



**THE COURT OF APPEAL
CIVIL**

NO REDACTION NEEDED

**Neutral Citation No. [2021] IECA 303
Court of Appeal Record No. 2021/33
High Court Record No. 2019/16FJ**

**Whelan J.
Murray J.
Barniville J.**

**IN THE MATTER OF REGULATION (EU) NO. 1215/2012
AND
PURSUANT TO ORDER 42A OF THE RULES OF THE SUPERIOR COURTS
(JURISDICTION, RECOGNITION AND ENFORCEMENT OF JUDGMENTS) 2017
AND
IN THE MATTER OF A JUDGMENT OF THE SOFIA CITY COURT, REPUBLIC
OF BULGARIA**

BETWEEN

HENRY ALEXANDER BROMPTON GWYN-JONES

APPLICANT/APPELLANT

- AND -

RICHARD WILLIAM MCDONALD

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 12th day of November 2021

Background

1. The legal and factual context to this appeal is described in my judgment in closely related proceedings between the same parties ([2021] IECA 206). Essentially, legal entities then related to and/or controlled by the appellant and respondent became involved in the acquisition of a shopping complex in Bulgaria ('the Burgas Plaza'). That transaction was initiated in November 2007 and was completed by January 2009. It was effected via a Maltese special purpose vehicle which acquired the shares of a Bulgarian company, MB Izgrev EAD. This latter entity subsequently changed its name to Burgas Plaza AD.
2. The companies directly involved in the transaction were (insofar as relevant for present purposes) Gort (Holdings) Ltd. ('Gort') (the vehicle used by the appellant to make his investment), Balkan Holdings Limited, now known as MRP Brazil Ltd. ('MRP') (the vehicle representing the interests of the respondent) and Burgas Holdings Ltd. ('BHL') (the Maltese special purpose vehicle used for the purpose of the investment). The appellant now claims that the respondent made fraudulent misrepresentations to him at the time of this transaction, but for which he would not have made the investment in the Burgas Plaza. This claim is the subject of arbitration proceedings commenced by Gort against MRP and various other corporate bodies before the International Chamber of Commerce International Court of Arbitration ('ICC') in late 2014 ('the first arbitration'), in aid of which certain interlocutory freezing orders were made against MRP by the Isle of Man High Court.

3. In 2011, and following the completion of the Burgas Plaza transaction, the appellant and respondent entered into three identically worded agreements by which the latter lent monies to the former (those agreements being dated March 28, April 18 and April 26 2011). The monies advanced on foot of these agreements were not repaid, and proceedings were brought by the respondent before the Sofia City Court for judgment on foot thereof.
4. Two separate actions were commenced. One action was to enforce the March 28 and April 26 agreements, and the other to enforce the agreement of April 18. The action to enforce the agreement of April 18 resulted in a judgment of the Sofia City Court of November 11 2016. The action on foot of the March 28 and April 26 agreements resulted in a judgment of the Sofia City Court of October 31 2017. While this appeal is concerned with the recognition and enforcement of the judgment of October 31 2017, as matters have developed the two judgments have become irretrievably intertwined.

The judgment of the Sofia City Court of November 11 2016

5. The proceedings seeking to enforce the loan agreement of April 18 were purportedly served on the appellant at his home in Cork on 19 August 2016. The appellant did not defend those proceedings at first instance, contending thereafter that he had not been duly or properly served with them. Upon the granting by the Sofia City Court on November 11 2016 of judgment in those proceedings in the sum of €119,522.24 and the service of that judgment on the appellant on 26 June 2017, the appellant sought to set this judgment aside before the Bulgarian Supreme Court of Cassation ('SCC'), relying to that end upon Article 303 of the Bulgarian Civil Procedure Code. When by

decision of 17 July 2018, the SCC refused this application, the appellant sought to have the SCC reconsider its decision. This request was refused on 25 January 2019.

6. In the meantime, the appellant (in July 2018) brought proceedings before the High Court seeking orders refusing the recognition and/or enforcement of this judgment of the Sofia City Court. In that application he claimed that the proceedings had not been duly or properly served upon him, as well as advancing an argument based upon public policy and a fraud the appellant contended had been perpetrated upon him. He also relied upon the fact that in January 2020 and shortly before the hearing the appellant had commenced a second arbitration commenced before the ICC in which he personally sought relief against the respondent arising from the alleged fraud ('the second arbitration'). In a judgment delivered in May 2020 Meenan J. ([2020] IEHC 240) refused the appellant that relief. That decision was unsuccessfully appealed to this court resulting in the judgment to which I have referred above ([2021] IECA 206).

The judgment of the Sofia City court of October 31 2017

7. Unlike the procedure leading to the first judgment, the action seeking judgment on foot of the agreements of March 28 and April 26 2011 was fully contested by the appellant at first instance, and the judgment granted against him on October 31 2017 (following a hearing on 5 October 2017) was unsuccessfully appealed to the Court of Appeal, Sofia Civil Division (the hearing before which was on 5 November 2018, judgment being delivered on 6 December 2018). An application to the SCC to allow the appellant to make a further appeal to it was rejected by decision of 10 October 2019. The judgment thereby obtained by the respondent was in the sum of €425,926 together with interest.

8. In those proceedings the appellant did not deny the fact of the loan agreements nor the fact that the monies advanced thereunder had not been directly repaid by him. Instead, he asserted that the loan agreements were connected with agreements between two corporate entities pursuant to which advertising space was leased in the Burgas Plaza. He said that the parties had agreed that instead of the appellant fulfilling his obligations under the loan agreements, a contract for the lease of space in Burgas Plaza would be entered into with a company owned by the respondent thereby granting to the respondent the opportunity to profit from that arrangement. The respondent was, under this agreement, to pay a rental price to a company controlled by the appellant, that rental payment being deducted over time from the sums the appellant owed under the loan agreements. In this way, it was said, the appellant had discharged his obligations under the loan contracts by deducting the amount he believed to be due for income rental. This defence is described in the Bulgarian decisions in terms that the loan obligations in question were extinguished '*by giving instead of performance*'.
9. The court of first instance, the Court of Appeal and the SCC rejected the defence. The Court of Appeal said that there was no evidence that the respondent had agreed to the arrangement alleged by the appellant, and it upheld the finding of the court of first instance that it could not establish a connection between the legal relationship arising under the loan contracts and the legal relationship arising under the lease contract, the former being between the appellant and the respondent and the latter being between corporate bodies.

