registered it under an Irish flag. There is nothing in the transaction in respect of which the claim is made, namely a transaction pleaded in reliance on a breach of duty which has any connection to Ireland. Accordingly, it seems to me that the rejection in the authorities and especially *Marinari v. Lloyds Bank Plc.* of jurisdiction in the domicile or place of business of a claimant is directly on point and has the effect that the plaintiff's claim does not have a sufficient connection with Ireland to establish jurisdiction in the Irish Court.

63. Accordingly, I consider that the defendants are entitled to the order sought in the motion.