THE HIGH COURT

[2021] IEHC 247

[Record No. 2016/6403P]

BETWEEN

CAROLINE FANNING

PLAINTIFF

AND

TRAILFINDERS IRELAND LIMITED

DEFENDANT

AND

RCL CRUISES LIMITED

THIRD PARTY

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 8th day of March, 2021

Introduction

1. These proceedings are brought in contract and tort for loss and damage sustained by the Plaintiff during a voyage in the Caribbean on the 'Oasis of the Seas', a luxury cruise liner owned and operated by the third party, Royal Caribbean Cruises Limited (RCL), a Liberian corporation headquartered in Miami, Florida, USA. The ship embarked from Port Lauderdale, Florida, on the 8th August 2015 and was scheduled to disembark at the same port a week later having visited the islands of St Thomas, St Maarten and Nassau in the Bahamas, where the ship is registered. The cruise was booked with and arranged by the Defendant under contract with RCL. The Plaintiff paid the Defendant for the holiday on the 7th July 2015 and was accompanied by her daughter, Miss Caitlin Fanning.

2. It is agreed between the parties that the contract between the Plaintiff and the Defendant is governed by the Package Holiday and Travel Trade Act 1995 and that the Irish courts have jurisdiction to hear and determine her claims both in contract and in tort. The claims in tort are brought in negligence, trespass to the person and defamation and rise from the alleged conduct of the employees and /or agents of RCL during the cruise. On the 9th August 2015 the Plaintiff and her daughter were disembarked on the at Nassau in the Bahamas on the order of the ship's captain. Having regard to the facts pleaded in the General Endorsement of Claim on the Plenary Summons to ground the Plaintiff's claims, the Defendant sought and, on the 20th March 2017, obtained an order joining RCL as a third party to the proceedings. Following the making of that order RCL indemnified the Defendant and took over the conduct of the defence.

3. For reasons which are not material to the matters with which this judgment is concerned the proceedings took a protracted course. A Statement of Claim was eventually delivered on the 21st February 2019. A Defence was delivered on the 22nd May 2019 and was followed by an amended Defence delivered on the 4th November 2019. In addition to traversing the Plaintiff's claims, it was pleaded in this defence that as the causes of action in defamation, false imprisonment and assault and battery arose out of acts or omissions alleged to have occurred on a ship then on the high seas, and thus not subject to the jurisdiction of the Irish courts, the proper law applicable to the determination of the issues raised therein was not Irish law.

4. The Plaintiff had initially sought to have all causes of action tried by judge and jury and had set the action down and had served notice of trial on the 26th April 2017. Thereafter the Defendant sought and, on the 24th April 2018, obtained an order to have the notice of trial set aside. The order directed that the Plaintiff was entitled to have her claims in defamation and trespass to the person tried by judge and jury with the claims in negligence and breach of contract to be tried thereafter by a judge sitting alone. On the 2nd of December 2019 Plaintiff delivered a Reply by which she joined issue with the Defendant on its amended Defence and by special reply pleaded that Irish law was the proper law for the determination of her claims in defamation, false imprisonment and assault and battery.

The Issues

5. Consequent upon the closure of the pleadings the Defendant brought a motion pursuant to Order 25, Rule 1 and Order 34, Rule 2 of the Rules of the Superior Courts 1986, as amended, (the choice of law motion) for the trial of the following preliminary issues of law:

   (i) Whether Irish law is the proper law governing the alleged causes of action in defamation, false imprisonment and assault and battery;

   (ii) If Irish law is not the proper law, whether the law of the Commonwealth of the Bahamas is the proper law governing said causes of action, and;

   (iii) If the law of the Commonwealth of the Bahamas is the proper law, whether the Plaintiff is entitled to trial by judge and jury in respect of the said causes of action.

   The issues which fall for determination on this application raise questions of private international law and ancillary matters and are the primary focus of this judgment. In brief, the Plaintiff's case is that all of the causes of action pleaded against the Defendant in these proceedings are governed by Irish law whereas the Defendant contends that the causes of action which are the subject of the motion (the subject causes of action) are governed by the law of the Bahamas. In the course of the hearing of the motion the Defendant and RCL quite correctly conceded that matters of procedure, including the mode of trial, were governed by Irish law, see *Kelly v. Groupama* [2012] IEHC 177. The issues arising are best understood and contextualised against the background from which they emerged.

Background.

6. The Plaintiff is a practising solicitor. She was unrepresented on the hearing of the choice of law motion but subsequent thereto she retained solicitors and counsel. The Defendant and RCL were represented by the same solicitors and counsel and presented a united front on the choice of law motion. Although this is addressed to the Plaintiff, for reasons which will become apparent RCL will also be referred to in conjunction with the Defendant throughout the judgment. The approach taken by these parties has a significance to the outcome of the choice of law motion.

7. The proposition advanced on behalf of these parties that the law of the Bahamas is the proper law applicable to the determination of the Plaintiff's claims in defamation, assault and battery and false imprisonment, is founded on circumstances, including the location and time of the commission of the acts about which the Plaintiff complains. In short, the 'Oasis of the Seas' is registered in the Bahamas, flies the Bahamian flag and was on the high seas or was in the territorial waters of the Bahamas when the subject torts are alleged to have taken place. It followed that in all or any of these eventualities the proper law governing these claims is the law of the Commonwealth of the Bahamas.

8. The Plaintiff's case is that as all causes of action pleaded herein derive under the contract she made with the Defendant, Irish law applies and that by virtue of Regulation (EC) No. 593/2008 of The European Parliament and of The Council of June 17th 2008 on the law applicable to contractual obligations (Rome I) and Article 4.3 of Regulation (EC) No. 864 /2007 of The European Parliament And The Council of 11th July 2007 on the law applicable to non-contractual obligations (Rome II) the Court should assume jurisdiction in circumstances where, as here, a conflict of laws arises and determine the subject causes of action in accordance with Irish law. In support of this contention the Plaintiff calls in aid the manifestly closer connection between the parties with the Irish courts, based on their pre-existing contractual relationship entered into on the 7th July 2015, a proposition with which the Defendant and RCL take issue.

9. While the Plaintiff accepts that her cause of action in Defamation is not governed by Rome II, she contends that the Court may and should assume jurisdiction on the grounds of public policy in safeguarding the protection of the Constitutional and human right of an Irish citizen travelling on a consumer package holiday covered under EU directive transposed legislation in the form of the Package Holiday and Travel Trade Act, 1995.

10. As stated above, RCL took over the defence of the proceedings on behalf of the Defendant and a united front was presented on the choice of law motion and as no issue arose between them on the terms, their contract did not feature in the course of the hearing of the motion. Whatever may have been intended concerning the incorporation of RCL's standard terms and conditions into contracts negotiated by the Defendant with Irish consumers, the Plaintiff maintained that none such had been incorporated into her contract, an assertion which, in the circumstances particular to the case, was accepted by the Defendant.

