THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 179

Record Number: 2014/35, 2015/234, 2015/235

[Article 64 Transfer]

Peart J.
Irvine J.
Mahon J.
BETWEEN:

Mevlut Abama And Others

Plaintiffs/Respondents

- And -

Gama Construction (Ireland) Limited And

Gama Endustri Tesisleri Imalat Ve Montaj A.S.

Defendants/Appellants

Judgment of the Court delivered on the 31st day of July 2015

1. The plaintiffs concede that they may have put a foot wrong procedurally when they sought an order for service out of the jurisdiction in respect of the second named defendant by relying upon O. 11, r. (1)(e) RSC prior to the commencement of these proceedings. This error, if it be such, has led to no end of difficulty, and a delay of some five years in the prosecution of their claims.

2. The second named defendant submits that no mere procedural error occurred, and that a conscious decision was made by the plaintiffs to move an application for leave to issue and serve these proceedings outside the jurisdiction under Order 11, r. (1) RSC, and that the order made should be set aside on the basis of common law principles regarding *'forum non conveniens'* as sought in their Notices of Motion each dated 15th January 2009.

3. The second named defendant submits that the plaintiffs should not be allowed to meet its application to set aside the order made under O. 11(1)(e) RSC by now claiming that the Irish Courts have jurisdiction to determine their claims by virtue of Council Regulation 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as 'the Regulation'). By Order of White J. made on the 14th October 2014 they have been permitted to amend their Indorsement of Claim so that it contains a statement therein that (1) the claim made by the summons or other originating document is one which, by virtue of the Regulation, the Court has power to hear and determine, and (2) no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union, these being matters referred to in Order 11A, r. 2 RSC, as being pre-requisites for service out of the jurisdiction without leave of the Court under the Regulation, and which under Order 4, r. 1A RSC are required to be endorsed on the originating summons before it is issued.

4. The plaintiffs submit that form should not be permitted to triumph over substance, and that the claims should now be permitted to proceed on the basis of the jurisdiction provided under Article 18 of Regulation 44/2001 EC for claims of this nature, since that jurisdiction always existed, and even though in error they sought an order under Order 11 (1) RSC, and even though the Indorsement of Claim did not contain the endorsement required by Order 4, r. 1A RSC.

5. In the Court below, Dunne J. decided that the claim came within the Regulation and that, in accordance with the judgment in *Owusu v. Jackson (trading as Villa Holidays Bal-Inn Villas and others* (Case C281/02 [2005] E.C.R–1 383) common law principles of *forum non conveniens* must yield to the jurisdiction founded upon the Regulation. She went on to conclude that even if she was wrong in holding that claims came within, and jurisdiction existed for the Irish Courts to determine the claims, the application to set aside the order made should be refused in any event under *forum non conveniens* principles for reasons which she set forth in her judgment. The second named defendant submits on this appeal that in so concluding both issues, Dunne J. erred as pleaded in its Notice of Appeal.

A little background

6. Each of the plaintiffs is a Turkish national employed by the second named defendant (I shall refer to it as 'Gama Turkey' for convenience) under an individual contract of employment made with that company. Gama Turkey is a company registered in the Republic of Turkey.

7. The sample of this individual contract of employment which has been exhibited contains 'Article 9 – Disputes' which states that *"any dispute that may arise during the performance of this Agreement shall exclusively be settled by Ankara courts and enforcement offices"*. It also contains 'Article 2 – Place of Performance of the Works' which states:

> *"The Employee hereby irrevocably agrees to work at the workplace at Ayas Yolu, Seker Fabrikasi karsisi, No. 114 Etimesgut, Ankara or in any place owned by the Employer and located [in] the same or any other city or district or abroad on condition, which he may be assigned to, notwithstanding whether or not there is a member or a representative of a trade union provided that he receives an allowance and acknowledges that the Employer may assign him to such other workplaces."* [emphasis added]

8. It obviously makes complete sense that if the employee is working in Turkey under this contract any dispute arising in relation to its terms and conditions would be subject to the laws of Ankara. Gama Turkey however also relies on this jurisdiction clause in Article 2 in relation to any disputes arising during the time that they were working abroad in Ireland. They submit that the clause shows a clear intention on the part of the plaintiffs that any claims arising from their employment, whether in Turkey or abroad, must be brought in the courts in Ankara, notwithstanding that those claims might arise by virtue of alleged non-compliance with an Irish

Registered Employment Agreement referred to in the Secondment Agreement between Gama Turkey and Gama Ireland described below, and Irish law generally.

