

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**[2014 No. 20 FJ]**

**BETWEEN**

**SPORTING INDEX LIMITED**

**PLAINTIFF**

**AND**

**JOHN O'SHEA**

**DEFENDANT**

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 15th day of June 2015.**

**Introduction**

1. The defendant in these proceedings is appealing an order of the Master of the High Court deeming two judgments obtained in the County Court in London, England, against the defendant, enforceable in this jurisdiction.

2. The first judgment, dated the 30th August 2013, relates to the indebtedness of the defendant arising from regulated contracts in the form of spread bets on the outcome of specified sporting events. The second judgment, dated the 6th December 2013, relates to the plaintiff's costs of an application on the part of the defendant to set aside the first judgment.

**Background**

3. The defendant opened an online spread betting account with the plaintiff, a U.K. based company specialising in sports spread betting. The defendant made a bet on a Heineken Cup rugby match, the results of which did not turn out in his favour. The plaintiff permitted the betting account to become overdrawn resulting in the liability for gambling debts which were at issue in the U.K. proceedings.

4. The defendant submitted a limited defence to the plaintiff's claim in the County Court in London outlining the reckless nature of the plaintiff's conduct by permitting his account to go overdrawn where he did not request such facility. The defendant further contended that such proceedings should have been initiated in the Republic of Ireland as he was domiciled in Ireland during the U.K. proceedings. The plaintiff subsequently obtained judgment in the sum of €118,058.99 together with costs of the action summarily assessed in the sum of STG £17,500.00.

5. On the 20th May, 2014, pursuant to an *ex parte* application on the part of the plaintiff, the Master of the High Court made orders deeming both judgments enforceable in this State, together with the costs of the application. These orders were subsequently served on the defendant.

6. By notice of motion dated the 26th August, 2014, the defendant appealed those orders. The defendant's appeal came on for hearing before this Court on the 20th April, 2015.

**Ground of Appeal**

7. The parties agreed that the sole basis of the appeal is the contention that the decisions of the Master should be overturned on the ground that the first judgment arose from a gambling contract, the enforcement of which is prohibited pursuant to s. 36(2) of the Gaming and Lotteries Act, 1956.

8. Therefore, the question for this Court to consider is whether enforcement within this jurisdiction of the first and second judgments may be denied on the basis that such enforcement would be manifestly contrary to public policy in Ireland.

**European Council Regulation No. 44/2001**

9. The Regulation, which replaces the earlier 1968 Brussels Convention, has as its aim, *inter alia*, the harmonious administration of justice within the European Union. It was incorporated into Irish law under the Jurisdiction of Courts and Enforcement of Judgments (Amendments) Act 2012. The preamble provides that: -

"(16) Mutual trust in the administration of justice in the

Community justifies judgments given in a Member State

being recognised automatically without the need for any

procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the

procedure for making enforceable in one Member State

a judgment given in another must be efficient and rapid.

To that end, the declaration that a judgment is

enforceable should be issued virtually automatically after

purely formal checks of the documents supplied,  
without there being any possibility for the court to raise  
of its own motion any of the grounds for  
non-enforcement provided for by this Regulation.  
(18) However, respect for the rights of the defence means  
that the defendant should be able to appeal in an  
adversarial procedure, against the declaration of  
enforceability, if he considers one of the grounds for  
non-enforcement to be present. Redress procedures  
should also be available to the claimant where his  
application for a declaration of enforceability has been  
rejected.”

10. The Defendant relies on articles 34(1) and 34(3) of Regulation no. 44/2001 as the basis for his assertion that the judgments should not be recognised in this jurisdiction.

11. Article 34 states that a judgment shall not be recognised:-

- “ 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
- 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
- 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.”