11. The potential relevance of the contract between the Defendant and RCL is that it contains a jurisdiction and choice of law clause (clause 5.9) whereby those parties agreed that Irish law governs the contract with Irish consumers as well as any claim in tort arising from the performance of the services to be rendered thereunder. This information emerged following the hearing of the choice of law motion and resulted in a motion being brought on behalf of the Plaintiff in which a number of reliefs were sought, including an order re-entering the choice of law motion for further consideration.

12. The application was grounded on an affidavit sworn by the Plaintiff, at the heart of which is the proposition that as the terms of the contract between RCL and the Defendant

provided expressly for the application of Irish law to the Plaintiff's claims in contract and tort it followed that these provisions were determinative of the first and second issues raised on the choice of law motion, an outcome which would also dispose of the third issue. Written and oral submissions were made on the motions and have been considered by the Court.

13. It is not intended to summarise the submissions in detail, suffice it to say at this stage that the net effect of the case made on the Plaintiff's motion is that by virtue of the provisions of the contract between the Defendant and RCL, in particular clause 5.9 thereof, these parties are estopped from asserting that the subject claims in tort are governed by the law of the Bahamas. It follows that if the Plaintiff's contention is well founded it would dispose of the private international law questions arising on the choice of law motion. Accordingly, the Court will approach the determination of the applications by addressing the Plaintiff's motion first.

Application to Reopen the Choice of Law Motion

14. A very considerable quantity of correspondence passed between the parties in connection with the motions. Included therein were numerous personal complaints made by the Plaintiff against the solicitor representing the Defendant and RCL. These led, *inter alia*, to an *ex parte* application to have the papers in the case referred to the DPP. The Plaintiff subsequently withdrew the motion but thereafter sought to have the costs order made thereon re-entered with the choice of law motion. The re-entry of that motion, the case made on behalf of the parties thereon and the outcome thereof have been dealt with separately and are not material to the matters with which this judgment is concerned.

Third Party Contract; Incorporation of Terms; Plaintiff's Contract

15. Amongst the materials exhibited in the affidavits exchanged between the parties on the motions is a copy of the contract between the Defendant and RCL together with a Guest Ticket Booklet, which includes details of the cruise summary, port destinations, a cruise planner and luggage tag instructions. That the Plaintiff received these documents is not in question, however, she pleads that her contract consists of the content of a telephone call which took place between herself and a representative of the Defendant which was followed by a confirmatory email dated the 7th July 2015, on foot of which she paid for the holiday. The Plaintiff received an email two days later in which she was informed that the holiday 'cruise documents', which included RCL's standard terms and conditions of contract, were available in electronic format. However, it was not until approximately two weeks later that she adverted to the contents.

16. The Plaintiff has always maintained in correspondence, on affidavit, in argument and in her pleadings that RCL's contract terms were never incorporated into her contract with the Defendant. No issue arises on that plea; the contract as pleaded by the Plaintiff is admitted in the amended Defence; consequently, the proforma RCL terms and conditions, including the provisions of clause 5.9, were not incorporated into that contract. In the interests of completeness, I pause here to observe that in responding to the Plaintiff's motion this was not suggested otherwise by the Defendant, in fact, quite the contrary. Nor does the Plaintiff seek to amend the Statement of Claim to include a plea that the

standard terms and conditions were incorporated into her contract with the Defendant. On the face of it therefore the jurisdiction and choice of law clause in the contract between RCL and the Defendant which, if it had been incorporated, would have avoided any conflict of law issue, is inoperable and of no consequence for the resolution of the issues on the choice of law motion.

Plaintiff's Submissions

17. However, it was argued on behalf of the Plaintiff that the attention of the Court should have been drawn to the terms of the contract between RCL and the Defendant on the hearing of the choice of law motion. That this ought to have been done arose from the fact that not only were the provisions directly relevant as a matter of material substance to the determination of the issues and consequential questions of private international law, but also because the Court was being invited to reach a conclusion which conflicted therewith. In short, those parties had agreed, *inter alia*, that any claims arising from the provision of the holiday, whether in contract or tort, were to be governed by Irish law and not, as they were now contending, the law of the Bahamas.

18. It was not the Plaintiff's case that she was seeking to rely on a provision which had not been incorporated into her contract with the Defendant, rather the purpose was to avoid the prejudice which might likely arise from a failure to bring the attention of the Court to contractual provisions which were potentially determinative of the issues which the Court was invited to resolve. Ms. McNally, senior counsel for the Plaintiff, argued that between them what the Defendant and RCL were attempting to do on the choice of law motion was to bypass the terms of their own contract, behaviour which was impermissible and from which they were in effect, estopped.

19. It was fairly conceded that there was an onus of proof on the Plaintiff to adduce evidence on the hearing of the choice of law motion which she considered material and that she was just as culpable as the Defendant in failing to bring the third-party contract to the attention of the Court. She was not seeking to have the choice of law motion reheard *ab initio* rather she was simply inviting the Court to take the jurisdictional provisions of that contract into consideration when determining the issues. Pertinence and relevancy arose from the fact that these elaborate and expand upon the whole concept of the jurisdictional issue and also the contractual nexus between the parties, both between the Plaintiff and the Defendant, and the Defendant and RCL and therefore properly falls within the remit of the choice of law motion.

20. While there could be no challenge to the veracity of the third-party contract and no prejudice arose to any of the parties by reference thereto, the exclusion thereof from consideration by the Court would result in prejudice to the Plaintiff. The situation which had arisen was analogous to circumstances provided for by O. 28 r. 1 of the Rules of the Superior Courts whereby pleadings could and should be amended so as to ensure that the real issues in controversy between the parties could be litigated. In this regard the Court's attention was drawn to *Croke v. Waterford Crystal Ltd & Ors* [2005] 2 IR 383. Admitting the standard terms and conditions into evidence on the choice of law motion so as to

consider implications of clause 5.9 for the outcome of the choice of law motion ensured that the real issues in controversy thereon were completely litigated.

21. In this regard, Ms. McNally also drew the attention of the Court to the dicta of Clarke J. in *The Law Society v. Daniel Coleman* [2017] IESC 39 at para. 4.1 where he stated:

> *"In my view a court should always endeavour, should it prove possible and should there be no significant risk of injustice, to determine questions such as the scope of an appeal or proposals to admit new grounds of appeal or new evidence, in advance of the substantive hearing. It is always better, if it can be done, that the precise issues which the court will have to address when hearing a substantive appeal and the materials to which the Court can refer are known in advance."*

The purpose of the application was simply to make sure that the Court was fully aware of all relevant and pertinent material before determining the issues raised on the choice of law motion.

22. The Court was also invited to consider in a parallel view the *dicta* and logic applied by the Supreme Court in the leading case regarding leave to amend an application for judicial review of *Keegan v. Garda Siochana Ombudsman Commission* [2012] 2 IR 570. The immutable consequence of taking into consideration the provisions of clause 5.9 of the contract between the defendant and the third party was that the proper law governing not only the contract but also the causes of action arising from the provision of the services was the law of Ireland. If that be so, then the matter was at an end and all causes of action would be governed by the law of Ireland.

