IMPORTANT LEGAL NOTICE - The information on this site is subject to a disclaimer and a copyright notice.

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 24 May 2007 [1](1)

Case C-98/06

Freeport plc
v
Olle Arnoldsson

(Reference for a preliminary ruling from the Högsta domstolen)

(Jurisdiction – Regulation No 44/2001/EC – Special jurisdiction – Number of defendants)

1. By the present reference for a preliminary ruling, the Högsta domstolen (Court of Cassation), Sweden, submits to the Court of Justice a series of questions concerning the interpretation of Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Regulation No 44/2001' or 'the regulation'). (2)

2. Those questions have been raised in the context of proceedings in which the Högsta domstolen has to determine whether the tingsrätt (Court of First Instance), Göteborg, has jurisdiction to hear the action brought before it by Olle Arnoldsson against Freeport Leisure plc ('Freeport plc'), a company established under British law.

I – The legislative background

3. As we know, in extending the powers of the Community in the held of judicial cooperation in civil matters, the Treaty of Amsterdam provided a specific legal basis which was used for the 'Communitarisation' of the Brussels Convention of 27 September 1968 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels Convention').

4. Adopted on the bases of Articles 61(c) and 67(1) EC, Regulation No 44/2001 ('Brussels I') establishes, in a spirit of continuity with the Brussels Convention, (3) the new Community rules on civil and commercial jurisdiction in disputes which have cross-border implications and on the movement of judgments taken in relation to those disputes. (4)

5. Chapter II of Regulation No 44/2001 lays down the Community rules on the attribution of jurisdiction. Section 1 of that Chapter is entitled 'General provisions' and consists of Articles 2 to 4 which define the persons covered by those rules.

6. According to Article 2(1):

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

7. According to Article 3(1):

‘Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.’

8. Section 2 of Chapter II of Regulation No 44/2001, entitled ‘Special jurisdiction’, consists of Articles 5 to 7. For the purposes of this case, it is, in particular, necessary to call to mind some of the provisions of Articles 5 and 6, according to which a person domiciled in a Member State may, at the claimant’s discretion, be sued before courts other than the general court of the defendant’s domicile, if the dispute has specific links with such courts.

9. According to Article 5:

‘A person domiciled in a Member State may, in another Member State, be sued:

1.(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

...

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

... .’

10. According to Article 6:

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

....’

II – The dispute in the main proceedings and the questions referred

11. The facts which gave rise to the dispute in the main proceedings, as they emerge from the order for reference and the case-file, may be summarised as follows.

12. Mr Arnoldsson, the respondent in the main proceedings, worked with Villages des Marques S.A. (‘Villages des Marques’), a company which has been involved, since 1996, in identifying suitable locations in Europe in which to set up what are known as factory outlets and that in developing projects relating them.

13. Some of those projects and, in particular, the project concerning the Swedish site of Kungsbacka, were transferred to Freeport plc, a company with its registered office in the United Kingdom, in return for the payment of a percentage of the added value based on the difference between the market value of each site and the costs of developing the relevant project. According to the documents annexed to the observations which Mr Arnoldsson has submitted to the Court, on 15 September 1999 Freeport plc and Trading Places Ltd, the

parent company of Villages des Marques, concluded an agreement concerning, inter alia, the Kungsbacka site, in the form of a joint venture agreement. (5)

14. On 11 August 1999, in the context of negotiations concerning the transfer of the Kungsbacka site, the representative of Freeport plc and Mr Arnoldsson entered into an oral agreement under which Freeport plc undertook to pay Mr Arnoldsson GBP 500 000 as a 'success fee' ('the agreement') when the Kungsbacka facility opened. Freeport plc confirmed that agreement by fax of 13 September 1999, stating, among other things, that the payment would be made by the site-owning company.

15. The Kungsbacka facility was officially opened on 15 November 2001. It is owned by Freeport Leisure (Sweden) AB ('Freeport AB'), which is a wholly-owned subsidiary of Freeport plc, through its own – similarly wholly-owned – subsidiary Freeport Leisure (Netherlands) BV. Registered in Sweden under a different name on 13 September 1999, Freeport AB was acquired by the Freeport Group in spring 2000.

16. After the facility opened, Mr Arnoldsson requested payment of the commission under the agreement from Freeport AB and Freeport plc. No payment was made and, as a result, on 5 February 2003, Mr Arnoldsson brought a claim for payment against both companies before the tingsrätt, Göteborg, within whose jurisdiction the registered office of Freeport AB was located, claiming that they should be jointly and severally ordered to pay him the sum of GBP 500 000, or the equivalent sum in Swedish Kroner, plus interest.

