THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 93

Kelly J.
Peart J.
Mahon J.

2014 1415

2014 1417

2014 1418

(Article 64 Transfer)

Michael O'Flynn and John O'Flynn, Brabston Limited, Broomco (4102) Limited, Cesium Limited, Coleridge International Limited, Crestor Limited, Deanshall, Dellacourt Limited, Eastgate Developments (Cork), Fairbury Unlimited, FTG Projekt Kerpen GMBH & Co. KG, Galileo Residenz Bremen Gmbh & Co. KG acting by its general partner Galileo Residenz GMBH, Graiguemore Limited, Jelton Limited, Lamada Limited, Little Island Property Limited, Magnum Freeholds Limited, Magnum Property Nominees 15 Limited, Medallion Investment Limited, Millington Properties Limited, O'Flynn Construction (BTC) O'Flynn Construction (Lapps Quay), O'Flynn Construction (Rochestown), O'Flynn Construction (Technology Park), O'Flynn Construction Co., O'Flynn Construction Holdings, Precis (2111) Limited, Precis (2110) Limited, Precis (2102) Limited, Precis (2103) Limited, Precis (1672) Limited, Precis (2175) Limited, Precis (2176) Limited, Precis (2112) Limited, Residencias Universitarias, SA, Rose Castle, Sentinel Number Two Limited, Shelbourne Senior Living Limited, Tiger Atrium Limited, Tiger Bremen One GMBH, Tiger Bremen Two GMBH, Tiger Cowley Limited, Tiger Developments, Tiger Developments Gmbh & Co KG. Tiger Developments (Jersey) Limited, Tiger Guildford Limited, Tiger Hannover Gmbh & Co. KG, Tiger Harbour Island Limited, Tiger Haymarket Limited Partnership, Tiger 4 Limited, Tiger 55 Limited, Tiger 130 Limited, Tiger (Dominion) Limited, Tiger Haymarket No. 1 Limited (As General Partner For Tiger Haymarket Limited Partnership), Tiger (IOM) Limited, Tiger (Retail Dominion) Limited, Tiger No. 1 General Partner Limited for itself and as General Partner of Tiger No. 2 Limited Partnership, Tiger No. 1 Limited Partnership A Limited Partnership Established Under The Limited Partnership Act 1907, Tiger No. 2 General Partner Limited For Itself AND as General Partner of Tiger No. 2 Limited Partnership, Tiger No. 2 Limited Partnership a limited Partnership Established Under The Limited Partnership Act 1907, Tiger No. 5 Limited, Tiger Properties Limited, Tiger St. Michael's Limited, Tiger Teesdale Limited, Topwell No. 1 Limited, Topwell No. 2 Limited, Topwell No. 5 Limited, Topwell No. 6 Limited, Magnum Property Nominees 3 Limited, Magnum Property Nominees 4 Limited, Magnum Property Nominees 14 Limited, Magnum Property Nominees 16 Limited, Magnum Property Nominees 43 Limited, Godalming Trustee Company Limited, Tiger Enterprise No. 2 Limited, Stockley Park Trustee Company Limited, Stockley Park Trustee Company No. 2 Limited, The Livingstone Trustee Company Limited, Livingstone Trustee Company No. 2 Limited, Valdes Property Limited, Victoria Hall Construction Limited, Victoria Hall Limited, Zona Gastronomica SLU

Plaintiffs

and

Carbon Finance Limited Paul McCann, Patrick Dillon, Mark Byers, Marcus Wide and the Blackstone Group LP and the Blackstone Group International Partners LLP

Defendants

Judgment of the Court delivered on the 19th day of February 2015,

Introduction

1. On the 24th day of November 2014, the court dismissed three separate appeals from orders made by McGovern J. in the High Court Commercial Division.

2. One appeal was taken by the plaintiff and the others by the first and seventh and sixth defendants respectively.

3. The court indicated that it would give its reasons for dismissing the appeals at a later date which it now does in this judgment.

Part A

The Plaintiffs' Appeal

4. This is the plaintiffs appeal against an order made by McGovern J. in the Commercial Court in which he acceded to an application made by the first, sixth and seventh defendants and struck out that part of the plaintiff's claim which related to five group facility agreements each dated the 28th February, 2013, which were subject to an exclusive jurisdiction clause in favour of the Courts of England. The application was brought pursuant to O. 19, r. 27 of the Rules of the Superior Courts and the inherent jurisdiction of the court.

The Jurisdiction Clauses

5. Whilst eight corporate facility agreements are impleaded, the five which are the subject of the order under appeal, all contain the following clause:-

> *"40.1 Jurisdiction*
>
> *(a) The Courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this agreement (including a dispute regarding the existence, validity or termination of this agreement).*
>
> *(b) The Parties agree that the Courts of England are the most appropriate and convenient courts to settle disputes and accordingly no party will argue to the contrary.*

(c) This clause 40.1 is for the benefit of the finance parties and the secured parties only. As a result, no finance party or secured party shall be prevented from taking proceedings relating to a dispute in any other courts with jurisdiction. To the extent allowed by law, the finance parties and the secured parties may take concurrent proceedings in any number of jurisdictions."

6. In *Kutchera v. Buckingham International Holdings Limited* [1988] I.R. 61, McCarthy J. identified the proper approach which courts ought to have to a choice of jurisdiction clause. He said:

> *"The correct legal principle is that the parties' choice of jurisdiction should be upheld and the necessary procedural orders granted unless there are strong reasons to the contrary."*

Later in the judgment he said:

> *"It must be the policy of this and other courts to hold parties to the bargains into which they enter."*

7. More recently, Charleton J. in *Kelly v. Lennon* [2009] 3 I.R. 794, held that where parties to a contract have agreed a choice of jurisdiction the "court is obliged to give effect to the choice of jurisdiction".

The Plaintiffs Argument
8. The plaintiffs accept that the five agreements in question are governed by English law and confer jurisdiction on the Courts of England. But they contend that the first defendant waived its entitlement to rely on these exclusive jurisdiction clauses by entering a non conditional appearance to the plenary summons on the 1st August, 2014. Any doubt about that is said to have been put to flight by Carbon's conduct during and its participation in both examinership and injunction proceedings in early August 2014.

9. In order to understand how this argument comes to be made it is necessary to sketch out briefly what these proceedings are about and the somewhat complicated procedural history which followed their commencement.

The Proceedings
10. This action began with the issue of a plenary summons on the 31st July, 2014. At that time there were just two plaintiffs, Michael O'Flynn and John O'Flynn. There were five defendants. They were Carbon Finance Limited, an Irish registered company, Paul McCann and Patrick Dillon, both members of the firm of Grant Thornton, with a registered place of business in Dublin and Mark Byers and Marcus Wide, both of the firm of Grant Thornton with registered offices in London.

11. On the 1st August, 2014, an appearance was entered to the proceedings by the first defendant. The appearance was unconditional.

12. The proceedings sought a series of declaratory reliefs relating to the legality of what is said to be a premeditated and complicated enforcement plan instigated by the first defendant against the plaintiffs. The plaintiffs contend that the plan was implemented on foot of invalid demand letters of the 29th July, 2014, served on the first and second plaintiffs. Within three hours of so doing, the first defendant allegedly put into train a series of enforcement actions against the personal plaintiffs and members of the O'Flynn group of companies. It is not in dispute but that the receivers and directors appointed by the first defendant on foot of this alleged plan were removed by order of Irvine J. on the 13th August, 2014.