23. Finally, the nature of the material in question and the potential consequence thereof for the outcome of the choice of law motion met the test for the admission of new evidence after the conclusion of the hearing. The circumstances were exceptional, and the Court was warranted in admitting the contract into evidence in order to take the provisions thereof into consideration when determining the choice of law issue. In this regard reliance was placed by the Plaintiff on the *dicta* in Re *McInerney Homes Ltd* [2011] IEHC 25 and *Robinson v. Bird* [2003] EWCA Civ. 1820.

Defendant's submissions

24. It was submitted on behalf of the Defendant that the approach which the Court should take to the reopening of the choice of law motion was the same as the approach to be taken to an application to admit new evidence after judgment and before final order or where, a final order having been made, an appeal is pending and an application is made for leave to introduce new evidence. That the court has a jurisdiction to reopen a case before judgment is undoubted and is not in question, however, the exercise of the court's discretion on foot of that jurisdiction is dependent upon the satisfaction of certain criteria set out by Finlay C.J. in *Murphy v. The Minister for Defence* [1991] 2 IR 161 at 164 namely:

"(1) The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;

(2) The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;

(3) The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."

25. Mr. Conlon-Smyth also referred the Court to the judgment of Clarke C.J. in *Law Society v. Coleman*, supra, and *McInerney Homes*, supra. He contended that the Plaintiff had to meet the bar. Not only was there no 'new' evidence, the evidence which was sought to be admitted was known to her on the hearing of the choice of law motion. Indeed, in the course of the proceedings and in correspondence she had repeatedly asserted that the RCL standard terms and conditions did not apply to her contract, an assertion which was accepted by the Defendant. The application was in any event misconceived and bad in law. No authority had been opened to the Court for what Mr. Conlon Smyth described as an extraordinary proposition in law, namely that the Plaintiff could rely upon and take the benefit of a contract to which she was a stranger at law.

26. No matter which way it was dressed up, what the Plaintiff was trying to do was in effect to have a contractual provision from a third-party contract inferred into her contract while at the same time asserting what the parties had agreed, namely, that the third-party standard terms and conditions of contract had not been incorporated. The sole purpose of the exercise was to have the issues on the choice of law motion determined in a manner which she perceived to be beneficial to her; quite apart from which the circumstances did not attract, nor did they warrant the application of the doctrine of estoppel.

Decision

27. The situation which has arisen in this case is certainly unusual. The first observation to be made is that this is not a case in which the 'new' evidence which the Court is invited to admit and consider was unknown to the parties at the time when the matter was argued, quite the contrary. Both parties were aware of the terms of the contract between the Defendant and RCL. Indeed, the contract had featured in correspondence and in affidavits exchanged between the parties, as amply exemplified in the affidavit of the Defendant's solicitor, Ms. Noble, sworn herein on the 5th January 2021. The second observation is that this is not a case where a judgment has been given but a final order has yet to be made where additional evidence critical to the outcome of the proceedings has been ascertained or otherwise first became available or where, after a final order, an appeal is pending.

28. Although I had considered the evidence led and submissions made on the choice of law motion and the Court was about to deliver the judgment thereon when the Plaintiff brought the motion to re-enter the choice of law motion, the judgment had not been handed down and thus was not given. Where an oral or written judgment has been given

but a final order has yet to be made the Court enjoys a jurisdiction to revise or reverse its decision in 'exceptional circumstances' or as is sometimes said for 'strong reasons'. See the summary of the law set out by Wilson LJ. in *Paulin v Paulin* [2010] 1 WLR 19 approved by Clarke J., as he then was, in *McInerney*, supra, where the principal judgment had been delivered but the final order had yet to be drawn up at the point when the applicant sought to have the court revisit its decision. In that case his Lordship set out the general principle upon which a court, after delivery of a judgment but before final order, might consider entertaining further materials or submissions or new evidence:

> *"Where proceedings have come to their natural conclusion, whether in a court of first instance or, in the event of an appeal, as a result of a determination of the court which has the final appellate role in the circumstances of the case, then it can, at least in litigation involving the rights and obligations of parties, be said that the ruling of the courts is a final ruling which can only be displaced in very limited circumstances, such as where it can be demonstrated that the judgment of the court had been procured by fraud or the like." (para 3.1.)*

29. In cases where a party may want to bring new evidence or advance new argument in a situation where there is no unconscionable conduct his Lordship stated:

> *"In those circumstances the necessity to bring finality to proceedings outweighs any possible injustice that might be caused in an individual case. It is important to note that, if it were possible to reopen proceedings on a significantly less stringent test, then the finality of every case would be called into question with a significant collective injustice to all parties to all litigation. It is that consideration that outweighs any possible injustice on the facts of an individual case." (para. 3.1.)*

30. The public interest underlying cause of action estoppel, issue estoppel and the rule in in *Henderson v Henderson* (1843) Hare 100 is the same, namely that there should be a finality to litigation and that a party should not again, save on appeal, be vexed with the same matter. Accordingly, where a matter becomes the subject of litigation between parties in a court of competent jurisdiction they are required to bring their whole case before the court so that all aspects of it may be finally determined between them for once and for all, the object being to avoid the abuse of successive litigation between the parties on the same matters, questions or issues. See the judgment of Bingham MR in *Barrow v Bankside Members Agency Ltd [*1996] 1 WLR 257 at 260, and [1996] 1 All E R 981 at 983.

31. In order for a court to revisit its judgment before making a final order there has to be something more than just a post-judgment second thought based on material that was already in play. If it were otherwise, any fresh point that occurred to a party following the handing down of a judgment would entitle the party to require the court to hear further submissions with a view to revisiting the judgment. That would then become the rule rather than the exception. See *Heron Brothers Ltd (Central Bedfordshire Council) (No. 2)* [2015] EHHC 1009 (TCC). The new material or evidence must be of sufficient import so as to have had, if not a decisive, then at least a significant and influence on the

outcome. While the new evidence need not be conclusive, it must be credible. Finally, new evidence should not ordinarily be admitted if it could, with reasonable diligence, have been put before the court at trial. See *Re Vantive Holdings Ltd* [2009] IESC 69 at para 3.12.

Re-Opening Before Judgment

32. It is apparent from the authorities opened to the Court that a significant corpus of law has developed on the jurisdiction to reopen a case and admit new evidence in circumstances where a judgment has been delivered but a final order has yet to be made or where made, an appeal is pending. In the latter case an express jurisdiction is conferred on the Supreme Court by Order 58 Rule 30 to receive further evidence in the circumstances provided for in sub paras (a), (b) and (c) thereof. However, there appears to be a dearth of authority governing circumstances where leave is sought to re-open a motion or a trial where the evidence and submissions have been completed but the judgment thereon has yet to be delivered. I should add in the interest of completeness that separate considerations arise where a court is invited to correct a clerical error or mistake in a judgment or order under Order 28 Rule 11 of the Rules of the Superior Courts 1896, as amended.

