



APPROVED

## THE COURT OF APPEAL

Neutral Citation: [2022] IECA 104

Court of Appeal Record Number: 2019/376

**Donnelly J.**

**Ní Raifeartaigh J.**

**Collins J.**

**BETWEEN**

**JOAN DONNELLY**

**APPELLANT**

**-AND-**

**VIVIER AND COMPANY LIMITED**

**RESPONDENT**

**JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 6th day of May 2022**

### **The issue under appeal**

1. The appellant, who lives in Ireland, obtained an order for service of her plenary summons out of the jurisdiction on the respondent, a company incorporated in New Zealand. The appellant's claims include claims for defamation and a claim for payment of monies she says are due to her in respect of legal research services she performed for the respondent. The respondent entered a conditional appearance contesting the jurisdiction of the Irish courts and brought a motion to strike out the appellant's proceedings. This application was

successful in the High Court. The appellant appeals against the decision of the High Court and seeks to maintain her proceedings against the New Zealand company in Ireland.

## **Order 11 of the Rules of the Superior Courts and Service out of the Jurisdiction**

2. As the respondent is a company incorporated in New Zealand, Order 11(1) and the common law rules constitute the applicable legal framework. The EU regime (Regulation (EU) 1215/2012 or “Brussels 1 recast”) does not apply. Order 11(1) of the Rules of the Superior Courts (RSC) sets out a number of categories in which service out of the jurisdiction of an originating summons or notice of an originating summons may be permitted. The most relevant categories for present purposes are where:-

“(e) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract

(i) made within the jurisdiction; or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) by its terms or by implication to be governed by Irish Law, or is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction;

or

(f) the action is founded on a tort committed within the jurisdiction.”

3. The basic connection between the procedural question of service out of the jurisdiction and the underlying common law rules as to jurisdiction in cases with connections to several countries is well described by Delaney and McGrath, *Civil Procedure* (4<sup>th</sup> ed, 2018), who say at paragraph 1-13:

“Given that service is the foundation of jurisdiction, and that service out of the jurisdiction is not permissible except in those circumstances prescribed by Order 11, the question of whether the Irish courts have jurisdiction in a claim involving a foreign defendant or element essentially involves an inquiry as to whether service out is permissible pursuant to Order 11. ....Order 11, rules 1(a)-(s) enumerate the different circumstances in which proceedings can be served out of the jurisdiction. The courts have held that this represents an exhaustive list of situations in which the grant of leave to serve proceedings out of the jurisdiction will be contemplated. Thus, it is imperative that an applicant seeking an order for service out of the jurisdiction bring himself within one of the categories set out therein as otherwise leave will not be granted”. Order 11 is, however, discretionary; the fact that proceedings come within one or more of the categories specified in Order 11, rules 1(a)-(s) does not entitle the applicant as of right to succeed in an application for leave to effect service out of the jurisdiction.” (footnotes omitted).

4. Order 11, r. 5 provides:-

“Every application for leave to serve a summons or notice of a summons on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and

whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under r. 1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in r. 2 specified; and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.”

5. The burden is on the applicant for leave to demonstrate that “*the case is a proper one for service out of the jurisdiction under this Order*” (Order 11, r. 5 RSC). Therefore, an applicant for leave to serve out of the jurisdiction must show (i) that he or she falls within one or more of the categories in the sub-paragraphs of Order 11(1), which are in effect jurisdictional “gateways”; and (ii) that the case is a proper one for service, i.e. that this jurisdiction is *forum conveniens*.

### **The reliefs sought by the appellant in these proceedings**

6. Before setting out the reliefs sought by the appellant, some initial background facts may assist in providing some context. A more detailed chronology of events is set out later in this judgment.

7. The appellant, who was at all material times living and working in Ireland, was a director of the respondent company (“VCL”) from December 2014 until certain events occurred in the summer of 2017 which are the subject of these proceedings. As noted, the respondent is a company incorporated in New Zealand. The appellant was also a director of a connected Irish company during the same period. This Irish company went through various incarnations and name-changes and references will be made to Home Funding Corporation Limited, Vivier Mortgages Limited (hereinafter “VML”) and Elstree Mortgages Limited

(hereinafter “**EML**”) in that regard, as these different names feature in the documentary exhibits and affidavits in the case.

**8.** The appellant agreed to undertake some legal research for the respondent in connection with a particular project, which she carried out during the year 2015. Central to one of her claims is the contention that she was never paid for this work.

**9.** Certain events, described in further detail below, took place in the summer of 2016. There is a serious conflict between the parties as to one particular, and key, event. The respondent maintains that the appellant resigned her position as director of the respondent and sent a resignation letter by email to that effect. The appellant maintains that she did not. She maintains that any email or document purporting to show that she resigned is a forgery. Furthermore, she maintains that she stepped down as a director on a temporary basis with a clear understanding that this was for reasons of public optics only and that it was agreed that she would be entitled to come back after a short period. She also maintains that she never lost any of her rights during this temporary step-down.

**10.** In February 2017, there was an email exchange in which the appellant was sent the disputed resignation letter/email. She immediately responded that it was a forgery and that her electronic signature had been put on it by the respondent and not herself. She continued to make her views on this issue known to various parties over the ensuing days, weeks and months. This, in turn, evoked strong denials by the respondent and its officers that the document was forged. Various communications ensued, with each side accusing the other of defamation.

11. Unsuccessful settlement talks between the parties took place in London in April 2017. The next day, her directorship with EML was terminated.

12. The appellant made various complaints to bodies in New Zealand, as we shall see below. She then decided to bring proceedings in Ireland. She made the respondent aware of this and correspondence was exchanged. Among other things, the respondent or its agents maintained in the course of this correspondence that the appropriate jurisdiction for the resolution of the dispute was New Zealand. It requested that its position on this, together with one particular document (discussed below) be brought to the attention of the High Court on any leave application. In fact this was not done. The appellant maintains that she did not do so because it was an irrelevant document.

13. The appellant made an *ex parte* application for leave to serve out of the jurisdiction pursuant to Order 11(1) grounded upon an affidavit setting out her version of the facts and exhibiting a small number of documents. An order was granted by the High Court (Meenan J.) on the 9 April 2018 (perfected on the 16 April 2018) giving her leave to serve out of the jurisdiction by email. Regrettably the order does not identify the particular category of Order 11(1) in respect of which leave was given ( despite what was said in this regard in *Shipsey v British and South American Steam Navigation Co.* [1936] IR 65, and *Analog Devices* [2002] 1 IR 272). In any event, the argument in this appeal has centred on Order 11(1) subparagraphs (e) and (f).

14. The above provides a general context for the reliefs sought by the appellant. She identifies three broad forms of relief in her plenary summons, which is dated the 19 April

2018, and in her statement of claim. Incidentally, the statement of claim furnished to the Court was undated, but Mr. Hashemifar has averred that it was issued on the 11 May 2018.

**15.** First, she seeks “€36,000 for legal services rendered to the defendant”. No further details are provided as to how this sum was calculated but it is not in dispute that it refers to payment claimed by the appellant in respect of the legal research conducted by her for the respondent. In her affidavit seeking leave to serve out of the jurisdiction, she referred at paragraph 6 to this claim being based upon *quantum meruit*. The Statement of Claim appears to be in accordance with this view (i.e. *quantum meruit*) of the nature of this claim (although it is curious, perhaps, that the claim is for a definite sum of €36,000 and no reference is made to the court having to evaluate the services rendered or how the relevant valuation is to be conducted). Later, as we shall see, the appellant asserted that her claim was based upon a contract concluded by an exchange of emails, but this suggestion arose for the first time from a replying affidavit which she swore in response to the affidavit grounding the respondent’s motion to dismiss the proceedings.

**16.** Secondly, the appellant seeks damages for defamation. The Statement of Claim enumerates six different alleged instances of defamation. The content of five of the alleged defamatory publications is identical; namely, that the respondent alleged that the appellant had manufactured a false allegation of forgery against the respondent in order to circumvent the waiver of fees contained in her alleged letter of resignation and thereby extort monies from the company. Those five different publications of this identical alleged defamation are alleged to be as follows:

- i. From the management of the respondent to the members of its own Board of Directors
- ii. From the respondent to Consult-Partners, which is said to be its parent company.
- iii. From the respondent to EML

iv.From the respondent to the New Zealand Privacy Commissioner

v.From the respondent to the New Zealand Companies Office

**17.** The sixth alleged defamation is a publication by the respondent to the New Zealand Human Rights Review Commission to the effect that the appellant had, over a two-year period, sent vituperative emails to the personnel of the respondent for the purpose of intimidating and harassing the company.

**18.** The third relief or claim is described as “Intimidation and Economic Duress arising out of the decision of the respondent to manipulate EML into threatening to dismiss the plaintiff from her positions with EML if she should ever contact the respondent again or issue proceedings against it (which decision led to the dismissal of the plaintiff from her position with EML)”. I will refer to this as the “Intimidation/Economic Duress” Claim.

### The present application

**19.** The normal procedure – and in my opinion the appropriate procedure under the Rules - for a defendant seeking to aside the order granting leave to serve out would bring an application to this effect under Order 12, r. 26 together with an application for a stay on the ground of *forum non conveniens*, but this was not the procedure adopted here. Instead the respondent brought a motion seeking an order striking out the proceedings for want of jurisdiction and declaring that the Court had no jurisdiction to hear and determine the plaintiff’s claim against the defence. However, the application appears in effect to have been treated by both parties as an application to set aside the *ex parte* order. I will comment on the burden and standard of proof in respect of such an application later in this judgment.



**20.** After the appellant obtained leave on an *ex parte* basis to serve out of the jurisdiction, the respondent entered a conditional appearance on the 26 June 2018 for the purpose of contesting jurisdiction.

**21.** The notice of motion contesting jurisdiction is dated the 15 November or December 2018 (it was difficult to decipher the date on the copy provided to the Court). This was grounded on an affidavit sworn on the 23 October 2018 by a Mr. Ali Hashemifar, exhibiting a number of documents, including a “consultant’s contract” dated the 4 December 2014 which clearly provides for New Zealand as the jurisdiction for the resolution of disputes between the appellant and the respondent. The respondent maintains that this document clearly shows that Ireland does not have jurisdiction.

**22.** The appellant filed a replying affidavit sworn in January 2019 (again the precise date is difficult to decipher) which exhibited further documents. The appellant maintains that the contract of the 4 December 2014 was confined to her directorship duties and did/does not apply to the legal research services in respect of which she now seeks remuneration. She exhibited (for the first time) a number of emails dated August 2014 which, she contended, showed that there was a separate contract governing the issue of the legal research which contained no choice of law/jurisdiction clause. She contended that the appropriate jurisdiction for the resolution of any dispute relating to this subject-matter (i.e. the legal research services she provided) fell to be governed by the common law, and that the application of the common law principles favoured the assumption of jurisdiction by the Irish courts. (As I have already observed, she had previously put forward her claim for payment of money on a *quantum meruit* basis).

