THE HIGH COURT

[2021] IEHC 394

[2019 No. 7672 P.]

BETWEEN

CAROLINE CROTTY

PLAINTIFF

AND

SAS AB AND SWEDAVIA AB

DEFENDANTS

JUDGMENT of Ms. Justice Butler delivered on the 10th day of June, 2021

Introduction

1. This plaintiff suffered an unfortunate accident when disembarking a flight from Stockholm at Ostersund Airport in northern Sweden in November 2017. She claims to have slipped and fallen on ice as a result of which she sustained a serious injury to her right arm. She has sued two defendants in respect of this accident. The first defendant, SAS AB, is an airline carrier and operated the flight between Stockholm and Ostersund on which the plaintiff was a passenger. The second defendant, and the moving party in the application before the court, is the airport authority which manages and operates Ostersund Airport.

2. Although the factual basis of the plaintiff's claim is ostensibly straightforward, it has given rise to complex jurisdictional and procedural issues. This judgment concerns the second defendant's application to strike out the plaintiff's proceedings against it on the basis that it has not been properly served and that the Irish Courts do not have jurisdiction to determine the claim.

Procedure to Date

3. The plaintiff issued proceedings by way of personal injury summons in October 2019, having been duly authorised to do so by the Personal Injuries Assessment Board. In these proceedings, the plaintiff makes an identical claim against both defendants on four separate grounds, namely negligence, breach of duty, breach of contract and breach of statutory duty and regulation including Article 17 of the "Montreal Convention Regulation EC 2027/97". As shall be seen, the Montreal Convention and Regulation (EC) 2027/97 are in fact two discrete legal instruments making it difficult to ascertain exactly what claim is being made by the plaintiff under the latter. Paragraph 3(iii) of the personal injury summons expressly pleads that the first defendant and only the first defendant is liable pursuant to the Montreal Convention.

4. Identical particulars, which are fairly general in nature, are pleaded as against both defendants focusing on the presence of and the failure to clear ice and the failure to warn the plaintiff of this danger. Both defendants have raised particulars seeking to ascertain the location of the ice and the point in the disembarkation process at which the plaintiff fell. Although clearly relevant to potential liability as between the two defendants, these matters are not apparent from the case as pleaded and, at the time this application was heard the plaintiff had not replied to the particulars raised.

5. The summons issued by the plaintiff was endorsed in respect of jurisdiction as follows:-

"This Honourable Court has jurisdiction to hear and determine this claim pursuant to Article 33(2) of the Montreal Convention and Article 17 of the Montreal Convention Regulation EC No. 2027/97. The plaintiff in this matter is domiciled and permanently resident in this State. Furthermore, the defendant carrier flies from this State to Sweden.

This Honourable Court has jurisdiction to hear and determine this matter pursuant to Articles 7(1) and (2) of Council Regulation (EC)1215/2012. No other proceedings have been instituted in any other Member State of the European Union."

This endorsement allowed for service out of the jurisdiction on the defendants, both of whom are domiciled in Sweden, without leave of the court.

6. The second defendant entered a conditional appearance for the purpose of contesting jurisdiction on 9th January 2020 and on the same date issued this motion seeking to have the service on it of the personal injury summons set aside and the proceedings struck out. The first defendant entered an appearance on 17th January 2020 and, for reasons which are explained more fully below, did not contest the jurisdiction of the Irish Courts to deal with the plaintiff's claim against it. Thus, the Irish Courts are properly seised of the plaintiff's claim against the first defendant and the issue for determination is whether the plaintiff's claim against the second defendant comes within or can be brought within the jurisdiction of the Irish Courts either in its own right or because it arises out of the same facts and circumstances as the plaintiff's claim against the first defendant.

Montreal Convention, 1999 and Regulation (EC) 2027/97

7. The Montreal Convention, 1999 (which replaced the earlier Warsaw Convention) provides unified rules for the liability of carriers in respect of the death or injury to passengers and the loss or damage of baggage or cargo occurring in the course of international air carriage. Ireland, Sweden and the European Union have all ratified the Montreal Convention.

8. Under Article 17(1) of the Convention, a carrier is strictly liable for bodily injury of a passenger "*upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking*". There are financial limits on the carrier's strict liability under Article 17(1) and, where the damages claimed exceed that amount, the carrier is not liable if it can show that the injury was not due to its negligence or was due to the negligence of a third party. Further, Article 33 provides for the jurisdiction of national courts to hear a claim for damages under the Convention. Article 33(2) allows the plaintiff the option of suing in the courts of the domicile of the carrier or of its principal place of business or where it has a place of business through which the contract was made or the courts of the place of destination of the flight or, alternatively, the courts of the place where the plaintiff has his or her principal and permanent residence at the time of the accident provided the carrier operates passenger services to and from that place. Questions of procedure are to be determined by the law of the court seised of the case (Article 33(4)).