13. The plaintiffs also claimed damages for abuse of process and conspiracy arising from the presentation by the first defendant of a petition seeking the appointment of an examiner in respect of O'Flynn Construction Company Limited and three related companies. That petition was presented to McGovern J. at 4.00 pm on the 29th July, 2014, *ex parte*. The companies, the subject of that petition, applied successfully to have it set aside. That order was also made by Irvine J. on the 13th August, 2014. She held that the petitioner had breached its obligations under s. 4A of the 1990 Act to act in good faith and also held that there was significant non disclosure on the part of the petitioner.

14. It is important to remember that neither of the two personal plaintiffs (and the only plaintiffs on the 1st August 2014) were party to the facility agreements in question.

15. There was, at that time, just one corporate defendant (the first defendant) and the other personal defendants were receivers who had been appointed by the first defendant over the personal assets of the plaintiff and also over certain companies of the O'Flynn Group.

16. The plaintiffs, in the course of their written submissions, contended that:

> "Additionally, the plaintiffs sought relief in respect of the construction of amended and restated facility agreements dated the 28th February, 2013, and in respect of the operation thereof."

17. That assertion is incorrect. As is clear from a perusal of the general endorsement of claim on the summons, the plaintiffs sought declaratory relief in respect of just one amended and restated facility agreement. That agreement is specifically identified as being dated the 28th February, 2013, and made between O'Flynn Construction Holdings and others of the first part and National Asset Loan Management Limited of the second part. The declarations which are sought in respect of that agreement are all sought by reference to it and are in the singular, speaking of "an agreement" or "the facility agreement".

18. There is no dispute between the parties, but that the agreement referred to in the plenary summons is not subject to the exclusive jurisdiction of the English Courts.

19. It is perhaps difficult to understand how, in such circumstances, it can be said that when the first defendant, an Irish company, entered an unconditional appearance on the 1st August, 2014, to the summons issued the preceding day, it waived its entitlement to rely on the exclusive jurisdiction clause in the five agreements subject to it, but which were not at that time the subject of any relief in the proceedings.

20. It was not until the 26th August, 2014, that an order was made for the joinder of the sixth and seventh defendants. On the 29th August, 2014, they entered a conditional appearance which on its face makes it clear that they did so without prejudice and solely to contest the jurisdiction of the court.

21. The sole issue on this appeal is therefore whether the trial judge was correct in striking out para. 11 of the statement of claim

insofar as it makes reference to the five facility agreements which are the subject of the exclusive jurisdiction clause in question.

22. McGovern J. held that insofar as the sixth and seventh defendants were concerned, there could not be any doubt but that they intended to contest the jurisdiction of the court to try any issues relating to the facility agreements which are subject to the exclusive jurisdiction of the English Courts. He was undoubtedly correct in so concluding having regard to the conditional nature of the appearances entered by these defendants. The appeal fails insofar as the sixth and seventh defendants are concerned. But he went on to hold that notwithstanding the unconditional appearance which was entered by the first defendant on the 1st August, 2014, that it was also entitled to rely on the exclusive jurisdiction clause in the five agreements in suit.

23. Insofar as those clauses are concerned, the High Court held that the relevant clauses relating to jurisdiction are clear and unambiguous. That is so.

24. McGovern J. went on to hold that when the first defendant entered an appearance to the plenary summons on the 1st August, 2014, *"it was by no means clear that the proceedings encompassed agreements, some of which were subject to English law and English jurisdiction clauses"*. He held that in such circumstances the defendants were entitled to rely on the exclusive jurisdiction clause with regard to the agreements which were subject to English law and English jurisdiction.

25. If one has regard solely to the endorsement of claim on the plenary summons as it stood on the 1st August, 2014, it is clear that the proceedings did not encompass any of the five agreements subject to the jurisdiction clause. As was already pointed out, the proceedings involved a single agreement which was not subject to such clause.

26. The plaintiffs contend that it is too narrow an approach to simply look at the wording of the plenary summons when considering the question of waiver. Instead, it is contended that it is necessary to look at all of the surrounding circumstances. In addition, it is said that the judge was wrong when referring to the exchange of correspondence between the solicitors for the parties to rely on what was said in a letter of the 20th August, 2014, from the first defendants' solicitor to the plaintiffs' solicitor. That exchange of correspondence which made it clear that there was an acceptance on the part of the defendants solicitors to accept service (on behalf of the sixth and seventh defendants) and to plead to the amended pleadings, was:

> *"Entirely without prejudice to all of their rights and entitlements (contractual and otherwise) and is strictly subject to the 'choice of law' and 'choice of jurisdiction' clauses under any finance document, including the corporate facility agreements and any other document which afford the English Courts or any other courts (other than the Irish Courts) exclusive jurisdiction over any dispute."*

27. As this letter post dates the entry of an appearance and the first defendant's participation in the hearing involving both the injunction and examinership matters, it is said the judge was wrong to rely upon it in reaching the conclusion which he did.

28. The plaintiffs invite this Court to have regard to six matters which, they say, had the trial judge considered them properly, would have resulted in him refusing the relief sought on the motion.

Waiver
29. The plaintiffs case is that, notwithstanding the clear and unambiguous wording of the exclusive jurisdiction clause in each of the five agreements, the defendants waived their entitlement to rely upon it.

30. It is important to remember precisely what must be demonstrated in order to preclude a party from relying upon an exclusive jurisdiction clause. In *Transportstyrelsen v. Ryanair Limited* [2012] IEHC 226, Hedigan J. had to consider a challenge to jurisdiction where the defendant had entered an unconditional appearance, filed in affidavit in response to a motion for judgment, consented to the case being sent to plenary hearing, raised particulars, sought and obtained further and better particulars and delivered a counterclaim. He adopted the test of whether the defendant had "taken a number of steps which would only be necessary or only useful if the objection to the jurisdiction had been waived". He cited with approval the following passage from Dicey Morris and Collins on the "*Conflict of Laws*" (14th Ed. 2006) at paras. 130 to 134:

> *"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 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."*

31. In that case, Hedigan J. had no difficulty in concluding that the defendant had made it clear that it had engaged with and accepted the jurisdiction of the Irish Courts and thus was precluded from seeking to object to the exercise of that jurisdiction. The case demonstrates the type of activity that is required in order to show that a party has waived reliance on a choice of jurisdiction clause.

32. There was and is no evidence of an express waiver on the part of these defendants. That is agreed. The proposition put by the plaintiffs relies entirely upon the concept of an implied waiver to be inferred from a number of circumstances which will be outlined presently. Before doing so it should be borne in mind that the onus of proof of demonstrating a waiver by the first defendant of its exclusive jurisdiction rights lies on the plaintiffs.

Circumstances
The plaintiffs contend that by

> (a) entering an unconditional appearance on the 1st August, 2014,
>
> (b) participating in an interlocutory hearing which lasted a number of days in early August,
>
> (c) taking judgment on the 14th August, 2014, on those applications,
>
> (d) on the same day agreeing directions as to the trial of the issues in the proceedings, the first defendant submitted to the jurisdiction and waived its entitlement to rely on the relevant clause.

33. In support of these propositions, the plaintiffs invited the court to examine six particular aspects of the proceedings. They were:

(a) Correspondence which was generated in advance of the proceedings being instituted.

(b) The entry of an unconditional appearance on the 1st August, 2014, to the summons which was issued on the 31st July, 2014.

(c) The affidavit which was sworn and served on the same day as the summons was issued.

(d) The participation of the first defendant in the hearing before Irvine J. in early August 2014.

(e) Correspondence from the solicitors for the first defendant and in particular letters between the 20th and the 29th August, 2014.

(f) The absence of any evidence indicating a mistake or confusion on the part of the first defendant as to the ambit of the proceedings.