10. In December 2019 proceedings were brought by the appellant in this jurisdiction seeking orders refusing recognition and/or enforcement of this judgment or, in the alternative, a stay on the recognition or enforcement thereof. The appellant contended he was entitled to that relief because (a) the loan agreements formed part of a fraud perpetrated by the respondent and companies controlled by him on the appellant and (b) because there was an arbitration proceeding pending before the ICC arising from that fraud. Barr J. ([2020] IEHC 689) rejected this application. It is from that decision that this appeal is brought.

The proceedings before Barr J.

11. The proceedings before Barr J. came on for hearing following the decision of Meenan J. and while the appeal from that decision was pending before this court. In that action the appellant relied (as he had done in the proceedings heard by Meenan J.) upon the fact that in February 2014 Deemster Gough in the Manx High Court had granted a freezing injunction in proceedings brought by Gort against MRP and upon the conclusion reached by the Manx High Court that the evidence in that application disclosed a sufficiently clear *prima facie* case of fraud to ground such an order. Ultimately, those proceedings culminated in the appointment in July 2016 by that court of receivers to MRP.

12. The appellant contended before Barr J. that the respondent was controlling the contracts the subject matter of the Bulgarian judgment for and on behalf of MRP and/or that those contracts formed part of the series of agreements entered into as part of the alleged fraud arising from the Burgas Plaza transaction. The factual basis for this claim was

outlined by a lawyer with the French firm representing the appellant in the ICC arbitration and in the Isle of Man proceedings. He said that but for the fraudulent conduct of the respondent in inducing the appellant to enter into a series of contracts and actions to acquire the shares of Burgas Plaza AD subsequent contracts, including the advertising contract and related loan contracts, would not have been entered into.

- 13.** Another lawyer with the same firm asserted that the respondent agreed to advance a sum of funds to the appellant personally equal to the established value of funds that the respondent would be required to send to the appellant from the advertising company profits. He continued:

‘Consequently, the conduct of Mr. McDonald to induce Mr. Gwyn-Jones to invest through his companies in Burgas Plaza AD are directly related to the loans and advertising contracts. I confirm therefore that Gort and Henry Gwyn-Jones are claiming in the ICC Proceedings that both the loan contracts and the advertising contracts would never have been entered into if Mr. Henry Gwyn-Jones did not acquire the shares in Burgas Plaza AD as Mr. Henry Gwyn-Jones and Gort would have no reason or basis to enter into such contracts’.

- 14.** As in the application before Meenan J., the appellant contended before Barr J. that it was contrary to the public interest in this jurisdiction to allow enforcement of a foreign judgment obtained on foot of an agreement which had itself been procured by fraud. Reliance was also placed upon the second ICC arbitration.

The decision of Barr J.

15. Barr J. resolved these issues as follows. First, he expressed his agreement with the conclusion reached by Meenan J. that the existence of a worldwide freezing order made by the Isle of Man High Court was not of relevance as those proceedings concerned corporate entities while the enforcement action was as between the appellant and respondent personally. Second, Barr J. determined that the argument based upon the public policy against fraud was not made out as all the appellant had in that regard was an allegation that the contract between Gort and MRP and other contracts were induced by fraudulent representations, but (a) that there had been no finding by any court or arbitral tribunal that Gort or the applicant had been defrauded by the respondent or by any company controlled by him and (b) that the judgment of Deemster Gough did no more than find that the appellant had an arguable case of misrepresentation or deceit. This, the court found, was not sufficient to enable it to conclude that it would be contrary to public policy to refuse recognition or enforcement of the judgment.

16. Barr J. also rejected the application made by the appellant for a stay preventing enforcement of the Bulgarian judgment pending the outcome of the second arbitration proceedings before the ICC. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters (recast) ('the Recast Regulation') did not expressly provide for such relief. Insofar as the appellant argued that this arbitration was relevant because in the event that findings were made in favour of the appellant, he would bring an application to the SCC seeking to set aside the judgment, this also was found not to afford a basis for relief. Barr J. referred to Article 51(1) of the Recast Regulation (at para. 80), which provides that the court to which an

application for refusal of enforcement is submitted may stay the proceedings if *an ordinary appeal* has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. Stressing the phrase ‘*ordinary appeal*’ in Article 51(1) Barr J. said that here, no such appeal had been lodged, further suggesting that even if a challenge were brought to the judgment before the SCC that would not be an ‘*ordinary appeal*’ for the purposes of this provision (at para. 81).

The appeal in the proceedings relating to the judgment of the Sofia City Court of November 11 2016

17. Before the appeal against the judgment and order of Barr J. came on for hearing, this court heard the appeal against the judgment and order of Meenan J. rejecting the appellant’s application for orders refusing to recognise or enforce to judgment of the Sofia City Court of November 11 2016. I delivered a judgment explaining why I believed that the appeal should be dismissed. The other members of the Court (Whelan J. and Costello J.) agreed.

18. The conclusions I reached in that judgment as to the legal principles governing the fraud and public policy arguments can be summarised thus:

- (i) While the Recast Regulation enables the refusal of recognition and/or enforcement by the courts of one Member State of the judgment of courts of another Member State where to do so would be manifestly contrary to public policy in the Member State addressed, this is a power that should be strictly construed and which arises only exceptionally and where there is a

manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement was sought or of a right recognised as fundamental within that legal order.

