THE HIGH COURT

[2022] IEHC 710

Record No. [2020 8416 P]

BETWEEN

THE HEALTH SERVICE EXECUTIVE

PLAINTIFF

AND

ROFTEK LIMITED

DEFENDANT

Judgment of Mr. Justice Mark Heslin delivered on 15th day of December 2022

Introduction

1. The plaintiff (hereinafter "the HSE") is a statutory health authority, having its registered place of business at an address in Co. Kildare. The defendant is a limited liability company with its registered office at an address in Gloucestershire, United Kingdom. On 16 December 2020, the plaintiff issued a plenary summons against the defendant alleging breaches of duty, including contractual and statutory duty, negligence and misrepresentation, in respect of the design, manufacture, sale and supply of an allegedly defective "Flexmort mortuary" (hereinafter "the Dome") which was delivered to the plaintiff by the defendant on or about 8 October 2018. The purchase price is pleaded to have been €84,007.40.

2. A statement of claim was delivered on 8 March 2021 [note: there is a typographical error, in that it is dated 8 March 2020]. The present motion was issued some 6 weeks later, on 19 April 2021.

3. In the statement of claim, the plaintiff pleads, inter alia, that on 16 March 2020 the Dome was delivered to Collins Barracks in Cork city and was inflated as part of the plaintiff's preparations and emergency response to the emerging Covid–19 crisis. It is further pleaded that on or about 29 April 2020 the Dome collapsed and a tear along a seam was identified. The plaintiff also pleads that it engaged the services of a specialised manufacturer of inflatable products who repaired the seam on or about 1 May 2020. The statement of claim goes on to plead that the Dome was inflated but, within a period of 48 hours approximately, deflated and, upon further inspection, numerous holes were identified in the Dome and repaired. It is pleaded that on 6 May 2020 the Dome was inflated but collapsed again on 18 May 2020 with a further tear identified along a different seam/join (see

paras 7–9 inclusive of the statement of claim). At para. 10 of the plaintiff's statement of claim it is pleaded that in breach of: -

> "*. . . agreement and/or representations to like effect upon which the plaintiff relied, negligently and/or in breach of warranty and/or in breach of representations made, the Defendant, its servants or agents: -*
>
> *(a) Failed to manufacture and/or design the said dome, either properly or at all.*
>
> *(b) Failed to provide a dome to the Plaintiff that was fit for the purpose for which it was sold.*
>
> *(c) Failed to ensure that the said dome was of good and merchantable quality.*
>
> *(d) Failed to ensure that the said dome was free from all defects.*
>
> *(e) Failed to use good and proper and appropriate materials in and about the production, design and manufacture of the said dome.*
>
> *(f) Failed to ensure that the said dome was manufactured to a due and proper standard;*
>
> *(g) Caused or occasioned the Plaintiff to be supplied and sold a product that was incapable of operating properly.*
>
> *(h) Caused or occasioned the Plaintiff to be supplied and sold a dome that was inherently defective in a fundamental respect and not of merchantable quality.*
>
> *(i) Failed to have any or any proper regard for the ultimate user, namely the Plaintiff, in and about the design, production, manufacture, distribution, sale and supply of the said dome".*

4. It is fair to say that the essence of the plaintiff's claim is that the manufacture of the Dome was defective. This is also clear from the contents of a "letter before action" dated 13 August 2020 which was sent to the defendant at its Gloucestershire address, by Messrs. Comyn Kelleher Tobin, solicitors for the plaintiff, which stated inter alia:

> *"It seems to us that the Flexmort Mortuary Dome supplied to our client is not fit for purpose and not of merchantable quality. We have advised our clients of the requirements and obligations pursuant to the Sale of Goods and Supply of Services Act 1980 and the 2003 European Regulations. Furthermore, in our view, the faults in the Flexmort Mortuary Dome are such as to constitute a breach of contract and in the circumstances our clients wish to terminate the contract, return the Flexmort Dome to you and obtain a full refund in addition to the costs of repairs and legal costs to date.*

If we do not hear from you within 14 days of the date of this letter with an admission of liability and confirmation that our clients monies will be refunded to include costs of repair and legal costs we shall have no option but to issue proceedings against you. This letter will be used to fix you with the costs of any such proceedings."

5. It is clear that the reference to the "*Sale of Goods and Supply of Services Act 1980"* in the said letter of claim was to Irish legislation and the letter signalled an intention to issue proceedings in this jurisdiction, rather than any other.

6. On 17 February 2021, the defendant entered a 'conditional' appearance to the proceedings in which jurisdiction was contested (i.e. wherein it was stated that the appearance was entered "…*without prejudice and solely to contest the jurisdiction of the court*"). The matter comes before this Court by way of the defendant's motion wherein it seeks that the proceedings be struck out for want of jurisdiction.

7. The 16 December 2020 plenary summons contains an indorsement asserting that: *"These proceedings are issued and commenced under and pursuant to the provisions of European Council Regulation (EU) No 1215/2012 incorporating the Brussels Convention on the jurisdiction of courts and enforcement of judgments in civil and commercial matters…"* (hereinafter "the Brussels Recast Regulations" or "Brussels Recast"). The indorsement contains a certificate that this court has the power to assume jurisdiction by virtue of Regulation 1215/2012 and that no other proceedings between the parties concerning the same cause of action are pending in any other Member State. It is also certified that this Court may assume jurisdiction: -

"…(iii) in matters referred to in Sections 3, 4 or 5 of Regulation No. 1215/2012 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant".

