Neutral Citation Number: [2011] IEHC 308

THE HIGH COURT

2008 6463 P

BETWEEN

MEVLUT ABAMA AND OTHERS

PLAINTIFFS

AND

GAMA CONSTRUCTION IRELAND LIMITED AND

GAMA ENDUSTRI TESISLERI IMALAT VE MONTAJ A.S.

DEFENDANTS

JUDGMENT of Ms. Justice Dunne delivered the 25th day of February 2011

The plaintiffs in these proceedings, who total some 491 individuals, by order dated the 28th July, 2008 (Peart J.) obtained liberty to serve notice of a plenary summons against the second named defendant (Gama Turkey). Conditional appearances were entered by the first named defendant (Gama Ireland) and by Gama Turkey on the 10th September, 2008, and on the 10th December, 2008, respectively. The appearances were entered for the sole purpose of contesting the jurisdiction of the Irish courts in relation to these proceedings.

Background
The 491 plaintiffs in these proceedings were originally employed by Gama Turkey which has its primary location in Turkey. Gama Ireland is a separate legal entity based in Ireland. Gama Ireland is engaged in the construction and development industry. It appears that on foot of a consultancy agreement, dated the 1st November, 2001, Gama Turkey seconded the plaintiffs to Ireland. Gama Ireland arranged for work permits for the plaintiffs through the Department of Enterprise, Trade and Employment and provided food and accommodation for the plaintiffs for the duration of their stay in this country.

A dispute arose between the plaintiffs and the defendants with regard to rates of pay. By letter dated the 17th July, 2008, the plaintiffs informed the defendants that they would be issuing proceedings against each of the companies. Following this the order referred to above was granted by the High Court allowing the plaintiffs to serve Gama Turkey outside the jurisdiction.

The general endorsement of claim on the plenary summons herein indicates that each plaintiff claims the following reliefs:

> "1. A declaration that, at all material times, the contract of employment between the plaintiff and the defendant was governed by a registered employment agreement.
>
> 2. An order directing payments of all outstanding wages, pension contributions and expenses due to him pursuant to the registered employment agreement.
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> 3. Damages for breach of contract and/or breach of terms of office and/or breach of terms of statutory duty.
>
> 4. An account or inquiry of all sums due to him arising from his employment with the defendants."

Further ancillary relief is sought. Following the entry of conditional appearances by the defendants, each defendant issued a notice of motion seeking an order pursuant to the inherent jurisdiction of the court staying the proceedings on the ground of *forum non conveniens* on the basis that the appropriate forum within which the plaintiffs claim should be litigated is that of Turkey. The notices of motion were in identical terms.

The primary issue in this case is whether or not the proceedings herein should be stayed on the ground of *forum non conveniens*. There is a related issue as to whether or not the provisions of Brussels Regulation EC 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter referred to as "the Regulation") has any application to these proceedings. A number of other issues have been raised on behalf of the defendants, but while they may have some bearing as was contended on behalf of the defendants, they are not within the scope of the application before the court. Those issues are whether some of the claims are *res judicata* as it is contended that 102 of the plaintiffs named in these proceedings have brought similar proceedings in Turkey and secondly whether what has been described as a "class action suit" can be brought and recognised under Irish law. In essence complaint is made that it is inappropriate to commence proceedings on behalf of 491 plaintiffs seeking individual relief on one plenary summons.

Facts
These proceedings arise out of a claim for, *inter alia*, compensation for outstanding wages, expenses, holiday pay, sick pay and pension entitlements due to the plaintiffs pursuant to the registered employment agreement ("REA") , which are legally enforceable in the state in respect of every worker of the class, type or group to which it is expressed to apply. The total amount of the claim is set out in the statement of claim dated the 13th of March 2009 as a figure of €40,332, 659.06. In addition, there is a claim for exemplary damages arising from the matter in which the plaintiff's wages were withheld and/or a manner that they are employment was terminated when the complaints were made.

By way of background, it would be useful to refer briefly to the decision of the Supreme Court in the case of *Gama v Minister for Enterprise, Trade and Employment and Edward Nolan* (Unreported, Supreme Court, 30th April, 2009). The Supreme Court was dealing with judicial review proceedings initiated by the applicant seeking the quashing of a report by the head of the Labour Inspectorate in rest of alleged breaches of employment rights. In the course of his judgment, Kearns J. described the background as follows:-

> "The applicant first named in the title hereof (hereinafter "Gama Turkey") has its primary seat or location in Turkey. The

second named applicant is Irish based and was incorporated in 1999. It is a company ultimately owned by Gama Turkey. Gama Construction Ireland (hereinafter "Gama Ireland") has a number of Irish subsidiary and related companies. Gama Ireland is involved in the construction industry. It commenced operations in Ireland in 2000 and competed successfully for several important public sector projects, funded mainly from the National Development Programme. Projects in Ireland include major road projects, power stations and social housing. The value of the work carried out by Gama Ireland and its related companies in the calendar year 2003 was of the order of €89 million. According to the 2003 audited Gama Ireland Group accounts, there were 1,066 employees in Gama Ireland who received wages and salaries of €28,051,524 in that year. In March, 2005 Gama Ireland had 927 current work permits, of which 924 were in respect of Turkish nationals. Before deciding to grant work permits to Gama, the Work Permits Section of the Department of Enterprise, Trade and Employment had received assurances from Gama Ireland and its legal advisors at that time that all provisions of Irish employment law would be observed and that the 'going rate' would be paid to all Turkish workers. In work permits documentation, the Turkish workers were described as employees of Gama Ireland or other Irish-registered companies.

On 8th February, 2005, Mr. Joe Higgins T.D. made the following statement in Dáil Éireann in respect of alleged abuses of employment rights by Gama Ireland:-

> 'There is a major foreign based multi-national construction company, employing approximately 10,000 people, 2,000 approximately in this State, which has secured massive local authority and State contracts here. This company imports workers from its home base, who do not speak English, controls their passports and work permits, accommodates them often in company barracks, demands an extent of hours worked that can only be called grotesque and, incredibly, pays unskilled construction workers between €2 and €3 per hour basic pay and skilled workers somewhere over €3 per hour. In short, this is a modern version of bonded labour. The instigator is Turkish-based Gama Construction Ireland Limited.'

