

**APPROVED  
NO REDACTION NEEDED**



**THE COURT OF APPEAL**

**CIVIL**

**Appeal Number: 2023 234**

**Costello J.**

**Neutral Citation Number [2023] IECA 291**

**Allen J.**

**O'Moore J.**

**BETWEEN**

**CARLYLE AVIATION MANAGEMENT LIMITED**

**AND**

**SASOF III (D) AVIATION IRELAND DAC**

**PLAINTIFFS**

**AND**

**LLOYD'S INSURANCE COMPANY S.A., INGOSSTRAKH INSURANCE  
COMPANY, CONVEX EUROPE S.A., AIG EUROPE S.A., HDI GLOBAL  
SPECIALTY SE SWEDEN, LIBERTY MUTUAL INSURANCE EUROPE SE,  
ALLIANZ GLOBAL CORPORATE AND SPECIALTY SE, LA RÉUNION**

**AÉRIENNE**

**AND**

**AXIS SPECIALTY EUROPE SE TRADING AS AVIABEL BELGIUM**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Allen delivered on the 6<sup>th</sup> day of December, 2023.**

*Introduction*

1. On this day last week the court heard the appeal by Ingosstrakh Insurance Company, a Russian Federation corporation (*“the appellant”*) against the judgment and order of the High Court (McDonald J.) of 13<sup>th</sup> July, 2023 refusing a motion for an order pursuant to O. 12, r. 26 of the Rules of the Superior Courts to set aside the service of notice of the plenary summons for want of jurisdiction.

2. In the ordinary way, my colleagues and I had read and considered the voluminous papers – three folders of papers and the two folders of authorities – filed on behalf of the appellant in advance, and at the conclusion of the oral hearing we were quite satisfied that we could give our decision that the appeal failed and must be dismissed. I now give my reasons for that decision.

*The action*

3. By the action, commenced by plenary summons issued on 5<sup>th</sup> April, 2023, the plaintiffs (*“the respondents”*) claim declarations that they are entitled to indemnity on foot of two insurance policies – a War Risks Policy and an All Risks Policy – in respect of the claimed loss of two Boeing 737-800 aircraft which were leased to Joint Stock Company NordStar Airlines (*“NordStar”*) – Russian Federation company – and are said to have been seized by the Russian Federation following the invasion of Ukraine; payment of the agreed value of the aircraft, less an agreed excess; and damages, *inter alia* for breach of contract,

negligence and breach of duty, conspiracy, intentional interference with economic relations and causing loss by unlawful means.

4. The appellant is one of nine insurance companies who are sued as being severally liable for various percentages of the loss claimed.

5. Before the summons was issued, an *ex parte* application was made on behalf of the respondents to the High Court for an order pursuant to O. 11, rr. 1(e)(iii), (f) and (h) of the Rules for liberty to issue and serve the then intended proceedings on the appellant outside the jurisdiction, and for an order pursuant to O. 10, r. 1 permitting substituted service of the proceedings by e-mail; and an order accordingly was made by the High Court (McDonald J.) on 31<sup>st</sup> March, 2023.

6. All of the defendants bar the appellant are E.U. domiciled. The summons was indorsed with an omnibus indorsement to the effect that:-

*“The High Court has power to hear and determine the claim of the plaintiff as against each of the defendants under and by virtue of Articles 4(1), 7(1), 8(1), 11(1)(a), 11(1)(b), 11(1)(c), 11(2), 15(5), 16 and/or 25(1) of Regulation (E.U.) No. 1215/2012 of 12 December 2012 on ‘Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.’ The High Court therefore has jurisdiction and ought to assume jurisdiction in relation to each of the defendants. There are no proceedings pending between the plaintiffs and any of the defendants concerning the same causes of action in any other Member State of the European Union.”*

7. If a purist draftsman would have included a separate indorsement as to jurisdiction in respect of each of the defendants, or, perhaps, separate indorsements in respect of those defendants who are domiciled in the E.U. and in respect of the appellant, who is not, anyone

with a passing familiarity with Regulation (E.U.) No. 1215/2012 (*“Brussels I Recast”*) would know that of the provisions listed in the omnibus indorsement, only Article 25(1) applies to a defendant who is not domiciled in the E.U. and does not have a branch, agency or other establishment in the State. The summons shows on its face that the appellant’s registered office is in Moscow and there is no suggestion that it is domiciled in Ireland or that it has a branch, agency or other establishment here.