9. The plaintiff has also endorsed the personal injury summons under what is described as the "Montreal Convention Regulation EC 2027/97". This is presumably intended to be a reference to Regulation (EC) 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air. Although this regulation predates the adoption of the Montreal Convention in 1999, it was adopted in anticipation of that Convention which was then under negotiation and, thus, expressly provides that it applies not only to the Warsaw Convention but also to all international instruments which supplement and are associated with it. The Regulation itself was amended in 2002 by Regulation (EC) 889/2002 to take full account of the Montreal Convention.

10. An "*air carrier*" is defined for the purposes of the Regulation as meaning an air transport undertaking with a valid operating licence and a "*community air carrier*" is an air carrier with a licence granted by a Member State. A "*person entitled to compensation*" means a passenger entitled to claim in accordance with applicable law. Under Article 3(1) of the Regulation, the liability of a community air carrier in respect of passengers is governed by all provisions of the Montreal Convention relevant to such liability. The Regulation is concerned in part with ensuring that carriers have sufficient insurance to meet claims and, in part, with ensuring that when carriers are selling tickets to members of the public that a summary of the main provisions governing liability for passengers and their baggage is made available to intending passengers. The notice to be provided to passengers is contained in an annex to the Regulation and, *inter alia*, clearly sets out that for damages below the relevant amount *"the air carrier cannot contest claims for compensation". Further, the notice stipulates under "time limit for action"* that any court action claiming damages "*must be brought within two years from the date of arrival of the aircraft*". The Regulation does not deal expressly with jurisdiction in respect of the claims covered by its provisions.

11. Although the flight on which the plaintiff was travelling was an internal flight, it was part of a contract for international carriage from Dublin to Ostersund between herself and the first defendant. Consequently, the first defendant as an air carrier will be strictly liable to the plaintiff up to certain financial limits and liable without limitation if shown to be negligent in respect of any injury sustained by her whilst in the process of disembarking the aircraft. In effect, all the plaintiff has to show is that she was injured in the course of disembarking from the plane (as she has pleaded) in order to succeed, subject to certain limitations, against the first defendant. Further, under Article 33(2) of the Convention, the plaintiff is entitled, at her election, to bring these proceedings before the Irish Courts being the courts of the place of her principal and permanent residence in circumstances where the first defendant operates passenger services to and from Ireland. Consequently, and unsurprisingly the first defendant has not taken issue with the jurisdiction of the Irish Courts in respect of the plaintiff's claim.

12. However, the first defendant's liability is dependent on the plaintiff establishing that the accident occurred in the course of disembarking the plane. The Convention does not define what is meant by disembarking and there is a grey area between a passenger being wholly within a plane and being wholly within an airport and thus both legally and

factually a potential overlap exists between the liability of the carrier and the liability of the airport. At the same time, the second defendant, as an airport and not a carrier, does not come within the scope of the Montreal Convention nor Regulation (EC) 2027/97 and is not strictly liable to the plaintiff for any injury sustained by her merely because she was present on an airport property. Instead, the liability of the second defendant will most likely depend on the rules regarding occupier's liability or its equivalent under Swedish law. The Montreal Convention does not purport to confer jurisdiction on any courts in respect of injuries sustained in airports. This is logical. The purpose of the Montreal Convention was to ensure that people who sustain injury or loss in the course of international travel in circumstances where no one state might have readily identifiable jurisdiction and it might not be possible to ascertain the governing law, should be entitled to appropriate damages. The imposition of strict liability whilst allowing a plaintiff a choice of jurisdiction obviates the need for the courts in any jurisdiction to attempt to identify or apply the law of another jurisdiction.

Brussels Recast Regulation

13. Jurisdiction as between Member States of the European Union in civil proceedings is dealt with in Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Regulation is also known as the Brussels Recast Regulation since it is a recasting and replacement of Council Regulation 44/2001 which in turn replaced the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. The Regulation provides a mandatory system of rules for determining which courts have jurisdiction in respect of proceedings which, in the case of Ireland, replaces the common law doctrine of *forum non conveniens* in matters to which it applies. The common law doctrine required that a court should decline jurisdiction when it was apparent that another venue was more appropriate for the adjudication of the matter. This, in general, meant that the Irish Courts would decline jurisdiction in respect of an accident which occurred in Sweden and involved Swedish defendants even though the plaintiff might be an Irish resident or an Irish citizen.