On the same day and in the aftermath of the foregoing allegations, the Minister for Enterprise, Trade and Employment directed the Labour Inspectorate of his Department to carry out an urgent investigation into the matter."

It was the report of the Labour Inspectorate that was sought to be quashed by the proceedings that concluded in the Supreme Court decision referred to above.

It would also be helpful to refer briefly to the letter sent on behalf of the plaintiffs prior to the issue of these proceedings. It is has some relevance to the position of the parties herein. In the course of that letter dated the 17th July, 2008, (a similar letter was sent to each of the defendants), it was stated:-

> "For reasons including the application of Turkish Labour Law, the passage of time, the nature of the work carried out by our clients for Gama Construction (Ireland) Limited and other relevant characteristics of their relationship with your company, our clients subsequently became employees of Gama Construction (Ireland) Limited. This is a fact which has been accepted in correspondence and court pleadings by your company in the Republic of Turkey and elsewhere."

The defendants had placed some emphasis on that paragraph in the course of their submissions. Reliance was also placed on a replying affidavit of Donal Taaffe, solicitors sworn herein on behalf of the plaintiffs on the 24th April, 2009, it was averred that:

> "The defendants summoned the plaintiffs to Ankara where they surrendered heir passports to the Turkish company. The plaintiffs were required, at this time, to sign a plethora of unidentified documents running from 20 to 30 pages. I say that that the contents of those documents were not explained to the plaintiffs, nor were the plaintiffs given an opportunity to read the documents, nor were they provided with a copy of the documents. Inexplicably, some of these documents were in English and Turkish was not made available to the plaintiffs at the time of signing or since."

Mr. Taaffe further averred at para. 39 of the affidavit having referred to Turkish labour law, he went on to say:-

> "It appears therefrom 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."

Subsequent to the letter of the 17th of July 2008 referred to above, on the 28th of July 2008, a High Court order was granted allowing the plaintiffs to issue and serve notice of the plenary summons out of the jurisdiction on Gama Turkey pursuant to Order 11, Rule 1(e) of the Rules of the Superior Courts, ("RSC"). Gama Ireland was served with a concurrent plenary summons on the 1st August 2008 and a conditional appearance was entered on behalf of Gama Ireland on the 10th of September 2008. Gama Turkey was served with notice of the plenary summons on the 27th of November 2008 and a conditional appearance was entered on its behalf on the 10th of December 2008. The appearances were entered for the sole purpose of contesting the jurisdiction of the Irish courts.

Submissions of the Defendants

The thrust of the submissions on behalf of the defendants is that the application for leave to serve the defendants outside the jurisdiction is a common law application and therefore has to be determined in accordance with the common law doctrine of *forum non conveniens*. In applying that doctrine, it was argued on behalf of the defendants that the natural and appropriate forum from the point of view of convenience is Turkey.

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 the plaintiffs have invoked the common law rules in relation to service outside the jurisdiction. To that extent, counsel on behalf of the defendants relied on the decision in the case of *Spielberg v. Rowley* [2004] I.E.H.C. 384 in which Finlay Geoghegan J. stated:-

> "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, O.J. L012/1 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./44/2001 had not been relied upon at the time of service of the proceedings on the first and second named defendants. Service on the first and second named defendants was effected pursuant to the order of the High Court of the 17th May, 2004, following an application under O.11 of the Rules of the Superior Courts, 1986. The first and second named defendants are now entitled to an order setting aside such service."

Accordingly counsel on behalf of the defendants rejected any contention by the plaintiffs that the Regulation has any application to this case. In making the case that these proceedings should be stayed on the grounds that the proceedings should be brought in Turkey, counsel on behalf of the defendants relied on a number of matters to demonstrate that Turkey is the natural and appropriate forum for the resolution of these proceedings, namely:-

> 1. The plaintiffs are domiciled in Turkey.
>
> 2. Gama Ireland is an Irish company which is a subsidiary of Turkish Holding Company Gama Holding Incorporated.
>
> 3. Gama Turkey is a Turkish company which has no business or place of business in Ireland and is also a subsidiary of the company Gama Holding Inc.
>
> 4. The witnesses are all likely to be domiciled and located in Turkey.
>
> 5. Most of the parties speak Turkish and do not speak English.
>
> 6. Most, if not all of the documents are in Turkish.
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> 7. The presence that either of the defendants has in Ireland is very tenuous at this point.
>
> 8. It appears that effectively identical claims have been brought by approximately 102 of the plaintiffs in Turkey.
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> 9. The Turkish have already considered cases from 102 of the plaintiffs.
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> 10. No court or employment tribunal proceedings which concern employment law rights and obligations have been instituted against Gama Turkey in Ireland apart from the instant ones.
>
> 11. No court or employment tribunal proceedings which concern employment law rights and obligation have been instituted against Gama Turkey in Ireland apart from two cases.
>
> 12. There is a choice of jurisdiction clause in the contracts between the plaintiffs and Gama Turkey which provides that: "any dispute which may arise during the performance of the agreement shall exclusively be settled by Ankara Courts and Enforcement Officers".
>
> 13. The plaintiffs were employed by Gama Turkey under Turkish contracts of employment with the Turkish choice of jurisdiction clause and the plaintiffs letter before action refers to the "the application of Turkish labour law".
>
> 14. A key event occurred in Ankara, namely the entering into the contract of employment.
>
> 15. Key issues have to be determined as a matter of Turkish law.
>
> 16. There is no assertion that the Turkish courts had any difficulty in addressing the claims. Therefore, the principle of comity of nations should apply.
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> 17. Given the fact that the Turkish courts have already dealt with this litigation they are fully familiar with the issues and in particular are in a much better position than the Irish courts to determine which of the plaintiffs are seeking to re-litigate matters in these proceedings that they have already litigated in Turkey.