**8.** The respondents’ position was and is that the High Court has jurisdiction to hear and determine its claims against the appellant under Article 25 (1) of Brussels I Recast but made the application under O. 11 from an abundance of caution.

**9.** Following the issue of the summons on 5<sup>th</sup> April, 2023, notice of the proceedings was given to the appellant by e-mail of 12<sup>th</sup> April, 2023. A conditional appearance was entered on behalf of the appellant on 5<sup>th</sup> May, 2023 for the purpose of contesting jurisdiction, and the motion the subject of this appeal was issued on behalf of the appellant on 6<sup>th</sup> June, 2023.

*The motion to set aside service*

**10.** The appellant’s motion to set aside service was grounded on an affidavit of Mr. Dmitri Makelov, head of the appellant’s department of analytics and general legal practice. In the High Court, it was common case that although the appellant was the moving party, the onus was on the respondents to justify the service, which they did by filing a short replying affidavit of Mr. Tom Casey, solicitor, which was filed on 16<sup>th</sup> June, 2023, and by relying on the affidavits of Mr. Marcus Miller, a director of the second respondent, filed on 27<sup>th</sup> March, 2023 and Mr. Enda Hurley, solicitor, filed on 30<sup>th</sup> March, 2023, in support of the *ex parte* application.

**11.** The onus having been on the respondents to justify service out of the jurisdiction on the appellant, the logical starting point is to look at the respondents’ evidence and arguments.

**12.** Mr. Miller started by describing all of the parties. The first respondent is a Bermuda registered company which is registered in Ireland as an external company and has a registered address at Burlington Road, Dublin. The second respondent is an Irish registered designated activity company and has its registered office at the same address at Burlington Road. Each of the defendants other than the appellant is incorporated under the laws of a European Union country and has its registered office in the place of its incorporation. The appellant, as I have said, is a company incorporated under the laws of the Russian Federation and has its registered office in Moscow.

**13.** In section B of his affidavit, Mr. Miller set out particulars of the two aircraft and the two insurance policies, which he identified as:-

*“(a) A policy of ‘Excess Aircraft Hull War and Allied Perils Insurance’ bearing policy number 21V641068084 (the **War Risks Policy**); and*

*“(b) A policy of ‘Excess Aircraft Hull All Risks Insurance’ bearing evidence of cover number 21V641068083 (the **All Risks Policy**).”*

**14.** Mr. Miller deposed that the defendants and the respondents’ insurance brokers had refused to provide the respondents with copies of the full terms and conditions of the insurance but he exhibited two bundles of documents, each of about 114 pages, said to record the creation of the War Risks Policy and the All Risks Policy.

**15.** The documents exhibited by Mr. Miller included two documents called *“Evidence of Cover”* issued by the London brokers which – setting out the policy numbers – confirmed that that had effected Excess Aircraft Hull War and Allied Perils Insurance and Excess Aircraft Hull All Risks cover for the aircraft subject to a number of conditions. In each case, the Evidence of Cover identified the *“INSURED”* as each of the respondents, each with the

same address at Burlington Road, Dublin, and under the heading “*CHOICE OF LAW AND JURISDICTION*” provided:-

*“This insurance shall be governed by and construed in accordance with the law of the Insured’s country of domicile, as per the Address shown herein, and each party agrees to submit to the exclusive jurisdiction of the Insured’s country of domicile.”*

- 16.** The Evidence of Cover in respect of All Risks sets out the percentage shares of the risk for which the insurers were to be severally liable.
- 17.** In section C of his affidavit, Mr. Miller dealt with the invasion of Ukraine and subsequent developments, setting out that the respondents had first requested NordStar to relocate the aircraft to Spain and then, when they failed to comply with the instruction, issued Notice of Default and Termination of Leasing. Mr. Miller set out a number of legislative and administrative measures taken by the Russian authorities and various correspondence by which the respondents had sought to recover the aircraft.
- 18.** In section D, Mr. Miller deposed that the second respondent (the owner of the aircraft) had been deprived of the possession and free use of the aircraft and asserted that the losses were covered by the insurance policies. He went on to set out the respondents’ efforts to obtain a copy of the policies and said that although they had not been provided, the respondents were satisfied that the defendants were liable on foot of them and had demanded payment. The exhibits to Mr. Miller’s affidavit ran altogether to upwards of 600 pages.
- 19.** Mr. Miller’s affidavit was supplemented by an affidavit of Mr. Enda Hurley, the respondents’ solicitor, who set out to address the requirements of O. 11, rr. 2, 3 and 5.
- 20.** Mr. Hurley deposed that the Evidence of Cover documents exhibited by Mr. Miller showed that each of the policies was governed by Irish Law and subject to the exclusive jurisdiction of the Irish courts and that he believed that each of the respondents had a good