17. Mr Arnoldsson relied on Article 6(1) of Regulation No 44/2001 to establish the jurisdiction of the tingsrätt, Göteborg, in relation to Freeport plc.

18. Freeport plc objected, first and foremost, that the Swedish court in question lacked jurisdiction and disputed whether the provision relied on by the claimant was applicable to the case.

19. In particular, according to the account which the national court has provided, Freeport plc maintained that the claim against it had a contractual basis, whereas the claim against Freeport AB could only be based on alleged liability in tort or delict, since not only was Freeport AB not a party to the agreement, the company did not even exist at the time when the agreement was concluded. According to Freeport plc, the claim against Freeport AB is entirely without foundation because, in Swedish law, a contract cannot give rise to obligations binding a third party. Consequently, there was no risk of irreconcilable judgments being handed down if the claim against Freeport plc and the claim against Freeport AB were heard by two different courts. The claim against Freeport AB had, therefore, been brought with the sole object of suing Freeport plc before a Swedish court.

20. Mr Arnoldsson replied that the claims brought against the two companies had the same contractual basis. According to Mr Arnoldsson, at the time when the agreement was entered into, the representatives of Freeport plc were acting on behalf of both Freeport plc and Freeport AB which, on becoming part of the Freeport group, had accepted the payment arrangement which Freeport plc had passed on to it on the basis of the agreement. According to Mr Arnoldsson, there was, consequently, at least a quasi-contractual relationship between himself and Freeport AB.

21. The tingsrätt, Göteborg, dismissed the objection of lack of jurisdiction which Freeport plc had raised. The latter then appealed against that decision to the hovrätten för Västra Sverige (Court of Appeal for Western Sweden), which upheld it.

22. Freeport plc therefore referred the matter to the Högsta domstolen which took the view that, in order to resolve the dispute, it was necessary to refer the following questions to the Court for a preliminary ruling:

'1. Is an action based on an alleged obligation on the part of a joint-stock company to make a payment as a consequence of an undertaking given to be regarded as being based on contract for the application of Article 6(1) of … Regulation [No 44/2001],

even though the party which gave the undertaking was neither a representative nor an agent of the company at the relevant time?

2. If the answer to the first question is in the affirmative: is it a precondition for jurisdiction under Article 6(1), in addition to the conditions expressly laid down therein, that the action against a defendant before the courts of the State where he is domiciled was not brought solely in order to have a claim against another defendant heard by a court other than that which would otherwise have had jurisdiction to hear the case?

3. If the answer to the second question is in the negative: should the likelihood of success of an action against a party before the courts of the State where he is domiciled otherwise be taken into account in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 6(1)?'

III – Procedure before the Court

23. Pursuant to Article 23 of the Statute of the Court of Justice, Mr Arnoldsson, Freeport plc and the Commission submitted written observations to the Court.

IV – Analysis

A – *The first question referred*

24. By its first question, the national court is in essence asking the Court to clarify whether, in the light of the circumstances described in the order for reference, Mr Andersson's claim against Freeport AB has a contractual basis.

25. It is clear from the information which the order for reference contains that this question has arisen because the Högsta domstolen considers that, in order for Article 6(1) of Regulation No 44/2001 to apply, the claim brought against the defendant domiciled in the Member State of the court seised and the claim against the defendant domiciled outside that State must share the *same basis*. It is also clear from the order for reference that the national court bases that view on a reading of the Court's judgment in *Réunion européenne and Others*. (6)

26. Before I set out the reasons why I consider that the Högsta domstolen is relying on an incorrect interpretation of the abovementioned judgment, it is necessary to call to mind the rules governing connected claims under Article 6(1) of Regulation No 44/2001, as those rules emerge, in particular, from the clarification which the Court's case-law provides.

27. As we know, the current wording of that article derives from the Court's interpretation of the corresponding provision of the Brussels Convention in its judgment in *Kalfelis*, (7) an interpretation which the Community legislature adopted when the provisions of the Brussels Convention were incorporated into Regulation No 44/2001.

28. In that judgment, the Court laid down as a condition for the application of Article 6(1) of the Brussels Convention that 'there must be a connection between the claims made against each of the defendants.' (8) When subsequently analysing the type of connection required, the Court first pointed out that Article 6(1) had the same purpose as Article 22 of the Convention in regard to situations in which related actions were brought before the courts of different contracting States, (9) and then went on to explain that Article 6(1) applies 'where the actions brought against the various defendants are related when the proceedings are instituted, that is to say where it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.' (10) The Court also made clear that '[i]t is for the national court to verify in each individual case whether that condition is satisfied.' (11)

29. On the basis of Article 6(1) of Regulation No 44/2001, therefore, a number of defendants domiciled in various Member States may be jointly sued before the courts of the domicile of one of them, provided that the claims directed against them are appropriately

and sufficiently connected. That a connection of that nature exists must be clear at the time when the proceedings are instituted (12) and must be assessed in the light of the need for a common decision in order to avoid judgments which may prove to be irreconcilable.