14. The fundamental basis for jurisdiction under the Recast Regulation is a defendant's domicile and this is provided for in Article 4(1) 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."*

Exceptions are then made from this fundamental principle by a series of special rules. That these exceptions are derogations from a general rule is evident from Article 5(1) which states:-

> *"Article 5*
>
> *(1) Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter."*

15. There are two main objectives underlying the various special rules both linked to the sound administration of justice and the rationale for which is evident from Recitals 16 and 21 which provide, respectively:-

"(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States…"

16. The special rules upon which the plaintiff has relied in these proceedings are contained in Article 7(1) and (2) and Article 8(1) and (2). The main difference between Article 7 and Article 8 is that cases come within the former directly because of the nature of the cause of action and/or the manner in which it arises whereas they come within the latter because of their connection to other defendants or other proceedings. Insofar as relevant, these articles provide as follows:-

"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…

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

And:-

"Article 8

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

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were

instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;"

17. The endorsement on the plaintiff's summons does not distinguish between the basis on which it is claimed that the Irish Courts have jurisdiction in respect of the case against the first defendant and in respect of the case against the second defendant. As the second defendant is not an air carrier, it does not fall within the scope of the Montreal Convention and the first paragraph of the endorsement is manifestly not applicable to it. The second paragraph refers only to Article 7(1) and (2) of the Recast Regulation.

18. The second defendant's solicitor challenged the asserted basis for jurisdiction under Article 7 in an affidavit sworn to ground this motion. In a replying affidavit dated 2nd September 2020, the plaintiff's solicitor focused the claim on Article 7(2) but also tentatively advanced grounds on which Article 7(1) might be relied upon. In addition, the plaintiff's solicitor sought to rely on Article 8(1) and (2) even through these provisions were not recited in the endorsement on the summons. In particular, he stated that although he did not know at that stage whether the first defendant would seek an indemnity or contribution against the second defendant, in the event that the first defendant were to seek such an indemnity or contribution "*then this Honourable Court has jurisdiction to hear the plaintiff's claim by reason of Article 8(2) of the said regulations and if necessary, the plaintiff will apply to this Honourable Court at the hearing of the motion to amend the Indorsement of the Personal Injury Summons*".

19. A notice of indemnity and contribution dated 3rd September 2020 was subsequently served by the first defendant on the second defendant. That notice is endorsed pursuant to the Jurisdiction of Courts and Enforcement of Judgments (EC) Act, 1998 and the Recast Regulation citing Article 8(2) and Article 67 of the latter. Article 67 of the Recast Regulation provides that the Regulation *"shall not prejudice the application of provisions governing jurisdiction… in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*". The invocation of Article 67 may be intended to refer to the jurisdictional provisions of the Montreal Convention and/or to the provisions of Council Regulation (EC) 2027/97 but as no argument was addressed to the court on Article 67, this remains unclear. A significant issue in this application is whether the service of this notice of indemnity and contribution crystallised an existing basis for the jurisdiction of the Irish Courts in respect of the plaintiff's claim or created a new basis for jurisdiction which did not otherwise exist at the time the summons was served on the second defendant. If the latter is the case, then a further issue arises as to whether the invocation of jurisdiction by the first defendant can remedy a lack of jurisdiction at the time the summons was served on the second defendant by the plaintiff. Before dealing with these questions, I propose looking firstly at some general principles applicable to the determination of jurisdiction under the Recast Regulation and then examining each of the bases on which the plaintiff claims that the Irish Courts have jurisdiction.

General Principles

20. The fundamental principle underlying the Recast Regulation is that persons should be sued before the courts of the Member State in which they are domiciled (Article 4(1)) and jurisdiction is almost always available on this ground (see Recital 15). The special rules, although they provide an independent basis for conferring jurisdiction on the courts of a Member State, are nonetheless derogations from that fundamental principle. Consequently, the special rules must be interpreted restrictively (per Fennelly J. in *Leo Laboratories v. Crompton* [2005] 2 IR 225 applying Case C-168/02 *Kronhofer v. Maier*). In addition, the CJEU regards the special rules as exhaustively listing the exceptions to the general principle contained in Article 4(1) (see *Réunion Européenne v. Spliethoff's Bevrachtingskantoor BV* Case C-51/97 at para. 16). This means, as the CJEU puts it, that the special jurisdictional rules cannot give rise to an interpretation going beyond the cases envisaged by the Recast Regulation itself. This is consistent with the requirement to give a restrictive interpretation to those rules.

21. Further, even though these issues have arisen on an application brought by the second defendant, the onus remains on the plaintiff to establish the exception, i.e. that one of the special rules applies to the proceedings (see *Hunter v. Gerald Duckworth & Co*. [2000] 1 IR 510 and *Ewins v. Carlton* [1997] 2 ILRM 223). The second defendant, as a company domiciled in Sweden, had an expectation that any proceedings brought against it would be brought before the Swedish Courts. If this is not to be the case, then the plaintiff must establish unequivocally that the Irish Courts have jurisdiction by showing that her claim comes within one of the exceptions.

