THE HIGH COURT

[2023] IEHC 169

Record Number 2016/594P

BETWEEN

CIARA MAEVE MICKS-WALLACE

Plaintiff

AND

GABRIELLE DUNNE AND VINCENC GILETE GARCIA

Defendants

JUDGMENT of Mr. Justice Mark Heslin delivered on the 31st day of March 2023

Introduction

1. The second named defendant brings an application seeking:

1. An order pursuant to Order 12 of the Rules of the Superior Courts, setting aside service of the personal injuries summons and concurrent amended personal injuries summons (and notice thereof) and striking out the within proceedings as against the second named defendant for one of jurisdiction; and
2. An order pursuant to Order 11A, Rule 8 of the RSC setting aside and striking out the within proceedings as against the second named defendant for want of jurisdiction;

Jurisdiction asserted

2. Later in this judgment I will look closely at the pleas made in the concurrent amended personal injury summons. For present purposes it is sufficient to note that it contains *inter-alia* the following wording in "Schedule III" thereof:

> *"The court has the power to hear and determine the plaintiff's claim against the second named defendant pursuant to the provisions of Article 8(1) of Council Regulation 1215/2012 on the basis that the second named defendant is one of a number of defendants, of whom the first named defendant is domiciled in Ireland and the plaintiff's claims against the defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings. No other proceedings involving the same cause of action are pending in another contracting state."* (emphasis added)

Brussels Recast

3. The plaintiff has asserted jurisdiction exclusively on the basis of Article 8 (1) of "*Council Regulation 1215/2012*". This is a reference to "*Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters*" ("Brussels Recast" or the "Brussels Recast Regulations" or the "Regulations").

Article 4

4. Article 4 of the Brussels Recast Regulations states: *"1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."* (emphasis added)

5. Although the foregoing represents the 'default position' (meaning that the second named defendant would be sued in Spain) the words "*Subject to this Regulation…*" make clear that there are exceptions.

Article 5

6. Article 5 of the Regulations begins: *"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"* (emphasis added)

Section 2

7. Section 2 is entitled "*Special jurisdiction*" and Article 8 of Section 2 provides:

> *"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 that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings;"*

8. It is clear from the foregoing that the Plaintiff does not base the jurisdictional claim on an assertion that any contract concerning the second named defendant's services was concluded in *this* State. The latter assertion is certainly made by the plaintiff but is not something which arises for determination in the present application.

9. The second named defendant asserts that it cannot be said that the claim in issue is so closely connected that it is expedient to hear and determine the claims together so as to avoid the risk of irreconcilable judgments. It is common case that the second named defendant has at all material times been domiciled in Spain. He also submits that there is no risk of irreconcilable judgments because the claim against the first defendant has been resolved and she is no longer a party.

Certain relevant legal principles

10. Article 8(1) must be interpreted in light of recitals 15 and 16 of Brussels Recast which state:

> *"(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make common rules more transparent and avoid conflicts of jurisdiction.*
>
> *(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."* (emphasis added)

Predictability and Foreseeability

11. In light of the foregoing the concepts of *predictability* and *foreseeability* infuse the proper interpretation of Brussels Recast, in particular the exceptions to the default position. It is also common case that, being a rule of "*special jurisdiction",* the Article 8(1) exception must be interpreted strictly.

Onus on the Plaintiff

12. Reflective of the above, the onus of proof rests on the plaintiff to establish that the claim "*unequivocally"* comes within the relevant exception. The headnote to the Supreme Court's decision in *Handbridge Ltd v. British Aerospace communications Ltd* [1993] 3 IR 342 makes this clear:

> "*Held by the Supreme Court (Finlay CJ, O'Flaherty, Egan, Blayney and Denham JJ) in allowing the appeal: 1, that the primary jurisdictional principle in the Convention was that a defendant domiciled within a contracting state should be sued in the courts of that state. Where a plaintiff sought to invoke one of the derogations from that principle contained in the Convention so as to litigate his claim in a jurisdiction other than that of the defendant's domicile, the onus was upon such plaintiff unequivocally to show that his claim fell within the scope of the derogation relied upon. Gannon v. British and Irish Steampacket Co Ltd [1993] 2 IR 359 and Kalfelis v. Bankhaus Schroder, Munchmeyer, Hengst & Co [1988] E.C.R. 5565 applied.*" (emphasis added)

Fact finding

13. At para. 5 of the learned judge's decision in *Ryanair Dac v, SC Vola.ro Srl* [2019] IEHC 239, Ní Raifeartaigh J stated (in the context of a claim contesting the jurisdiction of the Irish Courts to hear and determine the plaintiff airline's substantive case):

"5. The Court is mindful that it must be careful not to conflate issues of jurisdiction and substance; and that it should not go beyond the appropriate parameters of fact finding when the issue arising is one of jurisdiction. Nonetheless, it seems to me that this is one of those cases in which it is inevitable that the court must engage to some degree in fact finding before applying the relevant principles of law to the facts so found. The facts include some technical matters relating to the Ryanair and vola websites". (emphasis added)

14. I want to emphasise at this point that no observation made in this judgment with respect to questions of fact purports to be a determination of any facts in dispute. The question before this court is purely one of jurisdiction.

Close enquiry

15. Among the submissions made on behalf of the plaintiff is that it was not appropriate for this court to subject the jurisdiction question to "anxious scrutiny" or overly close analysis. However, given that the exceptions to the general rule must be interpreted strictly, it seems to me that close enquiry is appropriate. The proposition that this Court should look *closely* at the jurisdiction question seems to me to be well-settled, having regard to the Supreme Court's (3 July 1992) decision in *Gannon* to which the Supreme Court referred (in its 10 March 1993) decision in *Handbridge Ltd.* For the sake of clarity, in *Gannon*, the Supreme Court (Finlay CJ) put the matter as follows (at pp.374-5 of the reported decision):

"Having regard to the importance of the principle laid down that the provision of this Convention vesting jurisdiction in the courts of the state of the defendant's domicile must not be called in question by any interpretation of the derogation or exception contained in Art. 6(1), it seems to me that the court in considering a claim for jurisdiction made to it under Art. 6(1) must closely enquire not only as to the making of a claim against a defendant domiciled in this jurisdiction but must also enquire as to the plausibility of such a claim in a prima facie fashion." (emphasis added)

Anchor defendant

16. Various authorities have dealt with situations where proceedings were brought in the member state where one defendant was domiciled (often referred to as the "anchor defendant") but naming other defendants domiciled elsewhere. In Case C-539-03 *Roche Nederland BV & Ors v. Frederick Primus & Anor* [2006] ECR I-06535 ("Roche") the anchor defendant was a Dutch company and legal proceedings were brought in the courts of the Netherlands. The case involved Doctors Primus and Goldenberg, who were domiciled in the United States and were the proprietors of a certain European patent. They brought proceedings in the Netherlands against *Roche Nederland BV* and against 8 other companies in the Roche group, established in the USA, Belgium, Germany, France, United Kingdom, Switzerland, Austria, and Sweden. The applicants claimed that those companies had infringed the rights conferred on them as patent-owners.

Irreconcilable

17. In its 13 July 2016 judgment, the court looked at the term *"irreconcilable"* in respect of which the decision in Case C-406/93 *Tatry* [1994] ECR I-5439 took a *wider,* and Case 145/86 *Hoffman* [1988] ECR 645, a *narrower,* interpretation.

18. At para. 22 in *Roche*, the Court noted that the approach taken in *Tatry* was "*to the effect that, in order to establish the necessary relationship between the cases, it is sufficient that separate trial and judgement would involve the risk of conflicting decisions, without necessarily involving the risk of giving rise to mutually exclusive legal consequences".* (emphasis added)

19. At para. 23 in *Roche*, the Court contrasted this with the approach in *Hoffman* stating that: "*In Hoffmann, the court had held that, in order to ascertain whether two judgements are irreconcilable within the meaning of article 27(3), it must be determined whether they entail legal consequences which are mutually exclusive".* (emphasis added)

20. In submissions on behalf of the plaintiff, emphasis was laid on the *Roche* decision, in particular on the use of the word "*broad*" in para. 25. It is important to note that at para. 35 in *Roche,* the Court made clear that it did *not* have to resolve the tension between the approaches in *Tatry* and *Hoffman*, stating:

> *"25. However, it does not appear necessary in this case to decide that issue. It is sufficient to observe that, even assuming that the concept of 'irreconcilable' judgements for the purposes of the application of Article 61 of the Brussels Convention must be understood in the broad sense of contradictory decisions, there is no risk of such decisions being given in Euro patents infringement proceedings brought in different contracting States involving a number of defendants domiciled in those states in respect of acts committed in their territory."*

21. It is clear from the foregoing that the decision in *Roche* was very fact specific. There is, in my view, a fundamental difference between (i) a single set of proceedings brought against a range of defendants (domiciled in different States) all of whom are said to have committed the same wrong (infringement of the applicant's patents) and (ii) a single set of proceedings brought against an Irish driver concerning the manner in which they drove a car in Dublin and against a surgeon in relation to the manner in which surgery was performed/the necessity for surgery over 4 years after the RTA.

Same situation of law and fact

22. Before leaving *Roche*, it is important to note that in coming to its decision, the Court went on to state the following at para 26:

> *"26. As the Advocate General observed, in point 113 of his Opinion, in order that decisions may be regarded as contradictory, it is not sufficient that there be a divergences in the*

outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact." (emphasis added)

23. The significance of a single situation of law and fact is also illustrated in case C- 645/11 *Land Berlin v. Sapir,* EU:C:2013:228*.* The backdrop to the case concerned an overpayment, in error, of compensation in respect of the loss of real property during persecution under the Nazi regime. The property in question was originally owned by a Mr Busse who, in 1938, was forced to sell to a third party. The plot of land was later expropriated by the German Democratic Republic and incorporated into a larger plot, together with other publicly owned properties. Following German reunification, the ownership of that parcel of land passed partly to *Land Berlin* and partly to the Federal Republic of Germany. In September 1990, four persons domiciled in Israel, one domiciled in Spain and one domiciled in the United Kingdom, a Mr Busse, made an application for return of the relevant portion of land, as the successors in title to the original owner. The land was sold but under German national law compensation was payable. When making the payment, *Land Berlin* (or *Land*) made an error and unintentionally paid the entire amount of the sale price to the lawyer representing the first 10 defendants in the proceedings, who distributed the entire amount amongst those defendants. The questions referred by the German court were:

"1. Does a claim for the repayment of an amount unduly paid constitute a civil matter within the meaning of Article 1(1) of Regulation No 40/2001 in the circumstances where a 'Land' ordered by a public authority to pay to victims by way of compensation part of the proceeds from the sale of land instead, erroneously, pays to those parties the entire purchase price?

2.Can claims be regarded as so closely connected as required pursuant to Article 6.1… where the defendants rely on additional compensation claims which must be determined on a uniform basis?

3.Does article 6.1… also apply to defendants not domiciled in the European Union? If that question is answered in the affirmative, does this also apply where, in the defendant's State of domicile, pursuant to a bilateral convention with the State determining the claim, recognition of the judgement might be refused for lack of jurisdiction?" (emphasis added)

24. It is the second question which is of relevance in the present application and, at paragraph 45 of the Court's decision, it noted that all claims had:

"…their origin in a single situation of law and fact, namely the right to compensation which the first 10 defendants in the main proceedings are recognised as having…" (pursuant to German national law) *"… and the transfer of the disputed sum erroneously made by the Land Berlin in favour of those defendants*" (emphasis added)

Same factual and legal situation

25. The court went on to refer, at para. 46, to the relevant German national law, stating that only it: *"…can provide the defendants in the main proceedings with the legal basis to justify the*

excess amount they received, which also requires an assessment, for all of the defendants, in relation to the same factual and legal situation…" (emphasis added)

26. From para. 47 onwards, the Court in *Land Berlin* went on to state, *inter alia* that:

"[47]…As the Advocate general stated, in point 99 of her Opinion, all of the claims relied on in the various actions in the main proceedings are directed at the same interest, namely the repayment of the erroneously transferred surplus account.

48.Having regard to the foregoing considerations, the answer to the second question is that Article 6.1… must be interpreted as meaning that there is a close connection, within the meaning of that provision, between the claims lodged against several defendants domiciled in other Member States in the case where those defendants, in circumstances such as those at issue in the main proceedings, rely on rights to additional compensation which it is necessary to determine on a uniform basis."

EU law

27. It is also accepted by both sides in the present application that the applicability, or not, of Article 8(1) is to be determined in the context of EU authorities. In other words, the question is *not* governed by national law (or domestic law concepts such as, for example, that of 'concurrent wrongdoer' pursuant to our Civil Liability Act). This principle speaks to the need for uniformity of interpretation throughout Member States.