23. It is now necessary to examine in greater detail the factual events which took place insofar as this may be constructed from the pleadings to date and the affidavits filed in relation to the motion together with the documents exhibited therein. I will confine myself to such matters as appear relevant to the issue before the court. The appellant made many allegations in respect of the respondent and its officers which are not directly relevant to this appeal. What is most relevant for present purposes is the nature of the claims, the location of various events, and the content of particular documents, all of which are relevant to the issue of jurisdiction under Order 11(1).

**The facts according to the evidence available to the Court on this appeal**

24. As noted, the respondent “VCL” is a company incorporated in New Zealand which provided financial services at the material time. The Chief Executive Officer was one Luigi Wewege. The appellant has averred that the company is legally owned by one Eduardo Goncalves but is beneficially owned and managed by one Ian Andrews, formerly known as Ian Leaf. The Irish company, EML, is registered with the Central Bank and operates in Ireland. It was formerly known as VML and before that again, Home Funding Corporation Limited.

***July 2014: Directorship contract between the appellant and Home Funding Corporation (later EML)***

25. On the 31 July 2014 the appellant entered into an agreement with Home Funding Corporation Limited whereby she became a director of that company. The appellant averred that the company was a credit servicing firm and that it is legally owned and managed by one Richard Andrews.

26. The Court has seen a written agreement of July 2014 whereby the appellant became director of Home Funding Corporation. It is clear from Clause 11 of that document that any disputes were to be resolved by arbitration within this jurisdiction, with the possibility of an appeal to the High Court on a point of a law arising out of an award.

27. On the 14 August 2014 the company changed its name to VML and then on the 10 August 2016 to Elstree Mortgages Limited (EML). Mr. Hashemifar exhibited the certificates of incorporation on change of name to VML and then EML.

28. The Court has also been furnished with a letter dated the 20 June 2016 whereby the appellant signed up to various alterations in her directorship agreement with the Irish Mortgage Company, but none of these are relevant to jurisdiction.

***The appellant is requested to do research work on the Project***

29. The appellant averred that in early 2015, VCL was facing deregistration in New Zealand and that the CEO of the respondent, Mr. Wewege, requested her to become involved in a project known as the “Bank Jurisdiction Comparison Project” (hereinafter “**the Project**”). She was to carry out research to assist the company in locating a jurisdiction other than New Zealand in which it could establish itself, by advising on the legal and other requirements for the issue of bank licences in a multiplicity of jurisdictions across the world. She says that it was a “massive undertaking” and that she frequently worked up to 7,10 or 12 hours per day on the project. She says that Mr. Wewege continually reviewed and encouraged the work she undertook.

**30.** While it does not appear to be in dispute that the appellant agreed to carry out research work for the respondent, what is in dispute is whether a contract was created with regard to this work and if so, the precise document(s) constituting the contract. As noted above, the appellant contends that a contract was created by means of an email exchange on the 18 August 2014, whereas the respondent maintains that the position was governed by a contract dated the 5 December 2014, which designated New Zealand as the jurisdiction in which any disputes would be resolved. I will turn first to the emails of the 18 August 2014, although they were not in fact adduced in evidence until the appellant swore her replying affidavit to that of Mr. Hashimefar. She had not referred to any such agreement or the emails in her grounding affidavit seeking leave to serve outside the jurisdiction or Statement of Claim.

***18 August 2014 - Emails between the appellant and Kevin MacLeod***

**31.** The email exchange in question took place between the appellant and one Kevin MacLeod on the 18 August 2014. The appellant has described Mr. MacLeod as being of Consult-Partners, a UK consultancy firm beneficially owned by Ian Andrews. Again, I emphasise that these are the emails which the appellant now maintains form the basis of the contract between her and the respondent with regard to the work she performed on the Project. In this regard, it is unfortunate that the copies of the emails furnished to the court were in places illegible because of the photocopying process. I have recorded this below where appropriate.

**32.** There is an email on the timed 13:26 from the appellant to Mr. MacLeod saying:

*“Dear Kevin, Thank you for your email. I am certainly interested in playing a role in these areas [words illegible]. Legal research: I am aware that Home Funding*

*operates in the unlicensed subprime market and is not therefore subject to regulatory codes. But as you mention legislative or regulatory changes may be in the pipeline. Writing a paper for submission to government is "right up my alleyway". I have extensive experience of conducting legal research and actually secured the highest mark in this subject in the Bar exam. As far as a fee is concerned, I don't like the idea of charging on a time-costing basis. Charging on this basis encourages overservicing and time sheet abuse and discourages professionalism. Whilst I would never yield to these temptations, I perish the thought. I still feel from the perspective of Vivier, a fixed fee would be a more appropriate basis for remunerating me. I don't know how much work is involved in this project. May I therefore respectfully request you to suggest an appropriate fee?/ Computer Skills: [Words illegible] ... "I would therefore need more information about what the work entails. What level of Visual[Basic?] is required? Is knowledge of HTML required? I presume...[Words illegible] Therefore, an annual retainer fee may be more appropriate than rewarding on an hourly basis for the reason already cited). But I am definitely interested. I look forward to clarification in this regard. Kind regards ..."*

**33.** There is an email timed 15:11 from Mr. MacLeod to the appellant which says "*Dear Joan, many **thanks I think the best way to proceed is to discuss fees as and when specific tasks calling for your expertise arise.** In the meantime, Luigi has asked that you link in as director and secretary of Vivier Mortgages [ words illegible]. He would also like you to confirm your agreement to your acting as legal advisor to Vivier & Co. and Vivier Developments Limited. Fees would be on the same ad hoc basis. If you agree please link in as legal adviser to the two Vivier companies. Finally please note that the change of name from HML to Vivier Mortgages Limited is now recorded at CRO*". (emphasis added)

34. An email from the appellant on the same date timed 15:32 says “*Yes I confirm my agreement to act as legal advisor to Vivier & Co. and Vivier Development Ltd.*”

35. The final email is from Mr. McLeod at 15:32: “*Dear Joan, Many thanks. Luigi will be pleased. Please could we give our emails subject headings, that way I know where to [illegible] them.*”

36. The appellant’s position is that these emails constitute a contract between her and the respondent on the subject of the research services she was to provide, and that because the work was to be performed by her in Ireland, that is the appropriate jurisdiction for resolving the dispute which has arisen as to payment for those services.

***4 December 2014 - Contract between appellant and respondent***

37. In contrast, the respondent’s position is that a document dated the 5 December 2014 governed the appellant’s research work on the Project and explicitly superseded any prior agreements. The appellant maintains that this contract encompassed her *directorship duties* only and did not extend to the legal research she was to carry out on the Project. Therefore, she says, it did not supersede her agreement concerning the research work. As noted, this document was not disclosed by the appellant to the High Court when she sought leave to serve out of the jurisdiction.

38. The contract in question carries the title “Consultancy Agreement”. The date of the contract is the 5 December 2014 and it states that the respondent company wishes to engage

the appellant as an independent contractor to perform “the services”. The schedule provides that “the services” are as follows:

- To procure that the company features on comparison websites; and
- To secure representative agreements between the company and off-shore company registration agents in all respects approved in writing in advance by the company.

**39.** Paragraph 4 deals with the hours of work and says that the consultant undertakes and accepts to work the minimum hours set out in a schedule. It also provides that she may work such additional hours as may be necessary or required by the company in order to perform the services effectively, accepting that the fees and any commission allow for any such additional hours. In the event that any part of the month is not worked in full, she is entitled to *pro rata* fees accordingly.

**40.** Importantly for present purposes, paragraph 12 provides that the agreement shall be governed by and interpreted in accordance with the laws of New Zealand. Paragraph 12.3 provides that any dispute that cannot be resolved within 10 working days of receipt of written notice from one party to the other shall be referred to mediation.

**41.** Paragraph 15 provides that the agreement cancels and is in substitution for all previous letters of engagement, agreements and arrangements whether oral or in writing “relating to the subject matter hereof” between the consultant and the company, all of which shall be deemed to have been terminated by mutual consent.

42. The schedule provides, under “hours of work”, that the expectation is that the consultant will average not less than 20 hours per week over a 7-day week contemporaneously with the hours undertaken with the company’s sister company, VML.

43. The fees in the schedule are described as follows:

- For every full month during which the company features on a comparison website introduced solely by the consultant and approved by the company, €200; and,
- For every agreement signed by the company and an off-shore company registration agent introduced solely by the consultant, €500.

Provision is also made for commission in relation to each 12- month rolling notice deposit brought in solely by the consultant and accepted by the company.

44. The schedule provides for a review date, saying that the agreement shall be reviewed within six months of the relevant date for a possible extension.

***2015 - The appellant’s work on the Project***

45. The appellant’s position is that she worked from January to November 2015 on the project and that her work was reviewed directly by Mr. Wewege.

46. With regard to payment, in her grounding affidavit, she had said –

“Although I was entitled to raise an invoice for the work I had carried out on the project, I did not immediately do this. My director’s contract with VCL established my right to earn commissions for bringing in deposits to VCL – a very valuable right – and I had also been led to believe by Mr. Wewege that VCL would one day offered



me a full-time position with the company. I was prepared to regard anticipated future benefits as a substitute for monetary remuneration for my input to the Bank Jurisdiction Comparison Project”.

47. The same information was set out in the Statement of Claim.

***The events of Summer 2016***

48. The appellant averred that in May 2016, the New Zealand Court of Appeal upheld a decision of the Financial Markets Authority (FMA) to delist the respondent. As a result of this, an article on the case appeared in the Irish media. The appellant averred that as a result of this adverse publicity, she had a *discussion* with Mr. Wewege about whether he wanted her to resign as director of the respondent “in order to obviate the semblance of a link between VML in Ireland and VCL in New Zealand”, but that she never actually offered to, or agreed to, resign.

49. She averred that Mr. Wewege without her consent directed the Corporate Secretary, Ms. Jana Backova, to effect the appellant’s resignation at the Companies Office in New Zealand. She was “upset”, but Mr. Wewege assured her that the resignation was temporary and that she would be re-admitted to the Board of Directors of the respondent whenever she would so “choose”. She averred that the purpose of the resignation was solely to decouple her name from the company in New Zealand by reason of the adverse publicity in the media, but that her rights, such as her right to earn commission, were to be unaffected.

**50.** The appellant averred that by September 2016, she felt the “storm” in Ireland had passed and so she called upon Mr. Wewege to re-admit her to the Board of Directors but he refused.

**51.** The respondent’s position is that the appellant did in fact resign from her position as director of the respondent and that she did so by means of an email dated the 19 May 2016 sent to Ms. Jana Backova, Corporate Secretary for the respondent.

**52.** The appellant maintains that the document purporting to show that she resigned is a forgery and that the electronic signature which it bears, purporting to show it came from her, was copied without her consent.

### ***Steps taken by the appellant in 2016***

**53.** The appellant averred that when it became apparent to her that Mr. Wewege did not intend to re-admit her to the Board of the respondent or provide her with full-time employment, she decided to seek compensation in respect of her Project work on a *quantum meruit* basis. She says she served a number of notices of dispute but that the respondent ignored them.