cause of action. He spelled out that the value of the claim was US\$13,529,926 and said – as the Evidence of Cover document showed – that the appellant was liable to pay 8.5% of any amount paid on foot of the All Risks Policy.

**21.** As to the comparative convenience and cost of proceedings on Ireland or Russia, Mr. Hurley pointed to the choice of law and jurisdiction clauses; to the fact that the claim against the appellant, if tried in Ireland, would be tried in parallel to the claims against the other eight defendants; and – in some detail – to the prevailing circumstances and relations between the European Union and Russia which – he suggested – were such that it was not practical, let alone comparatively more convenient, that the proceedings be conducted in Russia.

**22.** By order of the High Court made on 31<sup>st</sup> March, 2023 the respondents were given leave to issue and serve the proceedings on the appellant pursuant to O. 11, r. 1(e)(iii) – an action to enforce a contract which by its terms or implication was to be governed by Irish law – O. 11, r. 1(f) – an action founded on a tort committed within the jurisdiction – and O. 11, r. 1(h) – that the appellant was a necessary or proper party to the action against the other defendants.

**23.** As I have said, the appellant’s motion to set aside service was grounded on the affidavit of Mr. Makelov. Mr. Makelov averred that the proceedings were brought in respect of an insurance policy which required that proceedings be issued in the Russian Federation.

**24.** Mr. Makelov went *seriatim* through the various provisions of Brussels I Recast identified in the indorsement of jurisdiction on the summons averring, on advice, that the respondents’ reliance on them was misplaced. Specifically, he averred that the appellant had not entered an agreement providing for Irish jurisdiction but had entered an agreement providing for Russian jurisdiction, and had not entered an agreement to prorogue jurisdiction.

**25.** Mr. Makelov identified Mr. Hurley's averment that the Evidence of Cover documents exhibited by Mr. Miller record that the policies were governed by Irish law and subject to the exclusive jurisdiction of the Irish court. This, he said, was a matter for legal submission. He did not disagree with it or say that he had been advised that Mr. Hurley was wrong.

**26.** As to O. 11, r. 1(f), Mr. Makelov suggested that there was no factual basis for any claim but he did point to Mr. Hurley's averment that "*the intended defendants, whether in concert or individually, have caused the intended plaintiffs to suffer loss and/or damage by inter alia refusing to engage with the intended plaintiffs in respect of their claims on foot of the policies.*"

**27.** As to whether the appellant was a necessary or proper party to the proceedings, Mr. Makelov said that this was a matter for legal submission. He went on to assert that the appellant was neither a necessary nor a proper party to the proceedings but did not say why.

**28.** At para. 22 of his affidavit, Mr. Makelov turned to a document called Operator's Policy, Insurance Contract No. 494-121918/21. I do not want to get ahead of myself but he did not say what this was, or how it tied in to what Mr. Miller and Mr. Hurley had said as to the terms governing the respondents' insurance policies, or how it tied in – or did not tie in – with the Evidence of Cover in respect of the All Risks Policy. Mr. Makelov did not say anything about reinsurance or the relationship – if any – between the appellant and the other defendants.

**29.** What was exhibited by Mr. Makelov as a "*a copy of this policy*" was an 81 page document in the Russian language, followed by what appears to be a 72 page English translation. It identifies the policyholder as NordStar and the insurer as the appellant. The contract period tallies with that relied on by the respondents and the respondents' aircraft are



among thirteen aircraft listed on the policy. In a long list of “*Additional insured:*”, the second respondent is listed “*as lessor,*” in respect of each of its aircraft.