30. That connection exists, above all, where the claims against a number of individuals are so closely linked that they must be brought before the same court, as the subsequent judgment can be delivered only in relation to all of the parties involved. The provision at issue does not, however, necessarily require a similar degree of linkage; (13) it is sufficient that there should be a connection capable of establishing an interest that the claims be heard together to avert the risk of irreconcilable judgments. Consequently, situations in which the claims are connected in terms of the subject-matter or the basis of the claim are also caught by Article 6(1).

31. I should point out that, since neither Regulation No 44/2001 nor the Community courts when interpreting the regulation itself or the provisions of the Convention which preceded it, have provided a comprehensive definition of those situations in which Article 6(1) may apply, it is for national procedural law to incorporate the rules for which Article 6(1) provides. In other words and as, moreover, already stated in the abovementioned judgment in *Kalfelis*, (14) in the absence of Community rules, it is for the court seised of the case to assess, on the basis of its procedural law, whether it is necessary to concentrate jurisdiction in one court where there are a number of defendants.

32. Having made those preliminary points, I shall now consider the relevance, for the purposes of resolving the dispute pending before the Högsta domstolen, of that court's reference to the abovementioned judgment in *Réunion européenne and Others*. (15)

33. In that judgment, the Court handed down a preliminary ruling on a series of questions which had been submitted by the French Cour de Cassation and concerned the interpretation of Article 5(1) and (3) and Article 6(1) of the Brussels Convention. Those questions had been raised in the context of a dispute between a number of insurance companies – which had been subrogated to the rights of a French company that was the recipient of goods which had proved to be damaged on arrival, after being carried by sea and by land from Melbourne to Rungis – and the carrier under the contract, with its registered office in Sidney, the Dutch owner of the vessel that had made the sea voyage from Melbourne to Rotterdam and the Master of the vessel, who was domiciled in the Netherlands. The Tribunal de Commerce, Créteuil, in whose jurisdiction Rungis – the place where the goods were delivered – is situated, declared itself competent to hear the insurers' claim against the Australian carrier only, but declined jurisdiction in regard to the other defendants in favour of the courts of Rotterdam, the place of performance of the Dutch ship-owner's obligation, or of Amsterdam in which the latter had its registered office or, indeed Sidney. Before the Cour de Cassation –which was seised of the case after the Cour d'appel, Paris, had upheld the judgment of the Tribunal de commerce, Créteuil –the insurers' main argument was that since no contractual relationship had been established between the recipient of the goods, on the one hand, and the ship owner and the Master of the vessel, on the other, the courts ruling on the merits ought to have applied the connecting factors which Article 5(3) of the Brussels Convention lays down in relation to liability in tort or delict, and not Article 5(1) which relates solely to matters of contract. In the alternative, the claimant companies pointed out that the claims directed against the various defendants related to the same transport operation and that the dispute was, therefore, indivisible.

34. The first three questions referred concerned the interpretation of Article 5(1) and (3) of the Brussels Convention. By those questions, the Court of Justice was, in essence, asked to rule on whether or not the claims the insurers were making against the Dutch ship-owner and the Master of the vessel were matters relating to a contract, as well as to provide an interpretation of the phrase 'place where the harmful event occurred', within the meaning of Article 5(3).

35. By its fourth question, however, the Cour de Cassation asked the Court whether 'a defendant domiciled in the territory of a Contracting State [may] be brought, in another Contracting State, before the court hearing an action against a co-defendant not domiciled in the territory of any Contracting State, on the ground that the dispute is indivisible, rather than merely displaying a connection.' (16)

36. In its answer to that question, the Court first ruled out that the conditions governing the applicability of Article 22 of the Brussels Convention were satisfied in the case in point, (17)and then drew attention to the wording of Article 6(1) thereof, stating that the condition governing the applicability of Article 6(1), is that 'it applies only if the proceedings in question are brought before the courts of the place where one of the defendants is domiciled,' (18) a condition that was not met in that case. (19)