8. Order 4, r. 1A of the Rules of the Superior Courts (hereinafter "the RSC") provides as follows: -

"Where an indorsement of claim on an originating summons concerns a claim which by virtue of Regulation No. 1215/2012, Regulation No. 2201/2003, the 1968 Convention or the Lugano Convention, the Court has power to hear and determine, the following provisions shall apply:

(1) The originating summons shall be endorsed before it is issued with a statement that the Court has the power under Regulation No. 1215/2012, Regulation No. 2201/2003, the 1968 Convention or the Lugano Convention to hear and determine the claim and shall specify the particular provision or provisions of Regulation No. 1215/2012, Regulation No. 2201/2003,

the 1968 Convention or the Lugano Convention (as the case may be) under which the Court should assume jurisdiction.

(2) The originating summons shall be endorsed before it is issued with a statement that no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union or in a Contracting State of the Lugano Convention". (Emphasis added).

9. The indorsement does not specify which article of Regulation 1215/2012 is being relied upon. Whilst the indorsement refers to "*Sections 3, 4 or 5*" of the aforesaid Regulations, no specific Article is invoked. Section 3 of Regulation 1215/2012 is entitled "*Jurisdiction in matters relating to insurance*" and comprises of Articles 10–16 inclusive. The defendant is not an insurer and, at the hearing, counsel for the plaintiff/respondent very properly accepted, on his client's behalf, that s. 3 of Regulation 1215/2012 is of no application. Similar comments apply in relation to ss. 4 and 5 of the same Regulation.

10. Section 4 is entitled "*Jurisdiction over consumer contracts*" and comprises of Articles 17–19 inclusive. Article 17 begins: -

"In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section. . ."

11. At para. 3 of the statement of claim it is pleaded inter alia that ". *. . the defendant was acting in its course of a business*". Thus, it was very properly accepted, on behalf of the plaintiff/appellant, that s.4 is of no relevance. Section 5 concerns "*Jurisdiction over individual contracts of employment*". There is no question of the defendant being an employer and it was very properly accepted that s. 5 is not relevant.

12. The Brussels Recast Regulations concern jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Under Article 4, persons domiciled in a Member State, whatever their nationality, shall be sued in the courts of that Member State. For present purposes, it would mean that the defendant, as a UK registered company, would be sued in the courts of England and Wales. However, Article 7 of s.2 provides the following: -

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

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

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

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

. . . .

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

13. There is no dispute between the parties that the Dome was, in fact, delivered to an address within this jurisdiction. It is also clear that, in addition to the unit price for the dome itself, and a separate charge for flooring in respect of the dome, the defendant invoiced the plaintiff for a "*Delivery Charge*" which was specified to be GBP £1,500, in circumstances where, in the context of the agreement between the parties to this dispute, the Dome was never intended to be used where it had been designed and manufactured. Rather, it was to be delivered to, for use in, *this* State.

14. Several iterations of an invoice dated 22 December 2017 were exhibited. (See exhibits "PM1" to the affidavit sworn on 19 April 2021 by Mr. Patrick Madigan, solicitor for the defendant; and item 9 of Exhibit "DOS1" referred to in the affidavit sworn on 20 October 2021 by Mr. David O'Sullivan, Chief Emergency Management Officer of the plaintiff). Both of those documents specified the delivery charge. All versions of the invoice were directed to the plaintiff's "*Interagency Emergency Management Office*" in Cork. Thus, in accordance with Article 7 of the Brussels Recast Regulations, the defendant may be sued in this jurisdiction, either on the basis that "*the place of performance*" was here (*per* 1(b)) or on the basis that "*the harmful event occurred*" here, namely the alleged failure and repeated collapse of the Dome, upon inflation in Cork.

15. The fact of delivery to this jurisdiction and the alleged failure and repeated collapse of the dome on inflation in this jurisdiction are specifically pleaded in the plenary summons and statement of claim, from which the following are *verbatim* extracts: -

(Plenary summons)

"GENERAL INDORSEMENT OF CLAIM

The Plaintiff's claim is for loss, damage, inconvenience and expense caused or occasioned to the Plaintiff by reason of the Defendant's, its servants or agent's negligence, breach of contract, misrepresentation, and/or breach of statutory duty in and about the manufacture, production, design, supply and sale of a defective Flexmort Mortuary Dome to the Plaintiff which was purchased from the Defendant on or about the 8th of October 2018 for valuable

consideration in the sum of €84,007.40 and which was purchased for use and as part of the plaintiff's major emergency management plan for the southern region…" (Emphasis added).

(Statement of claim)

"6. Upon receipt of the said dome, the defendants, its servants or agents provided two days training in relation to the erection, operation and use of the said product and thereafter, in accordance with the defendant's instructions and directions, the dome was packed and stored in a weather tight storage container.

7. On or about the 16th of March 2020, the dome was deployed to Collins Barracks in the city of Cork and was inflated as part of the plaintiff's preparations and emergency response to the emerging Covid – 19 crisis.

8. On or about the 29th April 2020, the said dome collapsed and a tear along a seam was identified. In the premises and due to the necessity to have the dome available to the plaintiff, its servants or agents, during the Covid – 19 pandemic, the plaintiff engages the services of J. B. Roche Limited, a specialised manufacturer of inflatable products, to repair the seam. The said seam was repaired on or about the 1st May 2020 and the dome was inflated, but within a period of 48 hours approximately, deflated, and upon further inspection by J.B. Roche Limited, numerous holes were identified in the dome and repaired.

9. On or about the 6th of May 2020, the dome was inflated by the plaintiff, its servants or agents at Collins Barracks in the city of Cork, but collapsed again on the 18th of May 2020 with a further tear identified along a different seam/join . . .". (Emphasis added).