33. I did not understand Ms. McNally to demur from the submission made by Mr. Conlon-Smyth as to the proper approach to be taken by a court on an application to reopen a motion or trial to take new evidence or hear further submissions in these circumstances. In essence it should mirror the approach to be taken after judgment is delivered but before a final order is made or an appeal therefrom is pending. Whether before or after judgment, the exercise of the court's discretion is to be considered as an exception and warranted only once certain criteria are satisfied, the rationale being the same in either case. Reopening the case is an extreme measure and should only be allowed sparingly and with the greatest of care.

34. The approach to be taken on an application such as the present, before judgment, has been considered by the Superior Courts of Canada. See *Scott v. Cooke* [1970] OJ No. 1487, 2 OR 769 (HCJ); in 671122 *Ontario Ltd v. Sacaz Industries Canada Inc*. 2001 SCC 59, 2 SCR 983 (SCC) and *Varco Canada Ltd v. Pason Systems Corp* [2011] FC 467, 92 CPR (4th) 399 (FC) where, with slight modification, it was decided that the test set out in *Scott v. Cooke*, approved by the Supreme Court of Canada in *Sagaz*, was applicable to a motion to reopen a case "*… before the court has rendered its judgment*"… the test being for the moving party to satisfy the court that the new evidence, if it had been presented, could reasonably have influenced the result and that the evidence sought to be introduced could not have been discovered by the exercise of due diligence.

35. This test as expressed in the judgments in these cases is almost on all fours with the test as enunciated in the Irish authorities to which the court has been referred on reopening a case after judgment has been delivered but before final order or where an appeal is pending therefrom. In *Varco*, Phelan J., commenting on a situation in which the decision of the court had yet to be rendered, suggested that the first limb of the test was subject to slight modification, and concluded that it was more appropriate to ask whether the

evidence, if it had been presented, could have had any influence on the result rather than whether the evidence would probably have changed the result. The rationale set out in these judgments commends itself to me and having regard to the similarity with the test to be applied after judgment has been delivered enunciated by the Irish authorities cited, the Court finds that the statements of the law in the Canadian authorities to which I have referred also represents the law in Ireland.

36. The 'new' evidence which the Plaintiff seeks to have admitted for consideration, though on the face of it decisive of the subject issues and thus meeting the first limb of the test, is not 'new' evidence but was known to the parties when the choice of law motion was heard. In circumstances pertaining herein, the interests of justice required that the Court should entertain the application in order to be satisfied as to whether the evidence which the Plaintiff sought to have admitted bore sufficient importance to the outcome that to omit it would prejudice either party to the point of working an injustice.

Conclusion

37. With respect I cannot accept the submissions made by Ms McNally and find that the circumstances and justice of the case does not warrant the Court in acceding to the application. I am persuaded that that the submissions made by Mr Conlon-Smyth are correct. The evidence which the Plaintiff seeks to have the Court consider is not 'new' evidence; accordingly, this limb of the test has not been met but even if it had been satisfied the Plaintiff cannot, in my judgment, invoke the provisions of a contract to which she is a stranger, notwithstanding that she was to derive a benefit therefrom through the service she was to receive. She has no *locus standi* to enforce the terms of a contract to which she is not a party, yet on my view of it this is in effect what the Court is being invited to do.

38. As mentioned earlier, it is accepted by the Defendant and RCL that the terms and conditions of their contract were not incorporated into the Plaintiff's contract with the Defendant. It is undoubtedly the case that had that been so, different considerations would apply. The timing and receipt of the cruise holiday documentation, including RCL's standard terms and conditions of trading, is a classic example in contract law of past consideration being no consideration. The terms of contract had been agreed between the parties and the Plaintiff had paid for the service to be provided before the standard terms and conditions were sent and received by her.

39. While the Plaintiff does not seek to amend her Statement of Claim by pleading the incorporation of the terms of the contract between the Defendant and RCL, the net effect of the relief sought is to have the Court take into consideration the provisions of that contract for the purpose of disposing of the choice of law motion in a manner which she perceives will be of benefit to her; the old adage that you cannot have your cake and eat it seems particularly apposite. Whatever arrangement has been made between the Defendant and RCL, it is a first principle of the law of contract that the parties are at liberty to agree the variation, including the abandonment, of any of the terms thereof.

40. I infer from the case made on behalf of the Defendant and RCL that neither seeks to rely on the jurisdiction and choice of law provision which requires any claim arising therefrom or thereunder to be determined in accordance with Irish law. As stated above the Plaintiff has no *lex standi* to require them to comply therewith, moreover, I am satisfied in the circumstances and particularly where the Plaintiff did not alter her legal position at all never mind as a result of any action on the part of the Defendant and/ or RCL, the case advanced for an estoppel is, in my judgment, misconceived.

Ruling

41. Accordingly, the Court will refuse the Plaintiff's application and will determine the choice of law motion without reference to or consideration of the terms of the contract entered into between the Defendant and RCL.

Choice of Law Motion

42. When an Irish Plaintiff takes a cruise on a package holiday and sues the tour organiser for breach of contract under the provisions of the Package Holidays and Travel Trade Act 1995 and for torts alleged to have occurred while on board a ship at sea, what is the proper law of the causes of action? This is a question of private international law which arises from the issues raised on the choice of law motion set out at the commencement of this judgment. As stated earlier, the parties are agreed that Irish law is the proper law of the contract and the cause of action in negligence but not the other causes of action pleaded in tort.

43. In passing I consider it appropriate to note at this juncture that on the final day of the hearing of the choice of law motion, the Plaintiff opened the recent decision of the Court of Appeal in *Kellett v. RCL Cruises Ltd. & Ors*. [2020] I.E.C.A. 287 (hereinafter "*Kellett*") wherein the Court analysed the standard of care to be applied under the Package Holidays and Travel Act, 1995 (hereinafter "the 1995 Act") which implemented Council Directive (90/314/EEC) of 13th June 1990 of the European Communities on Package Travel, Package Holidays and Package Tours (hereinafter "the Package Holidays Directive"). Collins and Haughton JJ. indicated *obiter* that, in other factual circumstances to those which fell for consideration, they would have sought a preliminary ruling from the CJEU on the extent to which local regulations/standards are relevant to Art. 5 of the Package Holidays Directive. On the basis of these *obiter* comments the Plaintiff sought to have the issues which fall for determination on this motion referred to the CJEU but subsequently withdrew that application.

44. For reasons outlined to the Plaintiff during the hearing of this motion, the claims in assault and battery, false imprisonment and defamation were procedurally separated from the claims in negligence and breach of contract under the Package Holidays Act, 1995, the mode of trial for the former being by judge and jury. As mentioned previously, McDonald J. made an order on 24th April 2018 whereby the initial Notice of Trial was set aside, and the court directed that the subject causes of action in tort are to tried by judge and jury and that thereafter the causes of action for breach of contract and negligence are to be tried by a judge sitting alone.

