Neutral Citation Number: [2012] IEHC 226

THE HIGH COURT

JUDICIAL REVIEW

2009 3691 S

BETWEEN

TRANSPORTSTYRELSEN

PLAINTIFF

v.

RYANAIR LIMITED

DEFENDANT

Judgment of Mr. Justice Hedigan delivered the 4th of May 2012

1. The plaintiff is the Swedish Transport Agency its registered office is located at 0581 Norrkoping, Sweden. The defendant airline's registered office is located at Corporate Head Office, Dublin Airport, in the County of Dublin.

2. The defendant in this motion seeks the following relief;

> (i) An Order dismissing the plaintiffs claim on the grounds that the plaintiff is seeking to recover a foreign revenue and/or public law and/or administrative debt from the defendant;
>
> (ii) An Order dismissing the plaintiffs claim on the grounds that the plaintiff is seeking to recover a foreign revenue and/or public law and /or administrative debt
>
> (iii) In the alternative an Order staying the within proceedings on the basis of the doctrine of *forum non conveniens.*

Background Facts

3.1 The plaintiff is a Swedish state entity, which was established in 2009 pursuant to a Swedish Regulation. The Swedish word *Transportstyrelsen* translates into English as the Swedish Transport Agency. The plaintiff replaced an entity known as *Luflfartsstyrelsen* which translates as the Swedish Civil Aviation Authority ("the Authority"). The Authority came into existence on 1st January, 2005. The plaintiffs claim in these proceedings is for what it describes as security charges, which were introduced in Sweden as a result of extra security measures at airports due to the 9/11 terrorist attack. The charges were introduced by the Civil Aviation Security Act SFS 2004: 1100 (referred to as the "CAS") which was enacted in Sweden on the 18th November 2004. This Act was enacted in compliance with Regulation (EC) No. 2320/2002 of the European Parliament and of the Council on the 16th December 2002.

3.2 The charges were to be paid by passengers and were intended to be revenue neutral as far as airlines were concerned. The airlines were to collect the charges from passengers when they were booking their flight and pay them on to the plaintiff. The charges were to be imposed on all passengers departing Swedish airports from 1st January, 2005 regardless of when they booked. Ryanair however was notified of the amount of the new charges in December 2004. It complains that at that stage many of its customers had already booked their flights for travel after 1st January, 2005.

3.3 In these proceedings issued on the 3rd day of September 2009 the plaintiff is claiming the charges for passengers who booked and paid for their flights before the charges were introduced but who were travelling after 1st January, 2005. The plaintiffs claim is for SEK 10,193,883.50 (approximately €1,150,476.05) The defendant has charged all its passengers who booked after 1st January, 2005 in respect of these charges. The defendant entered an appearance on the 18th day of September 2009.

3.4 The defendant has now brought an application dated the 1st September 2011 in which it seeks to have the proceedings dismissed. It is seeking to dismiss the plaintiffs claim on the grounds that it is seeking to recover a foreign revenue and/or public law and/or administrative debt from the defendant and that the Irish Courts have no jurisdiction to determine that claim. In the alternative, if it is determined that the court does have jurisdiction to determine this claim, the defendant is seeking to stay the proceedings pursuant to the doctrine of *forum non conveniens* as it claims there is another more appropriate jurisdiction for these proceedings to be determined i.e. Sweden.

Defendants Submissions

4.1 The defendant submits that the plaintiff is attempting to recover a foreign revenue debt in Ireland. It is well settled that an Irish Court will not enforce a revenue debt of another country. This principle was explained in the following terms by Kingsmill Moore J. in *Buchanan Limited v. McVey* [1950] IR 89 at 102-103.

> "These decisions establish that the Courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority or the representative of such an authority; and that, even if a judgment for a foreign penalty or debt be obtained in a county in which it is incurred, it is not possible successfully to sue in this country on such judgment. They do not expressly go further, the sum of dicta suggests there may be a principle that our Courts will not lend themselves indirectly to the collection of a foreign tax and will not entertain a suit which is brought for that object. Such a wide extension is also suggested by the authorities which establish that our Courts will not entertain an action for the enforcement of a penalty imposed by the laws of a foreign State, a principle which seems to have been the parent of the rule as to not enforcing foreign revenue claims."

