

## SUPREME COURT

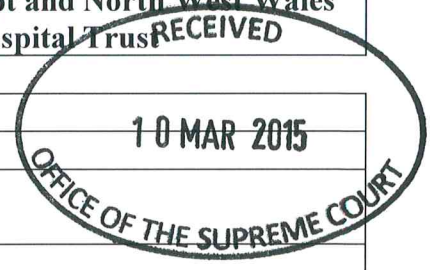
## Respondent's Notice

Supreme Court record number	S: A P: IE: 2015: 00004
-----------------------------	-------------------------

[Title and record number as per the High Court proceedings]

Aidan McDonald Record No. 2009/1913P	V	A.Z. Sint Elizabeth Hospital, Dr Joost Van der Sypt and North West Wales National Hospital Trust
---	---	--

Date of filing	
Name of respondent	A. Z. Sint Elizabeth Hospital
Respondent's solicitors	McGarr Solicitors
Name of appellant	Aidan McDonald
Appellant's solicitors	Herbert Kilcline



## 1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	
------------------------	--

The respondent was served with the application for leave to appeal and notice of appeal on date
---

25 February 2015
------------------

The respondent intends :
--------------------------

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
--------------------------	---

<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
--------------------------	---

<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
-------------------------------------	---

<input type="checkbox"/>	not to oppose the application for leave to appeal
--------------------------	---

<input type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
--------------------------	--

<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
--------------------------	---

<input type="checkbox"/>	Other (please specify)
--------------------------	------------------------

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input type="checkbox"/>
--	--------------------------

Respondent's Representation

Solicitor Edward McGarr			
<b>Name of firm</b>	McGarr Solicitors		
<b>Email</b>	info@mcgarrsolicitors.ie		
<b>Address</b>	12 City Gate, Lower Bridge St, Dublin 8	<b>Telephone no.</b>	016351580
		<b>Document Exchange no.</b>	
<b>Postcode</b>	Dublin 8	<b>Ref.</b>	
<b>How would you prefer us to communicate with you?</b>			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input checked="" type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
<b>Name</b>	Padraig McCartan SC		
<b>Email</b>	Padraig@mccartan.org		
<b>Address</b>	The Law Library, Distillery Building, Church St, Dublin 7	<b>Telephone no.</b>	01 817 4449
		<b>Document Exchange no.</b>	
<b>Postcode</b>			

Counsel			
<b>Name</b>	Liam Reidy SC		
<b>Email</b>	lgrsc@indigo.ie		
<b>Address</b>	5 Arran Square, Arran Quay, Dublin 7	<b>Telephone no.</b>	01 817 4673
		<b>Document Exchange no.</b>	
<b>Postcode</b>			

Counsel			
<b>Name</b>	Leigh Hamilton BL		
<b>Email</b>	leigh@leighhamilton.com		
<b>Address</b>	The Law Library, Distillery Building, Church St, Dublin 7	<b>Telephone no.</b>	01-817 5837
		<b>Document Exchange no.</b>	
<b>Postcode</b>			

**If the Respondent is not legally represented please complete the following**

<b>Current postal address</b>
<b>Telephone no.</b>
<b>e-mail address</b>

<b>How would you prefer us to communicate with you?</b>			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

**If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused**

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

**Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:**

a. The Respondent does not dispute the information provided by the Applicant in Section 4 of the Notice of Appeal, save as follows:

b. The Applicant has stated at point 3 thereof:

*"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..."*

The Respondent denies that the said procedure was defective, and therefore this statement by the Applicant shall be contested.

c. It should also be noted that the existence of a contract between the First Named Defendant (Respondent) and the Plaintiff (Applicant) herein is a matter which remains in dispute between the parties herein.

4. Respondent's reasons for opposing leave to appeal

**If leave to appeal is being contested, set out concisely here the respondent's reasons why:**

Public Importance

1. The case is of little general importance given the fact that the legislation which applies to the Plaintiff's circumstances has been largely replaced by the Regulation 593/2008 EC (Rome II) which applies to contracts made after the 17<sup>th</sup> December 2009. Therefore the public importance element must be limited.
2. The same may be said for the Giuliano Lagarde report (O.J. C 282/24) (1980), which is relevant to only the interpretation of the Rome Convention 1980, and is required to be given *"such weight as is appropriate in the circumstances"* by the

Contractual Obligations (Applicable Law) Act 1991. The general public import of the report must be regarded as limited by the fact that the legislation to which it is a guide has since been replaced since 17<sup>th</sup> December 2009.

3. The decision of Mr Justice Hogan [2015] IEHC 62 does not demand, as is alleged by the Plaintiff, the application and interpretation within the jurisdiction of the Brussels Regulation 44/2001/EC and Article 13 thereof. The decision of Mr Justice Hogan at [2015] IEHC 62 concerns the Rome Convention 1980 and the interpretation thereof. The Brussels Regulation is referred to only in the context of background and in relation to the earlier decision made by the Court under the Regulation. The Appellant is here seeking to reopen the earlier decision of Mr Justice Hogan at [2014] IEHC 88 through the vehicle of this appeal and it is submitted that they are not entitled to do so. It cannot rightly be said that there is public importance attaching to the element of the decision of Mr Justice Hogan at [2015] IEHC 62 concerning the interpretation or application of the Brussels Regulation.
4. There is no apparent conflict between the provisions of Article 5[2] and 5[3] of the Rome Convention and Article 13(3)[b] of the Brussels Regulations emerging from the decision of Mr Justice Hogan at [2015] IEHC 62. Rather, (at para 32 in his decision at [2015] IEHC 62) Mr Justice Hogan correctly interprets the differences in wording between the Rome Convention and Brussels Regulation as indicating *“important consequences for the scope of application of the respective provisions”*.