34. The court will consider each of these in turn.

(1) Pre Litigation Correspondence
35. This correspondence cannot be of any assistance to the plaintiffs in attempting to make a case of implied waiver. During the course of it, the first defendant consistently made it clear that all of its rights in respect of the finance documents were fully reserved and that nothing in the correspondence should constitute or be construed as a waiver or compromise of any term or condition in the finance documents or any of the lenders rights in relation to them.

36. In a letter of the 8th September, 2014, the plaintiffs' solicitor asserted that the pre-action correspondence supported their contention that there had been a waiver. In a response to that it was correctly pointed out that there was a consistent reservation of rights in that correspondence. The only response to that from the solicitor for the plaintiffs was a suggestion that the reservation of rights language used was "formulaic". It was not.

37. In fairness, counsel for the plaintiffs accepted that, given the reservation of rights contained in that correspondence, he was in difficulty in relying upon this as a basis for suggesting an implied waiver.

(2) The entry of Appearance
38. The appearance was entered to the proceedings as they stood on the date of entry of the appearance. The summons, as has already been pointed out, made no mention of any of the five agreements the subject of this appeal. Entry of an appearance is, of course, a submission to the jurisdiction of the court. But it is a submission by reference to the claims in the summons and nothing else. The fact that agreements in excess of those the subject of the summons had been mentioned in pre-litigation correspondence does not alter the position that the appearance was entered to the summons as issued.

39. In *Murray v. Times Newspapers Limited* [1997] 3 I.R. 97, Barrington J. speaking for the Supreme Court in a challenge to jurisdiction said:

> *"But it appears to me that if a defendant enters an unqualified appearance he only accepts the jurisdiction of the court to entertain the case which has been formulated against him by the plaintiff in his plenary summons or statement of claim. . . .*
>
> *It is for the plaintiff to formulate his claim. If the plaintiffs in the present case had made clear on the face of their statement of claim that they were claiming in respect of publication made or damage suffered in the United Kingdom, they would have put the defendant on guard as to whether it, the defendant, wished the Irish courts to have jurisdiction to entertain these claims. But no such claim was clearly made by the plaintiffs in the present proceedings."*

Earlier in the judgment that judge said:

> *"When therefore, the defendant entered an appearance to the plaintiffs' claim it must be regarded as entering an appearance to this claim and not to any other."*

As the summons as it stood on the 1st August, 2014, made no mention of the five agreements in suit, this argument fails.

(3) The Affidavit sworn on 31st July, 2014.
40. It is said that, whatever about the summons relating to a single agreement, the grounding affidavit in support of a notice of motion which was issued on the 31st July, 2014, made it clear that the agreement mentioned in the summons was by way of sample only and that what has been described as the "loan construction issue" was common to all of the group facility agreements. It is contended that from the material sworn to in the grounding affidavit, this must have been abundantly clear. A number of examples are relied upon.

41. Paragraph 19 of the grounding affidavit, in identifying the facility agreement, speaks of one sample group facility agreement and confirms that the other seven such agreements are identical. The definition of the "loan construction issue" at para. 35 of the affidavit makes it clear that the issue is common to all group facility agreements.

42. At paras. 37 to 40, Mr. O'Flynn, the first plaintiff, describes the consequences for the entire O'Flynn Group arising from the "loan construction issue". There, he speaks of the Group's facility agreements in the plural.

43. At para. 40, he speaks of the proper construction of the agreements in the plural. Finally at para. 89 of the affidavit he speaks of the significance of the "loan construction issue" in relation to property in Clerkenwell in London. It is clear that the proceeds in relation to that property fall to be determined under an agreement containing the exclusive jurisdiction clause.

44. The respondents point out that the notice of motion seeking injunctive relief did not refer to the English facility agreements at all, but rather was concerned with the validity of the appointment of the receivers over the O'Flynn's assets. They also point out, correctly, that at paras. 47, 48, 49, 51, 52, 55, 62, 64, 67, 77, 78, 79, 91, 92, 94 and 95 of his grounding affidavit, Mr. O'Flynn makes reference to the corporate facility agreement in the singular. This, it is said, makes it clear that the declarations sought in the plenary summons were sought in respect of that agreement and it alone. Furthermore, when reference was made to the "loan construction issue" in this affidavit, it was referred to as a backdrop to the complaints which were being made then about the actions taken by the

first defendant in appointing receivers over the personal assets of the plaintiffs. In the replying affidavit of Lorna Browne, sworn on behalf of the first defendant, she said that the "loan construction issue" was not relevant to the issues to be determined by the court on the application for injunctive relief. That appears to be correct. It must also be borne in mind that the corporate plaintiffs who are party to the English facility agreements were not, either at the time when the summons was issued or during the hearings in early August, parties to the proceedings at that stage.

45. In these circumstances, the court is of the view that this material, which at its best from the plaintiffs' point of view, was ambiguous, comes nowhere near demonstrating, either on its own or in conjunction with the other matters relied on an implied waiver of the jurisdiction clause.

Participation
46. The fourth circumstance which is relied upon is the participation by the first defendant in the injunction proceedings on the 5th, 6th and 7th August, 2014. It is said that that was done on the clear and mutual understanding that the "loan construction issue" and the associated reliefs related to all eight group facility agreements. Thus, the first defendant cannot now rely on the provisions of the English facility agreements, it is said.

47. Whereas it is undoubtedly correct to say that the "loan construction issue" was referred to by Irvine J. in the course of her judgment, the disputes in that regard formed part of the background to the applications made by the plaintiffs. But that judge was not asked to nor did she interpret any agreement, because that issue was not before her on the interlocutory hearings.

48. The court is unable to see how this or indeed the giving by Irvine J. of directions concerning the future trial could constitute alone or collectively an implicit waiver of the exclusive jurisdiction clause.

Correspondence between the 20th and 29th August, 2014.
49. It is common case that the first defendant's solicitors first raised the choice of jurisdiction clause in a letter of the 20th August, 2014. A portion of that letter was quoted at para. 19 of the trial judge's judgment. It is important to remember the context in which that letter was written.

50. On the 15th August, 2014, the plaintiffs' solicitors wrote to the first defendant's solicitors proposing to join additional plaintiffs to the proceedings. These additional plaintiffs were to include the counter parties to the English facility agreements. Enclosed with that letter was the statement of claim.

51. Paragraph 24 of the statement of claim identified the "loan construction issue" as one arising in respect of the proper construction "of key provisions of the corporate facility agreement". The phrase "the corporate facility agreement" is not defined in the statement of claim and the expression is in the singular throughout the entire of the statement of claim.

52. The letter of the 20th August, 2014, was the first piece of correspondence emanating from the first defendant's solicitors after they learned of the intention to join the counter parties to all of the facility agreements to the proceedings. The letter, in addition to raising issues concerning the lack of clarity as to which specific facility agreement the pleadings were referring to, said:

> *"For the avoidance of doubt, our client's willingness to accept service of, and to plead to, the amended pleadings is entirely without prejudice to all of their rights and entitlements (contractual and otherwise) and is strictly subject to 'choice of law' and 'choice of jurisdiction' clauses under any finance document, including the corporate facility agreements and any other document which afford the English Courts or any other Courts (other than the Irish Courts) exclusive jurisdiction over any dispute relating to or arising under such documents and render such disputes subject exclusively to the law and courts of such jurisdiction and all of our clients rights in this regard are fully reserved."*

53. Even at that stage the position was not one of great clarity. It was not until replies to further and better particulars were delivered by the plaintiffs on the 2nd September, 2014, that they clearly set out their wish to seek declaratory relief in respect of the English facility agreements. Even before that clarity was manifest, the first defendant had, in the letter of the 20th August, 2014, confirmed its insistence on adherence to the choice of jurisdiction clauses.

54. Thereafter, when the sixth and seventh defendants were joined they entered conditional appearances on the 29th August. On the 10th September the motion which led to the order under appeal was brought.