The plaintiff disputes that the sums claimed in these proceedings are taxes, however, it is clear that this non-enforceability goes beyond foreign revenue claims, it also applies to other public law matters. In *Municipal Council of Sydney v Bull* [1908] I K.B. 7 at page12, Grantham J., in holding that an act of a foreign legislature could not be enforced, made the following observations:-

> "Some limits must be placed on the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes....The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last mentioned State."

In *Bank of Ireland v Meeneghan* [1994] 3. I.R. 111 at 117 Costello J. approved this case and stated as follows:-

> "The defendant firmly anchors his case on the well established principle of private international law to the effect that the Irish courts have no jurisdiction to enforce directly or indirectly the penal, revenue, or other public laws of a foreign state."

The charges in question are non-voluntary pecuniary sums paid to a state agency by members of the public for the purposes of ensuring the security of the Swedish state. Each passenger pays a set charge which is not referable to the cost of their own security check. The purpose of the charge is to raise revenue. In essence, it is submitted that the charges claimed are taxes. However, even if it is determined that the sum claimed is not a revenue debt it is beyond doubt that this is a public law matter. The plaintiff is a state entity seeking to recover a sum allegedly due under Swedish legislation. The plaintiff is not entitled to sue for this debt in this jurisdiction.

4.2 The plaintiff submits that the entry of an appearance by the defendant prevents it from contesting jurisdiction. The defendant however submits that if it is accepted that the sum claimed is a foreign revenue or public law debt then the Irish courts have no jurisdiction to hear the case and that is the end of the matter. The fact that the defendant has entered an appearance cannot confer a jurisdiction on the Court it does not have. The rules of the Superior Courts make no mention of entering an appearance solely to contest jurisdiction or a conditional appearance. The issue was considered in some detail by Morris J. (as he then was) in *Campell International Trading House Limited v Van Aart* [1992] 2 I.R. 305. Notwithstanding that his judgment was overturned on appeal he does set out some useful observations on the matter and the Supreme Court's decision was based largely on the wording of Article 18 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Convention") which has no applicability in this case. Morris J. held as follows:-

> "Under the Rules of the Superior Courts, 1986, provision is made for the entry of an appearance by Order 12. No machinery exists under that order or any of the other rules of court for the entry of an appearance "solely to contest jurisdiction". In certain types of cases (such as an appearance entered to a summons for the recovery of land) liberty is given to a defendant to limit a defence in his appearance, but no other provision is made for a limited appearance. It has been pointed out that a practice has developed whereby the Central Office will accept appearances marked "Without prejudice" or "Under protest" but such endorsements are not recognized by the Rules of the Superior Courts"

As is referred to above the Supreme Court overturned this decision, however, it did so because of the wording of Article 18 of the Convention. Finlay CJ held as follows:

> "... Having regard to the terms of Article 18, it is quite clear that if a person wishes or intends to contest the jurisdiction of the court in proceedings brought pursuant to the Act of 1988 and the Convention, then it is necessary in entering the appearance that they should so indicate..."

The defendant submits that the decision of the Supreme Court is predicated on the fact that it was dealing with a case concerning the convention. The defendant maintains that the Convention has no application here because it relates to a revenue or public law matter and therefore the courts of Sweden have exclusive jurisdiction to determine this case. Without prejudice to that position if the Convention does apply then Ryanair relies on Article 16 of the Convention and submits that the courts of Sweden have exclusive jurisdiction to determine this case. Therefore, this judgment does not have a wider application. In this case the defendant made clear in its replying affidavit to the plaintiff's motion for summary judgment (as well as in its defence) that it was contesting jurisdiction.

4.3 If it is determined that the Irish Courts do have jurisdiction to determine these proceedings the defendant submits that they should be stayed pursuant to the doctrine of *forum non conveniens* as there is another more appropriate forum for the hearing of the trial. In *Intermetal Group v. Worslade Trading Limited* [1998] 2 I.R. 1, the Supreme Court considered this issue. Murphy J. cited the decision of Bingham LJ in the English case of In *Re Harrods (Buenos Aires) Limited* [1992] Ch 72. In that case Bingham LJ in turn quoted from Goff LJ in *Spiliada Maritime Corporation v Cansulex Limited* to the effect that:-

> "a stay would only be granted on the grounds of *forum non conveniens* where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

Bingham LJ then went on to comment as follows at 103:-

> "The words I have emphasised make clear, as does the reference to justice, that a broad overall view must be taken: the primary task is not to decide which forum is advantageous or disadvantageous to any particular party. The Court should first look to see what factors there are, taking its broad overall view, which point in the direction of another forum: at that stage it is connecting factors (including convenience, expense, availability of witnesses, governing law, place of residence and place of business) which must be considered. If it is shown that there is some other available forum which prima facia is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all of the circumstances justice requires that a stay should not be granted.".