- (ii) The courts of the State in which enforcement is sought may not refuse to recognise or enforce that judgment on the basis only that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought.
- (iii) In theory, where it is established that the judgment of the foreign court has been procured by fraud, this may afford a basis on which the courts in this jurisdiction may, exceptionally, refuse enforcement or recognition.
- (iv) Where there was a remedy for an alleged fraud in obtaining the judgment in the jurisdiction in which it was issued, the courts of the Member State addressed should ordinarily leave the defendant to pursue his remedy there.
- (v) The courts in this jurisdiction should not normally entertain a challenge to a judgment to which the Regulation applies where it would not permit a challenge to an Irish judgment. This means that the power should operate exceptionally, should arise only where the person resisting recognition and enforcement establishes a knowing and deliberate deceit of the court and where the fraud alleged affects the impugned decision in a fundamental way.

19. Having regard to those principles, I determined that the appellant had failed to establish the conditions for the application of the public policy exception on the ground of fraud. The basic reason for that conclusion was that the applicant was not in truth alleging that the judgment had been procured by fraud in the sense that the court had been deceived into giving it, but instead was claiming that the contract on foot of which the judgment issued had itself been the consequence of fraudulent misrepresentation by the respondent. That, I decided, was not an admissible public policy objection of the kind envisaged by Article 45(1)(a) of the Recast Regulation, but was instead an impermissible attack on the merits of the underlying decision. I concluded that the case advanced by the appellant depended on the incorrect assumption that fraud as a ground of public policy for the non-recognition or non-enforcement of the judgment of the courts of another Member State of the European Union captured an objection based upon the substantive law of contractual misrepresentation, deceit and set off in circumstances where these were matters for the courts of the Member State of origin. I also found that the evidential basis relied upon by the appellant to support his application was *‘conspicuously vague as to how – exactly – the loan document sued upon by the defendant was itself procured by fraud’* (at para. 74).

20. In the course of my judgment I observed the lack of clarity around the legal basis on which the appellant contended that the fact of the second arbitration enabled the court to refuse to recognise or enforce the judgment. I found that the only evidence before the court germane to the contention was the loan agreement itself, which submitted any dispute relating thereto to the jurisdiction of the Bulgarian courts. I also refused an application that enforcement of the judgment be stayed pending the outcome of the

arbitration, noting the failure of the appellant to identify any legal basis for that application.

This appeal

- 21.** The appellant has raised three objections to the judgment of Barr J. in his Notice of Appeal. First, he says that the trial Judge erred in failing to refuse enforcement of the Bulgarian judgment on the grounds that to permit same would be contrary to public policy as provided for in Article 45(1)(a) of the Recast Regulation. Second, he claims that the trial Judge erred in refusing enforcement given that the appellant had recently initiated arbitration proceedings in the ICC against the respondent personally alleging that the respondent had defrauded the appellant of €26M and that the contracts the subject of the Bulgarian judgment were procured as a result of that alleged fraud. Third, he said that the trial Judge erred in refusing to stay enforcement of the Bulgarian judgment pending the hearing and outcome of the arbitral proceedings before the ICC.
- 22.** The fact that this court determined the appeal against the judgment and order of Meenan J. as it did posed a significant challenge for the appellant in seeking to contend that Barr J. had erred in the conclusions he had reached. Indeed, the respondent issued a motion to dismiss the appeal contending that, as a consequence of that judgment, the appellant was precluded by *res judicata* from prosecuting the appeal. This was not, I think, quite correct. The claim here is on foot of a different judgment so that cause of action estoppel does not arise. The only aspect of *res judicata* that might prevent this Court from revisiting the questions decided in the first appeal is the possibility of an issue estoppel arising, precluding the appellant from re-opening issues determined in the other case which, of course, was between the same parties. Issue estoppel, however, is

a more flexible principle than cause of action estoppel, incorporating a ‘*special circumstances*’ exception (see McDermott ‘*Res Judicata and Double Jeopardy*’ (1999) at para. 2.04). I would certainly have been prepared to entertain an application by the appellant to exceptionally permit argument as to why the judgment in the first appeal was incorrect in its reasoning if some basis had been advanced as to why this should be done and why the conclusions were in error.

23. In the course of the oral hearing, counsel when asked to identify the precise basis on which he contended that the decision in the first appeal was in error made clear that he was relying in this regard exclusively on his written appeal submissions. Those submissions argued as follows:

- (i) The court could in principle come to a different conclusion in relation to the specific factual and legal issues argued in this appeal, the appellant being entitled to have a separate appeal heard and determined by the court.
- (ii) The terms of a consent order in the ICC arbitration proceedings combined with the decision of the Isle of Man High court comprised sufficient evidence to show the nature of the underlying fraud perpetrated by the respondent.
- (iii) The fraud and deceit thus evidenced show that ‘*the judgment herein were* [sic.] *obtained by an underlying fraud*’.

24. I will deal separately with the issue around the consent order. However, even assuming that this constitutes additional evidence to which regard should be had by this court,

and even assuming that it advances the contention that the respondent engaged in a fraud that can be connected to the loan agreements, two factors show that it is not sufficient to displace the conclusions that follow from my judgement in the first appeal.

25. First, the appellant does not engage at all with the conclusion that the basis for its invocation of the public policy objection to enforcement – that the fact that the loan agreements in question were connected to a broader fraud arising from the appellant’s investment in Burgas Plaza and/or that the respondent misrepresented the purpose of the agreements for advertising space and the loan agreements - was not (having regard to the findings of law I have summarised above) a cognisable public policy exception at all, but instead an attack on the substance of the Bulgarian court decision.

26. Second, he does not identify any legal provision pursuant to which this court would have jurisdiction to either refuse recognition or enforcement or place a stay on enforcement of the Bulgarian order by reason of the ICC arbitration. The absence of such provisions formed the basis for my conclusion on these issues in the first appeal.