I should note that whilst there was no dispute by the plaintiffs in relation to a number of those matters, some issues were undoubtedly disputed on behalf of the plaintiffs. I will return to this aspect of the matter later.

In the course of the submissions, counsel on behalf of the defendants referred to the decision in the case of *Donohue v. Armco* [2002] 1 All E.R. 749, a decision of the House of Lords, to support the contention that an exclusive jurisdiction clause will only be departed from where there are strong or exceptional reasons for doing so. It was held in that case, *inter alia*, that where the parties had bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party could show strong reasons sufficient to displace the other party's *prima facie* entitlement to enforce the contractual bargain would depend on all the facts and circumstances of the particular case. Where the dispute was between two contracting parties, one of which sued the other in a non contractual forum, and the claims fell within the scope of the exclusive jurisdiction clause in their contracts, and the interests of other parties were not involved, effect would in all probability be given to the clause. Reliance was also placed on the decision in the case of *Microsoft Ireland Operations Limited v. EIM International Electronics Limited and EIM Computerised Technologies Limited* [2010] I.E.H.C. 228. In that case there was a jurisdiction clause in favour of Ireland and that clause proved decisive in the context of that case. In the course of his judgment de Valera J. stated at p. 21 of the judgment:-

> "The defendants' claims as to the invalidity of the jurisdiction clauses were made for the first time in these proceedings in an attempt to extricate themselves from their contractual obligations. If the clauses were so objectionable to the defendants it is difficult to say why they did not raise any such objections at any stage with the plaintiff."

Relying on that passage, it was urged on the court that there was an exclusive jurisdiction clause in this case in favour of the Turkish courts and there are no other jurisdictional clauses in any other documents relied on by the plaintiffs, therefore in the light of the fact that there is an exclusive jurisdiction clause in the contracts in favour of the Turkish Courts these proceedings should not continue in this jurisdiction. Finally it was contended on behalf of the defendants that the various facts and matters referred to above, demonstrate that Turkey is the most appropriate forum, because there are a large number of factors which connect the proceedings

with that forum.

Submission of the Plaintiffs.
Counsel on behalf of the plaintiffs indicated that in the first instance the jurisdiction of this Court was based on traditional grounds in relation to the first named defendant and as against both named defendants on foot of the Regulation. Accordingly, it was contended on behalf of the plaintiffs that there was no longer any discretion under the doctrine of *forum non conveniens* to recognise jurisdiction in the forum most appropriate for the resolution of a dispute by virtue of the provisions of the Regulation.

A fundamental part of the argument on behalf of the plaintiffs was to the effect that the defendants in basing this application on the common law principles have acted on a misunderstanding as to the basis of the courts jurisdiction. Counsel on behalf of the plaintiffs took issue with the defendants argument to the effect that the plaintiffs, having obtained liberty to serve under O. 11 of the RSC cannot now invoke the Regulation and further that the Regulation cannot form the basis of jurisdiction given that the application in this case was not made pursuant to Order 11A or 11B. Counsel on behalf of the plaintiffs contended that service out of the jurisdiction could not have been made in these proceedings pursuant to O. 11A of the RSC as Turkey was not a member stated of the European Union or a contracting state of the 1968 Conventions or the Lugano Convention or the Jurisdiction of Courts and Enforcement of Judgments Act 1998. It was further contended on behalf of the plaintiffs that by virtue of O. 11A, r. 4 of the Rules of the Superior Courts they were obliged to apply for leave to serve out of the jurisdiction under Order 11. Order 11A, r. 4 of the Rules of the Superior Courts provides as follows:-

> "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 No. 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."

Accordingly, it is the plaintiffs' contention that as Turkey is not domiciled in the European Union and is not a contracting state to any of the relevant conventions referred to above, O. 11A cannot apply and the correct procedure to have been followed on behalf of the plaintiffs was that prescribed by O. 11 of the RSC.

It was conceded on behalf of the plaintiffs that the plenary summons issued herein and served on the defendants did not contain the endorsement required pursuant to O. 4, r. 1A of the RSC to the effect that the court has power under the Regulation to hear and determine the claim and specifying the particular provision or provisions of the Regulations under which the court should assume jurisdiction. Despite the concession of the error in this regard it was contended that the error was not fatal to the application of the Regulation. It was argued that the Regulation was in fact applicable and that the Rules of the Superior Courts could not deprive the courts of a jurisdiction which was available pursuant to the Regulation. It was contended therefore that the issue of jurisdiction was not required to be pleaded and that the Rules of the Superior Courts have to be read as being subservient to the regulation.

Counsel on behalf of the plaintiffs then proceeded to examine the provisions of the Regulation and particular emphasis was placed on the provisions of Article 21. Article 21 is contained in a section entitled "Jurisdiction over Individual Contracts of Employment" and provides:-

> "The provisions of this section may be departed 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."

It was submitted on behalf of the plaintiffs that the Regulation provided a uniform jurisdictional regime for employees. By virtue of Article 21, the Regulation can only be departed from on foot of an agreement entered into after the dispute has arisen or by an agreement which gives an employee the choice to sue in another state, but it was emphasised that a pre-dispute clause which restricts the employees rights cannot give rise to a departure from the provisions of the Regulation. It was argued that the effect of Article 21 is to enable a jurisdiction clause to be applied in favour of an employee. On that basis it was the plaintiffs case that the jurisdiction clause relied on by the defendants did not avail the defendants and was unenforceable under the Regulation.

Counsel for the plaintiffs in support of the arguments referred to above to the effect that the Regulation is applicable to these proceedings referred to the case of *Owusu v Jackson (trading as Villa Holidays Bal-Inn Villas) and Others* [2005] E.C.R.I. 383. It was stated in para. 46 of the judgment of the court as follows:-

> "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."

