THE HIGH COURT

[2022] IEHC 586

[Record No. 2019/1706 P]

BETWEEN

JOE MORONEY COACH HIRE LIMITED

PLAINTIFF

AND

MOSELEY IN THE SOUTH LIMITED AND VAN HOOL NV

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 24th day of October 2022

Introduction

1. This judgment deals with the jurisdiction of the Irish courts to hear the plaintiff's claim against the defendants arising out of the purchase by the plaintiff from the first defendant of a luxury coach which had been manufactured by the second defendant. The first defendant is a company based in the United Kingdom ("*the UK defendant*") and the second defendant is a company based in Belgium ("*the Belgian defendant*"). Both of the defendants have entered conditional appearances for the purposes of contesting jurisdiction and have brought separate motion seeking to have the plaintiff's plenary summons set aside under O. 12, r. 26 of the Rules of the Superior Courts or, alternatively, to have the proceedings struck out for want of jurisdiction. All parties agreed that the court's jurisdiction falls to be determined under EU Council Regulation 1215/2012, otherwise known as the Brussels 1 Recast Regulation but which, for convenience, I will refer to as the Brussels Regulation. This regulation replaced an earlier one to similar effect, Council Regulation 44/2001, which in

turn replaced an even earlier Convention, the 1968 Brussels Convention. Some of the case law relied on by the parties considered similar or identical provisions of the earlier legislation.

The Plaintiff's Claim

2. The plaintiff operates a luxury coach hire business and the claim arises out of the purchase of a newly manufactured luxury coach fitted out to the plaintiff's specifications which, it is claimed, is defective. The plaintiff commenced these proceedings by way of plenary summons issued in February 2019, alleging negligence and breach of duty, including breach of statutory duty against both defendants. However, the relief sought as against each defendant is different in a manner which is material to the issues which the court has to determine. There is a claim for rescission of contract and damages for breach of contract made against the UK defendant only. The contract is described as being one *"made… in or about May 2013"* and related to the purchase of the 59-seater luxury coach. There is then a claim made against both defendants for damages for negligence, breach of duty and breach of statutory duty, together with various ancillary reliefs.

3. It should be noted at this stage that the plaintiff has issued a motion under O. 15, r. 2 RSC seeking to join *"Joseph Maroney trading as Joe Moroney Coaches"* as a co-plaintiff to the proceedings and seeking liberty to amend the statement of claim under O. 28, r. 2 and 6. According to an affidavit sworn by the plaintiff's solicitor, Joseph Moroney incorporated his business on 15 December 2016, subsequent to the purchase of the coach and prior to the institution of the proceedings. Mr. Moroney then transferred his assets, including the coach, to the newly formed business. Because the solicitor took over the file from another firm of solicitors shortly before the proceedings were instituted in 2019, he was unaware that the business had previously been run and the coach purchased by Mr. Moroney in his personal

capacity. Logically, it is necessary for the court to determine whether it has jurisdiction to deal with the case at all before proceeding to make any orders joining additional parties. Although the Belgian defendant initially made some arguments based on the fact that the plaintiff's action concerns an agreement allegedly made in 2013 when it did not come into existence until 2016, ultimately, and quite properly, it did not pursue any issue as to the identity of the plaintiff for the purposes of these motions.

4. The plenary summons is endorsed pursuant to O. 11A of the Rules of the Superior Courts. The endorsement asserts the power of the court to hear and determine the claim against both defendants pursuant to the provisions of Article 7(1) and (2) of the Brussels Regulation. It also identifies, at para. 3 *"the place of the performance of the obligations arising under the contract the subject matter of these proceedings"* as being within the jurisdiction of the Irish courts. Similarly, at para. 4, the endorsement recites that *"the harmful events"* the subject of the proceedings occurred in this jurisdiction. Finally, the domicile of each of the defendants under Article 62 of the Brussels Regulation is correctly recorded as being the UK and Belgium respectively. This endorsement allowed for service out of the jurisdiction on the defendants without leave of the court. It might be noted that although the UK has since left the EU, it was a member at the time of the events giving rise to the proceedings and at the time the proceedings were issued and there is no dispute but that the UK defendant's application falls to be determined pursuant to the terms of the Brussels Regulation.

5. As previously noted, both defendants entered conditional appearances as for the purposes of contesting the jurisdiction of the High Court and did so in July 2019. The plaintiff served a statement of claim on 2 May 2020. The manner on which the case is pleaded in the statement of claim is of some significance as many of the averments made by Mr. Moroney in the affidavits filed in these motions differ materially from the way in which

the case was initially pleaded on his behalf. Crucially, at para. 4 of the statement of claim, the plaintiff pleads that the purchase of the coach for total price of €344,950 (cash plus trade-in value) was *"by an oral agreement, evidenced in writing in or around the time of delivery, made between the plaintiff… and the first name defendant… concluded in or around May 2013"*.

6. At para. 5 of the statement of claim, it is pleaded that the vehicle was manufactured by and/or imported into the State by the Belgian defendant and that, consequently, that defendant owed the plaintiff a duty under the Liability for Defective Products Act 1991. Given the circumstances of delivery of the coach, the plaintiff did not pursue the contention that it had been imported into the State by the Belgian defendant. At para. 6, it is pleaded that the plaintiff requested and paid a significant premium to have a coach customised to its needs and that both defendants were aware of the plaintiff's particular requirements as it had been discussed with each of them *"in detail during the negotiations culminating in the conclusion of the agreement and the delivery of the coach in or around May 2013"*. Paragraph 7 pleads a series of duties allegedly owed by the defendants to the plaintiff both generally and, in the case of the UK defendant, by virtue of the contract between the parties. No distinction is drawn between the duties allegedly owed under the contract and as a matter of general law. The duties pleaded relate to ensuring that the coach was fit for purpose and of merchantable quality.

7. It is then pleaded that in breach of these terms, conditions and duties, the coach was defective and particulars are provided. The details of the defects alleged are not relevant to the question of jurisdiction. According to the consulting engineer who inspected the vehicle on behalf of the plaintiff, the main problem seems to have been with the transmission and the vehicle was returned to the UK defendant in 2014 for repairs to the transmission. Further repairs were carried out in 2016 and 2018. As a result of these matters, it is pleaded that the

plaintiff has lost all confidence in the coach, he has been denied its use for long periods causing financial loss and he is unable to use it as intended *"because of its inherent defects would result in actual loss"*. Needless to say, the defendants dispute the contention that the coach is defective but, again, this is not relevant to the question of the court's jurisdiction.

8. The loss and damage claimed by the plaintiff includes the purchase price of the coach and loss of earnings allegedly sustained as a result of its defective nature. Finally, it is pleaded at para. 13 that the contract was made *"within the jurisdiction of this Court within the preceding six years"*. No argument was made by the plaintiff that jurisdiction could be determined by reference to the place in which the contract was made and no issue was raised by the defendants as to the proceedings being out of time.

9. The statement of claim is endorsed in identical terms to the endorsement on the plenary summons. At the hearing of the case the plaintiff made additional arguments as to jurisdiction based on the repairs to the vehicle constituting a *novus actus interveniens.* The defendants argued, correctly, that this had not been pleaded nor has the factual basis for such a claim been properly set out even in the affidavits sworn for the purposes of objecting to the relief sought in these motions. Consequently, I do not propose considering any jurisdictional claim based on *novus actus interveniens*.

10. The Belgian defendant raised particulars regarding the plaintiff's claim seeking details as to the location and date of the delivery of the coach and asking for copies of the agreement as evidenced in writing or of the documents concerned. In reply, the plaintiff confirmed that the coach was delivered to him at Fishguard in Wales on 26 May 2013. As regards the agreement, or documents, the plaintiff stated the following:-

> *"The witness for the Plaintiff will say at the time of purchase he received three separate letters to include a quote, an invoice and an amended invoice. The First Named Defendant has entered an Appearance wherein it contests jurisdiction, without*

any explanation or detail as to the jurisdiction contest. Therefore, given that issue, all documents exchanged between the witnesses for the Plaintiff in the First Named Defendant will remain a matter for discovery."