55. The letter of the 20th August, 2014, demonstrates that the first defendant, far from waiving its entitlements under the choice of jurisdiction clauses, in the very first letter after learning of the intention to join the counter parties to all of the facility agreements, reiterated them.

Confusion
56. Insofar as the plaintiffs attempt to rely upon the absence of any affidavit evidence from the first defendant indicating a mistake or confusion as to the ambit of the proceedings the first defendant contends that this is to mistake where the burden of proof lies in relation to the implied waiver. In response to the application to strike out, it is, it is argued, incumbent upon the plaintiffs to demonstrate evidence of waiver and that burden remains with them throughout. To require the first defendant to place evidence of a mistake or confusion on its part as to the ambit of the proceedings is, it is said, to reverse the onus of proof. The court agrees.

Conclusion
57. McGovern J. held that the first defendant was entitled to rely upon the choice of jurisdiction clause notwithstanding the entry of an unconditional appearance to the summons. He did so in circumstances where he held that it was by no means clear that the proceedings encompassed agreements some of which were subject to English law and English jurisdiction clauses at the time that that appearance was entered. In the view of this court, the judge was well justified in so concluding.

58. There was, in this case, no evidence of an express waiver on the part of the first defendant of its entitlement to rely upon the exclusive jurisdiction clause. The elements identified as constituting an implied waiver neither individually or collectively come anywhere near discharging the onus of proof which would be required in order to succeed in such a claim. It is for these reasons that this appeal was dismissed.

Part B

The First and Seventh Defendants Appeal

59. The first and seventh defendants (namely, Carbon Finance Ltd. and the Blackstone Group International Partners LLP) seek to challenge that part of the order of McGovern J. of 6th October 2014, where he refused to strike out the plaintiffs claims for conspiracy, and causing damage by unlawful means, inducement of breach of contract and interference with contractual relationships ("the other economic torts"), pursuant to O. 19, r. 5 and/or O. 19, r. 27 of the Rules of the Superior Courts. In particular, the first and seventh defendants maintain that

- Insufficient particulars have been furnished such as would ground the claim of conspiracy and the other economic torts as would meet the test laid down in *National Education Welfare Board v. Ryan and Others* [2008] 2 I.R. 816 ("*NEWB*"), more particularly that no particulars of the nature of the alleged conspiracy or how it is alleged the conspiracy took place, were furnished.

- Insufficient particulars have been furnished to ground the claims for the other economic torts.

- The trial judge failed to adequately, or at all, consider the ingredients of the aforementioned torts in his decision that adequate particulars had been given.

The Pleadings
60. The allegations of conspiracy and the other economic torts are pleaded at paras. 42-44 of the Statement of Claim (delivered on 15th August 2014). Paragraph 15 of the prayer in the Statement of Claim seeks damages in respect thereof (the claims under these headings against the Receivers were withdrawn prior to the decision of McGovern J).

61. In their Notice for Particulars dated 20th August 2014, the first and seventh defendants sought particulars of the conspiracy claim (Paragraphs 96, 97, 98 and 99), and the claims for the other economic torts (Paragraphs 100 and 101).

62. In their replies to particulars dated 24th August 2014, the plaintiffs stated at Para 98:

> *"Full particulars of the acts of Blackstone in furtherance of the conspiracy await discovery herein. Without prejudice to the foregoing, it is clear that persons working for the sixth and seventh defendants were involved in the acquisition of the loans of the O'Flynn Group and the loans of the personal plaintiffs and were also involved in devising a strategy for the management of those loans including the enforcement strategy. Letters dated 23rd April 2014 issued by NALM to the personal plaintiffs and to the O'Flynn Group Companies involved each of them that "the Blackstone Group International LLP acting through a newly incorporated acquisition vehicle has been selected by NAMA as the preferred bidder". Carbon Finance Limited was first incorporated on 25th April 2014. Persons known to have been involved in devising certain parts of the aforementioned strategies included Jonathan D. Stay (Global Head of Real Estate and a member of the Board of Directors of Blackstone), Ken Caplan (Senior Managing Director and Head of Real Estate Europe), Anthony Myers (Senior Managing Director in the Real Estate Group), Samir Amichi, Justin Meissal and Alia Elgazzar (Senior Associate), Lorna Brown (Managing Director in the Real Estate Group), Farhaid Karim (Managing Director and Chief Operating Officer of Real Estate Europe), David McClure, Samantha Kempe (Associate), and Mike Pegler (Managing Director to the Real Estate Group)."*

63. Further particulars of a more general nature were provided in the subsequent paras. 99, 100 and 101.

64. The defendants sought further and better particulars in relation to a number of matters on 29th August 2014. At para. 98 they stated as follows:

> *"With respect it is not permissible for the plaintiffs to make serious allegations that the first, sixth and seventh named defendants unlawfully combined and conspired with the predominant purpose of injuring the plaintiffs (or some of them) and then state that particulars of these acts must await discovery (which would plainly be fishing).*
>
> *Please now give detailed particulars of the acts which the plaintiffs assert amount to the unlawful combination and conspiracy."*

65. The plaintiffs replied to the notice for further and better particulars on 2nd September 2014. At para. 98 they stated:

> *"The requests at para. 98 mischaracterise the response given at para. 98 of the Replies to Particulars.*
>
> *Without prejudice to the foregoing, particulars of the plea of unlawful means conspiracy are set out fully and adequately at para. 42 of the Statement of Claim (which in turn refers to the unlawful acts (herein before set out)". The said unlawful acts are set out fully at inter alia paras. 27, 32, 34, 35 and 39 of the Statement of Claim."*

The Decision of the High Court
66. The defendants brought an application to the High Court to strike out the plaintiffs claim for conspiracy and the other economic torts pursuant to Order 19, r. 5 and/or r. 27 of the Rules of the Superior Courts on the basis that insufficient or inadequate particulars had been furnished or provided in respect thereof.

67. McGovern J refused the application to strike out the said claims.

68. The judge expressed his satisfaction that the conspiracy and other economic tort claims were pleaded to the extent that the plaintiffs were in a position to do so at this stage in the proceedings. He was satisfied that the test set out by Clarke J. in "*NEWB*" was satisfied and expressed his view that the defendants had had "reasonable knowledge" of the nature of the torts alleged against them.

The Appellants Submissions
69. The appellants maintain that the pleadings and the particulars furnished are deficient in relation to the claims for conspiracy and the other economic torts. They allege that the particulars furnished are inadequate to support those claims, and that accordingly all such claims should be struck out. It is contended that, based on the principles established in the *NEWB* case, *Iarnród Eireann v. Holbrook* [2000] IECH 47, *Taylor v. Smyth* [1991] I.R. 142 and *Mero-Schmidlin (UK) PLC v. McNamara & Co. Ltd.* [2011] IEHC 90, the

necessary ingredients of the tort of conspiracy are absent in the plaintiff's claim. In particular they maintain that there is an absence of:-

- Evidence of an agreement or concerted actions between two or more persons.
- Evidence of the use of unlawful means.
- Evidence of knowledge of the unlawfulness, and
- Evidence of resultant damage.

70. The appellants argue that, at a minimum, they are entitled to know the nature of the agreement to conspire, and the identities of the individuals who are parties to such agreement. They argue that the conspiracy and the other economic torts pleaded are inadequately particularised and that the plaintiffs have provided "very little further particularisation" of the allegations. They maintain that no particulars of how, or when, it is alleged the seventh defendant induced the first defendant to commit the various alleged breaches of contract, or how and when it is alleged they interfered with contractual relations.