**30.** The Operator’s Policy – as Mr. Makelov deposed – provides for a mandatory pre-trial settlement procedure and thereafter for arbitration, and, by the incorporation of Chapter 6 of the appellant’s Rules of Voluntary Aircraft Insurance, that:-

*“All other conditions not stipulated by these Rules are governed by the legislation of the Russian Federation. All disputes under the insurance contract are resolved through negotiations, and if the parties do not reach an agreement, disputes with individuals are subject to consideration in court in the manner prescribed by the current legislation of the Russian Federation, and with legal entities – in the Arbitration Court of Moscow unless otherwise provided by the insurance contract.”*

**31.** At para. 24 of his affidavit, Mr. Makelov deposed that the Operator’s Policy, Insurance Contract No. 494-121918/21, clearly provides that the proper jurisdiction for the resolution of any dispute is in the Russian Federation and said that “*Thus, the dispute is subject to the exclusive jurisdiction of the Arbitration Court of Moscow.*”

**32.** As I have said, there is no indication in the affidavit as to how the Operator’s Policy ties in with the policies or Evidence of Cover documents relied on by the respondents. Mr. Makelov, at para. 27, said that the impact of the Operator’s Policy on the Excess Hull All Risks Policy was a matter for legal argument at the hearing of the application.

**33.** In opposition to the appellant’s motion, a short affidavit of Mr. Casey was filed on behalf of the respondents. Mr. Casey exhibited a booklet of documents which for some reason included a copy of Mr. Makelov’s affidavit, a copy of the Operator’s Policy – both in Russian and the English translation – previously exhibited by Mr. Makelov; and another copy

of the Evidence of Cover in respect of the All Risks Policy, previously exhibited by Mr. Miller.

**34.** The substance of what Mr. Casey had to say was that while Mr. Makelov had identified the grounds of the appellant's application he had not substantiated them. Mr. Casey explained that the order giving leave to serve out of the jurisdiction had not been made under Brussels I Recast but under the principles of private international law. While the respondents could, he said, have relied on the Regulation alone, they had elected to seek the order permitting service out of the jurisdiction out of an abundance of caution and in the hope of avoiding an unmeritorious or tactical challenge to jurisdiction.

**35.** I pause to say that if the respondents had been content to – and were entitled to – rely on the Regulation, strictly speaking the summons could have been served out of the jurisdiction without leave.

**36.** Mr. Casey averred that the terms of the Operator's Policy, although relevant to the proceedings –he did not suggest how they were relevant to the proceedings – were not relevant to the question of jurisdiction. The proceedings, he said, related to two insurance policies. The appellant was party to one of those policies, the All Risks Policy. The relevant Evidence of Cover document, he said, contained an unambiguous choice of law and jurisdiction. He pointed to the provision in the Operator's Policy that "*All terms and conditions follow the Operator's policy as far as applicable.*" He suggested that even if the Operator's Policy had been incorporated into the contract between the respondents and the appellant, the specific terms would take precedence over the general terms.

**37.** The appellant's motion was heard by the High Court (McDonald J.) on 13<sup>th</sup> July, 2023.

*The High Court judgment*

38. In an *ex tempore* judgment the judge first noted that although the application had been brought by the appellant, it was quite clear in the case law that the onus was on the respondents to show jurisdiction.

39. The judge succinctly summarised the respondents' claims, identifying the principal claim as a claim on foot of an insurance policy.

40. The judge first looked at Article 25(1) of the Regulation. The applicable principles, he said, had been set out by Peart J. in *Gaffney t/a Art of Fitness v. Life Fitness (UK) Limited* [2015] IEHC 123 and by Barrett J. in *Colclough v. Association of Chartered Certified Accountants* [2018] IEHC 85, and he set them out. Those principles, as set out by Peart J., and reformatted by Barrett J., are:-

*“[1] [T]he question of whether there is or is not a consensus between the parties as to jurisdiction is not determined by reference to national law, but rather according to European law in the interests of ensuring consistency of interpretation throughout the European Community....*

*[2] [T]he provisions of Article 23 [now Art.25] must be strictly construed in view of the consequences for the parties of such a choice of jurisdiction....*

*[3] [W]hether or not such a consensus exists must be assessed objectively, and in the context of the commercial environment in which the parties were conducting their business....*

*[4] [T]he purpose of the formal requirements in Article 23 [now Art.25] is to ensure that a consensus between the parties is clearly and precisely demonstrated....*

*[5] Article 23 [now Art.25] can be satisfied where the jurisdiction clause is either in writing or evidenced in writing, but that the signature of a party on any such writing is not required in order that the party be bound by same....*