**54.** The Court has seen an email dated the 16 October 2016 to Mr. Wewege, in which the appellant expresses her disappointment at not having heard from him within the previous ten days with a view to resolving their dispute and asserts that, *according to the consultant’s contract*, the next step was to appoint an appropriately qualified person to mediate. The appellant suggested a particular person who was a New Zealand mediator and solicitor. She also said that she was prepared to consent to a variation in the consultancy agreement to

facilitate the appointment of a mediator outside New Zealand and is receptive to having the dispute mediated in Ireland, the UK or the United States, but says that “*the dispute would continue to be governed by New Zealand law*”. For obvious reasons, the respondent lays emphasis upon this email.

**55.** By Notice of Dispute dated the 19 October 2016, the appellant sought to invoke both Clause 12.3 of the “consultant’s contract” (i.e. the contract of December 2014) and clause 11.2 of the Home Funding/VML contract. It may be noted that at paragraph 14 of this document she lists the items in dispute as follows:

- 1) Failure to remunerate her on a *quantum meruit* basis for the work she had done on the Project**
- 2) Breach of contract arising from failure to adhere to the requisite formalities of the respondent, VIL and VDL;
- 3) Breach of the contractual representation made on 20<sup>th</sup> May 2016 to the effect that, whenever she would request, they would readmit her to the board of directors of the respondent, VIL and VDL;
- 4) Failure to deliver on new agreement to enable her to earn commissions as promised;
- 5) Failure to discharge invoice re proof reading and editing of phase 2 of E-Book despite a promise to “make this up to me”.

**56.** I note that while items (2), (3) and (4) appear to concern her directorship of the respondent, item (1) concerns remuneration for her work on the Project. Further, the claim is referred to as a *quantum meruit* claim.. Again, this is a document upon which the respondent lays emphasis.

57. I note also that in this lengthy Notice of Dispute, in which the appellant recounts a history of events, she mentions that in September 2014 Mr. Wewege said he hoped that she would one day work full-time for VCL. She describes becoming a board member of VCL and the December contract and the work she undertook in that regard. She then describes discussing payment for this work, and whether she should obtain the monthly fee or the commission fee (described in the contract) and that Mr. Wewege said “*neither*” and that his London agent, Kevin McLeod “*assured me however that you had lots of plans in the pipeline (thereby implying that I would be richly rewarded for all my efforts at some time in the future)*”. She goes on to describe the Project work that she undertook and observes: “*Although I requested you to agree to pay me an ad hoc fee for the work I had undertaken, you refused. I did not make an issue about this as I had been led to believe that a full-time job would one day develop for me within Vivier. However that never happened. When I specifically asked you for a full-time position, you said you had nothing to offer*”. She then complains that other people were appointed to positions, including Edwards Medel, Natasha Radovsky, as legal officers, and a new Corporate Secretary, as well as Ali Hashemifar to the position of MLR officer. She complains that no-one appeared to have any familiarity with New Zealand law although she herself had completed her training in New Zealand in 2010.

***February 2017: The Radovsky emails***

58. Up to this point, it would seem that the appellant’s dispute with the respondent concerned a failure to re-instate her to her directorship of the respondent and (connected thereto) her claim for payment for the research (because she could no longer expect future benefits from her directorship). In February 2017, the dispute escalated, with an allegation of forgery coming into the picture and subsequent cross-accusations of defamation.

**59.** The Court has been provided with a batch of emails dating from the period the 12-15 February 2017. By email at 08:14 on the 12 February 2017, Ms. Radovsky, Chief Legal Office of the respondent, says that the appellant has been sending emails to multiple individuals at the respondent alleging that the company owes her €36,750 for services. She says that after reviewing her consulting agreement and other relevant documentation, Ms Radovsky has concluded that no fees are owed to the appellant. She asserts that the agreement shows that the compensation was solely success- and commission-based and makes no provision for any hourly rates for services. She also refers to a resignation letter and quotes from its contents. The email then says that if the appellant wishes to maintain her position she is obliged to follow the contractual procedure for dispute resolution outlined in s.12 of the Consulting Agreement, namely mediation in the first instance and determination of the courts of New Zealand if this is not successful. The appellant replies by email seeking a copy of the alleged resignation letter, which Ms. Radovsky duly provided.

**60.** The appellant then sends an email at 02:58 saying “*This is a forgery. I have never attached my name to this letter*”. She threatens various actions in consequence. In her affidavit in these proceedings, the appellant averred: “*I was stunned. I had never written such a letter*”.

**61.** Ms. Radovsky replies by email, saying that she is puzzled by this response and says that the signature on the resignation letter appears to be identical to the one on the executed Consulting Agreement. The appellant replies at 11:12 saying that it is an electronic signature and that it was copied from the consultancy agreement and attached to the letter without her authorisation.

**62.** There is a further email from the appellant on the 13<sup>th</sup> February 2017 at 22:17 accusing the respondent of having fabricated a letter of resignation and indicating that she has decided to issue a civil bill. She says that her claim against the respondent is governed not by her the respondent's contract but by her *VML contract*. This appears to be the first assertion to this effect in the documentation furnished to the Court.

**63.** Ms. Radovsky replies on the 14 February at 11:13 saying that once they are served, they will move for immediate removal based on the lack of jurisdiction.

**64.** On the same date, the appellant emails at 12:39 asking for clarification as to whether Ms. Radovsky is saying that the appellant attached her signature to the letter of resignation and returned it to her, or that she authorised "Jana" to attach her signature to the letter (a reference, presumably, to Jana Backova, Corporate Secretary). There is a further email from her at 05:37 saying that Ms. Radovsky's emails are in conflict which shows that she is "making things up as she goes along".

**65.** There is a lengthy email from the appellant to Ms. Radovsky at 21:51 on the 14 February in which she sets out that she agreed to a temporary step-down from VCL and that the purported letter of resignation has no legal effect whatsoever. The email also contains the following: "*I don't know why your (sic) puzzled about my bringing a claim in Ireland. My claim is governed by the VML contract which says that it is one of my duties 'to give legal and other advice to the companies within the Vivier Group'. The other claims arise by virtue of the VCL contract – invalid removal of me as director etc.'*".

**66.** There is an email on the 15 February at 04:09 from Ms. Radovsky saying that she finds the tone of the appellant's emails unprofessional and offensive. She makes some further comments and then says that she understands it might take a couple of weeks before the appellant could recover the data and emails from her "other computer", and requesting that the appellant send the copies of the three emails alleged to be fraudulent. She makes further comments about the appropriate jurisdiction in which to resolve the dispute.

**67.** The appellant averred that she never authorised Ms. Backova to attach her electronic signature to any letter of resignation. She averred that while she did send emails on the relevant date, the emails she sent do not match the emails subsequently furnished by the respondent and have therefore (she says) been "tampered with".

***April 2017 - Settlement talks and termination of the appellant's directorship at EML***

**68.** The appellant averred that she received an email from Kevin MacLeod inviting her to participate in a consultation in London to try to settle her claim against the respondent. The Court has seen an email dated the 20 February 2017 in which Mr. MacLeod says that there is an "appetite" on the respondent's side for a compromise and a recognition "*that an essential ingredient of any compromise would include 'establishing your innocence'*". It invites her to settlement talks on condition that she would not contact any party directly or indirectly connected to EML or the respondent without their prior written consent.

**69.** The appellant appears to have travelled to London but the settlement talks did not prove fruitful. The date of the meeting in London appears to have been the 26 April 2017 (referred to in a letter dated the 8 August 2017 written by Mr. Andrews which was exhibited to the affidavit of Mr. Hashemifar).

**70.** The appellant averred that she then told the Board members of the respondent that she proposed to issue proceedings in Dublin and that the next day, she received an email from Kevin McLeod warning her that if she did so, her position with EML would be terminated. Her directorship position with EML was in fact terminated on the 27 April 2017.

***May 2017: Correspondence concerning the Irish proceedings***

**71.** The deponent on behalf of the respondent, Mr. Hashemifar, says in May 2017 that the appellant notified the respondent that she was intending to bring an *ex parte* application to the High Court in Dublin. Mr. Medel on behalf of the respondent wrote to her by letter dated the 16 May 2017 saying, inter alia, that the relevant jurisdiction was New Zealand, and that even if another court had jurisdiction, New Zealand would nevertheless be the more appropriate forum for any proceedings. The author also requested that the letter be shown to the High Court if she proceeded with her *ex parte* application. There were further letters on the 19 and 22 May 2017, and the 7 June 2017. The tone and content of the letters shows that relations between the parties were very acrimonious.

***8 August 2017 - the Richard Andrews letter***

**72.** The document is in the form of a letter but bears the words “by email” on its face. It is from Richard Andrews, with a letter head bearing the name “Elstree Mortgages”, and is addressed to Mr. Edward Mendel, Legal Counsel, Vivier & Co., with an address in New Zealand. I set this out in full because the appellant bases her claim in defamation (to the Irish company EML) on an inference to be drawn from this letter. It says as follows:-

Dear Mr. Medel,

**Joan Donnelly**



As you probably know, since February 2016 I have owned this company, Elstree Mortgages Limited. It is a mortgage lender, operating in Ireland and registered with the Central Bank here. From 01 August 2014 to 27 April 2017, the above person was one of its directors.

I understand that Ms. Donnelly is bringing a legal claim against Vivier & Co. on the ground:

- That Vivier told Elstree that she had made a false allegation of forgery against Vivier; and
- That this caused Elstree to terminate her directorship agreement.

**I wish to state categorically that her allegations are untrue.**

Earlier this year, I became aware that Ms. Donnelly was threatening to sue Vivier for unpaid fees of some €36,000. She was proposing to use a clause in her directorship agreement with Elstree to bring her claim in Ireland. I established that she was claiming to have worked on a Vivier project for over ten hours per day between January and November 2015. This was not consistent with the amount of time she was working for this company during the same period. Moreover, on 26 April 2017, at a meeting in London, she openly admitted to me that she had absolutely no time sheets or other records to support her claim for time spent on the project.

I took the view that, as a director of my company, if she did bring such a flawed claim in Ireland, it would potentially lead to bad publicity for Elstree, causing us severe embarrassment and preventing Ms. Donnelly from devoting her time properly to my business. She was aware of this, because the day before our meeting she gave notice

of her resignation, effective from 31 July 2017, albeit via a most curious email, citing her dispute with Vivier.

Immediately after our meeting in London, probably while she was awaiting her return flight to Dublin, she sent a series of inflammatory and unprofessional emails to various parties. I asked her to desist from sending such emails and to drop her legal claim here or she would be dismissed with immediate effect.

On the following day, after she refused to comply with my request, we decided to terminate her directorship; it was for no other reason. In fact, to the best of my recollection, I have not communicated with anyone from Vivier since February 2016.

I have no objection to you using this letter in defence of Ms. Donnelly's claim.

Yours Sincerely,  
Richard Andrews

***Pre-and post-leave correspondence***

**73.** On the 6 March 2018 the appellant emailed the defendant indicating that she was maintaining Irish proceedings against the respondent although she was seeking agreement that the claim could be taken in the Circuit Court instead of the High Court. She wrote again on the 6 May 2018.