28. It is, however, for national courts, to assess, taking into account all relevant factors, whether there is a risk of irreconcilable judgments if the claims were determined separately. On this issue, at para. 41 of its decision in *Freeport v. Arnoldsonn* [2007] ECR I-08319; [2008] QB 634, the Court of Justice stated:

"*It is for the national courts to assess whether there is a connection between the different claims brought before it, that is to say, a risk of irreconcilable judgements if those claims were determined separately and, in that regard, to take account of all the necessary factors in the case file, which may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court*." (emphasis added)

29. In Case C-103/05 *Reisch Montage AG v. Kiesel Baumaschinen Handels GmbH* [2013] ECR I-06827 the court was concerned with an action for the recovery of a sum of money, which was brought by a Lichtenstein company, Reisch Montage, in the Austrian courts. The claim, taken in January 2004, was against a Mr Gisinger, who was domiciled in Austria, and an entity with a German registered office, Kiesel (who stood as security for Mr Gisinger in relation to the sum claimed). In February 2004, the Austrian court dismissed Reisch Montage's action against Mr Gisinger, on the grounds that bankruptcy proceedings concerning his assets had been initiated in July 2003, and were not completed at the time the action was brought. Kiesel disputed the jurisdiction of the Austrian court, arguing that Reisch Montage could not rely on Article 6(1)

(wording mirrored in Article 8(1)) to justify the Austrian court's jurisdiction, since the claim was dismissed as "*inadmissible*". Ultimately the Austrian Supreme Court referred the following question to the Court of Justice for a preliminary ruling:

"Can a claimant rely on Article 6(1)… when bringing a claim against a person domiciled in the forum state and against a person resident in another member state, but where the claim against the person domiciled in the forum state is already inadmissible by the time the claim is brought because bankruptcy proceedings have been commenced against him, which under national law results in a procedural bar?" (emphasis added)

30. During the hearing before me, the Plaintiff laid considerable emphasis on the *Reisch Montage* decision, but as is clear from the foregoing, the facts were very different to those in the present application as was the particular question raised. The Court answered the question from para. 22 onwards of its 13 July 2006 decision, from which the following extracts seem to me to be of particular relevance, given that the Court set out a number of applicable principles (the headings below being mine):

Exceptions to Art. 4 - exhaustively listed

"… that the courts of the member state in which the defendant is domiciled are to have jurisdiction, constitutes the general principle and it is only by way of derogation from that principle that that regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another member state…" (emphasis added) (para 22);

Exceptions to be strictly interpreted

"*it is settled case-law that those special rules on jurisdiction must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged*…" (emphasis added) (para 23);

Legal certainty

"It is for the national courts to interpret those rules having regard for the principle of legal certainty, which is one of the objectives of Regulation No…" (emphasis added) (para. 24);

Foreseeability

"That principle requires, in particular, that the special rules on jurisdiction be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued..." (emphasis added) (para. 25);

"*As regards the special jurisdiction provided for in Article 6(1)… a defender may be sued, 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 judgements resulting from separate proceedings'." (para. 26);

No admissibility requirement

"In that regard, it must be found, first, that that provision does not include any express reference to the application of domestic rules or any requirement that an action brought against a number of defendants should be admissible, by the time it is brought, in relation to each of those defendants under national law" (emphasis added) (para. 27);

National rules do not affect applicability

"Second, independently of that first finding, the question referred seeks to determine whether a national rule introducing an objection of lack of jurisdiction may stand in the way of the application of Article 6(1)…" (emphasis added) (para. 28)

Interpreted independently

"It is settled case law that the provisions of the regulation must be interpreted independently, by reference to its scheme and purpose…" (emphasis added) (para.29);

"*Consequently, since it is not one of the provisions… which provide expressly for the application of domestic rules… Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules"* (emphasis added) (para. 30);

Ratio of *Reisch Montage*

"In those circumstances, Article 6(1)… may be relied on in the context of an action brought in a member state against a defendant domiciled in that state and a co-defendant domiciled in another member state even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant" (emphasis added) (para. 31);

31. Counsel for the plaintiff submits that *Reisch Montage* is authority for the principle that the *settlement* of a claim against the anchor defendant is of no relevance to Article 8(1). I must disagree. Regardless of the undoubted sophistication with which the argument is made, it seems to me that the Court in *Reisch Montage* gave very specific answers to very specific questions, which simply do not arise in the present case.

32. I feel bound by the very principles articulated in *Reisch* (in particular, at paras 22 to 25 inclusive of the Court's decision) to take a different view than the Plaintiff urges. There is, to my mind, a material difference between (i) a claim against an anchor tenant being found *inadmissible* under national bankruptcy law; and (ii) an *admissible* claim against the anchor defendant which the parties decided to *settle.* The facts in *Reisch Montage* are also strikingly different, in that they involved a claim for a single sum (wholly unlike the position in the present case). In short,

Reisch Montage is not, in my view, authority for the principle that the *settlement* of a claim against the anchor defendant is of no relevance to Article 8(1).

Identical legal bases

33. In Case C-145/10 *Eva Maria Painer v. Standard Verlags* [2011] ECR -00000 the applicant, Ms Painer was a freelance photographer who had worked for many years photographing children in nurseries and day homes and, in the course of that work, took several photographs of a "Natascha K". After Natascha K, then a child of 10, was abducted in 1998, security authorities launched a search appeal in which the applicant's photographs were used. Following her escape, and prior to her first public appearance, the defendants in the claim (one newspaper established in Austria, and four based in Germany) published the photographs taken by Ms Painer in newspapers, magazines and websites, without indicating her name as photographer, or indicating a name other than Ms Painer's as the photographer. Ms Painer brought a claim against all five newspapers concerning the use of the photographs under the "Agreement on Trade -Related Aspects of Intellectual Property Rights". The first of the questions referred to the court of justice was as follows:

"(1) Is Article 6(1) to be interpreted as meaning that its application and therefore joint legal proceedings are not precluded <u>where actions brought against several defendants for copyright infringements identical in substance are based on differing national legal grounds the essential elements of which are nevertheless identical in substance</u> - such as applies to all European states in proceedings for a prohibitory injunction, not based on fault, in claims for reasonable remuneration for copyright infringements and in claims in damages for unlawful exploitation?" (emphasis added)

A relevant factor

34. At para. 80 of its judgment in *Painer*, the court held that the presence of identical legal bases is "*not an indispensable*" pre-requisite to the application of Article 6 (1) [See also para. 38 of the Court's 2007 decision in *Freeport*, wherein it stated that: "*It is not apparent from the wording of Article 6(1) that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have <u>identical</u> legal bases*"(emphasis added)]. However, in *Painer*, the Court went on to make clear that is "*one relevant factor among others*" when determining whether there is a risk of irreconcilable judgments if the claims were determined separately.

Different legal bases - Foreseeability required

35. Emphasising the question of *foreseeability,* the Court went on to state the following from para. 81:

"81. Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1)…<u>provided however that it was foreseeable by the defendants</u> that they might be sued in the member state where at least one of them is domiciled…" (emphasis added)

36. In light of the foregoing, if this court is satisfied that the plaintiff's claim against the respective defendants has *different* legal bases, this fact alone, is not dispositive of the question regarding reliance on Article 8(1). It is, however, a relevant factor. Furthermore, where claims have different legal bases, the issue of *foreseeability* is engaged. In other words, a difference in legal bases will not preclude the application of Article 8(1) provided that it was foreseeable by the defendants that they might be sued in a member state where at least one of them is domiciled. It can be noted that this principle, as articulated in *Painer*, reflects the contents of Recital 16 of Brussels Recast (which lays emphasis on *foreseeability*) and Recital 15 (which emphasises *predictability*).

Whether the Defendants acted independently - relevant

37. At para 83 of *Painer*, the Court went on to say that:

> *"83. It is, in addition, for the referring Court to assess, in the light of all the elements of the case, whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgements if those claims were determined separately. For that purpose, the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant."* (emphasis added)

38. Case C-352/13 *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v. Noble NV* [2016] 53 CML Rev 225 concerned a Belgian company, CDC, established for the purpose of pursuing, judicially and extra-judicially, claims for damages of undertakings affected by a cartel. In March 2009, it brought an action for damages, in the German courts, against six chemical undertakings, five of which were domiciled in other member states. The backdrop was a finding by the European Commission (Commission Decision 2006/93/EC) that, in connection with hydrogen peroxide and sodium perborate, the defendants and other undertakings "… *participated in a single and continuous infringement of the prohibition of cartel agreements provided for in Article 81 EC and Article 53 of the EEA Agreement".* According to para 10 of the judgment, the infringement (which took place between January 1994 and December 2000) "… *consisted principally in exchanging important and confidential market and/or company relevant information, limiting and/or controlling production, allocating markets and customers and fixing and monitoring prices as part of multilateral and/or bilateral meetings and telephone conversations held at regular and irregular intervals mainly in Belgium Germany and France".* At an early stage in the proceedings, the plaintiff withdrew its action against the anchor defendant. Regarding the importance of the "same situation of fact and law", the Court stated the following from para. 21 of its decision:

> *"21. The requirement that the same situation of fact and law must arise is satisfied in circumstances such as those of the case in the main proceedings. Despite the fact that the defendants in the main proceedings participated in the implementation of the cartel at issue by concluding and performing contracts under it, in different places and at different times, according to decision 2006/903 upon which the claims in the main proceedings are based, the cartel agreement amounted to a single and continuous infringement…"* (emphasis added)

39. At para 22, the court held that there was a risk of irreconcilable judgments resulting from separate proceedings "*since the requirements for holding those participating in an unlawful cartel liable in tort may differ between the various national laws".* I pause at this juncture to observe that, the foregoing finding was in relation to the potential of suing different defendants in different member states for the *same* unlawful action which each of them had engaged in, namely "*participating in an unlawful cartel*". The foregoing is in stark contrast to the position in the present application, where the allegedly unlawful acts of the two defendants are different. By way of illustration, it is no more alleged that the first defendant driver performed surgery on the plaintiff (in breach of contract/negligently) that it is alleged that the second named defendant doctor drove a car (negligently) over four years earlier.

40. At para. 23 in *Cartel Damages*, the Court went on to emphasise that the divergence in legal bases for actions in damages against the defendants would not, in itself, preclude the application of Article 6(1) (now 8(1)) provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled. This was, of course, a principle emphasised by the Court in (the 2011 decision in) *Painer*, to which I referred earlier. The principle was expressed as follows in *Cartel Damages*:

> *"23. Nevertheless, the Court points out that, even in the case where various laws are, by virtue of the rules of private international law of the court seised, applicable to the actions for damages brought by CDC against the defendants in the main proceedings, such a difference in legal basis does not, in itself, preclude the application of article 6(1)…provided that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see judgement in pain C14 510 EU see 2011 798 paragraph 84)"*

Where the outcome of one action could affect another

41. Case C-366/13 *Profit investment SIM SpA v. Stefano Occi & Ors,* EU:C:2016:282 concerned investment bonds issued by a German bank, containing a clause which conferred exclusive jurisdiction of the courts of England. The bonds were subsequently cancelled and the claimant, an Italian registered company, brought proceedings in the Italian courts seeking a declaration of nullity concerning the acquisition of the bonds, and recovery of the purchase price. Declarations were also sought against its parent company by reason of mismanagement of the subsidiary and compensation was sought against a number of parties.

42. The Court in *Profit Investment,* addressed whether it could be said that there was a sufficient "*connecting link*" between claims where the subject matter and the legal basis were different, but where the outcome of one action could have an effect on the outcome in another action (as put in para. 19.1, whether *"… the upholding of one of those actions is nonetheless potentially capable, in practice, of affecting the extent of the interest on the grounds of which the other action has been brought?"*). This question seems to be one of considerable relevance in the present application in that a positive answer by the Court would clearly assist the

Plaintiff. At paras. 60–65, the Court restated principles which I have already referred to in this judgment. At para. 66, it gave the following answer to aforementioned question:

"66. In order to assess, in a situation such as that at issue in the main proceedings, whether there is a connection between the various claims brought before it and therefore a risk of irreconcilable judgements if those claims were determined separately, it is for the national court to take into account, inter-alia, as the Advocate General emphasised in paragraphs 95 to 100 of his Opinion, the factual and legal differences between, on the one hand, the procedure for damages on the grounds of mismanagement and, on the other, the procedure for a declaration of nullity of one of the contracts and restitution of sums paid but not due, the results of which are independent. In that respect, the mere fact that the result of one of the procedures may have an effect on the result of the other - in particular the potential impact of the amount to be repaid in the context of a claim for a declaration of nullity and restitution of the sums paid but not due on the evaluation of the potential loss suffered in the context of a damages claim - does not suffice to characterise the judgements to be delivered in the 2 procedures as irreconcilable for the purposes of Article 6(1)…". (emphasis added)

Potential effect on another action not sufficient

43. The Court went on, at para 67, to state *inter-alia* that Article 6(1) (now Article 8(1)) *"… must be interpreted as meaning that where two actions - which have different subject matters and bases and which are not connected by a link of subordination or incompatibility – are brought against several defendants, the fact that the upholding of one of those actions is potentially capable of affecting the extent of the right whose protection is sought by the other action does not suffice to give rise to a risk of irreconcilable judgements within the meaning of that provision*" (emphasis added). The 23 April 2015 Opinion of Advocate General Bot (to which the Court referred at para. 66 of *Profit Investment*) included *inter alia*:

"96. I consider, next, that it is not sufficient, in order for two claims directed against a number of defendants to be regarded as connected, that the decision given on one be capable of affecting the decision to be given on the other. The requirement that a divergence must arise in the context of the same situation of law and fact makes it necessary to ascertain whether the decisions that might be given by two different courts have the potential to be inconsistent and contradictory, even if it is not necessary to establish that they will have radically irreconcilable legal consequences…

100. The mere fact that the restitution of the price paid that would be effected if the action for nullity were upheld might have an impact on the extent of the loss suffered by Profit if the latter were awarded damages against Profit Holding , does not , to my mind , represent a risk of irreconcilable judgements." (emphasis added)

O'Keeffe v. Top Car Ltd

44. In *O'Keeffe v. Top Car Limited & Anor.* (High Court, unrep. 2 July 1997, Flood J), the background concerned the purchase by the plaintiff (a resident of Cork) of a second-hand car

from the first defendant company (registered in Ireland) which he then drove to Scotland. The car broke down and the plaintiff requested the second named defendant to carry out necessary repairs (performed in Inverness). The plaintiff alleged that the repairs were negligently carried out and proved defective. The car broke down for a second time *en route* to London and serious damage was done to the engine. The car ended up in storage in London, and the plaintiff instituted proceedings in Cork Circuit Court against the first defendant (domiciled in Cork) and the second defendant domiciled in Scotland). The plaintiff asserted jurisdiction pursuant to Article 6(1) of the Brussels Convention.