*[6] [T]he fact that a party may have paid little attention to the jurisdiction clause, or perhaps did not even read a document containing same and therefore was not actually aware of its existence, does not prevent that party being deemed to be aware of it and therefore bound by it....*

*[7] [T]he question whether the requirements of Article 23 [now Art.25] are met for the purpose of deciding the preliminary issue of jurisdiction is a wholly separate question from the validity or enforceability of the contract in which the clause exists, the latter question being determined at a later stage in the proceedings under national law....*

*[8] [I]t is the moving party seeking to rely upon Article 23 who has the onus of proving any relevant facts on the balance of probability, and who, so far as legal issues are concerned, must satisfy the court as to the correctness of any legal submissions made by them.”*

**41.** The then plaintiffs, said the judge, were relying on the Evidence of Cover document which contained a jurisdiction clause in favour of Ireland. That was, he said, a document issued on behalf of the insurers and addressed to the insured, and on which the insured could rely. The document satisfied the requirement that the consensus between the parties as to jurisdiction must be in writing or evidenced in writing.

**42.** The judge noted that the insured were named on the Evidence of Cover and shown to have the same address. He noted that the first respondent was on the external register.

**43.** The judge noted that the first of the conditions set out on the second page of the Evidence of Cover was that *“All terms and conditions to follow the Operator’s policy as far as applicable”* and that it was later provided – in what the judge characterised as very clear and simple terms – that:-

*“This insurance shall be governed by and construed in accordance with the law of the Insured’s country of domicile, as per the Address shown herein and each party agrees to submit to the exclusive jurisdiction of the Insured’s country of domicile.”*

44. The judge found that the first page of the Evidence of Cover document showed that there was agreement between the parties that Ireland was the place where each of the insured was domiciled and that the courts of Ireland would have exclusive jurisdiction.

45. The one potential fly in the ointment – as the judge put it – was the provision that all terms and conditions would follow the operator’s policy as far as applicable. He recalled that the appellant had relied on clause 13.1 of the Operator’s Policy, which provided that:-

*“All other conditions not stipulated by these Rules are governed by the legislation of the Russian Federation. All disputes under the insurance contract are resolved through negotiations, and if the parties do not reach an agreement, disputes with individuals are subject to consideration in court in the manner prescribed by the current legislation of the Russian Federation, and with legal entities – in the Arbitration Court of Moscow unless otherwise provided by the insurance contract.”*

46. Absent evidence of Russian law or as to how this clause might be construed in Russian law, the judge construed it as a clear acknowledgement that if there was a provision to the contrary in the insurance contract, then clause 13.1 did not apply. Any provision in the insurance contract dealing with the settlement of disputes must take precedence over clause 13.1 in the Operator’s Policy.

47. Moreover, said the judge, the Evidence of Cover incorporated those provisions of the Operator’s Policy *“as far as applicable.”* Those words clearly conveyed that if there was provision in the Evidence of Cover document, it could not be said that any contrary provision

in the Operator's Policy applied. On either analysis, the choice of law and jurisdiction clause in the Evidence of Cover document must prevail.

**48.** For completeness, the judge addressed an argument which had been advanced on behalf of the appellant that the provision in clause 13.1 for the resolution of disputes by negotiation meant that that clause survived, even though it clashed with the provision for dispute resolution in the Evidence of Cover. The judge rejected that argument on the grounds – as he put it – that it was not possible to dice and slice the conflicting clauses and then seek to give effect to both of them. The issue before the court, he said, was not the enforcement of a pre-litigation negotiation clause.

**49.** The judge's conclusion on the Article 25 issue, he said, was dispositive but – against the eventuality that he might be wrong, or might be thought to be wrong – he went on to deal with the application under Order 11.

**50.** Recalling that the onus was on the respondents to establish that they had at least a good arguable case, the judge said that it was quite clear, having regard to the conclusion to which he had come on the Article 25 question, that the respondents had, at a minimum, made out a good arguable case that the contract was governed by Irish law. Therefore the gateway threshold in O. 11, r. 1(e)(iii) had been met.