11. The second defendant also raised queries concerning the harmful events relied on for the purposes of O. 11A of the RSC including specific requests to identify the location of *"the event giving rise to the damage"* alleged in the proceedings and the place where the damage is alleged to have occurred. In reply to the first of these queries, the plaintiff identified the location of the events giving rise to the damage as *"Ireland"*. In response to the query as to the place where the damage is alleged to have occurred, the plaintiff stated that it *"occurred and manifested in the jurisdiction of this Court"*.

The Defendants' Motions – UK Defendant

12. The Belgian defendant issued a motion seeking to have the plenary summons set aside and the proceeding struck out on 29 July 2020. The UK defendant issued a similar motion on 19 May 2021. Although both motions are ostensibly similar, they gave rise to different legal issues because the claim made by the plaintiff against each defendant is materially different. At this point, I intend to outline only the factual basis upon which each motion is brought and I will deal in more detail with the legal issues relevant to each motion as part of the analysis below. I propose to start by looking at the UK defendant's application as it is the first defendant and, at the hearing, its application was the first opened even though the Belgian defendant's was the first in time. In addition, the factual issues concerning the relationship between the plaintiff and the UK defendant are more complex than those concerning the relationship between the plaintiff and the Belgian defendant.

13. In bringing its motion, it was pointed out that the UK defendant was wound up voluntarily on 26 March 2021. The motion was accompanied by an affidavit from the

liquidator confirming that the liquidation was a solvent liquidation and that the affidavit of the former director of the UK defendant, Mr. Moseley, was sworn with his authority and consent. The motion on behalf of the UK defendant relies on three main arguments. Firstly, under the Brussels Regulation, the default position is that a defendant should be sued in the place of its domicile and the onus is on a plaintiff attempting to sue elsewhere to show that one of the special rules as to jurisdiction applies to a case. Secondly, although the plaintiff purports to sue the UK defendant in contract and in tort, as a matter of EU law, jurisdiction is governed by the contractual claim. Under the Brussels Regulation, the UK courts have jurisdiction over the contractual claim as the place of delivery of the goods the subject of the contract was the UK. Thirdly, even if jurisdiction were not determined by the rules applicable to contracts under the Brussels Regulation, the terms and conditions of the agreement under which the UK defendant provided the coach to the plaintiff, which it is alleged were incorporated into the contract between them, contained an exclusive jurisdiction clause conferring jurisdiction on the UK courts, which clause is recognised under the Brussels Regulation.

14. Factually, the UK defendant points to a series of documents provided by it to the plaintiff during the course of the dealings between the parties culminating in a receipt signed by Mr. Moroney on the delivery of the vehicle on 26 May 2013. All of these documents have the UK defendant's terms and conditions printed on the reverse. The documents relied on include a quotation, a new vehicle order form, correspondence regarding the placing of the order and the trade-in of the plaintiff's old vehicle, an invoice, a revised invoice and the receipt signed by the plaintiff on the delivery of the vehicle. The plaintiff queried whether all of these documents had been sent to him and also whether they had been sent by fax such that the terms and conditions printed on the reverse of the page would not necessarily have been seen by him. The plaintiff's evidence on these points was vague – he does not actually deny

receiving the documents referred to but states that he cannot remember whether he received them and that he has not kept copies of the documents he did receive. He also points to the absence of his signature on the new vehicle order form without being able to state definitively that he did not receive a copy of this document. Consequently, Mr Moseley swore a supplemental affidavit on behalf of the UK defendant to confirm exactly what it could prove had been sent or given to the plaintiff, whilst reserving its position on other documents (such as the quotation) some of which the plaintiff seemed to have implicitly acknowledged receiving as he relied on them as part of the contractual documentation in his replies to the Belgian defendant's particulars (e.g. the quotation).

15. The UK defendant was in a position to confirm that correspondence had been sent by post to the plaintiff on 7 December 2012 and on 17 May 2013, both of which letters were on paper with the UK defendant's terms and conditions printed on the reverse. The letter of 7 December 2012 confirmed the sale to the plaintiff of the coach, acceptance of the plaintiff's vehicle in part exchange with *"the allowance for this vehicle to be agreed to post factory visit"* and that the plaintiff would finalise finished details with the coachbuilders during a forthcoming factory visit. The letter of 17 May 2013 enclosed an invoice and notice that the relevant figures had been forwarded to the bank through which payment was to be arrranged. The receipt signed by Mr. Moroney states, above the signature, *"I declare that I am duly authorised by the purchaser to sign this receipt and to bind the purchaser under the terms thereof"*. The UK defendant has provided the legal opinion of a UK barrister to the effect that, as a matter of UK law, its terms and conditions were validly incorporated into the contract between the parties for the purchase of the coach. This was not disputed, or even engaged with, by the plaintiff. Instead, the issue raised by the plaintiff was whether the terms and conditions were so incorporated as a matter of EU law for the purposes of the Brussels Regulation.

16. The UK defendant's terms and conditions comprise 21 conditions with many subclauses which, when printed on a single page, undoubtedly conform to the stereotypical *"small print"*. They provide a detailed contractual framework for the purchase and supply of any vehicle dealing with matters such as payment, risk, title retention and lien, warranties for new goods, cancellation, finance and part exchange. The provisions relied on in particular by the plaintiff are as follows:-

> "*7.0 DELIVERY*
>
> *7.2 Delivery should be to the Buyer or any person purporting to be the Buyer's agent (whether or not such is the case) at the Company's premises or at the Company's option at the nearest convenient delivery point to the factory of manufacture or port of importation.*
>
> *19.0 ARBITRATION*
>
> *Any dispute or difference as to the meaning or effect of these conditions and/or of the Company's warranty or as to the rights or liabilities by the party under the Contract may be referred to the final decision of a single arbitrator in England to be nominated by the parties or in default by the President of the Society of Motor Manufacturers and Traders Limited.*
>
> *20.0 APPLICABLE LAW*
>
> *(1) These conditions and the Company's warranty (if any) and any arbitration hereunder shall be interpreted and governed in all respects according to the laws of England and in any litigation or arbitration shall exclusively take place in England."*

17. In addition to relying on the fact that these terms and conditions were provided to the plaintiff in the course of this transaction, the UK defendant also relied on two other matters. Firstly, Mr. Moseley, a director of the UK defendant, expressly avers that it is standard

practice in the luxury coach business for the seller to operate on standard terms and conditions which are incorporated by reference and included on the reverse of all documentation. The UK defendant points out that this averment has not been contradicted by the plaintiff. Secondly, in response to the plaintiff's affidavits contending that concluded agreements had been reached between Mr. Moroney and the UK defendant's agent in advance of any documentation being produced by the UK defendant and relying on a history of such *"gentlemen's agreements"*, the UK defendant responded by exhibiting new vehicle order forms signed by Mr. Moroney on behalf of his business in 2005 and 2007. These new vehicle order forms contain a clause printed immediately above Mr. Moroney's signature to the effect that he understood *"that this order (if accepted) will be subject to the seller's conditions of sale affecting the rights and duties of the parties which I/we accept"*. These documents were relied on not only to dispute the plaintiff's contention that prior dealings between the parties had been primarily by way of oral contract, but also to indicate that Mr. Moroney had personal knowledge of the UK defendant's terms and conditions and of the fact that they were applicable to this transaction.

