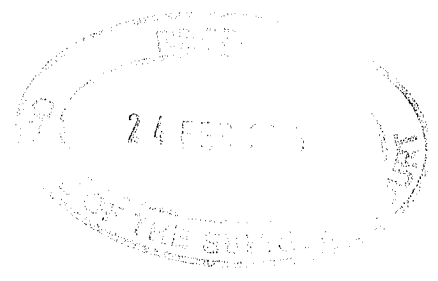


4/15



Appendix FF

No. 1
SUPREME COURT

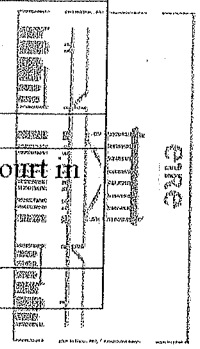
Application for Leave and Notice of Appeal

Supreme Court record number of this appeal
Subject matter for indexing

Leave is sought to appeal from The High Court
[Title and record number as per the High Court proceedings]

X

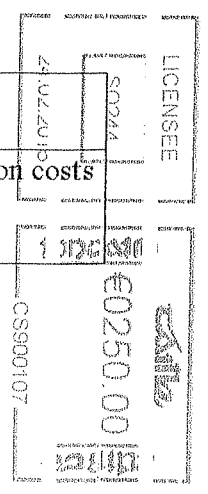
Aidan McDonald Record No. 2009/19013P	V	A.Z. Sint Elizabeth Hospital, Dr. Joost Van Der Sypt and North West Wales National Hospital Trust [No.2]
Date of filing		
Name(s) of Applicant(s)/Appellant(s)		Aidan McDonald, 1875 Lourdesville Place, Kildare, County Kildare
Solicitors for Applicant(s)/Appellant(s)		Herbert Kilcline, 10 Bessborough Parade, Rathmines, Dublin 6.
Name of Respondent(s)		A.Z. Sint Elizabeth Hospital, Dr. Joost Van Der Sypt and North West Wales National Hospital Trust [No.2] [proceedings have been discontinued against the third named defendant/respondent]
Respondent's solicitors		Emerson McGarr Solicitors, 12 City Cage, Bridge St Lower, Dublin 8. [solicitor for both Respondents]
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
		<input checked="" type="checkbox"/> No
If yes, give [Supreme Court] record number(s)		
Are you applying for an extension of time to apply for leave to appeal?		<input checked="" type="checkbox"/> No
If Yes, please explain why		



620 400
5 600

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mr Justice Hogan
Date of order/ Judgment	Judgment on preliminary issue delivered on 22 January 2015 Judgment on costs delivered on 6 of February 2015 Order perfected on 12 th February 2015



2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Aidan McDonald,
-----------------------	-----------------

<input checked="" type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner
<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Original status

Solicitor: Mr. Herbert Kilcline			
Name of firm	Herbert Kilcline		
Email	herbertkilcline@hotmail.com		
Address	10 Bessborough Parade,	Telephone no.	01-4966943
	Rathmines, Dublin 6.		
Postcode	Dublin 6		

How would you prefer us to communicate with you?

E-mail

Counsel

Name	Ms. Patricia Dillon SC		
Email	pdillonsc@gmail.com		
Address	PO Box 5939,	Telephone no.	01-4905478
	145-151 Church Street	Document Exchange no.	810041
Postcode	Dublin 7		

Counsel

Name	Mr. D. J. Hegarty SC		
Email	djhegartysc@gmail.com		
Address	Law Library, Four Courts	Telephone no.	01 817 4595
		Document Exchange no.	812047
Postcode	Dublin 7		

Counsel

Name	Mr. Joseph Jackson BL		
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Address	Law Library Four Courts	Telephone no.	087 7518488
		Document Exchange no.	810272
Postcode	Dublin 7		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address
e-mail address
Telephone no.

How would you prefer us to communicate with you?

Document Exchange E-mail

Post Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Original status

Respondent's full name	A.Z. Sint Elizabeth Hospital
------------------------	------------------------------

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner
<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor: Emerson McGarr			
Name of firm	McGarr Solicitors		
Email	info@mcgarrsolicitors.ie		
Address	12 City Cage, Bridge St Lower, Dublin 8.	Telephone no.	01-6351580
		Document Exchange no.	
		Ref.	
Postcode	Dublin 8		

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange
<input type="checkbox"/>	Post
<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Mr Padraig McCartan SC		
Email	padraig@mccartan.org		
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		Document Exchange no.	816016
Postcode	Dublin 7		
Counsel			
Name	Mr Liam Reidy SC		

Email	lgrsc@indigo.ie		
Address	5 Arran Sq, Arran Quay, Dublin 7	Telephone no.	01 2884695
		Document Exchange no.	812101
Postcode	Dublin 7		
Counsel			
Name	Ms Leigh Hamilton BL		
Email	leigh@leighhamilton.com		
Address	5 Inchicore Terrace South, Inchicore Dublin 8	Telephone no.	01 817 5837
		Document Exchange no.	816539
Postcode	Dublin 8		

If the Respondent is not legally represented please complete the following
How would you prefer us to communicate with you?