**51.** As to O. 11 r.(1)(h), the judge noted – as was common case – that it was sufficient for the respondents to establish that the appellant was either a necessary or a proper party to the proceedings. He accepted the argument of the respondents that the liability claimed was a several liability, so that if the appellant was not party to the proceedings the respondents would not be able to recover in full what they alleged was due under the insurance policy. Moreover, if the respondents did not join the appellant to the proceedings, the other defendants might seek to associate the respondents under the Civil Liability Act, 1961 with

the appellant's share of any damages which the respondents might establish. That alone, he said, would have been a sufficient basis to satisfy the requirements for rule 1(h). He referred to the judgment of Barniville J., as he then was, in *Trafalgar Developments Ltd. v. Mazepin* [2022] IEHC 167.

**52.** Recalling the judgments of the Supreme Court, to which he had been referred – in particular, it must have been the *dictum* of Fennelly J. in *Analog Devices B.V. v. Zurich Insurance Company* [2002] 1 I.R. 272, at p. 286, as well as *Irish Bank Resolution Corporation Ltd. v. Quinn* [2016] 3 I.R. 197 – the judge asked whether, if the appellant had been an Irish company, it would have been joined: to which, he said, the answer was undoubtedly yes. In looking at whether the appellant was a necessary or proper party to the proceedings, the judge took into account the evidence, particularly in the affidavit of Mr. Miller, as to whether the respondents had a good arguable case against the other defendants.

**53.** As to O. 11, r. 1(f) – an action founded on a tort committed within the jurisdiction – the judge was less convinced. The only element of the alleged tort that could have occurred within the jurisdiction was the non-payment of the claim on foot of the policy. Having considered whether there might – as submitted on behalf of the respondents – be a parallel with the decision of the Court of Appeal in England in *Actial Farmaceutica v. De Simone* [2016] 2 CLC 1020, the judge concluded, with some misgivings, that the respondents had just about met the low threshold of establishing a good arguable case. Mindful of the principle in *Analog Devices B.V. v. Zurich Insurance Company* that the court must proceed with caution in asserting jurisdiction against a foreign defendant, the judge held that he could not find that the respondents had no argument to make in relation to that element of their case.

**54.** Having found that the gateway provisions applied, the judge turned to the other criteria in Order 11. As to *forum conveniens* the judge observed that at first blush Russia

might be thought to be the most appropriate forum. It is there that the appellant is based and it is there that the appellant's assets are. There were, however, a number of countervailing considerations. First, and very significantly, there was a risk of conflicting decisions if the appellant were pursued in Russia and the other defendants in Ireland. Secondly – and, if the judge did not say so in terms, nevertheless as I read the transcript, no less importantly – if the respondents were forced to take separate proceedings against the appellant in Russia, this would lead to a fragmentation of its claim. The judge recalled that in *Irish Bank Resolution Corporation Ltd. v. Quinn* [2016] 3 I.R. 197, at p. 223, Clarke J. (as he then was) citing with approval the statement from *Dicey, Morris and Collins The Conflict of Laws (15<sup>th</sup> ed.)(2012)* at p. 553, said that:-

*“... in a case to which it may be relevant, an overall adjudication on which may be the more natural or appropriate forum requires the court to consider ‘whether the claim is part of a larger overall dispute which would be damaged by being fragmented.’”*

**55.** That, said McDonald J., was a consideration which applied very strongly in this case. It would make no sense that the claim against the insurers would not be pursued in a single case where all of the issues that were likely to arise could be resolved.

**56.** The judge also referenced the uncontroverted evidence of Mr. Hurley as to the difficulties that would be encountered if proceedings were instituted in Russia; first, the necessity in any such proceedings for evidence of Irish law, and the consequent increase in costs; secondly, the prevailing political conditions between the E.U. and Russia; thirdly, the existence of a decree by the President of the Russian Federation designating Ireland as an unfriendly foreign state; fourthly, the difficulty if not impossibility that the respondents would face in obtaining the services they would require to travel to and litigate in Russia;



fifthly, the difficulty and expense of ensuring that any potential service providers who might be identified were not subject to E.U. sanctions; and sixthly, Department of Foreign Affairs warnings and guidance as to safety in traveling to and spending time in Russia.

57. While he was of the view that the fragmentation issue was by itself sufficient to establish that Ireland was the more convenient forum, the judge identified the practical difficulties of litigating in the Russian Federation as a further countervailing consideration. He concluded that even if he had not found in favour of the respondents on the Article 25 question, the proceedings would have met the requirements of Order 11 and that the respondents were entitled to proceed in Ireland.