18. The plaintiff's opposition to the UK defendant's motion is largely factual. Mr. Moroney has sworn in affidavit in which he contends he reached a fully concluded verbal agreement with the UK defendant's agent, a Mr. Vaulter, at a trade fair in Dublin in November 2012. He claims that all the documents referred to by the UK defendant came into existence after this agreement was reached and, consequently, cannot alter that agreement. It might be noted that this affidavit evidence is inconsistent with two paragraphs of the Statement of Claim (paragraphs 4 and 6) in which it is expressly pleaded that the agreement was concluded in May 2013. He states that his previous dealings with the UK defendant (which seemed to involve the purchase of three vehicles in two transactions over a seven-year period) were also all verbal agreements made over the telephone.

19. Mr. Moroney's affidavit is unsatisfactory in many respects. For example, he states that he has no recollection of receiving the quotation from the UK defendant although he identified the quotation as part of the documentation forming the contract in his replies to particulars. His assertion that earlier dealings with the UK defendant were purely verbal is manifestly contradicted by the presence of his signature on new vehicle order forms in 2005 and 2007, both of which expressly accept that the order so placed was subject to the seller's terms and conditions. The factual basis for Mr. Moroney's claim that prior dealings between the parties were entirely verbal is not sustainable and he does not engage with the averment on behalf of the UK defendant that it is common practice in the luxury coach trade for the seller's terms and conditions to be incorporated into all contracts in the manner described.

20. In addition to these difficulties, Mr. Moroney's position changed in a number of subtle but potentially significant respects between his first and second affidavit and between his affidavit evidence and the legal submissions filed on his behalf. For example, in his second affidavit, instead of relying on a course of dealing which was entirely verbal, he makes a completely different argument focusing on the fact that the earlier new vehicle order forms were signed by him to contend that *"a different form of agreement was concluded in respect of this vehicle"*. In his first affidavit, he makes a point of stating on multiple occasions that the agreement between the parties was concluded in Ireland, a point of no legal significance. He then goes on to expressly aver that, as the agreement was made in Ireland and the vehicle was to be used in Ireland, *"…it was clearly understood… that the contract was governed by Irish law"*. The written submissions characterise this as an agreement. Apart from the obvious difficulty Mr. Moroney has in purporting to aver to the understanding of a person with whom he was conducting negotiations in the absence of any supporting evidence, the two matters relied on do not provide a generally accepted basis for treating an international contract for the purchase of goods as being governed by the law of the buyer's

domicile. In the written legal submissions, responding to the UK defendant's arguments based on Article 7(1), it is contended that regardless of the place of delivery of the vehicle, it was *"understood"* that the contract was governed by Irish law.

21. At a later point, the plaintiff argues that the UK defendant's practice may have been *"to seek to unilaterally to amend* (sic*) concluded terms and conditions without bringing the attention of the purchaser to those amendments by purportedly furnishing pre-printed terms and conditions which differ from what was agreed on the obverse of documents which, to the purchaser, simply seem to be materials advancing the computers agreements"*. This description of the course of dealings between the parties is neither fair nor accurate. Even taking Mr. Moroney's affidavit evidence at its height, what was agreed between himself and Mr. Vaulter was the purchase of a particular type of vehicle at a particular price which was subject to variation (and was actually increased) depending on the precise fit-out which the plaintiff would subsequently agree with coachbuilders (the Belgian defendant). The payment of the purchase price was to include a trade-in of the plaintiff's vehicle, which trade-in was necessarily accompanied by its own suite of documentation. The UK defendant placed the order for the vehicle with the Belgian defendant - subject to building and finishing details to be completed, i.e. agreed with the plaintiff, during the forthcoming factory visit by him - on 7 December 2012. On the same date, the UK defendant sent the plaintiff, by post, written confirmation of the agreement including the trade-in on paper which had its terms and conditions printed on the reverse. Thus, far from the agreement being concluded by a handshake in November 2012 between that meeting and 7 December 2012, the plaintiff was furnished with a quotation, a new vehicle order form was prepared and most likely furnished to the plaintiff (although this cannot be definitively proved) and the paperwork in respect of the trade in was also prepared. The purchase was then formally confirmed at the same time

the order was placed with the coachbuilders but even then the final details of the fit out to the coach and the price of those finishings remained to be agreed.

22. Somewhat surprisingly, the plaintiff does not appear to have retained much of the paperwork relating to this valuable transaction and his recollection is vague as to what he may have received and when. At the hearing, counsel on behalf of the plaintiff argued that there was a concluded agreement between the parties and that the place of performance of the obligations under the contract was Ireland. This is not in fact supported by the plaintiff's averments which put the matter no further than it having been "understood" that the contract would be governed by Irish law and that the place of performance of the obligations under the contract was Ireland. It is also averred that it was "entirely foreseeable" that if there was a defect in the vehicle damage "would occur and manifest itself" in Ireland.

The Defendant's Motions – Belgian defendant

23. The factual position regarding the Belgian defendant is somewhat simpler as, despite the provision of a two-year warranty by the Belgian defendant, neither the plaintiff nor that defendant contends that the relationship between them is governed by contract. (In any event, the warranty had a jurisdiction clause under which the Belgian courts would have had exclusive jurisdiction over any dispute arising under the warranty). Instead, both parties agree that jurisdiction as regards the claim against the Belgian defendant falls to be determined under Article 7(2) of the Brussels Regulation as a claim in tort for the negligent manufacture of the vehicle. The dispute between them is largely a legal one concerning the identification of *"the place where the harmful event occurred"*.

24. The evidence before the court establishes that the Belgian defendant was contracted by the UK defendant to build a coach that the plaintiff had ordered from the UK defendant, albeit that the ultimate specification as to the detailed finish of the vehicle was agreed directly

with the plaintiff following a visit to the Belgian defendant's factory in Belgium. The coach was delivered by the Belgian defendant to the UK defendant in the UK before the UK defendant delivered it to the plaintiff in Wales. The Belgian defendant argues that, if the coach was defective as a result of negligent manufacture (which is itself denied), then that harmful event took place during manufacture in Belgium. The plaintiff argues that the defects did not manifest themselves until the vehicle was put into use in Ireland and, consequently, that the event which gave rise to the damage produced its harmful effects (including damage to the plaintiff's business reputation and loss of business) in Ireland.

Brussels Regulation

25. The application by the Irish courts of the jurisdictional rules contained in the Brussels Regulation and its precursor regulations is well established and does not require detailed examination. The parties are agreed as to the relevant provisions of the Brussels Regulation which are potentially applicable but disagree as to the legal effect of their application. In brief, the Brussels Regulation applies a set of common rules to determine jurisdiction over civil and commercial matters with the object of enhancing judicial co-operation throughout the European Union. The principal rule is that jurisdiction is primarily determined by the place of the defendant's domicile and jurisdiction is always available on this basis (see Recital 15 and Article 4). Although the Brussels Regulation sets out rules for determining domicile (see Articles 62 and 63), there is no issue as to the domicile of the defendants in this case being the UK and Belgium respectively.

26. In addition to jurisdiction based on the defendant's domicile, the Brussels Regulation contains rules which confer *"special jurisdiction"* on the courts in another Member State in certain circumstances (see Articles 7 and 8). The special rules, as derogations from the general rule, must be construed strictly. These special rules are based on the existence of a

"close connection" between the court and the action or should *"facilitate the sound administration of justice"* (see Recital 16). The Recitals emphasise the need for predictability and certainty in the rules governing jurisdiction and, in particular, the desirability of avoiding situations where a defendant is sued in the courts of a Member State which he could not have reasonably foreseen (see Recitals 15 and 16).

