

APPROVED

[2023] IEHC 297



THE HIGH COURT

2020 No. 8170 P

BETWEEN

ANN CASEY

PLAINTIFF

AND

**REDSPOKES LTD
TRADING AS REDSPOKES ADVENTURE TOURS**

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 June 2023

INTRODUCTION

1. This judgment addresses the question of whether the Irish Courts have jurisdiction to entertain the within proceedings. The proceedings take the form of a personal injuries action arising out of an accident which is alleged to have occurred while the plaintiff was participating in a cycling holiday organised by the defendant. The defendant is a company domiciled in the United Kingdom

NO REDACTION REQUIRED

and the accident occurred in a third country, namely, Sri Lanka. The only circumstance which might, potentially, confer jurisdiction upon the Irish Courts is the fact that the plaintiff herself is domiciled in the Irish State.

2. The allocation of jurisdiction is governed by Regulation (EU) No 1215/2012 (otherwise, the recast Brussels I Regulation). The principal dispute between the parties is whether the special rules governing jurisdiction over consumer contracts apply to the proceedings. The resolution of this dispute turns largely on the question of whether the defendant can be said to have *directed* its commercial activities to the Irish State, i.e. the Member State of the plaintiff's domicile.
3. The plaintiff relies, *inter alia*, on the content of the defendant's website, and upon the fact that the defendant accepted her booking through its website notwithstanding that she had provided an address in the Irish State, as demonstrating that the defendant had manifested its intention to establish commercial relations with consumers from the Irish State.
4. For completeness, it should be recorded that the plaintiff is no longer pursuing an objection that the defendant delayed in issuing its motion contesting jurisdiction.

LEGAL FRAMEWORK

5. Jurisdiction over consumer contracts is governed by Section 4 of Regulation (EU) No 1215/2012. This provides that a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled, or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled. This represents a

derogation from the general rule that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State (Article 4).

It also represents a derogation from the special rules governing jurisdiction in contractual disputes *simpliciter*, i.e. that in matters relating to a contract, proceedings should be pursued before the courts for the place of performance of the contractual obligation (Article 7).

6. Insofar as relevant to the present proceedings, a consumer contract includes a contract which has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
7. (The special rules on jurisdiction do not apply to a contract of transport *other than* a contract which, for an inclusive price, provides for a combination of travel and accommodation. The defendant has conceded, solely for the purpose of the present application, that the contract between it and the plaintiff is a consumer contract).
8. The leading judgment on what is meant by the phrase "*directs such activities to*" the Member State of the consumer's domicile is that of the Court of Justice of the European Union in Joined Cases C-585/08 and C-144/09, *Pammer*, EU:C:2010:740. This judgment concerned the precursor to Regulation (EU) No 1215/2012, namely the original Brussels I Regulation, Regulation (EC) No 44/2001. The judgment is nevertheless directly relevant in that the wording of the equivalent provisions of the recast Brussels I Regulation is almost identical.

9. The CJEU held in *Pammer* that a trader cannot be said to be *directing* its commercial activities to other Member States merely because its website is accessible in Member States other than that in which the trader concerned is established. Something more is required: the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the claimant consumer's domicile.
10. The CJEU held that the type of evidence capable of establishing that an activity is "*directed to*" the Member State of the consumer's domicile includes all clear expressions of the intention to solicit the custom of that State's consumers. The CJEU then set out a non-exhaustive list of items of evidence which, possibly in combination with one another, are capable of demonstrating the existence of an activity "*directed to*" the Member State of the consumer's domicile. This list includes, relevantly, the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example ".*de*", or use of neutral top-level domain names such as ".*com*" or ".*eu*"; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.
11. The CJEU went on to hold that the following does not represent evidence of intention: the mention on a website of the trader's email address or geographical address, or of its telephone number without an international code. Mention of such information does not necessarily indicate that the trader is directing its

activity to one or more other Member States, since that type of information is, in any event, necessary to enable a consumer domiciled in the Member State in which the trader is established to make contact with it.

12. If the website permits consumers to use a different language than those generally used in the Member State from which the trader pursues its activity, or to use a different currency, then the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States.
13. The principles in *Pammer* have been applied in a number of judgments of the Irish Courts including, most relevantly, the following two judgments of the High Court.
14. The first in time is the judgment of the High Court (Kearns P.) in *Harkin v. Twopik* [2013] IEHC 351, [2014] 1 I.L.R.M. 51. The proceedings there involved a contractual claim in respect of a medical procedure which had been carried out in Poland. The court held that there was no evidence to indicate that the defendants had directed their activities in any specific way to the Irish market. The defendants' website had a United Kingdom domain name; the contact telephone number provided to the plaintiff was an English telephone number not preceded with an international dialling code; and the currency dealt with had been not Euro, but Sterling. The court attached weight to the fact that the medical procedure, the subject of the claim, had been performed outside the Irish State.
15. The question of jurisdiction over consumer contracts came before the High Court once more in *McDonald v. AZ Sint Elisabeth Hospital* [2014] IEHC 88, [2014] 1 I.R. 311. The contractual claim, again, arose out of a medical