45. Notwithstanding this order, which was made before any issue as to the choice of law arose, the Court was invited on this motion to determine whether the Plaintiff was entitled to have the subject claims tried by a judge and jury if Bahamian law was the proper law. Mr Conlon-Smyth had contended, *inter alia*, that if the Plaintiff was so entitled it would be impracticable for a jury to try the case in accordance therewith, about which more later. Suffice it to say for present purposes that having subsequently accepted procedure was governed by the law of the *lex fori*, in this case Ireland, he fairly and correctly conceded that the Plaintiff is entitled to trial by jury in respect of the subject claims albeit determined in accordance with the law of the Bahamas.

Background

46. As mentioned earlier, these proceedings arise out of a package holiday which the Plaintiff booked and paid for on 7th July, 2015. The package arranged by the Defendant included flights and an all-inclusive 7-day Caribbean cruise on board the "Oasis of the Seas" cruise ship, embarking on August 8th, 2015 at Fort Lauderdale, Florida and stopping at Nassau and the islands of St Thomas and St Maarten. The ship was registered in Nassau and was flagged with the flag of the Commonwealth of the Bahamas. The Plaintiff and her daughter boarded the vessel at approximately 3:30pm on 8 August 2015.

47. The events alleged by the Plaintiff to constitute false imprisonment, assault and battery and defamation took place between 8th and 9th August, 2015 while the vessel was sailing from Fort Lauderdale to Nassau. It follows that the voyage commenced in the territorial seas of the United States continuing thereafter on the high seas until entering the territorial waters contiguous to the Bahamas. Following arrival at Nassau on August 9th , the Plaintiff and her daughter were disembarked on the orders of the ship's captain.

The Pleadings; Choice of Law Motion

48. As mentioned at the outset, this motion arises from the plea at Paragraph 19 of the amended Defence and the Reply delivered thereto, namely, that as the alleged tortious acts alleged took place on a ship which was not subject to Irish jurisdiction at the relevant time Irish law was not the proper law of the causes of action in defamation, false imprisonment and assault and battery. Given the conflict of which has arisen the Plaintiff submits that Art. 4 (3) of Regulation (EC) No 864/2007 of the European Parliament And The Council of 11 July 2007 on the law applicable to non-contractual obligations, 'Rome II', is applicable, that the Irish courts have jurisdiction and that Irish law applies. It is argued that this provision is operative having regard to the manifestly closer connection between the Plaintiff and Defendant based on their pre-existing contractual relationship and, although not covered by Rome II, public policy considerations warrant the Court assuming jurisdiction in respect of the claim in defamation.

Conflict of Laws; Rome I and Rome II

49. In 1980 the European Union adopted the Convention on the Law Applicable to Contractual Obligations, commonly called the Rome Convention. In order to advance unification and harmonisation of choice of law in the European community and to eliminate the inconveniences arising from the diversity of the rules of conflict, the Rome Convention established the uniform rules concerning choice of law in contracts among EU member

states. The Regulation was essentially replaced by Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17th June 2008 (Rome 1). Torts/delicts are governed by Regulation (EC) No. 869/2007 of the European Parliament And Council on the Law Applicable to Non-Contractual Obligations of 11th July, 2007.

Irish Authorities on Private International Law

50. There has been a paucity of analysis by the Irish courts of the law relating to Rome II. However, a number of cases provide helpful guidance on the general application of the principles of private international law. The principles to be applied in deciding whether a tort has been committed within the jurisdiction were considered by the Supreme Court in *Grehan v. Medical Incorporated* [1986] I.R. 528. Walsh J. emphasised the importance of flexibility, stating that the Irish courts should be capable of responding to the individual issues presented in each case. In a number of Irish authorities of greater antiquity dealing with malicious injuries, which clearly proceeded by way of analogy with the criminal law, there was also a "last event" approach and merit examination.

51. In *Fermanagh Co. Council v. Farrendon* [1923] 2. I.R. 180 a shot fired from Donegal killed a soldier in Fermanagh. The court rejected the argument that the malice existed in Co. Donegal only and was of the opinion that it also existed in Fermanagh from the Border until it struck the applicant. In *Fermanagh County Council v. The Board of Education of Donegal Presbytery* [1923] 2 I.R. 184 damage to a church, manse, and cottage in Pettigo, County Fermanagh was in question. The Court applied *Farrendon*. Moore L.J. in giving the judgment stated at p. 185 that the case before the Court involved "exactly the same question, though arising under different sections."

52. In *Canning v. Donegal County Council* [1961] I.R. 7 Budd J. held that *Farrendon v. Fermanagh County Council* had been correctly decided. *Canning* concerned a rowing boat taken from the Co. Donegal side of Lough Foyle and later found abandoned and damaged in the Northern Ireland side of the Lough, about two hundred yards from where an explosion had taken place in a gun emplacement. It appears that those who had taken the boat had used it when on the way to cause the explosion. The boat was damaged by the action of the waves.

53. It was held that Donegal County Council was not obliged to compensate the owner of the boat under s. 1 of the Malicious Injuries (Ireland) Act, 1853 because the damage, though caused by an unlawful act following unlawful assembly in the area of Co. Donegal, had been suffered elsewhere. In following *Farrendon* Budd J. considered that the proceedings should have been brought in Co. Derry as that was the place where the malicious injury had been committed.

Law on Maritime Torts

54. The implementation of independent plans of different members of human society will inevitably produce the potential for conflict. Where intentional these plans will usually lead to some kind of arrangement and coordination; this is the domain of contract law. But the conflict of interest may also be purely accidental if none of the affected parties or only one of them was motivated by intention. These relationships, the interference therewith

and the consequences thereof are domain of the law of tort. The increasing density of population, the development of new technologies, economic growth and the risks attendant thereon that have occurred in society, particularly since the industrial revolution resulted in greater interpersonal interaction leading to increased risk of injury and/or loss were met by an evolution in the law of tort.

55. The civil law of wrongs was not uniform throughout Europe but depended on different rules and principles of law particular to the different legal systems which developed on the Continent and in these Islands. Irrespective of the system of law, territoriality was a feature shared by all. Each system of law developed private international law rules to address conflicts of law which arise from social and economic cross boarder/ international relationships and in the context of certain non-contractual obligations these are laid down for contracting member states of the EU in Arts. 4-9 of Rome II. Most of these rules are constructed on the assumption that the world is neatly divided into allotments of sovereignty we call states and that it is possible to localize conflicts where they arise in a single state, thereby establishing a clear link between the facts of the conflict and the laws governing in that territory.