**74.** Finally, the Court has been shown a letter dated the 6 May 2018, after the granting of liberty to serve out, from the respondent to the appellant. It includes an allegation that she deliberately misled the High Court by failing to disclose the jurisdiction provisions in the

December 2014 agreement. The appellant's position is and was that this document is irrelevant and therefore that it was not necessary to disclose it when making her application. Whether the December 2014 agreement is a contract which governs the Project work done by the appellant is a matter to which I will later return.

***Other bodies contacted by the appellant***

**75.** The appellant averred that in 2017, she requested the respondent to provide personal information it was holding on her pursuant to the New Zealand Privacy Act 1993 and that, following their failure to do so, she complained to the Privacy Commissioner which found in her favour. She said that the respondent still did not comply.

**76.** The Court has seen an email dated the 14 September 2017 which shows that the appellant made a complaint to Companies Office in the Ministry of Business, Innovation and Employment concerning her allegedly unlawful removal as director of the respondent. The email indicates that the Office does not propose to progress the complaint any further. The email notes that there appears to be an email in which the appellant expressly authorised Ms. Backova to attach her electronic signature to the resignation letter and that the meta data appears to suggest that the emails were sent by the appellant. Given the above, and despite the fact that they appreciate that she disputes the authenticity of particular emails in May 2016, they were not satisfied that her removal as director was unlawful. The email suggests that if she wishes to contest the authenticity of the emails, the appropriate forum is the High Court of New Zealand.

**77.** Mr. Hashemifar averred that the appellant also made a complaint to the New Zealand Human Rights Review in April and December 2017 and that she had made complaints in several other countries including the UK, Spain and Slovakia.

***Some further information from the hearing of the appeal***

**78.** The Court questioned the appellant at the hearing about the absence of any documentary material about the Project work engaged in by her, such as emails asking her to undertake that project, the precise tasks to be undertaken, the method/amount of payment, and how the figure of €36,000 had been arrived at. The appellant's response was that initially, her computer was temporarily broken and later, when she had left the company, she was unable to access the information because the respondent had changed the password, thereby blocking her from accessing the emails. She said that the respondent has all of this information and that she would seek access to it by way of discovery. She said that there would be hundreds of emails demonstrating these matters because they had been in contact on a daily basis.

**79.** She also informed the Court that, originally, she had not intended to raise an invoice on the research work because she was happy with the prospect of a job in return. However, when it became clear that this was never going to happen, she had decided to raise a fee note for the work she had done. She said that she subsequently learned that €25.00 per hour was an appropriate rate for work she was doing, and that was the hourly rate she then applied to arrive at the sum of the €36,000. She accepted that she had no documentation showing the numbers of hours worked. Nor did she explain in further detail how the figure of €25.00 per hour was arrived at.

**80.** When questioned about the emails about mediation (described above), she said that her involvement in mediation was pragmatic and should not be interpreted as an acceptance

on her part that the governing contract was the December 2014 one. She was merely ‘playing their game’ in the hope of a short-term resolution of matters.

**81.** In answer to a question from the Court as to why or how she maintained that a defamatory allegation had been made in Ireland, she referred to the letter of the 8 August 2017 from Richard Andrews of EML. She submitted that the only possible inference from this letter was that the respondent had conveyed defamatory information about her to Mr. Andrews. She said what was relevant in terms of jurisdiction was that the allegation was made to a CEO of an Irish company, and the effect of the defamation upon her *qua* director of a Irish company, not the location of the publication itself.

### **The High Court judgment**

**82.** The Court was furnished with a brief note of the *ex tempore* judgment of the High Court judgment which was agreed between the parties (although not, apparently, approved by the trial judge). It appears that the judge (O’Regan J.) said that there were two separate contracts between the appellant and the respondent; a contract concluded by email on the 18 August 2014 which governed her role as legal advisor, which she described as ‘the Irish agreement’, and a contract dated the 5 December 2014 governing the appellant’s role as director of the respondent, which she described as ‘the New Zealand agreement’. She said that the Irish agreement did not contain a jurisdiction clause while the New Zealand agreement provided that disputes not settled by mediation would be subject to the jurisdiction of the courts of New Zealand. O’Regan J. noted that the appellant submitted that there was a claim for breach of contract which was governed by the Irish agreement, which dealt solely with the provision of legal advisory services by her, whereas the New

Zealand agreement dealt solely with the provision of certain business development services. She said that although there was a provision in the New Zealand agreement stating that it would supersede earlier agreements dealing with the same subject matter as the New Zealand agreement, this provision was inapplicable as the two agreements dealt with entirely separate and mutually exclusive subject matter.

**83.** She said that as there was no jurisdiction clause in the Irish agreement, the issue of jurisdiction was to be resolved by the application to the dispute of the rules of private international law. She said that the contract of the 18 August 2014 did not bear an electronic signature. She ruled that the claim for the provision of legal services by the appellant was governed by New Zealand law.

**84.** As to the claims in respect of defamation and intimidation and economic duress, she noted that the appellant's submission was that the causes of action in tort arose in Ireland because this was the place where she had suffered the effects of the torts, while the respondent had submitted that the causes of action arose in the place of domicile of the respondent, namely New Zealand. O'Regan J. appears to have taken the view that the appellant was conflating the issue of where the torts were committed and where the effects of the torts were felt (the damage caused by the torts), and ruled that the causes of action in tort arose in New Zealand.

## **Analysis and Decision**

### ***Some relevant general principles***

**85.** Jurisdiction in this case falls to be considered under Order 11 and common law principles. It is necessary to consider the question of jurisdiction separately in respect of

each of the appellant's three claims. Nonetheless, it may be helpful to preface each of those discussions with some general observations.

***General approach to service out of the jurisdiction and to Order 11***

**86.** In the first instance, it is important always to bear in mind the overall approach to service out of the jurisdiction as described by Fennelly J. in *Analog Devices* in the following terms:-

“When the court grants leave for the service out of the jurisdiction of proceedings, it requires a person, not otherwise within the jurisdiction of our courts, to appear here and to answer the claim of a person made in what is for him a foreign court rather than leaving the plaintiff to pursue his remedy against that person in that other jurisdiction. The international comity of the courts have long required, therefore, that our courts examine such applications with care and circumspection. The applicant must furnish an affidavit verifying the facts upon which he bases his cause of action. It is not sufficient that he assert that he has a cause of action. The court judges the strength of the cause of action on a test of a ‘good arguable case’”.

**87.** It may also be helpful to comment on certain observations made by the Court in *Ryanair Ltd v. Fleming* [2016] 2 IR 254, upon which the appellant laid considerably emphasis in her submissions. The Court (judgment delivered by Hogan J.) set out the fundamental starting principle that a defendant should normally be sued in the place of his/her/its domicile, together with a general explanation of the kinds of principle underpinning the various exceptions to this general rule:-

“[19] Before considering the particular issues of jurisdiction and *forum conveniens*, it should be noted that a fundamental principle of our conflict of laws rules is that, absent special circumstances, a defendant should normally be sued in the place where he or she is domiciled. The basis for this principle is obvious, since a defendant should not be forced to defend in a foreign jurisdiction – and be thereby deprived of the legal system with which he or she is most familiar, not to speak of the attendant costs and expense of defending proceedings in a foreign jurisdiction – unless there are some special circumstances which justify the attribution of jurisdiction to the courts of the forum selected by the plaintiff. This general principle must, accordingly, inform any consideration of whether the plaintiff can satisfy the court that the High Court had jurisdiction in the matter and, even if it had, whether it would be appropriate to exercise that jurisdiction on *forum conveniens* grounds.

[20] It would, of course, be manifestly unfair if a defendant were forced to defend in a foreign jurisdiction in circumstances where he could not reasonably have foreseen that his conduct would expose him to the real risk that he might properly be sued in that foreign jurisdiction. An underlying purpose, therefore, of our conflict of laws rules should, therefore, be to promote the orderly administration of international justice so that potential defendants can arrange their affairs in such a manner as will enable them to predict where such conduct will or (as the case may be) will not render them liable to suit.

[21] Different considerations apply, of course, where the defendant has engaged in conduct in the foreign jurisdiction in question or where the wrongful act at issue occurred in that jurisdiction. If, for example, the defendant has in the course of



business targeted consumers in a particular jurisdiction through internet advertising aimed at consumers in that jurisdiction, it is not considered unfair or otherwise inappropriate that it should be liable to be sued in respect of wrongful conduct in that jurisdiction, precisely because such a state of affairs is predictable and foreseeable: see, e.g., in the context of the Brussels Convention the decision of the European Court of Justice to this effect in *Pammer v. Reederei Karl Schlüter GmbH & Co. KG* (Joined Cases C-585/08 and C-144/09) [2010] E.C.R. I-12527).

[22] In those type of circumstances that jurisdiction will also of necessity have close connections with the dispute, so that the orderly administration of justice will often favour permitting the jurisdiction where the motor accident occurred or the breach of contract happened to hear the dispute, the foreign domicile of the defendant notwithstanding.

[23] These principles may be said to form the basis of the entire Brussels Regulation (and, indeed, the wider Lugano Convention) system which has been the mainstay of the European Union's jurisdiction allocating rules for the best part of 50 years. It is true, of course, that the present jurisdictional dispute falls completely outside the scope of the Brussels/Lugano system and is governed by our own national conflict of law rules. The point, however, is that conflict of laws rules reflecting the principal allocation of jurisdiction as between competing fora must, in general, at least, in order to be fair, reflect these considerations of foreseeability and the orderly administration of international justice.”

**88.** I would interpret the above as an explanation of the general rule (that a person should be sued in their domicile), followed by general remarks about the general reasons underpinning the various exceptions to that rule, illustrated with reference to the Brussels/Lugano system. However, I do not think it would be correct to characterise Hogan J. as having, *via* those remarks, imported the tests for jurisdiction from the Brussels/Lugano system into the common law on a wholesale basis. Nor was he suggesting that the existing common law rules or the categories set out in Order 11 can be disregarded or that there is some overarching, more general test of “foreseeability” or “predictability” which a plaintiff may invoke even if he or she does not come within the categories of Order 11. Indeed, as discussed below, Hogan J. went on to apply the common law rules concerning publication in reaching the conclusion that there was no publication within the jurisdiction in that case, and therefore no basis for jurisdiction under Order 11(1)(f). Insofar as the appellant’s submissions may seek to suggest that the Court somehow substituted the common law rules with the EU rules, or that general tests of “foreseeability” or “predictability” are to replace the Order 11(1) categories, I would reject them.

**89.** Indeed, it may be noted that in the case of *Albaniabeg Ambient Sh.p.k v. Enel S.p.A and Enelpower S.p.A.* [2018] IECA 46, Hogan J. drew a clear distinction between the common law rules governing conflicts of law, and the Brussels/Lugano system, saying:-

“The Brussels/Lugano system involves the application of fixed and non-discretionary rules as to jurisdiction in which the concepts of exorbitant jurisdiction and *forum conveniens* are excluded and in respect of which judgments are entitled to near automatic enforcement (with strictly limited exceptions) in other Member States (or, as the case may be, Contracting States) on a full faith and credit basis. The position at

common law regarding jurisdiction and enforcement is not entirely dissimilar, but there are nonetheless important differences between the two systems. Chief among these are that the jurisdictional bases upon which Irish courts may assume jurisdiction may be exorbitant and are mitigated by considerations of *forum conveniens*.”