procedure carried out abroad (on the facts, the procedure had been performed in Belgium). The High Court (Hogan J.) held that the Irish Courts had jurisdiction to entertain proceedings against the hospital. It was held that the web-based promotional material had been clearly directed at both the United Kingdom and Ireland. The promotional material had been written in English and not in Flemish or French. The promotional material had indicated a consultation address in Dublin at a named medical centre and prospective customers had also been supplied with an Irish telephone number. The promotional material also contained a testimonial from an Irish-based patient and reference was made to the possibility of pre-travel consultations in Dublin and Cork. The prices for the initial consultation had been offered in both Sterling and Euros.

DISCUSSION AND DECISION

16. As appears from the above case law, one of the principal issues to be considered in allocating jurisdiction is whether the trader has manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the claimant consumer's domicile. There was some debate at the hearing before me as to whether intention refers to the trader's *subjective* intention, or, alternatively, refers to the trader's *objective* intention as evidenced by its outward actions. In particular, the defendant sought to argue that it did not intend to actively target consumers in the Irish State. It has been explained on affidavit that whereas the defendant does pay to promote its website in internet search results, it does not target Ireland as part of any search engine optimisation.

17. With respect, the logic of the judgment in *Pammer* is that it is the objective intention of the trader which must be considered principally. The CJEU's non-exhaustive list of the items, which might evidence an intention to establish commercial relations with consumers from one or more other Member States, consists entirely of outward actions. The list looks to how the trader presents to prospective consumers. The list includes items, such as, testimonials from international consumers or prices quoted in foreign currency: these are all factors from which it can legitimately be inferred that the trader is directing its commercial activities to one or more other Member States. A trader cannot rebut this inference by having an office manager of the company baldly state on affidavit that it did not intend to *actively* target international consumers.
18. In the present case, an intention on the part of the defendant to establish commercial relations with consumers from the European Union, including, relevantly, consumers from the Irish State, is apparent from the following factors.
19. First, the group cycling tours organised by the defendant take place overseas, i.e. outside the United Kingdom. It is clear from the standard booking conditions that the participants had to join the tour locally and that the defendant does not regard its responsibility as having commenced until the appointed time at the designated meeting point. There is thus an international dimension to the commercial activity. Unlike the position in the two High Court decisions cited earlier, consumers were not availing of a service provided in the country where the relevant trader was domiciled.
20. The defendant did not arrange air transport to the destination country (here, Sri Lanka). Importantly, however, the trader did arrange to collect participants from

the airport in the destination country. The defendant has sought to suggest, on affidavit, that the “*actual booking process is in no way customised to accommodate a person’s nationality or place of residence*”. With respect, this suggestion overlooks the fact that the defendant did facilitate the plaintiff in travelling from Ireland to the extent that it arranged for land transport from the airport in Sri Lanka. This required co-ordination with the plaintiff’s flights. Indeed, prior to the making of the booking, the defendant had agreed, in principle, to allow the plaintiff to join the tour late, so as to allow for the possibility of her purchasing a cheaper flight on a different date. (See email exchange of 6 September 2018).

21. The fact that the defendant did not arrange air transport to the destination country meant that there was no material distinction between the position of a prospective participant domiciled in the United Kingdom and one domiciled in the Irish State. Both would have to arrange their own air transport. It was not the case that the service commenced with participants travelling on a flight originating in the United Kingdom which had been organised by the defendant. The defendant’s service cannot be said, therefore, to have been principally, or even preferentially, directed to consumers in the United Kingdom. As stated in the “*trip dossier*” provided to the plaintiff, the defendant appreciates that “*people join redspokes tours from all over the world*”.
22. This leads to the second factor evidencing intention. The defendant’s website displays testimonials from individuals who have previously participated in the group cycling tours organised by the defendant. In each instance, the testimonial expressly identifies the nationality of the participant. It is common case that, as of the time the plaintiff accessed the website, these testimonials had included

one from an Irish person. The existence of such testimonials can only be understood as intended to convey the cosmopolitan nature of the group holidays organised by the defendant, with a view to encouraging other individuals from those Members States to participate in future tours. Any prospective consumer browsing the website would anticipate that the nationalities of participants in any group cycling tour purchased by them would similarly be diverse, and that the group would not be confined to persons from the defendant's country of domicile, i.e. the United Kingdom.