9. On 1st October 2001 Gama Turkey entered into a Secondment Agreement with the first named defendant, which is its Irish registered subsidiary (I will refer to it as 'Gama Ireland'). Under that agreement Gama Turkey agreed, inter alia, the following:

> *"3.1: For the purposes of this Agreement and the provision of the Services, Gama Turkey shall procure and provide and make available to Gama Ireland such of Gama Turkey's Employees as shall be agreed between Gama Turkey and Gama Ireland from time to time to perform the Services and Gama Ireland agrees to engage Gama Turkey to perform such Services."*
>
> *3.2: …*
>
> *3.3: Gama Turkey shall provide and for the purposes shall procure that Gama Turkey's Employees shall on behalf of Gama Turkey provide the Services for such hours as are in the opinion of Gama Ireland reasonably necessary to properly and diligently provide the Services subject to compliance with all appropriate laws in Ireland which shall include but shall not be limited to the Organisation of Working Time Act and the Registered Agreement relating to construction workers being the Registered Employment Agreement (Construction Industry Wages and Conditions of Employment) registered in the Register of Employment Agreements on 15th of March 1967 as varied by the Labour Court under Section 28 of the Industrial Relations Act, 1946.*
>
> *3.4: …*
>
> *3.5: It is hereby declared that each and every Gama Turkey's Employee is not and shall not become an employee or agent of Gama Ireland and shall remain under the direct control and management of Gama Turkey. Gama Turkey shall withdraw any Gama Turkey's Employee in respect of whom an objection is notified for any reason by Gama Ireland."*

10. Regarding the payment of Gama Turkey's employees who are seconded to Gama Ireland under this Agreement and other obligations to them, Article 7.1 provides:

> *"7.1: It is hereby declared that each and every Gama Turkey's Employees is not and will not become an employee or agent of Gama Ireland and shall not be entitled to any fee, salary, pension, bonus or other fringe benefits from Gama Ireland and it is agreed that Gama Turkey shall be responsible for all payments to Gama Turkey's Employees for their Services and for the purpose of this Agreement will be responsible for, if applicable, the deduction of all Income Tax and other deductions which it is appropriate to make and Gama Turkey here by agrees to indemnify and hold harmless Gama Ireland against any claims or demands that may be made by the relevant authorities …… . For administrative convenience Gama Ireland may agree at the request of Gama Turkey to pay to the employees of Gama Turkey a portion of all of the remuneration payable by Gama Turkey to its employees. In such circumstances Gama Ireland shall make an appropriate deduction from any subsequent invoice."*

11. This Secondment Agreement provided at Article 16 that it would be governed in accordance with the laws of Ireland. In addition each party agreed as follows:

> *"… that any suit action or proceedings under or arising out of or relating to this Agreement may be instituted in any Court of the Republic of Ireland having jurisdiction in relation to such matters, and each of the parties hereto hereby irrevocably waives any objection which he or it may have now or hereafter to the said choice of jurisdiction for any such suit action or proceedings, and any claim that such suit action or proceedings has been brought in an inconvenient forum and irrevocably submits to the jurisdiction of any such Court in any such suit action or proceedings provided always that nothing herein shall affect the right of any other party to bring proceedings against any other party in the Courts of any other jurisdiction or jurisdictions."* [emphasis added]