12. The plaintiff draws the Court’s attention to use of the word “manifestly”, which was absent from the regulation’s predecessor. Counsel for the plaintiff relies on Case C-681/13 *Diago Brands BV v. Simiramida-04 EOOD*, in which Advocate General Szpunar said of the change, at para. 42, that:-

“the adverb ‘manifestly’, added in the course of transformation of the {Brussels} Convention into the regulation {44/2001}, gives concrete expression, in the regulation, to the expectation of a manifest conflict between the recognition{for enforcement} of judgments and public policy. As is clear from the explanatory memorandum in relation to Article 41 of the proposal for a Council regulation, that change was intended to underscore the ‘exceptional nature of the public policy ground’ with a view to ‘improv[ing] the free movement of judgments’.”

### **S. 36 of the Gaming and Lotteries Act, 1956.**

13. The defendant submits, in respect of the public policy exception, that the Oireachtas have clearly prohibited the enforcement of any betting contracts and same are deemed null and void pursuant to s. 36 of the 1956 Act which states:-

“36.—(1) Every contract by way of gaming or wagering is void.

(2) No action shall lie for the recovery of any money or thing which is alleged to be won or to have been paid upon a wager or which has been deposited to abide the event on which a wager is made.

(3) A promise, express or implied, to pay any person any money paid by him under or in respect of a contract to which this section applies or to pay any money by way of commission, fee, reward or otherwise in respect of the contract or of any services connected with the contract is void and no action shall lie for the recovery of any such money.

(4) This section does not apply to any agreement to subscribe or contribute to any plate, prize or sum of money to be awarded to the winner or winners of any game, sport or pastime not prohibited by this Act provided that the subscription or contribution is not a stake.”

14. It is the contention of the plaintiff that this provision is not an obstacle to recognition and enforcement of the English court orders because the court would be enforcing the court orders and not the gambling debts.

15. The plaintiff further submitted that the defendant is inviting the Court to review the judgments of the U.K. court as to their substance, which is specifically prohibited pursuant to articles. 36 and 45(2) of the regulation (“36 Under no circumstances may a foreign judgment be reviewed as to its substance”)

### **E.U. Case law**

16. The question of interpreting the term “public policy in the state in which recognition is sought” received consideration in case C-7/98 *Dieter Krombach v. Andre Bamberski* [2000] E.C.R. I-01935 which involved an appeal from a German national against a judgment

of a French court in circumstances where he had been denied the opportunity to defend himself. It was held, at para. 21, that the starting point for consideration of article 27(1):-

"...must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention (*Solo Kleinmotoren*, cited above, paragraph 20). With regard, more specifically, to recourse to the public-policy clause in Article 27, point 1, of the Convention, the Court has made it clear that such recourse is to be had only in exceptional cases (Case 145/86 *Hoffmann v Krieg* [1988] ECR 645, paragraph 21, and Case C-78/95 *Hendrikman and Feyen v Magenta Druck & Verlag* [1996] ECR I-4943, paragraph 23)."

17. The court went on to clarify that it viewed its role not to define the content of public policy in a contracting state, but as reviewing the limits within which the courts may have recourse to the content of public policy. The court outlined the public policy exception at para. 37:-

"37. Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order."

18. The plaintiff submits that whereas the right to be legally represented holds a prominent position in the operation of a fair trial and consequently to refuse this right to an individual constitutes a manifest breach of a fundamental right, this can be contrasted with the instant case, whereby the defendant failed to turn up for his application to set aside the first judgment in December.

### Irish Jurisprudence

19. Article 34(1) was considered by the High Court in *Fairfield Sentry Limited (In Liquidation and Kenneth Kryss v. Citco Bank Nederland NV, Stitching Shell Pensioenfond and Atlanta Business Inc* [2012] I.E.H.C. 81. In that case Finlay-Geoghegan J found that protecting the rights of unsecured creditors of a BVI company being wound up did not constitute a fundamental principle of Irish law such that it forms part of "Irish Public Policy" for the purposes of article 34(1).