23. Thirdly, a person browsing the defendant's website had the option of having the prices quoted in currencies other than Sterling. The alternative currencies included, relevantly, the Euro. The existence of this option indicates that the group holidays provided by the defendant are directed to a market beyond the United Kingdom, including countries, such as the Irish State, which use the Euro. The provision of the currency convertor on the website can only be understood as having been intended to encourage non-UK domiciles to purchase a group cycling tour from the defendant by allowing them to benchmark the cost in their own currency. It is this factor which supports the inference that the defendant was directing its commercial activities to, *inter alia*, the Irish State. This inference is not rebutted by the fact that the defendant required that all payments be made in Sterling and did not operate any foreign currency bank accounts. The form of payment only occurs after a consumer has already committed to purchasing a holiday from the defendant. As explained in *Pammer* (at paragraph 92) what is to be ascertained is whether, before the conclusion of any contract with the consumer, it is apparent from the defendant's website and the defendant's overall activity that the defendant was envisaging doing business

with consumers domiciled in the Member State of the consumer's domicile, in the sense that it was minded to conclude a contract with them.

24. Fourthly, some weight can be attached to the fact that the booking process operated by the defendant requires that a prospective consumer, prior to making a booking, must first create an online account. The online form contains fields which require the consumer to identify their city and country of residence and to provide a postal code. The practical effect of this is that the defendant would have been on notice of the fact that the plaintiff was at least resident (if not necessarily domiciled) in the Irish State at the time it accepted her booking.
25. It has been suggested by academic commentators that knowledge by a trader of the fact that a consumer is domiciled in, and acting from, a foreign State can be considered as the clearest expression of its intention to "*direct its activity*" to the foreign State in question. Both sides made reference to the following passage from Dickinson and Lein, *The Brussels I Regulation Recast* (Oxford University Press, 2015) at §6.54:

"According to the CJEU, the trader's willingness to target consumers domiciled in a foreign State must be clear from the existing evidence 'before the conclusion of any contract with the consumer'. Nevertheless, in e-commerce, the manifestation of consent typically takes place through confirmation of an order; confirmation is usually followed (or sometimes replaced) by the sending of goods or provision of services ordered. In all of these cases, the trader expresses, through its active behaviour, its willingness to conclude the contract with that specific consumer. If the trader is aware of the fact that the consumer is domiciled in, and acting from a foreign State, his dealings with that consumer and *a fortiori* consent to the contract can be considered as the clearest expression of its intention to 'direct its activity' to the foreign State in question, and this even though it had not specifically targeted this market from the outset. This interpretation leads to a fair result for the parties involved."

*Footnotes omitted

26. It is a question of degree as to whether a trader is directing their commercial activities to a particular Member State. It is not necessary for a trader to refuse ever to enter into contractual relations with a person in a particular State before it can be said that they are not directing their commercial activities to that State. However, where a trader, as in the present case, is not only on express notice of the fact that the consumer is resident in and acting from the Irish State, but also took steps to facilitate the consumer travelling from Ireland to join the group cycling holiday, i.e. by arranging land transport from the airport in Sri Lanka, this constitutes evidence of intention.
27. Finally, the contact telephone number and top-level internet domain name are largely neutral factors in the present case. Whereas the contact telephone number on the website does include the international dialling code, the domain name is a national one: “.co.uk”. These two *indicia* tend to cancel each other out. It seems from the material exhibited that communications between prospective consumers and the defendant take place mainly by email correspondence, rather than telephone. The use of a national domain name is probably of less practical significance nowadays than it was when *Pammer* was decided in 2010 given that most consumers are likely to land on a website by way of an internet search rather than by typing in the domain name.

CONCLUSION AND PROPOSED FORM OF ORDER

28. The Irish Courts have jurisdiction, pursuant to Section 4 of Regulation (EU) No 1215/2012, to entertain the plaintiff’s claim for breach of a consumer contract. In particular, the contract meets the criteria specified at

Article 17(1)(c). It follows, therefore, that the defendant's motion to dismiss the proceedings must be refused.

29. As to legal costs, my *provisional* view is that the plaintiff, having been entirely successful in resisting the motion, is entitled to recover her costs as against the defendant, in accordance with the default position under Section 169 of the Legal Services Regulation Act 2015. Any such costs would be subject to adjudication pursuant to Part 10 of that Act. A stay would be placed on the execution of the proposed costs order pending the final determination of these proceedings.
30. If the defendant wishes to contend for a different form of costs order than that proposed, it should serve and file written submissions within 14 days. The plaintiff will have 14 days thereafter to reply. This matter will be listed, for final orders, on Monday 17 July 2023 at 10.30 AM.

Appearances

Pearse Sreenan, SC and Brian Hallissey for the plaintiff instructed by Cantillon Solicitors

Brendan Savage for the defendant instructed by Kennedys Solicitors LLP

Approved
Gemma S. Mans