37. Although that finding was of itself sufficient to preclude reliance on Article on 6(1) of the Brussels Convention in the main proceedings and to answer the national court's question, the Court continued with its line of reasoning and referred to the clarification which the abovementioned *Kalfelis* judgment (20) provides concerning the conditions under which Article 6(1) applies, (21) as well as the passage in that judgment according to which a court which has jurisdiction under Article 5(3) of the Convention over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based. (22) At paragraph 50 of the grounds, which the Högsta domstolen cites in the order for reference, the Court concluded that '[i]t follows that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected.' (23)

38. Although it is possible to interpret the latter statement as meaning that the Court intended making the application of Article 6(1) of the Brussels Convention subject to a further condition, as compared with the position it had taken in *Kalfelis* – and that, in fact, is how it has been construed by the courts of some Contracting States – I consider that its scope should be reassessed in its proper context.

39. In actual fact, if we consider paragraphs 49 and 50 of that judgment in their logical context, it appears that they should instead be interpreted as confirming what the Court had already stated at paragraph 44, that is to say that, within the scheme of the Convention, the element of connection may act as a criterion for conferring jurisdiction solely in favour of the courts of the place of the defendant's domicile. In particular, it seems to me that, in those passages, the Court intended explicitly to confirm that, for the purposes of hearing disputes involving several co-defendants together, the jurisdiction of courts other than those of the place of defendant's domicile is irrelevant, by precluding the possibility that such jurisdiction could permit several related claims to be heard together, if that jurisdiction was justified in relation to one of those claims only.

40. A similar construction must be placed on the reference to the paragraph in the *Kalfelis* judgment in which the Court stated that the court which has jurisdiction under Article 5(3) may not be seised of matters other than matters relating to tort and delict, even if those matters are raised in the context of the same claim. In point of fact, it follows that if a court has been seised of two connected claims which have been brought against different defendants, and the first is based on delict and the second on contract, it may not order that the two claims be heard together because they are connected if it has jurisdiction on the basis of Article 5(3) (24) of the Convention to hear the first claim, but its own jurisdiction in relation to the second claim is not independently established (in a situation, for example, where the place of performance of the contractual obligation and the place in which the harmful event occurred are the same, or pursuant to the general criterion of the court of the defendant's domicile). In those circumstances – namely where there is no link with the domicile of one of the co-defendants – the connection between the two claims is not, in fact, capable of acting as a criterion conferring jurisdiction, nor can jurisdiction be established on the basis that the jurisdiction pursuant to Article 5(3) exerts a 'power of attraction', case-law having expressly ruled out that possibility.

41. If that is the interpretation to be given to paragraphs 49 and 50 of the judgment in *Réunion européenne*, then, contrary to the view which the national court takes, that judgment does not preclude the applicability of Article 6(1) of the Brussels Convention in actions involving both contractual and non-contractual liability, provided that bringing the relevant proceedings together *has the effect of conferring jurisdiction on the courts of the domicile of one of the co-defendants*.

42. The interpretation of paragraphs 49 and 50 of the judgment in *Réunion européenne* which I have suggested above, and which the Commission broadly shares, appears to be consistent with the approach which the Court had already taken in *Kalfelis* and, more generally, with the scheme of the Brussels Convention (now Regulation No 44/2001).

43. On the one hand, it continues the approach adopted in the judgment in *Kalfelis*, on the basis of which the existence of a connection between the claims, as set out in that judgment, constitutes the *only objective requirement* for the application of Article 6(1), whereas the interpretation which the national court is suggesting basically implies introducing a further requirement to the effect that the actions relating to the various defendants must have the same basis.

44. On the other hand, that interpretation is not incompatible with the objectives pursued by the scheme of, first, the Brussels Convention and, then, Regulation No 44/2001, which include achieving a balance between the sound administration of justice and the need to enhance the legal protection which the courts afford individuals within the European judicial area, whereas a different interpretation of that judgment, such as the interpretation which the national court suggests, risks *unduly restricting the scope of Article 6(1)*, thus undermining the aims of procedural economy, *without that being justified by the need to protect the pivotal position of the defendant's place of domicile as the general criterion for conferring jurisdiction* or to ensure predictability in the establishment of jurisdiction.

45. In the light of the above considerations, it is my view that the first question submitted by the national court derives from an incorrect interpretation of the Court's case-law and is not relevant for the purposes of resolving the dispute forming the subject-matter of the main proceedings. If, in fact, Article 6(1) of Regulation No 44/2001 also applies in situations which involve both contractual and non-contractual liability, the solution to the dispute before the Högsta domstolen does not require that it first be established whether or not the claim underlying the Mr Andersson's action against Freeport AB is of a contractual nature.