12. The third document of relevance to these proceedings is a letter (I will refer to it as 'the secondment letter') from Gama Turkey addressed individually to any of its employees who were being seconded to Gama Ireland under the foregoing Secondment Agreement. A sample of that letter has been exhibited. It stated firstly that it *"confirms the arrangement for your temporary secondment to [Gama Ireland],* and noted that the employee had asked Gama Turkey to facilitate him in taking up that position. It went on to state that while on secondment the employee would receive *"the additional salary and benefits set out in Schedule 1 of this letter"*. That Schedule included that *"while in Ireland you shall be paid in accordance with the Registered Employment Agreement for the construction industry"*. Apart from setting out in general terms the arrangements, it also informed that *"while in Ireland you shall have all rights and obligations afforded to you under Irish law"* and that *"except as set out in this letter and Schedule 1 the terms of your Contract of Employment remain unchanged and continue in force"*. As there was no reference to a jurisdiction clause in this letter, the clause contained in the individual contract of employment remained operative – i.e. the Courts of Ankara, subject to any interplay between that contract and the Secondment Agreement in which the jurisdiction for any disputes arising from the latter was Ireland.

13. It was Gama Ireland which arranged work permits for the plaintiffs through the Department of Enterprise, Trade and Employment before they came to Ireland, and which also had responsibility for making arrangements for their accommodation and food while they were employed in Ireland.

14. All the plaintiffs claim that while working in Ireland they were not paid in accordance with the Irish Registered Employment Agreement referred to in the Secondment Agreement and the secondment letter which they each received. Each claims, inter alia, firstly, a declaration that at all material times their contract of employment with the defendants was governed by the Registered Employment Agreement; secondly, an order directing payment to them of all outstanding wages, pension contributions and expenses pursuant to the Registered Employment Agreement; and thirdly, damages for breach of contract and/or breach of terms of office and/or breach of statutory duty.

15. There is some lack of clarity as to whether one only, or each, jurisdiction clause has some relevance to these proceedings, and if the former, then which one. That is because the contract of employment between Gama Turkey and the plaintiffs provides for the Courts of Ankara to have jurisdiction over claims arising from that contract. But that contract itself makes no reference to the Registered Employment Agreement (though it does provide that Gama Turkey may require the employee to work abroad), and it is in respect of this agreement that the plaintiffs seek declaratory relief and orders for the payment of the outstanding sums. However, the secondment letter states that each plaintiff will be paid in accordance with the Registered Employment Agreement. The Irish jurisdiction clause in the Secondment Agreement applies only in respect of disputes arising between Gama Turkey and Gama Ireland on

foot of the Secondment Agreement to which the individual plaintiffs are not a party.

16. Despite the terms of Article 3.5 and 7.1 of the Secondment Agreement, the solicitors acting for the plaintiffs, in their warning letter to each of the defendants dated 17th July 2008 sent ahead of the commencement of proceedings, refer to *"their [clients'] contracts of employment with Gama Construction (Ireland) Limited"* and state, having referred to their previous employment in Turkey, that *"our clients subsequently became employees of Gama Construction (Ireland) Limited"*. The rationale for that statement becomes clearer in a replying affidavit filed on the plaintiffs' behalf in response to the defendants' motions to stay the proceedings to which I refer in paragraph 21 below.

The Order 11 application

17. The application under Order 11 (1) RSC proceeded in the High Court on the 28th July 2008 grounded upon an affidavit sworn by the plaintiffs' solicitor. This disclosed that all the plaintiffs are residents of Turkey. He averred that even though Gama Ireland and Gama Turkey were separate companies, there was a relationship between the two. He went on to state the defendants were obliged to pay the plaintiffs the rates of pay applicable under the Registered Employment Agreement enforceable in this State. Paragraph 11 of this grounding affidavit stated:

> *"11. I say and believe that the intended plaintiffs were employed in the State under a contract of employment that is subject to the jurisdiction of this Honourable Court. Accordingly, I believe that the cause of action falls within the terns of Order 11 rule 1(e) of the Superior Court Rules …".*

18. On the basis of that affidavit, an order was made giving the plaintiffs liberty to issue the proceedings and to serve notice of same on Gama Turkey at its registered office in Ankara, Turkey. The Order contains the recital: *"And it appearing that this intended action falls within the class of actions set out in Order 11 Rule (1)(e) of the Rules of the Superior Courts".*

19. In due course notice of the plenary summons was served on Gama Turkey as permitted by this Order, and the summons itself was served in the normal way on Gama Ireland in this jurisdiction. A conditional appearance was entered by each defendant for the purposes of contesting jurisdiction. On the 15th January 2009 each defendant issued a separate Notice of Motion seeking an order pursuant to the inherent jurisdiction of the Court staying the proceedings on the ground of *forum non conveniens* claiming that the appropriate forum in which the proceedings should be litigated is Turkey, and those motions came before Dunne J. for determination.