16. The hearing before me proceeded on the basis that the plaintiff "…*accepted that the plenary summons incorrectly specifies Sections 3, 4 or 5 of the Brussels Recast instead of Article 7. It is submitted however that there is no prejudice to the defendant by this error and no basis on which this Court ought to refuse jurisdiction of the claim"* (see para. 25 of the plaintiff's written submissions dated 16 November 2022). The plaintiff relies inter alia on the Supreme Court's decision (Geoghegan J.) in *Croke v. Waterford Crystal Ltd*. [2005] 2 IR 383, wherein (at 396–397) the Supreme Court endorsed the following statement of principle on the proper approach to the question of the amendment of pleadings to which Flood J. referred in *Palamos Properties Ltd. v. Brooks* [1996] 3 IR 597: -

"*There are, however, some other pertinent and useful quotations from English cases in the judgment of Flood J. He first cites the well known case of Cropper v. Smyth (1884) 26 Ch. D. 700 at pp. 710 and 711, where Bowen L.J. said the following:*

> *"It is a well established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake, which if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other part[ies]. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace ...It seems to me that as soon as it appears that the way in which the party has framed his case will not lead to a decision on the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.""*

17. Whereas the correct indorsement is required under the RSC (as opposed to the terms of Brussels Recast) the plaintiff also relies on O. 28, r. 1 RSC which provides as follows:-

> *"1. The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties".*

18. Furthermore, the plaintiff relies on O. 19, r. 26 RSC which provides that:-

> *"26. No technical objection shall be raised to any pleading on the ground of any alleged want of form".*

19. In oral submissions, counsel for the plaintiff - who as I say, ran the case on the basis of a very appropriate acknowledgement that the plenary summons incorrectly referred to ss. 3, 4 or 5, instead of Article 7 - made clear the intention of the plaintiff to apply to amend the proceedings appropriately in the event that this Court refused the defendant's application. He also drew the court's attention to the decision of Dunne J., when in this Court, in *Abama & Ors. v. Gama Construction Ireland Ltd*. [2011] IEHC 308. The plaintiffs in *Abama* comprised 491 individuals who obtained liberty to serve notice of a plenary summons against the second named defendant ("Gama Turkey"). Conditional appearances were entered by the first defendant ("Gama Ireland") and by Gama Turkey, for the sole purpose of contesting the jurisdiction of the Irish courts. The underlying proceedings concerned a

claim for, inter alia, compensation for outstanding wages, expenses, holiday pay, sick pay and pension entitlements allegedly due to the plaintiffs pursuant to a legally enforceable registered employment agreement. As the learned judge made clear (p. 33) one of the arguments relied on by the defendants was: - "*. . . the fact that the plenary summons was not endorsed with the recital required under the Rules of the Superior Court*" and reference was made to O. 4, r. 1(a). The learned judge went on to state (p. 34) that: -

> "*In the course of the submissions on behalf of the plaintiffs in this respect it was accepted that there was an error on the part of the plaintiffs in not having the required endorsement but it was submitted that it was an error of form and not one that affects the jurisdiction of this court. To that extent I was referred to a passage from Cheshire, North and Fawcett on Private International Law (14th Ed.) at p. 300 where it was stated [by] the authors as follows:*
>
> > *"Under the traditional English rules on jurisdiction, service of a claim form performs the dual functions of providing the basis of jurisdiction and giving the defendant notice of the proceedings. The Regulation has bases of jurisdiction which do not depend on service of a claim form. Procedure is largely left as a matter for national law, rather than being dealt with by the Regulation. The procedure under English law where the Regulation applies is as follows. A claim form can be served out of the jurisdiction without the permission of the court provided that each claim included in the claim form is one which the court has power to determine under the judgment Regulation…"*
>
> *I think the passage quoted above is a correct statement of the law in this jurisdiction also. The Regulation is the basis upon which the court has jurisdiction. That is not to say that the procedure is not relevant. In this case, the plaintiffs have not complied correctly with the procedure laid down by the national law for invoking the jurisdiction under the Regulation. Having said that, I do not think the basis of the jurisdiction provided under the Regulation can be ousted by a failure to invoke the jurisdiction in accordance with the procedures laid down by the national law. It may be necessary in this case to amend the pleadings to show the basis on which jurisdiction has been invoked but I do not propose to comment further on that aspect of the matter*". (Emphasis added).

20. The foregoing statement of principle argues strongly in favour of a refusal of the reliefs sought. The approach taken by Dunne J was endorsed by the Court of Appeal in *Abama & Ors. v. Gama*

Construction (Ireland) [2015] IECA 179. It is sufficient for present purposes to quote from paras. 38 and 43 of the Court of Appeal's decision: -

> "*38. Dunne J. went on to conclude that the Regulation was applicable and could be invoked by the plaintiffs despite the fact that they had moved their application for service out of the jurisdiction under O.11. and had not invoked O.11A or 11B RSC and had not included within the Plenary Summons the endorsement required by O. 4, rule 1A RSC as already referred to above. Her conclusion that the Regulation is the basis of the Court's jurisdiction over the plaintiffs' claims despite a procedural irregularity by the plaintiffs in failing to include that endorsement in their Plenary Summons was, she felt, and correctly so in my view, supported by a passage which she quoted in her judgment from Cheshire, North and Fawsett on Private International Law (4th ed.) at p.300 as follows . . .*
>
> *. . .*
>
> *43. In circumstances where the plaintiffs moved correctly under O.11 RSC but had omitted an endorsement required by O.4 RSC, this rule is ample enough to enable the Court to permit the summons to be amended in that regard should it wish to exercise its discretion in that regard. It was in my view a correct exercise of discretion for White J. to permit the amendment provided for in his order dated 16th October 2014*".

21. The reference, in para. 43 of the Court of Appeal's decision, to the "*Rule*", was to O. 124, r. 1 RSC which, as quoted in the Court of Appeal's judgment states: -

> "*Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit".* (Emphasis added).