46. I shall therefore move on to consider the second and third questions which the Högsta domstolen has submitted.

B – *The second and third questions*

47. By its second and third questions, which I consider it appropriate to examine together, the national court is in essence asking the Court, on the one hand, whether Article 6(1) of Regulation No 44/2001 applies only provided it is established that the action against a defendant domiciled in the Member State of the court seised has not been brought solely with the object of removing another defendant from the jurisdiction of the court which could be competent in this case (25) and, on the other, if that question is answered in the negative, whether the fact that the claimant is pursuing an objective of that nature affects the assessment of the likelihood of that action succeeding in the context of the analysis of the risk of irreconcilable judgments for which Article 6(1) of Regulation No 44/2001 provides. (26)

48. It seems to me that, albeit in terms which are confined to the sphere of application of the provision whose interpretation is sought, these questions raise the sensitive issue of the limits on the fraudulent or wrongful use of the bases for jurisdiction which Regulation No 44/2001 lays down. I do not intend, nor do I consider it necessary for the purposes of resolving the current dispute, to deal with that problem generally; I shall, therefore, confine myself to setting out the considerations that an analysis of the questions which the national court has submitted strictly demands, although I am aware of the sensitivity of the basic issue that forms the backdrop to those considerations.

49. As I have already had occasion to point out, within the scheme of Regulation No 44/2001 (and, similarly, the earlier Brussels Convention) the requirement that there should be a specific jurisdictional connection in the situations where cases may be heard together pursuant to Article 6(1) and (2), is justified because the objectives pursued are those of procedural economy and compatible judgments.

50. I have also pointed out that the applicability of that connection is circumscribed by the need to avoid either unduly restricting the scope of the general criterion of the court of the defendant's domicile – thereby jeopardising legal certainty in relation to the establishment of jurisdiction – or making it possible, indirectly and more or less systematically, to have the case heard by the courts of the place of the claimant's domicile, to which the Community legislature has clearly been opposed (even prior to the Brussels Convention).

51. Consequently, it seems to me that in interpreting the provisions of Regulation No 44/2001 relating to the procedural connection, account must be taken of the dialectic between the interest in the sound administration of justice and respect for the pivotal position of the courts for the place of the defendant's domicile as the general jurisdictional linking factor.

52. That said, it is necessary to begin by pointing out that since, in cases involving a number of defendants, actions on a warranty or guarantee or in any other third party proceedings, the linking factors provided for by Article 6(1) and (2) are alternatives to the criterion whereby jurisdiction is conferred on the court of the defendant's domicile, the claimant has in that regard *an option* which he is likely to exercise in the light of his own interest in having the dispute heard by one court rather than another. This is inherent in the scheme of the regulation and is a consequence which it is difficult to counteract, since it is not possible to prevent a party wishing to bring proceedings within the 'European judicial area' from using the possibilities that system affords to select, in compliance with the rules which that system lays down, the court best-suited to him. (27)

53. However, as well as recognising that an option of that nature exists, the system of rules also establishes certain mechanisms which make it possible to curtail the opportunities for using it in a fraudulent or wrongful manner.

54. The application of the provisions in question is, first of all, subject to a common condition – which also acts as the main limitation on the use of the alternative courts having jurisdiction for which they provide – namely that there must *be a real and current interest in the disputes being heard together*. The existence of that interest has to be determined on the basis of a comprehensive evaluation by the court seised, based on *objective* criteria for assessment inherent in the cases which that court is hearing, such as the degree of connection which characterises them and the degree of proximity in relation to the court.

55. In actions on a warranty or guarantee or in any other third party proceedings in which the connection with the original proceedings is usually inherent (28) and – in contrast to the position pursuant to Article 6(1) where there are a number of defendants – the proceedings are not necessarily concentrated before the courts of the defendant's domicile or of the third party's domicile, a further limit on the applicability of the relevant emerges, since those cases in which the original proceedings prove to have been instituted solely with the object of removing the defendant from the jurisdiction of the court which would otherwise be competent in the case are specifically precluded. (29)

56. It should be pointed out that, as is clear from the wording of Article 6(2) of Regulation No 44/2001, that limitation precludes the applicability of the jurisdictional linking factor for which Article 6(2) provides, both in cases in which its use proves to be fraudulent and where it takes the form of abuse of the claimant's right to choose, (30) that is to say for *a purpose different from the purpose for which that right was conferred*. (31)

57. The Högsta domstolen is asking the Court whether that limitation also applies to Article 6(1) of Regulation No 44/2001, even though that article does not specifically provide for it.