22. Finally, although not directly relevant to the issues the court has to decide, it is worth bearing in mind that the question of which court properly has jurisdiction is a separate one to which is the applicable law. When the CJEU considers the extent to which there is a "*close connection*" between the court and the proceedings, one of the factors to which it has regard is the extent to which the law governing the dispute is the same or similar to the law of the jurisdiction in which the court is situated. In this case, it probably makes little legal difference whether the claim against the first named defendant is made heard in Ireland or in Sweden since that claim is governed by the strict liability provisions of the Montreal Convention. However, there is no evidence before the court as to whether Swedish law on occupier's liability is similar to Irish law. For example, although the plaintiff has pleaded the case on the basis of a breach of statutory duty, manifestly the Swedish occupier of premises located entirely in Sweden cannot be made subject to the Occupier's Liability Act 1995 simply because the plaintiff happens to be Irish. Irish legislation does not have an extraterritorial effect and it would give rise to significant legal uncertainty if the liability of an occupier could vary depending on the domicile of persons who might happen to be present on the premises from time to time. Equally, the common law cannot be applied to the Swedish occupier of a premises located in Sweden, a civil law country, just because the plaintiff chooses to sue in Ireland. If, as the plaintiff claims, the Irish Courts have jurisdiction and especially if that jurisdiction arises solely because the plaintiff has sued the first defendant in this jurisdiction, then the effect will be to require the Irish Courts to apply Swedish law in order to determine the second defendant's liability to the plaintiff.

Article 7 of the Recast Regulation

23. The plaintiff's solicitor's argument under Article 7(1) of the Recast Regulation is tentative and can be dealt with shortly. He points to the fact that the price of the plaintiff's electronic ticket from the first defendant includes amounts charged under the headings "*Taxes, Fees, Other Charges*" and "*Domestic/International Fees*". He then states that it is unclear if these charges relate to services to be provided by the second defendant, i.e. the airport in which one of the plaintiff's flights was due to land. Although he does not expressly say so, the solicitor is presumably suggesting that a contractual relationship might be inferred between the plaintiff and the second defendant by the inclusion in the ticket price paid by the plaintiff to the first defendant of a sum to cover services to be provided by the second defendant. The services are not identified nor the portion of the overall figures which might be ascribed to any service provided by the second defendant at Ostersund as opposed to services provided elsewhere or by third parties. Even without considering the second defendant's replying affidavit on this point, merely suggesting that something which is unknown and unclear might provide a basis for ascribing jurisdiction to the Irish Courts cannot discharge the onus on the plaintiff to show unequivocally that the exception under Article 7(1) applies.

24. However, the suggestion is demonstrably refuted in a replying affidavit sworn by Susanne Norman, the second defendant's director of regional airports. She states categorically that the second defendant does not charge or collect from passengers using their airports any taxes, fees or other charges save for services specifically purchased by an individual passenger such as carparking. In addition, she points out that Article 7(1) does not confer jurisdiction generally based on the existence of a contract but confers jurisdiction on the courts of the place of performance of the obligations arising under the contract. Consequently, even if the second defendant could be characterised as having been in a contractual relationship with the plaintiff (which I do not believe to be the case), the place of performance of the relevant obligations under any such contract would be Ostersund in Sweden. This is clearly correct and there is no basis under Article 7(1) for the Irish Courts to assume jurisdiction of this dispute.

25. The case made under Article 7(2) is somewhat different and focuses on identifying *"the place where the harmful event occurred"*. The argument made is that although the accident occurred in Sweden, the plaintiff travelled back to Ireland and her claim for personal injuries, which relates to an on-going injury, continues in this jurisdiction. In argument, the plaintiff's counsel relied on the decision of the CJEU in Case C-21/76 *Bier*. This case was taken by a horticultural producer based in the Netherlands which was dependent on water from the River Rhine. An upstream pollution event in France in which an industrial installation discharged waste into the river caused damage to the horticultural produce and the producer was required to put expensive treatment in place in order to deal with the consequent pollution. An issue arose as to whether the French or the Dutch Courts had jurisdiction in respect of the subsequent claim. The CJEU held that where the place of the happening of an event and the place where that event results in damage are not identical, then the expression "t*he place where the harmful event*

occurred" covers both and the defendant can be sued at the plaintiff's option in either place.

26. However, subsequent case law makes it clear that this does not allow a plaintiff simply to elect to sue in the place of the plaintiff's domicile on the basis that he is suffering an on-going loss or injury as this would be inconsistent with the fundamental principle under Article 4(1) that a defendant should be sued in the place of the defendant's domicile. In Case C-364/93 *Marinari*, the CJEU held, at para. 14 of the judgment:-

> *"Whilst it has thus been recognized that the term 'place where the harmful event occurred' within the meaning of [Article 8(2)] may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere."*

On the facts of that case, an Italian plaintiff could not sue in Italy in respect of events which had taken place in a bank in the United Kingdom even though the claim included on-going financial damage alleged to result from these events.