22. The defendant submits that, rather than follow the approach identified in *Abama,* this Court should grant the reliefs sought in the motion and dismiss the proceedings on the basis that there have been "*cumulative errors*" of the type explained in the decision of Noonan J. in *Castlelyons Enterprises Ltd. v. Eukor Car Carriers Inc. & Anor* [2016] IEHC 537. Having carefully considered the *Castlelyons* decision, and before referring to the "cumulative errors" question, it seems to me that the facts are so materially different to those in the present case as to make the Castlelyons decision of no assistance as regards to what the court is asked to decide in the present application.

23. The plaintiff in *Castlelyons* wished to transport a cargo of construction machinery to the United Arab Emirates. It engaged an English shipping agent (the second named defendant, "NMT") to make

arrangements and NMT contacted the first defendant's agents. The first defendant ("Eukor") was a shipping company registered in South Korea. In February 2009 NTM booked carriage of the relevant goods through Eukor's agents ("WWL") from Dublin to the United Arab Emirates on Eukor's vessel and the latter issued an original bill of lading for the cargo. In March 2009, WWL, in turn, provided three original bills of lading to NTM in respect of the cargo. The original bill of lading had certain general terms appended to it. This included a clause which provided that any claim concerning custody or carriage under the bill of lading, whether based on breach of contract, tort, or otherwise, should be brought before the Seoul Civil District Court, in South Korea. The plaintiff alleged that it did not receive the bill of lading until 2010, after the events of which it complained. As the High Court's judgment made clear, Eukor was domiciled in South Korea. Having analysed Recitals 13 and 14 of Brussels Recast, the Court observed (at para. 9) that: -"*This clearly suggests that the Recast Regulation applies only to defendants domiciled in the European Union".* This seems to me to be a fundamental point of distinction. The significance of it, in the context of Article 7, is brought home by the findings of the Court from para. 11 onwards: -

> "*11 In argument, Counsel for the plaintiff relied upon Article 7 of the Recast Regulation dealing with special jurisdiction and in particular Article 7(2) which provides*
>
> > *'A person domiciled in a Member State may be sued in another Member State…*
> >
> > *…(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.'*
>
> *It will be immediately seen that Article 7 can only apply to a defendant domiciled in a Member State. There is no dispute in the affidavits before the court that Eukor is domiciled in South Korea.*
>
> *12. Although a number of arguments were advanced to the court in relation to whether Article 7(2) could in any event apply as Ireland was not 'the place where the harmful event occurred' nor was it 'the place of the performance of the obligation in question', I find it unnecessary to consider these because it seems to me clear beyond doubt that the Recast Regulation cannot apply to Eukor.*
>
> *13. Although strictly not necessary for the purposes of my conclusion, I would add that it is not in dispute that the bill of lading was subject to a choice of jurisdiction clause which would in any event oust the jurisdiction of the Irish court. I do not see how it could be said, as the plaintiff sought to argue, that it can rely on a breach of the terms of the bill of lading on the one hand but on the other hand disregard those terms where jurisdiction is concerned.*

Conclusion

14. For these reasons therefore, I am satisfied that this court has no jurisdiction to hear this matter and I will therefore set aside the summons and dismiss the plaintiff's claim as against Eukor".

24. In light of the foregoing, it seems to me that the facts in *Castlelyons* are materially very different to those in the present case and I regard myself as bound to follow the approach endorsed by the Court of Appeal in *Abama*.

25. Furthermore, the "*cumulative errors"* identified by Noonan J. in Castlelyons comprised of the following: -

(i) The summons initially appeared to indicate that the court had jurisdiction under Articles 5(1) and (3) of Council Regulation (EC) No. 14/2001 ("the Brussels Regulations");

(ii) This endorsement was struck through and a second endorsement applied with reference Brussels Recast Regulation, but this did not identify the articles of the Regulation relied upon (something Noonan J. regarded as fatal);

(iii) In addition to the foregoing, the plaintiff served the original plenary summons, rather than a notice of the summons, on Eukor (not an Irish citizen) and this was contrary to O. 11, r. 8 of the RSC.

26. As well as involving materially different facts, it does not appear to me that the present case involves *cumulative* errors of the type identified in *Castlelyons.* Rather, it seems to me that there was a *single* error, namely, the admitted mistake that, instead of specifying Article 7, the pleadings specified Sections 3, 4 or 5 of Brussels Recast.

27. Furthermore, having carefully considered all averments in the affidavits exchanged and the contents of all exhibits, it does not seem to me that any prejudice to the defendant has been identified which would warrant the very drastic step of striking out the plaintiff's claim in respect of what is, at its heart, a technical breach of the RSC (and a mistake which, as counsel for the plaintiff made clear, the plaintiff seeks to remedy by way of an application to amend, conscious that such an application may have adverse costs implications for the plaintiff).

28. It also seems appropriate to note that the mistake with respect to the indorsement does not relate in any way to the issues in dispute between the parties which have, at all material times, been clearly identified and pleaded.

29. The affidavit grounding the motion, sworn by Mr. Patrick Madigan, solicitor for the defendant, makes no reference whatsoever to any alleged prejudice to his client arising out of the plaintiff's

mistake concerning the endorsement. Similarly, no prejudice to the defendant is asserted in the affidavit sworn by Mr. Simon Rothwell, former managing director of the defendant company, on 28 January 2022; or in the affidavit of Mr. Steve Huggins, commercial director of the defendant company, sworn on 8 November 2022.

30. Furthermore, and unlike the situation which pertained in *Castlelyons*, service of the proceedings was effected properly by the plaintiff on the defendant. At para. 7 of the affidavit sworn by Ms. Cliona Kenny, solicitor for the plaintiff on 20 October 2021, she avers inter alia that: -

> *"I arranged for the proceedings to be sent to the Mayo office of the Courts Service for service in the UK on the defendant on the 18th December 2020. I say and believe that this was before the end of the transition period".*

31. She proceeds to aver (at para. 8 of the same affidavit) that, by letter dated 15 April 2021, the Courts Service enclosed a certificate of service from the relevant UK authorities, which certificate confirmed that service was effected on the defendant on 11 February 2021.