Murphy J. in *Intermetal* concluded that the test enunciated by Bingham LJ was the test to be applied in this jurisdiction. In *McCarthy v Pilay* [2003] 1 I.R. 592 Hardiman J. elaborated on the test to be applied. He stated as follows:-

> "On this aspect, there is an agreement that an onus rests on a third party of demonstrating that there is a distinctly more appropriate forum outside the jurisdiction ...If it does this, then the onus passes to the defendants to demonstrate that justice requires that a stay should be refused."

This case concerns an alleged liability that the defendant has incurred in Sweden. The claim is governed by Swedish law. In its

defence the defendant alleges that the legislation is invalid and unconstitutional and it would be impossible for an Irish Court to rule on these matters. If the trial went ahead in this jurisdiction the Irish court would need to hear expert evidence on Swedish law. Because of the necessity for expert evidence if the case ran in Ireland the trial would be much longer and consequently more expensive. All of the witnesses on both sides would have to travel from Sweden. As Sweden is clearly a more appropriate jurisdiction the burden is on the plaintiff to show that the justice of the case requires the application to be refused. It is submitted by the defendant that in fact the justice of the case requires the application to be granted. This is due to the defence which has been raised in which it is asserted that the legislation introducing the charges breached Swedish law and the Swedish constitution, the way in which the legislation operates breaches the prohibition on retrospective taxation, the manner in which the taxes were introduced was in breach of the rules of the International Civil Aviation Organization of which Sweden is a member. The defendant disputes the plaintiff's entitlement to claim interest pursuant to the Swedish Interest Act. The defendant claims to be indemnified by the plaintiff and/or other Swedish state entities which operate Swedish airports due to contracts it entered into with those parties when it commenced operating out of Swedish airports. Furthermore, the defendant also wishes to counterclaim against the plaintiff. This counterclaim is based in tort law, the torts in question occurred in Sweden and therefore these issues should also be determined in a Swedish Court. For all these reasons the defendant believes that justice can only be done in a Swedish Court. An Irish Court would be extremely reluctant to reach a conclusion that a piece of Swedish legislation was introduced in Sweden contrary to Swedish Law or contrary to the Swedish Constitution.

4.4 The plaintiff seeks to rely on Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It is submitted that the plaintiff cannot rely on this regulation for two reasons. Firstly, because they did not do so in their summary summons and statement of claim and secondly because the regulation does not apply to revenue or administrative matters. In *Spielberg v Rowley and Others Unreported*, High Court 26th November 2004, Finlay Geoghegan J. held that a plaintiff could not rely on this regulation in circumstances where the regulation was not relied upon for the purposes of serving the summons:-

> "Counsel for the plaintiff did seek to raise Article 22(2) of Council Regulation E.C./44/2001 of 22nd December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 0.1. L01211 16.1.2001 and sought to assert that this Court had jurisdiction thereunder to hear and determine the claim as against the first and second named defendants. 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 E.C./44/200I had not been relied upon at the time of service of the proceedings on the first and second-named defendants."

Secondly Article 1 of Council Regulation (EC) No. 44/2001 makes clear that it does not apply to revenue or administrative matters. It states:-

> "This regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs, or administrative matters."

In summary, the defendant argues that the plaintiff is acting in the exercise of its public authority powers and therefore Regulation 44/2001 has no application to the within action. The plaintiff is not entitled to maintain a claim for a revenue debt or a public law matter in this jurisdiction and the proceedings should be dismissed accordingly. In the alternative if it is determined that the court has jurisdiction to hear and determine these proceedings then they should be stayed as there is another country which also has jurisdiction, Sweden, and for the reasons set out above it is a more appropriate jurisdiction than Ireland and the justice of the case requires this action to be determined there.