#### *The appeal*

58. By notice of appeal filed on 17<sup>th</sup> August, 2023 the appellant appealed against the entire decision of the High Court and on 12<sup>th</sup> October, 2023 an amended notice of appeal was filed. The amended grounds of appeal ran to twenty numbered paragraphs over five pages. The first three pages comprised a summary of the claim in the proceedings and a summary of the judgment of McDonald J.

59. At para. 15 it was said that the judge erred in law in concluding that the respondents had provided evidence and submissions that they had a good arguable case that the action was brought in relation to a contract which by its terms or by implication was to be governed by Irish law: but not why. The appellant pointed to the references in the Operator's Policy to the respondents as "*Additional insureds*" and to the governing law and jurisdiction clause in the Operator's Policy which stipulates for the law and exclusive jurisdiction of the Insured; who, under the Operator's Policy, was NordStar.

**60.** Separately, at paras. 16 and 17 it was said that the judge erred in concluding that the respondents had provided evidence and submissions sufficient to demonstrate that they had a good arguable case under O. 11, rr. 1(f) and (h): but not why.

**61.** At para. 18 it was asserted – again – that the appellant is not domiciled in Ireland so that Articles 4(1), 7(1), 8(1), 11(1)(a), 11(1)(b) and 11(1)(c) of the Regulation have no application. But while these provisions were among those listed in the omnibus indorsement of jurisdiction on the summons, they were never relied on by the respondents. More to the point, they were not relied on by the judge.

**62.** Finally, at para. 20, it was asserted that the judge erred in his application of the test for jurisdiction asserted under Article 25(1) of the Regulation: but not how.

**63.** The outline written submissions filed on behalf of the appellant ran to 4,867 words over seventeen pages. The first page is an introduction; the second and third reproduce *verbatim* the general indorsement of claim and indorsement as to jurisdiction on the plenary summons; the relevant provisions of O. 11 and O. 12, r. 26 are set out in about a page and a half; the applicable legal principles – which were and are agreed – are set out with commendable brevity in a page; and eventually – on page 8 – the written submissions come to “*Application of the Relevant Law*”.

**64.** As to O. 11, r. 1(e)(iii), it was said that the respondents must prove that they have a good arguable case that the action is brought in relation to a contract which by its terms or by implication is to be governed by Irish law. That much was common case in the High Court but – as I will come to – was acknowledged on the oral hearing of the appeal not to be the applicable test on the appeal. That, it was said, involves a detailed consideration of the policies. What is described as the Excess Hull All Risks Insurance – but what I take to be a reference to the Evidence of Cover for All Risks – is said to contain a governing law and

jurisdiction clause by reference to the Insured's country of domicile but – it was said – only one of the plaintiffs is domiciled in Ireland.

**65.** As to O. 11, r. 1(f), the appellant's written submissions simply asserted that the judge erred in holding that the respondents had established a good arguable case "*and therefore*" it is submitted that they have not.

**66.** As to O. 11, r. 1(h), the appellant accepted that it was not necessary that the respondents should have established that it is both a necessary and a proper party. The appellant's written submissions referred to the judgment of the High Court in *Trafalgar Developments Ltd. v. Mazepin* [2022] IEHC 167 and quoted extensively from the judgment of Fennelly J. in *Analog Devices B.V. v. Zurich Insurance Company* [2002] 1 I.R. 272 but did not even suggest that the appellant is not a proper party, still less why not, and still less that the judge erred in his conclusion that it was.

**67.** Starting at the end of page 12, the appellant's written submissions set out the text of Articles 4(1), 7(1), 8(1), 11(1)(a), 11(1)(b) and 11(1)(c) of Brussels I Recast and over four pages tilted at the windmill that they can have no application to the appellant because it is not domiciled in a Member State and does not have a branch, agency or other establishment in a Member State. Article 25 was dismissed as having no application because – it was said – there was no agreement to prorogue jurisdiction. It was not said that the High Court judge erred in declaring that the court has jurisdiction under Article 25(1). Startlingly, the appellant simply ignored the finding of the High Court judge that the respondents' claim was founded on an agreement in writing, specifically, on the Evidence of Cover in respect of the All Risks Policy.

**68.** On the oral hearing of the appeal, senior counsel for the appellant, at the outset, volunteered that the issue on the appeal was not – as it was in the High Court – whether the

respondents could show or had shown that they had a good arguable case that the action was brought in relation to a contract which by its terms or by implication is to be governed by Irish law, but rather – as is, and as was accepted by counsel as being, absolutely clear from the judgment of the Supreme Court in *Ryanair Ltd. v. Billigflüge.de GmbH* [2015] IESC 11 – whether the appellant could discharge the heavy burden of demonstrating that the High Court judge had fallen into error such that the decision was untenable.