Examination of pleaded claim

45. The approach taken by the learned judge on appeal to this court in *O'Keeffe v. Top Car* was to look at the pleaded claim at the date of the institution of the proceedings. The Court's observations on the various pleas can be seen on internal page 4 of the judgment, wherein Flood J found that, in essence, the claim against the first defendant, which was for breach of an implied or express term of a contract for sale in relation to the vehicle, essentially related "*to the condition of the car at the date of sale*" and "*would include the actual cost of the repairs carried out by the second named defendant when the vehicle broke down in Scotland*".

Different sequence of events

46. The learned Judge went on to observe that the plaintiff's claim against the second named defendant for damages "*consequent upon the poor workmanship*" in the execution of repairs "*essentially sounds in tort but arises from an entirely different sequence of events which are clearly post-the said contract of sale and arise from wholly independent facts and events".*

Different facts/circumstances/times

47. The court went on to hold that there was nothing irreconcilable in Cork Circuit Court, and the court in Scotland, dealing with the plaintiff's claims against the first and second named defendants, respectively. The learned judge stated that:

> *"This is because the two actions are dependent on entirely different facts which arise under entirely different circumstances at an entirely different time. The Judgements in the two Actions have no necessary dependence one upon the other. Accordingly, in my opinion, there is no connection 'of such a kind that it is expedient to determine the Actions together in order to avoid the risk of irreconcilable judgements resulting from separate proceedings'."* (p. 5) (emphasis added)

Daly v Irish Group Travel Ltd

48. An Irish authority where the court *was* satisfied of claims against defendants so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments is the 16 May 2003 decision of Kearns J (as he then was) in *Daly v Irish Group Travel Ltd & Ors.* [2007] 4 IR 423. The background involved a tragedy. The plaintiff issued proceedings in Ireland following the death of her husband, while on a white-water rafting trip. The holiday had been purchased from an Irish travel agent, whereas the rafting trip was

provided by Austrian-domiciled defendants. Claims in contract and tort were brought against all defendants. The Austrian defendants contested jurisdiction, submitting that, in reality, the plaintiff's claim against the Irish defendant was in contract only, while the claim against the Austrian defendants was founded in negligence. On that basis, they contended that the was no real risk of irreconcilable judgments resulting from separate proceedings.

Single event – overlapping issues

49. I pause at this point to note how very different the foregoing scenario is to the present application. *Daly* concerned a single trip, and a single tragic event, at a single point in time (as opposed to different events over four years apart). This Court refused the application by the Austrian defendants, and (*per* the headnote) held:

> *"2. That the plaintiff had to satisfy the court that there were prima facie a grounds for alleging a breach of an obligation by an Irish defendant which could have contributed to the plaintiff's injuries and that there was an overlap of issues as between the claims against the Irish defendant and the Austrian defendants;*
>
> *3.That the instant case did not lend itself to any sort of characterisation of the claim against the Irish defendant being one exclusively in contract and the claim against the Austrian defendants being exclusively in tort".* (emphasis added)

Spring v. Ministry of Defence & Anor.

50. In submissions on behalf of the plaintiff particular reliance was laid on *Jeffrey Spring v. Ministry of Defence & Anor.* [2017] EWHC 3012 (QB). Without intending any disrespect, I note that this was a decision, not by a judge of the neighbouring jurisdiction, but by a Master Yoxall. The foregoing seems to me to be relevant to the status of the decision insofar as it might be capable of assisting this Court.

51. As to the background, the claimant was in the army (his employer being the first defendant) and stationed in Germany. In March 1997, he sustained a serious fracture of his right leg and ankle, while off-duty in Germany. On the same day, he was treated in hospital in Germany (the second named defendant) and admitted for surgery, which involved the insertion of "*screws and washers*", under an established arrangement for the treatment of UK service personnel between the first defendant and the second named defendant . Following discharge from hospital he was meant to undertake sedentary duties only. The plaintiff's claim against the first defendant was that he was allocated non-sedentary duties. According to the claimant, non-commissioned officers ("NCOs") ignored the advice to rest given by army medical officers. In July 1997, he underwent a second operation at the hospital. The fracture had healed in incomplete dislocation (or separation) and the operation was to realign the dislocation. Thereafter there were complications, including infection and swelling. This ultimately resulted in the amputation of the claimant's right leg, below the knee in March 1998.

52. The plaintiff commenced proceedings in England in September 2000, against the first defendant. In April 2001, he served amended particulars of claim which pleaded negligence on the part of the hospital surgeons. These pleas were made, not against the second defendant, but on the basis that the first defendant was vicariously liable for the negligence of the hospital doctors. It was alleged that the doctors removed a certain screw before the ligaments and fractures had healed, and that they attempted to re-fix the ankle without a "cross screw" to hold the tibia and fibula in position. These pleas were made in reliance on a certain medical report by a clinician who was not supportive of a clinical negligence claim. The first defendant denied responsibility for the acts of the doctors; denied vicarious liability; denied the claimant was assigned to tasks he was not physically fit for; pleaded contributory negligence; and did not plead that it was the negligence of the second defendant hospital which caused the claimant's injuries. By order made on February 2002, the claim was stayed pending the outcome of litigation to determine the liability of the Ministry of Defence in relation to medical treatment provided by German hospitals pursuant to a contract made with a NHS Trust. In December 2010, re-amended particulars of claim were served, wherein the allegation of clinical negligence against the hospital was removed.

53. In August 2015, the first defendant served a report by its expert in which he opined that the claimant's loss and damage was *entirely* caused by the negligence of the hospital. This was the first time that a medical expert had said that the surgical treatment at the time of the first operation at the hospital was substandard. In September 2015, experts provided a joint statement following discussions. Both experts agreed that the two operations were negligently performed by the hospital surgeons. However, the medical expert retained by the claimant stated that the non-sedentary work contributed to the failure of the first operation. As a consequence of the foregoing, the claimant took steps to add the German hospital to the proceedings as second defendant, commencing with a letter of claim sent to the hospital in October 2015. It was after referring to that very specific factual backdrop that Master Yoxall went on to state *inter alia*:

"*35. I am satisfied that there is a risk of irreconcilable judgements in this case. I take the point that the claim against the first defendant is a claim based on employers liability whereas the claim against the hospital is based on clinical negligence. However, should the proceedings be separate there is a risk of the English and German courts reaching irreconcilable judgements on causation of loss. One possibility (or risk) is of the English court finding that the claimants damage (in particular the first operation) was not caused or contributed to by the first defendant but was caused by the negligence of the hospital surgeons. Against this, the German court could find that the cause of the claimants damage was the negligence of the NCOs of the first defendant in a blind in the claimant to adhere to arduous non-sedentary work. In my judgement, given the history of the expert evidence in this case, there is a distinct possibility of the second defendant juicing expert evidence to the effect that the cause of the claimant's loss was the first defendant's negligence. The hospital, not unnaturally, has not yet revealed what its defence might be.*

36.The claims are evidently closely connected and overlap. The claimant's case remains that the first defendant's negligence made a material contribution to the breakdown of his fracture repair and the need for the eventual amputation. In my judgement article 81 applies. It would be expedient for the claims to be heard together - so that all the factual evidence and expert evidence is heard by one court. In this way the real risk of irreconcilable judgements can be avoided.

37. I bear in mind that in considering article 81 and irreconcilable judgements a broad common sense approach is justified rather than an over sophisticated analysis…" (emphasis added)

Expedient

54. I have highlighted the foregoing because it does not seem to me to be a correct statement of law that jurisdiction is determined by what is *expedient*. It might well be more convenient that all factual and expert evidence relating to a single plaintiff be heard in one court, but that, of itself, is not sufficient to discharge the onus resting on a plaintiff to prove unequivocally that an Art. 8(1) exception applies.

Common sense approach

55. Furthermore, and having regard to the authorities examined earlier in this judgment, it does not seem to me that "*a broad common sense approach*" is the appropriate test, insofar as determining the question of jurisdiction under the Article 8(1) exception (to what is, of course, the default position *per* Article 4). To the extent that reference to "*an over sophisticated analysis*" suggests that this court should *not* look closely at the exception contended for, I feel bound to reject that proposition. Furthermore, there would seem to me to be an unresolved tension between the views expressed by the Master (of a risk of irreconcilable judgments on causation of loss) and the relevant jurisprudence (which emphasises that the potential for the outcome of one action to affect another is not sufficient to come within the Article 8(1) exception). It could hardly be controversial to observe that, in the context of legal proceedings where damages for personal injuries are sought, and given the frequency of road traffic accidents, Courts routinely deal with situations where, at the time of an accident attributed to a defendant's wrong(s), the plaintiff had for example (i) a relevant pre-existing health condition and/or (ii) had previously been involved in a relevant accident years before, which may have given rise to legal proceedings long since determined. My point is that in this scenario (where (i) and (ii) may well be relevant to *causation*) it is plainly not the case that a trial concerning the historic accident (ii) is run *again* so that evidence concerning both accidents can be considered by the same court. Rather, the trial court hears evidence in relation to the index event and comes to a decision on causation in light of such evidence as is put before it, without any risk of injustice or irreconcilable decisions. In the foregoing example, whether the historic accident gave rise to legal proceedings abroad or in a lower court in this jurisdiction does not seem to be of any relevance to the issue. The point is that, whether separated by temporal distance or geographical distance, there will not infrequently be situations where two different

courts must consider the question of causation of loss to a single plaintiff. However, in the context of an Art.8(1) exception, the test is *not* to ask what is expedient.

56. Quite apart from the foregoing, the decision in *Spring* appear to address the important issue of foreseeability in the manner which the jurisprudence requires. The Master certainly noted that one claim was for employer's liability whereas the other was for clinical negligence. In that scenario, the *dicta* in *Painer* and in *Cartel Damages* makes clear that such a divergence in legal bases for actions in damages does not, of itself, exclude reliance on Art. 8(1) provided that it was *foreseeable* by the German Hospital (as well as the Ministry for Defence) that the former might be sued in the United Kingdom (then an EU Member State) where at least one of them is domiciled. It is not clear to me whether that important issue was engaged with in *Spring* and, if it was, how it was resolved.

57. In addition to the above observations, it is very clear that the claims in *Spring* arose out of the *same* factual matrix. This is in stark contrast to the present application, where there were two very different sets of facts, over 4 years apart. In *Spring,* there was an obvious temporal connection between the acts/omissions complained of and, thus, a potential for "*overlap*" of the sort referred to. What culminated in the amputation comprised a single injury. Again, this contrasts sharply with the position in the present case where the first defendant is said to have caused soft tissue injuries due to negligent driving, whereas a range of different injuries of the most serious kind are attributed to surgery which was allegedly carried out in breach of contract and below the standards reasonable expected of a medical professional.

58. For these reasons, the decision in *Spring* is certainly not determinative of the question before this court and seems to me to be of very little assistance in the present situation, which is so markedly different.

Evidence

59. Armed with the principles examined thus far, I have carefully considered the pleadings and evidence before the court, comprising of:

1. the affidavit sworn on 29 May 2021 by Ms Niamh McKeever, solicitor for the second named defendant, to ground the motion, and exhibits 'NMcK1' to 'NMcK10' thereto;
2. the affidavit sworn on 28 October 2021 by the second named defendant confirming his agreement with the contents of Ms McKeever's affidavit;
3. the replying affidavit sworn, on 26 November 2021, by Mr John Power, solicitor for the plaintiff, and exhibits'JP01' to 'JP01' thereto;
4. the supplemental affidavit sworn on 24 January 2022 by Ms McKeever.