Plaintiffs Submissions
5.1 The defendant argues that the plaintiff is attempting to recover a foreign revenue or public law debt in Ireland. The question that therefore arises is whether the claim made by the plaintiff is a claim to recover a foreign revenue or public law debt. In the case of *Conroy v Byrne* [1998] 3 I.R. 1 Kelly J. held that the question as to whether the offence alleged against the applicant was a revenue offence was to be determined by reference to Irish law. In order to do this the Court was required to look to the true nature of the offence. Kelly J. found that the levies in respect of which the applicant was alleged to have committed the offence charged were not taxes and therefore the offence charged was not a revenue offence. In coming to this conclusion Kelly J. noted that the levies had their origin in European Law established to support the common agricultural policy of the European Community. Each member state of the Community was obliged to implement the levy scheme as part of the obligations imposed upon it by European Law. Any loss caused by the actions alleged against the defendant was a loss to the European Union and not to the United Kingdom. Following the ratio expressed by Kelly J. and approved by the Supreme Court in that case, the basis upon which the plaintiffs claim arises must be considered in order to determine whether it constitutes a foreign revenue, penal or public law claim that would be incapable of determination within this jurisdiction.

5.2 The charges the subject of the within proceedings were introduced by the Civil Aviation Security Act SFS 2004: 1100 (referred to as the "CAS") which was enacted in Sweden on the 18th November, 2004. This Act was enacted in compliance with Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of the 16th December, 2002. The purpose of the Regulation was to establish common rules among member states in relation to security measures in the aviation sector. The CAS provided at section 11 that the costs of the operator of each airport which was subject to the legislation would be covered by a fee. The fee was to be charged in a fee equalization system that covers all regulated airports within the European Union and to which the Regulation applies. The fee was to be charged to all air carrier companies that transport passengers. The CAS provided at section 13 that the Swedish Government or its designated agency may issue regulations on the amount of the fee and how the fees collected should be allocated to recover the reasonable costs of aviation security. In supplemental provisions to the CAS which were enacted in Sweden by the Civil Aviation Security Ordinance (SFS 2004 : 1100) the Authority (and subsequently the plaintiff) was authorized to administer the fee equalization scheme and to set the fee for the security controls required following the implementation of the Regulation. Section 10 of the Ordinance provides that the fees collected are to be used to compensate each airport for the cost of having to carry out the security controls required by the CAS. The plaintiff submits that it is clear from a consideration of these features that the charges that are sought to be recovered by it in the within proceedings are not taxes or revenue claims within the sense in which those terms are understood by Irish law. The charge is not collected for the benefit of the Swedish state and the purpose of the charge is not to raise revenue, it is to fund the costs of implementing security controls in Swedish airports as required by EU Law.

5.3 The defendant argues that enforcement of the claim is prohibited in this jurisdiction. However it is submitted by the plaintiff that there is no general prohibition in the law against the enforcement in one jurisdiction of a claim arising out of the public law of another jurisdiction. In the case of *Bank of Ireland v Meenaghan* [1994] 3 I.R. 111 Costello J. reviewed the authorities in this area. At page 118 of the reported decision Costello J. endorsed the following statement from the speech of Watson L. in the case of *Huntington v Attrill* [1893] A.C. 150 as giving guidance towards what kinds of claim would fall within the general prohibition against enforcing the public laws of another country:-

> "A proceeding in order to come within the scope of the rule must be in the nature of a suit in favour of the State whose law has been infringed"

It submitted by the plaintiff that from the authorities reviewed by Costello J. in the *Meenaghan* case it is clear that in order to come within the scope of the prohibition the claim in issue must involve some assertion of the sovereignty of a foreign state. The claim must be made by or at the behest of a foreign state or by some organ of that state acting for and on behalf of the foreign state and for the benefit of its citizenry in general. It is clear that this claim is not made at the behest of Sweden for the benefit of its citizens in general.

5.4 The defendant claims it is entitled to contest the jurisdiction of the Court to hear the within claim. The plaintiff submits that the starting point for considering the question of jurisdiction outside the scope of the Brussels I Regulation is the domicile of the defendant. In this case the defendant is domiciled within the jurisdiction of the Court. Its registered office is located at Dublin Airport. In the case of *Campbell International Trading House Limited and Nature Pure Limited v Peter Van Aart and Natur Pur G.M.B.H* [1992] 2 I.R. 305, the Supreme Court held that the first defendant's failure to enter an appearance solely to contest jurisdiction automatically resulted in the High Court having jurisdiction to hear the action and the jurisdiction of the Court could not subsequently be challenged. This was a case which fell to be considered under the provisions of Article 18 of the Brussels Convention. It is however quite clear that the general guiding principle in cases that fall outside the Convention is that the entry of an unconditional appearance by the defendant is one of the steps which shall be regarded as a submission to the jurisdiction of the Court by that defendant.