58. The Commission proposes that this question should be answered in the negative. It takes the view that Article 6(1) must be interpreted as meaning that if the claims are sufficiently connected, there can be no questioning of the objectives the claimant is pursuing. According to the Commission, that interpretation is confirmed by the abovementioned judgment in *Kalfelis*, (32) in which the condition that the claims should be connected was

considered to have the effect of precluding the possibility that the option accorded to the claimant by Article 6(1) of the Brussels Convention could be exercised with the sole object of ousting the jurisdiction of the courts of one of the defendants. (33)

59. I do not consider that the interpretation which the Commission is proposing can be accepted.

60. First of all, I do not agree with the above interpretation of the judgment in *Kalfelis*. In my view, the only inference which may be drawn from that judgment is that it was the Court's intention to establish a *presumption* that there was neither fraud nor abuse if the specific connection which it requires exists. (34) Moreover, in a later judgment, the Court clearly demonstrated that it considers that this presumption may be overturned, if the circumstances make it possible to establish the fraudulent or wrongful use of the linking factor which Article 6(1) lays down. (35)

61. The interpretation which the Commission is suggesting then falls foul of the fact that while the existence of a connection between the claims, which Article 6(1) of Regulation No 44/2001 requires, ensures that the provision will be applied in accordance with the purpose for which it was introduced, it does not preclude the possibility of the claimant using the basis for jurisdiction under Article 6(1) with the sole object of ousting the jurisdiction of the court for the place of domicile of one of the defendants and, consequently, does not eliminate the risk of fraud or abuse. That could happen, for instance, if a person were sued before the courts of the domicile of a *fictitious co-defendant*, against whom proceedings are brought which, although *objectively connected* with the proceedings brought against the other defendant, are manifestly unfounded or are proceedings in which the claimant has no real interest. (36)

62. It is my opinion that the applicability of the uniform rules on conflict which Regulation No 44/2001 lays down is generally limited by '*fraud relating to the jurisdiction of the courts*', and that fraud of that nature occurs if those rules have been applied as a result of manipulation on the part of the claimant which is designed to and has the effect of ousting the jurisdiction of the courts of a particular Member State over a legal relationship which is the subject of a dispute or of having the case heard by the courts of a Member State which would not have had jurisdiction had that manipulation not taken place. Moreover, the Court has already recognised that a limit of that nature applies, at least in cases in which the fraud is the result of the linking factors being manipulated in such a way that the basis for jurisdiction is artificially created. (37)

63. More delicate, however, is the question (38) whether it is possible to identify in the scheme of Regulation No 44/2001 a general prohibition on the *abuse of the right to choose the court* and whether, if that right is wrongfully exercised, it becomes impossible to determine jurisdiction, with the result that the uniform rules on conflict come into play, (39) or if its sole effect is on the admissibility of the claim, (40) and the attribution of jurisdiction under the provisions of the regulation remains unaffected.

64. As I mentioned, I do not intend analysing that question further at this time. In fact, as I have already had occasion to point out, although the prohibition to which the applicability of the linking factor is subject under Article 6(2) of Regulation No 44/2001 is worded in such a way as to catch both instances of fraud and abuse of the right to select the court, I see no reason – linked in particular to the need for a uniform application and independent interpretation of the regulation's provisions – that would prevent it from applying to the cases regulated by Article 6(1) as well.

65. Extending the prohibition under Article 6(2) by analogy in that way – and this has, moreover, already been approved by implication by the Court – (41) makes it possible, in particular, to preclude Article 6(1) being applied to situations which do not fall within its natural scope as well as to prevent the basis for jurisdiction which it lays down being relied on if that is designed to serve interests which do not merit protection.

66. As regards ascertaining whether that prohibition has been respected, it will be for the court hearing the case to determine whether, although the claims made against the different

defendants are objectively connected, Article 6(1) of Regulation No 44/2001 has been relied upon with the sole object of removing one of those defendants from the courts of his own domicile. However, I should add here that it does not seem to me to be sufficient ground to establish fraudulent or wrongful intent on the part of the claimant – likely unduly to restrict the scope of Article 6(1) – that the action brought against the defendant domiciled in the forum Member State *appears to be unfounded*, since that action must, at the time when it was lodged appear to be *manifestly* unfounded in all respects – to the point of proving to be contrived – or devoid of any real interest for the claimant.

67. On the basis of the information which the national court has provided, it does not seem to me that the claim which Mr Arnoldsson has brought against Freeport plc displays any of those features.