#### Interests of Justice

1. The interests of justice would be best served by maintaining a high level of certainty in relation to the law applicable of contractual obligations. In this case, the characteristic performance of the contract (which is denied) is easily determined and leads inevitably to the conclusion that Belgian Law is the proper law of the dispute. This certainty is among the objectives of the Rome Convention<sup>1</sup>, and would be best vindicated by denying leave to appeal in this case.
2. The interests of justice would be adequately satisfied if the Plaintiff went on to litigate his claim in Ireland, under Belgian law, as directed by Mr Justice Hogan. It

---

<sup>1</sup> Judgment of the Court (Grand Chamber) of 6 October 2009. *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Corporations BV*. Reference for a preliminary ruling, Case C-133/08.

is submitted that it is not just to allow the Plaintiff to engage in “law shopping” which is the equivalent to “forum shopping”, conducted by the Plaintiff in order to seek a benefit in the litigation. and that the Plaintiff’s actions have the effect of delaying the matter and increasing costs. As outlined at para. 41 of the decision of Mr Justice Hogan: *“In the absence of an express choice of law, no one who travels to a foreign destination for the purpose of receiving medical treatment there could, I think, realistically suppose that Irish law should be deemed to govern the contract, save where the contract had been executed in Ireland in advance of travel...”*

3. The decision of Mr Justice Hogan does not involve *“the formation of cross border contracts through the medium of the internet”* as the Plaintiff alleges. Mr Justice Hogan’s decision concerns the proper law of the alleged contract only, and Mr Justice Hogan correctly concludes as a matter of fact that the said contract (which is denied) was **not** formed through the medium of the internet. Again, the Plaintiff is here seeking to reopen an earlier decision of Mr Justice Hogan in relation to the Brussels Regulations ([2014] IEHC 88) under the guise of an appeal against the index decision ([2015] IEHC 62).

Exceptional Circumstances:

It is not accepted that the Supreme Court is the only national Court within the jurisdiction competent to refer a case or matter of law concerning the Rome Convention 1980 to the European Court of Justice. In this regard the Court is referred to the First Protocol of the Rome Convention 1980 and Article 2(b) thereof wherein it states as follows:

*“Any of the courts referred to below may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment:...*

*(a) — in Ireland:*

*the Supreme Court...*

*(b) the courts of the Contracting States when acting as appeal courts.”*

Thus it is submitted that another Irish Court, when acting as an appeal court, as outlined in the First Protocol, Article 2(b) of the Rome Convention 1980, is permitted to request

the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning interpretation of the provisions contained in the instruments referred to in Article 1 if that court considers that a decision on the question is necessary to enable it to give judgment.

*\*delete where inapplicable*

5. Respondent's reasons for opposing appeal if leave to appeal is granted

**Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):**

Defendant/Respondent's reasons for opposing appeal if leave to appeal is granted:

1. That the Court was correct in its findings outlined at paragraphs 6.1. a to e of the Plaintiff/Appellant's Form No. 1 herein:
  - a. That the Plaintiff/Appellant's claim fell outside the scope of Article 5(2) and (3) of the Rome Convention on the applicable law.
  - b. That the Plaintiff/Appellant's claim fell within the counter-exception 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 Article 4(2) of the Rome Convention 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 Rome Convention must be adjudged to be Belgian Law.
2. That the Court acted correctly in interpreting the Rome Convention, and did not, as alleged, defer exclusively or disproportionately to it. Further, that the Court did properly consider the application of the Brussels Convention to the Plaintiff/Appellant's case.
3. That the Court acted properly in its consideration of the Giuliano /

Lagarde report, and attached the proper and correct weight to the report in its interpretation of the principles of European Law.

4. That the Court gave due and proper consideration and interpretation to the case of *Rudolf Gabriel* [2002] ECRI 6367 (Case C-96/00) and did not, as alleged or at all, incorrectly interpret or distinguish same.
5. That the Court correctly interpreted the language and usage of words in the Rome Convention and did not, as alleged or at all, incorrectly construe or interpret Article 5(2) thereof.
6. That the Court was correct in its conclusion that the Plaintiff/Appellant had not taken “all” steps necessary for conclusion of the contract within this jurisdiction.
7. That the Court was correct in its’ finding that the execution of a consent to medical treatment form by the Plaintiff/Appellant was “a necessary precursor to the completion of the contract”.

**Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:**

**Padraig McCartan SC**

6. Additional grounds on which decision should be affirmed

**Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:**

1. Additional Grounds on which decision should be affirmed
  - a. The Respondent relies upon the conclusions of Mr Justice Hogan in his decision in relation to the finding that the Plaintiff falls under the counter exception in Article 5(4)(b).
  - b. Further, the Respondent relies upon the finding of the Court that the Plaintiff had not “*taken all the steps necessary for the conclusion of that contract*” whilst in Ireland. Further, the Respondent adds:
    - i. That the alleged contract (which is denied) was not concluded until the Plaintiff presented himself for surgery in Belgium.
    - ii. That, additionally, the alleged contract (which is denied) was not concluded until the Plaintiff filled out the necessary documentation to allow the said surgery.

iii. That, additionally, the alleged contract (which is denied) was not concluded until the Plaintiff had paid consideration in respect of the said surgery.

Are you asking the Supreme Court to:

**depart from (or distinguish) one of its own decisions?**

Yes

No

If Yes, please give details below:

**make a reference to the Court of Justice of the European Union?**

Yes

No

If Yes, please give details below:

**Will you request a priority hearing?**

Yes

No

If Yes, please give reasons below:

Signed: M. Egan Solicitors

(Solicitor for) the respondent

Please submit your completed form to:

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

**This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.**