20. Dunne J. delivered a written judgment on the 25th February 2009. She correctly identified the two issues requiring determination as being (1) whether the proceedings should be stayed on the basis of *forum non conveniens*, and (2) the related issue as to whether or not the provisions of Regulation 44/2001 EC has any application to the proceedings.

21. Dunne J. referred also to paragraph 39 of the replying affidavit of Donal Taaffe, the plaintiffs' solicitor, which explains why the plaintiffs were referred to as being and/or having become employees of Gama Ireland in the pre-commencement warning letter sent to the defendants. In that paragraph he stated:

> *"It appears therefrom [i.e. Turkish Labour law 4857] that, under Turkish law, a secondment contract is only valid for six months or up to one year if the contract is renewed by the parties and that at the end of this period, the employee becomes an employee of the company to which he has been seconded. There is no evidence that the alleged secondment agreement was renewed. Accordingly, in the absence of renewal, the Irish company would appear to have become the plaintiff's employers after six months by operation of Turkish law."*

22. The question whether the plaintiffs became employees of Gama Ireland or were employees of Gama Turkey will clearly be a live issue when these claims are being heard in whatever jurisdiction. Mr Taaffe's first replying affidavit states that only an Irish company may obtain a work permit for an employee coming to this country to work, and that it was Gama Ireland which obtained permits for the plaintiffs on that basis. He refers also to some plaintiffs who received documentation from the Revenue Commissioners which, he says, makes it clear that Gama Ireland was their employer here, and not Gama Turkey, despite what is contained in the individual employment contracts signed by each in Turkey before they came here.

23. Referring to the defendants' argument that since the plaintiffs' application under Order 11, r.1 RSC was a common law application it must be determined in accordance with the common law principle of *forum non conveniens* (which they submitted must be Turkey) Dunne J. set out that argument in more detail as follows:

> *"The basis of this contention on the part of the defendants is that the plaintiffs in this case obtained liberty to issue and serve out of the jurisdiction on the defendants pursuant to the provisions of O.11 of the RSC. In other words such an application is based on the common law provisions for service outside the jurisdiction. Had an application been made pursuant to O.11A or 11B, the plaintiffs would have been relying on regulations or conventions such as Council Regulation EC 44/2001. Had the application been made pursuant to one of those orders, the plenary summons herein would have contained the necessary endorsement indicating that the plaintiffs were invoking an international Convention. In those circumstances, it was contended that that the plaintiffs have invoked the common law rules in relation to service outside the jurisdiction."*

24. She referred also to the submission made by the defendants which relied on a judgment of Finlay Geoghegan J. in *Spielberg v. Rowley* [2004] I.E.H.C. 384, namely that the plaintiffs could not now avail of the jurisdiction founded upon the Regulation having invoked the common law jurisdiction at the time the O.11 order was applied for and granted. It is a case with very different facts. There an order had been obtained based upon the existence of other defendants who were in this jurisdiction, and in reliance on O.11, r. (1)(c) and (h) RSC. However before determining the application by the foreign defendants to set aside the order, the learned judge had acceded to an application to have the proceedings struck out against the defendants who were in this jurisdiction. Consequently, when she was considering the application by the first and second defendants to set aside the O.11 order, the whole basis on which that order had been granted was no longer present, and it followed that the application to set aside the order had to be granted. It was in that context that the plaintiff's submission that there was jurisdiction under Article 22.2 of the Regulation (EC/44/2001) to hear and determine the claim against the first and second named defendants came to be considered in that case, and in respect of which Finlay Geoghegan J. stated:

> *"I ruled that such submission could not now be made in response to the present application on behalf of the first and second named defendants as Council Regulation EC44/2001 had not been relied upon at the time of service of the proceedings on the first and second named defendants".*

25. While Dunne J. does not specifically state that Spielberg can be distinguished on its facts from the present case, it can be

inferred that she considered that it could be, and in my view she was correct to do so. The cause of action was very different. The first and second named defendants resided in Isle of Man – outside the EU, and it was not in any case an application to set aside based upon the common law principle of *forum non conveniens*. Neither did the proceedings relate to an individual contract of employment for the purpose of Article 18 of the Regulation. In fact it is hard to see how the cause of action in Spielberg came within the ambit of Article 22.2 of the Regulation.