Current postal address
e-mail address
Telephone no.
Document Exchange
Post
E-mail
Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned

(a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

The relevant orders and findings made in the High Court.

I.

Scope of the Appeal

1. The Appellant seeks to appeal the decision that the Plaintiff/Appellant's case:-

- a. falls outside the scope of Article 5(2) and 5(3) the Rome Convention on the law applicable to Contractual Obligations 1980 (OJ 1980, L22, p1) "*The Rome Convention*".
- b. falls within the counter-exception contained in Article 5(4) of *The Rome Convention*.
- c. that Belgium was the Place of performance of the obligation characteristic of the contract for the purposes of Article 4 (2) of *The Rome Convention*.
- d. that the finding that Article 4(2) of *The Rome Convention* as applied by Mr. Justice Hogan was not displaced by article 4(5) of the *The Rome Convention*.
- e. that the proper law of the contract for the purposes of Article 4(2) and 5(4) of the *The Rome Convention* must be adjudged to be Belgian law.

2. The order of Costs made against the Plaintiff/Appellant on the 6th of February 2015 is also appealed.

3. In brief, the case involves a preliminary determination as to the proper law to be applied to the Plaintiff/Appellant's claim for breach of contract concerning a defective gastric bypass procedure performed on the Plaintiff/Appellant at the first named Defendant/Respondent's Hospital in March 2007.

4. The decision was preceded by an earlier decision of Mr. Justice Hogan, *McDonald v AZ Sint Elizabeth Hospital [2014]IEHC 88*, delivered on the 27th of February 2014 wherein he ruled that the High Court had no jurisdiction to entertain an action in negligence against either the Hospital or the treating consultant, the second named Defendant, but held that Plaintiff/Appellant was a "consumer" for the purposes of Article 15 of the Brussels Regulation 44/2001/EC and could bring these proceedings within this jurisdiction against the first named Defendant/ Respondent only. The proceedings as against the third named defendant had been discontinued previously.

5. Mr. Justice Hogan has decided that the proper law for the determination of the Plaintiff/Appellant's breach of contract proceedings is the law of Belgium as and against the first named Defendant/Respondent only.

6. The facts found by the learned High Court Judge in this decision are not contested by the Plaintiff/Appellant. Neither are the findings made in his previous decision.

7. The Plaintiffs refer to relevant facts as set out at paragraphs 5 to 10 of the Judgment and paragraphs 3-11 of Mr. Justice Hogan's earlier decision on 27th of February 2014 in *McDonald v AZ Sint Elizabeth Hospital [2014]IEHC 88*.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—

I.

Please list (as 1, 2, 3, etc) concisely the reasons in law:

- i. why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court and
- ii. why there are exceptional circumstances warranting a direct appeal to the Supreme Court

I.

The Public Importance of the Case

1. The determination of this case has consequences which extend beyond the scope of the current appeal and involve the application and interpretation within this jurisdiction of the Rome Convention on the law applicable to Contractual Obligations 1980 (OJ 1980, L22, p1) "*The Rome Convention*" in particular Articles 4 and 5 thereof which has been given the force of law pursuant to Article 29.6 of the Constitution by s.2(1) of the Contractual Obligations (Applicable Law) Act 1991.
2. The decision concerns the application and interpretation within this jurisdiction of the Report of Professor Mario Guiliano and Professor Paul Lagarde "*Guilano/Lagarde*" on the Rome Convention pursuant to s3(2) of the Contractual Obligations (Applicable Law) Act 1991, which requires that the said report "*shall be given such weight as is appropriate in the circumstances*".

3. In addition the decision concerns the application and interpretation within the jurisdiction of the Brussels Regulation, 44/2001/EC (*the Brussels Regulations*) and in particular Article 13 thereof.
4. An apparent conflict exists as to the rules to determine the proper law of a contract for the cross border or transnational supply of goods and services to consumers between the provisions of Article 5 [2] and 5[3] of the *Rome Convention* and Article 13 [3] [b] of the *Brussels Regulations*., which has not been determined.