27. For these reasons alone, I would hold that the appellant has failed to identify any basis on which the decision of Barr J. was wrong. However, in this case there is a further and equally critical factor, which did not arise in the appeal from the judgment of Meenan J. In relation to the loans the subject of the decision by Barr J. the appellant did defend the claim on the merits, yet never raised before the Bulgarian courts the argument that the agreements in question were unenforceable as being vitiated by fraud. While he contended – unsuccessfully - that the loan agreements and the advertising contracts were interconnected (seemingly for the purposes of an argument as to set off),

he never made the case either (a) that the loan agreements were obtained as a result of a fraud relating to the advertising agreements, or (b) that the loan agreements were one aspect of a broader fraud which was enabled only because of the respondent's alleged misrepresentations regarding his investment in the centre. In fact, in the evidence most recently tendered to this court (and to which I will return further below) the appellant's Bulgarian lawyer testifies that *'as of my knowledge Mr. Gwyn-Jones has never made a claim of fraud against Mr. McDonald before any Bulgarian court.'*

The failure to raise the objection based upon fraud before the Bulgarian courts

- 28.** The failure of the appellant to raise this objection before the Bulgarian courts combined with his failure to proffer any credible explanation for the fact that he did not do so is itself fatal to the appellant's attempt to rely upon the allegedly fraudulent conduct of the respondent as a basis for non-enforcement of the judgment. It is an inevitable consequence of the exceptional nature of the public policy exception in Article 45(1)(a), of the principle of mutual trust and confidence between the courts of Member States underlying the Recast Regulation, of the requirement imposed by that Regulation that the enforcement of the judgments of courts of Member States be effected swiftly and of the practical consideration that it is the court of the Member State of origin usually applying its local law and always applying its own procedures that is best placed to determine all issues touching the merits of a dispute before it, that the courts of a State to which a judgment is addressed under the Regulation must generally defer to the process before the courts of the State of origin. It follows that they should normally only entertain a public policy challenge to such a judgment where either (a) the challenge could not have been raised before the court issuing the judgment, or (b) that

challenge was raised but for reasons which themselves represent a public policy objection to enforcement they were rejected by the trial court, that refusal not being capable of being remedied on appeal in the courts of the Member State of origin.

29. It was essentially for these reasons that Phillips J. in *Interdesco v. Nullifire* [1992] 1 Lloyd's Rep. 180 (a decision I considered at some length in my judgment in the first appeal) rejected an objection to enforcement based on public policy arising from the contention that the claimant in proceedings before the French courts had obtained the judgment sought to be enforced by deliberate falsehoods before the trial court. The objection, he held, was properly addressed before the French courts, which afforded a procedure enabling this to be done and, moreover, an English court should not, he said, entertain a challenge to a judgment of the courts of a Convention State in circumstances in which it would not permit a challenge to an English judgment on the basis of *res judicata* or issue estoppel (including the 'rule' in *Henderson v. Henderson* (1843) 3 Hare 100). While stressing that principles of issue estoppel had to be applied flexibly and with care in relation to foreign proceedings, this meant that – at least presumptively – a ground of objection which could have been but was not agitated in the foreign proceedings should not usually be entertained in the courts of the Member State addressed in proceedings seeking to prevent recognition or enforcement.

30. That was also the conclusion reached by Cooke J. in *Smith v. Heurtas* [2015] EWHC 3745 (Comm). There, the public policy objection taken to the enforcement of a French judgment arose from a litany of complaints about the fairness of the procedures before the court of trial which, it was contended, amounted to a breach of Article 6 of the European Convention on Human Rights. Rejecting the challenge, *inter alia* because it

would have been possible for the claimant to have raised the objections before the French courts, including on appeal, and concluding that in order to sustain his challenge to the judgment the claimant would have to have established that the system of legal remedies in France did not afford a sufficient guarantee of his rights, Cooke J. explained (at para. 21):

'Where the factors relied on as being contrary to public policy in England are factors which the court has already considered in the foreign jurisdiction or are factors which could have been raised by way of objection in that jurisdiction, it appears to me self-evident that the foreign jurisdiction must be treated as the best place for those arguments to be raised and determined. To do otherwise would be contrary to the spirit of the Convention and, where issues of unfairness are raised which are capable of being the subject of appeal in the foreign jurisdiction, the court in the enforcing jurisdiction would be much less able to assess them than the original court which was familiar with its own forms of procedure. It is plain that an enforcing court will have much more difficulty in understanding the overall foreign system and its procedures for ensuring that justice is done than the appeal court of the original jurisdiction itself. There is moreover a highly unattractive element in a defendant not raising points which he could have raised in the original jurisdiction, by way of appeal against the judgment and only seeking to raise those matters when the judgment is exported to an enforcing jurisdiction under the Convention as matters of public policy for that court.'

31. That conclusion reflects another principle embedded in the Recast Regulation. A judgement given in a Member State should be treated as if it had been given in the Member State addressed (Recital 26). It follows that the public policy preclusion in Article 45(1)(a) must insofar as it is reasonably practicable to do so, be applied in the same way to the judgment of the courts of another Member State as it would operate *vis a vis* a domestic judgment (Article 41(1)). Thus, as I explained in my judgment on the first appeal, the courts in this jurisdiction will – in certain limited and exceptional circumstances – set aside a domestic judgment that has been procured by fraud. There is, however, no version of the law whereby a defendant could expect to defend a case for breach of contract on one basis, lose, and then seek to avoid enforcement of the resulting judgment on the basis that the original contract was, in fact, part of a broader fraudulent scheme which although known at the time of the first trial, was never agitated before the court hearing the matter. That, however, is the precise outcome which the appellant seeks to achieve here.