Chronology

60. From a consideration of the pleadings and evidence, the following chronology emerges (and for ease of reference I propose to highlight certain dates):

61. The plaintiff was born on **12 December 2001** and resides in Limerick;

62. On **27 December 2013**, the plaintiff was involved in a road traffic accident. Later in this judgment, I will make reference to a "*Memorandum for Dr Gilete*" which was prepared by the plaintiff's solicitor (the "memorandum") a copy of which comprises Exhibit "NMcK8" to the affidavit grounding the second named defendant's motion, sworn by Ms Niamh McKeever, solicitor, on 29 May 2021. This memorandum appears to have been furnished to the second named defendant *prior* to 3 July 2020 (i.e. when proceedings against the first defendant alone were listed for hearing). The following *verbatim* quotes from that memorandum describe post-accident events in the following terms:

Anne Micks is the mother and next friend to Ciara Micks. She was married to Paul Wallace, but they are divorced. Mr Wallace resides in Scotland and Ciara lived with her mother in Scotland until 2012 when they returned to Ireland to live in Limerick. He was born in Scotland.

*Subsequent to the accident, Ciara and her father continued on their journey to Scotland where her father lived. Ciara's father, Paul, did not want Ciara to let her mother know that there had been an accident on the way to the airport and she did not receive medical attention in Scotland. She did experience and complain of pain in her shoulders, upper back and neck regions for some two days post-accident. Having returned after Christmas to Ireland, Ciara was stiff and sore and was seen by Dr JP Donohoe, general practitioner, Dooradoyle, Limerick initially on the **6 January 2014**. She is still under the care of Dr JP Donoghue.*

Dr JP Donohoe noted that 'Eight months after the rta Ciara continued to experience intermittent soft tissue pain in her left shoulders and inter-scapular regions'. He recommended more regular intensive physiotherapy together with a special emphasis on core muscle strengthening exercises and posture retraining.

Dr Donohoe found that Ciara's injuries were chronic at that stage, but while it was difficult to give a definitive long-term prognosis, he was hopeful for a full recovery over three to six months and did not expect any long-term sequellae.

*Dr Donohoe reported again on the **15 July 2015**. This report referenced the fact that Ciara had been seen by a number of specialists viz*

- *Dr Brian Mulcahy, Consultant Rheumatologist,*
- *Prof Eric Masterson, Consultant Orthopaedic surgeon;*
- *Dr Irfan Ahmad, Consultant Paediatrician,*
- *Had been in receipt of physiotherapy.*

*Ciara was referred by Dr Donohoe who to Dr Brian Mulcahy, Consultant Physician and Rheumatologist and he first saw her on the **21 April 2015**. Dr Mulcahy made a diagnosis of*

Hypermobility/Ehlers Danlos Syndrome (HEDS) on the basis of her history and clinical examination. In the third paragraph of his report he comments that:

'Patients with HEDS are more prone to soft tissue injury and have a heightened awareness of pain following injuries and take a lot longer to heal than those with normal collagen tissue. As well, traumatic incidents can trigger a generalised flare in EDS symptoms and both of these have occurred'…

…

Ciara's mother Anne, and her grandmother Breda were diagnosed with EDS subsequent to Ciara's diagnosis …"(emphasis added)

63. At paragraph 4 of Mr Powers 26 November 2021 affidavit, he avers inter-alia that: *"It is the plaintiff's case in this action, as supported by expert medical opinion, that the said accident caused or certainly severely aggravated this condition of EDS*" (emphasis added). Without meaning any criticism, it cannot be correct to say that the index accident *"caused*" EDS. Paragraphs 2.4 and 2.5 of the May 2020 medical report which was prepared at the request of the plaintiff's solicitor by Dr Peter Keston (consultant diagnostic and interventional neuro radiologist, Western Gen Hospital, Edinburgh), states inter-alia:

"2.1 The claimant was involved in a road traffic collision on 27 December 2013.

2.2 The claimant's car was struck from the rear, causing her to be thrown forward to the point where her head impacted on her knees.

2.3 No medical attention was sought at the time of the incident.

2.4 The claimant developed chronic symptoms following the incident with neck and shoulder pain.

2.5 The pain did not improve spontaneously. The claimant was eventually referred to a number of specialists. This culminated in a diagnosis of hypermobility / Ehlers Danlo syndrome (HEDS), a genetic condition characterised by abnormal connective tissue elasticity, abnormal range of joint movement and a variety of other symptoms related to reduced soft tissue strength.

2.6 The claimant was referred to a specialist team with expertise in HEDS and in treatment of associated symptoms, under the care of Prof Rodney Graham

2.7 A wide range of symptoms were recorded, including: poor sleep, headache, mine or gastrointestinal disturbance, musculoskeletal pain etc

2.8 Imaging of the spine was obtained using a vertical open MR machine, a specialist piece of equipment designed to permit MRI imaging of a patient as they flex and extend the spine. The imaging was interpreted by Prof Frank Smith

2.9 Prof Smith has interpreted the imaging as showing a deterioration between 2016 and 2017. Surgical review was recommended…" (emphasis added)

64. Dr Keston's confirmation that HEDS or EDS is "*a genetic condition*" chimes with the statement in the memorandum that the Plaintiff's mother and grandmother were subsequently diagnosed as having this condition, but excludes the possibility that the condition was *caused* by the RTA in question.

65. On **22 January 2016** the plaintiff issued proceedings by way of a personal injuries summons. In the concurrent amended personal injuries summons (the "Amended Summons") the plaintiff is described as a restrained passenger in a vehicle being driven near Dublin airport. It is pleaded that a vehicle driven by the first defendant collided violently with the rear of the vehicle in which the plaintiff was travelling. The plaintiff's claim against the first defendant is one in which she alleges negligence breach of duty and breach of statutory duty. The plaintiff claims to have initially suffered soft tissue injuries to her neck back and shoulders. It is pleaded that these symptoms persisted and required pain medication and physiotherapy. It is pleaded that in April 2014 the plaintiff complained of lower back pain. She alleges that, approximately 18 months post-accident, she had made minimal progress and continued to experience pain.

66. On **22 February 2016**, an Appearance was entered by the first defendant who was then the sole defendant).

67. According to the "*Memorandum for Dr. Gilete"* prepared by the Plaintiff's solicitor in advance of 3 July 2020, the plaintiff's GP, Dr Donohoe, referred her to Professor Rodney Grahame, a consultant Rheumatologist and a leading expert on HEDS, who confirmed her diagnosis and referred the plaintiff to a number of his colleagues including Professor Chris Mathias, Dr Nigel Meadows and Professor Francis Smith.

68. The Memorandum states that the plaintiff was seen by Prof. Grahame on **10 August 2016.** It is further stated that Prof. Grahame arranged for a number of consultants to see the plaintiff, with the intention that they would devise a plan which could be implemented in Ireland and reviewed in the UK as required.

69. From **October 2016,** correspondence passed between the plaintiff's mother and the second named defendant's team. This is averred by Ms McKeever at para. 29 of her grounding affidavit. She goes on to aver that: *"In general terms, the second defendant was asked to comment on medical reports obtained by the plaintiff at that time. The plaintiff's mother was sent questionnaires and forms to complete by email in or around the start of November 2017, prior to the consultation with the second defendant. The correspondence also concerned inter-alia the arrangement of appointments, the payment of fees, requests for documents and imaging and information relating to the surgeries to be performed in Spain.*" Insofar as references are made in this judgment to averments by Ms McKeever, it is important to note that, at para. 5 of her affidavit which grounds the motion, she avers: *"For the avoidance of any doubt no admission is made by or on behalf of the second defendant as regards any of the issues said to be in dispute in these proceedings".* Quotes from Ms McKeever's affidavit must be seen in the foregoing context but, in circumstances where it is no function of this court to decide any issue in the underlying proceedings (and nothing in this judgment should be taken as suggesting otherwise), it is nonetheless important to understand relevant facts in order to determine the jurisdiction question (and this approach reflects principles outlined in *Ryanair Dac v SC Vola* and in the Supreme Court's decision in *Gannon*, examined earlier).

70. On **5 April 2017**, a notice of change of solicitors was filed. In respect of the chronology thereafter, the "*Memorandum prepared for Dr Gilete*" prepared by the plaintiff's solicitor, states inter alia:

*" … In **May 2017**, it was noted that there were concerns about gross ligamentous instability at the plaintiff's atlanto-axial joint in her neck as demonstrated on MRI…*

*…Ciara reviewed by Professor Rodney Grahame, hypermobility clinic, in **September 2017**…*

*…Professor Francis Smith carried out an upright positional MRI examination on Ciara's cervical spine and cranio-cervical junction on the **28 September 2017**, and the findings were compared with the MRI carried out on the 28 September 2016. The MRI scan carried out on the 28 September 2017 showed there was deterioration in the appearances of the cervical spine since the examination one year previously. His findings led to the suggestion and consideration of surgery possibly in Barcelona.*

Ciara was referred to you for review…"

71. On **6 November 2017** the first on-line consultation took place with the second named defendant . This is averred by Ms McKeever at para 30 of her affidavit, wherein she proceeds to aver that: "*… Thereafter a face-to-face consultation was held in Barcelona on 27 November 2017. The second defendant recalls that there may have been a meeting with the plaintiff again on 5 December 2017".*

72. In **November 2017** the plaintiff attended the second named defendant, practicing as a neurosurgeon and spinal surgeon at Tekon Hospital, Barcelona. MRI scans of the Plaintiff's cervical and lumbar spine were performed. The second named defendant advised the plaintiff's mother that the plaintiff should undergo surgical fusion of her cervical vertebrae.

73. On **26 February 2018** the second defendant completed a prior authorisation application form for the purpose of the health service executive cross-border healthcare directive. This form was sent to the plaintiff's mother by email thereafter. The foregoing is averred at para. 31 of Ms McKeever's grounding affidavit. The Court understands that funding was not made available, but nothing turns on the foregoing for the purposes of the present application.

74. As pleaded in the Plaintiff's **27 April 2018** updated Particulars of Injury Loss and Damage, by that time, the plaintiff's medical condition had significantly worsened and medical opinion was that the accident had triggered a "*profound worsening*" of the plaintiff's EDS.

75. On **5 March 2018** the plaintiff was admitted to hospital in Barcelona (as averred at para. 34 of Ms McKeever's affidavit grounding the application).

76. On **6 March 2018** the plaintiff's mother executed a document which, in the manner presently made clear, included a choice of law and jurisdiction clause. This 2-page document was on the headed paper of "*Promohealth*". At para. 32 of Ms McKeever's grounding affidavit she avers inter alia that "*The entity "Promohealth SL" is a patient management company under the control of the second defendant. I am instructed by the second defendant that this document was signed by the plaintiff's mother at the Teknon hospital Barcelona Spain"*. The said document began in the following terms:

"*This Agreement is entered into on*
6-Mar-18

By and between

PROMOHEALTH S.L.,
TAX ID Number B64996663
c/Independencia 3 A4-386, entiol D1,
E-08041 Barcelona (Spain), hereinafter called "PROMOHEALTH"

AND

parent/legal guardian of patient,
Ms Ciara Micks,
Irish citizen,
Passport #...
145 The Grange, Raheen, Limerick,
Ireland

DOB: 12/12/2001,
Age: 16 years

hereinafter called "CLIENT"…"

77. The document went on to name the second named defendant , state *inter-alia:*

"CLIENT decided not to treat the diagnostic finding in a hospital in her country of origin…

Promohealth as a Service Company facilitates contact with our affiliate surgeons. We encourage and advise you to discuss all medical issues with your medical doctor in your home country before making a decision on medical treatment outside your country

As a client, you agree to assume all responsibility in connection with choosing any affiliate Dr of promo for your desired procedure

Promohealth does not assume any responsibility or liability for any treatment or other services rendered by affiliate doctors, or for any malpractice claims and other claims that may arise directly or indirectly from any such advice, treatment or other service

The parties hereby put forward and agree to the following:

First: QUOTE
PROMOHEALTH has offered the possibility of diagnosing our condition with Dr Gilete &Dr. Oliver as per quotation 0512 CM 1 dated
5-Dec-17
attached as annex 1 to this contract, which details the type of diagnosis and surgery if necessary

once the client accepted the quote by email, surgery is proposed for the:
8-Mar-18
…
Eight: LAW AND JURISDICTION
You agree that the associate services and the medical treatment covered under this contract are to be carried out in the city of Barcelona Spain

This contract shall be governed by and construed in accordance with the applicable Spanish law, which is expressly subject to the contracting parties.