The interests of Justice

5. The interest of justice within this jurisdiction are served by the determination of the issues in dispute by reason of their general application to the supply of goods and services within the European Community pursuant to the single market.
6. The subject matter of the case concerns the provision of cross border or transnational medical services.
7. The law pertaining to the entry into and the formation of cross border or transnational contracts through the medium of the internet is a rapidly evolving and burgeoning concern to consumers.

II.

Exceptional Circumstances

8. The Supreme Court, pursuant to the **First Protocol on the interpretation of the 1980 Convention by the Court of Justice / 1980 Rome Convention**, Article 2 [a] thereof is the only national Court within the jurisdiction competent to refer a case or matter of law concerning the said Convention to the European Court of justice.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

1. **the specific ground(s) of appeal and the error(s) of law related to each numbered ground**
2. **the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom**
3. **The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely**
4. **The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal**

I. The Specific Grounds and Errors of Law

1. The Court erred in finding that the Plaintiff/Appellant's claim:
 - a. falls outside the scope of Article 5(2) and 5(3) the Rome Convention on the law applicable to Contractual Obligations 1980 (OJ 1980, L22, p1) "*The Rome Convention*".
 - b. falls within the counter-exception contained in Article 5(4) of *The Rome Convention*.
 - c. that Belgium was the Place of performance of the obligation characteristic of the contract for the purposes of Article 4 (2) of *The Rome Convention*.

- d. that the finding that Article 4(2) of *The Rome Convention* as applied by Mr. Justice Hogan was not displaced by article 4(5) of *The Rome Convention*.
- e. that the proper law of the contract for the purposes of Article 4(2) and 5(4) of the *The Rome Convention* must be adjudged to be Belgian law.
2. The Court deferred exclusively or disproportionately to the *Rome Convention* and in doing so failed to fully or properly consider the application and benefit of Article 13[3][b] of the *Brussels Convention* to the Plaintiff/Appellant's case.
3. Attached the incorrect weight to be given to the *Guilano/Lagarde* report in its interpretation of the aforesaid principals of European Law.
4. Incorrectly interpreted or distinguished the decision of the European Court of Justice in *Rudolf Gabriel* [2002] E.C.R.I 6367 (case C-96/00).
5. Incorrectly construed or interpreted the words used in Article 5[2] of the *Rome Convention*.
6. Erroneously concluded that Plaintiff/Appellant had not taken "all" steps necessary to conclude the contract within this jurisdiction.
7. Erroneously concluded that the execution of a consent to medical treatment form on the 7th of March 2007 in Belgium by the Plaintiff/Appellant was "a necessary precursor to the completion of the contract".

II. The legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom

1. 2. 3. And 4.

The Conflict in the European Law applicable.

Mr. Justice Hogan adverted at paragraphs 29-32 of his Judgment to an apparent conflict in European law for determining jurisdiction in respect of consumer contracts, between the provision of Article 5[2] of the *Rome Convention* and Article 13[3] of the *Brussels Convention*.

Article 5[2] of the Rome Convention requires proof that the consumer "*had taken in that country all steps necessary on his part for the conclusion of the contract*". Article 13[3][b] of the Brussels Regulation merely requires "*that the consumer took in that State the steps necessary for the conclusion of the contract*".

By reason of the finding of fact already made by Judge Hogan in his first judgment *McDonald v AZ Sint Elizabeth Hospital* [2014] IEHC 88 on the 27th of February 2014 that a consumer contract came into existence, he should have first resolved the dilemma generated by the two conventions, to determine which convention was to be applied, and in the alternative whether or not they had a bearing on their respective interpretations, before proceeding to place his emphasis exclusively on the provisions and wording of Article 5[2] of the Rome Convention, or to rely upon the *Guiliano/Lagarde* report.

The only attempt made to address this problem was to place special emphasis on the fact that the word "*all*" appears in the Rome Convention but not in the Brussels convention. In relying on this emphasis, the Judge then had to distinguish the Plaintiff/Appellant's case from having the benefit of relying on the ECJ decision in the Austrian case *Rudolf Gabriel* [2002] ECRI 6367.

- 5 and 6.

The construction of the words and phrases:

Having noted the distinction between the Conventions, but without resolving the conflict between them, the Mr. Justice Hogan is criticized for how he went on to construe Article 5 [2]. By placing his total emphasis on the word “all” he ignored or failed to take into account the context in which it should be interpreted, namely “all” those steps necessary to be taken by a consumer “on his part” thereby drawing an incorrect inference that disregarded that all the steps taken by the Plaintiff/Appellant within this jurisdiction were all the steps that could be taken by him prior to traveling to Belgium. This interpretation conflicts with the findings reached Mr. Justice Hogan’s earlier decision in *McDonald v AZ Sint Elizabeth Hospital* [2014] IEHC 88 on the 27th of February 2014.