56. However, the maritime realm creates peculiar issues within the private international law architecture. For ease of reference the entirety of Art. 4 of Rome II is set out below:

> *"1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the **country** in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
>
> *2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same **country** at the time when the damage occurs, the law of that country shall apply.*
>
> *3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a **country** other than that indicated in paragraphs 1 or 2, the law of that other **country** shall apply. A manifestly closer connection with another **country** might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question" [emphasis added]*

57. The first observation to be made in connection with these provisions is the express provision for the application thereof by reference a 'country' or countries. Maritime undertakings are in the main governed by contract. Unintentional conflicts which arise on land, such as a road accident which brings together people who never previously met each other, is not a very common occurrence in the maritime realm. Collisions at sea do of course occur, such as collisions between vessels or between vessels and piers, underwater cables or drilling rigs and so forth. Economic and environmental loss can, and all too often does occur as a result of maritime activities involving vessels and other

activities such as off shore wind farms, gas and oil rigs ---but these events are infrequent when compared to land-based activities. Maritime torts generally, though not always, occur against a background of pre-existing contractual relations: the negligent loss of cargo by a carrier or as allegedly occurred in the instant case the assault and battery, false imprisonment and defamation of a passenger by crew on board a ship being but two examples.

58. Given the historical evolution of private international law rules for the resolution of conflicts in law it is no surprise that the rules for conflict resolution prescribed by Rome 1 and Rome 11 are framed by reference to a '**country'** which is defined by Article 29 in the normal private international law sense as a territorial unit with its own rules of law. What is immediately obvious is that no specific provision is made in Rome 11 for choice of law rules in maritime torts. For example, as Article 4 (1) applies the law of the '**country'** where the damage occurs, it is necessary in maritime torts to identify the waters where the damage occurs and if the tort occurs in the territorial waters of a state, referred to as the littoral state, Art. 4 (1) applies as usual. [emphasis added]

59. However, if a tort is committed on a vessel as a result which the damage occurs while the vessel is on the high seas it is by definition not in the territorial waters of any state/ '**country'** and thus outside the scope of the Regulation, which begs the question: what the is proper law of the tort? For reasons which follow later, the law of the flag rule provides the most appropriate and practical answer where the tort is committed on a single vessel, in which event Chapter 11 of Rome II would apply irrespective or regardless of the waters where the damage occurred. In effect the vessel is identified with the '**country'** where she is registered and whose flag she flies. Different considerations apply where for example two vessels registered in different countries and flying different flags are involved [emphasis added]

60. In each of the examples mentioned above a community of interests is created by contract prior to the commission of the tort, sometimes a contract made between the perpetrator and the victim of the tort, sometimes contracts made between each of these parties and a third person, for example the ship owner or charterer. In the instant case, the Plaintiff's relationship to the Defendant and Third Party was created by the contract under which the Defendant was obliged to provide a package holiday to the Plaintiff under the terms set out thereunder. In the maritime realm this community of interests has traditionally been described as the maritime venture, within which a distinction is to be drawn between torts which are internal or external depending on whether the effects reach beyond the pre-existing maritime venture; the subject torts being an example of those which are internal.

61. If not only the damage, but also the damaging event occurs on board one and the same vessel the relevance of the ship's nationality would follow from the pre-existing relationship between the parties within the meaning of article 4. (3) In this case the nationality of the Oasis of the Seas is the Bahamas, being the '**country'** where she is registered and whose flag she flies. The distinction to be drawn between torts internal and

external to the maritime adventure is significant, particularly in the context Art 4 (3) on which the Plaintiff relies. Mr. Conlon-Smyth forcefully submitted that Art. 4 cannot be relied upon in the manner contended for by the Plaintiff because the alleged torts occurred at sea and not within 'a country'. He submits that the Plaintiff cannot bring herself within Art. 4(1) for this reason. As a corollary he asserts that the Plaintiff cannot bring herself within Art. 4(2) as it operates as an exception only where a '**country'** can be identified and finally it follows that the Plaintiff cannot rely on Art. 4(3) as it is a residual clause that is only engaged where the 'country' concerned is other than that claimed to apply under Art. 4(2). [emphasis added]

62. With respect I find myself unable to agree with this analysis. The prevalence of the law governing the pre-existing relationship under Art. 4 (3) would rather appear as the basic rule for what I have described as internal torts of the maritime venture. Even where contract does not affect the law applicable to the tort, an internal tort occurring aboard a vessel is much more linked to this particular maritime venture than to the vessel's position on the high seas or in the territorial waters of any state. In my judgment, where the tort is committed on a single vessel the maritime venture should be considered as the pre-existing contractual relationship for the purposes of Article 4(3).

63. As identified above, the problem which stems from an attempted application of the rules comprised in Article 4 to the subject torts is that most of the connecting factors are territorial in nature. Under Art. 4 (1) "*the law of the **country** in which the damage occurs*" will apply. In respect of product liability, which may also be relevant in maritime activities, a similar conflict rule is contained in Art. 5 (1)(c). The same is true with regard to liability for environmental damage, but here the victim may also choose to base the claim "*on the law of the **country** in which the event giving rise to the damage occurred."* With regard to industrial action between ship owners and sailors and their respective organisations, Art. 9 refers to "*the law of the **country** where the action is to be, or has been, taken."* [emphasis added.]

64. These territorial connections are clear when applied to land-based activities but, as mentioned earlier, there are two peculiarities specific to the maritime world which make them equivocal and uncertain when applied to maritime torts: the absence and/or reduction of sovereignty in the major part of the oceans, and the occurrence of acts giving rise to tortious or other liability on vessels, i.e. moving objects which cannot simply be ascribed to the coastal state through whose waters they are plying; as occurred in this case. In my judgement, as mentioned above, the issue which falls for determination in this case, where the subject torts are alleged to have occurred on a single vessel, is best addressed by the application of the law of the flag rule, accordingly, it necessary to consider the evolution of this rule at common law and in Community law. The rules applicable to torts external to the maritime venture are not relevant to the subject issues. For general discussion and analysis, however, see the 9th Cheshire, North and Fawcett 9th ed Chap.20.

Evolution of The Law of Flag; Common Law

65. The national self-interests which developed throughout Europe in the sixteenth century, particularly following the discovery of what is euphemistically referred to as the 'new world', created the foundations for the theory of the law of the flag. The sovereign states which emerged were desirous of maintaining their dominion over their territory and control of the commercial activities carried out therein. Ships operating from the territory were seen as an extension of the 'country': for all the world a vessel was considered to be a floating island.

66. However, despite these traditions, case authority for the applicability of the law of the flag to single-ship torts on the high seas is sparse. In *R v. Anderson* (1868) L.R. 1 C.C.R. 161, a criminal court was concerned with whether a manslaughter committed on a British ship within French territorial waters would be subject to its jurisdiction. In finding that it would, Byles J. at p. 166 stated:

> *"I told the jury that the ship, being a British ship, was under the circumstances a floating island where British law prevailed; that the prisoner, although an alien, enjoyed the protection of the British law and was…subject to its sanctions."*

The same view was expressed in R v. Keyn (1876) 2 Ex. D. 63, where a person on board a British ship was drowned as a result of a collision with a German ship in English territorial waters. Lindley J. at p. 93 found that:

> *"…when, indeed, a ship is out at sea in waters which are not the territorial waters of any State, it is right that those on board her should be subject to the laws of the country whose flag she bears."*

67. *Madrazo v. Willes* (1820) 3 Barn. & Ald. 353, 106 E.R. 692 has also been cited as tenuous authority for the proposition that the law of the flag assumes the role of *the lex loci delicti* in maritime torts on foreign vessels. The English court found Spanish law to be applicable as the law of the flag, and that under Spanish law the slave trade was lawful; as a result, the seizure of the ship was improper, and the shipowner was entitled to damages. The preceding cases are of limited assistance as these are essentially concerned with issues of jurisdiction in a foreign territory and not choice of law on the high seas.