### ***The burden and standard of proof***

**90.** The parties did not address the Court on the burden and standard of proof in applications to set aside leave to serve out of the jurisdiction. Indeed, as we have seen above, the motion brought the respondent did not conform – in form at least – to an application to set aside at all, but rather consisted of an application seeking an order striking out the proceedings for want of jurisdiction and declaring that the Court had no jurisdiction to hear and determine the plaintiff’s claim against the defence. However, the Court will treat this in substance as an application to set aside the *ex parte* leave to serve out, as the High Court appears to have done.

**91.** The burden of proof in such applications was discussed by this Court in *Albaniabeg* where it was held that the burden to show that the case falls within a particular jurisdictional gateway of Order 11(1) remains at all times on the plaintiff, even in the application to set aside, because a court cannot constitutionally make an *ex parte* order which finally affects the rights of parties (see paragraph 18 of the judgment). This statement as to the burden of proof was recently followed and applied in *Trafalgar Developments and others v Mazepin and others* [2022] IEHC 167 at paragraphs 133-140, where the court continued a discussion it had started in *Microsoft Ireland Operations Limited v. Arabic Computer Systems & Anor.* [2020] IEHC 549 with regard to the burden of proof and whether there was conflict in the authorities on the issue (Barniville J. concluded that there was not). I also accept the position

as stated in *Albaniabeg*, namely that the burden of proof in the High Court and in this appeal fell and falls on the appellant to establish that she falls within one of the Order 11(1) categories.

**92.** The standard of proof is an altogether more complex issue. A distinction may be drawn between the standard of proof as to (a) whether the case falls within a particular category of Order 11(1); and (b) whether the plaintiff has a case on the merits, although (a) and (b) may sometimes be intertwined; a pertinent example would be where there is a dispute as to the existence of a contract and a party wishes to bring itself within Order 11(1)(e). The recent judgments of Barniville J. in both *Microsoft* and *Trafalgar* address in detail the standard of proof in respect of both issues (a) (the category issue) and (b) (the merits issue). He opines there is some difficulty in reconciling some of the statements in the judgments on this specific point in *Analog Devices B.v. v. Zurich Insurance Co* [2002] 1 IR 272 (judgment of the Supreme Court delivered by Fennelly J.) with the judgment in *IBRC v. Quinn* [[2016] 3 IR 197 (judgment of the Supreme Court delivered by Clarke J., as he then was, who uses phrases such as whether the claim is “reasonable capable of being proven” and whether the claim has “reality in law and in fact”). In *Trafalgar*, Barniville J, after an exhaustive analysis of each of those judgments reached the conclusion that the correct standard to be applied in respect of both (a) and (b) was “a good arguable case” (see paragraphs 147-170). He rejected the proposition that a standard of “a serious issue to be tried” applied to issue (b) (the merits issue) (see discussion at paragraphs 146-173 of his judgment). He also rejected the application of a gloss on the “good arguable case” test developed in some of the English cases, where “the better of the argument” was the preferred formulation, seeing it as inconsistent with Irish authorities such as *Analog Devices* and *IBRC* (see his judgment at paragraphs 174-177, referring to *Four Seasons Holdings Incorporated v Brownlie* [2018] 1

WLR 192, *Goldman Sachs International v. Nova Banco SA* [2018] UKSC 34, and *Kaefer Aislamientos SA de CV v. AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10). As the parties in the present case did not address any of these nuances concerning how the threshold test may be described, or whether there is any real difference between *Analog* or *Quinn*, I do not think it would be appropriate to comment upon the analysis of Barniville J. or to express a view as to the correctness of his ultimate conclusion. In any event, it will not be necessary to do so in this case, for reasons I will explain later.

93. With the above remarks in mind, I turn now to a consideration of whether the appellant's case falls within any of the relevant Order 11(1) "gateways" to jurisdiction.

***1. The claim for payment of money in respect of the legal research work carried out***

94. As we have seen, Order 11, r. 1(e) provides for service out of the jurisdiction where the action is one brought "to enforce, rescind, dissolve, annul, or otherwise affect a contract", or "to recover damages or other relief for or in respect of the breach of a contract (i) made within the jurisdiction; or (ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or (iii) by its terms or by implication to be governed by Irish Law, or is one brought in respect of a breach committed within the jurisdiction of a contract wherever made...". Further, as a matter of common law principle, where parties enter into an agreement which contains a specific clause stating that the parties will submit to the jurisdiction of a particular country, this will amount to an unequivocal acceptance of the jurisdiction of that court: *Kutchera v. Buckingham Holdings Ltd.* [1988] IR 61. While the parties are not in dispute as to this fundamental principle, they were in dispute as to what (if any) contract governed the legal

research services carried out by the appellant. Logically of course, if any of the grounds for jurisdiction in Order 11(1)(e) is to apply, there has to be a contract in the first place.

**95.** The respondent's position is that the formal written, signed "consultant's contract" of the 5 December 2014 governed both the appellant's research work and her directorship duties; that it explicitly described itself as superseding all previous agreements; and that Clause 12.2 within this agreement clearly chose New Zealand as the forum for resolution of disputes between the appellant and the respondent. It also points out that the legal research commenced, according to the appellant herself, in January 2015, one month after this written contract.

**96.** The appellant submits that the December 2014 contract was confined to her rights and duties as director of the respondent and that her research work for the Project was governed by an earlier agreement dated the 18 August 2014, concluded months before she had signed the formal document of December 2014. She says that it was agreed that she would be paid the same ad hoc rate as would apply to providing legal research services to VML/EML (the Irish company) of which she was also a director. She submits, therefore, that she entered two different contracts with the respondent, dealing with two separate and mutually exclusive subject matters. The appellant contends further that the contract which she says was formed via the emails of the 18 August 2014 did not address the issue of applicable law or jurisdiction and therefore the rules of private international law apply. She says that what is relevant in this regard is that the agreement was concluded in Ireland because she was in Ireland when she agreed to provide the services to the respondent and that the work she undertook was performed entirely in Ireland.

**97.** She also submits that the respondent is a New Zealand company in name only and has no real connections with that jurisdiction; that the respondent does not trade in New Zealand and is a subsidiary of Consult-Partners which was registered in the UK; that her meetings with Mr. Wewege took place in Ireland; that the beneficial owner Ian Andrews lives in England; that the respondent has only one director in New Zealand who is nominal and in any event recently submitted his resignation, and that the respondent has its sister company in Ireland (EML) which has at various times employed various Irish solicitors to act on its behalf. She also points out that her directorship contract with EML (dated the 31 July 2014) provided for non-exclusive jurisdiction of the Irish courts. She also contends that all of the witnesses would be in England apart from Mr. Wewege, who she says is based in Panama.

**98.** The appellant submits that the High Court judge erroneously took the view that the absence of an electronic signature was fatal to the formation of a contract by way of these emails, arguing that there is no rule requiring such signature for the formation of a contract in Ireland. She submits that the rules on contract formation are governed by the common law authorities, such as *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256, and that the essential elements of contract identified therein are present within the email exchange of 18 August 2014. She also submits that it is relevant that the emails constituting the agreement were in writing and were made between two qualified lawyers.

**99.** With regard to the interests of justice, the appellant maintains that she cannot afford lawyers to bring a case in New Zealand, particularly in circumstances where the respondent has indicated that it would seek security for costs if she does so, and relies on the judgment in *Ryanair* for the argument that economic disparity is a factor that can be taken into account. She says that in circumstances where the claim involves a failure to pay her for work done,

it would be unconscionable that the respondent be permitted to place to economic barriers in the way of her claim. She also submits that in *Ryanair* at paragraphs 19-21, the common law principles concerning *forum non conveniens* were brought in line with Brussels Regulation even in non-Brussels cases and that she is therefore entitled to sue a defendant “in the courts for the place of the obligation in question” in matters relating to a contract.

**100.** The respondent points out that there was no reference at all to the emails of the 18 August 2014 in the Statement of Claim or the appellant’s grounding affidavit, and that it was only when the respondent issued its Notice of Motion and drew attention on affidavit to the contract of December 2014 that the appellant suggested in her affidavit of reply, for the first time, that these emails constituted a contract governing the Project work to be performed by the appellant. The respondent submits that it is not at all clear from the emails of August 2014 (or her affidavit) with whom, or precisely what, the appellant was seeking to agree anything with. Mr. MacLeod, the other person in the email exchange, was with Consult Partners, a UK company, and not the respondent as such. Further, in her email of 15:32 on the 18 August 2014 the appellant appears to agree that they would defer the finalising of discussions about fees. It points out that the appellant has repeatedly stated that she was happy to do the work in the expectation that it would lead to a full-time position. They also point out that at paragraph 2 of her replying affidavit, in which she raised the emails of August 2014 for the first time, she asserted that the legal research services were agreed to be paid at the same rate as the rate that applied to her providing services to VML, and that her agreement with VML (dated the 31 July 2014) provides a specified fee of €125.00 per calendar month plus expenses, not an hourly rate.

**101.** The respondent also points out that the appellant herself had sought mediation in accordance with Clause 12.2 of the December 2014 agreement and say this is consistent with



a belief on her own part that this was the governing agreement. It draws attention to her email of the 16 October 2016 (set out above) in which she said that she was prepared to consent to a variation in the consultancy agreement to facilitate the appointment of a mediator outside New Zealand (such as in Ireland, the UK or the United States) but accepts that the dispute would continue to be governed by New Zealand law.

**102.** The respondent points that there while the appellant refers to *quantum meruit* in the body of her Statement of Claim, there is no reference to it in the reliefs sought, and that a definitive figure of €36,000 was put forward by her for remuneration; further, that this figure is arrived at without any explanation as to how it was calculated.

**103.** The respondent submits that the resignation letter from the respondent is the crux of the dispute between the parties. If it is authentically her own letter, then she is not owed any fees from any source because the letter waived any claims for payment. It follows that the first matter for any court would be to determine that issue. All of this, it submits, falls to be determined under New Zealand law.

***Decision on jurisdiction concerning the claim for payment in respect of the legal research work carried out***

**104.** I have earlier explained that there are two stages to the analysis in an application such as this: (1) Has the plaintiff/appellant shown that she falls within the relevant category of Order 11(1)? And if so: (2) Should the court exercise its discretion to grant leave to serve out on the basis that Ireland is the appropriate jurisdiction for determining the dispute? In the first stage of analysis, the Court is concerned solely with whether the case falls within the jurisdictional gateway contained in Order 11(1)(e).

**105.** I agree with the submission of the appellant that the trial judge was in error insofar as she concluded that the emails of the 18 August 2014 *could* not amount to a concluded contract *because* there was no electronic signature. Irish law does not require that this particular formality be observed as a precondition to the validity of a contract. However, the question remains as to the nature of the agreement, if any, between the appellant and the respondent concerning her Project work.