The application to admit fresh evidence

32. It is in this context that the focus of this appeal shifted shortly before it came for hearing. The applicant issued a motion seeking an order pursuant to Order 86A, rule (4)(b) of the Rules of the Superior Courts to admit additional evidence comprising a consent award made by Sir Bernard Eder QC arbitrator in ICC case No. 20711/TIO between Gort (Holdings) Limited and MRP Brazil Limited (formerly Balkan Holdings Ltd.) and BHL (which it will be recalled was the special purpose vehicle established to execute the acquisition), together with certificates and copies of translations of applications made to the SCC on 24 September 2021 seeking annulment/revocation of the

judgement the subject of the enforcement proceedings. The evidence thus sought to be admitted was exhibited in an affidavit of the appellant's solicitor sworn on the 29 September 2021, to which the respondent's solicitor replied on October 5. The affidavit sworn by the respondent's solicitor exhibited an affidavit from Emil Emanuilov, a Bulgarian lawyer representing the respondent, sworn on October 4. On October 13, the appellant's solicitor delivered a further affidavit exhibiting an affidavit of Yordan Yordanov. Although not expressly the subject of the motion, it follows that the appellant also sought liberty to adduce this expert evidence of Bulgarian law.

33. On the basis of that additional evidence the appellant sought to advance a new argument. He said that the court should stay enforcement or execution of the judgment in question pending the outcome of the application to the SCC. It will be noted that this argument in those terms was not advanced to the High Court, so that in fact the appellant was seeking not merely to admit new evidence, but to advance a new ground of appeal based upon a claim that had not been argued in the High Court.

34. The court - above the objection of the respondent - determined to admit this evidence at the hearing of the appeal *de bene esse*. It is my view, having regard to the decisions in *Lough Swilly Shellfish Growers Co-op Society Ltd. v. Bradley* [2013] IESC 16, [2013] 1 IR 227 and *Allied Irish Banks v. Ennis* [2021] IESC 12, that this evidence should be admitted and that the appellant should be allowed to agitate the new ground of appeal he advances having regard to the following:

- (i) While the argument sought to be advanced was not made in the High Court, a closely related argument was proposed. The appellant contended before Barr J. that the court should stay enforcement pending the outcome of the

arbitration between the appellant and the respondent because if he prevailed in the arbitration he would then apply to the SCC to vacate the judgment. The claim he now seeks to make is that the court should grant such a stay because in fact such an application has been made to the SCC. Thus, the foundation for the argument was advanced – insofar as it could have been made at the time – before the High Court. While that argument was addressed to a potential outcome in a different arbitration, I do not see this as affecting the essential connection between and similarity of the case made in the High Court, and the argument now sought to be advanced on appeal.

- (ii) For reasons to which I will return, it is possible for this court to adjudicate on the issues arising from that evidence without remitting the matter to the High Court, and without resolving disputed issues of fact.
- (iii) The respondent has himself sought to deploy in the hearing a procedural ruling made by the second arbitral tribunal in September 2021.
- (iv) The evidence in question was not available at the time of the High Court proceedings: the fresh application to the SCC was, as I have observed, made in September 2021, and was based upon the consent award of the arbitrator of June 28 2021.

35. The respondent's objection to the admission of this evidence was that it was '*wholly irrelevant to this appeal*'. Specifically, he emphasised that the focus in the High Court was on the arbitration between the appellant and the respondent, whereas the consent

award was made in a different arbitration between Gort and MRP and other legal entities. This is true. However, the two arbitrations are closely related. What is critical is that the appellant contended before the High Court that he should have a stay because he would, in certain events, make an application to the SCC, and that he now seeks a stay because such an application has in fact been made. For the reasons I have noted above, it is appropriate that the appellant be permitted to make the case he seeks to advance regarding the effect of the application to the SCC and to that extent the material he seeks to adduce in evidence is relevant.

The arbitrations

- 36.** To understand the asserted relevance of the new evidence it is necessary to visit in more detail the sequence of events around the arbitrations. The original request for arbitration (ICC Case No. 20711/TO) was submitted under the ICC Rules on December 18 2014. The claimant was Gort and the respondents were MRP, Bridgecorp AD (a company said to be controlled by the respondent which it was originally intended to use in the acquisition but which was later substituted by MRP) and BHL.
- 37.** The referral to arbitration was said to arise from provisions in the original Memorandum of Understanding on foot of which the investment proceeded, together with a series of subsequent Loan Agreements. Neither the appellant nor the respondent were party to these agreements, and were not parties to this arbitration as thus constituted. The arbitrator is Sir Bernard Eder QC. Between September 2015 and August 2020 he made a series of procedural rulings, one of which (in April 2015) confirmed that the claimant's claim against Bridgecorp AD was withdrawn with no order as to costs,

leaving two respondents MRP (which was in receivership) and BHL (of which both appellant and respondent were directors).

38. In January 2020 the second arbitration was commenced before ICC (ICC Case No. 25093/70). Here the claimants were the appellant and Gort, and the respondents were the respondent to this appeal, Bridgecorp AD, MRP Brazil Limited and other corporate entities. Those proceedings alleged that a number of agreements (including the loan agreements) would not have been entered into but for the fraudulent misrepresentation of the respondent. It is specifically claimed in the Request for Arbitration that the respondent as executive director of Burgas Plaza AD arranged for a contract between a firm set up by him to purchase the advertising space in the Burgas shopping centre for resale to advertisers at a profit. It is claimed that the respondent fraudulently induced the appellant to consent to this contract by indicating that the respondent would provide a series of limited personal loans to him that would then be repaid through a share of the advertising profits generated in the advertising company through this contract with Burgas Plaza AD. In this way, it is said, the respondent '*effectively agreed to advance the value of Mr. Gwyn-Jones' share of those anticipated profits and for the loans to be repaid in this manner*'. It is claimed that the respondent failed to honour this arrangement and that the proceedings in Bulgaria to recover on foot of the loans were '*abusively*' commenced.

39. On June 22 2020 the ICC court decided that this second arbitration would proceed between the appellant, Gort, the respondent and Bridgecorp AD. Proceedings were brought before a Paris court challenging the exclusion of the other parties. It is apparent from the additional evidence before this court that the Paris court ruled against the

appellant in April 2021, with the result that this second arbitration remains constituted as directed by the ICC in June 2020. The arbitral panel comprises Stephen Jagusch QC, George Burn and John Beechey CBE.