27. In the course of his arguments, counsel for the plaintiff emphasised the plaintiff's status as a consumer and the relative inconvenience for him in having to sue large commercial operations in jurisdictions with which he has no connection, especially Belgium where he also does not speak the language. However, the Brussels Convention does not create special jurisdiction rules in favour of consumers. He argues that as the coach was manufactured for and sold to an Irish client for use in Ireland, it must have been reasonably foreseeable to the defendants that they would be sued in Ireland. This may be so, but it is not the legal test to be applied. The rules have been drawn up so as to allow for departures from the general domicile based-rule where there is a close connection between the action and the courts in an alternate Member State so as to ensure legal certainty and reasonable foreseeability. This Court does not have a freestanding discretion to accept jurisdiction where a case does not clearly come within these rules based on an assessment of the closeness of the connection nor the degree to which a defendant might reasonably have foreseen litigation in a jurisdiction other than that of its domicile, although considering the connection and whether it was foreseeable that a defendant might be sued in a particular jurisdiction may help a court in determining whether a particular claim comes within the rules. Nonetheless, the court must apply the special rules as they have been framed in the Regulation and does not have discretionary jurisdiction going beyond those rules.

28. In this regard, the key provisions of the Brussels Regulation are as follows:-

"Article 4

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Article 7

A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies;

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

29. It might be observed that Article 8 of the special rules allows for a co-defendant to be sued in the place of another defendant's domicile provided the claims are so closely connected that it is expedient to have them heard and determined together. It is likely that the claims against these defendants would meet the latter half of this test but as neither is domiciled in Ireland they do not satisfy the first part. Consequently, even if the plaintiff establishes that the Irish courts have jurisdiction in respect of the case against one of the

defendants, it does not enable the plaintiff to sue the other defendant here regardless of how expedient or convenient it might be for him to do so. As a result of this, it is necessary for the court to consider whether it has jurisdiction in respect of the claim made against each defendant separately. Of course, the plaintiff would have had the choice of suing both defendants in either the UK or in Belgium – although by reason of the passage of time, that option might no longer be available to him.

30. In addition to the general rules, the UK defendant relies on the provisions of Article 25 under the heading of *"Prorogation of Jurisdiction"* in respect of the exclusive jurisdiction clause contained in its terms and conditions. The Brussels Regulation recognises what it describes as *"the autonomy of the parties to a contract"* (see Recital 19) or, as it is more generally known in the common law, freedom to contract. Consequently, the entitlement of parties to decide, as part of the contractual arrangements between them, both the law governing the contract and the courts having jurisdiction over it remains. Interestingly, Recital 20 points out that, where a question arises as to the validity of a jurisdictional clause in a contract, *"that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-law rules of that Member State"*. In this case the courts designated in the agreement are those of the UK and consequently the validity of the jurisdictional clause falls primarily to be determined with UK law. The only evidence before the Court as to the law of the UK on this issue is that of the UK barrister expressing her legal opinion that the jurisdictional clause is valid and has been validly incorporated in t the contract between the plaintiff and the UK defendant according to UK law.

31. The particular provisions relied on are found in Article 25(1), (2) and (5). These provide as follows:-

"Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid."

Jurisdiction in respect of Claim against UK Defendant

32. There were three strands to the detailed argument made by counsel on behalf of the UK defendant. Firstly, it was contended that as the relationship between the plaintiff and the UK defendant was one under contract, then, notwithstanding the fact that the plaintiff had pleaded its claim against that defendant in both contract and negligence, the provisions of Article 7(1) apply exclusively and those of Article 7(2) do not apply at all. Secondly, when the provisions of Article 7(1) are applied as the contract of sale of goods, it is governed by the first indent of subpara. (b) and jurisdiction is determined by the place where the goods were delivered, being in this case the UK. Finally, if the court were not to accept the UK defendant's arguments under Article 7, reliance is placed under Article 25 on the exclusive jurisdiction clause at para. 20 of the terms and conditions. Counsel contends that Article 25(1) provides three different ways through which an exclusive jurisdiction clause can be incorporated into the contractual relations between parties and that, in this case, each of the three possibilities is satisfied. Finally, and there is no dispute on this, although these motions were brought by the defendants, it is the plaintiff who bears the onus of establishing that one of these special rules as to jurisdiction under Article 7 applies to the case. Needless to say, the UK defendant contended that the plaintiff had not discharged the legal onus upon it to do this.

33. I think that the arguments made by the UK defendant in respect of each of these issues are correct, although having found in its favour on the first two, it will be unnecessary for me to formally decide the third.

34. Firstly, as a matter of capital EU law, it is clear that Article 7(1) and Article 7(2) are mutually exclusive such that a claim arising out of a contractual relationship between parties cannot simultaneously be tortious. Counsel cited a number of authorities in support of this proposition with both the Irish courts and the CJEU expressing similar views. In the earliest of these cases, *Kalfelis* Case 189/87, the referring court sought clarity on whether in

proceedings brought in both contract and tort, the courts of a Member State which had jurisdiction in respect of the tortious claim could also hear the claim in contract in respect of which it did not otherwise have jurisdiction. The Court of Justice emphasised that, in order to ensure the equality and uniformity of the rights and obligations arising out of what is now the Brussels Regulation, it was necessary to ensure that its concepts are not interpreted simply by reference to the national law of the state whose courts are asked to determine the jurisdictional question. Instead, these must be treated as autonomous EU law concepts which must be defined by reference to the scheme and objectives of the Brussels Regulation. The Court of Justice then concluded (note that Article 5 of the Brussels Convention is the equivalent to Article 7 of the Brussels Regulation):-

> *"17. In order to ensure uniformity in all the Member States, it must be recognized that the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1).*
>
> *18. It must therefore be stated in reply to the first part of the second question that the term 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5 (3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5 (1)."*

35. The judgment of a O'Sullivan J. in the Irish High Court in *Rye Valley Foods v. Fisher Frozen Foods Ltd* (Unreported, 10 May 2020) put the matter succinctly as follows:-

> *"The concept of tort, delict and quasi-delict, therefore, is not necessarily identical with the concept of tort or its equivalent in any Member State but rather is autonomous and independent of all. Furthermore, and in this respect it is unlike the position in this country, it is a concept covering all actions seeking to establish the*

liability of a defendant which are not related to a "contract" within the meaning of Article 5(1)."

36. More recently, in *Brogsitter* Case C-548/12, a plaintiff who had had a contractual relationship with the defendants (based in France and Switzerland) brought an action exclusively in tort before the German courts. The defendants contested the jurisdiction of the German courts on the basis of the contractual relationship between the parties contending that as the place of performance of the obligations under the contract was France, the French courts had exclusive jurisdiction.

37. The CJEU summarised the question which had been referred to it as follows:-

"By its question, the referring court asks, in essence, whether claims for civil liability, such as those at issue in the main proceedings, made in tort under national law, must nonetheless be regarded as concerning 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001, taking account of the contract which binds the parties in the main proceedings."

Having referred to its earlier judgment in *Kelfelis*, the court then continued:-

"21. In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature (see, to that effect, Case C-167/00 Henkel [2002] ECR I-8111, paragraph 37).

22 It is apparent from the order for reference that the parties to the main proceedings are bound by a contract.

23 However, the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim concerns 'matters

relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.

24 That is the case only where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract.

25 That will a priori be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.

26 It is therefore for the referring court to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.

27 If that is the case, those claims concern 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001. Otherwise, they must be considered as falling under 'matters relating to tort, delict or quasi-delict' within the meaning of Article 5(3) of Regulation No 44/2001."

38. As noted above, the plaintiff did not really engage with this element of the UK defendant's case but accepted that the UK defendant's presentation of the law was correct as regards a rolled-up case of contract and tort in which the two claims are inextricably linked. Although the plaintiff has sued the UK defendant in both contract and tort, the claim in tort against that defendant arises out of the contractual relationship between them. Indeed, the

overlap is so great that the particulars of contract pleaded against the UK defendant and the breach of duty alleged against both defendants are virtually identical and identical damages claimed under both headings. Consequently, I am satisfied that as a matter of EU law, the entire of the plaintiff's claim against the UK defendant is one the legal basis for which is an alleged breach of the rights and obligations set out in the contract between them and that the terms of this contract would have to be taken into account in deciding the claim in tort. Therefore, jurisdiction in respect of the plaintiff's claim against the first defendant falls to be determined exclusively by reference to Article 7(1) of the Brussels Regulation.