**106.** The respondent's position that the contract of the 4 December 2014 governed the Project work to be performed by the appellant is in my view problematic. The "services" referred to in that contract, i.e. those the appellant is to perform under that contract, are described in the following terms: "*to procure that the company features on comparison websites*" and "*to secure representative agreements between the company and off-shore company registration agents....*". Further, the fees are described as commission-based fees (€200 for every month that the respondent features on comparison websites, and €500 for every agreement signed between the respondent and an offshore company registration agent introduced solely by the consultant). To my mind, that does not describe or fit with the type of research work that the appellant has indicated she was being asked to perform on the Project; rather, it sits more naturally with her role as director. It does appear that the December 2014 agreement was, as the appellant contends, confined to the subject-matter of her directorship and was not intended to apply to her Project work. Therefore, the fact that it says that it supersedes previous agreements and the fact that it contains a clause designating New Zealand as the appropriate jurisdiction becomes irrelevant because it concerns a subject-matter (the appellant's directorship) other than the subject-matter in issue here, namely the claim for remuneration in respect of the appellant's Project work.

**107.** Putting the December 2014 contract to one side does not, however, open a clear pathway for the appellant *via* Order 11(1)(e). If we return to the email exchange of the 18 August 2014, which the appellant says constitutes a concluded contract, and consider it in conjunction with the appellant's averments on affidavit, various problems arise.

**108.** We have seen that in an email at 13.16 on the 18 August 2014, the appellant, when discussing fees, expressed the view that a fixed fee would be the appropriate basis for remunerating her, and then asked Mr. MacLeod to "*suggest an appropriate fee*". The response was "*the best way to proceed is to discuss fees as and when specific tasks calling for your expertise arise*". This explicitly left open the question of remuneration for the Project work to be undertaken by the appellant. Another problem is that there is some lack of clarity as precisely who any such alleged contract is with, given that she is talking to Mr. MacLeod of Consult-Partners and not Mr. Wewege, and that several companies are mentioned in the email exchange. The email exchange also needs to be considered against a background where the appellant herself has variously described the situation as (a) one where she was entitled to fees along the lines of her contract with the Irish company (which would be a monthly and commission-based approach); (b) that she did not expect or ask for any remuneration because she hoped ultimately to obtain a full-time position with the company as reward; and/or (c) that she was entitled to be paid at an hourly rate which reflected the work done and her level of skill and experience. Also, as will be recalled, she did not draw the High Court's attention to the emails of August 2014 until rather late in the day, namely in her affidavit of reply on the respondent's motion to dismiss in these proceedings. Her submissions appeared to oscillate between a position which was more in the nature of a *quantum meruit* claim and a position (belatedly reached by her) that the emails of August 2014 constitute a concluded agreement with regard to Project work.

**109.** Even more problematic is that the appellant did not address the Court on how the claim, if it were to be characterised as a *quantum meruit* claim, would sit with Order 11(1)(e) or Irish law more generally. The Court was referred to *Donnelly v. Woods* [2012] IEHC 26 where Charleton J. discussed the ingredients of a *quantum meruit* claim and dismissed the claim before him because it was too vague, but no issue relating to Order 11 and service out of the jurisdiction arose in that case. At first sight, one might think that a *quantum meruit* claim is simply a quasi-contractual claim which falls within Order 11(1)(e), but I do not think the answer is necessarily that simple, as I will now briefly address.

**110.** It is well-known that the law in relation to unjust enrichment claims, and its relationship to the law of contract, has been in a state of considerable development in recent decades; see successive editions of Goff and Jones, *The Law of Restitution*, and latterly *The Law of Unjust Enrichment*, currently in its 9<sup>th</sup> edition, as well as Irish textbooks such as Clarke, *Contract Law in Ireland* (8<sup>th</sup> edition, 2016), or McDermott & McDermott on *Contract Law* (2<sup>nd</sup> edition, 2017). In particular, concerning *quantum meruit* claims by professionals suing for payment in respect of services provided, see paragraphs 24.84 and 24.89 of McDermott & McDermott, *Contract Law*; and Chapter 20 of Clarke, *Contract Law in Ireland* entitled ‘*Quasi-Contractual or Restitutionary Relief*’. The conceptualisation of *quantum meruit* claims has been affected by this broader development.

**111.** It has been said that *quantum meruit* claims are of two broad kinds:

“...there is an important distinction between: (a) the situation where the court has to determine what is a reasonable sum, in a case where a contract either expressly or impliedly provides that a reasonable sum shall be payable; and (b) the situation where

the court is having to assess what is the appropriate figure to award a claimant by way of *quantum meruit*, in a restitutionary claim for unjust enrichment claim. In the former case, the assessment of such a sum will depend upon all of the circumstances, the objective being to ascertain what the parties to the contract would have considered to have been a reasonable amount. In contrast, the objective in a restitutionary *quantum meruit* assessment is to reverse the unjust enrichment of a defendant, with the measure of any award reflecting the benefit to that defendant of the services received”.

(*per* Gloster LJ in *Energy Venture Partners v Malabou Oil and Gas Ltd.* [2013] EWHC 2118, at paragraph 281)

**112.** The shift in attitude towards *quantum meruit* claims was explained by Lightman J. said in *Albon v Naza Motor Trading Sdn Bhd* [2007] 1 WLR 2489; [2007] EWHC 9 (Ch):-

“Whilst the philosophy held sway for many years that a claim for money had and received or in pursuance of an ineffective contract gave rise to a (quasi) contractual obligation to repay (see e.g. *Sinclair v. Brougham* [1919] AC 398 ) and this view was carried over to and reflected in the construction and application of RSC Ord 11 , the predecessor of CPR 6.20 (see e.g. *Bowling v. Cox* [1926] AC 751 ) and this is echoed in the 2006 White Book (see Civil Procedure 2006, vol 1, para 6.21.34), with the coming of age of the law of restitution based on the principle of unjust enrichment, that philosophy has now been consigned to history: see e.g. *West Deutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 at 710, 718 and 738 and *Kleinwort Benson Ltd v. Glasgow City Council* [1999] 1 AC 153 , 167. It is to be noted that there is a separate and distinct gateway for claims in restitution (see CPR 6.20(15) ) ...” (at paragraph 25)

**113.** It was again addressed, for example, by Lord Justice Etherton at paragraph 140 of the judgment in *Benedetti v Sawiris* [2010] EWCA Civ 1427-

“[141] The common law cause of action for a *quantum meruit*, like other restitutionary claims, was formerly perceived to rest on the theory of an implied contract. That theory was rejected implicitly in *Lipkin Gorman v Karpnale Ltd* [1991] AC 548 and expressly in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938. In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 Robert Goff J expressly characterised a *quantum meruit* claim for services as a claim, founded on the principle of unjust enrichment, which is concerned with restitution in respect of the benefit obtained by the defendant. The historical development and demise of the implied contract theory were described in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] HLUK 34, [2008] 1 AC 561 by Lord Nicholls at paragraphs [105] and [107] and Lord Walker at paragraph [174].

[142] In assessing an award of restitution in such a case, it is the defendant's benefit which must be identified and valued. Concentration is on the defendant's benefit rather than the expense, loss or other personal aspect of the claimant's condition: *BP* at pp. 839–840. In *Sempra* Lord Hope said that, for restitution, it is the gain that needs to be measured, not the loss of the claimant; that the claimant's remedy is the reversal of the defendant's gain; and that the process is one of subtraction, not compensation: [28] [33]. That gain is to be measured objectively, that is to say, what a reasonable person would pay for the benefit in question; and so, where there is a market, by reference to market rates: *BP* at p. 840; *Sempra* at [45] [103], [116].”

**114.** In the conflicts of law arena, whether the claim is an unjust enrichment claim for restitution, or a claim based on an implied term of a contract, assumes a more than theoretical or academic significance. This is because the first condition of service out of the jurisdiction under Order 11(1) is that the claim falls (to the requisite standard of proof) within an appropriate “gateway” for service out of the jurisdiction. In the modern law of England and Wales, there are two potential gateways: a “contract” gateway and a “restitutionary” gateway. It has been held in that jurisdiction that some *quantum meruit* claims fall within the “contract” gateway while others fall within the “restitutionary” gateway. If the distinction between different kinds of *quantum meruit* claims holds true in Ireland, it creates a potential problem for service out of the jurisdiction in non-contract unjust enrichment claims, because there is no Irish “restitutionary” gateway in Order 11(1), only a “contract” one (namely, subparagraph (e)).

**115.** The English position concerning service out of the jurisdiction in respect of a *quantum meruit* claim was discussed in *Daad Sharab v. His Royal Highness Prince Al-Waleed Bin Talal Bin Abdul-Aziz Al-Saud* [2012] EWHC 1798 (Ch)), where the distinction between two different categories of *quantum meruit* claim was set out in the following terms:

“Is the claim ... founded on the existence of a contract, valid in law, under which the claimant is to render certain circumstances in return for a commission where, however, the amount of the commission was not finally agreed ...? Or is it a claim founded on the conduct of the claimant in rendering services to the defendant at his request in circumstances where it cannot be said that a contract, valid in law, for the provision of those services for a reward came into being? In short, is it in the now accepted terminology a claim in unjust enrichment for restitution to the claimant of the value of her services?” (paragraph 44)

**116.** The characterisation of the *quantum meruit* claim arose in *Sharab* because it was necessary (for procedural reasons which do not concern us here) to determine whether the claim fell within the “contract” gateway or the “restitution” gateway in the relevant English provision. The relevant “contract” gateway was, at the time, contained in CPR 6.20 (5)(a), (b) and (c) (since replaced by paragraph 3.1 of Practice Direction) and referred to where:-

A claim is made in respect of a contract where the contract –

- (a) was made within the jurisdiction;
- (b) was made by or through an agent trading or residing within the jurisdiction;
- (c) is governed by English law.

There was a different gateway for restitution claims (CPR 6.20 (11) to (15) (now in paragraphs (12) to (16) of paragraph 3.1 of Practice Direction 6B).

**117.** In *Sharab*, it was held that a claim falling within the first category identified (“a claim ...founded on the existence of a contract, valid in law, under which the claimant is to render certain circumstances in return for a commission where, however, the amount of the commission was not finally agreed”) would fall within the “contract” gateway, while a claim falling within the second category (“a claim in unjust enrichment for restitution to the claimant of the value of her services”) did not. The latter claim would fall only under the “restitution” gateway. It is important to note that Irish law does not contain any corresponding “restitution” gateway, so that within the framework of this analysis, if the appellant’s *quantum meruit* claim fell outside the “contract” gateway, she would be excluded from Order 11(1) altogether.