The consent award

40. In December 2020 the parties to the first arbitration advised the arbitrator that they wished to submit the text of a settlement agreement to be recorded as an award by consent under Articles 16 and 32 of the ICC Rules of Arbitration. After issuing a procedural ruling, the Settlement Agreement was submitted to the Arbitrator on April 8. That Agreement was signed on 7 April 2021 on behalf of Gort by the appellant and on behalf of MRP by the appointed receiver. The appellant also signed the agreement on behalf of BHL, his authority to do so deriving from a resolution of the general meeting of that company following the removal of the respondent as a director thereof. The additional evidence furnished to the court discloses that the entitlement of the appellant to so represent BHL is to be challenged before the Maltese courts by a shareholder in that company.

41. The settlement agreement provided that the claimant was entitled to payment by the respondents of damages in the amount of £18,770,539.95 together with £3,200,000 for fees and expenses. It also contained (in Part III thereof) a series of admissions to the effect that the respondent committed a civil fraud whereby the appellant was induced to invest sums and to provide guarantees to banks in order that Gort would invest in the Burgas Plaza project. MRP and BHL acknowledged in this part of the agreement that they were used by the respondent as legal vehicles to facilitate this impropriety and to

assist in the civil fraud and that they considered that the respondent was liable for the damage caused to the appellant. A sequence of agreements are identified as having been entered into and as being *‘relevant and directly related to this dispute’*. These included:

‘Personal loans between Messrs. Henry Gwyn-Jones and Richard McDonald related to advertising contracts of Burgas Plaza AD for which Mr. McDonald has obtained Bulgarian Court Orders and related Irish Court Orders related to enforcement of those Bulgarian Court Orders.’

42. In his consent award dated 28 June 2021, the arbitrator confirmed his satisfaction that *inter alia* the appellant was the proper representative of BHL with power and authority to sign the settlement agreement. However, the arbitrator was clear that he was neither adjudicating upon the merits of the dispute nor had he considered the admissions contained in Part III of the settlement agreement. Paragraph 18 of the consent order states:

‘However, the Tribunal emphasises and hereby makes clear that it has not considered the merits of the disputes between the Parties; not the allegations or admissions of the Parties as recorded in the Settlement Agreement including, in particular, the matters set out in Section III of the Settlement Agreement (which, for the avoidance of doubt, the Tribunal does not adopt and forms no part of this Award); nor has it considered the reasonableness or otherwise of the terms of the Settlement Agreement.’

(Emphasis added).

The new applications to the SCC

- 43.** Shortly after the issuing of this consent award, the appellant brought two applications to the SCC seeking the annulment/revocation of both of the Bulgarian judgments. Those applications relied upon the consent award by the arbitrator of June 28, referring to Part III thereof, which it described as ‘*an integral part of the Arbitration Award*’. From there it is said that ‘*the decision rendered by the Arbitration court at the ICC contains recognition of unfavourable facts for Richard McDonald*’ which are said to involve ‘*the existence of civil fraud constituting grounds for annulment of loan agreements*’. It is said that on the basis of this evidence the court of first instance should uphold the appellant’s allegations of a direct link between the procedural loan agreements and the advertising contracts.
- 44.** The parties adduced conflicting expert affidavit evidence addressing the prospects of success enjoyed by this application. The respondent’s expert, Mr. Emanuilov, expressed the view that the application could not succeed as the arbitrator’s award did not constitute new circumstances or new evidence comprising, as it does, a judicial act. Moreover, he says that does not establish fraud of a kind envisaged by the relevant provision of Bulgarian law - Article 303 of the Bulgarian Civil Procedure Code - as it does not evidence fraud on which the judgment was established or in connection with the adjudication of the case. He also emphasises the statement by the arbitrator that the allegations made in the settlement were not being adopted by him, stating that there is ‘*no possibility*’ of the SCC adopting as new facts in evidence the allegations contained in the arbitral award having regard to that statement.

45. Mr. Yordanov disputes many of these propositions. He says that the consent of the parties to the award is a new fact for the purposes of the applicable provision of Bulgarian law, and that those applications are with merit and that the appellant will prevail in them. He emphasises that the court appointed receiver of MRP signed the settlement and thereby confirmed his understanding that this company was used by the respondent to commit the deceit and civil fraud alleged.

46. Mr. Yordanov referred in the course of his affidavit to the fact that the appellant had applied to the arbitrators in the second arbitration for orders preventing the respondent from enforcing the Bulgarian judgments (and orders for costs made in the Paris proceedings determined in April 2021) stating that the fact of that application also was a circumstance upon which the set aside applications were based. In fact, he appears to have been unaware that on 16 August 2021 that Arbitral Tribunal had issued its decision on that application, refusing it. The Arbitral Tribunal found that the appellant had failed for the purposes of that application to make out a *prima facie* case that the claimants could establish that the Tribunal had jurisdiction over the appellant or the respondent, and that he had failed to prove to the required standard such a case on the merits of his claim.¹

¹ Following the hearing of this appeal on October 22 2021 but before the delivery of the unapproved judgment in the matter on November 12, the Tribunal in the second arbitration issued (on October 26) a new procedural order, Procedural Order No. 3. This order (which was not drawn to the attention of this court prior to its delivering judgment) arose *inter alia* from the application of the respondent to bifurcate the arbitration and to hear first by way of preliminary issue an application for the determination of the Tribunal's jurisdiction. The Tribunal refused this application stating *inter alia* that this was not a case in which the Tribunal could form the view that it was dealing with a manifestly impecunious claimant pursuing an '*obviously hopeless case*' (at para. 303). The appellant applied to the court to reflect this finding in its final judgment. The court is happy to do this, while noting that the Tribunal also stated its agreement with the respondent's submission that there had been no substantive change since the Tribunal issued Procedural Order No. 2 which '*should cause the Tribunal to take a different view as to the question of its prima facie jurisdiction*' (at para. 402 to 404).