20. *Emo Oil Limited v. Mulligan* [2011] I.E.H.C. 552 concerns the Insolvency Regulation no. 1346/2000 article 26 of which provides for a public policy exception to recognising insolvency proceedings. Accordingly, the plaintiff submits that *Emo* is of assistance in the instant case in that the article 26 ground is largely comparable with the ground set out in article 34(1). In her consideration of the public policy ground for refusal Dunne J. noted the importance of the *Krombach* decision and went on to conclude at para. 21:-

"21. I think it can be seen from the authorities referred to above, that in general terms a decision based on public policy to refuse recognition to a judgment of another Member State will only arise in exceptional circumstances. The exceptions which have given rise to a refusal to recognise appear to be exceptions in which a fundamental right of an individual or entity has been engaged, such as the right to a fair trial."

### Conclusion

21. On the basis of the foregoing case law, the plaintiff submits that the courts have consistently held that it is the role of the courts in individual member states to determine what the content of their own public policy is. On a referral of questions from the national court, the Court of Justice may review the limits within which the courts of a member state have recourse to that concept in order to refuse enforcement. In that role the E.C.J. has stated repeatedly that the public policy ground must be interpreted strictly otherwise there is a risk of defeating the purpose of the Regulation.

22. In assessing the extent to which public policy in a member state must be offended so as to disallow enforcement, the case law has consistently stated that the infringement must constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is being sought. I do not read the dicta of Dunne J. in *Emo Oil* (supra) as meaning that the public policy exemption may only be invoked if the foreign trial breached fundamental rights. The learned judge notes that cases where the exemption had been invoked involved such circumstances.

23. I reject the argument that the public policy exception does not apply in the instant case. The intention of the legislature in relation to the relevant provisions of the 1956 Act is perfectly clear. The enforcement of any betting contracts is prohibited and I am satisfied that the statute constitutes a rule of law regarded as essential in the legal order of this State. There is a manifest conflict between the foreign court order arising from a gambling debt and Irish public policy as expressed in the 1956 statute. Because this rule was enacted by the Oireachtas I am bound to find that the rule is essential in the legal order of the State. The rule reflects public policy on the control of gambling. It is an essential measure in as much as the Oireachtas has considered it necessary for the purposes of controlling gambling.

24. Counsel for the plaintiff has submitted that the Court is not being asked to enforce a betting contract in the present case, but rather, the plaintiff seeks to have a judgment for monies owed validly obtained in the English courts enforced in this jurisdiction. This is an unrealistic view. This court is asked to permit the plaintiff to enforce a court order which in turn enforces a gambling debt. It is not permissible for this court to go behind the foreign order, for example to check the merits of the case which led to the outcome expressed in the order or to check the foreign court's jurisdiction. The regulation contains an absolute prohibition of any review of the substance of the foreign court order (see articles 26 and 45(2)). But this court is not prohibited from knowing what the substance of the proceedings were. It may not go behind the foreign court order on this application. An affidavit on behalf of the plaintiff (sworn by Paul Hughes) and the affidavit sworn by the defendant confirms that the foreign court order was for the defendant's gambling debts. Enforcing the court order would have the effect of enforcing a gambling debt in the State. The debt and the order are as inseparable as "the dancer from the dance" The law prohibits any enforcement of such in this State. Further, the Regulation directs that a foreign court order "shall not be recognised" if recognition is manifestly contrary to public policy in Ireland and as I so find I am prohibited from recognising the order of the London Court.

25. I take a different view of the order referable to the costs of the proceedings incurred by the plaintiff in seeking to enforce a gambling debt. I do not regard this order as constituting enforcement of gambling debt. The monies are not owed from a betting transaction. They relate to litigation expenses only and the order is enforceable in the ordinary way under the regulation.

26. I can see no reason to refer this matter to the C.J.E.U.. I cannot see that the C.J.E.U. can give any further guidance on public policy exception and it would be bound to say that it was not a matter for it to decide whether the Irish statutory provision

constituted a rule of law regarded as essential in Ireland. Nor could the C.J.E.U. decide whether there was a manifest conflict between Irish public policy and the order sought to be enforced. These surely are questions which only the authorities in this State are competent to assess.

27. In light of the foregoing, the defendant's appeal is upheld with respect to the order for €118,058.99 but is refused with respect to the order for STG £17,500.00.