The contracted parties are subject to, for any divergences, conflict or doubt that may arise between them in connection with the performance, breach or interpretation of this contract, waving their own jurisdiction if different, explicitly, to the Courts and Tribunals of the city Barcelona, Spain

You also agree not to take any legal action or proceedings under or with respect to this agreement outside of Barcelona Spain" (emphasis added)

78. The signature of the plaintiff's mother appears on the second page of the 6 March document. In para. 17 of the affidavit sworn on 24 November 2020 by the plaintiff's solicitor, Mr John Power, in the context of applying to join Dr Gilete as second named defendant into the proceedings, he averred inter alia:

"17. I say and believe that the contract for the professional services provided by the said Dr. Gilete Garcia was made in this Jurisdiction in that the plaintiff (through her next friend) agreed in Ireland to the terms and conditions of Dr Gilete Garcia's retainer and to his offer of professional services. I say also that the proposed co-defendant is a necessary party to the currently constituted action to enable this Honourable Court to determine all the issues that now arise between the plaintiff and the existing defendant in these proceedings…"

79. However, in the manner previously noted, the plaintiff has *not* asserted jurisdiction on the basis that the relevant contract was made in Ireland. Rather, the *sole* basis for jurisdiction is reliance on the Article 8(1) exception (to the 'default' rule that a person domiciled in a Member State shall be sued there). Furthermore, at paras. 24 and 25 of his 26 November 2021 Affidavit, sworn in response to the present motion, Mr Power avers:

> "***Domicile of the second defendant***
>
> *24. For the avoidance of doubt, it is accepted by the plaintiff that at all material times the second named defendant was domiciled in Barcelona, Spain and carried on a medical practice at the Teknon Hospital, Consultoris Marquesa, Office 46, Marques de Vilallonga, 12, 08017 Barcelona, Spain.*
>
> ***Applicable law***
> *25. It is further accepted that the question of the law applicable to the resolution of the dispute between the parties is not a matter which arises for consideration by this Honourable Court at this juncture…"*

Foreseeability

80. It seems to me that, whilst the choice of law and choice of jurisdiction clause contained in the document executed by the plaintiff's mother on 6 March 2018 (i.e. over four years *after* the RTA) is certainly not determinative of the question before this court, its existence adds weight to the proposition that a surgeon domiciled in Spain, carrying out surgery in Spain, in 2018, pursuant to an agreement which specified Spanish law and the jurisdiction of the Spanish courts could reasonably regard it as *foreseeable* that any legal action against him, arising from that surgery, would be brought in the courts of Spain (not in Irish proceedings concerning the liability of a driver on Irish roads in respect of a road traffic accident 4 ½ years before).

81. On 6 March 2018, the plaintiff's mother also executed a document entitled "*DOCUMENT OF INFORMED CONSENT*" which began in the following terms:

> *"For the satisfaction of Patient Rights, as a document in favour of the correct use of Diagnostic and Therapeutic procedures and in agreement with the general health law*
>
> *I, as parent/legal guardian of patient,*
> *Ms Ciara Micks*
> *Irish citizen,*
> *Passport #...*
> *145 The Grange, Raheen, Limerick,*
> *Ireland*
>
> *DOB: 12/12/2001,*
> *Age: 16 years*

in full possession of my faculties, freely and voluntarily,

EXPOSE

*I have been INFORMED by **Dr. Gilete** Collegalate 28133 COMB & Dr. Oliver Colleglate 15452 COMB, by electronic message and in a personal interview that took place on the 06-03-2018 that due to:*

1-Basllar Invaginatoin
2-Cranlocervical Instability (CCI)
3-Atlatoaxial Instability (AAI)
4-Subaxial Instability probably down to C5
5- Occult Tethered Cord Syndrome

it is necessary to do the following therapeutic procedure known as;

Posterior fusion stabilisation C0 to T1 with intraoperative reduction (traction)

AND

Surgical tight filum terminalis release including 1 level laminectomy + probably 1 level transpedicular M15 fusion

Before the procedure, it is required to sign (as a patient or his/her legal representative, relative or alleged) this document of "INFORMED CONSENT" which authorises the doctor/s who signed below, to perform the action specified, assuming the possibility that complications may occur and which are detailed in this present document.

This is a measure of mandatory legal compliance prior to any medical act.

Description of the procedure…
…
I acknowledge that the doctor has explained and the following has been fully clarified:

1. *I understand the need for the operation that has been proposed*
2. *I have been informed, in detail and in clear language of the risks and possible complications that may occur during the diagnostic examinations, the operation and in the post-operative procedure.*
3. *I have been informed that some unforeseen circumstances may occur during the operation. The need to use different surgical techniques than previously planned may arise. In this case I authorise the surgeon to act accordingly to what he considers appropriate in agreement with medical science.*
4. *I am satisfied that I had the occasion to ask all the questions that I wanted.*

5. *Being aware of the risks involved in this procedure, in case of complications requiring admission to our clinic, the patient will assume: the cost of admission to our clinic, as well as the required tests involved in the diagnosis and treatment of the condition. Should a further operation be required, owed to complications related to the treatment received, the patient will assume hospital costs, including anaesthesia and use of the operating theatre. In these instances, doctor/s reserves the right to evaluate the cost of the additional expenses based on each individual case and pass it onto the patient.*
6. *I consent transfusion of blood or blood products.*

Weighing out the risks and benefits, I have decided to undergo the surgery that has been proposed.

I understand that this consent may be revoked by me at any time prior to the procedure. For the record I sign this document

***Barcelona**,*
3/6/2018…" (emphasis added)

82. At paragraph 33 of Ms McKeever's affidavit she avers inter-alia that: *"I am instructed by the second defendant that this document was signed by the plaintiff's mother at the Techno hospital Barcelona Spain."* Plainly the foregoing consent documents related to surgery to be performed in Barcelona. The foregoing document also seems to me to be of relevance to the issue of *foreseeability* as to where legal action (arising from surgery to be carried out in Barcelona, Spain, which was, in fact, performed there, in 2018) would be taken.

83. On **8 March 2018**, the second defendant performed surgery [described as posterior fusion stabilisation C0 to T2 with intraoperative reduction (traction) and C2 – C3 laminectomy (canal estenosis) and left Hemilaminectomy L2-L3, surgical tight filum terminalis release and interspinous process fixation]. With respect to this surgery, the plaintiff's solicitor, Mr John Power, who swore an affidavit on 24 November 2020 in the context of an application to join the second named defendant, averred (at para. 7) *inter-alia* that: *"This operation was not successful as promised and gave rise to continuing symptomatology".*

84. On **23 March 2018** the plaintiff was discharged from hospital (as averred by Ms McKeever at para. 35).

85. In **September 2018** the plaintiff was reviewed by the second named defendant, in Barcelona, as averred at para. 8 of Mr Power's affidavit. Mr Power went on to aver *inter-alia* that the Plaintiff was: *"…then advised by him that radiology and physical examination verified the further presence of lumbar instability at L2/3, necessitating further surgery. Again, the plaintiff's mother trusted in the professional judgement and opinion of Dr Gilete, and so the plaintiff underwent a second operation under Dr Gilete, involving L2/3 disectomy and interbody fusion with cage and plate on 4 October 2018…"*

86. On **2 October 2018** the plaintiff's mother executed a further 'agreement' document. It was on the headed paper of "*Chiari & Hypermobility Barcelona*" and was described as an: *"AGREEMENT BETWEEN CUSTOMER AND SPINE & NEUROTECH S.L.".* At para 36 of Ms McKeever's affidavit she averred *inter-alia* that "*The entity "Spine & Neurotech SL" is a patient management company in respect of which both the plaintiff and his colleague are shareholders. I am instructed by the second defendant that this document was signed by the plaintiff's mother at the Teknon hospital Barcelona Spain."* The terms of this document, which identifies the second named defendant , included the following:

"This Agreement is entered into on
2-Oct-18
By and between

Spine & Neurotech S.L.,
TAX ID Number B67229740
c/Vilana, 12 office 109/111
08022 Barcelona (Spain), hereinafter called "Spine & Neurotech"

AND

parent/legal guardian of patient,
Ms Ciara Micks,
Irish citizen,
Passport #...
145 The Grange, Raheen, Limerick,
Ireland

DOB: 12/12/2001,
Age: 16 years

hereinafter called "CLIENT"

General terms

CLIENT diagnosed with:
Lumbar Instability
("DIAGNOSTIC FINDINGS"), is interested in a medical treatment.
Lateral interbody lumbar fusion with interbody cages ad vertebral plates (XLIF)
CLIENT decided not to treat the diagnostic finding in a hospital in her country of origin. Spine & Neurotech is a mediation company located in Spain for international and national patients.

Spine & Neurotech is a Service Company that facilitates contact with our affiliate surgeons. We encourage and advise you to discuss all medical issues with your medical doctor in your home country before making a decision on medical treatment outside your country.

As a CLIENT you agree to assume all responsibility in connection with choosing any affiliate doctor of Spine & Neurotech for your desired procedure. Spine & Neurotech does not assume any responsibility or liability for any treatment or other services rendered by affiliate doctors, or for any malpractice claims and other claims that may arise directly or indirectly from any such advice treatment or other services.

The parties hereby put forward and agree to the following:

First: QUOTE

Spine & Neurotech has offered the possibility of diagnosing your condition with ***Dr. GILETE*** *& Dr. OLIVER as per quotation 2609 CM 2 dated*

1-Oct-18

attached as Annex 1 to this contract, which details the type of diagnosis and surgery if necessary.

Once the CLIENT accepted the quote by email, surgery is proposed for the:

4-Oct-18*…*

…

Eight: LAW AND JURISDICTION

You agree that the associate service/s and the medical treatment covered under this contract are to be carried out in the city of Barcelona, Spain

This contract shall be governed by and construed in accordance with the applicable Spanish law, which is expressly subject to the contracting parties.

The contracting parties are subject to, for any divergences, conflict or doubt that may arise between them in connection with the performance, breach or interpretation of this contract, waiving their own jurisdiction if different, explicitly, to the Courts and Tribunals of the city Barcelona, Spain

You also agree not to take any legal action or proceedings under or with respect to this agreement outside of Barcelona (Spain)

Barcelona

2-Oct-18" (emphasis added)

87. Again, whilst *not* determinative of the question before this court, I take the view that the contents of this agreement (regarding surgery to be carried out in Barcelona, Spain, which was, in fact, carried out there, which agreement explicitly nominates Spanish law and Spanish courts) is a factor which speaks to the *foreseeability* of legal action regarding the appropriateness or quality of surgery being taken in Spain. In addition, the plaintiff's mother executed an "*Informed Consent"* document in relation to this second procedure. This is averred by Ms McKeever at para 37 of the grounding affidavit, wherein she also avers inter-alia: *"I am instructed by the second defendant that this document was signed by the plaintiff's mother at Technon Hospital* ***Barcelona Spain****"* (emphasis added). The foregoing also speaks to that same issue of foreseeability.

88. On **4 October 2018** the second defendant performed further surgery on the plaintiff in Barcelona, Spain (described as lateral interbody lumbar fusion with interbody cages and vertebral plates)

89. In **2019/2020**, what is described as a "*protracted discovery process*" took place between the first named defendant and the plaintiff.

90. On **28 February 2020** the first named defendant's solicitor swore an affidavit in the context of seeking discovery from the plaintiff in which he made averments to the effect that a consultant neurosurgeon retained by the first defendant was of the view the plaintiff's condition was attributable to the surgeries performed in Spain, rather than the accident.

91. In **May 2020**, the plaintiff retained Dr Peter Keston, consultant neuro radiologist. He reviewed all of the plaintiff's MRI scans of her cervical and lumbar vertebrae, including imaging of the plaintiff's cervical spine performed at Teknon hospital in Barcelona, on 27 November 2017. Dr Keston's opinion is detailed in his May 2020 report, a copy of which comprise exhibit "JP02" to the affidavit sworn by Mr Power on 24 November 2020 in the context of the application to join the second defendant. Section 4 of the said report sets out Dr Keston's opinion and paras. 4.4 and 4.5 of same state:

4.4 "I do not think there is any significant deterioration in the imaging appearances between 2016 and 2017. Specifically I do not think that there is any evidence of cervical spine instability.

4.5 The radiology report in 2017 makes a recommendation for surgical referral to an overseas clinic. I am unsure of the rationale for this recommendation."