Relying on that case it was argued that the national courts may not apply the doctrine of *forum non conveniens* in civil and commercial actions governed by the Regulation, even when one of the parties is domiciled in a non member state. Reliance was also placed in the case of *Goshawk Dedicated Limited and Others v. Life Receivables Ireland Limited* [2008] I.E.H.C. 90 (Unreported, High Court, Clarke J. 27th February, 2008). In that case, the defendants sought to stay proceedings where there were ongoing proceedings in Georgia, United States of America. Clarke J. refused the application, finding that the traditional common law doctrine of *forum non conveniens* had been eroded by the provisions of the Regulation. (See para. 1.3 of the judgment in that case). Counsel on behalf of the plaintiffs went so far as to submit that no aspect of forum non convenien survives the application of the Regulation. Indeed at para. 6.18 of his judgment Clarke J. noted as follows:-

> ". . . it seems to me that the only answer which can be given which is consistent with the jurisprudence of the ECJ is one which determines that a court in Ireland retains and must exercise a jurisdiction conferred on it by Article 2, notwithstanding the fact that there may be proceedings in a non Member State which are first in time, which involve the same subject matter, and where a judgment from the court of the non Member State would be recognised in Ireland. For those reasons it does not seem to me that I have a jurisdiction to stay these proceedings pending the result of the Georgia proceedings or, indeed, pending a decision by the competent courts in the United States as to whether those courts have jurisdiction."

In the light of the strong arguments by counsel on behalf of the plaintiffs to the effect that the decision in *Owusu* was such that the

doctrine of *forum non conveniens* had been eroded by the provisions of the Regulation it is interesting to note a further passage from the judge of Clarke J. at paragraph 4.10. He stated, having quoted at length from the decision in *Owusu* as follows:-

> "Before leaving the judgment of the court it is important to note that a second question had been referred to the ECJ which sought to ascertain whether the Brussels Convention precluded the application of the doctrine of *forum non conveniens* in all circumstances or only in certain circumstances. The court noted that the justification to make a reference for a preliminary ruling is not such that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that the determination of the ECJ on the issues referred is necessary for the effective resolution of a dispute. In those circumstances the court found that there was no need to reply to the second question.
>
> It is clear, therefore, that the court expressly declined to decide any issue wider than that which was necessary for the purposes of determining the underlying case which had been the subject of the reference. It confined itself, therefore, to ruling that the Brussels Regulation precluded a court from declining jurisdiction on the basis that a court of a non-Contracting State would a more appropriate forum. The court did not, therefore, in my view rule in express terms that the doctrine of *forum non conveniens* could never be invoked in circumstances where the Brussels Convention applied. Rather it confined itself to determining that that aspect of the doctrine which allows (or more accurately would have allowed) a court in a common law jurisdiction to decline to deal with a case on the basis that the courts of another jurisdiction where more convenient, could not be used to oust the jurisdiction conferred by the Brussels Convention. That is not to say, however, that *Owusu* is of no or only limited relevance to the issue which I have to decide. The judgment of the court in Owusu is in clear and unambiguous terms."

That decision was appealed to the Supreme Court and in the course of the judgment of the Supreme Court (Unreported, Supreme Court, 30th January, 2009), Denham J. delivering the judgment of the court stated at p. 21:-

> "The Irish courts, following on from *Owusu*, have a mandatory jurisdiction, pursuant to Article 2 of the Brussels I Regulation and may not decline this, unless there is provision for a derogation from the application of that Article, in the Regulation itself."

The court went on to note that *Owusu* was the most relevant case law, but that it was limited to the facts of the case and it was pointed out that those facts were not similar to the facts in the *Goshawk* case. The result of the appeal was that there was a reference made to the ECJ in relation to the circumstances that arose in that case as to whether, when a defendant is sued in its country of domicile, it is inconsistent with the Regulation for the court of a Member State to decline jurisdiction or to stay proceedings on the basis that proceedings between the same parties and involving the same cause of action are already pending in the courts of a non Member State and are therefore first in time.

Counsel for the plaintiffs proceeded to submit that in the event that the court did not accept that the court was precluded from granting a stay on these proceedings by virtue of the Regulation then, the following grounds supported the contention that Ireland is the forum with which the proceeding have the most real and substantial connection namely:-

1. The plaintiffs were employed in Ireland under the terms of a registered employment agreement.

2. The applicable law is Irish law and involves the interpretation of a large number of statutory provisions.

3. A key issue will be the investigation required to clarify and ascertain the method by which monies were routed from Ireland and presumably Gama Ireland to Finans Bank and then transferred to Ryder Investments MV.

4. There are a number of Irish based witnesses.

5. There are issues in relation to the discovery of documents.

6. The plaintiffs want to have their action tried before the Irish courts.

7. Gama Turkey previously submitted to the Turkish courts that the Irish courts have jurisdiction.

8. Gama Ireland is an Irish registered company and subject to Irish law.

9. Gama Ireland was not a party to any proceedings in Turkey.

10. Gama Turkey is domiciled in Ireland for this action by virtue of the Brussels Regulation 1.

11. The plaintiffs worked on construction projects primarily paid for by the Irish State.

12. The Garda Fraud Squad, the Competition Authority, the Director of Corporate Enforcement, the Garda National Immigration Bureau and the Revenue Commissioners have been provided with the report of the labour Inspectorate which was commissioned by the Minister for Enterprise.

13. There is clear and unequivocal evidence that the defendants have breached Irish employment law.

14. The Irish court is a proper forum to deal with the issue of whether the monies paid under the Labour Court agreement preclude these plaintiffs from joining in these proceedings. Documentary evidence would constitute the primary items of proof and therefore a trial in Ireland would be relatively straightforward if case managed.

15. Irish public policy considerations will need to be applied and the Irish courts are the best suited forum to address those issues.

16. Large amounts of the plaintiffs' claims would not have an alternative forum. It appears (See the affidavit of Donal Taaffe, sworn on the 21st April, 2009, at para. 61) that the plaintiffs will be statute barred from large portions of their claims if they are forced to bring their proceedings in the Republic of Turkey.