The plaintiff submits that the defendant is precluded from making the within application at this stage not merely by the unconditional appearance that it entered in response to the summons but also by the steps it has subsequently taken in the proceedings and its adoption of the jurisdiction of the Court. It is clear that the defendant has taken steps unequivocally referable to the merits of the case comprised in the within proceedings. The plaintiff submits that it has incurred costs as a result of the plaintiff continuing to progress the matter before the Court since September 2009 and the defendant is thereby estopped from seeking to object to the jurisdiction of the Court at this juncture.

5.5 The defendant claims that the proceedings should be stayed under the doctrine of *forum non conveniens* as Sweden is a more appropriate jurisdiction for the proceedings to be litigated. The doctrine was considered by the Supreme Court in the case of *Intermetal Group Limited v Worslade Trading Limited* [1998] 2 I.R. 1. Having reviewed the authorities in detail Murphy J. stated at page 36 of the reported decision that the test to be applied in determining/arum non conveniens was simply "the broad principle of justice for both parties". In applying this test to the facts of the case the judge put a heavy emphasis on the fact that the defendant was incorporated in Ireland. At page 37 of the reported decision he stated as follows:-

> 'The starting point must be the incorporation of the defendant in this jurisdiction. In argument it was understandably emphasised that the proceedings were instituted here as of right".

The plaintiff submits that in the within case, the application of the broad principle of justice for both parties requires the Court to confirm that it has jurisdiction to hear the within claim and to confirm that the defendant is bound by that jurisdiction having submitted to it voluntarily and by its actions. Of particular significance is that the defendant is a company registered in Ireland and whose head office is situate in Ireland. The conduct of the trial of these proceedings in Ireland will not present any insuperable difficulty. The court is competent to receive such evidence of foreign law as may be required from suitably qualified experts and to reach a determination on the plaintiffs claim and the defendant's liability in due course.

The plaintiff submits that the issues of Swedish Law that fall to be determined by the Court are simple. The basis upon which the charges are due to the plaintiff are clearly set out. In fact it does not appear that the defendant contests that the sums are due on a prima facia basis. The complaint now made by the defendant in the application before the Court would have far more conviction if the defendant had taken any steps in Sweden within the past two years to challenge the validity of the legislation that it alleges to be deficient. The plaintiff further submits that the proceedings herein are at such an advanced stage that it would be contrary to the general principle requiring the expeditious disposal of litigation to allow this matter to be referred to another jurisdiction where fresh proceedings would have to be commenced. In the circumstances of this case it is submitted that the defendant is estopped from challenging the jurisdiction of the Court at this late stage, having encouraged the plaintiff to prosecute the within proceedings up to a point at which the matter is almost ready for hearing and the within application should therefore be dismissed.

Decision of the Court

6.1 The plaintiff is the Swedish Transport Agency. It was established in 2009 to replace the Swedish Civil Aviation Authority ("the Authority") which itself came into existence on 1st January 2005. The plaintiff's claim in these proceedings is for security charges which were introduced in Sweden as a result of extra security measures at airports due to the 9111 terrorist attack. The charges were introduced by the Civil Aviation Security Act SFS 2004: 1100 (referred to as the "CAS") which was enacted in Sweden on the 18th November, 2004. This Act was enacted in compliance with Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of the 16th December, 2002. The airlines were to collect the charges from passengers when they were booking their flight and pay them on to the plaintiff. The charges were to be imposed on all passengers departing Swedish airports from 1st January, 2005 regardless of when they booked. The defendant was notified of the amount of the new charges in December 2004. At that stage many of its customers had already booked their flights (for travel after 1 January 2005). The defendant argues that it could no longer at that date charge their customers further. In these proceedings the plaintiff is claiming the charges for passengers who booked and paid for their flights before the charges were introduced (but who were travelling after 1st January, 2005). The plaintiffs claim is for SEK 10,193,883.50 (approximately €1,150,476.05) The defendant has charged all its passengers who booked after 1st January, 2005 the relevant charges. The defendant has now brought an application dated the 1st September, 2011, in which it seeks to have the plaintiff's proceedings dismissed on the grounds that it is seeking to recover a foreign revenue and/or public law debt from the defendant and the Irish Courts have no jurisdiction to determine that claim. In the alternative, if it is determined that the court does have jurisdiction to determine this claim, the defendant is seeking to stay the proceedings pursuant to the doctrine of *forum non conveniens* as it argues there is another more appropriate jurisdiction for these proceedings to be determined i.e. Sweden.