68. On the basis of all of the above considerations, I propose that the Court reply to the second question as follows:

'Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that it does not permit a claimant to bring claims against more than one defendant with the sole object of ousting the jurisdiction of the courts of the Member State in which one of the defendants is domiciled, even if those claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

69. As regards the third question, since it was submitted in the event that the second question was answered in the negative and I am proposing that the Court reply to that question in the affirmative, I shall merely point out that the assessment of the risk of irreconcilable judgments, which Article 6(1) of Regulation No 44/2001 requires of the court seised, must be made taking account of all the relevant factors.

70. Like the Commission, I consider that that assessment may also include an evaluation of the likelihood that the claim brought against the defendant who is domiciled in the forum Member State will succeed. However, that evaluation will be of real practical relevance for the purpose of excluding the risk of irreconcilable judgments only if that claim proves to be manifestly inadmissible or unfounded in all respects.

71. I must emphasise, however, that the conclusion which the Court reached in *Reisch Montage* seems to contradict that view. In that judgment, the Court held that the manifest inadmissibility of the claim brought against a defendant domiciled in the forum Member State, as a result of a procedural bar under national law, did not preclude reliance on the basis for jurisdiction under Article 6(1) of Regulation No 44/2001 in relation to a defendant domiciled in another Member State. (42)

V – Conclusion

72. In the light of the above considerations, I propose that the Court reply to the questions referred by the Högsta domstolen as follows:

'Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that it does not permit a claimant to bring claims against more than one defendant with the sole object of ousting the jurisdiction of the courts of the Member State in which one of the defendants is domiciled, even if those claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

---

1 – Original language: Italian.

---

2 – OJ 2001 L 12, p. 1.

---

3 – See, in particular, recitals 5 and 19 of the preamble to the regulation.

---

4 – Regulation No 44/2001 is binding on all of the Member States with the exception of Denmark, which did not exercise its 'opt in' right as regards measures adopted pursuant to Title IV of the Treaty, as provided for in Protocol 5, annexed to the Treaty on European Union and the EC Treaty. The Brussels Convention will, therefore, continue to apply to Denmark until the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 19 October 2005 enters into force (OJ 2005 L 299, p. 62); the agreement extends to Denmark the application of the provisions of Brussels I. However, as a result of their declarations of acceptance, the regulation has been binding from the outset on the United Kingdom and Ireland, which have the same right to opt in, pursuant to Protocol 4.

---

5 – A similar agreement concerning sites in France was concluded on the same day between Freeport plc, Trading Places Ltd and Villages des Marques.

---

6 – Case C-51/97 [1998] ECR I-6511.

---

7 – Case 189/87 *Kalfelis* [1988] ECR 5565.

---

8 – Paragraph 9. The Court arrived at that interpretation after making the point that Article 6(1) of the Brussels Convention is an exception to the principle that jurisdiction is vested in the courts of the State of the defendant's domicile and 'must be treated in such a manner that there is no possibility of the very existence of that principle being called in question', a possibility that 'might arise if a plaintiff were at liberty to make a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled.'

---

9 – Now Article 28 of Regulation No 44/2001.

---

10 – Paragraph 12.

---

11 – Paragraph 12.

---

12 – See paragraph 12 of the judgment in *Kalfelis*.

---

13 – See, to that effect, the Opinion of Advocate General Darmon in *Kalfelis*, cited above, at point 8.

---

14 – Paragraph 12.

---

15 – Footnote 6 above.

---

16 – Paragraph 13.

17 – Paragraphs 38 to 41.

18 – Paragraph 44.

19 – Paragraph 45. The Court added that 'the objective of legal certainty pursued by the Convention would not be attained if the fact that a court in a Contracting State had accepted jurisdiction as regards one of the defendants not domiciled in a Contracting State made it possible to bring another defendant, domiciled in a Contracting State, before that same court in cases other than those envisaged by the Convention, thereby depriving him of the benefit of the protective rules laid down by it' (paragraph 46).

20 – Footnote 7 above.

21 – Paragraphs 47 and 48.

22 – Paragraph 49.

23 – Paragraph 50.

24 – However, that applies generally in all cases in which jurisdiction is attributed on the basis of linking factors which leave the defendant's domicile out of consideration.

25 – The Högsta domstolen dolmen refers, in that connection, to Article 6(2), which specifically lays down that condition.

26 – Setting aside the fact that the wording of that point in the order for reference is unclear, it seems to me that the substance of the third question and way in which it is linked to the second question may be accurately summarised as I have set out above.