**118.** Indeed, one might even raise the further question as to whether the Irish “contract” gateway under Order 11(1)(e) is necessarily as broad as the English “contract” gateway, since our provision (unlike the English one) does not use the phrase “*in respect of a contract*”, which is broadly interpreted in the law of England and Wales. Our Order 11(1)(e), as we have seen, refers to claims to “*enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract...*”. The English provision uses the language of where “*a claim is made in respect of a contract...*”. Arguably the phrase “in respect of a contract” is a significant difference of wording. The difference between them was discussed by Lightman J. in *Albon*, in the following terms:

“[26]. But in my judgment claims under the gateway in rule 6.20(5) are not confined to claims arising *under a contract*. It extends to claims made “*in respect of a contract*” and the formula “*in respect of*” (tested by reference to English law) is wider than “*under a contract*”: see e.g. *Tatam v. Reeve* [1893] 1 QB 44 . The provision in the CPR is in this regard *deliberately wider than the provision in its predecessor RSC Order 11* . In this regard, unlike Mr Nathan (counsel for the defendants) I do not think that any assistance is obtained from the decision in *Kleinwort Benson v. Glasgow City Council* [1999] 1 AC 153 , 162, 167. In that case the House of Lords was concerned with sections 16 and 17 of the Civil Jurisdiction and Judgments Act 1982 which (subject to certain modifications) incorporated the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968) into the law of the United Kingdom. One modification effected to Title 11 of the Convention was to the following effect: ‘5. A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued: (1) in matters *relating to a contract*, in the courts for the place of performance of the obligation in question...’ In the context

of the formula of words there used, and in particular the reference to the place of performance of the obligation in question, there is postulated the existence of a contract giving rise to an obligation of performance in the country whose courts are to have jurisdiction.

[27.] Accordingly the formula of words in CPR 6.20(5) “*in respect of a contract*” *does not require that the claim arises under a contract: it requires only that the claim relates to or is connected with the contract.* That is the clear and unambiguous meaning of the words used. No reference is necessary for this purpose to authority and none were cited beyond *Tatam v. Reeve* [1893] 1QB 44 . If such reference were needed, I would find support in a passage which I found after I had reserved judgment in the judgment of Mann CJ in *Trustees Executors and Agency Co Ltd v Reilly* [1941] VLR 110 at 111: ‘*The words ‘in respect of’ are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.*’ ”(Emphasis added)

**119.** The difference in wording as between the Irish and the (modern) English “contract” gateways for service out of the jurisdiction was not mentioned, let alone the subject of any argument in this case, and I merely point out that it is one of a number of issues that might require to be teased out in an another case.

**120.** I hope that the above discussion is sufficient to show that, even if the appellant has an arguable claim in *quantum meruit* “on the merits”, the question of whether this claim fits within the Order 11(1)(e) gateway is not at all self-evident. It is unfortunate that neither party to the appeal addressed this issue with reference to authority. I have considerable sympathy for the appellant, who has averred that she carried out a considerable amount of work on the

Project at the respondent's request and was never paid for it. These facts were not disputed by the respondent on affidavit. However, we are here dealing only with a jurisdictional issue and the question of service out of the jurisdiction. To my mind, it is clear that no actual amount or method of payment was agreed upon between the appellant and the respondent with regard to her Project work; and one of the strongest themes in the appellant's submissions was that she did this work in the hope that she might in future receive a full-time position. To my mind, this is in reality an unjust enrichment claim rather than a claim derived from a contract. If so, there is no obvious gateway available to her under Order 11(1), and the burden falls upon the appellant to show a good arguable case that she falls within an Order 11(1) gateway.

**121.** As regards the appellant's claim in respect of payment for the Project work she carried out, I have reached the following conclusions. In the first instance, I am not satisfied that the appellant has reached the threshold required "on the merits" with regard to her claim on the basis of a contract, whether one describes that threshold as "a serious issue to be tried", or a claim which has "reality in law or in fact" or is "reasonably capable of being proven" or a "good arguable case" (being the various descriptions of the threshold set out in *Analog Devices* and *IBRC v. Quinn*, and discussed in *Microsoft and Trafalgar*). Secondly, I am not satisfied that the appellant has established a good arguable case that any claim that she may have in *quantum meruit* falls within the "contract" gateway as set out in Order 11(1)(e).

**122.** There is, additionally, a further problem in any event which, in my view, represents an insuperable obstacle to this jurisdiction being the *forum conveniens* for the appellant's claim for payment. The respondent maintains that the appellant resigned and that her resignation letter waived all claims for payment. Even if the appellant could show an arguable case that

she falls within Order 11(1)(e), contrary to what I have suggested above, the Court should in my view exercise its discretion against accepting jurisdiction in circumstances where the ultimate outcome of the case would have to turn on the validity of the disputed resignation letter. On no version of the facts would the validity of her resignation from a New Zealand company be appropriately decided in this jurisdiction; and as that issue is closely linked to the validity of her claim for payment in respect of her Project work, this is not the appropriate jurisdiction for the trial of the dispute, despite the other connections to the jurisdiction such as that the appellant lives here and performed the work in question here.

**123.** In conclusion and by way of summary in respect of the appellant's claim for remuneration in respect of the Project work, I am not satisfied that she has a good arguable case that any *quantum meruit* claim she may have claim falls within any category of Order 11(1)(e) nor am I satisfied that she has reached the threshold "on the merits" of her contract claim to bring herself within Order 11(1)(e), on any version of that threshold test as described in *Analog* or *IBRC v. Quinn*. In the event that I am wrong about this, I am of the view that Ireland is not in any event the *forum conveniens* for the determination of this claim, by reason of the close nexus between this claim and the necessity for a court trying it to adjudicate on the issue of the validity of her resignation from the respondent, a New Zealand company. I would add that this case points up the absence of any gateway for unjust enrichment or restitutionary claims in Order 11(1) and one might expect that, given the development of the law on unjust enrichment in recent decades in this regard, this *lacuna* might be addressed sooner rather than later.

## ***2. The Claims for Defamation***

**124.** Under Order 11 r. 1(f), a court may grant leave to serve out of the jurisdiction where “the action is founded on a tort committed within the jurisdiction”. The respondent submits that, with regard to the tort of defamation specifically, the appellant must establish to the relevant standard that *publication* of a defamatory statement took place within the jurisdiction, and that she has failed to do so.

**125.** The respondent submits that only one of the six alleged defamations could have any possible link to Ireland, namely the alleged publication by the respondent to EML. I accept that submission. Three of the allegations of defamation concern publication by the respondent to New Zealand entities (the Privacy Commissioner, Companies Office, and Human Rights Review Tribunal). One is from the management of the respondent to its own Board of Directors. Another is from the respondent to Consult-Partners, a UK company. In truth, the appellant appears to have accepted this insofar as she concentrated her attention in submissions on the alleged defamation as between the respondent and EML, the Irish company.

**126.** As regard this particular alleged defamation, which is the only one with any possible connection to Ireland, the respondent submits that there is no evidence of publication within the jurisdiction. It is necessary to look more closely at this. The Statement of Claim pleads that the defamation consists of “the allegation made by [the respondent] to Elstree Mortgage Limited to the effect that the [appellant] had manufactured a false allegation of forgery against [the respondent] in order to circumvent the waiver of fees contained in the alleged letter of resignation and thereby extort monies from the company. The appellant appears to contend that the defamatory communication was made by Mr. MacLeod of Consult-Partners, an English director of an English company, to Mr. Andrews, of the Irish company EML. The

respondent observes that the appellant travelled to London to meet Richard Andrews of EML (in the context of the settlement talks), which would support the view that the claim has more connection with England than Ireland.

**127.** In this regard, the respondent relies on *Ryanair v. Fleming Ltd.* [2016] 2 IR 254 where Hogan J. held that there was no evidence of publication in Ireland, with the result that Ireland lacked jurisdiction. In that case, the communication in question consisted of electronic messages posted by the respondent pilot on the internet. Hogan J. said there was no evidence of their having been accessed or downloaded in this jurisdiction and therefore no evidence of publication.

**128.** The appellant maintains that she was “targeted” in Ireland and that this brings her within a category identified by Hogan J. in *Ryanair* as an exception to the general rule that a defendant should be sued in its place of domicile. She maintains that the “targeting” consisted of the defamatory allegations being broadcast, not to the world at large, but to the Irish-registered company for which she worked. She says it was therefore entirely “predictable” and “foreseeable” that she would issue proceedings in Ireland, falling within the language of Hogan J. in the *Ryanair* judgment. Indeed, her submissions appeared at times to go so far as to submit that in *Ryanair*, the Court established *a test* for determining whether a claim may be brought in Ireland of “targeting” and “predictability”.

**129.** The appellant submits that where Mr. Andrews was physically located when the defamatory statement was made to him is irrelevant. She refers to the doctrine of attribution in the context of company law, citing *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd* [1957] 1 QB 159, and argues that under this doctrine, the knowledge acquired by the

officer of a company is attributed to the company in the location where the company is incorporated. Accordingly, she submits, even if Mr. Andrews was in England when he received the defamatory communication, the doctrine of attribution means that the publication simultaneously occurred in Ireland, the location of the company.

**130.** The appellant maintains that the *Ryanair* judgment brought the common law conflict of law rules on cross-border torts into line with the Brussels Convention; and further, that the principles in Article 7(2) of the Convention and its interpretation in *Bier BV v. Mines de Potasse d'Alsace* ECLI:EU:C:1976:166 means that she can legitimately sue both in the place where the damage occurred as well as where the events giving rise to the damage took place. The appellant also refers to *e-Date Advertising GmbH v. X and Olivier Martinez* ECLI:EU:C:2011:685 (a decision of the Grand Chamber of the CJEU in joined Cases C-509/09 and C-161/10) and submits that the objective of sound administration of justice requires her to submit claim in defamation in Ireland for all the damage because this is where her “centre of interests” lie.

**131.** She maintains that the dispute has a close connection with Ireland because it is the place where she resides and works, where she suffered the effects of the defamatory statement, and where the recipient of the defamatory statement was registered as a company. She also maintains that it would be most unfair to expect her to sue in New Zealand in circumstances where the respondent has failed to pay her for work done, and relies upon the passage in *Ryanair* where Hogan J. spoke about the relative financial positions of the parties.

**132.** The respondents dispute the appropriateness of the appellant's reliance on the passage concerning the 'targeting' of a jurisdiction, as discussed in *Ryanair*. It also disputes that impecuniosity is a relevant factor.

**133.** The respondent cites cases on *forum non conveniens*, including *Intermetal Group Limited v. Worslade Trading Limited* [1988] 2 IR 1, *Abama v. Gama Construction Ireland Ltd and another* [2011] IEHC 308, and *IBRC Limited v. Quinn* [Unreported, 28<sup>th</sup> July 2016]. The respondent cites the fact of the respondent being a New Zealand company and asserts that the appellant has failed to show any prejudice.

## **Decision**

**134.** Again, the first stage of the analysis is to address the question of whether the case falls within the jurisdictional gateway contained in Order 11(1)(f), namely whether the tort was committed within the jurisdiction. The question of *forum conveniens* would arise only if the appellant can bring herself within that gateway.