27. This point was reiterated in Case C-51/97 *Réunion Europénne* (above), a case taken by insurance companies which had been subrogated to the claims of a French fruit company against a Dutch shipping company and an Australian transport company in respect of damage caused to 5,199 cartons of pears resulting from a breakdown in a cooling system while the pears were being transported from Australia to Rotterdam and onwards by road to France. Again, the issue was whether the Dutch or the French Courts had jurisdiction but this time in circumstances where the French Courts accepted jurisdiction against the Australian defendant whose contract included an obligation to deliver the fruit in France but declined jurisdiction in respect of the Dutch defendants as their contracts did not provide for through transport. None of the defendants were domiciled in France. The insurers argued that all of the defendants were involved in the same transport operation such that the disputes in which they were involved were indivisible. The CJEU did not accept that the French Courts had jurisdiction on the basis that France was the place in which the damage was ascertained (the fruit being in sealed containers up to the point of delivery). It reasoned (at para. 34 of the judgment) that to allow the plaintiff to bring the carrier before the courts in the place where the damage was ascertained "w*ould in most cases mean attributing jurisdiction to the courts for the place of the plaintiff's domicile, whereas the authors of the Convention demonstrated their opposition to such attribution of jurisdiction otherwise than in the cases for which it expressly provides*".

28. Thus, it is clear from this line of authority that the ongoing consequences of a harmful event which may be either ascertained or suffered on a continuing basis by a plaintiff in the jurisdiction of his or her domicile do not themselves constitute a harmful event giving the plaintiff an entitlement to sue in that jurisdiction. The damage referred to in the *Bier* judgment was direct damage sustained by the plaintiff albeit at a location physically removed from the place where the tortious act had taken place. This reasoning is

consistent with the legal basis for the tort of negligence in this jurisdiction. The tort comprises a negligent or careless action (or omission) in circumstances where a duty of care is owed and which causes damage. Until damage has been caused, the tort is not complete and no proceedings can be brought: once damage has been caused, the tort is complete and the plaintiff can sue. The tortfeasor is not guilty of a continuing tort merely because the plaintiff continues to suffer the consequences of his tortious action. In this case, assuming the plaintiff's allegations against the second defendant were to be borne out, then the second defendant committed the tort of negligence by allowing ice to be present on its premises which, in turn, caused the plaintiff to fall and injure herself. The tort was complete at that point and did not continue even though the plaintiff continued to suffer its adverse consequences. Limitation periods will, by and large, run from the date of the defendant's actions giving rise to the injury or harm. To suggest, as the plaintiff's solicitor does, that there is a continuing tort or "*harmful event*" merely because the plaintiff remained under the care of her orthopaedic team until June, 2018 shows the absurdity of the proposition. On this analysis, the defendant would be continuously committing the tort of negligence arising out of the presence of ice at its airport long after the summer sun had melted any ice even as far north as Ostersund. The limitation period would not run from the date of the accident but from whenever the plaintiff's doctors signed her off as being fully recovered, which in the case of a permanent injury would mean the limitation period would run indefinitely.

29. I have no doubt, on the facts of this case, that the alleged harmful event took place in its entirety at Ostersund Airport in Sweden in November, 2017. The plaintiff sustained a serious injury on that date, indeed, an injury sufficiently serious that it appears she cut short her trip and returned to Ireland a number of days earlier than she had originally planned. There is no basis for finding that the "*harmful event*" within the meaning of Article 7(2) occurred in this jurisdiction.

30. Based on these conclusions, it is apparent that the Irish Courts did not have jurisdiction over the plaintiff's claim against the second defendant on the grounds set out in the endorsement on the personal injury summons. The court must proceed to examine whether the Irish Courts have jurisdiction, as now claimed, under Article 8 of the Recast Regulation and, if so, whether this jurisdiction existed or was required to exist at the time the plaintiff served the summons.

Article 8 of the Recast Regulation

31. The plaintiff's claim under Article 8(1) can also be disposed of shortly. The basis for this claim, as deposed to by the plaintiff's solicitor, is that the plaintiff has lawfully issued proceedings against the first defendant in this jurisdiction and, consequently, the claim against the second defendant which is "*closely connected*" to the claim against the first defendant ought to be heard here. However, as the second defendant rightly points out Article 8(1) only applies in proceedings against a number of defendants which are brought "*in the courts for the place where any one of them is domiciled*". As both defendants are Swedish companies, neither of which is domiciled in Ireland, Article 8(1) has simply no application. Consequently, it is unnecessary to consider the extent to which the

proceedings against the second named defendant are "*closely connected*" to those against the first. There is, of course, an obvious connection between the two claims as both are brought by the plaintiff arising out of the same set of facts. On the other hand, the claim against the first defendant is based on strict liability under the Montreal Convention whereas the claim against the second defendant appears to be one in the nature of occupier's liability and will be governed by Swedish law. Although not determinative, the CJEU regards the difference in the law to be applied to claims against two different defendants as a factor to be taken into account when deciding if those claims are closely connected for the purpose of affording jurisdiction. For the reasons already stated, the balance between these competing factors is not one that has to be drawn in the circumstances of this case.