26. Dunne J. was also referred by the defendants to a judgment of Geoghegan J. in *Schmidt v. Home Secretary* [1995] 1 ILRM 301. That was a case where the second named defendant sought to set aside an order made under O.11 RSC for service of proceedings upon him in the United Kingdom on a number of grounds, including that the alleged torts were not committed in this State but in the United Kingdom. Geoghegan J. was satisfied that the alleged torts were "matters relating to tort" and that they must be taken to have been committed in Ireland, and therefore were within the meaning of Article 5 of the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Accordingly, the proceedings fell to be dealt with under O. 11A RSC, and not O.11 RSC, thus requiring the order made to be set aside. In that regard he pointed to the wording of O. 11, r. 1 which states:-

> *"Provided that an originating summons is not a summons to which Order 11A applies, service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever …" {emphasis added].*

27. In her judgment, Dunne J. first of all addressed the parties' submissions in relation in relation to whether the *forum conveniens* should be considered to be Turkey or this State, and also the legal principles relating to the recognition to be given to an exclusive jurisdiction clause in a contract between the parties. I need not dwell on those submissions, or her conclusion that even if she was wrong to conclude that the Regulation determined the correct jurisdiction for the plaintiffs' claims, as she was satisfied that this State was also the more convenient forum under common law principles despite the exclusive jurisdiction clause.

28. However, this appeal can be determined by a consideration of whether the learned judge in the Court below was correct in concluding that the Irish Courts enjoyed jurisdiction to hear and determine the plaintiffs' claims under the Regulation, and that by virtue of the Owusu decision this trumped the exclusive jurisdiction clause and the principles of forum non conveniens.

29. Essentially, Gama Turkey submitted in the Court below and on this appeal that having chosen to proceed by way of Order 11 (1) (e) RSC, the plaintiffs could not now change horses and seek to have jurisdiction determined by reference to the Regulation, particularly where the Plenary Summons lacked the endorsement referred to in Order 4, r. 1A RSC or indeed any reference to the Regulation being relied upon. The plaintiffs on the other hand submitted that one way or another, whether the application was being made under common law principles as to jurisdiction or whether jurisdiction was founded upon the Regulation, an application was required to be made under O.11 RSC for service of notice of the proceedings out of the jurisdiction since Turkey was not a Member of the European Union and therefore O.11A RSC was inapplicable. In this regard they refer to the provisions of O. 11A, r.4 RSC which provides:

> *"Where two or more defendants are parties to proceedings to which the provisions of this Order apply, but not every such co-defendant is domiciled in a Member State of the European Union or a Contracting State of the 1968 Convention or a Contracting State of the Lugano Convention for the purposes of Regulation 44/2001 or the 1998 Act, then the provisions of Order 11 requiring leave to serve out of the jurisdiction shall apply to each and every such co-defendant."*

30. It is in these circumstances, as noted by Dunne J., that the plaintiffs submit that by making their application under O.11 RSC they were correct, even though they accept that the required endorsement was omitted from the plenary summons, and even though they moved under the wrong sub-rule. It was submitted that these mere procedural errors could not render the Regulation inapplicable, or deprive the Irish Courts of a jurisdiction which was conferred by the Regulation.