A number of other issues were raised on behalf of the plaintiffs to the effect that even if the court accepted that Turkey was the proper forum, that a stay should not be granted in the interests of justice and a number of grounds were put forward for that

contention, namely:

1. Significant elements of the proceedings concern the interpretation and understanding of Irish law.

2. The Turkish courts are not a suitable forum for applying Irish law and in particular Irish labour law.

3. The Turkish courts have demonstrated an inability to apply Irish law.

4. The Turkish courts have shown an unwillingness to apply the rates under the registered employment agreement in cases where it has found for a plaintiff.

5. The defendants have misrepresented Irish law to the courts in Turkey. (In this regard reference was made in the affidavit to support this contention).

6. The plaintiffs would be statute barred from taking their claim in Turkey.

7. The relief of exemplary damages is not available in Turkey.

8. Some of the documentation required to be signed by the plaintiffs was in English and therefore would have to be translated into Turkish.

9. The defendants themselves do not assert that the Turkish courts would have regard to Irish law simipliciter. In an affidavit sworn by Dogan Yagiz on the 17th January, 2009, it was deposed that: "Irish rights and obligations . . . were taken into account by the Turkish courts to the extent that they were not contrary to Turkish law and public policy". It was contended that such an approach by the Turkish courts does not amount to adequate protection or enforcement of rights under Irish law before the Turkish courts and that in those circumstances Turkey cannot be seen as an appropriate forum.

The plaintiffs submissions can be summarised as follows:-

1. The court has the jurisdiction to hear the case under and by virtue of the Regulation.

2. The plaintiffs did not have to serve the defendants under O. 11A as O. 11A, r. 4 provides that O. 11 is the appropriate provision under which to apply for leave to serve out the jurisdiction where one of the co-defendants is not domiciled in the Member State.

3. The jurisdiction clause is unenforceable under and by virtue of the Regulation.

4. Ireland is the more appropriate forum because of the number of connection factors referred to on behalf of the plaintiffs.

Discussion of Legal Issues and Decision

I now want to consider the doctrine of *forum non conveniens* and the test applicable to an application to stay proceedings on the basis that there is a more appropriate forum available. The central issue in this aspect of the case is whether the courts of Turkey would be more appropriate for the hearing of the issues between the plaintiffs and the defendants than the courts of this jurisdiction.

There is no dispute between the parties as to the relevant test to be applied in considering this issue. The leading English case is *Spiliada Maritime Corporation v. Cansulex Limited* [1987] A.C. 460, in which Lord Gough outlined the principle to be applied in considering the courts discretion as to whether or not to stay proceedings on the grounds of *forum non conveniens*. It was stated at p. 476 of the judgment as follows:-

> "The basic principle is that a stay will only be granted on the ground 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."

The approach to be taken in this jurisdiction was outlined in the Supreme Court decision in the case of *Intermetal Group Limited v. Worslade Trading Limited* [1998] 2 I.R. 1 in which the court considered and referred to the decision of the English Court of Appeal in the case of *In Re. Harrods (Buenos Aires) Limited* [1992]. Having referred to the decision of Bingham L.J. in the *Harrods* case who had in turn referred to the principle formulated by Gough L.J. referred to above, Murphy J. at p. 35 of his judgment set out his conclusions as follows:-

> "I am satisfied that the principle quoted from the judgment of Gough L.J. by Bingham L.J. is fully consistent with the judgment of Blayney J. in *Doe v. Armour Pharmaceutical Company Incorporated* [1994] 3 I.R. 78, and represents a correct statement of law in this jurisdiction. In these circumstances I have reached the conclusion that the test proposed by Diplock L.J. in *MacShannon v. Rockware Glass Limited* [1978] A.C. 795, is not an appropriate one. To refuse a stay because it would 'deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court' is, in my view to narrow a test. The proper test is as Bingham L.J. said in *In Re. Harrods (Buenos Aries) Limited* [1992] Ch. 72 and Blayney had anticipated in *Doe v. Armour Pharmaceutical Company Incorporated* [1994] 3 I.R. 78, the broader principle of justice for both parties. To apply a narrower test might involve refusing a stay on the grounds of relatively minor procedural differences or the perception as to quantum of damages awarded in different jurisdictions."

Reference was also made to the decision in the case of *McCarthy v. Pillay* [2003] 1 I.R. 592. That was an application by a third party to stay the proceedings on the grounds of *forum non conveniens*. In his judgment Hardiman J. stated at p. 601 as follows:-

> "On this aspect, there is agreement that an onus rests on the Third Party of demonstrating that there is a distinctly more appropriate forum outside the jurisdiction, i.e., in this case that the Courts of New York are a distinctly more appropriate forum for the resolution of the issue between the defendant and the Third Party. If it does this, then the onus passes to the defendant to demonstrate that justice requires that a stay should be refused."

Taking the decisions referred to into account, the first observation to make is that the appropriate test is that laid down by Murphy J. in the passage referred to above namely, the broader principle of justice for both parties. Then, applying the two stage process described by Hardiman J. it would appear to be necessary for the defendants in this case to establish that Turkey is a more appropriate forum of the resolution of the issues between the parties herein. If the defendant succeeds in doing so, the onus then rests on the plaintiffs to demonstrate that justice requires that the stay should be refused and that the matter should be dealt with by the Irish courts.

Accordingly one of the questions that has to be determined is whether the defendants have demonstrated that Turkey is the competent jurisdiction or more appropriate jurisdiction within which these proceedings should be conducted. The defendants in their submissions referred to Cheshire, North and Fawcett on *Private International Law* (14th Ed.) at p. 431 in which it was stated:-

> "In ascertaining whether there is a clearly more appropriate forum abroad, the search is for the country with which the action has the most real and substantial connection. The court will look for connecting factors and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction . . ., and the place where the parties respectively reside or carry on business."

The matters to be taken into consideration in this regard were set out by Bingham L.J. in the case of *Re. Harrods (Buenos Aires) Limited* to which reference has been made above at p. 124 in which he stated:-

> "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 look first to see what factors there are, taking this 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 facie* is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all the circumstances justice requires that a stay should not be granted . . . if a plaintiff can show that he will not obtain justice in the foreign jurisdiction, that is of course a powerful reason for refusing a stay . . . since in such a case the foreign forum can scarcely be a more suitable forum for the interest of all the parties and for the ends of justice."