32. Whilst the plaintiff appeared to accept that she could not show either defendant to be domiciled in Ireland, nonetheless she argued that Article 8(1) should be applied because its purpose is to avoid irreconcilable judgments. If the second defendant is correct, she would then have to issue separate proceedings against the second defendant in Sweden, giving rise to the potential for conflicting judgments in two different jurisdictions. It is an objective of the Recast Regulation, reflected in Recital 21, to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. However, this is not an absolute requirement and, indeed, Article 30 expressly envisages that related actions may be pending before the courts of different Member States. Article 30(1) gives any court, other than the one first seised, a discretion to stay its proceedings in those circumstances. Article 30(2) allows a court, at the invitation of any of the parties, to decline jurisdiction if the court first seised has jurisdiction over the actions and its law permits consolidation. It is significant that these powers are discretionary. Thus, Article 30 expressly recognises the possibility that notwithstanding the provisions of the Recast Regulation, related proceedings may co-exist in two or more jurisdictions and that while a court may stay its proceedings or decline jurisdiction in favour of the court first seised, there is no mandatory requirement that it do so. I do not think that the general objective of avoiding irreconcilable judgments allows the court to give Article 8(1) the broad interpretation suggested by the plaintiff.

33. I note the second defendant argues that there is no potential for irreconcilable judgments since the plaintiff's claim against the first defendant will be determined on the basis of strict liability under the Montreal Convention and the claim against the second defendant will be determined by reference to occupier's liability (governed by the law of Sweden). This is correct as regards the governing law, but I do not think that it eliminates the possibility of irreconcilable judgments entirely. In this case the potential is mainly factual as strict liability under the Montreal Convention applies only to the extent that the plaintiff is held to have been disembarking the aircraft when the accident occurred. As noted earlier, there is a grey area between a passenger being wholly on the aircraft and a passenger being wholly within the airport. There is some possibility that different courts seised of related proceedings arising out of these facts would reach different conclusions as to when, as a matter of fact, the process of disembarkation was complete and by extension whether the plaintiff was in the process of disembarking when the accident

occurred. In passing, I might observe that this possibility would also arise as between different courts in a single jurisdiction and not merely because the courts which might be seised of the plaintiff's claims against the first and the second defendant are in different jurisdictions. As it happens, it is simply not possible to comment on this matter further because of the manner in which the plaintiff has pleaded the case and the fact that she has not replied to the particulars raised by either defendant seeking to ascertain exactly where the accident occurred. Again, this is not a matter I need to consider in circumstances where I do not have to address whether the claim against both defendants is in fact "*closely connected*" since the other conditions for the application of Article 8(1) are not met.

34. Article 8(2) presents a more complex problem. Under that provision, the second defendant can be sued as a third party before the Irish Courts, being the courts seised of the "*original proceedings*". There is an exception to this if the court were to take the view that these proceedings had been issued in Ireland solely with the objective of removing the second defendant from the jurisdiction of the Swedish Courts which would otherwise be competent. I am satisfied that these proceedings were not instituted solely for that purpose. There are many perfectly legitimate and practical reasons why someone injured on an aircraft would wish to prosecute any resulting claim before their national courts and, of course, the plaintiff was entitled under Article 33(2) of the Montreal Convention to sue the first named defendant in this jurisdiction.

35. Indeed, the second defendant does not suggest that the plaintiff's proceedings were brought in Ireland with any such ulterior motive. Instead, the second defendant argues that it is simply not open to the plaintiff to rely on Article 8(2). That provision is one which gives a defendant in existing proceedings the right to have connected third party proceedings determined by the courts which have jurisdiction over the original proceedings. This is in ease of a defendant, which generally will have little or no say over the jurisdiction in which it is sued and enables that defendant to have all issues in connected proceedings resolved before the courts of a single jurisdiction. It does not permit a plaintiff to sue a defendant over whom the Irish Courts have no jurisdiction in the hope or expectation that a co-defendant, properly before the Irish Courts, will bring third party proceedings thereby legitimising the presence of the defendant who is not otherwise properly sued here. I think this argument is fundamentally correct.

36. Bearing in mind that the special rules exhaustively list the exceptions to the general principle that a defendant should be sued where it is domiciled (Article 4(1)) and the need to give a restrictive interpretation to such derogations, I do not accept the plaintiff's argument that the potential from the outset for third party proceedings between defendants whom the plaintiff wishes to sue jointly is sufficient to bring the proceedings within the scope of Article 8(2). If the plaintiff's argument were correct, then the distinction between Article 8(1) and Article 8(2) would be significantly elided and the requirement in Article 8(1) that at least one of the co-defendants be domiciled in the jurisdiction would be rendered superfluous. The plaintiff could sue all defendants in the

courts of any Member State in which any one of them might be properly sued. Such an interpretation goes well beyond the cases envisaged by the Recast Regulation itself.