The Plaintiffs Submissions
71. The plaintiffs maintain that their allegations of conspiracy and the other economic torts are "fully pleaded and well known to the (defendants)". They emphasise that as they are strangers to the internal affairs of the Blackstone Organisation, they are not in a position to identify the precise steps taken within that organisation, or by whom they were taken, and which they allege led to the illegalities and damage claimed. They argue that discovery is required, not as a fishing expedition, but to provide the necessary details in support of their claims.

The Law
72. Order 19 Rule 5 provides that certain categories of claims must be adequately particularised in pleadings. Rule 5(2) specifically refers to actions in which misrepresentation or fraud or breach of trust or wilful default is alleged. While Order 19 does not specifically refer to allegations of conspiracy and/or the other economic torts which are relevant to this appeal, such torts are clearly similar in nature to the types of allegations specifically mentioned in R. 5(2).

73. Order 29, Rule 27 provides the court with the general power to strike out proceedings which it considers are unnecessary or scandalous, or may tend to prejudice, embarrass or delay the fair trial of the action.

74. The appellants maintain that the conspiracy and other economic tort claims alleged by the plaintiffs lack sufficient (or any) particularisation and ought to be struck out. Put plainly, they allege that these claims have simply been included in these proceedings in the hope that some information will emerge from the discovery process which may prove sufficient to stand up one or more of them.

75. In *Ryanair v. Bravofly* [2009] IEHC 41, Clarke J. considered the sufficiency of the particulars pleaded in an abuse of a dominant position claim. He said (referring to his decision in *NEWB* case)

> *"While the analogy between a fraud claim and an anti competitive activity claim is far from complete, there are not insignificant analogies. Both involve allegations which, if true, involve activity which is likely to be at least in part clandestine. A person bringing a valid claim in respect of such matters will be unlikely to be able to plead such a claim with a great degree of particularity in advance of having had the opportunity to exercise procedural measures such as discovery. On the other hand, there is a clear competing requirement that a party should not be able to make a bald and general accusation of wrongful activity and thus gain access to its opponent's private papers, for the purposes of seeing if it can make out a case. A balance between these two competing requirements needs to be struck."*

76. In the *NEWB* case Clarke J. stated the following:

> *"It seems to me that I should, therefore, approach this case on the basis of asking the following questions:*
>
> *(i) Has the plaintiff established a sufficient threshold so as to take it outside a case where there is a bald allegation of fraud?*
>
> *(ii) If so, has the plaintiff given sufficient particulars to enable the second defendant to plead by way of defence?*
>
> *(iii) In all the circumstances of the case (including the extent to which the plaintiff may have established a prima facie case for the fraud alleged) it is appropriate to require any further particulars to be delivered in advance of the defence?"*

77. In that case Clarke J. cautioned against requiring too much detail at an early stage of proceedings in circumstances where the plaintiff would not have the means of knowing the precise extent of what had been done to him until he had obtained discovery. He remarked:

> *"A balance between two competing considerations needs to be struck. The balance must be struck on a case by case basis but having regard to the following principles. Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party in its pleadings, specifies in sufficient, albeit general terms, the nature of the fraud contended together with specifying the alleged consequences thereof, and establishes a prima facie case to that effect, then such a party should not be required prior to defence, and thus prior to being able to rely on discovery and interrogatories, to narrow this claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for and establishes a prima facie case to that effect, the defendant should be required to deliver his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial."*

78. Somewhat similarly in an earlier decision, *Mooreview Developments v. First Active plc* [2005] IEHC 329, Clarke J., stated that:

> "The fact that it may be possible, upon obtaining discovery, for a party to be able to give more detailed particulars does

not absolve it from the obligation to particularise the claim as best it can when it makes that claim."

Decision
79. While the torts of conspiracy and the other economic torts which are the subject matter of this appeal are not precisely referred to in O. 19 r. 5(2), they undoubtedly fall into the same broad category of the causes of actions referred to therein.

80. The general nature and thrust of these proceedings are that the defendants, or a number of them, acted together in a planned and purposeful manner, to bring about a situation where the plaintiffs would suffer significant economic loss and damage. Such is abundantly clear from the Statement of Claim, and from the pleadings in general, including the particulars furnished by the plaintiffs. This is not a case where allegations of conspiracy and the other economic torts can reasonably be said to amount to a "*bald and general accusation of wrongful activity (for the purposes of gaining) access to its opponent's private papers in order to see (if it can make out a case)*." *Ryanair v Bravofly* [2009] IEHC 41.

81. As to how precisely the alleged conspiracy or the other claimed economic torts were planned or activated, or who took the decisions, or who implemented those decisions, or what individual steps were taken, are questions to which, given the lack of connection or common enterprise between the plaintiffs and the defendants, (such as they maybe, and if any) answers are only likely to emerge with discovery. It may be the case that the necessary proof to establish the existence of the essential ingredients of conspiracy and the other economic torts will not be forthcoming, even with discovery, and if this transpires to be the case, these claims will not succeed.

82. The court is satisfied that the plaintiffs have furnished such particulars as can reasonably be expected at this stage of the proceedings given the nature of the allegations made and the circumstances of the case. It follows that they are not in breach of their obligations and for these reasons this appeal was dismissed.

Part C

The Sixth Defendant's Appeal
83. The final appeal is one brought on behalf of the sixth named defendant, The Blackstone Group L.P. against the order of McGovern J. when he refused that defendant's application to set aside an *ex parte* order made by O'Malley J. on the 26th August 2014 insofar as same gave liberty to issue a Concurrent Summons in respect of the sixth named defendant, and to serve notice of same on that defendant outside the jurisdiction under the provisions of Order 11, rule 1 RSC.

84. In addition, the same order gave the plaintiffs leave to add the sixth and seventh named defendants to their existing proceedings, and to amend same by including the additional reliefs of damages for conspiracy, damages for reputational harm, damages for causing injury by unlawful means, and finally, aggravated and exemplary damages ('the conspiracy claims'). In very broad terms the allegation by the plaintiffs in this regard is that the first named defendant 'Carbon', the sixth named defendant and the seventh named defendant all conspired to cause unlawful damage to the plaintiffs.

85. The seventh named defendant, The Blackstone Group International Partners LLP is a limited partnership registered in the United Kingdom, and accordingly service out of the jurisdiction was properly effected in respect of that defendant without any order of the Court, by reason of Order 11A RSC, implementing Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.

86. However, the sixth named defendant is a limited partnership with a registered office in New York, hence the need for an order under Order 11 RSC for the issue and service of notice thereof out of the jurisdiction. For convenience the sixth named defendant will hereafter be referred to as simply 'Blackstone'.

The *Ex parte* Application
87. The *ex parte* application made to O'Malley J. on the 26th August 2014 by the plaintiffs Michael O'Flynn and John O'Flynn was grounded on an affidavit of Michael O'Flynn in which he exhibited some correspondence which had passed between the plaintiffs' solicitors, Messrs. P.J.O'Driscoll & Sons and Messrs. Arthur Cox acting for the defendants, including the proposed sixth and seventh defendants, in the period immediately preceding the 26th August 2014.

88. By letter dated 15th August 2014, P.J.O'Driscoll & Son wrote to Messrs Arthur Cox enclosing "by way of service upon you" the Amended Plenary Summons, the Amended Concurrent Summons and Statement of Claim. These documents were anticipating the granting of the order yet to be applied for, presumably in order to save time given the urgency of the proceedings generally from the point of view of the plaintiffs. Messrs. O'Driscoll went on to advise that they intended to bring an application to add the additional plaintiffs and defendants which were indicated in the documents enclosed, and concluded by asking Messrs. Arthur Cox to confirm (a) that they would consent to the proposed amendments, (b) that they would agree to plead on the basis of the amended Plenary Summons and amended Concurrent Summons, and (c) that they had authority to accept service on behalf of the sixth and seventh named defendants.