6.2 The issues to be determined in this case are as follows:-

a) Whether the plaintiffs claim is for the recovery of a foreign revenue or public law debt?

b) Whether the defendant has submitted to the jurisdiction of the court?

c) Whether these proceedings be stayed under the doctrine of *forum non conveniens?*

Whether the plaintiffs claim is for the recovery of a foreign revenue or public law debt
6.3 The defendant submits that the plaintiff is seeking to recover a foreign revenue or a public law debt. It argues that the charges are non-voluntary pecuniary sums paid to a state agency by members of the public. Passengers pay a set charge which is not referable to the cost of their own security check. The purpose of the charge is to raise revenue. The defendant submits that this is a public law matter as the plaintiff is a state entity seeking to recover a sum allegedly due under Swedish legislation. On the other hand the plaintiff submits that the charge is to provide increased security post September 9/11 and is not a revenue raising measure but a measure introduced pursuant to EU law obligations. The charges were introduced by Swedish Legislation which was enacted in compliance with Regulation (EC) No. 2320/2002 of the European Parliament. The purpose of the Regulation was to establish common rules among member states in relation to security measures in the aviation sector. The fee system covers all regulated airports within the European Union and to which the Regulation applies. The fees collected are used to compensate each airport for the cost of having to carry out the security controls required by the CAS.

It seems to me that the charges that are sought to be recovered are not taxes or public law debts. The charge is not collected for the benefit of the Swedish state, it's purpose is not to raise revenue but to fund the costs of implementing security controls in Swedish airports as required by EU Law. In determining the nature of the charges, in accordance with the judgment of Kelly J. in *Conroy v. Byrne* [1998] 3 I.R at page 1, I must have regard to the nature of the charges in question. The evidence is that the funds raised are not kept by the Swedish state but are disbursed to the airports to defray the cost of security controls. The loss of the charge therefore is not a loss to the Swedish State but a loss to the various airport operators who have had to implement security controls in respect of flights made by the defendant into their airports. The claim is not therefore in my judgment a claim for recovery of a foreign revenue or public law debt.

Whether the defendant has submitted to the jurisdiction of the court?
6.4 The defendant submits that the entry of an unconditional appearance does not prevent it from contesting jurisdiction. It argues that the sum claimed is a foreign revenue or public law debt and in these circumstances the Irish courts have no jurisdiction to hear the case therefore whether or not appearance has been entered is irrelevant. In any event the defendant argues that the rules of the Superior Courts make no mention of entering an appearance solely to contest jurisdiction or a conditional appearance.

The plaintiff seeks to rely on the Supreme Court decision in Campbell where it was held that the first-defendant's failure to enter an appearance solely to contest jurisdiction automatically resulted in the High Court having jurisdiction to hear the action and the jurisdiction of the Court could not subsequently be challenged. Finlay CJ held as follows:-

> "No indication of any description was given by the first defendant between that time [March 1990] and late February or early March 1991, to either the Court or to the first plaintiff of any challenge to the jurisdiction of the Court. In those circumstances, I am quite satisfied that the mere absence which was relied upon by the first named defendant in this case of an actual form inserted in the Rules of the Superior Courts, 1989, providing for an appearance specifically directed towards the act of 1998 and solely to contest the jurisdiction has no bearing on the case. Having regard to the terms of Article 18, it is quite clear that if a person wishes or intends to contest the jurisdiction of the court in proceedings brought pursuant to the Act of 1988 and the Convention, that it is necessary in entering the appearance that they should so indicate... That could be done, conceivably by a letter accompanying the appearance, by letter immediately following the appearance, or by a notice of motion accompanying or following an appearance contesting jurisdiction …..
>
> In these circumstances, I am quite satisfied that where the Defendant does not establish anything other than a plain or unconditional appearance, and where such was entered and where such a lapse of time like this occurred, and there could be no conceivable justification for relieving him from any mistake, and he is not asserted a mistake at that time that in those circumstances the provisions of the first part of Article 18 have been satisfied by the facts in this case, namely, it is an action brought in the Courts of this State to which the defendant has entered an appearance and the proviso which would reach a different result if that appearance had been entered for the purpose of contesting the jurisdiction does not and cannot arise."