39. The second element of the UK defendant's argument was more contentious. The UK defendant argued, firstly, that the structure of Article 7(1) is such that the provisions of subpara. (b) which provides special rules for determining the *"place of performance of the obligation"* under the contract in the case of contracts for the sale of goods and for the provision of services, must by virtue of subpara. (c) take precedence over the more general rule in subpara. (a). Under subpara. (b) in the case of a contract for the sale of goods, the place a performance of the obligation is deemed to be the place where the goods were delivered, in this case the UK. Consequently, the plaintiff's arguments as to the place of performance of the obligations under the contract are largely irrelevant since the Brussels Regulation's deeming provision takes priority in a contract of this type. Secondly, counsel argued that, in any event, even if subpara. (a) were to be regarded as applicable, the place of the performance of the obligation was still the UK.

40. The plaintiff in contrast relied on the fact that all parties were aware that the coach was intended for use in Ireland and on alleged agreement between the parties, specifically between Mr. Moroney and Mr. Vaulter, that the place of performance of the obligations under the contracts would be Ireland. Counsel argued that it would be unfair to treat the plaintiff as being bound by the terms and conditions proffered by the UK defendant purely on

the basis of his having signed a receipt for delivery of the vehicle on the reverse of which those terms and conditions were printed.

41. A number of points need to be addressed in respect of the plaintiff's factual argument before I consider the UK defendant's legal argument. These points need to be considered at the outset because of two important principles which were not in dispute, namely that the plaintiff bears the onus of proving that one of the special rules of jurisdiction under Article 7 applies and the need for those rules to be interpreted restrictively (see the decision of the CJEU in *Kronhofer v. Miaer* Case 168/02 and that of Fennelly J. in *Leo Laboratories v. Crompton BV* (Supreme Court, 12 May 2005)). I accept, as the plaintiff contends, that notwithstanding the Brussels Regulation the parties retain a freedom to contract or, as the Brussels Regulation itself puts it, the parties to the contract retain the autonomy to determine the courts having jurisdiction over disputes arising from the contract. However, in this case, as the default position under Article 4 is that the UK courts have jurisdiction, that means the plaintiff has to establish positively that the parties reached a specific agreement conferring jurisdiction on the Irish courts. Any such agreement would not only be inconsistent with the terms of the Brussels Regulation but would also be contrary to the terms and conditions which the UK defendant contends form part of the contract between them. I am not satisfied on the evidence before me that the plaintiff has discharged this onus.

42. Firstly, there is absolutely no documentary evidence of any sort, even emanating from the plaintiff itself, which supports the existence of the contractual terms for which the plaintiff contends. Secondly, the plaintiff's affidavit evidence, even taken at its height, does not go so far as to state that such terms were expressly agreed. The most that can be extracted from the averment made by Mr. Moroney is his belief that a fully concluded oral agreement had been reached between himself and Mr. Vaulter which did not include the UK defendant's terms and conditions and his belief that there had been an *"understanding"* based on the fact

that the contract was made in Ireland and the vehicle was intended for use in Ireland *"that the contract would be governed by Irish law"* and that the place where the parties' obligations under the contract would be performed was Ireland. During the course of the hearing, counsel acknowledged that an *"understanding"* is not the same thing as evidence that Mr. Moroney and Mr. Vaulter had expressly discussed either jurisdiction or the applicability of Irish law to the contract, much less that they had reached an agreement on these issues.

43. Further, the existence of a fully concluded oral agreement between these parties as of November 2012 is inconsistent with all of the steps taken (which I have outlined above) between that date and the furnishing of confirmation of that order on 7 December 2012. The non-application of the UK defendant's terms and conditions to that agreement is inconsistent with the prior history of dealing between the parties and with the general practice in the industry. It is also inconsistent with the fact that the terms and conditions were furnished on at least three separate occasions (that can be proved by the UK defendant) before the plaintiff took possession of the vehicle at the point of delivery. Of course, to a certain extent the incorporation of the UK defendant's terms and conditions into the contract is not essential to determine jurisdiction under Article 7, particularly if the UK defendant succeeds in establishing that jurisdiction should be determined by reference to the place of delivery under Article 7(1)(b). If jurisdiction is to be determined under Article 7(1)(a), then arguably an express agreement that the place of performance of the obligations under the contract would be Ireland could displace the fact that both payment for and delivery of the goods took place in the UK. However, as previously noted, the averment that there was an *"understanding"* does not amount to evidence that there was a binding agreement to that effect. This is particularly so since it does not follow from the two factors relied on by Mr. Moroney (i.e. that the agreement was made in Ireland and that the vehicle would be used in Ireland) that the contract was one subject to Irish law or to the jurisdiction of the Irish courts.

44. The views expressed in the preceding paragraph are largely *obiter*, since I accept the argument made by the UK defendant that the scheme of Article 7(1) is that jurisdiction in respect of a contract for the sale of goods is to be determined by reference to subpara. (b) rather than subpara. (a). As was noted by the CJEU in *Brogsitter* (above) at para. 28:-

> *"It should also be noted that, in the first case, jurisdiction in matters relating to a contract is to be determined in accordance with the connecting factors defined in Article 5(1)(b) of Regulation No 44/2001 if the contract at issue in the main proceedings is a contract for the sale of goods or for the supply of services within the meaning of that provision. As provided in Article 5(1)(c) of Regulation No 44/2001, it is in fact only when a contract does not fall within either of those two categories that it is appropriate to determine the competent jurisdiction in accordance with the connecting factor provided for in Article 5(1)(a) of Regulation No 44/2001…""*

45. In this case, it was clearly agreed between the parties that the goods, i.e. the vehicle, would be delivered at Fishguard in Wales and it was, as a matter of fact, delivered at that location. As the place where the goods were delivered is deemed to be the place of performance of the obligation under the contract, then the UK courts as the courts of that place have jurisdiction in respect of the plaintiff's claim against the UK defendant.

46. In reality, that disposes of the need to determine the third issue raised by the UK defendant, namely the existence of an exclusive jurisdiction clause conferring jurisdiction on the UK courts by virtue of the incorporation of the UK defendant's terms and conditions into the contract between the parties. The freedom of the parties to a contract to determine that the courts of a nominated Member State should have exclusive jurisdiction is recognised and preserved pursuant to Article 25. Both of the parties relied on the decision of the Court of Justice in the case of *Car Trim Gmbh v. Key Safety Systems SRL* Case C-381/08 which, in the case of a contract for the sale of goods under what is now Article 7(1)(b), emphasised the

parties' freedom of contract, including the entitlement to fix a place of delivery of goods which is not in fact the actual place of delivery. As I understand the argument, the plaintiff does not contend that the parties had agreed a nominal place of delivery different to the actual place of delivery but relies on a more general references to the parties' freedom to contract.

47. The plaintiff also relies on the decision of the CJEU in *Salotti* which considered the precursor provision to Article 25, which it should be noted differs materially from Article 25 in many respects. Most significantly, Article 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which was under discussion in that case, provided only for prorogation of jurisdiction where the agreement relied on was either in writing or an oral agreement evidenced in writing. As will be recalled, Article 25(1) of the Brussels Regulation allows such an agreement to be established through any one of three different ways, either an agreement in writing or evidenced in writing; an agreement in a form according with the practices the parties have established between themselves or in a form known to and regularly observed by parties to contracts of the type involved in the particular trade or commerce concerned. The UK defendant contends that the jurisdiction clause in its terms and conditions satisfies all three of these possibilities.