32. The "*transition period*" referred to by Ms. Kenny related to the withdrawal of the United Kingdom from the EU, as governed by the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" (2019/C 384 I/01) (hereinafter "the Withdrawal Agreement"). Title VI concerns ongoing judicial cooperation in civil and commercial matters. Article 67(1)(a) of the Withdrawal Agreement provides that in the UK and in the Member States "*In respect of legal proceedings instituted before the end of the transition period*" Brussels Recast shall apply. Article 126 of the Withdrawal Agreement defined the transition period as up to 31 December 2020. It is not in dispute that the proceedings were issued on 16 December 2020. Furthermore, it is common case that the relevant UK receiving agency acknowledged receipt of the plenary summons on 30 December 2020, namely, prior to the expiration of the transition period on 31 December 2020. In a second affidavit sworn by Ms. Kenny on 21 January 2022, she made inter alia the following averments: -

> *"3. In accordance with Article 6, concerning the receipt of documents by receiving agency, of the Service Regulation (EC no. 1393/2007), the relevant UK receiving agency sent an acknowledgment of receipt of the within plenary summons which confirms that the date of receipt was the 30th December 2020, which was before the expiration of the transition period on the 31st December 2020".*

33. Ms. Kenny also exhibited a copy of the relevant acknowledgment of receipt. In light of this evidence, the hearing before me proceeded on the basis that service was *not* an issue in the case.

Thus, service of the notice of plenary summons was properly effected via the UK receiving authority (wholly unlike the position in *Castlelyons* where the *original* plenary summons was purportedly served on an entity domiciled in South Korea). Furthermore, and again wholly unlike *Castlelyons*, no statute of limitations issue has been raised in the present case in any of the affidavits sworn on behalf of the defendant. By contrast, the Court of Appeal's decision in *Castlelyons* notes (at para. 5) that: *"The plenary summons herein was issued on 16th October 2015, over six and half years after the events complained of".* It will be recalled that the sale and supply of the allegedly defective Dome took place on or about 8 October 2018, whereas the plenary summons was issued on 16 December 2020 and, at para. 25 of Mr. Rothwell's affidavit, he avers that service was ". . . *effected on the defendant on 11 February 2021 pursuant to Article 10 of Regulation 1293/2007* . . .".

34. Having regard to the foregoing analysis, I am satisfied that the court should not strike out the present proceedings for what, in essence, is a drafting-error capable of amendment without causing prejudice to the defendant. I do not accept as valid any criticism of the plaintiff for not bringing an application to amend. The reasons why I take this view are as follows: -

(i) The proceedings were served in the United Kingdom on 11 February 2021 and a conditional appearance was entered on 25 February 2021. This made clear that the appearance was "*without prejudice and solely to contest the jurisdiction of the court*" but very obviously did not set out the basis for the jurisdictional challenge.

(ii) The conditional appearance was followed, relatively soon afterwards, by the present motion, which issued on 19 April 2021. It was only at *that* juncture that the plaintiff was put on notice of the basis for the challenge to jurisdiction.

(iii) From para. 11 onwards of Mr. Madigan's grounding affidavit, the inappropriate reference to Sections 3, 4 or 5 of the Regulation is set out. Another principal basis for challenging jurisdiction is the defendant's contention that the present proceedings are governed by Article 25 of Regulation EU 1215/2012, specifically, that the Courts of England and Wales have exclusive jurisdiction, in light of the defendant's trading terms and conditions which, it contends, formed part of the relevant agreement with respect to the purchase of the Dome.

(iv) In light of the foregoing, it seems to me that even if the plaintiff had issued an application to amend, *immediately* upon receipt of the defendant's 19 April 2021 motion, the application to amend could not have been determined by the court until *after* the court ruled on the application to strike out (and, as I referred to earlier, the plaintiff, through its

counsel, has clearly flagged an intention to make an application to amend if the defendant's motion is unsuccessful).

35. The defendant also submits that the plaintiff has failed to adhere to the exclusive jurisdiction clause contained in s. 16.10 of the defendant's general terms and conditions which specifies that all disputes arising from the said contract are to be determined by the Courts of England and Wales. In order to address this submission, it is necessary to look closely at the evidence before the court in the present application. Before doing so, it is appropriate to note that Article 25 of Brussels Recast states the following under the heading "Prorogation of Jurisdiction": -

> *"1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing;*
>
> *(b) in a form which accords with practices which the parties have established between themselves; or*
>
> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned".*

36. With regard to the present motion, both sides agree that Article 25 permits the parties to a contract, regardless of their domicile, to agree that the courts of a particular Member State are to have jurisdiction to deal with any disputes arising (and this was affirmed relatively recently in a decision by Ní Raifeartaigh J. in *Ryanair v. SC Vola* [2019] IEHC 239).

37. With respect to the provisions of Article 25(1)(b) and (c), the averment made at para. 6 in the affidavit sworn on 20 October 2021 by Mr. David O'Sullivan, Chief Emergency Management Officer of HSE South, would appear to be relevant: -

> *"I say and believe that this was a singular purchase by the plaintiff from the defendant and did not form part of a series of sales/purchases nor indeed does it form part of any form of ongoing trading relationship (then or now*)".

38. The foregoing is an uncontroverted averment from which the court is entitled to hold, for the purposes of this motion, that the purchase of the Dome was a 'one off' transaction by parties, who did not have an established relationship.