Campbell is a case which fell to be considered under the provisions of the Brussells Convention. In cases which fall outside the scope of the Convention the general principle is that the entry of an unconditional appearance by the defendant is one of the steps which should be regarded as a submission to the jurisdiction of the Court by that defendant. The defendant has taken a number of steps which would only be necessary or only useful if the objection to the jurisdiction has been waived. In *Dicey, Morris and Collins* on *The Conflict of Laws* (Fourteenth Edition 2006) at paragraph 130-134 the authors state that:-

> "A person who would not otherwise be subject to the jurisdiction of the Court may preclude himself by his own conduct from objecting to the jurisdiction and thus give the Court an authority over him which, but for his submission, it would not possess... In order to establish that a defendant has by his conduct in the proceedings submitted or waived his objection to the jurisdiction it must be shown that he has taken some step which is only necessary or only useful if the objection has been varied waived or never been entertained at all."

In addition to entering an unconditional appearance to the summary summons, the defendant has filed an affidavit in response to a motion for liberty to enter final judgment, consented to the matter being sent to plenary hearing; raised particulars, sought and obtained an order for further and better particulars and filed a counterclaim. It is quite clear that the defendant has engaged with and accepted the jurisdiction of the Irish Courts. In these circumstances I am satisfied that the defendant is precluded from now seeking to object to the jurisdiction of the Court.

Whether these proceedings be stayed under the doctrine of *forum non conveniens*?
6.5 The defendant submits that if it is determined that the Irish Courts do have jurisdiction to determine these proceedings the defendant maintains that they should nonetheless be stayed pursuant to the doctrine of *forum non conveniens* as there is another more appropriate forum for the hearing of the trial i.e. Sweden. The plaintiff submits that the application of the broad principle of justice for both parties requires the Court to confirm that it has jurisdiction to hear the within claim and to confirm that the defendant is bound by that jurisdiction having submitted to it voluntarily and by its actions. The proceedings are at an advanced stage, the plaintiff is a company registered in Ireland, it has taken many steps to progress the matter and it would be unfair at this late stage to allow it to stay the proceedings on the basis of *forum non conveniens*.

The Supreme Court considered the doctrine of *forum non conveniens* in the case *Intermetal Group v. Worslade Trading Limited* [1998] 2 I.R. 1 Murphy J. cited the decision of Bingham LJ in the English case of In Re Harrods (Buenos Aires) Limited [1992] Ch 72. In that case Bingham LJ held at 103:-

> "The words I have emphasised make clear, as does the reference to justice, that a broad overall view must be taken: the

> primary task is not to decide which forum is advantageous or disadvantageous to any particular party. The Court should first look to see what factors there are, taking its broad overall view, which point in the direction of another forum: at that stage it is connecting factors (including convenience, expense, availability of witnesses, governing law, place of residence and place of business) which must be considered. If it is shown that there is some other available forum which *prima facia* is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all of the circumstances justice requires that a stay should not be granted.".

Having reviewed the authorities Murphy J. stated at page 36 of the reported decision that the test to be applied in determining *forum non conveniens* was simply "the broad principle of justice for both parties."

It seems to me that the trial of these proceedings in Ireland will not present any insurmountable difficulty. The defendant is a company registered in Ireland and has its head office in Ireland. The court is competent to receive such evidence of foreign law as may be required from suitably qualified experts and to reach a determination on the claim. The courts can and often do, decide cases based on expert testimony as to foreign law. If there is a conflict between the experts the Court must decide the matter itself. In the Supreme Court decision of *McNamara v Owners of the S.S. Hatteras* [1931]. I.R. 73, Fitzgibbon J said that:-

> "If the evidence of the experts is conflicting, either as to the text of the law or as to its interpretation, or as to the way on which the question at issue would be decided by the foreign Court which might have to administer the law, then the Court must make up its own mind as best it can, using the material at its disposal and deciding between the experts as it would have to if they were giving their opinion upon any specific question"

These proceedings are at an advanced stage and the case is ready for a trial date. on a consideration of all of the circumstances it seems to me that justice requires that a stay should not be granted on the basis of *forum non conveniens*. For all the above-mentioned reasons the within application is refused.