27 – Within certain limits, 'forum shopping', interpreted according to the definition provided by Advocate General Colomer, as '[c]hosing a forum according to the advantages which may arise from the substantive (and even procedural) law applied there' (see the Opinion of 16 March 1999 in Case C-440/97 *GIE Group Concord and others* [1999] ECR I-6307, in particular p. I-6309, footnote 10) is undoubtedly permitted.

28 – See Case C-77/04 *GIE Réunion européenne and Others* [2005] ECR I-4509, paragraph 30, and the Opinion of Advocate General Jacobs of 24 February 2005 in the same case, at point 32.

29 – In *GIE Réunion européenne and Others*, cited above, the Court seems to consider that this condition is met if there is a sufficient degree of connection between the original proceedings and the third party proceedings. However, as will become clearer below, the existence of a connection of that nature is not always enough to prevent fraud or an abuse of jurisdiction.

30 – Academic legal writers seem to accept that the choice between the various criteria of connection from which the claimant benefits under the provisions of Regulation No 44/2001 constitutes a genuine individual right, a corollary of the right to effective protection by the courts.

---

31 – That is to say, to allow the claimant better protection of his own rights by the courts as a result of the possibility of joining in a single action connected claims brought against various individuals.

---

32 – Footnote 7 above.

---

33 – Paragraphs 8 and 9.

---

34 – The same presumption appears to be accepted in the judgment in *GIE Réunion européenne and Others*, cited in footnote 28 above, at paragraphs 32 and 33.

---

35 – See Case C-103/05 *Reisch Montage* [2006] ECR I-6827. At paragraph 32 of that judgment, the Court calls to mind that 'the special rule on jurisdiction provided for in Article 6(1) of Regulation No 44/2001 cannot be interpreted in such a way as to allow a plaintiff to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the Member State in which that defendant is domiciled,' but does not consider that to be the case in the main proceedings. The question for a preliminary ruling arose in the context of proceedings before an Austrian court which related to two separate disputes, the first concerning an individual domiciled in Austria against whom bankruptcy proceedings had previously been brought, and the second against the company that had stood security for him. Since the action brought against the first defendant had been declared to be inadmissible because of the procedural bar which bankruptcy gave rise to under the national law, the national court raised the question whether, in such circumstances, the claimant could legitimately rely on Article 6(1) to establish the jurisidiction of the court hearing the case of the second defendant. Although the two actions were clearly connected, the Court made it plain that the jurisdiction of the court seised within the meaning of Article 6(1) of Regulation No 44/2001 may be called into question if it has been relied on wrongfully. The fact which led the Court to rule out abuse of that nature in that case – and which emerges from the order for reference – was, probably, the lack of evidence that the claimant was aware of the state of bankruptcy and, consequently, that he was acting in bad faith.

---

36 – Thus, for example, reliance on the basis for jurisdiction in Article 6(1) of Regulation No 44/2001 could have been objected to in the national proceedings which gave rise to the Court's judgment in *Reisch Montage*, cited in footnote 35 above, had it been established that the claimant was acting in bad faith.

---

37 – See Case C-106/95 *MSG* [1997] ECR I-911 concerning the interpretation of Article 5(1) of the Brussels Convention. At paragraph 31, the Court points out that 'whilst the parties are free to agree on a place of performance for contractual obligations which differs from that which would be determined under the law applicable to the contract, without having to comply with

specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.' See also Case 220/84 *Malhé* [1985] ECR 2267.

---

38 – That question falls within the more general context of the mechanisms which make it possible to identify and prevent misuse of the provisions of the regulation and, all in all, to prevent what has been described as the *forum shopping malus*. The need to guarantee the effectiveness and uniform application of, first, the Convention and, then, Regulation No 44/2001, by ensuring that the linking factors those instruments employ have objective value – as they must be in order to ensure that the basis for jurisdiction is predictable – has led the Court to adopt a particularly cautious approach to these matters, which has inevitably attracted criticism from academic legal writers. See, in particular, Case C-159/02 *Turner* [2004] ECR I-3565 on anti-suit injunctions and Case C-116/02 *Gasser* [2003] ECR I-14693 on lis alibi pendens.

---

39 – As in the case of Article 6(2) of Regulation No 44/2001 and, before that, the Brussels Convention.

---

40 – The Court has made clear that establishing the conditions governing the admissibility of an action is a matter for national procedural law, subject only to the proviso that that application of that law must not impair the effectiveness of the rules on jurisdiction laid down in the Convention (Case C-365/88 *Hagen* [1990] ECR I-1845, paragraphs 17 to 20).

---

41 – See the judgment in *Reisch Montage*, cited above in footnote 35.

---

42 – Advocate General Colomer took quite the opposite view in his Opinion in that case.