Amendment of endorsement

37. In light of these conclusions I have considered whether the endorsement on the personal injury summons can be amended as requested by the plaintiff. I note that in *Abama v. GAMA* [2015] IECA 179, the Court of Appeal upheld a High Court decision which allowed an amendment of a summons to include an endorsement showing jurisdiction under the precursor to the Recast Regulation. The ground of jurisdiction sought to be introduced was one available to the plaintiff at the time the proceedings were issued but had not been relied on at that time. I accept the plaintiff's argument that, in principle, an endorsement made on a summons for the purposes of showing jurisdiction under the Recast Regulation can be amended. However, it does not follow from the fact that an endorsement can be amended that an amendment should necessarily be made in this case.

38. The second defendant argues, based on the decision of the House of Lords (Lord Steyn) in *Canada Trust Co v. Stolzenberg* [2000] 4 All ER 481, that the relevant date for deciding whether an amendment is open to the plaintiff is the date on which the summons was issued and not any later date. The issue arose in *Canada Trust* because the plaintiff sought to sue a number of defendants before the UK courts of whom only one was domiciled in the UK at the time the proceedings were issued. That defendant evaded service and subsequently left the UK without having been served. Some of the other defendants challenged the jurisdiction of the UK courts on the grounds that the relevant defendant had not been domiciled in the UK on the date on which they were served. It was held that the relevant date upon which one of the defendants had to be domiciled in the UK in order to avail of a provision akin to Article 8(2) under the Lugano Convention was the date on which the proceedings were issued and not the date of subsequent service. The House of Lords noted that the CJEU had held that the concept of "*initiation of proceedings*" was not a single autonomous concept under EU law such that identifying the point at which proceedings were "*definitively brought*" in order for a national court to be seised of them was a matter for national law.

39. The particular difficulty which arose in *Canada Trust* does not arise in this case since the proceedings were both issued and served, a conditional appearance entered and this motion brought before the service of a notice of indemnity and contribution by the first defendant, being the circumstance on which the plaintiff now relies to claim jurisdiction under Article 8(2). Nonetheless, the rationale underlying the decision in *Canada Trust* is important because it emphasises the need for the court to have jurisdiction in respect of the claim at the time the proceedings are brought (however that may be defined). In my view, the Irish courts did not have jurisdiction over the plaintiff's claim against the second defendant at the time the proceedings were instituted nor indeed at the time the proceedings were served. The potential for such jurisdiction is not sufficient to actually give the Irish courts jurisdiction as it is inherently uncertain. What would be the position if the plaintiff had endorsed the summons under Article 8(2) from the outset and the first

defendant had elected not to seek an indemnity or contribution from the second defendant? Would the Irish courts still have jurisdiction over the plaintiff's claim against the second defendant? Did they ever have such jurisdiction? These questions are necessarily abstract because the first defendant has in fact served a notice of indemnity and contribution so it is now necessary to consider the effect of that on the plaintiff's proceedings.

40. The plaintiff now seeks to amend the endorsement to include a reference to Article 8(1) and (2) in addition to Article 7. In my view, an amendment to include a reference to Article 8(1) would not be of assistance as, for the reasons already set out, the Irish courts do not have jurisdiction under that provision. I have also come to the view that I should refuse the plaintiff's request to amend the endorsement to include a reference to Article 8(2). This is for two reasons. Firstly, the plaintiff cannot invoke Article 8(2) so as to confer jurisdiction upon the Irish courts in respect of her claim against the second defendant. The first defendant may be able to rely on that provision as regards a third-party claim (more of which below), but not the plaintiff. The Article is based on the bringing of a third party claim in the context of "*original proceedings*". In this case the plaintiff's claim against the first defendant is the "*original proceedings*" in which the first defendant may move against the second defendant. However, the plaintiff's proceedings themselves cannot constitute both the original proceedings and the third-party proceedings and to allow the plaintiff to treat them as such would again elide the distinctions carefully drawn in the Recast Regulation.

41. Secondly, the purpose of the endorsement is linked not only to jurisdiction but also to service. Proceedings in respect of which the Irish Courts have jurisdiction under the Recast Regulation can be served out of the jurisdiction without leave of the court under O. 11A(2)(a) of the Rules of the Superior Courts. The endorsement establishes the existence of such jurisdiction at the time the summons is issued and served. Here, there was no basis for asserting that such jurisdiction existed at the time the summons was issued nor at the time the summons was served. Unlike the situation in *Abama v. GAMA* (above), the jurisdiction now claimed under Article 8(2) did not exist at the material time. In my view, the summons cannot now be amended so as to retrospectively show a basis for jurisdiction which did not exist at the time the summons was served. Put simply, the plaintiff was not entitled to serve these proceedings on the second defendant pursuant to O. 11A because, at the time such service was effected, the Irish Courts did not in fact have jurisdiction over the plaintiff's claim against the second defendant. In this regard the problems which the second defendant has identified in relation to the service of the proceedings upon it are not of a nature that can be readily cured by means of an amendment to the summons or by deeming the defective service good. The issues raised are fundamental and go to the jurisdiction of the court. In my view, an amendment which would allow it to be asserted that jurisdiction existed at a time when it did not and on a basis which did not exist at the time of service is not one which should be allowed.