68. Perhaps of rather more compelling authority for the applicability of the law of the flag is the decision of the Supreme Court of Canada in *Canadian National Steamships v. Watson* [1939] 1 DLR 273. The case concerned a British vessel, registered at Vancouver, British Columbia. When the ship was 100 miles off the coast of Bermuda, she was struck by a wave that swept the respondent off his feet, carried him 25 feet across the deck and brought his head into violent contact with the bulkhead, resulting in severe injury. Duff C.J. upheld the decision of Lord MacNaghten in *Carr v. Fracis Times & Co* [1902] A.C. 176, 182 applying the two-limbed rule in *Phillips v. Eyre* (1870) LR 6 QB 1 to an action for damages in respect of personal injuries caused by a tortious act on board a vessel, committed outside the province in which that action was brought.

69. Consequently, the Plaintiff had to show that the act complained of was actionable under the *lex fori*, and that it was not justiciable under the law of the place where the tort was committed. It was thought that, in determining the *lex loci delicti*, it could "…*either be the law of England"* (on the basis that this was the law of the ship's flag) or "…*that of the port of registration.*"; if the law of the flag differed from the law of the country in which the ship's port of registry was situated, then the latter was held to take primacy over the former. Thus, although it was a British ship, the ship was registered in Vancouver; as a result, it was held that the *lex loci delicti* was the law of British Columbia.

70. In the event, the law of British Columbia was not pleaded, but in the absence of proof to the contrary, the Plaintiff was entitled to rely on the presumption that the general law of the place where the tort occurred is the same as the *lex fori* i.e. the law of Quebec. The Supreme Court nevertheless emphasised that, had the law been pleaded and proven, it would have governed questions of liability in the case:

> *"The case must be governed by the law of the port where the ship is registered. The vessel being registered in the port of Vancouver in the Province of British Columbia, the law of that province on negligence might have applied if it had been alleged and proven."*

Accordingly, I find that I agree with the statement set out in Cheshire North & Fawcett that, at common law, in the absence of a conflict with the port of registration, the law of the flag is the decisive factor whenever the acts complained of all occurred on board a single vessel.

71. I should add for the purpose of completeness that the decision in *O'Daly v Gulf Oil Terminals (Ireland) Ltd* [1983] ILRM 163, is not determinative of the question under consideration since this involved a question of jurisdiction rather than a choice of law. The case involved a French registered vessel which exploded while docked at Whiddy Island terminal, killing thirty-seven people, including all the crew. In proceedings taken by the widow and administrator of a deceased crew member the defendant contended that as the ship was French registered it was essentially French territory and thus subject to the jurisdiction of the French courts, an argument rejected by Barrington J. who found that the defendant had failed "…*to show that the fact that a private ship is registered in France and flies the French flag ousts the jurisdiction of the littoral state in whose waters the ship happens to be".*

However, in the context of the maritime venture he choice of law issue has been addressed in more recent times by the European Court of Justice.

The Law of the Flag: EU Law

72. The authority for the proposition that the law of the flag applies to Art. 4 of Rome II can be found by analogy in the Court's treatment of Art. 5 of the Brussels Convention in C-18/02 *DFDS Torline v. Sjöfolk* (hereinafter "*DFDS*"). The defendant had submitted to the plaintiffs a collective agreement for Polish sailors working on board the ship 'Tor Caledonia' which was owned by DFDS, registered in the Danish International Ship

Register and providing services between Gothenburg in Sweden and Harwich in the United Kingdom. When DFDS rejected the request for a collective agreement, Sjöfolk instructed its Swedish members not to accept employment on the 'Tor Caledonia' and called for sympathy action by other trade unions.

73. Following that request, the Swedish Transport Workers Union called upon its members to refuse any work whatsoever relating to the 'Tor Caledonia' which would prevent the ship from being loaded or unloaded in Swedish ports. In response, DFDS brought two actions against *Sjofolk*, one in the Danish Employment Tribunal (Arbejdsret) seeking an order that the two trade unions acknowledge that the principal and sympathy actions were unlawful and had to be withdrawn by the unions; and the other before the Maritime and Commercial Court of Denmark claiming that the defendant was liable in tort for unlawful industrial action. The losses alleged arose from the immobilisation of the 'Tor Caledonia' and the consequent leasing of a replacement ship.

74. The Court of Justice was addressed by the Employment Tribunal which referred preliminary questions relevant for both proceedings. The Court decided that a litigation over the legality of industrial action is covered by Art. 5 (3) of the Brussels Convention. As a consequence, the Court's previous interpretation of Art. 5 (3) granting jurisdiction, at the plaintiff's choice, to the court of the place where the damage occurred (place of damage) and to the place of the event giving rise to it (place of acting) also applies to the assessment of the illegality of industrial action. The Court was asked further to address the issue of where the damage sustained by the ship owner occurs in such a case.

75. The Court concluded that the place where the event likely to give rise to liability sounding in tort could only be Sweden, since that was the place where the defendant union had its head-office and published the notice of industrial action. With regard to the place where the damage occurred, the Court instructed the national court to inquire whether the financial loss had arisen at the place where the plaintiff shipowner is established. The Court held that:

> *"…in the course of that assessment by the national court, the flag state, that is the state in which the ship is registered, must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board the Tor Caledonia. In that case, the flag state must necessarily be regarded as the place where the harmful event caused damage."*

76. Notably, the Court, in accordance with the opinion of Advocate General Jacobs, considered the ascertainment of the place where the damage occurred was a question of fact to be left to the national court, however, the decision went beyond the Advocate General's opinion in commenting upon the role of the flag. It is significant, in my judgment, that the Court's statement in relation to the role of the flag in such situations was not qualified by any reference to the position of the ship in territorial waters or on the

high seas. Provided that the damage occurs on board the ship, her nationality and not the location of the port in a foreign state was expressed to be a decisive factor.

Conclusion: Rome II and the Law of the Flag

77. Accordingly, having considered the above authorities, I am satisfied and the Court finds that for the purposes of applying the conflict of law rules comprised in Rome II to the subject torts of the maritime venture in this case, the law of the flag is the proper law to be applied to the determination of the Plaintiff's claims therein. This conclusion provides for a continuous tort law regime aboard a vessel, i.e. a regime for internal torts that does not change as the ship sails through the territorial waters of different states. If the place of damage of internal torts was related not to the vessel, but to her position in territorial waters or on the high seas, the law applicable to torts committed on the vessel would change as she plies her course.