92. As regards information provided to the second named defendant prior to the application to join him into the proceedings, the following is averred by Ms McKeever at paras. 38 to 40 in her grounding affidavit:

"***Information and request for records received prior to the application to join as co-defendant***

38. For the sake of completeness, I am instructed that the second defendant received information in relation to the plaintiff's claim (then against first defendant only) in the form of a 5 page document entitled "Memorandum for Dr Gilete" (the ***"memorandum****"), prepared by the plaintiff's solicitor. In the memorandum a description of the incident and of the plaintiff's subsequent treatment is set out. It is also confirmed that the plaintiff had seen a number of specialists in relation to the diagnosis of EDS, to include the second defendant, and it is noted that the plaintiff underwent surgery in March 2018 and again on 4 October 2018 (carried out by the second defendant).*

39. The memorandum also confirms that High Court proceedings on behalf of the plaintiff are listed for hearing on 3 July 2020, with liability having been admitted by the "Defendants" in respect of the accident. The memorandum notes that the "Defendants" (it is presumed that this is a reference to the then sole defendant) dispute that the plaintiff's injuries and present condition were aggravated by the accident. The second last paragraph of the memorandum states:
"The defendant's solicitors arranged several medical examination [sic] of Ciara over the last year. Their experts hold a different opinion in relation to Ciara's surgery. In particular when expert claims that the surgeries were unnecessary"

40. The memorandum ends by requesting the now second defendant, at the specific request of senior counsel, to furnish copies of his notes to include operation notes in respect of both operations up to the date of discharge..."

93. The statement in the memorandum that: "*High Court proceedings were instituted by us, on behalf of Keira and these proceedings are listed for hearing in Dublin commencing on the 3* ***July 2020****"* (emphasis added) allows for a finding that the memorandum was not prepared *after* 3 July 2020. There is nothing in the memorandum to suggest that the plaintiff then regarded Dr Gilete as having committed any legal wrong which had caused her any damage. Nor is it stated or suggested that the plaintiff would institute any legal proceedings against Dr Gilete. Still less was it suggested that legal action would be pursued in Ireland where no surgery had been performed by the second named defendant and where he is not domiciled.

94. In **8 September 2020,** the Court of Appeal heard an appeal by the first named defendant against a decision by this Court (Cross J) to grant discovery.

95. On **19 October 2020**, the Court of Appeal delivered its judgment. At that stage, the first disclosed the medical report of the first defendant's consultant neurosurgeon, Mr Crimmins, dated 23 August 2019 and 18 November 2019

96. On **24 November 2020**, the plaintiff's solicitor, Mr John Power, swore an affidavit in the context of an application to join the second named defendant in which Mr Power made *inter-alia* the following averments:

"9. Following the surgeries, the plaintiff's medical condition deteriorated dramatically to the point where the plaintiff now suffers virtual disability, rendering her to be fully dependent at home. It appears that she has suffered complete and permanent loss of independence and will require constant care for the remainder of her life.

10. It is now apparent that the defendant, while not disputing the severity of the plaintiff's condition, intends to defend this case on the basis that her current medical condition was not caused by the subject accident, rather it was caused by the surgeries carried out by Dr Gilete Garcia, the proposed co-defendant. This first came to the plaintiff's attention on 28 February 2020 when the defendant's solicitor, Mr Robert Kennedy, swore an affidavit in support of a wide-ranging application for discovery of pre and post-accident medical records. Mr Kennedy averred at paragraph 10 of his affidavit that the defendant's medical expert, Mr Darach Crimmins, consultant neurosurgeon, did not believe that the plaintiff's disability stemmed from the subject accident at all. Mr Crimmins' view was that the plaintiff's condition was largely caused by her health management and surgical operations, including 'several dangerous and morbid operative procedures with no plausible indication in Barcelona'. I beg to refer to a true copy of this affidavit and exhibits attached thereto, when produced.

11. Following these issues now raised by the defendant, the plaintiff retained Dr Peter Keston, consultant neuro radiologist in May 2020. Dr Keston reviewed all of the MRI scans of the plaintiff's cervical and lumbar vertebrae. In particular for present purposes, he reviewed the imaging of the plaintiff's cervical spines performed at Teknon Hospital in Barcelona on 27 November 2017. He commented that there was poor visualisation of the atlanto-occipital articulation. In his opinion, the imaging showed a large degree of movement in the cervical spine which was at just above normal limits; however, despite that hypermobility, there was no evidence of any vertebral listhesis or other significant instability. Dr Keston concluded that there was no significant deterioration in the imaging appearances between 2016 and 2017. Specifically there was no evidence of cervical spine instability and in the circumstances, Dr Keston was unsure of the rationale for surgery. I beg to refer to a true copy of the said report of Dr Keston…

…

13. As appears from Mr Crimmins' email of 23 August 2019, having reviewed imaging of the plaintiff carried out in Limerick, London and Spain, he was of the opinion that there was no evidence of injury or spinal instability in the plaintiff's cervical or lumbar spine or any evidence of tethered cord. He described the surgeries in Spain as unnecessary, highly inappropriate and harmful. He also commented that he could not think of one surgeon in Britain or Ireland who would not be appalled at what had been done to the plaintiff. In his report of 18 November 2019 he described the surgeries undergone by the plaintiff in Barcelona as dangerous and morbid operative procedures with no plausible indication, and his view is that it was likely that the effects of the surgery were severe and permanent. He concluded that the plaintiff's current condition was largely down to her healthcare management.

14. It now appears that not only will the defendant dispute causation of the plaintiff's condition of EDS but she will also rely on medical experts now disclosed to contend at trial that the plaintiff's current medical condition has been caused wholly or partly by the medical care afforded to her since the accident with particular reference to the surgeries carried out by Dr Gilete Garcia. Dr Keston on behalf of the plaintiff has also questioned the rationale for surgery…"

97. On **25 November 2020** the Plaintiff issued the motion to join the second defendant.

98. On **9 December 2020** this court (Cross J) made an order granting liberty to the plaintiff to join the second named defendant as a co-defendant into the proceedings. The operative part of that Order states:

"…IT IS ORDERED that

- *the Minor Plaintiff be at liberty to proceed in his/her own name*
- *Dr Vincenc Gilete Garcia with an address at Hospital Teknon Consultorios Marquesa Office 46 Marques de Vilallonga 12-08017 Barcelona be joined as a co-Defendant in this action*
- *Pursuant to Order 11a RSC the Plaintiff be at liberty to issue an Amended Personal Injuries Summons herein for service outside the jurisdiction and to serve Notice of the same on the said co-Defendant within a period of thirty five days from the date hereof*
- *Reserve costs…"* (emphasis added)

99. Having regard to the foregoing, the second named defendant was as a matter-of-fact joined into the proceedings on **9 December 2020**. At that point, the plaintiff's claim against the first defendant was ongoing, as the plaintiff's solicitor, Mr Power, avers at para 16 of his 26 November 2021 affidavit:

"…when the order joining the second defendant to the proceedings was made on the 9 December 2020 (thereby seizing the courts of Ireland with the dispute between the plaintiff and the second defendant) the proceedings against the first defendant were ongoing".

100. With respect to the position which pertained on 9 December 2020, the plaintiff's solicitor also made the following averments at para. 21 of his affidavit:

"When the second defendant was joined to the proceedings by order of the 9 December 2020, there was an obvious connection between the claims against the defendants having regard to the need for determination by the court of the extent to which the injuries, loss and damage suffered by the plaintiff were caused or contributed to by the road traffic accident or the subsequent surgical interventions…"

101. No issue is taken by the second named defendant with the fact that, as of 9 December 2020, the first defendant was in the case. Thus, at *that* point they were the "anchor defendant". The decision of the CJEU in Case-189/87 *Kalfelis v. Bankhaus Shroder* [1988] ECR 5565 ("Kalfelis") makes clear that Article 6(1) of the Brussels Convention (the precursor to Article 8(1) of Brussels Recast) "… *applies where actions against different defendants are connected at a time when they are commenced*…". (emphasis added)

102. On **18 December 2020**, the court (Cross J) varied the 9 December 2020 order. The relevant variation was to add reference to a concurrent personal injuries summons, as is clear from the 3rd bullet point in the 18 December 2020 order which stated:

- *"Pursuant to Order 11a RSC the Plaintiff be at liberty to issue an Amended Personal Injuries Summons and Concurrent Personal Injuries Summons (Copies attached) for service outside the jurisdiction on the said Co-Defendant within a period of thirty five days from the date hereof."* (emphasis added)

103. Although formal service did not take place on 18 December 2020, it is also accepted that the plaintiff's solicitors sent the second defendant copies of the orders made on 9 and 18 December and a copy of the concurrent amended personal injuries summons under cover of a letter dated 18 December, to which I now turn.

104. On **18 December 2020** the plaintiff's solicitor wrote to the second named defendant. That letter and its enclosures were sent by email to the second named defendant on **21 December 2020.** The said letter began in the following terms:

"Dear Dr. Gilete,

We refer to the above entitled proceedings and to previous correspondence between us. We attach herewith copy orders of the Irish High Court dated 9 December 2020 (perfected on the 10 December 2020) and 18 December 2020 (perfected on 18 December 2020) joining you as a co-defendant to these proceedings and giving liberty to serve notice of the proceedings on you outside the jurisdiction. Please note that arrangements are now being made to formally effect service of the plaintiff's proceedings by serving a Notice of Concurrent Amended Personal Injuries Summons upon you in the appropriate manner. As a matter of courtesy, we enclose herewith a copy of the Concurrent Amended Personal Injuries Summons.

Since the making of these orders of court, the plaintiff has received an offer of damages from the first defendant, Gabrielle Dunne, in settlement of the liability of that defendant only. The offer is in the sum of €1,750,000 in damages plus a proportion of the plaintiff's costs of the claim to date (yet to be determined) this offer is being made in accordance with the provisions of the Irish statute, namely the ***Civil Liability Act 1961.****"*

105. In circumstances where this letter is dated 18 December 2020, it seems uncontroversial to say that the settlement offer was contemporaneous with the 18 December 2020 order made by Cross J. The letter went on to state:

The plaintiff is still suffering extreme disability, she uses a wheelchair to aid mobility. The plaintiff is entirely dependent on her mother for all of her daily needs. There are therapies and services which she needs and which would be of immediate benefit to her. Because she has no financial means to avail of such therapies and remedial services, she must accept this offer of settlement against the first defendant, only, in part satisfaction of her claim. In accepting this settlement the plaintiff intends to and will continue her claim against you, the second defendant, for the full amount of compensation to which she is entitled for the specific injuries, loss and damage caused by your negligence and breach of duty to her." (emphasis added)

106. In the foregoing manner, the plaintiff was drawing a clear distinction between (i) the injury loss and damage caused by the first named defendant and (ii) what her solicitor described as *"the specific injuries, loss and damage caused by* [the second named defendant's] *negligence and breach of duty to her".* There is no suggestion in the letter that it was not possible for the plaintiff to determine which of the defendants was responsible for the alleged wrongs causing alleged loss (as would often be articulated in letters of the 'O'Byrne' type). The letter proceeded as follows:

"We understand that the first defendant will seek indemnity from you in respect of the sums for damages and costs now offered. That issue, if pursued by the first defendant will form part of the hearing of this action in due course." (emphasis added)

107. Whilst the foregoing reflected the understanding of the plaintiff's solicitor on 18 December 2020, the state of the evidence before the court on 9 March 2023, when the hearing of this application took place, is that there had been no correspondence from the first named defendant's solicitors and no indemnity claim was made of the type anticipated by the Plaintiff's solicitor over 2 years earlier. The letter concluded as follows:

"The purpose of this letter is ***firstly*** *to advise you of this intended settlement of her claim against the first defendant; and* ***secondly*** *that at the conclusion of the proceedings the plaintiff will give you credit for the part payment of damages to be set off against the entire of the damages which we expect the Irish court will award to the plaintiff in full satisfaction of her claim and in respect of the full amount of the costs of these proceedings.*

Take notice therefore, that the plaintiff intends to accept the above offer of settlement in satisfaction of her claim against the first defendant only as a partial settlement offer claim, and that in doing so the plaintiff does not release you from the full extent of her claim for compensation which she will pursue in these proceedings against you and in respect of which you remain liable as a concurrent wrongdoer within the meaning of the Civil Liability Act 1961.

We suggest that you seek legal advice in relation to this matter…" (emphasis added)

108. As is clear from the foregoing, the plaintiff regarded both defendants as *"concurrent wrongdoers"* within the meaning of the Civil Liability Act 1961 which is, of course, national (as opposed to EU) legislation. As seen earlier, national rules do not affect the question of whether the Art. 8(1) exception can be relied upon. At para. 19 of his 26 November 2021 Affidavit, the plaintiff's solicitor averred inter-alia:

"Insofar as the second defendant asserts that there are distinct underlying legal bases for the claims against each defendant such that it cannot be said that claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings, the plaintiff contends that the defendants are concurrent wrongdoers within the meaning of the civil liability act 1961 and are responsible to the plaintiff in respect of the same damage. On that basis the first defendant retains the right to seek indemnity or contribution from the second defendant to recover some of the damages which she has paid to the plaintiff. Further the plaintiff's case against the first defendant is a claim in tort and her claim against the second defendant is a claim in tort and contract. In the circumstances, the plaintiff's claims against the defendants can be said to arise from the same situation of law." (emphasis added)

The plaintiff's claim

109. It seems to me essential to examine closely the plaintiff's claim as pleaded in the concurrent amended personal injury summons. Doing so reflects the dicta in *Handbridge Ltd* and *O'Keeffe v. Top Car*.