The jurisdiction of the Court to stay enforcement of the Bulgarian judgments

47. The Bulgarian law experts, however, are in agreement as to the following four matters.

First, the SCC has jurisdiction to entertain an application of the kind filed by the appellant and, if that application is successful, to set aside the decision of the Sofia City Court in whole or in part and return the case for a new hearing to the competent court. Second, that the making of such an application does not itself stay enforcement of the relevant judgment. Third, that the SCC has the power to grant such a stay before determining the application. Fourth, where such a stay is sought the appellant *must* furnish ‘*due security*’.

48. These four considerations are important in identifying and applying the legal basis for the application now made by the appellant for a stay on the enforcement of the Bulgarian order pending the outcome of the application to the SCC. That legal basis arises from the combined effect of two provisions of the Recast Regulation – Articles 44 and 51.² These distinguish between the *suspension* of the *enforcement proceedings* (addressed in Article 44) and the *staying* of the proceedings seeking *refusal of enforcement* (provided for in Article 51). It is important to stress the different role of

² Article 38 of the Recast Regulation allows the court or authority before which a judgment given in another Member State is invoked to ‘*suspend the proceedings*’ if ‘*the judgment is challenged in the Member State of origin*’. The provision appears in Chapter III Section 1 of the Regulation which addresses (Article 36) two scenarios – the right of an interested party to apply for a decision that there are no grounds for refusal of recognition of a judgment, and the situation in which the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition. It follows that the ‘*proceedings*’ with which Article 38 is concerned are those comprising either a pre-emptive application for a declaration that there are no grounds for refusal of recognition of a foreign judgment in accordance with Article 36 of the Regulation, or where an incidental question arises in an action which is dependent upon whether recognition should be refused (see Dickinson and Lein ‘*The Brussels I Regulation Recast*’ (Oxford, 2015) at para. 13.138 fn. 131). Clearly, the application the subject of this appeal is not within the scope of Article 38.

these provisions : *‘the Art. 51 stay only halts challenges (and related appeals) to the enforcement of the judgment in the Member State addressed: it does not stay the enforcement of the foreign judgment itself’* (Fitchen *‘Enforcement of civil and commercial judgments under the new Brussels Ia Regulation’* (2015) 26(4) ICCLR 145). Such a stay *on enforcement proceedings* can only be obtained under Article 44.

49. However, the provisions are closely linked insofar as the power to suspend *enforcement proceedings* (where there has been no suspension in the Member State of origin) appears only to arise where proceedings seeking refusal of enforcement have been instituted and are at the time of the making of an application for suspension, still extant. In this regard I should emphasise that my conclusions in relation to these provisions are necessarily somewhat tentative: the court was not addressed in any detail as to the legal basis for this aspect of the appellant’s application.

50. Article 44(1) is as follows:

‘In the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3, the court in the Member State addressed may, on the application of the person against whom enforcement is sought:

- (a) limit the enforcement proceedings to protective measures;*
- (b) make enforcement conditional on the provision of such security as it shall determine; or*
- (c) suspend, either wholly or in part, the enforcement proceedings’*

(Emphasis added)

51. The discretion is self-evidently broad, being limited only by the stipulation in Article 44(2) that if enforcement is suspended in the Member State of origin, the competent authority in the Member State addressed is *mandated* to suspend enforcement proceedings. However (a) as the first highlighted phrase makes clear, Article 44(1) assumes that there is a pending application for refusal of enforcement³ and (b) what is to be suspended pursuant to the provision is the ‘*enforcement proceedings*’. The former – the application for refusal of enforcement - is governed by Section 3 subsection 2 of Chapter III of the Regulation, comprising Articles 46 to 51 inclusive. Article 46 provides that the basis for refusal of enforcement is as iterated in Article 45, which includes the public policy ground relied upon in these proceedings. The latter – the enforcement proceedings which Article 45 allows to be suspended if there is a pending action for refusal of enforcement – is governed by the law of the Member State addressed.

52. But for the application to stay enforcement of the Bulgarian judgment, this appeal would – for the reasons I have explained above – have been dismissed. That being so, at least at this stage of the process, one would have to question whether there is any basis on which the court could now resort to the power of suspension of enforcement provided for by Article 44. Article 44 does not grant a free-standing power to arrest enforcement of a foreign judgment because there is an appeal pending in the Member State of origin. It prevents enforcement where the Member State of origin has

³ Recital 31 to the Recast Regulation reflects the assumption that Article 44 is directed to a situation in which an application for refusal of ‘*enforcement*’ is pending. It states:

‘Pending a challenge to the enforcement of a judgment, it should be possible for the courts in the Member State addressed, during the entire proceedings relating to such a challenge, including any appeal, to allow the enforcement to proceed subject to a limitation of the enforcement or to the provision of security’

suspended the judgment, but otherwise it appears to require that there be a proper pending challenge to enforcement on the grounds identified in Article 45 (or, at least arguably, where there is a dispute as to whether a judgment falls within the scope of the Regulation) before suspension is possible. The Recast Regulation, in other words, consigns the effect of a challenge to a judgment to which the Regulation applies to the law of the Member State of origin before whose courts that challenge has been brought *save* where a duly constituted challenge to enforcement is pending.

53. If that is wrong, and if this court could at this stage stay these proceedings thereby preserving the application to stay these proceedings so as to ground an application under Article 44(1), its only power so to do derives from Article 51. It states as follows:

*‘The court to which an application for refusal of enforcement is submitted ... may stay **the proceedings if an ordinary appeal** has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired’*

(Emphasis added).