78. This conclusion avoids oscillations in tort/delict law regimes and is of pivotal importance for the maritime venture since it applies regardless of whether the vessel is cruising in the high seas outside any sphere of sovereignty or plying the waters of a littoral state, in this case the territorial waters of the Caribbean islands through which she was scheduled to sail. Moreover, this continuity has the benefit of relieving the victim of a tort committed on board a single vessel from the burden of proof which would otherwise arise to establish the time and place of the commission of the tort, whether in territorial waters or on the high seas. Finally, in relation to the Plaintiff's plea in defamation, which falls outside of the provisions of Rome II and must therefore be determined in accordance with private international common law principles, the Court finds on the authorities *supra*, that the law of the flag must also apply.

Conclusion: Issues (i) and (ii)

79. It follows from the conclusions reached for the reasons given that the proper law governing the subject torts in defamation, false imprisonment and assault and battery is the law of the flag which, in this instance, is the law of Commonwealth of the Bahamas. Without intending to introduce a note on conditionality, I should add that on the basis of the evidence adduced on the affidavits herein it so happens that the damage alleged to have been suffered as a result of the subject torts most likely occurred in the territorial waters of a littoral state which in this instance in the same state where the ship is registered, the Bahamas thereby also attracting the application of Article 4(1).

Issue (iii) : Mode of Trial; Right to a Jury

80. Given the acceptance that the law of the *lex fori* governs matters of procedure as per *Kelly v Groupama* supra, and that the Plaintiff is thus entitled to have the subject causes of action tried by judge and jury, the Court is not required to decide this question. Nevertheless, at the invitation of the parties and in the interest of providing assistance in future should the issue re-emerge in another such case, the opinion of the Court on this matter, albeit *obiter*, is as follows.

81. The right to civil jury trial in Ireland derives from the Supreme Court of Judicature Act (Ireland), 1877 (hereinafter "the 1877 Act"). This preserved the pre-existing right to civil jury trial at common law following the procedural fusion of the common law courts and

courts of chancery. As Hogan J. observed at para 14 in *Lennon v. Health Service Executive* [2015] IECA 92 one of the primary motivations behind this legislation was to provide a procedure for individuals whereby common law and equitable claims could be merged in one set of proceedings and heard by a judge alone. Prior to the 1877 Act there existed virtually no equitable right to jury trial in the courts of chancery. The 1877 Act reserved the right to trial by jury in civil actions where the right had existed prior to the coming into force of the Act and was recognised at common law.

82. The right to trial by jury in civil actions after Independence was preserved by s. 94 of the Courts of Justice Act, 1924. This right of the citizen, enshrined as a precept of the common law, continued throughout the years of the Free State and thereafter following the adoption of the Constitution by the people in 1937 until 1988 when the right to such trial in personal injuries actions was abolished by the Courts Act, 1988. It is perhaps remarkable that the removal of the enjoyment of any right from the citizen, not to mention a right enjoyed since the Irish Magna Carta of 1216, appears to have been acquiesced by civil libertarians and the fourth estate, the media, when the Bill was going through the Oireachtas. As events transpired, the citizens paid a high price for the loss of the right in those causes action to which abolition was applied.

83. However, the right survived otherwise, particularly for those causes of action concerned with the vindication of fundamental rights guaranteed under Article 40 of the Constitution; the right to bodily integrity by actions for trespass to the person; the right to a good name by an action in defamation and the right to free speech provided by the defences of justification and privilege. In this regard s.1 (3) of the 1988 Act merits repetition

> *"(a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,*
>
> *(b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission, unless it appears to the court … that,having regard to the evidence likely to be given at the trial in support of the claim, it is not reasonable to claim damages for false imprisonment or intentional trespassed the person or both … in respect of that act or omission, or*
>
> *(c) a question of fact or an issue arising in the action referred to in paragraph (a) or (b) of this subsection other than an issue arising in an action referred to in the said paragraph (b) as to whether, having regard to the evidence likely to be given at the trial in support of the claim concerned, it is reasonable to claim damages for false imprisonment, intentional trespassed to the person or both, as the case may be, in respect of the actor omission concerned."*

84. As I observed in *Gordon v The Irish Racehorse Trainers Association* [2020] IEHC 446 at para 4:

> *"It is infinitely preferable to have serious cases involving causes of action concerned with the vindication of fundamental rights guaranteed by the Constitution, such as the rights to bodily integrity, a good name and individual liberty, determined by a jury of fellow citizens rather than by a judge sitting alone. As the great commentator on the common law Blackstone observed, trial by jury is looked upon as the glory of English law. Of the many attributes is the protection of the litigant from the caprice of the judge. See Blackstone's Commentaries on the Common Law 14th ed. Book 111 chap. 23."*

It follows as a matter of respect for an ancient tradition so embedded in the common law that where there is any ambiguity on an issue as to whether a plaintiff enjoys a right to trial by jury the issue should be determined by reference to preservation of the right by an order in favour of confirmation.

85. It had been submitted by Mr Conlon-Smyth that a number of significant practical issues would arise if the case was to be tried by a jury in accordance with Bahamian law, not the least of which was the necessity to have the law of that country proved as a matter of fact which would then have to be explained to the jury and on foot of which directions would ultimately have to be given to them. However, in my judgment the difficulties envisaged are more apparent than real and in any event are largely of a legal in nature. It is a fundamental tenet of the jury system that the jury is the arbiter of fact and that trial judge is the arbiter of the law and will direct the jury appropriately on all matters of the law at the conclusion of the evidence and submissions.

86. Having considered all materials relevant thereto the trial judge will charge the jury on the law of the Bahamas governing the subject torts in precisely the same manner as the jury would be charged if Irish law applied. It is a matter of public knowledge, and judicial notice of the fact may be taken for present purposes, that the Commonwealth of the Bahamas is a common law jurisdiction and as such there are a significant number of similarities with Irish tort law. The Bahamian law of torts is sufficiently similar to the Irish law of torts to suggest that it would not be unduly burdensome for an Irish jury to understand. Indeed, the whole civil jury system is premised on the concept of a group of twelve impartial citizens, chosen at random, having been appropriately charged by the trial judge on the law finding the fact of the case on the evidence adduced.

87. I see no major difference between the exercise of charging a jury on the law of another state or on Irish law. Either way the task the jury is required to undertake is the same, namely, to find the facts and thereafter to apply the law as directed to the findings made. No doubt the trial judge will need to be familiarised with the appropriate standards and duties under Bahamian law as proved but having done so I would not consider the task of charging the jury on the law significantly more burdensome than giving them directions on Irish law.

Ruling

88. For all these reasons the proper law to be applied to the determination of the Plaintiff's claims in defamation, false imprisonment and assault and battery is the Law of the Commonwealth of the Bahamas. And the Court will so Order.