39. From the defendant's perspective, the provisions of Article 25(1)(a) are of relevance. At para. 7 of the affidavit sworn by Mr. Patrick Madigan, solicitor for the defendant, on 19 March 2021, he makes the following averments: -

> *"7. I say and believe that the sales agreement between the parties was subject to the defendant's company normal terms and conditions which were provided to the plaintiff Health Authority at the time of the sale. I beg to refer to the said invoice and the attached terms and conditions upon which marked with the letter "PM1" I have endorsed my name prior to the swearing hereof".*

40. Exhibit "PM1" runs to a total of ten pages. The first two pages comprise a copy invoice dated 22 December 2017 issued by the defendant (specifying an address in Gloucestershire) which invoice is directed to the Inter-Agency Emergency Management Office. It records inter alia "*Invoice total GBP 72,700.00*" and "*Total net payments GBP 72,700.00*", below which it specifies "*Amount due GBP 0.00".*

41. Although this copy invoice also specifies "*Due Date: 09 Nov 2018*", and provides the defendant's banking details in order to facilitate payment, it is perfectly clear that, by the time it was issued, payment had *already* been made (i.e., the amount due when this invoice issued was "0.00").

42. Thus, insofar as Exhibit "PM1" purports to be the invoice with attached terms and conditions, as furnished to the plaintiff, several comments seem appropriate. First, according to the very terms of this invoice, it was issued *after* the plaintiff had already made payment for the Dome, and thus, as a matter of basic contract law, it does not comprise evidence that the transaction was (to quote from para. 7 of Mr. Madigan's affidavit) "*subject to the defendant's company normal terms and conditions*". This is for the simple reason that to furnish terms and conditions *after* payment has already been made in respect of the contract is not evidence that those terms and conditions formed part of the contract. Furthermore, whilst the defendant's solicitor avers that these terms and conditions were provided to the plaintiff "*at the time of sale*", exhibit "PM1" certainly does not establish this. This is because the invoice was plainly issued *after* the sale and after payment had been made. It should also be said that nothing in the invoice makes any reference to the defendant's terms and conditions. The invoice does not say, for example "see attached terms and conditions". Thus, the court is invited to *assume* that the terms and conditions (comprising pp. 3–7 of Exhibit

"PM1") were attached to the 22 December 2017 invoice (pp. 1–2 of Exhibit "PM1") despite the latter making no reference to the former. In addition to the foregoing, the defendant has not exhibited any letter or email which was sent by the defendant to the plaintiff enclosing or making any reference to the defendant's terms and conditions of sale. Indeed, during the course of the hearing before me, counsel for the defendant very fairly and appropriately acknowledged that the defendant is not in a position to point to any communication proving that the terms and conditions were sent to the plaintiff.

43. It is also appropriate at this juncture to make reference to the invoice which the plaintiff has exhibited, being the invoice paid by the defendant and described as "Invoice date stamped 17th October 2018" (see Item 9 in Exhibit "DOS 1" referred to in the affidavit sworn by Mr. O'Sullivan). This invoice is materially different to the invoice exhibited on behalf of the plaintiff (which comprised part of Exhibit "PM 1" to Mr. Madigan's affidavit). Among the various differences are the following:-

(a) the defendant gives a Birmingham (as opposed to a Gloucestershire) address;

(b) this invoice notes that the amount then *due* was "*GDP 72,700.00*";

(c) the copy exhibited by the plaintiff also contains certain manuscript entries made on the invoice which was 'date stamped' 17 October 2018 by the plaintiff's *"Inter Agency Emergency Management Office";*

(d) it is uncontroversial to say that this invoice, as paid by the plaintiff, was issued by the defendant *earlier* than the copy invoice exhibited by the defendant (for the simple reason that the latter records "*GBP 0.00"* as then due);

44. No terms and conditions were referred to in this invoice. Although the defendant delivered two further affidavits (i.e. in addition to the grounding affidavit sworn by Mr. Madigan) neither of those averred to any date upon which it was said that the defendant's terms and conditions were sent to the plaintiff. Nor, as I say, did any of the plaintiff's affidavits exhibit any cover letter or email enclosing or referring in any way to the defendant's terms and conditions. Furthermore, it is fair to say that nowhere has the defendant exhibited a copy of the actual terms and conditions which, according to the defendant, were in fact sent.

45. Later in submissions, counsel for the defendant described the issue of the exclusive jurisdiction clause as being "*50:50*" and a "*he said, she said*" situation. In other words, he acknowledged, and in my view very appropriately, that there is a fundamental dispute of fact disclosed in the affidavits. Before looking further at this dispute - and bearing in mind that there is no independent and objective

evidence in the form of a letter or email sending the terms and conditions to the plaintiff - it is appropriate to quote certain of the terms.

46. Internal p. 2 of the "Flexmort terms and conditions of sale" (Exhibit "PM1") contains inter alia the following: -

> *"5. Quality of goods*
>
> *5.1 The supplier warrants that on delivery, and for a period of 12 months from the date of delivery (warranty period), the Goods shall:*
>
> *(a) conform in all material respects with their description and any applicable Goods Specification;*
>
> *(b) be free from material defects in design, material and workmanship; and*
>
> *(c) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979)"*

47. Internal p. 5 (of 5) of the said terms and conditions concludes as follows: -

> *"16.9 Governing law*
>
> *The contract and any dispute or claim (including non–contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.*
>
> *16.10 Jurisdiction*
>
> *Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non–contractual disputes or claims) arising out of or in connection with the Contract or its subject matter or formation".*

48. The reality that there is a stark dispute of fact with respect to whether the defendant's terms and conditions were provided to the plaintiff at the time of the relevant sale is clear from the competing averments made by both sides including the following: -

> *"The defendant's standard terms and conditions were provided at the time of sale to the plaintiff. No deal would have been entered between the plaintiff, a public service body, and the defendant, a commercial entity, without agreeing and exchanging terms and conditions*". (see para. 15 of the affidavit sworn by Mr. Simon Rothwell on 28 January 2022)";
>
> *"…I am firmly of the view that the defendant terms and conditions did form part of the contract…"* (para. 24 of Mr. Rothwell's affidavit);

"I am certain that no contract was entered into with the defendant public body without the provision of terms and conditions". (para. 4 of the affidavit sworn by Mr. Steve Huggins on 25 January 2022).