54. In *Industrial Diamond Supplies v. Luigi Riva* Case 43/77 [1977] ECR I-2175, the issue was whether an appeal ‘*in Cassation*’ brought against a judgment of the Civil and Criminal Court in Turin to the Supreme court of Appeal in Rome was an ‘*ordinary appeal*’ for the purpose of Articles 30 and 38 of the Brussels Convention. Following a detailed analysis, the Advocate General concluded (a) that the concept of ‘*ordinary appeal*’ had to be given an autonomous meaning independent of the definition according to the law of the Member State concerned, (b) that the term ‘*ordinary appeal*’

assumed that the appeal must be lodged within a short period of time of the decision appealed against and (c) that it was an appeal which could lead to annulment or amendment of the judgment with effect for parties to the proceedings for enforcement. The Court of Justice similarly made it clear that the term ‘*ordinary appeal*’ as it appeared in Articles 30 and 38 had to be given an autonomous meaning within the framework of the Convention itself. It said that within those provisions:

‘any appeal which is such that it may result in the annulment or the amendment of the judgment which is the subject-matter of the procedure for recognition or enforcement according to the Convention and the lodging of which is bound, in the State in which the judgment was given, to a period which is laid down by the law and starts to run by virtue of that same judgment constitutes an ‘ordinary appeal which has been lodged or may be lodged against a foreign judgment’.

55. It was on this basis that in *Interdesco v. Nullifire* it was held that an application in accordance with the applicable French procedure to set aside a judgment (a ‘*recours en revision*’) was not an ordinary appeal for the purposes of Article 30 of the Brussels Convention because it was an application that could be brought at any time. The same is the case as regards the application under Article 303 of the Bulgarian Civil Procedure Code which, insofar as the evidence before this Court discloses, is not subject to any time limit and is analogous to the ‘*recours en revision*’ in that it allows an application at any stage to set aside a judgment as opposed to an appeal as ordinarily understood.

The exercise of the discretion to stay enforcement

56. If I am for whatever reason mistaken in this analysis and if, whether pursuant to Article 44 or otherwise, the Court has a broader discretion to grant this relief, I would not hesitate to refuse to do so. Any such exercise of discretion would have to strike a balance between two competing considerations. One arises from the interests of the appellant in not facing enforcement of a judgment which is ultimately unwound in the Member State that issued it, and from the undesirability of a situation in which there are conflicting judgments from Member State courts, one enforcing a judgment and the other vacating it. The other arises from the interests of the respondent in obtaining the fruits of the judgments he has obtained in Bulgaria and which have already been the subject of multiple appeals in that jurisdiction.

57. Both of these perspectives have to be judged in the light of the purpose of the Recast Regulation, and, in particular, the objective of ensuring the rapid enforcement and free circulation of judgments of Member State courts, the principle of mutual trust as between those courts and the fact that it is the courts of the Member State of origin before which issues on the merits between the parties are properly resolved. It follows from the foregoing that the courts of the Member State addressed should approach an application for such a stay attaching primacy to whether it is possible to obtain such an order in the Member State of origin. Where this is possible and such an application has either been made and refused, or not been made at all, the courts of the Member State addressed should (at least absent either a change in circumstances or an identified urgency) be most hesitant in making any order having the same effect. While decisions addressing the power of the courts of the Member State addressed to suspend proceedings under the Brussels Convention or Regulation 44/2001 must be approached with caution as the criteria are arguably different given the abolition of the procedure

of *exequatur* by the Recast Regulation, I think that this broadly reflects the analysis suggested in *Petereit v. Babcock International Ltd.* [1990] 1 WLR 350 (at p. 361).

58. Bearing these factors in mind I would exercise any discretion this court had against a stay on enforcement, for the following reasons.

59. First, it is clear that Bulgarian law provides a process for imposing a stay on the enforcement of the judgment pending the application before the SCC. The applicant has failed to invoke that procedure. Second, no credible explanation has been advanced for that failure. Third, insofar as it is suggested that such an application has not been brought because it would require the lodgement of security, no justification has been suggested for the refusal of the appellant to do this. Fourth, to the extent that the applications before the SCC are dependent upon the ruling of the Tribunal in the first arbitration, it is absolutely clear that the Tribunal did not (contrary to the statement to the SCC in the application to it) incorporate any of the admissions contained in Part III of the Settlement Agreement into its order. Fifth, to the extent that the applications before the SCC are dependent upon the application to the Tribunal in the second arbitration, that Tribunal has ruled that the appellant has failed to establish a *prima facie* case that the arbitration clause binds the appellant and respondent.⁴

60. Sixth and finally, while it is of course a matter for the Bulgarian courts as to whether they accede to an application to set aside a judgment on a basis that could have been, but was not, argued before the courts granting the judgment in question, insofar as this court has any discretion in the matter, I would attach considerable significance to the fact that no explanation of any kind has been provided to this court as to why the

⁴ See f.n. 1 *infra*.

allegations of fraud now deployed against the respondent were not raised before the Sofia City Court or Court of Appeal. To repeat the averment of Mr. Yordanov: '*as of my knowledge Mr. Gwyn-Jones has never made a claim of fraud against Mr. McDonald before any Bulgarian court.*' The suggestion that this only became possible because of the realisation of the facts recorded in Part III of the Settlement Agreement, does not withstand scrutiny in circumstances where at the same time it is contended that the findings of Deemster Gough in proceedings initiated in 2014 support the claim.

Conclusion

- 61.** Thus, and in conclusion, this appeal should be dismissed and the Order of Barr J. affirmed. The application of the respondent to dismiss the appeal *in limine* is refused, and the application of the appellant to admit further evidence granted. The application made for staying enforcement of the judgement pending the outcome of the application under Article 303 to the SCC is refused.
- 62.** It is my preliminary view that no order should be made in respect of the costs of either motion, but that the respondent should obtain his costs of this appeal. If either party disagrees with this preliminary view they should advise the Court of Appeal Office within ten days of the date of this judgment whereupon a further hearing will be convened to address the question of costs.
- 63.** Whelan J. and Barniville J. agree with this judgment and the Orders I propose.