Third party proceedings

42. Where then does that leave the claim which the first defendant wishes to make against the second defendant and in respect of which the first defendant has served a notice of indemnity and contribution? It is notable that the notice of indemnity and contribution was served only after the second defendant had brought this motion and the plaintiff's solicitor had sworn an affidavit identifying the possibility that the first defendant might seek an indemnity and/or a contribution from the second defendant. Nonetheless, even if the first defendant's actions in this regard were prompted by the second defendant's motion or the plaintiff's solicitor's suggestion, it does not take away the first defendant's entitlement in principle to bring third party proceedings against the second defendant arising out of the plaintiff's claim against it before the Irish Courts. This can be done by way of a third-party application in these proceedings or by way of separate proceedings (see *Sovag* Case C-521/14). As previously noted, the endorsement on the notice of indemnity and contribution invokes Article 8(2) which is of course apposite in circumstances where the first defendant wishes to bring a third party claim against the second defendant in the context of the plaintiff's original proceedings.

43. However, I do not think that this fully resolves the issues raised on this motion. The second defendant's motion seeks two reliefs: firstly, an order setting aside service on it of the personal injury summons and, secondly, an order striking out the proceedings against it on grounds of want of jurisdiction. As I have found that the Irish courts do not have jurisdiction in respect of the plaintiff's claim against the second defendant on any of the grounds endorsed on the summons or on any of the additional grounds advanced by the plaintiff in the course of this motion (at least not at the suit of the plaintiff), it follows that the service of the personal injury summons on the second defendant pursuant to O. 11A was legally defective. As the defects are ones which go to jurisdiction such service must be set aside. The second defendant is not and never was properly before the Irish courts at the suit of the plaintiff. The second defendant never submitted to the jurisdiction of the Irish courts, having filed only a conditional appearance for the purpose of contesting jurisdiction and having brought this motion in that context. Thus, the second defendant was not properly a party to these proceedings at the time the first defendant served the notice of indemnity and contribution upon it.

44. Under O. 16, r. 12, a defendant claiming an indemnity or contribution against another defendant may, without leave of the court, issue and serve on the other defendant a notice of indemnity and contribution. No appearance to such notice is necessary, presumably because the other defendant is already a party to the proceedings in which the notice has been served. The default position pursuant to O. 16, r. 12(2) is that unless the court directs otherwise, the claim, question or issue between the defendants should be tried at or after the trial of the plaintiff's action. It is a precondition of the valid service of a notice of indemnity and contribution under this rule that the party on whom the notice is served is already a party to the proceedings. Where an existing defendant wishes to make a claim for an indemnity or contribution against a person who is not already a party to the action, then he must seek the leave of the court to issue and serve a third party notice pursuant to O. 16, r. 1. I think it necessarily follows from this that the notice of indemnity and contribution served by the first defendant on the second defendant is

also legally defective. Whilst this has come about through no fault of the first defendant, the notice of indemnity and contribution was served on the second defendant at a time when it had expressly declined to submit to the jurisdiction of the Irish courts and consequently the entitlement of the first defendant to serve the notice was always conditional on the outcome of the second defendant's motion. For the reasons discussed above in relation to the availability of Article 8(2), I do not think that the service of a third-party notice on the second defendant at a time when the second defendant was not properly the subject of the plaintiff's proceedings can retrospectively overcome these difficulties.

Conclusions:

45. I recognise that the logical result of this analysis is in many respects unsatisfactory. Leaving aside whether the first defendant should be classified as a "*wrongdoer*" when subject to strict liability, the first defendant has a statutory right under s. 21 of the Civil Liability Act, 1961 to seek a contribution from the second named defendant as an alleged concurrent wrongdoer in respect of the damage sustained by the plaintiff. The first defendant also has an entitlement under Article 8(2) of the Recast Regulation to bring third party proceedings against the second defendant before the Irish courts which are seised of the original dispute between the plaintiff and the first defendant. However, as the second defendant is not currently properly before the Irish courts, the first defendant cannot rely on steps taken by it on the false assumption that the second defendant was lawfully an existing co-defendant to the plaintiff's proceedings. It remains open to the first defendant to take appropriate steps against the second defendant and to bring the second defendant properly before the Irish courts should it wish to do so and subject, of course, to any procedural or temporal rules that might apply.

46. In the context of this application, I will grant the second defendant both orders sought in its notice of motion, namely an order setting aside the service upon it of the personal injury summons and an order striking out the proceedings as against the second defendant for want of jurisdiction.