"The defendant sent its general terms and conditions which include its warranty in relation to the product in question. As per the general terms and conditions, same include a warranty clause, at Clause 5.1 and a jurisdiction clause at 16.10. In my experience as a commercial director, purchasers in particular public bodies are concerned about terms and conditions. In my experience, it is unprecedented not to furnish such terms and conditions, particularly in dealing with a public body such as the Inter Agency public body, which was the recipient of the product in question". (paras. 5 and 6 of the affidavit sworn by Mr. Huggins).

"At my direction and under my supervision, a complete trawl has been carried out of all relevant files on this matter held by the plaintiff and each of the relevant personnel involved in the review, tender and procurement and/or payment process in respect of the Flexmort Dome has been spoken to and all pertinent information assembled for the purposes of preparing this affidavit. I say and believe such records constitute the business records of the plaintiff and were compiled in the ordinary course of its business". (para. 2 of the affidavit sworn by Mr. David O'Sullivan, the plaintiff's Chief Emergency Management Officer);

"An extensive search has been undertaken with inquiries made of the relevant personnel and I say and believe that the terms and conditions (as exhibited at PM1) ***<u>were not</u>*** *received by or on behalf of the plaintiff by the defendant*". (para. 11 of Mr. O'Sullivan's affidavit; emphasis in original).

49. The foregoing averments disclose a fundamental conflict of fact. In my view, these conflicting averments illustrate that the defendant's counsel was entirely correct when he described the issue as "*50:50",* and "*he said, she said*". However, the defendant's counsel proceeded to submit that, notwithstanding the conflicting averments, the evidence before the court allows for a finding that the terms and conditions were, as a matter of fact, *received* by the plaintiff. In the manner explained in this judgment, I disagree.

50. In making the foregoing submission, the defendant's counsel contended that, in circumstances where Clause 5.1 of the terms and conditions refers to a warranty period, the reference in

correspondence to a "*warranty*", tipped the scales in favour of a finding by this Court, on the balance of probabilities, that the plaintiff did in fact receive the defendant's terms and conditions at the time of the sale and that, accordingly, Clause 16.10 was incorporated into the contract between the parties. The thrust of the defendant's submissions with respect to the warranty was that the 'one and only' place a warranty can be seen is at Clause 5 of the defendant's terms and conditions. Regardless of the skill with which this submission is made I take a different view for several reasons.

51. To begin with, it seems to me that when presented with a stark dispute of fact, it would be entirely inappropriate for this Court to prefer one sworn version of events over another. In substance, the defendant's submission is that this Court can and should reach a finding of fact that the defendant's terms and conditions *were* sent to and received by the plaintiff in the teeth of an averment that they were *not* and that exhaustive searches have found no such terms and conditions.

52. In addition, the motion proceeded on the basis of affidavit evidence and legal submissions only. It is certainly not a criticism of the defendant/applicant, but it is a fact that there was no application to cross–examine either Mr. O'Sullivan or Ms. Kenny, with respect to the averments made by them as regards terms and conditions or otherwise. In other words, this court heard no oral evidence and this fortifies me in the view that it would be entirely inappropriate for the Court to *prefer* one sworn version of events, over another, in what has been a purely 'papers–based' exercise, from this Court's perspective.

53. Furthermore, and focussing on the submission made as regards a warranty, whilst it is true that, in a letter dated 4 December 2020, the solicitors for the defendant wrote to the plaintiff's solicitors and stated inter alia that "*the Dome was sold with a 12–month warranty*", several things can fairly be said. First, this was the defendant's letter, not the plaintiffs. Second, there is no mention made in this letter of Clause 5.1 or, for that matter, any reference to the defendant's terms and conditions (i.e. while the word *warranty* was used, the defendant did not say that it was a warranty furnished by virtue of the terms and conditions it now says were incorporated into the contract). Third, this letter post–dated the sale by over two years. Fourth, although the defendant's 4 December 2020 letter makes clear that, should proceedings be commenced *"…our client will defend the matter in full and reserves the right to bring this correspondence to the attention of the courts, on the question of costs"*, there was no reference by the defendant to the question of jurisdiction, and no purported reliance by the defendant on Clause 16.10 (a copy of the 4 December 2020 letter comprises p. 20 of Exhibit "CK2" to the affidavit of Ms. Kenny sworn on 20 October 2021). Fifth, the initial 'letter before action' which was sent on 13 August 2020 by the plaintiff's solicitors to the defendant made

no reference to any warranty and did not refer to the defendant's terms and conditions (a copy of the 13 August 2020 letter comprises p. 1 in Exhibit "CK2"). Sixth, if one compares the contents of the plaintiff's initial letter of claim dated 13 August 2020 with the contents of Clause 5.1 of the defendant's terms and conditions, the following emerges. By means of Clause 5.1 of the defendant's terms and conditions, the supplier warrants that the goods shall *"(c) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979)"*(emphasis added). The foregoing is plainly a reference to UK legislation. By contrast, the letter of claim from the plaintiff's solicitors dated 13 August 2020 states inter alia: *"It seems to us that the Flexmort Mortuary Dome supplied to our client is not fit for purpose and not of merchantable quality. We have advised our clients of the requirements and obligations pursuant to the Sale of Goods and Supply of Services Act 1980 and the 2003 European Regulations"* (emphasis added). As I observed earlier in this judgment, the reference to the forgoing Act of 1980 is to Irish legislation and it also seems appropriate to note that the 1980 Act refers, inter alia, to an "implied warranty" ("for servicing and spare parts" - see s. 12 thereof). Indeed, it seems of some relevance to note that the 1980 Act refers, inter alia, to an "implied warranty for servicing and spare parts" (see s. 12 thereof).