89. A similar letter was sent to McCann Fitzgerald, solicitors acting for the 2nd, 3rd, 4th and 5th defendants (the Receivers), requesting their consent to the proposed amendments and to pleading on the basis of the amended documents. Their consent to the proposed amendments was given both by letter dated 20th August 2014 and email dated 25th August 2014.

90. Messrs. Arthur Cox responded by letter dated 20th August 2014 in which, having strenuously denied any wrongdoing on the part of any of the defendants whom they represent, went on to state that without prejudice to those denials of wrongdoing, they had been instructed not to object to the application to join the additional plaintiffs and the sixth and seventh defendants, and stated furthermore that the clients were anxious to have these proceedings determined as soon as possible. In relation to acceptance of service they went on to state:

> *"… Subject to the jurisdictional issue raised below, we therefore confirm that we accept service of the Amended Plenary Summons and Amended Statement of Claim on behalf of our clients and that we will plead to those amended pleadings. However, we must advise you that if, which we fully expect, our clients successfully defend these proceedings then Carbon and the BX Entities will hold your client is liable for all loss and damage that they will suffer including damage to their reputation arising out of the allegations made against them in these proceedings."*

91. In their final paragraph, having raised the issue already dealt with in this judgement in relation to the jurisdiction clause in the

English facility letters, Messrs. Arthur Cox concluded as follows:

> "Further, neither your Plenary Summons nor Statement of Claim identifies the jurisdictional basis for the joinder of the BX Entities. We invite you to identify this basis by return and in the meantime all of our clients' rights are fully reserved."

This final invitation was never taken up by the plaintiff's solicitors.

92. It follows that while Messrs Arthur Cox had clearly given their consent to the joinder of the additional parties, and the amendment of the pleadings, and had indicated that they would accept service of the proceedings on behalf of, *inter alia*, the sixth named defendant, they were not thereby conceding that in respect of the sixth named defendant an application to the Court under Order 11 (1) RSC was not required, or that they were consenting to the application intended to be made by the plaintiffs under Order 11 (1) RSC. – [see *Traynor v. Fegan* [1985] IR 586 regarding a practice whereby proceedings may in some circumstances be issued in advance of an application under Order 11 (1) RSC, provided same are marked *'not for service outside the jurisdiction without an order of the Court'*, despite the wording of Order 11 (6) RSC].

93. In fact, this letter makes it clear that the sixth named defendant was specifically reserving its position in relation to the Court's jurisdiction to make any order under Order 11(1) RSC, and invited the plaintiffs to identify the basis for the joinder of both the sixth and seventh named defendants.

94. The plaintiffs made an *ex parte* application to O'Malley J. on the 26th August 2014, and as a result, an order was made firstly adding the additional plaintiffs as sought; secondly, adding the two Blackstone entities as sixth and seventh defendants; thirdly, permitting the summons to be amended by the addition of the Council Regulation endorsement in relation to the seventh named defendant, and by the addition of the conspiracy claims; and fourthly, permitting the issue and service of notice of a Concurrent Amended Plenary Summons on the sixth named defendant outside the jurisdiction pursuant to the provisions of Order 11(1)(f) RSC, and providing a period of thirty five days from date of service for entry of appearance thereto.

95. In giving that summary of the order made, I am taking account of the fact that since that order was first perfected, an application was made to O'Malley J. on the 20th November 2014 under the 'slip rule' to correct certain imperfections which were perceived to exist in relation to the order as first drawn and perfected. The order as first perfected had omitted a number of matters, including any reference to Order 11(1) RSC, and in particular which paragraph of that rule the order was made under. This Court need not dwell too long on that aspect of the order since it has now been rectified, save to note that the plaintiffs' *ex parte* docket had stated that the order being sought was one pursuant to Order 11 (1)(e) and (f).

96. Order 11, rule (1) (e) relates to claims in contract and suchlike, whereas paragraph (f) thereof relates to a claim in tort. Accordingly, since the additional claims permitted to be added by the order dated 26th August 2014 were claims in tort only, paragraph (e) could have had no relevance at all. This does not seem to have been brought to the attention of O'Malley J. who simply granted the order as sought in the *ex parte* docket. However, as I have said, the matter has been now rectified under the slip rule. It must be borne in mind also that by the time the application to set aside that *ex parte* order came before McGovern J. on the application to discharge the order, no application under the slip rule had yet been made.

An Exhortation

97. Before addressing the arguments on this aspect of the appeal, the Court wishes to emphasise to practitioners generally the importance of ensuring that on an *ex parte* application under Order 11(1) RSC (a) the appropriate paragraph(s) of Order 11(1) RSC is/are stated correctly in the *ex parte* docket filed; (b) that the correct said paragraph(s) are referred to in the affidavit grounding the application; and (c) that the order as perfected and taken up contains a recital of the paragraph(s) of Order 11(1) under which the order has been made. The reason why these matters are important is that once served with the proceedings and a copy of the order, the defendant who is served outside the jurisdiction must know under what paragraph of Order 11(1) RSC the order has been made, because he/she is entitled under the Order 12(26)RSC to bring an application to the Court on notice to the plaintiff for an order discharging the *ex parte* order made which authorised service upon him/her outside the jurisdiction. In order to bring such an application, the defendant must know the basis on which the order was made, so that he can be properly advised in relation to any such possible application. Equally any Court hearing the application to discharge the order must know under what paragraph of Order 11(1) RSC the order was made.

Events Post the *Ex parte* Order

98. Moving on from that exhortation to practitioners for the future, the fact is that following the making of the order by O'Malley J. on the 26th August 2014, the summons and other documents were served upon Messrs. Arthur Cox, who thereupon entered a conditional appearance on behalf of the sixth and seventh named defendants, which stated that the entry of appearance was *"without prejudice and solely to contest the jurisdiction of the court"*. For the purpose of the present appeal, that reservation is relevant only insofar as it relates to the sixth named defendant.

99. In due course on 10th September 2014, Messrs Arthur Cox issued a Notice of Motion seeking an order pursuant to Order 12 (26) RSC to discharge the *ex parte* order made on 26th August 2014, on the grounds that the said application by the plaintiffs for leave to issue and serve the proceedings outside the jurisdiction on the sixth named defendant did not meet the requirements of Order 11 RSC and did not set out the requisite material and facts to justify the relief sought. The application was grounded upon an affidavit of John Finley who is the Chief Legal Officer of the sixth named defendant. Two replying affidavits were filed on behalf of the plaintiffs - one by Patricia O'Brien, a solicitor in P.J.O'Driscoll & Sons, and another by the first named plaintiff, Michael O'Flynn.