31. It is appropriate at this point to set forth the provisions of Articles 18 - 21 of the Regulation before addressing the parties' submissions in relation to same. They are contained in Part 5 of the Regulation under the heading: **"Jurisdiction over individual contracts of employment":**

Article 18

> 1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.
>
> 2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19
An employer domiciled in a Member State may be sued:

> 1. In the court of the Member State where he is domiciled or
>
> 2. in another Member State:
>
> > (a) in the courts of the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
> >
> > (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

> 1. An employer may bring proceedings only in the courts of the Member State in which the employee domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 21
The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or

2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

32. Given that under Article 18.2 of the Regulation Gama Turkey is deemed to be domiciled in this State, the provisions of Article 2 are relevant also and provide:

Article 2

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

33. Briefly summarised, these provisions mandate that the plaintiffs' employer is deemed to be domiciled in this State (Article 18.2), and that unless there is an agreement as to jurisdiction entered into after the date on which the dispute arose, the employer shall be sued in this State (Article 21 and Article 2). The plaintiffs argued in the court below and on this appeal that these provisions were mandatory since the Regulation enjoys direct effect, and that, despite the existence of the prior exclusive jurisdiction clause in the individual contracts of employment entered into between Gama Turkey and these plaintiffs, permits of no exceptions which might otherwise exist under *forum non conveniens* principles.

34. Two decisions in particular were relied upon by the plaintiffs before Dunne J. and again on this appeal, namely that in *Owusu v. Jackson (trading as Villa Holidays Bal-Inn Villas and others* (Case C281/02 [2005] E.C.R–1 383) and Goshawk *Dedicated Limited and Others v. Life Receivables Ireland Limited* [2008] I.E.H.C. 90 each generally to the effect that the Regulation supersedes the common law principles of *forum non conveniens*, and overrides the exclusive jurisdiction clause contained in the individual contracts of employment entered into between Gama Turkey and each of the plaintiffs.

35. As noted by Dunne J. in her judgment, Mr Owusu, who was a British national, had sustained an injury while on holiday in Jamaica. He had rented a villa there from Mr Jackson, another British national. An action was commenced in the United Kingdom for damages for personal injuries in which Mr Jackson and a number of Jamaican registered companies were named as defendants. The plaintiff was granted leave to serve proceedings out of the jurisdiction on the Jamaican companies, who in due course applied to have the proceedings stayed on the basis of *forum non conveniens*. The UK court decided at first instance that in view of the Brussels Regulation it could not stay the proceedings. On appeal a reference was made to the European Court of Justice seeking a ruling on the following question:

> *"Is it inconsistent with the Brussels Convention…, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings against a person domiciled in that State in favour of the courts of a non-Contracting State:*
>
> (a) if the jurisdiction of no other contracting State under the 1968 Convention is issue;
>
> (b) if the proceedings have no connecting factors any other Contracting State?"

36. In answering this question in the affirmative, the ECJ stated the following:

> *"37. It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principal it lays down except in the cases expressly provided for by the Convention …… .*
>
> *38. Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention …… would not be fully guaranteed if the court having jurisdiction under the convention had to be allowed to apply the forum non conveniens doctrine.*
>
> *39. According to its preamble, the Brussels Convention is intended to strengthen in the Community the legal protection of persons established therein, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before which proceedings in a particular case may be brought…*
>
> *40. The Court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in Article 2 of the Brussels Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued… .*
>
> *41. Application of the forum non conveniens doctrine, which allows the court seized a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.*
>
> *42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued. Second, whereupon he is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seized decides to allow the key, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another State and the prolongation of the procedural time-limits.*

43. Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.

44. The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgement and the impossibility of enforcing cross-claims against the other defendants.

45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above.

46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that Convention on the ground that a court of a non--Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."

37. Having noted the answer given by the ECJ in *Owusu*, Dunne J. went on to note the comments of Clarke J. in *Goshawk* when he refused a stay in that case on the grounds that the Regulation removed the discretion of the court under the common law, and she noted also that the Supreme Court had agreed. Dunne J. concluded in this regard:

"The thrust of the decision in Owusu is that national courts are deprived of the common law jurisdiction to stay proceedings on grounds of forum non conveniens. The decision in Donohue v. Armco emphasised that it will be a rare case in which a choice of jurisdiction clause will not be given effect but having said that it is a discretionary decision as to whether or not to grant a stay to give effect to a choice of jurisdiction clause. It is my view that Owusu is equally binding to deprive a national court of the common law jurisdiction in relation to the exercise of discretion in the context of a choice of jurisdiction clause subject, of course, to the provisions of the Regulation in relation to choice of jurisdiction clauses. In this case, the plaintiffs have contended that Article 21 of the caps on regulation which concerns contract of employment precludes the operation of the choice of jurisdiction clause relied on by the defendants as it was not entered into after the dispute between the plaintiffs and the defendants had arisen. Assuming that the Regulation is applicable to this case, I agree with that contention."