Mr. Justice Hogan has construed Article 5 [2] disjointedly and not con-jointedly. The whole phrase should be taken together.

6.

The weight placed on the Medical Consent form:

The limited or curtailed perspective of the steps taken by the Plaintiff/Appellant in the contract formation process by Judge Hogan is compounded by the undue weight, at paragraph 34 of the Judgment, placed on the execution of the consent form as being “*a necessary precursor to the completion of the contract*”. It was merely a necessary requirement for the purpose of medical practice in Belgium, it was not part of the actual contractual matrix and even if it was, it was never a “step” that the Plaintiff could have taken “on his part”, and accordingly, the finding at paragraphs 35 and 39 of the judgment are challenged. In the event if the more permissive Article 13[3] [b] was deemed to apply, instead of Article 5 [2] it may not in fact even be a relevant matter for the Plaintiff in the contract formation process.

III. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely.

The Appellants will rely, in particular, on the following provisions.

Constitutional Provisions

1. The Constitution, Article 29.6 thereof.

Act of the Oireachtas

2. Contractual Obligations (Applicable law) Act 1991.

European Law

3. The Rome Convention on the law applicable to Contractual Obligations 1980 (OJ 1980, L22, p1) (“*The Rome Convention*”) in particular Article 4 and 5 thereof.
4. Brussels Regulation, 44/2001/EC (“*the Brussels Regulations*”) and in particular Articles 13 and 15 thereof.
5. Report of Professor Mario Guiliano and Professor Paul Lagarde “*Guilano/Lagarde*” on the Rome Convention pursuant to s3(2) of the Contractual Obligations (Applicable Law) Act 1991, which requires that the said report “*shall be given such weight as is appropriate in the circumstances*”.

6. First Protocol on the interpretation of the 1980 Convention by the Court of Justice / 1980 Rome Convention,

IV. The Issue(s) of law before the Court appealed from to the extent that they are relevant to the appeal

These are set out above, and are encompassed in the submissions exchanged by both the Plaintiff/Appellant and the first named Defendant/Respondent for the High Court.

7. Other relevant information

Neutral citation is [2015] IEHC 62

Patricia Dillon SC
D.J. Hegarty SC
Joe Jackson BL

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

The Appellant seeks an Order in the following terms:

1. That the proceedings be referred to the European Court of Justice to determine the correct European law to be applied to the contractual dispute between the parties.

In the alternative and as may be necessary,

2. That the Plaintiff/Appellants case falls with the scope of Article 5(2) and 5(3) the Rome Convention on the law applicable to Contractual Obligations 1980 (OJ 1980, L22, p1) "*The Rome Convention*".
3. That the counter-exception contained in Article 5(4) of *The Rome Convention* does not apply to the Plaintiff/Appellant's case.
4. That Belgium was not the Place of performance of the obligation characteristic of the contract for the purposes of Article 4 (2) of *The Rome Convention*.
5. That Article 4(2) of *The Rome Convention* as applied by Mr. Justice Hogan was displaced by article 4(5) of the *The Rome Convention*.
6. That the proper law of the contract for the purposes of Article 4(2) and 5(4) of the *The Rome Convention* must be adjudged to be Irish law.
7. In the alternative, that the proper law of the contract for the purposes of Article 13[3][b] of *the Brussels Regulations* must be adjudged to be Irish law.
8. Such further or other order as may be required;
9. The costs of these proceedings, including the costs of the Appeal.

What order are you seeking if successful? Order being appealed: set aside

Original order: set aside

vary/substitute

restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention
--

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? **NO**

make a reference to the Court of Justice of the European Union? **YES**, details below:

1. The determination of the proper law to be applied to the contractual dispute between the parties necessitates a decision as to whether or not Article 5[2] of the *Rome Convention* which requires proof that the consumer "*had taken in that country all steps necessary on his part for the conclusion of the contract*" takes precedence, or is to be preferred, over Article 13[3][b] of the *Brussels Regulation* which merely requires "*that the consumer took in that State the steps necessary for the conclusion of the contract*".

2. Further, whether or not Article 5[2] of the Rome Convention should be interpreted disjointedly or con-jointedly.

3. And whether or not the execution of consent to medical treatment which is required as a matter of domestic medical practice law within Belgium is a contractual step.

4. The Supreme Court, pursuant to the **First Protocol on the interpretation of the 1980 Convention by the Court of Justice / 1980 Rome Convention**, Article 2 [a] thereof is the only national Court within the jurisdiction competent to refer a case or matter of law concerning the said Convention to the European Court of justice.

Will you require a priority hearing: **NO**

Please submit your completed form to:

The Office of the Registrar of the Supreme Court The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.