The test set out in that decision has been affirmed by the courts in this jurisdiction. Murphy J. quoted that passage with approval in the case of *Intermetal Group Limited v. Worslade Trading Limited* [1998] 2. I.R. 1. That was a case in which it was noted that a large number of witnesses in relation to an issue in that case were resident in Russia and their credibility was very much in issue and those witnesses were most likely to give their evidence in Russian. It was noted by the court that there was a very close relationship between that issue and the jurisdiction of the Russian courts. Nevertheless it was held by the Supreme Court that the High Court had been correct in refusing a stay, since justice required that the action be dealt with expeditiously.

I now want to look at the considerations to be taken into account in applying the test as to the appropriate forum. From the defendant's point of view, matters supporting their arguments include the fact that the plaintiffs are Turkish, reside in Turkey and speak Turkish. Having regard to the affidavits sworn herein, I think it is clear that there will be some logistical difficulties in ensuring that all of the plaintiffs are here for the purpose of conducting these proceedings. Many of the defendants' witnesses are based in Turkey. Much of the documentation in the case is in Turkish. One of the defendants is a Turkish company. Further it is the case that the plaintiffs entered into employment contracts in Turkey which contain a choice of jurisdiction clause nominating the courts of Ankara as the appropriate forum. It also appears that a significant number of the plaintiffs have brought proceedings in that jurisdiction. These are all matters which support the courts of Turkey as being the appropriate forum.

A number of facts support the plaintiffs' contention that the Irish courts provide the most appropriate forum. They include the fact that one of the defendants is an Irish company. It was suggested by counsel for the defendants in the course of the submissions that the Irish company's links with this jurisdiction are now tenuous. I cannot accept that contention. The first named defendant Gama Ireland is an Irish registered company and still has business connections in this jurisdiction. There may be an issue as to the identity of the plaintiffs' exact employer, but nonetheless, I think it is important to note that the plaintiffs were in this jurisdiction on foot of work permits issued to the Irish company by the Department of Enterprise, Trade and Employment. It is the case that there was, as referred to above, an investigation carried out by the Labour Inspectorate of the Department of Enterprise, Trade and Employment as to the circumstances surrounding the employment of the plaintiffs by the defendants and issues arising in relation to the manner in which they were paid. They were employed in this jurisdiction under the terms of the registered employment agreement relevant to their type of employment. The terms and conditions of the plaintiff's employment therefore fall to be considered under Irish law. Accordingly as I have indicated it seems to me that the applicable law will be Irish law. It is the case that in addition to a number of documents which are located in Turkey and in the Turkish language which will be relied upon in this case, it is inevitable that there will also be a certain amount of documentation in English relied upon. Documentation available in this jurisdiction will include the work permits of the plaintiffs and the applications in regard to those and the report of the Labour Inspectorate.

One of the issues raised by the plaintiffs as to the appropriate forum was the question of the type of relief available in this jurisdiction as opposed to the relief available in the courts of Turkey. It was asserted that the relief of punitive/exemplary damages was not available in Turkey. I think it is clear from the authorities referred to above that it is not appropriate to consider whether a forum provides a more advantageous or disadvantageous remedy to one or other of the parties. To that extent I do not think that that is a point which can be relied on by the plaintiffs.

An important consideration in this case is whether it has to be decided according to the common law doctrine of *forum non conveniens* or by the application of the Regulation. If the doctrine of *forum non conveniens* is applicable the case law described above sets out the applicable test and the next step is to apply the test to the facts of this case. There is no disagreement between the parties as to the applicable test to be applied. Further, there is no dispute between the parties as to the effect of a choice of jurisdiction clause. It is accepted that a court should give effect to an exclusive jurisdiction clause unless there are good reasons not to. This principle was stated in the case of *Donohue v. Armco* [2002] 1 All ER 749, a decision of the House of Lords. Lord Bingham at page 759 of the judgment in that case stated:

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties and a claim falling within scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion whether by granting a stay of proceedings in England or by restraining the prosecution of proceedings in the non-contractual form abroad or by such other procedural order as is appropriate in the circumstances to secure compliance with a contractual bargain unless the parties suing in the non-contractual forum, the burden being on him, can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognise that where an exercise for discretion is called for there can be no absolute or flexible rule governing that

> exercise …. Where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other parties' *prima facie* entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."

During the course of the submissions it was strongly contended on behalf of the defendants that the Regulation was not applicable to the facts and circumstances of this case. Reliance was placed on the fact that the application for leave to issue and serve the proceedings out of the jurisdiction on Gama Turkey was based on Order 11 of the RSE as opposed to Order 11A or 11B.

Accordingly, the next issue which arises is whether the Regulation is applicable. In other words, have the plaintiffs established that this is a case to which the Regulation applies.

If the plaintiffs' contentions are correct, it is necessary to consider the decision in *Owusu* referred to above in some detail. The facts of that case were that a British national domiciled in the United Kingdom suffered a very serious accident during a holiday in Jamaica. He brought proceedings in the United Kingdom against Mr. Jackson who had let to him a holiday villa in Jamaica. He also brought proceedings in the United Kingdom against a number of Jamaican companies. Having obtained leave to issue and serve proceedings out of the jurisdiction on a number of defendants in Jamaica, those defendants who had been served in Jamaica together with Mr. Jackson applied for a declaration that the case had closer links with Jamaica and that the Jamaican courts were the appropriate forum for trying the case for the interests of all the parties and the ends of justice. Ultimately it was held by the United Kingdom court that it was not possible to stay the proceedings as the Brussels Convention precluded him for staying proceedings in the action against Mr. Jackson. It was held that the United Kingdom and not Jamaica was the appropriate forum to try the action. The decision was appealed to the Court of Appeal and the matter was referred to the Court of Justice. It sought a ruling as follows:

> "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 in issue;
>
> (b) if the proceedings have no connecting factors to any other contracting State?"