**69.** In answer to a question from O’Moore J., counsel accepted that the appellant’s written submissions had not addressed the rationale for the judgment of the High Court. The follow on question, as to whether the court ought to entertain an argument at the oral hearing of an appeal which had not been identified in the party’s written submission and of which, in consequence, the opposing party had had no notice was left unanswered.

**70.** Counsel acknowledged that the judgment of the High Court was careful and reasoned and said that in dealing with what was said to be the main issue on the appeal of the Article 25(1) and O. 11, r. 1(e)(iii) issues he would “*focus on the coverage documents*”. The appellant, it was said, relied on the Operator’s Policy, which, it was said, provided for the law and jurisdiction of the Russian Federation. Again in answer to a question from the court, counsel acknowledged that in an Irish court Russian law is a matter of fact and – as the High Court judge had observed in his judgment – there was no evidence of Russian law. It was further acknowledged that there was no evidence or certificate to establish that what appeared to be the English translation of the Operator’s Policy was what it was tacitly suggested it was.

**71.** Counsel then brought the court through the provisions of the purported English translation of the Operator’s Policy and the provisions of the Evidence of Cover to which I have already referred and recalled that he had asked the High Court to favour the Operator’s Policy, which was, he said, what the appellant was “*dealing with.*” Counsel acknowledged

that Mr. Makelov had not attempted to explain the link between the Operator's Policy and the Evidence of Cover and had not disclaimed the Evidence of Cover or the authority of the broker to have issued that document to the respondents.

**72.** The High Court judge, it will be recalled, dealt as best he could in the absence of evidence of Russian law with the appellant's argument that clause 13.1 of the Operator's Policy applied. On its face, clause 13.1 contemplated that the general stipulation for Russian Federation might be displaced by provision otherwise in the insurance contract. On the appeal, counsel acknowledged – as he had to – that the reference in the Evidence of Cover for All Risks to the terms and conditions of the Operator's Policy was qualified by the words "*as far as applicable*" and so clearly envisaged circumstances in which those terms would not be apply.

**73.** Counsel acknowledged that anything he could say about the judge's conclusion that the respondents had brought themselves within O. 11, r 1(e)(iii) was the same point as the Article 25(1) point.

**74.** All that he could say as to the judge's conclusion – not without misgivings – that the respondents had crossed the low bar of demonstrating a sufficiently arguable case to satisfy the requirements of O. 11, r. 1(f) was that the judge had "*got the calibration wrong*".

**75.** As to O. 11, r. 1(h), it was submitted that the question as to whether the appellant was a necessary or proper party was connected to the law and jurisdiction question, so that if the court was of the view that Irish law applied – or was not persuaded that the High Court judge had been shown to have been wrong in his conclusion that Irish law applied – the claim came within para. (h) as well. This did not really address the conclusion of the High Court judge on that question. Counsel accepted that on the appellant's own case, it was one of a number of insurers who had assumed a several liability and that – irrespective of the applicable law –

there is clear authority for the judge's conclusion that the desirability of avoiding the fragmentation of the claim was a material consideration in assessing whether it was a necessary or proper party to the action.

**76.** By the end of the oral hearing, the unanswered question, as to whether the court ought to entertain an argument which had not been identified in the party's written submission had evaporated. Having put the appellant's case as best he could, in the end, counsel accepted that he could not identify any analytical error in the judgment of the High Court. There was no substance to the appeal and I had no hesitation in dismissing it.

#### *Conclusion*

**77.** There will be an order dismissing the appeal and affirming the order of the High Court.

**78.** The respondents having been entirely successful on the appeal, I can think of no conceivable reason why they should not have an order for their costs. Provisionally, I am bound to say also that I would be disinclined to stay execution on foot of the order for the costs of the appeal until the conclusion of the proceedings. However, I would allow the appellant 14 days within which to file and serve a written submission of no more than 1,000 words as to why any other costs order should be made, in which event the respondents will have 14 days within which to file and serve any response which they may deem necessary, similarly limited to 1,000 words.

**79.** Costello and O'Moore JJ. have read this judgment in draft and authorised me to indicate their agreement with it.