Order 12(26) RSC jurisdiction:

100. The foundation of the High Court's jurisdiction to discharge an order made under Order 11(1) RSC is Order 12(26) RSC which provides:

> *"(26) A defendant before appearing shall be at liberty to serve notice of motion to set aside the service upon him of the summons or notice of the summons, or to discharge the order authorising such service".*

101. On such an application the defendant applicant may place before the Court additional facts and materials to those before the *ex parte* judge, and may make legal submissions which lead the Court to conclude that the *ex parte* order should not stand. In that sense the application is not an appeal against the *ex parte* order. In effect it is a re-hearing but in the presence of both parties. The nature of such an application, and the onus that is upon the moving party, was the subject of consideration by Finlay Geoghegan J. in Chambers v. Kenefick [2007] 3 I.R. 526, albeit in that case that the application was one brought under Order 8 (2) RSC to set aside an *ex parte* application renewing a plenary summons. This Court sees no reason why her conclusions in that case should not equally apply in an application under Order 12(26) RSC. Beginning on p. 528, Finlay Geoghegan J. stated as follows:

> *"The first issue which I have to address is the onus on a defendant who seeks to set aside an order for renewal of a summons made ex parte. The application is brought under O.8, r. 2 which simply provides "In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order". Counsel for the plaintiff submitted that the onus on the defendant is exclusively as set out by Morris J. in Behan v. Bank of Ireland (unreported, High Court, the 14th December, 1995). In that judgment Morris J. stated at p.3:-*
>
> > *'In my view in moving an application of this nature the defendant takes upon itself the onus of satisfying the court that there are facts or circumstances in the case which if the court which made the order in the first instance, ex parte, had been aware, it would not have made the order. It is clear, in my view beyond dispute, that this application is not to be dealt with on the basis that it is an appeal from the original order and, accordingly, it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the plaintiff's application to the extent of satisfying the court that, had these facts been known at the original hearing, the order would not have been made.'*
>
> *The further submission was made by counsel for the plaintiff that there are no facts on this application put before the court which significantly alter the nature of the plaintiff's application as made to Kearns J. on the 15th December 2003.*
>
> *I accept that latter submission and, therefore, it is necessary for me to consider whether the approach of Morris J. sets out in full the proper approach of the High Court on hearing an application under O.8, r.2. With respect to Morris J. it appears to me that it does not set out the full circumstances in which the court may consider an application under O. 8, r. 2. It appears to me that, in addition to the approach set out by Morris J. it is open to a defendant, by submission, to seek to demonstrate to the court that, even on the facts before the judge hearing the ex parte application, upon a proper application of the relevant principles the order of renewal should not be made. This appears to me to be necessary having regard to the purpose of an application under O.8, r.2. It only relates to orders which have been made ex parte. On any ex parte application by the plaintiff, a defendant has not had an opportunity of making submissions to the court as to why the court should not exercise its discretion under O.8, r. 1 to renew a summons. It appears to me that the purpose of including O.8, r. 2 is to accord to a defendant fair procedures in the High Court, and to permit a defendant where he considers it necessary to make submissions to a judge, even on what might be described as an agreed set of facts, that the court should not exercise its discretion to renew a summons, and therefore I propose considering this application from the defendant on that basis."*

102. This Court considers this to be the correct approach also for an application to discharge an *ex parte* order for service out of the jurisdiction.

103. As the Court has already noted, the order made by O'Malley J. on the 26th August 2014 was in its unamended form at the time the application to discharge it came before McGovern J. In his judgment given on the 6th October 2014 he noted what he called "some confusion" in relation to the order of the 26th August 2014, and that the *ex parte* docket had referred to the application being made under Order 11(1) (e) and (f) RSC. However he then referred to a paragraph in the grounding affidavit which referred to Blackstone as being "a necessary and proper party to the within proceedings", and deduced from this that *"it is clear that by making such a statement the plaintiffs sought to rely on Order 11, rule 1(h)".* It would seem therefore that he proceeded on the basis that the order made by O'Malley J. was made under paragraph (h), in the absence of anything to the contrary in her said order. In fact no argument was presented to him in relation to paragraph (h) on the application to discharge the order, as the parties were agreed that since paragraph (e) clearly had no relevance, the only paragraph in play was paragraph (f).

104. Insofar as the *ex parte* docket had indicated that the application was being moved by reference to paragraphs (e) and/or (f) of Order 11, rule (1) RSC, McGovern J. stated:

> *"Since the application was made ex parte, it does not seem to me to be essential that all the relevant constituents of O.11 be set out in the ex parte docket [so] long as, at the hearing of the application, the applicant satisfies the judge that there are good grounds for permitting service outside the jurisdiction on the basis of one or more of the rules of Order 11".*

105. While this Court agrees that the *ex parte* docket itself may not strictly need to show the particular paragraphs of Order 11, rule (1) RSC which are relied upon, even though it is preferable that it would do so, the order of the Court, for the reasons already stated, must do so as must the grounding affidavit. But this Court is also satisfied that insofar as McGovern J. relied upon paragraph (h) as the basis for coming to the conclusion that the plaintiffs' claims in tort came within Order 11, rule (1) RSC, he was incorrect in doing so. If the claims are in tort, they must come within paragraph (f) of the rule. It is not the case that paragraph (h) operates as some sort of free-standing 'catch all' provision. Otherwise no plaintiff would have to do other than satisfy the Court that the proposed defendant is a necessary party to the proceedings, regardless of the type of claim being brought.

Order 11, rule (1)(h)

106. Order 11, rule (1)(h) provides:

> *"(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".*

107. In the present case it is not the situation that Blackstone was a necessary party to the action brought by the plaintiffs against any or all of the other defendants. Rather, the plaintiffs wished to bring claims in tort against Blackstone. It seems to this Court that in such a situation, the plaintiff must satisfy the Court that the claims in tort come within rule (f) which is specifically referable to a claim in tort, and that in such a case the order to be obtained must be granted under, at a minimum, that rule. If the plaintiffs' claims against Blackstone did not come within paragraph (f) this Court does not see how it could be saved by paragraph (h) alone. On the other hand where the claim is found to come within paragraph (f), there would be nothing objectionable about an order reciting that the order is made under both paragraphs, as occurred in *Short v. Ireland* [1996] 2 IR. 188. One could readily appreciate that paragraph (h) might be appropriately relied upon where, for example, an existing defendant sought to bring in a third party who was residing outside the jurisdiction (other than in an EU member state). In such a situation the defendant might well rely upon paragraph (h) since the third party would be *"a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction"*. There may be other situations also where that paragraph could avail a plaintiff or other party on a stand-alone basis. But where a tort is alleged, the first rule to be satisfied must be paragraph (f).

108. Since McGovern J. appears to have erroneously concluded that the order of O'Malley J. should not be discharged since the

plaintiffs' application could in any event have succeeded on the basis of Order 11(1)(h) RSC alone, this Court will set aside that order, and proceed to decide this appeal by reference to whether the plaintiffs' claims against Blackstone satisfy Order 11(1)(f) RSC and whether the plaintiffs have sufficiently particularised their claims against Blackstone in tort to be entitled to the order made by O'Malley J. on the 26th August 2014, as amended by the order made under the 'slip rule' on the 20th November 2014 which clarified that the earlier order was made pursuant to paragraph (f) of Order 11, rule (1) RSC.

Discharge

109. The gravamina of Blackstone's argument that the order made by O'Malley J. should be discharged are firstly, that on that application the plaintiffs failed to adduce sufficient evidence that they had a good arguable case for the conspiracy torts alleged against Blackstone, and secondly, that they failed to address at all by any affidavit evidence whether this jurisdiction was the appropriate forum for the resolution of those claims.

110. In relation to the first of these, namely, whether the plaintiffs had demonstrated that they have a good arguable case by reference in the materials and evidence that were before O'Malley J. when the *ex parte* application was made, the submissions by Blackstone are very similar to those made on behalf of the first and seventh named defendants/appellants on their appeal against that part of the order of McGovern J. which refused to strike out the plaintiffs' claims for conspiracy and other economic torts on the basis that insufficient particulars had been furnished. For the reasons given by this Court already for dismissing the appeal by those defendants/respondents against that part of the order of McGovern J. this Court is also satisfied that for the purposes of the application made under Order 11(1)(f) RSC the conspiracy torts are sufficiently particularised for Blackstone to know in broad terms the basis for those claims. They are not couched in terms that amount to no more than mere assertion. As already explained, there may be further particularity which the plaintiffs can provide as the case progresses, given the possibility at least that a process of discovery of documents may be considered necessary. The case at present is at a very early stage, and given the nature of the claims being made it is reasonable to allow, in the words of Clarke J. in *Ryanair v. Bravofly* [supra] that *"a person bringing a valid claim in respect of such matters will be unlikely to be able to plead such a claim with a great degree of particularity in advance of having had the opportunity to exercise procedural measures such as discovery".*

111. As to second question, namely whether the plaintiffs have established whether this jurisdiction is the appropriate forum for the resolution of the conspiracy claims, Blackstone has submitted that the onus stated by Fennelly J. in *Analog Devices BV v. Zurich Insurance Company* [2002] 2 IR 272 at 287 to be upon the plaintiff in these applications to satisfy the Court as to *"the appropriateness of the courts of this jurisdiction to try the case"*, has not been discharged.