48. The Court of Justice in *Salotti* adopted a restrictive interpretation of Article 17 requiring that the existence of an agreement as to jurisdiction which departed from the general rules applicable under the Convention had to be clearly and precisely demonstrated:-

> *"The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdictions provided for in Articles 5 and 6 of the Convention.*

In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed.

By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated."

49. Although the onus is on the plaintiff to establish that the special rules as to jurisdiction under Article 7 apply, presumably, in principle, the onus is on the UK defendant to demonstrate the existence of a contractual clause in the agreement between the parties under which the jurisdictional rules of Brussels Regulation are displaced. I say *"in principle"* because, of course, in this case, the effect of the jurisdiction clause relied on is identical to the default provision under Article 4 of the Brussels Regulation – i.e. that the UK courts being the place of the UK defendant's domicile would have jurisdiction. However, it would only be necessary to consider this issue if my analysis of the plaintiff's claim that the Irish courts have jurisdiction under Article 7(1) or Article 7(2) had yielded the opposite result to the conclusions which I have actually drawn. Therefore, the following analysis to predication on the hypothetical conclusion that the place of performance of the obligations under the contract is Ireland.

50. It is perhaps simplest to work backwards through the three possible ways of establishing that the parties have agreed that the UK courts should have jurisdiction under this contract. In his grounding affidavit on behalf of the UK defendant, Mr. Karl Moseley, states at para. 20:-

> *"I say and believe that the inclusion of general terms and conditions of sale on the reverse of purchase order forms, invoices and receipts is a practice which is common in the business of the international supply of luxury coaches."*

That averment is not disputed by the plaintiff.

51. It will be recalled that subpara. (c) of Article 25(1) requires the establishment of the existence of a usage of which the parties ought to have been aware and which is widely known to and regularly observed by parties to contracts of this type in the particular trade. In my view, it is somewhat unclear whether subpara. (c) requires that the usage referred to be one as regards jurisdiction itself or, as here, one as regards the incorporation of terms and conditions including a jurisdiction clause into a contract of this type. Certainly, Mr Moseley's averment does not go so far as to establish that international contracts for the purchase of luxury coaches generally confer jurisdiction on the court of the seller's domicile. It does establish the general practice of a seller's printed terms and conditions as included on the reverse of the seller's documentation being incorporated into the contract for the purchase of such a vehicle. However, I think it is probably unnecessary for me to decide this issue under subpara. (c) as both the evidence and the law supports a conclusion that the terms and conditions which are, of course, in writing, were incorporated into the agreement between the parties.

52. This is so either because they are in a form which accords with the parties' prior dealings under subpara. (b) or because they have been expressly accepted by the parties and are evidenced in writing. The UK defendant refers to a number of authorities in which terms and conditions printed on the reverse of official sales documentation have been held to be incorporated into the contract between the seller and the purchaser. These include the decisions of Fennelly J. in *Leo Laboratories* (above) and *Dan O'Connor v. Masterwood (UK)*

Ltd [2009] IESC 49. Indeed, in the latter case, he goes so far as to make an observation that might be regarded as particularly apposite in light of the facts of this case:-

> *"It would be to overlook the obvious, if the court were to ignore the admitted signature of the first named plaintiff on a set of printed conditions containing a clear and express jurisdiction clause. It may well be that the first-named plaintiff paid little attention to the terms of printed conditions. That is commonplace. However, people engaged in trade, certainly in international trade, must be taken to be aware that printed conditions contain clauses which can affect their rights. They choose to ignore them at their peril. That is why Article 23, section 1, subparagraph (c) refers to practices of which parties 'ought to have been aware'."*

The UK defendant has also provided the opinion of a UK barrister to the effect that the printed terms and conditions were, as a matter of UK law, incorporated into the contract between the plaintiff and the UK defendant. The plaintiff has not engaged with this affidavit nor with the legal authorities cited therein. In essence, the plaintiff's position remains that the concluded verbal agreement which he asserts existed between Mr. Moroney and Mr. Vaulter could not be altered by the subsequent furnishing of written terms and conditions apparently even if those terms and conditions were the same as those on which the parties had previously done business and even if it accepted delivery of the vehicle having signed a receipt accepting that those terms and conditions applied to the transaction. I do not think that the plaintiff's position in this regard is sustainable, particularly when regard is had to the fact that the Statement of Claim is not based on an agreement concluded in November 2012 but expressly pleads that the agreement between the parties was concluded in 2013. Consequently, I am satisfied that the UK defendant's standard terms and conditions, including the jurisdiction clause, were incorporated into that agreement.

The position as regards the second named defendant

53. The jurisdiction of the High Court over the plaintiff's claim against the Belgian defendant depends on whether Ireland can be regarded as a place where the harmful event giving rise to the plaintiff's claim against that defendant occurred.

54. The Belgian defendant contends that if it was negligent in the manufacture of the vehicle such that the vehicle is defective, those defects occurred at the place of manufacture, namely Belgium. Any financial loss suffered by the plaintiff is purely consequential upon this and cannot ground jurisdiction in this State. The plaintiff disagrees, arguing instead that the damage occurred or manifested itself in Ireland when it put the defective vehicle into service.

55. In teasing out these issues, the starting point must be that the onus of proving that Article 7(2) applies to its claim against the Belgian defendant lies on the plaintiff and that the standard of proof required to discharge that onus is the ordinary civil standard, namely on the balance of probabilities. Relying on the decision of the CJEU in *Kolassa v. Barclays Bank Plc* Case 375/13, the plaintiff submitted that in the circumstances of this case, the court should take the plaintiff's factual assertions at their height. In *Kolassa*, the court recognised that at the point where a national court is asked to determine jurisdiction, it does not examine the substance of the case under national law but, rather, focuses on the points of connection with the state that support the claim to jurisdiction. Consequently, although not strictly obliged to, the court should treat the applicant's assertions as regards the conditions for liability in tort as being established. I accept that this submission is correct which, in this context, means that the court should assume, firstly, that the vehicle is defective as a result of negligent manufacture by the Belgian defendant and, secondly, that these defects materialised, causing damage to the plaintiff, when the coach was put into service by it.

56. The notion of a harmful event giving rise to the plaintiff's claim in tort is conceptually more complex than that of a breach of contract. Accepting that the concept of tort, delict or quasi-delict must be given an autonomous EU law meaning which might not coincide fully with how they are understood as a matter of national law, a consideration of when a plaintiff's claim in negligence arises under Irish law usefully illustrates the complexity involved. The tort of negligence is generally understood to have three components. The first is the existence of a relationship or other circumstances as a result of which the law recognises that the defendant owes a duty of care to the plaintiff. The second is an act or omission on the part of the defendant which is in breach of that duty of care. The third is the suffering of an injury causing damage to the plaintiff as a result of the defendant's breach of the duty of care. The tort is not complete, and the plaintiff may not sue, until they have suffered damage, although the act or omission will necessarily have occurred prior to that. This begs the question as a matter of EU law, whether the *"harmful event"* refers to the defendant's action or to the plaintiff's injury. The answer, according to the CJ EU, is that it may encompass both.

57. The factual circumstances of *Bier v. Mines de potasse d'Alsace SA* Case 21/76 illustrate the point neatly. The plaintiff was a Dutch company which carried on a horticultural business on lands in the Netherlands. The defendant was a French mining company working mines in Alsace, whose operations involved the discharge of large quantities of waste into the Rhine upstream of the plaintiff's lands. The plaintiff claimed that this industrial waste polluted the river which supplied water to its lands as a result of which its horticulture operations were damaged and it was required to expend considerable sums in abating the pollution. The plaintiff instituted proceedings in the Netherlands and the defendant challenged the jurisdiction of the Dutch courts contending that under the then applicable

equivalent provision to Article 7(2), the event which had caused the damage had occurred in France.