In the course of the judgment in that case the European Court of Justice made a number of observations on the question of the compatibility of the *forum non conveniens* doctrine with the Brussels Convention. It stated at paragraphs 39 - 41:

> "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 …
>
> 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 …
>
> Application of the *forum non conveniens* doctrine, which allows the court seised 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."

The court went on to consider the points raised by the defendants in relation to consequences which would result if the English courts were obliged to try the case. The court then continued:

> "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.
>
> 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."

I have already referred to a number of passages from the decision of the High Court in the case of Goshawk. That case considered the judgment in *Owusu*. In the course of the judgment of the High Court, it was noted that "the judgment of the court in *Owusu* is in clear and unambiguous terms". The issue in *Goshawk* was slightly different to the factual background in *Owusu* as it raised the question as to whether or not the court retained a discretion under the *lis alibi pendens* doctrine, an aspect of the doctrine of *forum non conveniens*, to stay proceedings where proceedings already exist in another non-Member State. In the course of his judgment, Clarke J. observed at page 2 as follows:

> "The issue which arises at this stage between the parties to this case concerns the proper interpretation of the Brussels Regulation and its application to the circumstances which have arisen. The issue also involves a consideration of the traditional common law position concerning jurisdiction and in particular the circumstances where, as a matter of common law, the courts of one jurisdiction might, in effect, decline to deal with litigation on the basis that an alternative jurisdiction might be considered to be a more appropriate venue for the resolution of the disputes which had arisen (the doctrine of *forum non conveniens*). There can be little doubt but that that traditional common law jurisdiction has, at a minimum, been substantially eroded by the provisions of the Brussels Convention and the Brussels Regulation. In reality the issue which arises in this case is as to just how far that process has gone."

Clarke J. refused a stay in that case on the grounds that the Regulation removed the discretion of the court under the common law and the Supreme Court agreed that that decision was correct. Accordingly, there may be some issue as to the extent to which the ruling in *Owusu* clarifies all issues in relation to common law principles upon which a court may exercise a discretion to stay

proceedings. A definitive decision on the issue as to whether or not the doctrine of *lis alibi pendens* is still extant. As I have already mentioned, the Supreme Court in that case referred that question to the European Court of Justice but ultimately the matter did not proceed given that the parties compromised the proceedings notwithstanding the decision in *Owusu*.

The application to stay proceedings in this case has been based on the doctrine of *forum non conveniens*. The fact that there is a choice of jurisdiction clause in the original contract of employment between the plaintiffs and Gama Turkey is also relied on to a significant extent although there is some doubt as to whether the plaintiffs were in fact employed by Gama Turkey during the course of their time in this jurisdiction. In general terms the effect of a choice of jurisdiction clause is as set out in the case of *Donohue v. Armco* referred to above. Unless a party can show strong reasons to depart from the contractual obligation, effect will be given to such a choice of jurisdiction clause. I do not need to reiterate the nature of the reasons required in order to result in a decision not to stay proceedings where there is a choice of jurisdiction clause. Suffice it to say that a court in dealing with such an application has to exercise its discretion as to whether or not to grant a stay having regard to the facts and circumstances of the case.

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 Regulation which concerns contracts 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.

Given my view to the effect that the decision in *Owusu* has deprived national courts of the jurisdiction to stay proceedings in circumstances where there is a choice of jurisdiction clauses it is necessary to decide whether the Regulation can be invoked by the plaintiffs in this case with the consequences set out above or whether this is a case in which the common law principles are applicable by reason of the fact that the application for leave to serve out of the jurisdiction was made pursuant to Order 11 of the Rules of the Superior Courts as opposed to Order 11A or Order 11B.

The arguments of the defendants are predicated to a large extent on the fact that the application to issue and serve the plenary summons herein outside the jurisdiction was made pursuant to Order 11. They also relied on the fact that the plenary summons was not endorsed with the recital required under the Rules of the Superior Court. Order 4, r. 1A provides:

> "Where an endorsement of claim on an originating summons concerns a claim which by virtue of Regulation No. 44/2001, Regulation No. 2001/2003, the 1968 Convention or the Lugano Convention, the court has power to hear and determine, the following provisions shall apply:
>
> > (1) The originating summons shall be endorsed before it is issued with a statement that the court has the power under Regulation No. 44/2001, Regulation 2001/2003, the 1968 Convention or the Lugano Convention to hear and determine the claim and shall specify the particular provision or provisions of Regulation No. 44/2001, Regulation No. 2001/2003, the 1968 Convention or the Lugano Convention (as the case may be) under which the court should assume jurisdiction;"

In the course of the submissions on behalf of the plaintiffs in this respect it was accepted that there was an error on the part of the plaintiffs in not having the required endorsement but it was submitted that it was an error of form and not one that affects the jurisdiction of this court. To that extent I was referred to a passage from Cheshire, North and Fawcett on *Private International Law* (14th Ed.) at p. 300 where it was stated the authors as follows:

> "Under the traditional English rules on jurisdiction, 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 judgment Regulation …"

I think the passage quoted above is a correct statement of the law in this jurisdiction also. The Regulation is the basis upon which the court has jurisdiction. That is not to say that the procedure is not relevant. In this case, the plaintiffs have not complied correctly with the procedure laid down by the national law for invoking the jurisdiction under the Regulation. Having said that, I do not think the basis of the jurisdiction provided under the Regulation can be ousted by a failure to invoke the jurisdiction in accordance with the procedures laid down by the national law. It may be necessary in this case to amend the pleadings to show the basis on which jurisdiction has been invoked but I do not propose to comment further on that aspect of the matter.