112. It has been submitted that for the Court to be so satisfied the plaintiff at a minimum would have to know the essential elements of the case being made, the nature of the factual disputes between the parties, and the evidence required for each party to make out its case. It is submitted that the question of cost and convenience must be considered from the point of view of both parties and not just the plaintiff, when considering whether it is reasonable that a party outside this jurisdiction should be required to come to this jurisdiction in order to defend a claim being made against it, rather than that such proceedings should preferably be brought in the defendant's own jurisdiction – in this case the state of New York. In support of its submission in this regard Blackstone has referred to the judgment of Kelly J. in *Yukos Capital Sarl v. Oao Tomskneft VNK* [2014] IEHC 115 where at para. 99 thereof he stated:

> *"The wording of the relevant rules and the case law which I have quoted lead me to the conclusion that in considering both comparative cost and convenience and propriety, I have* ***to have regard to the interests of both parties to the litigation*** *and not merely the applicant".* [emphasis added]

113. Again, this Court considers this to be correct in so far as it goes, in the sense that Yukos was decided on very particular facts, and where the only proposed defendant was one outside the jurisdiction, which is in contradistinction to the present case, in which there were in existence already proceedings in this jurisdiction against, *inter alia*, a company which is part of the Blackstone family of companies in the U.K and other companies in this jurisdiction, arising out of the same matrix of facts which give rise to the claims sought to be litigated against Blackstone in these proceedings.

114. The need to "have regard to the interests of both parties to the litigation" involves a weighing of those competing interests to determine whether the interests of Blackstone which are said to favour allowing the claims to be litigated separately against it in New York outweigh the interests of the plaintiffs who seek a determination in this jurisdiction along with their claims arising out of essentially the same factual matrix which will be heard in any event in this jurisdiction.

115. Blackstone correctly points to the absence of any sworn evidence in the grounding affidavit which was before O'Malley J. on the 26th August 2014 relating to the comparative cost of litigating these claims here as opposed to in New York, save for what is stated in paragraph 24 of the affidavit of Mr O'Flynn which grounded that application as follows:

> *"The trial of issues arising as between the Plaintiff's and Additional Defendants can most cost effectively and fairly be disposed of within the present proceedings. Were this Honourable Court not to give leave pursuant to Order 11 of the Rules of the Superior Court for the issue and service of proceedings as against the Additional Defendants, the same issues (including the question of conspiracy between Carbon and the Additional Defendants) would, in effect, have to be tried twice in different jurisdictions giving rise to unnecessary and/or wasted cost and a risk of inconsistent verdicts on these issues".*

116. For completeness, the court refers also to paragraph 25 of the same affidavit where the deponent states, *inter alia*, that:

> *"The claims against Blackstone are also closely connected to the existing proceedings against Carbon …".*

117. That is the extent of what was before O'Malley J. On 26th August 2014 relating to the question of cost and convenience of having the matters determined in this jurisdiction. Blackstone say that this is not enough and that the evidence must go further and address what evidence needs to be adduced, the witnesses who would need to be called, and questions of cost and convenience relating thereto in this jurisdiction as opposed to in New York.

118. The plaintiffs in their submissions have referred also to Order 11, rules (2) and (5) RSC in resisting this appeal. Rule (2) thereof provides:

> *"2. Where leave is asked from the court to serve in summons or notice thereof under rule 1, the court to whom such application shall be made shall have regard to the amount or value of the claim property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence, and particularly in cases of small demands where the defendant is resident in England, Scotland, or Northern Ireland, to the*

powers and jurisdiction, under the statutes establishing or regulating them, or of the courts of limited or local jurisdiction in England, Scotland or Northern Ireland respectively."

119. Order 11, rule (5) provides:

> *"Every application for leave to serve the summons or notice of a summons on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve the summons or notice thereof under rule 1 stating the particulars necessary for enabling the court to exercise a due discretion in the manner in rule 2 specified; and no leave shall be granted* ***unless it shall be made sufficiently to appear to the court*** *that the case is a proper one for service out of the jurisdiction under this Order."* [emphasis added*]*

120. When considering these rules in his judgement in *Analog Devices BV v. Zürich Insurance*, Fennelly J. stated the following:

> *"These provisions, taken together, mean that the applicant must satisfy the court, i.e. has the burden of proving, at the ex parte stage, that Ireland is the forum conveniens. This means, according to Lord Goff of Cheveley in Spiliada Maritime Corporation v. Cansulex Limited [1987] 1 A.C. 460 at p. 480 'the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice'. Lord Goff had reviewed a range of dicta on the issue, some emphasising the "exorbitant" character of the jurisdiction and some (older cases) the annoyance and inconvenience for a foreigner at being brought to contest proceedings in England. Lord Goff himself found the word "exorbitant" to be "an old-fashioned word which carries perhaps unfortunate overtones". He also said that the defendant's place of residence may be no more than a tax haven. It seems to me that the dictum of Lord Wilberforce in Amin Rasheed Corpn. V. Kuwait Insurance [1984] A.C. 50 expresses a correct balance. He said at p.72:-*
>
> > *'the intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense'."*

121. The terms in which Order 11, rule (5) RSC is worded is important. The burden on a party on such an application to serve out of the jurisdiction is to ensure that it is *"made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order".* As seen from rule (2) thereof the Court must also have regard to, *inter alia*, *"the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence*". These factors will assist the Court in determining *"the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice*".

122. There will be cases where it may be necessary to establish on affidavit as accurately as reasonably possible the comparative cost of bringing the proceedings in one jurisdiction or another, and that exercise may involve an examination by the Court of what witnesses will be required, their place of habitual residence, the cost of their attendance in one jurisdiction compared to the other, perhaps also the speed with which the proceedings may be determined in each competing jurisdiction, and so on.

123. In the present case, such a detailed exercise was unnecessary in circumstances where there were already in existence proceedings between the same plaintiffs and a number of defendants for whom an order under Order 11 RSC was not required to be made, and therefore in respect of whom the claims would in any event fall to be determined in this jurisdiction. In such a case, the averment by Mr O'Flynn which is seen at paragraph 24 of his grounding affidavit was in the view of this Court sufficient to satisfy the requirement of Order 11, rule (2) to *"[make it] sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order*". Indeed, it is notable that in his affidavit grounding Blackstone's application to discharge the order of O'Malley J, John Finley at paragraphs 17 – 21 refers only to the omission by Mr O'Flynn in his affidavit grounding the *ex parte* application of any evidence or material regarding the comparative cost or convenience of prosecuting the proceedings against Blackstone in Ireland or in New York, and the omission of any information about the cost or convenience for Blackstone of defending the proceedings in Ireland rather than in New York. Nowhere in those paragraphs does he put forward any evidence to contradict the contents of paragraph 24 of Mr O'Flynn's grounding affidavit.

124. For these reasons, this court was satisfied that the order made by O'Malley J. on 26th August 2014 (being one made under Order 11(1)(f) RSC) should not be discharged, and Blackstone's appeal against the order of McGovern J. dated 7th October 2014 was dismissed.

Result

125. It was for the foregoing reasons that all three appeals were dismissed.