58. The CJEU in looking at a plaintiff's right to avail of the special jurisdictional rules under Article 7, considered those rules to be based on a particularly close connecting factor between the dispute and the court called upon to hear it. It continued:-

> *"14. 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.*
>
> *15. As regards this, it is well to point out that the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction.*
>
> *16. Liability in tort, delict or quasi-delict can only arise provided that a causal connexion can be established between the damage and the event in which that damage originates.*
>
> *17. Taking into account the close connexion between the component parts of every sort of liability, it does not appear appropriate to opt for one of the two connecting factors mentioned to the exclusion of the other, since each of them can, depending on the circumstances, be particularly helpful from the point of view of the evidence and of the conduct of the proceedings…..*
>
> *19. Thus the meaning of the expression 'place where the harmful event occurred' in article 5 (3) must be established in such a way as to acknowledge that the*

plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it."

59. This judgment introduces two additional concepts – the place where the damage occurred and the place of the event giving rise to the damage – both of which can in themselves constitute the place where the harmful event occurred. Reverting to the Irish tort of negligence, this equates either to the place of the defendant's act or omission which amounted to a breach of the duty of care owed to the plaintiff or, alternatively, the place where the plaintiff sustained damage or injury as a result of that breach of duty. In this case, the former is clearly Belgium and the Belgian defendant identifies that the net issue between the parties is whether the plaintiff is correct in its assertion that the damage occurred in Ireland such that it may elect to institute the proceedings here.

60. To a certain extent, *Bier* represents the high point in the jurisdiction as regards a plaintiff's right to rely on the place where damage occurred as the basis for invoking the special jurisdiction rule under Article 7(2). In the subsequent case of *Marinaria v. Lloyd's Bank Plc* Case C-364/93, the CJEU had to consider a claim taken in Italy by a plaintiff domiciled in Italy against a UK bank. The plaintiff had deposited valuable promissory notes in a UK branch of that bank which its staff regarded as suspicious and reported to the police. This led to the arrest of the plaintiff and the appointment of a receiver over the promissory notes. The plaintiff was subsequently acquitted by the UK courts and then sought damages from the bank, both in respect of the value of the promissory notes, the fact of his detention, and the damage to his reputation. The CJEU did not accept that the damage could correctly be characterised as having occurred in Italy. The court was also concerned that to allow plaintiff to sue in any location at which it claims to have suffered consequential loss would convert a general rule of jurisdiction based on the defendant's domicile into one in which the plaintiff could elect to sue in the place of its domicile. The court stated:-

> *"13. The option thus open to the plaintiff cannot however be extended beyond the particular circumstances which justify it, otherwise the general principle, enshrined in the first paragraph of Article 2 of the Convention, of the jurisdiction of the courts of the Contracting State in the territory of which the defendant is domiciled and to end up recognising, apart from the cases expressly provided for, the jurisdiction of the courts of the domicile of the plaintiff in respect of which the Convention expressed its disfavour in ruling out, in the second paragraph of Article 3, the application of national provisions providing for such courts of jurisdiction in respect of defendants domiciled in the territory of a Contracting State.*
>
> *14. While it thus accepted that the concept of "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 that of the causal event, that concept cannot, however, be interpreted so expansively as to encompass any place where the harmful consequences of an event which has already caused damage which has actually occurred in another place maybe felt.*
>
> *15. Consequently, that concept cannot be interpreted as including the place where the victim, as is the case in the main proceedings, claims to have suffered financial damage following initial damage occurring and suffered by him in another Contracting State."*

As Whelan J. observed in *Castlelyons Enterprises Ltd v. EUKOR* [2018] IECA 98, *Marinari* represents *"the current authoritative interpretation of 'where the harmful event occurred' in EU law"*.

61. The Belgian defendant argues that, as the plaintiff's claim is substantially one for financial loss, it is precluded from suing in Ireland by virtue of this passage simply because

financial loss has been suffered in this jurisdiction. I am not certain that this interpretation of *Marinari* is correct. Paragraph 15 does not refer to financial loss or damage *simpliciter* but to *"financial damage following initial damage occurring and suffered by him in another Contracting State"*. This is consistent with the reference in para. 14 to *"the harmful consequences of an event which has already caused damage which has actually occurred in another place"*. The limitation identified is not based on the type of damage for which compensation is claimed (e.g. financial loss) but on the extent to which there is a direct connection between that damage and the initial injury or damage. The plaintiff in *Marinari* suffered the loss of his promissory notes and incarceration in the UK. The financial loss claimed by him was consequent to those injuries. Here, the plaintiff suffered no loss or damage in Belgium. He took delivery of the vehicle in the UK and immediately brought it to Ireland. The defects manifested themselves shortly afterwards when the vehicle was put into service in Ireland. The fact that the financial loss claimed is consequent on the manifestation of these defects does not, in my view, preclude the plaintiff from relying on Ireland as the place in which the defects actually caused him damage.

62. Support for this proposition is found in the decision of the CJEU in *Kainz* Case C-45/13, a case with some parallels to this. It concerned an allegedly defective bicycle which had been manufactured in Germany but purchased by an Austrian national from an Austrian retailer. The plaintiff suffered an accident while cycling in Germany but sought to sue in Austria on the basis that the bicycle had been put into circulation in that jurisdiction. This point was disputed by the manufacturer which identified the place which the product had been put in circulation as its place of business in Germany from which it had been dispatched to Austria. In answering the questions referred which sought clarity as to *"the place of the event giving rise to the damage"*, the court stated:-

> *"27. In so far as proximity to the place where the event which damaged the product itself occurred facilitates, on the grounds of, inter alia, the possibility of gathering evidence in order to establish the defect in question, the efficacious conduct of proceedings and, therefore, the sound administration of justice, the attribution of jurisdiction to the courts in that place is consistent with the rationale of the special jurisdiction conferred by Article 5(3) of Regulation No 44/2001, that is to say, the existence of a particularly close connecting factor between the dispute and the courts for the place where the harmful event occurred (see, to that effect, Zuid-Chemie, paragraph 24, and Pinckney, paragraph 27)….*
>
> *29. It must therefore be held that, 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."*

The Belgian defendant submitted that this is a definitive statement to the effect that in a product liability case, the place where the harmful event occurred will always be the place of manufacture. However, the language used by the CJEU refers specifically to "the place of the event giving rise to the damage" rather than to the "place of the harmful event". Further, the court was not asked to deal with the proposition that the damage resulted from the accident itself (in turn caused by the defect) since the accident had occurred in Germany and the plaintiff wished to sue in Austria. This leaves open the possibility, even in product liability cases, that the place where the damage occurred (being the other possibility accepted in *Bier*) may be somewhere different to the place of manufacture.

63. Both sides relied on the judgment of the CJEU in *Zuid-Chemie* which is referred to in the extract quoted above. That case involved a particularly complex set of contractual arrangements. The plaintiff was a German manufacturer which bought a product called

micromix from a Dutch company (HCI) to use as an ingredient in the manufacture of fertiliser. The Dutch company had, in turn, obtained the micromix from the defendant, a Belgian company. The Dutch company provided the Belgian company with all of the raw materials for the purposes of manufacturing micromax, save one, zinc sulphate, which it, in turn, purchased from another Dutch company. The zinc sulphate turned out to be defective as a result of which the micromax and, in turn, the fertiliser manufactured using that micromix were also defective. The plaintiff instituted proceedings against the Belgian company in the Netherlands. None of the parties disputed the fact that proceedings could have been instituted in Belgium as *"the place of the event giving rise to the damage"* as the contaminated micromax had been manufactured there. The issue before the court was whether there was an alternate basis for jurisdiction in the Netherlands as the place where the damage occurred. The court approached the question by looking firstly at its earlier jurisprudence which established that in cases of tort, the place in which the event which may give rise to liability in tort occurred and the place where that event results in damage may not necessarily be identical and the expression *"place where the harmful event occurred"* in Article 7(2) must be understood as being intended to cover both of these places giving the defendant an option to sue in the courts of either (see *Bier "* [1976] ECR 1735, paras. 24 and 25). The court then went on to consider the particular questions as follows:-

> *"25. Although it is common ground between the parties to the main proceedings, as stated in paragraph 13 of the present judgment, that Essen is the place of the event giving rise to the damage ('Handlungsort'), they disagree as regards the determination of the place where the damage occurred ('Erfolgsort').*
>
> *26 The place where the damage occurred is, according to the case-law cited in paragraph 23 of the present judgment, the place where the event which may give rise to liability in tort, delict or quasi-delict resulted in damage.*

27 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.