110. Paragraph 1 describes the plaintiff. Paragraph 2 describes the first named defendant, pleading that they were the owner and driver of a certain motor vehicle. Paragraph 3 describes the second named defendant as a registered medical practitioner specialising in neurosurgery, who carries on such practice in a private hospital known as Teknon Hospital in Barcelona, Spain. There is no dispute in relation to the foregoing.

111. Para 4 refers to the road traffic accident on 27 December 2013 involving the first defendant. At the risk of stating the obvious, the second defendant had no hand, act, or part in this incident, nor is that asserted. That paragraph ends with the plea that the first defendant's motor vehicle was *"…caused or permitted to violently collide with the rear of the motor vehicle in which the plaintiff was travelling, in consequence of which the plaintiff suffered personal injuries, loss, damage, inconvenience and expense, all of which continue".*

112. Paragraphs 5 to 14, inclusive, constitute amendments, by way of additions to the original writ, which were added in the context of the joinder of the second named defendant . Para. 5 begins:

"*The plaintiff attended the second named defendant as a private patient pursuant to contract made within the jurisdiction of this court for investigation and potential treatment of the injuries sustained in the subject accident. The trauma of the accident rendered symptomatic*

and aggravated the condition of EDS, and was instrumental in the development of systemic complications of the syndrome, including chronic joint pain, gastrointestinal problems and postural tachycardia syndrome as particularised below. The referral of the plaintiff to this defendant was made having regard to his professed skill and experience in the treatment of such disorders and the surgical resolution thereof.

113. It seems to me that what is pleaded goes no further than saying that (i) the accident caused by the first defendant aggravated the plaintiff's EDS; (ii) the plaintiff was referred to the second defendant; (iii) the second defendant held himself out as professing skill and experience in the treatment of complaints which the plaintiff was experiencing. It does not appear to me that the plaintiff pleads an explicit link between the road traffic accident and the surgery which the second defendant performed. It is certainly not pleaded that, as a consequence of the road traffic accident, the plaintiff required surgery in Spain. Nor is it pleaded that, were it not for the road traffic accident, the plaintiff would not have gone to Spain for surgery.

Two distinct sets of facts

114. The foregoing speaks to there being two very distinct sets of facts. The first is, of course, the facts concerning the road traffic accident which occurred in December 2013, in particular, the manner in which the first defendant drove a vehicle. The second set of facts relate to the surgery and the manner in which it was performed in 2018. There is also an interval of some 4 and a half years between the two sets of facts. Furthermore, it seems to me that there are 2 very distinct legal bases for the claims articulated against the first and second named defendant 's respectively. This is plain from the contents of the Concurrent Amended Personal Injuries Summons.

115. Paragraph 6 of the endorsement of claim pleads *inter-alia* that it was the professional duty of the second named defendant to deliver to the plaintiff the quality and standard of care she was reasonably entitled to expect, and which the second defendant held himself out as possessing as a specialist neurosurgeon and spinal surgeon. It is also pleaded that the foregoing was a term of that contract between the plaintiff and the second named defendant.

116. Paragraph 7 refers inter alia to the plaintiff attending the second defendant on the 27 November 2017; the apparent review of the plaintiff's radiological imaging and the carrying out of further imaging and clinical examination; the diagnosis by the second defendant; his advice and recommendation that the plaintiff undergoes cervical spinal fusion surgery to avoid the risk of spinal-cord compromise; and the second defendant advised that, in the absence of surgery in the short-term, the plaintiff was highly likely to suffer devastating neurological consequences due to her spinal instability.

117. At paragraph 8, it is pleaded that the plaintiff's mother and next friend relied upon the second defendant's professed skill and expertise and, as a consequence, the plaintiff, through her mother, agreed to undergo the proposed surgery.

118. Paragraph 9 refers to events of 8 March 2018. Para 10 refers to a review of the plaintiff by the second defendant on 25 September 2018 when, it is pleaded, the latter recommended lumbar fusion by way of further surgery;

119. At paragraph 11 is pleaded that, in further reliance on the professed skill and expertise of the second defendant, the plaintiff underwent further surgery on 4th October 2018;

120. Paragraph 12 pleads that the surgical procedures and each of them were not successful; that the plaintiff's condition of EDS has been seriously worsened and aggravated by the procedures; that her general health and well-being have been seriously damaged; and that the plaintiff has since ascertained by expert neurological assessment that the surgical procedures and each of them were unnecessary and wholly inappropriate.

121. At paragraph 13 it is pleaded that, by reason of the matters aforesaid, the plaintiff has suffered and continues to suffer catastrophic personal injuries, loss, damage and expense, all of which continue and are likely to cause the plaintiff to suffer lifelong disabilities and dependence. Paragraph 14 comprises the following plea:

"14. The plaintiffs said personal injuries, loss, damage, inconvenience and expense were caused and occasioned as a result of the negligence and/ or breach of duty (including breach of professional duty) and breach of contract on the part of the second named defendant, his servants and/or agents, in and about the investigation, diagnosis, management and surgical treatment of the plaintiff".

122. It is fair to say that the essence of the plaintiff's claim against the second named defendant is that he recommended and performed unnecessary surgery which caused damage to her. Nowhere is it pleaded that the first defendant caused the injuries stemming from the surgery performed by the second defendant.

123. Paragraph 15 (on internal pages 4–5) of the concurrent amended personal injury summons comprise a pleading of: "*Particulars of negligence and/or breach of duty and/or breach of statutory duty on the part of the first named defendant, her servants and/or agents".* As expected, these all relate to the manner in which the first defendant's motor vehicle was driven. They include, by way of example:

(a) "Colliding with the rear of the plaintiff's motor vehicle and thereby causing the plaintiff to suffer personal injuries, loss, damage, inconvenience and expense;

(b) Failure to have regard for the movement, presence or position of the plaintiff's motor vehicle on the public highway;

(c) Failure to concentrate on the roadway ahead of her;

(d) Failure to keep any or any proper lookout;

(e) Failure to slow down when approaching a roundabout;

(f) Failing to slow down at all or in time;

…

(i) Breach of the Road Traffic (Traffic and Parking) Regulations 1997…

(j) Breach of the Road Traffic Act 1961…

(m) Without prejudice to the foregoing, the plaintiff will rely on the doctrine of Res Ipsa Loquitor…"

Different legal wrongs asserted

124. These assertions of legal wrongs relate to an entirely different set of facts (namely the December 2013 RTA) than the facts giving rise to the alleged legal wrongs by the second defendant (namely the surgery). Very obviously, the legal wrongs pleaded against the first defendant are also radically different to those pleaded against the second defendant. These are set out on internal pages 5–7 of the Concurrent Amended Personal Injury Summons, and the following are examples:

(a) "Failed to exercise any or any proper or adequate professional care for the safety and well-being of the plaintiff herein in connection with her medical care whilst under his care;

(b) Failed to exercise due skill, care and diligence in the performance of his various tasks and duties;

(c) Failed to bring any sufficient experience and expertise to bear in the course of the investigation, diagnosis and treatment of the plaintiff;

(d) Failed to have any or any adequate regard to the plaintiff's medical history and previous investigations prior to deciding on a treatment plan for the plaintiff;

(e) Carried out surgical operations which both individually and collectively were unwarranted, unprofessional and inappropriate for the plaintiff's condition and circumstances;

(f) Failed to carry out any or any adequate review of the MRI scans of September 2016 and September 2017 prior to deciding on the appropriate course of management for the plaintiff;

(g) Failed to ascertain from the radiological material that there was no clinical basis for carrying out the said surgeries or either or both of them or any such surgery;

…

(j) Negligently advised the plaintiff that spinal fusion surgery was required to avoid spinal cord compromise and/or severe neurological symptoms;

(k) Failed to obtain informed consent to both of the surgical procedures undergone by the plaintiff in March 2018 and October 2018;

(p) Failure to adequately investigate the symptoms reported by the plaintiff after the initial surgery and at her six-month review appointment on 28 September 2018 and wrongly concluding that lumbar fusion was the appropriate cause [sic] *of action;*

(q) Failed to instigate any or any proper radiological investigations prior to performing lumbar fusion surgery on the 4 October 2018 so as to ensure that same was necessary and appropriate;

(t) Failed to make, record and keep proper clinical notes and records;

(v) Fell below the requisite standard of surgical skill and care which the plaintiff was entitled to expect and receive from a spinal surgeon…"

Independent actors

125. It will be recalled that at para. 83 in *Painer,* the Court made clear that the fact that defendants *"did or did not act independently"* may be a relevant factor in the national court determining if there is a connection between the claims/risk of irreconcilable judgments if those claims were determined separately. That factor arises in the present case where, at all material times, the first and second named defendants were entirely independent actors (indeed, they acted completely independent of each other at the remove of well over 4 years). There is no connection whatsoever between them, and there does not appear to me to be any single or continuous breach or act/omission disclosed by the facts or asserted by the plaintiff.

Not the same issues of fact or law

126. This reality seems to me to be reflected in the contents of the Amended Concurrent Personal Injuries Summons, where two very distinct alleged causes of action, arising out of two very distinct factual scenarios, over 4 years apart, are articulated. It will be recalled that (*per* the decision in *Roche*) in order that decisions may be regarded as *irreconcilable* the divergence must arise in the context of "*the same situation of law and fact*." Based on my review of the pleaded claim against the respective defendants, I am satisfied that the claims do *not* arise in respect of the same issues of fact or law.

Fact

127. The factual basis for the plaintiff's claim against the first named defendant is the RTA of 27 December 2013. The factual basis for the plaintiff's claim against the second defendant (whom he saw for the first time almost 4 years after the RTA, in November 2017) concerns the quality of the care provided by the second named defendant, *qua* medical professional, in particular, surgery carried out in 2018.

Law

128. Reflective of the very different *factual* matrix underpinning the claim against each defendant, the *legal* bases for the respective claims are entirely distinct. The plaintiff's claim against the first named defendant relates to alleged wrongs as regards the driving of a vehicle and is essentially a claim in tort. The plaintiff's claim against the second named defendant is one of clinical or professional negligence in the context of a pleaded contractual relationship. As noted earlier, and whilst it is not for this court to resolve, a 'live' issue in the claim by the plaintiff against the second named defendant is the question of whether Spanish law applies to the contract (again highlighting that the claim against the second named defendant arise in respect of very different issues of fact and law to those relating to the claim against the first defendant).

Overlap

129. Recalling this Court's decision in *Daly,* I am not satisfied that there is an *"overlap of issues as between the claims"* against the Irish defendant (driver of a car, in 2013) and the Spanish defendant (doctor who performed surgery, in 2018). Furthermore, and again unlike this Court's

findings in *Daly,* I am satisfied that the plaintiff's claim against the first defendant is exclusively in tort, whereas the claim against the second named defendant is for breach of contract, as well as professional negligence, with the plaintiff making a distinction in the pleaded claim between the effects on her of the different wrongs by the different defendants. I also take the view that, in addition to being claims having different legal bases, in the circumstances of the present case, it was *not* foreseeable for the second named defendant that the Plaintiff would pursue an action in this State (by means of proceedings relating to a RTA in Dublin in 2013) against a surgeon not domiciled here in respect of surgery (in 2018) which was not performed here (see the *dicta* in *Painer* and in *Cartel Damages*).

130. The foregoing views seem to me to be supported by the "*Particulars of Personal Injuries"* pleaded at section 5 of the Amended Summons (on internal pages 7 -9) which, for the sake of clarity, I now quote *verbatim* as follows:

"***5. Particulars of personal injuries***

As a result of the accident complained of herein the plaintiff sustained soft tissue injuries to her neck, back and shoulders.

The plaintiff attended her general practitioner complaining of pain in her shoulders, upper back and neck regions and was diagnosed with soft tissue injuries to those areas. She was prescribed anti-inflammatory and painkilling medication and was advised to attend physiotherapy.

On review approximately 7 months post-accident, the plaintiff had attended physiotherapy but continued to complain of a dull intermittent pain on both sides of her neck, in her shoulders and between her shoulder blades aggravated by prolonged sitting periods, lifting her schoolbag on her right shoulder and swimming. The plaintiff reported an inability to swing a rounders bat during PE at school without experiencing pain and was unable to participate in sports day activities including the wheelbarrow race and the piggyback race. She complained of stiffness in her neck and shoulder region every morning. The plaintiff was advised to attend further physiotherapy and continued to take paracetamol as required.

At approximately one year post-accident, the plaintiff complained of mid to lower back pain since in or around April 2014 which became more pronounced after she began secondary school. She reported difficulty carrying her schoolbag and complained of stiffness in her back and shoulders every morning. She also reported difficulty reaching to overhead cupboards. She had had to give up dance classes and had gained weight as she was not as active as she used to be. She continued to use Nurofen for pain relief.