**135.** The appellant seeks to rely on cases which are not applicable to her case because they are confined to an interpretation of the Regulation (i.e. Brussels 1 recast) in respect of internet publications. (Non-internet cases continue, even within the Regulation context, to be governed by *Shevill v. Presse Alliance SA* [1995] EUECJ C-68/93.) Thus, the appellant's reliance upon EU cases such as *eDate* and *Martinezis* is doubly misplaced; her case is neither a Brussels 1 case nor does it involve an internet publication. Whatever the method of communication of the alleged defamation as between the respondent and EML, it has never been suggested that it was posted on the internet to the world at large.

**136.** The pertinent rules are therefore the common law rules. As Cox and McCullough point out at paragraph 13.26 of *Defamation Law and Practice* (2<sup>nd</sup> edition):-



“As a matter of Irish law, publication of a statement is deemed to occur at the place and time when it is received rather than when it is sent. Thus, where a cross-jurisdictional publication is at issue, publication occurs in the jurisdiction where the publication *is received* and not the jurisdiction from which it is sent”. (emphasis added)

**137.** This rule was in fact applied by this Court in *Ryanair Ltd. v. Fleming* [2016] IECA 265 which was a non-Brussels I recast case. The plaintiff sued in respect of comments made by the defendant, an Australian pilot who had no connections with Ireland, on an internet website operated by a company based in California. The Court upheld the decision of the High Court setting aside an order authorising service out of the jurisdiction. It held that it was necessary for a plaintiff to prove publication via the internet in the State through evidence that a third party within the jurisdiction had accessed or downloaded the material. Although Hogan J. made the general comments already adverted to earlier in this judgment, describing the general principles underlying the more specific conflicts of laws rules, later in his judgment, he held that the absence of publication within the jurisdiction was fatal to the assumption of jurisdiction by the Irish courts:

“[24] Quite apart from any other consideration, the plaintiff must, of course, establish publication in this State in order to establish jurisdiction. There is, however, no evidence before the court to establish that this post has been seen, accessed or downloaded by any third party within this jurisdiction. Proof of publication to a third party is, of course, an essential ingredient of the tort: see s. 6(2) of the 2009 Act. There could, of course, be many circumstances where the fact of publication in an on-line version – such as the of a major newspaper - would, as a matter of common sense, lead to the inference that it was so published to a third party. This cannot, however, obscure the

fact that the plaintiff is still required to prove that the material was accessed or downloaded by a third party in this jurisdiction.”

**138.** Hogan J. also cited *Al Almoudi v. Brisard* [2006] EWHC 1062, [2007] 1 WLR 113, and *Coleman v. MGN Ltd.* [2012] IESC 20, a decision of the Supreme Court, in support of the proposition that there must be evidence of publication within the jurisdiction. He concluded that “independently of any other consideration, the plaintiff has not demonstrated that the Irish courts have jurisdiction in this matter since, to repeat, there is no actual evidence that a third party located in this jurisdiction has accessed or downloaded the offending post” (paragraph 30).

**139.** I accept that Hogan J. went on to discuss a number of facts which are distinguishable from the facts of the present case, but it is clear that this was in the context of his subsequent analysis of *forum non conveniens* as an *alternative* basis for refusing jurisdiction, and that that he considered the absence of publication within the jurisdiction to be fatal in and of itself. This is clear from such comments as the following: “*there is nothing to suggest that [the High Court’s] conclusion that proceedings should be dismissed on forum conveniens grounds was incorrect even if – contrary to my view – the High Court had jurisdiction in this matter*” (emphasis added). There is nothing in the judgment to support the proposition that a court may take jurisdiction over a case on a *forum conveniens* ground despite it not falling within one of the Order 11(1) categories, or more specifically, in a defamation where it is not shown (to the requisite standard on such an application) that publication took place (in the sense of communication received) within the jurisdiction.

**140.** In the present case, proof of publication within Ireland is entirely absent in respect of five out of the six alleged defamations. The high-point of the appellant's case turns on the alleged defamation as between the respondent and the Irish company EML. However, her entire case is based upon an inference she seeks to draw from the letter/email of Mr. MacLeod, namely that he "must" have been given the information which she claims to be defamatory of her, given the contents of his letter. However, even assuming that to be so, there is still no information (direct or which can be drawn by way of inference) as to *where* or even by what means any such publication occurred. It might have been a phone call, or a face-to-face meeting, or an email. But in any event, there is no evidence whatsoever that communication took place *within the jurisdiction*.

**141.** The appellant maintains that it is sufficient that the communication was about her, was to an Irish company of which she was director, and that it had repercussions for her as director of that company. She relies among upon the remark of Hogan J. in *Ryanair v. Fleming*, set out above, as to the "targeting" of consumers within a jurisdiction, and suggests that she was "targeted" in the same way. She also relies upon the doctrine of "attribution" in company law to suggest that publication to a director of a company registered in Ireland must be deemed to constitute publication to the company *in* Ireland, even if the communication took place outside the jurisdiction.

**142.** It seems to me that the context for Hogan J's use of the word "targeting" was that of targeting *consumers* of a newspaper or other such publication in a particular jurisdiction so that they would download the information about the defamed person within the jurisdiction, thus leading to *publication* within the jurisdiction, not targeting in the sense of making defamatory comments about a person who is in resident in the jurisdiction. This passage in

the judgment in *Ryanair* judgment does not appear to me to advance the appellant's case in the absence of proof of publication within the jurisdiction. Further, the appellant's invocation of the doctrine of "attribution", which was developed to ensure personal criminal liability for crimes committed by companies, appears to me to be entirely misplaced. The reality is that defamation is a tort to which publication has always been central and in respect of which common law (and, for that matter, EU law) rules have been developed to address the fact that both publication and reputational harm may occur in different jurisdictions. It is a specialised and unique area of law and not one in which a concept, plucked from an entirely different context, may be dropped without any authority for doing so. The basic proposition in Irish law is that publication, in the sense of receipt of the communication, must take place, in order to satisfy the test within Order 11(1)(f) RSC. In the present case, this has not been established at all.

**143.** Were it not for that fact, the appellant might have a good case on the question of connection to this jurisdiction. Ireland is, as she submits, the place where she lives and works and where she has a reputation. Further, the publication was to a director of an Irish company and (she claims) the communication resulted in her loss of that directorship. However, the Court's discretion to designate the jurisdiction as the appropriate one in light of the various "connecting" factors does not arise unless the prior jurisdictional gateway under Order 11(1) has been accessed by means of sufficient evidence to the appropriate standard. Again it is my view that, even applying the lowest standard of "good arguable case" to the question of publication within the jurisdiction, the appellant has failed to meet the necessary threshold to show that the allegedly defamatory material was received by EML within the jurisdiction.

**144.** Accordingly, in my view, the appellant has failed to show that any of the defamation claims falls within Order 11(1)(f), and the question of discretion and/or *forum non conveniens* does not arise.

### ***3. The claim for “intimidation and economic duress”***

**145.** The claim for “intimidation and economic duress” is based upon the same facts as the defamation claim save that the loss alleged is not reputational loss but the loss of the directorship from EML. The appellant maintains that she was intimidated and subjected to economic duress in Ireland when she received an email from EML warning her that she must drop her claim against the respondent or have her position with EML terminated. She describes this as manipulation of EML by the respondent to induce her to drop her claim against the respondent. She says that she was in Ireland when she received the email containing the threat; that she was resident and working here at the time; and that the company which was manipulated was an Irish company.

**146.** She argues that it was “foreseeable” and “predictable” that the appellant would issue proceedings in this jurisdiction as she was “targeted” in Ireland and the dispute had a “close connection” to Ireland. She also maintains that “the close alignment of Ireland’s conflict of law rules in the context of cross-border torts with the Brussels Regulation”, the ECJ reasoning in *Bier BV v. Mines de Potasse d’Alsace SA* be adopted, namely that “where the harmful event occurred” must be understood as encompassing both the place where the damage occurred and the place of the events giving rise to it.

**147.** Insofar as this may be implied by the appellant’s submissions, I do not accept that more tests of “foreseeability” and “targeting” have replaced the common law rules in relation to jurisdiction in relation to cross-border torts. The categories or jurisdictional gateways set out

in Order 11(1) continue to apply, and thereafter the court must consider the question of *forum conveniens*. The Court is not entitled to simply bypass the jurisdictional categories set out in Order 11 and apply some kind of looser test as to “predictability” or “foreseeability”.

**148.** Under Order 11 rule 1(f), a court may grant leave to serve out of the jurisdiction where “the action is founded on a tort committed within the jurisdiction”. This was the subject of discussion by the Supreme Court in *Grehan v. Medical Incorporated and Valley Pine Associates* [1986] IR 528, where Walsh J. said that the issues was “not merely a mechanical one” and that “the task of the court is to interpret and apply the rule in a way designed to ensure that justice and common sense prevail”. It was held that if a significant element of the tort had occurred within the jurisdiction, that would be sufficient to come within rule 1(f). This did not necessarily mean that service out of the jurisdiction should be granted in all such cases, but it did allow jurisdiction to be assumed where Ireland was (also) the appropriate forum.

**149.** In that case, the plaintiff claimed that a heart valve which was inserted in his heart by open heart surgery in a hospital in Dublin was defective and brought a negligence claim. He applied to join the manufacturers of the valve to the proceedings and to serve notice of the proceedings outside the jurisdiction on them. They, the second named defendants, had manufactured the heart valve in San Diego in California and supplied it to the first-named defendants in the United States of America. The Supreme Court upheld the order for service out of the jurisdiction, finding that a significant element of the tort had occurred within the jurisdiction and there was sufficient connection with the jurisdiction by reason of what had occurred here to warrant the assumption of jurisdiction. It may be noted that Walsh J. considered authorities from a number of jurisdictions and also discussed *Bier BV v. Mines*

*de Potasse* as an authority of interest, even though the Brussels Regulation was not yet applicable in Ireland at that time. Curiously the decision in *Grehan* itself was not cited by either party in the present proceedings.

**150.** In my view the fundamental difficulty for the appellant here is not so much with showing a good arguable case that a significant element of a tort occurred within the jurisdiction, but rather with showing that *any* tort has been committed at all (to the relevant standard). The appellant did not seek to explain how the ingredients of the tort of intimidation was made out on the facts of her case, even taking those facts to be as she stated them to be at their height. Nor did she make clear precisely what she meant by “economic duress”, there being no tort of that name. Perhaps she had in mind the inducement of a breach of contract, or some form of conspiracy. However, there was no attempt to explain to the Court how the precise ingredients of these various torts might be satisfied on the basis of such facts as were established.

**151.** In my view, given the exceptional nature of the “service out” jurisdiction, the courts must be provided with an appropriate level of detail as to the precise claims being made, the facts supporting those claims, and how they connect with the particular jurisdictional category in Order 11(1) being relied upon. With regard to the alleged torts of intimidation and economic duress, this was not done in the present case.

## **Conclusion**

**152.** In view of the above analysis, I would dismiss the appeal and uphold the conclusion of the trial judge, albeit on different grounds to those advanced by her. The Court wishes to hear the parties in relation to the issue of costs. A brief hearing will be arranged and the

office will be in touch with the parties concerning a possible date in this regard. As this judgment is being delivered electronically, my colleagues Donnelly J. and Collins J. have asked me to indicate their agreement with it.