28. It must be recalled that the case-law distinguishes clearly between the damage and the event which is the cause of that damage, stating, in that connection, that liability in tort, delict or quasi-delict can arise only on condition that a causal connection can be established between those two elements…"

64. Based on that analysis, the court went on to hold that the place where the damage occurred could not be anywhere other than the plaintiff's factory in the Netherlands where the defective product was processed into fertiliser causing substantial damage to the fertiliser going beyond the damage to the micromix itself. The plaintiff relies in addition on para. 32 of that judgment emphasising that the damage on which it relies in its tortious claim occurred when it commenced normal use of the vehicle:-

"It follows from the foregoing that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the context of a dispute such as that in the main proceedings, the words 'place where the harmful event occurred' 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."

65. In this regard, I note that whilst many of the cases speak in terms of the place where the damage *"manifests"*, Baker J. in *CJ Gaffney Ltd v. Germanischer Lloyd SE* [2015] IEHC

721 suggests that *Zuid-Chemie* does not actually establish this as a rule but, rather, treats the significant connecting factor as being the place where the product was used in the normal way. The plaintiff seeks to distinguish *Gaffney*, a case relied on by the Belgian defendant, on the basis that it did not concern a defective product but, rather, a certificate of stability provided by a German company in respect of a fishing vessel purchased by the plaintiff in the Netherlands. Although not inherently defective, the vessel was not in fact suitable for fishing in Irish waters. Baker J. found that the initial and direct damage to the plaintiff occurred when it made the decision to purchase the vessel and the direct and immediate loss crystallised in that the plaintiff took possession of a vessel which did not have the stability characteristics required to operate in Irish waters (see para. 57). The plaintiff also points to Baker J.'s comment at para. 59 noting that there was no pleaded factor connecting the purchase of the vehicle with Ireland at the time it was acquired. The plaintiff argues, and has pleaded, that its identity as the intending purchaser was known to the Belgian defendant at the time the coach was manufactured. The plaintiff characterises this as establishing a causal connection between the place of manufacture and the place of use, making it foreseeable that loss would be suffered in the plaintiff's place of business.

66. Finally, the plaintiff relies on the decision of the CJEU in *VKI v. Volkwagen AG* Case 343/19 which concerned claims by a consumer rights association on behalf of a number of consumers who had purchased in Austria vehicles manufactured by the defendant in Germany. It transpired that the defendant had used software which manipulated the data relating to the exhaust gas emissions from those vehicles to make it appear that they complied with the prescribed limit values when in fact they exceeded them. The association argued that the owners of the vehicles had suffered damage in that they either would not have purchased the vehicles or would have purchased them at significantly lower prices. It argued that this was not a case of mere consequential damage following the purchase of the vehicles but

initial damage that conferred jurisdiction on the Austrian courts. The Court of Justice concluded (at paras. 30 and 31 of its judgment) that, although the vehicles became defective as soon as the software had been installed, the damage asserted occurred only when the vehicles were purchased as they were acquired for a price higher than their actual value. It continued:-

> *"Such damage, which did not exist before the purchase of the vehicle by the final purchaser who considers himself adversely affected, constitutes initial damage within the meaning of the case law… and not an indirect consequence of the harm initially suffered by other persons…"*

Whilst the facts of the case were somewhat extreme in that the defendant had deliberately engaged in unlawful tampering with vehicles sold in another jurisdiction, the proposition that the purchaser of such a vehicle sustains damage at the point, of purchase rather than at the point and place of manufacture would seem to have some relevance to the facts of this case.

67. Based on the jurisprudence discussed in the preceding paragraphs, the following would appear to be the principles relevant to determining whether a plaintiff has established a basis for relying on the special jurisdiction rule contained in Article 7(2) thus entitling the plaintiff to sue in a place other than that of the defendant's domicile:-

- The basis for the exception is the close connection between the action and the jurisdiction in which the plaintiff seeks to litigate such that it was reasonably foreseeable to the defendant that it might be sued there;
- The plaintiff must establish that the harmful event occurred in Ireland;
- The harmful event may be taken as having occurred either at the place of the event giving rise to the damage or at the place where the damage occurred. If these are different, the plaintiff has the right to choose to sue in either of these locations;

- In the case of defective products, the place of the event giving rise to the damage will always be the place where the product was manufactured;
- The place where damage occurs can encompass the place where initial damage occurred as a result of the normal use of the defective product. This is sometimes described as the manifestation of the damage;
- The place where the damage occurred cannot be interpreted so broadly as to encompass any place where the harmful consequences of an event may be felt. Thus, a plaintiff cannot seek to recover consequential financial loss in the place of its domicile in respect of an event which has already caused initial damage which has occurred and been suffered by him in another Member State;
- However, where a defect in a product causes the product to be worth significantly less than the purchaser paid for it, the resulting loss may constitute direct damage arising from the purchase rather than indirect damage consequent on the initial defect. It is unclear the extent to which this will depend on moral culpability going beyond the normal criteria for the liability of a defendant in tort.

68. Applying these principles to the facts of this case, it seems to me that the plaintiff has discharged the onus of proof upon it to show that the harmful event, meaning in this instance the actual damage, occurred in Ireland. To paraphrase CJEU in *Zuid-Chemie*, Ireland is the place where the event which gave rise to the damage produced its harmful effects or, alternatively, the place where the damage caused by the defective product actually manifested itself. In this context, the manifestation of the damage is not to be equated with its discoverability but, rather, is the place where the product was first used as intended and where the defects impacted upon the intended use. In this case the defects complained of are not such that the vehicle is incapable of being used at all. Rather the alleged defects are such that the vehicle is not sufficiently reliable or comfortable to be used as a luxury coach which

is the normal use of a vehicle of this type and specifically is the use the plaintiff, to the knowledge of the defendants, intended to make of it. This potentially has an impact both in terms of the damage the plaintiff claims has been done to its business but also as regards the actual value of the vehicle when compared to what the plaintiff paid for it. These are not simply consequential losses which might be claimed anywhere the plaintiff happened to be but are specifically connected to this jurisdiction.

69. That the fact that the Belgian defendant knew from the point when the UK defendant placed the order for the vehicle with it that the plaintiff, an Irish-based business, was the intending purchaser, suggests that it was foreseeable that this damage would occur in Ireland, but I do not regard this factor as determinative of the issue.

Conclusions

70. Based on the above, I find that the plaintiff has not established that the Irish courts have jurisdiction in respect of the claim in contract made by it against the UK defendant and, consequently, will allow the UK defendant's motion. The court will make an order pursuant to O. 12, r. 26 setting aside the issue of the plenary summons and the service of a notice thereof on the UK defendant. For the sake of completeness, I will also make an order striking out the plaintiff's proceedings against the UK defendant for want of jurisdiction in accordance with the Brussels 1 Regulation Recast.

71. However, I find that the plaintiff has discharged the onus upon it establishing that Article 7(2) of the Brussels Regulation confers jurisdiction upon the Irish courts in respect of its claim against the Belgian defendant. Consequently, I will refuse the relief sought in the Belgian defendant's motion.