At approximately 18 months post-accident the plaintiff had made minimal progress. She experienced pain in her neck, upper back and lower back on a daily basis. She had attended for a further physiotherapy but continued to complain of a dull persistent intermittent pain

on both sides of her neck, shoulders and between her shoulder blades. She also complained of lower back pain and generalised joint pain, clicking and weakness, in particular in her wrists and her knees.

The plaintiff was diagnosed with hypermobile Eher's Danlos Syndrome (EDS) in or around April 2015 which may be responsible for the plaintiff's joint pains. The plaintiff reported having no energy, feeling fatigued all the time and finding it difficult to do any of the exercises prescribed for the soft tissue injuries that she sustained in the subject accident. The medical opinion is that the plaintiff's prognosis is uncertain as with the EDS diagnosis as a contributory factor to her recovery process, she may be prone to flare ups of soft tissue pains in her neck, shoulder and scapular regions in the future. The plaintiff has attended a consultant orthopaedic surgeon, a rheumatologist, and a consultant paediatrician in relation to her EDS…" (emphasis added)

131. I pause at this juncture to note that all of the foregoing pleas were contained in the summons as *originally* issued against the first named defendant only. The following pleas were added into the Summons when amended in the context of the joinder of the second defendant:

"Following surgery on 8 March 2018, the plaintiff developed severe thoracic pain limiting comfortable breathing. Painkilling treatment was ineffective. The plaintiff was ultimately diagnosed with post thoracotomy syndrome resulting from inflammation of the intercostal nerves due to rib extraction. Intercostal blocks at 2 levels were administered under sedation, affording partial relief only. Following discharge the plaintiff's wounds required cleaning and bandaging every 24-hours. She was left with significant scars on her back following surgery. The plaintiff's ability to mobilise was affected. She started to require a wheelchair on a regular basis and was advised to use a motorised wheelchair with appropriate head and lumbar support to reduce stress on adjacent spinal levels which had not been fused. On her return to Ireland following surgery, the plaintiff continued to suffer from pain in her head, neck and shoulders and all the way down to her lower back. She experienced hip pain. She attended a pain specialist and received further nerve block injections. She began to experience photophobia and blurred vision. Following further surgery on 4 October 2018, the plaintiff began to suffer from regular seizures which could not be controlled by medication. By December 2018 she was suffering up to 6 seizures a day.

The medical opinion is that the plaintiff has undergone several dangerous and morbid operative procedures with no plausible indication in the absence of organic pathology or any evidence of cervical spine instability or tethered cord and that the effects of those surgeries are severe and permanent. The cervical spinal surgery in particular has taken away any movement in her neck and she no longer has the ability to turn her head.

Currently the plaintiff experiences near constant pain from her lumbar spine up through her cervical spine. She continues to suffer from near daily seizure type activity. The jerking motions she experiences during the seizures exacerbate her neck and back pain. She

requires constant supervision and assistance with activities of daily living. She has had repeated hospital admissions. She sleeps poorly. Her appetite is poor and she is very thin. She suffers from anxiety, panic attacks and low mood. She requires medication on a daily basis including Prozac, Gabapentin, Tizanidine, Arcoxia, Topamax, Diazepam, Oxycontin, Oxynorm and Zanaflex. She has been unable to return to education. Every aspect of her life has been negatively impacted by her condition, including the social, recreational and familial elements of her life. Her quality-of-life is poor. The plaintiff has suffered a complete and permanent vocational loss and will require care around the cloth for the remainder of her life. She will have further lifelong needs in respect of accommodation, transport, physiotherapy and psychological support." (underlining in Summon)

132. These *additional* particulars of personal injuries relate exclusively to the surgery carried out by the second named defendant (not to any act/omission of the first defendant). The symptoms and effects pleaded by the plaintiff are allegedly attributable to the second defendant's wrongs alone (in particularly the two surgeries performed by him). In other words, there is a clear distinction drawn, in the pleaded case, between the alleged effects of the RTA and the alleged effects of the surgery.

Post-RTA pain medication

133. By way of certain specific examples, the claim pleaded by the plaintiff is that she was dealing with pain attributed to the RTA by means of over-the-counter medication for pain relief, with specific to *paracetamol as required* and *Nurofen*.

Post-surgery pain medication

134. Regarding the post-surgery situation, the plaintiff pleads that she requires medication on a daily basis including *Prozac, Gabapentin, Tizanidine, Arcoxia, Topamax, diazepam, Oxycontin, Oxynorm* and Zanaflex

Post-RTA injuries

135. In terms of a further example, the claim made by the plaintiff with respect to her condition post-RTA includes: *"soft tissue injuries"; "dull intermittent pain…aggravated by prolonged sitting periods, lifting her schoolbag on her right shoulder and swimming"; "an inability to swing a rounders bat during PE at school without experiencing pain"; "stiffness in her neck and shoulder region every morning"; "dull persistent intermittent pain on both sides of her neck, shoulders and between her shoulder blades"; "lower back pain and generalised joint pain, clicking and weakness, in particular in her wrists and her knees"; "having no energy, feeling fatigued at all times and finding it difficult to do any of the exercises prescribed for the soft tissue injuries that she sustained in the subject accident"* (emphasis added)

Post-surgery injuries

136. Materially *different* injuries are attributed to the surgery carried out by the second defendant, in that the plaintiff pleads *inter alia* the following personal injuries, loss and damage: "*severe*

thoracic pain limiting comfortable breathing"; "post thoracotomy syndrome resulting from inflammation of the intercostal nerves due to extraction"; "significant scars on her back following surgery"; "plaintiff's ability to mobilise was affected"; "advised to use a motorised wheelchair with appropriate head and lumbar support to reduce stress on adjacent spinal levels which had not been fused"; "hip pain"; "photophobia and blurred vision"; "up to 6 seizures a day"; "the plaintiff has undergone several dangerous and morbid operative procedures with no plausible indication in the absence of organic pathology or any evidence of cervical spine instability or tethered cord"; "the cervical spinal surgery in particular has taken away any movement in her neck and she no longer has the ability to turn her head"; "she requires constant supervision and assistance with activities of daily living"; "She sleeps poorly"; "Her appetite is poor and she is very thin"; "She suffers from anxiety, panic attacks and low mood. She requires medication on a daily basis"; "She has been unable to return to education. Every aspect of her life has been negatively impacted."

137. In light of the pleaded case, it does not seem to me that the plaintiff pleads that the *same* damage was suffered as a result of the negligence/breach of duty of *both* of the defendants. Rather, a clear distinction is drawn in the pleaded case between the *effects* on the plaintiff of the alleged wrongs by the first defendant, and those of the second named defendant, respectively. The final paragraphs of the "*particulars of personal injuries*" which appeared in the *original* summons against the first defendant alone state:

"By reason of the matters aforesaid the plaintiff has suffered and continues to suffer physical pain, mental distress, discomfort and inconvenience. Further, the plaintiff has suffered a diminution of her enjoyment of life, together with a loss of amenity.

The onset of further adverse equality cannot be ruled out and the plaintiff reserves the right to deliver further and better particulars of personal injuries on or prior to the date of hearing".

138. No Defence has yet been delivered (in circumstances where the Appearance was filed for the purpose of challenging jurisdiction) but it is clear from the submissions by counsel for the Second named defendant that the Plaintiff's claim against him is denied.

Inexorability

139. It is submitted on behalf of the plaintiff that "*there is a continuum of events which led inexorably to Spain".* Regardless of the skill with which that submission is made, it seems to be true only with the benefit of hindsight. It is useful to take the plaintiff's position, *per* her pleaded case, and ask whether, as of, say, December 2014 (i.e. 12 months after the accident) was it inexorable or inevitable that proceedings would be issued against Spanish surgeon? The answer seems to me to be decidedly in the negative. There was nothing in the then factual matrix which gave rise to any conceivable claim.

140. If the same question was posed in 2015, 2016, 2017, the answer would still have been in the negative. This is for the simple reason that the facts giving rise to this very distinct claim, with very different alleged effects on the plaintiff, and a very different legal basis, had yet to occur. Returning to the topic of foreseeability, this fortifies me in the view that, when the second named defendant provided medical advice and carried out surgery in 2018, the second named defendant could not reasonably have foreseen that allegations of breach of contract and medical negligence with respect to his acts or omissions in Barcelona, would be articulated in a claim in Ireland concerning the allegedly negligent way in which a vehicle was said to have been driven in Dublin in 2013.

141. Recalling the *Land Berlin* decision, I am not satisfied that both claims were "*directed at the same interest"* (see *Land Berlin* para. 47). Rather, one claim is directed at the injuries loss and damage caused by the first defendant's negligent driving, whereas the other is directed at alleged breach of contract and medical negligence in respect of surgery performed four and a half years later. Nor is it a situation where it is "*necessary to determine on a uniform basis*" (*Land Berlin* para. 48) the right of the plaintiff to receive compensation from each defendant in respect of what are, in my view, very different claims. Furthermore, I take the view that both claims do not stem from "*the same factual and legal situation*" (*Land Berlin* para. 45). On the contrary - and to borrow a phrase from the decision of Flood J in *Top Car Limited* – the plaintiff's claims against these two defendants "*are dependent on entirely different facts which arise under entirely different circumstances at an entirely different time".* Returning to the chronology:

142. On **2 February 2021** the plaintiff's claim against the first defendant was struck out. The order made by this court (Cross J) of 2 February 2021 states inter alia:

> *"And it appearing that a settlement has been reached herein of the plaintiff's claim against the first named defendant*
>
> *By consent IT IS ORDERED that the first named defendant do pay to the plaintiff the costs of the action to include reserved costs and costs of discovery (if any) such costs to be adjudicated in default of agreement between the parties and that this action as against the first named defendant be struck out of the List and that the action as against the second named defendant be adjourned to the General List …"* (emphasis added)

143. On **22 February 2021** the second defendant was formally served with proceedings in Barcelona Spain. It is common case that before the second named defendant was served, the plaintiff had already settled her claim against the first named defendant.

144. On **29 March 2021,** the second named defendant entered a conditional Appearance to contest jurisdiction.

145. To conclude the chronology, the plaintiff's solicitor has made *inter-alia* the following averments at para. 22 of his 26 November 2021 affidavit:

*"22. It has only lately come to the plaintiff's attention that she likely has an action against the insurer of the second defendant directly, as a beneficiary of the contract of insurance between the second defendant and his insurer, and that that action can be brought where the plaintiff is domiciled. Would (sic) be entitled to sue the insurer in the courts of Ireland. The plaintiff is now actively pursuing this potential action and in this regard I beg to refer to a true copy of the letter requesting details of the second defendant's insurer sent to the second defendant's solicitors on the **26 November 2021**…"* (emphasis added)

146. The foregoing is not an issue which fell to be determined in the present application.

Decision summarised

147. The evidence before the court allows for a finding of fact that, at the time the second defendant was joined into the proceedings, the plaintiff's claim against the first defendant was still 'live' (and, therefore, the first defendant was then the anchor defendant). I can identify no principle in *Reisch* to support the proposition that a settlement by the plaintiff of her claim against the first defendant, subsequent to the joinder of the second named defendant, disentitled her to rely on Article 8 (1). Indeed, such a finding would seem to me to rob the Regulations of their efficacy and undermine a central objective of same. Nor is there any allegation made that the sole intention of the plaintiff is to remove the second defendant from the jurisdiction of the Spanish courts.

148. However, the fact that the plaintiff's claim has settled against the anchor defendant does seems to me to be a factor which this court is entitled to take into account, and one which undermines the plaintiff's ability to rely on Art. 8(1). For the avoidance of doubt, however, even if this Court took no account whatsoever of the settlement by the plaintiff of her claim against the first defendant, the outcome of this application would be the same i.e. for the reasons explained in this judgment, I am satisfied that the plaintiff has *not* discharged the onus of demonstrating unequivocally that she comes within the Art.8(1) exception.

149. If the skill with which submissions were made on behalf of the plaintiff determined the outcome of this application, the result might have been in doubt. However, well-established principles which emerge from relevant jurisprudence (which counsel for the second named defendant outlined so comprehensively), once applied to the particular facts in the present case, compels me to grant the relief sought at para. 2 of the second named defendant's Motion which issued on 3 June 2021, i.e. setting-aside and striking-out the proceedings against the second defendant for want of jurisdiction.

150. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless*

the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

151. In terms of a preliminary view on the costs question, the second named defendant has been *entirely successful*. Section 169 (1) of the Legal Services Regulation Act, 2015 ("the 2015 Act") provides as follows:

"169 (1) A party who is ***entirely successful*** *in civil proceedings* ***is entitled to an award of costs*** *against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*

(a) conduct before and during the proceedings

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation".

152. I have not identified any fact or circumstance which would merit a departure from what is, of course, the 'normal' rule (i.e. that 'costs' should 'follow the event'). The parties should correspond with each other, forthwith, regarding the appropriate form of order including as to costs which should be made. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 14 days of the start of Easter Term (i.e. by Friday 28 April 2023). In the event of agreement on the form of final order reflecting this decision, within the same period, a draft should be submitted to the Registrar as soon as possible.