38. Dunne J. went on to conclude that the Regulation was applicable and could be invoked by the plaintiffs despite the fact that they had moved their application for service out of the jurisdiction under O.11. and had not invoked O.11A or 11B RSC, and had not included within the Plenary Summons the endorsement required by O. 4, rule 1A RSC as already referred to above. Her conclusion that the Regulation is the basis of the Court's jurisdiction over the plaintiffs' claims despite a procedural irregularity by the plaintiffs in failing to include that endorsement in their Plenary Summons was, she felt, and correctly so in my view, supported by a passage which she quoted in her judgment from Cheshire, North and Fawsett on *Private International Law* (4th ed.) at p.300 as follows:

"Under the traditional English rules on jurisdiction, the service of a claim form performs the dual functions of providing the basis of jurisdiction and giving the defendant notice of the proceedings. The Regulation has bases of jurisdiction which do not depend on service of a claim form. Procedure is largely left as a matter for national law, rather than being dealt with by the Regulation. The procedure under English law where the Regulation applies is as follows. A claim form can be served out of the jurisdiction without the permission of the court provided that each claim included in the claim form is one which the court has power to determine under the judgement Regulation …".

39. Dunne J. concluded that the failure to adhere to the correct procedure by the plaintiffs did not oust the application of the Regulation, and suggested that an application to amend may be necessary to show the basis on which jurisdiction is invoked. The plaintiffs, as already noted, made such an application to amend before White J. and this was granted. That order is the subject of appeal before this Court also.

40. I am satisfied that the reasons stated by Dunne J. for her conclusion that the plaintiffs are entitled to rely on the provisions of the Regulation as forming the basis of jurisdiction, and therefore that the discretionary application made by the defendants for a stay in these proceedings is precluded by virtue of the application of the Regulation having regard to the decision in *Owusu* are correct.

41. The plaintiffs could not have availed of the provisions of O. 11A RSC even though the claims are made under contracts of employment covered by Part 5 of the Brussels Regulation, since Turkey is not a Contracting State. Turkey is deemed to be domiciled in Ireland by virtue of Article 18.2 of the Regulation, and jurisdiction in relation to disputes arising under the contracts of employment are to be determined in the courts of that domicile. Order 11A, rule 4 (1) RSC deals with a situation where there are two or more defendants but not every defendant is domiciled in a Member State of the European Union. That rule provides, as already set forth, that in such cases service of proceedings will be dealt with under O. 11 RSC and not O. 11A. The question then arises as to the particular paragraph within O.11, rule 1 RSC the claim comes within for the purpose of making an application for service out of the jurisdiction under O.11 RSC as mandated by O. 11A, rule 4 (1) RSC. The position is by no means clear. There is no sub-paragraph which specifically relates to a contract of employment coming within Part 5 of the Regulation as such. The nearest sub-paragraph is that under which the plaintiffs in fact moved, namely paragraph (e) when read in its totality. I do not see any other provision in O. 11 RSC under which the application could more clearly be brought, and yet the application must be brought under O. 11 RSC. I am satisfied that the order made under O. 11 was correctly made for all the reasons stated,

42. In so far as the plaintiffs omitted from their plenary summons the endorsement required by O. 4, rule 1A RSC, the provisions of O. 124, rule 1 RSC are relevant. This rule provides:

"Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit."

43. In circumstances where the plaintiffs moved correctly under O.11 RSC but had omitted an endorsement required by O. 4 RSC, this rule is ample enough to enable the Court to permit the summons to be amended in that regard should it wish to exercise its discretion in that regard. It was in my view a correct exercise of discretion for White J. to permit the amendment provided for in his order dated 16th October 2014.

44. For these reasons I would dismiss both appeals.