54. Having regard to the foregoing, I feel bound to reject the defendant's submission that: *"… in seeking to rely on the warranty contained within the general terms and conditions of sale, it is submitted that the plaintiff is aware of the said terms and conditions of sale*" (see para. 27 of the defendant's written submissions). The evidence before this court certainly does not support a finding that the plaintiff ever sought to "*rely on the warranty contained in the* [defendant's] *general terms and conditions".*

55. In *Ryanair DAC v. SC Vola* [2019] IEHC 239, Ní Raifeartaigh J. (referring to the Supreme Court's decision in *Ryanair Ltd. v. Billigfluege; Ryanair v. On the Beach Ltd*; [2015] IESC 11) stated the following at para. 77 of her judgment: -

> *"77. Charleton J. set out six principles in relation to interpretation and application of the Brussels Regulation, based on the authorities, as follows: -*
>
> *i. The primacy of the default rule under what is now Article 4;*
>
> *ii. The careful scrutiny required in applying the exceptions to Article 4 such as special jurisdiction under Article 7 and choice of jurisdiction under Article 25 (Case C-269/95 Benincasa v Dentalkit Srl [1997] ECR I-3767);*
>
> *iii. That what is or is not a choice of jurisdiction does not depend on traditional concepts of the formation of a contract, whether under civil law or common law, but the applicable law*

is a matter that emerges as a requirement from the text of the Regulation, and consent to jurisdiction must be interpreted uniformly throughout the European Union and is an autonomous regime (Benincasa, Case 150/77 Bertrand [1978] ECR 1431, paragraphs 14, 15, 16 and 19, and Case C-89/91 Shearson Lehman Hutton [1993] ECR I-139, paragraph 13);

iv. The requirement for certainty, and thus foreseeability, for litigants under the Regulation in order to fulfil its objective of introducing confidence in commercial relations (Case C-256/00 Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co [2002] ECR I-169);

v. Derogation from Article 4 in favour of Article 25 prorogation requires a demonstration that consensus has been reached between the parties as to where the dispute is to be litigated, this consensus must be clear and is 'a matter of the independent will of the parties'; a court may need to enter into a consideration of such limited facts as are relevant to jurisdiction while leaving any decision as to the substance of the case to the trial (Case C-387/98 Coreck Maritime GmbH v Handelsveem BV E.C.R. I-9337 at paras. 13 and 14. In Case C-24/76 Estas Salotti v Rua [1976] ECR 1831);

vi. In relation to Article 25(1)(c), which relates to customs within a branch of international and commerce, a court may inquire into those customs to determine a choice of jurisdiction (MSG, Hugo Trumpy)". (Emphasis added).

56. In circumstances where there is a fundamental dispute of fact as to whether the plaintiff ever received the defendant's terms and conditions, I cannot take the view that there has been "…*a demonstration that a consensus has been reached between the parties as to where the dispute has been litigated*". A consideration of the evidence which is before the court in the present motion demonstrates no such consensus. The contents of Clause 16.10 may well be very clear, but it is far from clear that this clause was known to the plaintiff at the time of the sale. A different finding might be appropriate if this Court had before it objective evidence demonstrating communication by the defendant of its terms and conditions to the plaintiff on or before 8 October 2018, but that is certainly not the factual position. Without for a moment criticising counsel for the skill and ingenuity with which submissions were made on the defendant's behalf, it seems to me that the defendant/applicant is inviting this Court to ignore, entirely, the factual position as averred to by the plaintiff and to ignore - in the context of the principles outlined by Charleton J. and referred to by the court in *Ryanair v. SC Vola* - the averment by Mr. O'Sullivan that "*I do not believe that any*

agreement or consensus was ever reached by or on behalf of the parties in relation to jurisdiction" (see para. 8 of his 20 October 2021 affidavit). This, the court simply cannot ignore.

Conclusion

57. For the reasons set out in this judgment, I am satisfied that the defendant's application should be refused. The plaintiff has outlined the basis upon which this Court should assume jurisdiction, namely, per Article 7 of Brussels Recast. In light of what emerges from a careful consideration of the evidence before this Court, I cannot take the view that there was a genuine consensus between the parties in relation to any choice of law clause, and that being so, Article 25 has no application in the present case. Flowing from a refusal of the defendant's motion is the appropriateness of the plaintiff being afforded a reasonable period of time to bring an application to amend. As the plaintiff acknowledged during the course of submissions, it would be for the plaintiff to bear the costs of such an application. It would also seem to follow that the defendant be required to enter an unconditional appearance following the amendment of the plaintiff's indorsement. Once the foregoing has been attended to, it will enable the real issue in dispute, which revolves around the merchantability of the Dome, to be determined. The Dome in question was delivered to and remains in Cork. It appears clear that the plaintiff's witnesses are all based in this jurisdiction. Although the defendant's witnesses are based in the neighbouring jurisdiction, it was always going to be the position that one 'side' would have to travel, regardless of where the proceedings were heard. The plaintiff has established jurisdiction and the case proceeds before this court. To take account of the upcoming Christmas and New Year period, the parties should submit a draft order, which reflects the terms of this judgment, by 11 January 2023. In the event of any dispute with respect to the form of a final order, including as to costs, short written submissions should be furnished by the same date. Apart from the foregoing, and should the parties regard it as of assistance in terms of the onward progression of the matter, they are invited to submit, by the same deadline, any agreed timetable in respect the exchange of pleadings and the making and responding to such voluntary discovery requests as may be made. If provided, it will be incorporated into the court's order by way of agreed directions.