In any event, it was contended on behalf of the defendants that the plaintiffs having dealt with the matter by an application under Order 11 and not having referred in the plenary summons to any International Convention that it was appropriate for the defendants to bring the applications to stay the proceedings pursuant to the common law principles of *forum non conveniens*. The defendants contend that as the plaintiffs relied on Order 11 and not upon Order 11A, the Regulation ought not to form the basis of jurisdiction. The plaintiffs' response to this contention is to argue that the defendants are wrong. It was pointed out that one of the defendants is an Irish company sued in Ireland and that it is not necessary for the plaintiffs to set out the basis of jurisdiction in respect of that defendant. Service on Gama Turkey could not have been made pursuant to Order 11A and in particular, Order 11A(4), which provides as follows:

> "(1) 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 No. 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 co-defendant."

It was pointed out that Turkey is not and was not 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 the Regulation and therefore, there could have been no question of the plaintiffs serving notice of the proceedings upon the second defendant in Turkey on foot of Order 11A. Thus it is contended that it was not open to the plaintiffs to serve Gama Turkey outside the jurisdiction other than in accordance with the provisions of Order 11.

I want to briefly consider two authorities that were opened to me in this context. The first of those was the decision in the case of *Spielberg v. Rowley* [2004] IEHC 384. In the course of her judgment, Finlay Geoghan J. stated:

> "Counsel for the plaintiff did seek to raise Article 22(2) of Council Regulation EC/44/2001 of 22nd December, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. … 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 EC44/2001 had not been relied upon at the time of service of the proceedings on the first and second named defendants. Service on the first and second named defendants was affected pursuant to the order of the High Court of the 17th May, 2004, following an application under Order 11 of the Rules of the Superior Courts, 1986. The first and second named defendants are now entitled to an order setting aside such service."

In that case the application to join the first and second named defendants was made pursuant to Order 11, rule 1(c) and (h) of the Rules of the Superior Courts. Those rules permit service out the jurisdiction of proceedings whenever:

> "(c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or …
>
> (h) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction;"

At the time of the hearing of the application in which it was sought to set aside the service of the proceedings on behalf of the first and second named defendants the position was that there was no person resident within the jurisdiction joined as a party to the proceedings. It was in those circumstances that it was found that the first and second named defendants were entitled to an order setting aside the service on them.

The other case relied on by the defendants is *Schmidt v. The Home Secretary* [1995] 1 ILRM 310 in which Geoghegan J. stated at page 315 as follows:

> "Rule 4 of the same 1989 Rules inserts an additional order into the main Rules of the Superior Courts to be called Order 11A. That order deals with the service of originating summonses in cases coming within the Judgments Convention. For the reasons which I have indicated I am of opinion that it therefore applies to this case. Accordingly there was no power in the court to grant leave for service out of the jurisdiction under Order 11. The application before Mr. Justice Carney was quite properly made ex parte and he did not have the benefit of either the evidence or the arguments which were now before me on the application by the second and third named defendants to set aside his order."

I think that in order to understand the passage referred to above it is necessary to also set out the preceding passage from the judgment of Geoghegan J. at p. 305. The relevant rule upon which the decision hinged was set out. Geoghegan J. stated at p. 305:

> "Rule 3 of the Rules of the Superiors Court (No. 1) 1989 (SI No. 14 of 1989) amends Order 11, rule 1 of the main Rules of the Superior Courts so that that Rule now reads:
>
> > (1) 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 …."

The passage then referred to above followed. The cause of action in that case included alleged breaches of constitutional rights and alleged breaches of European Community law. Geoghegan J. was of the view that the alleged breaches were "matters relating to tort" within the meaning of Article 5 of the judgments Convention. That being so, it was his view that given that the Convention applied, service had to be in accordance with the Rules and it was no longer permissible to serve outside the jurisdiction pursuant to Order 11 as it was a case to which Order 11A applied.

Undoubtedly there is a difficulty in this case in that the plenary summons did not contain the statement required by Order 4, rule 1(a) of the Rules of the Superior Courts. Nevertheless this is a case to which the provisions of Order 11A could not have applied given that Gama Turkey is not domiciled in a Member State for the purposes of the Regulation and in accordance with the provisions of Order 11A, rule 4 (1), service on such a defendant is governed by the provisions of Order 11. In those circumstances it seems to me that the plaintiffs are entitled to rely on the provisions of the Regulation as forming the basis of jurisdiction in these proceedings. That being so, I am of the view 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 and accordingly the defendants are not entitled to the relief claimed herein.

In the event that I am wrong in concluding that the Regulation is applicable to the facts and circumstances of this case, I want to consider briefly the matters relied on to demonstrate that Turkey is or is not the appropriate jurisdiction in which these proceedings should be conducted. The test in respect of *forum non conveniens* could be summed up in the phrase, the forum "with which the action has the most real and substantial connection". I have previously set out in detail the matters relied by the defendants to demonstrate that Turkey is the most appropriate forum. Of those, the fact that many witnesses, including the plaintiffs, will have to be brought to this jurisdiction to give evidence is a significant factor. The case will involve many witnesses who will have to give evidence with the assistance of interpreters. On the other hand, the plaintiffs have relied on the facts that the proper law applicable to any proceedings is Irish law. The issues involve the enforcement of REAs applicable to workers in this jurisdiction. The events at issue in the proceedings concern the involvement of the plaintiffs with the defendants on work in projects in this jurisdiction. There are issues relating to the movement from this jurisdiction of moneys apparently due to workers. There are issues of Irish public policy to be considered. (These are best encapsulated in the passage from the judgement of Kearns J. set out above.) Finally, issues were raised about the conduct of some proceedings which have taken place in Turkey.

I have come to the conclusion on this issue that despite the undoubted difficulty in bringing parties and witnesses to this jurisdiction together with the inevitable language difficulties, the plaintiffs have demonstrated that this action has the most real and substantial connection with this jurisdiction. I note the concerns as to the apparent manner in which some claims brought against the defendants in Turkey have been dealt with. This is an issue which seems to me to lead to a conclusion that the Plaintiffs may not recover their full entitlements under the relevant REA in that jurisdiction. To that extent, it seems to me that even if Turkey was the appropriate jurisdiction, the balance of justice is such that the proceedings should be dealt with in this jurisdiction.

Accordingly, I must refuse the defendants' application herein.