THE COURT OF APPEAL
CIVIL

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NO REDACTION NEEDED

Whelan J.
Costello J.
Murray J.

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLES 45, 46 AND 51 OF REGULATION 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

APPELLANT/APPLICANT

- AND –

RICHARD WILLIAM MCDONALD

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 23rd day of July 2021

The application

1. The appellant advances three grounds in support of his application for orders refusing recognition and/or enforcement of a judgment of the Sofia City Court, Republic of Bulgaria. First, he says that the proceedings on foot of which that judgment was obtained were never properly served upon him, and that he therefore was not aware of the action when the Bulgarian court decided to make the order in question. Second, he contends that enforcement of the judgment would be contrary to public policy because, he says, the claim underlying the judgment is so inter-connected with a fraud perpetrated upon him by the respondent that the courts of this jurisdiction should not give effect to it. Third, he asserts that the claims giving rise to the Bulgarian proceedings are the subject of an arbitration before the ICC Court of Arbitration ('ICC') and that this affords a separate basis in law for not recognising or enforcing the judgment. Each of these contentions was rejected by Meenan J. ([2020] IEHC 240).

The background

2. The facts relevant to the first of these propositions are few and to all intents and purposes undisputed, but the overall context relevant to the second and third questions is involved. While it will be necessary to return to some of the details later, the appellant's basic complaint is that in 2007 he was induced by fraudulent misrepresentation of the respondent to invest in a (then incomplete) shopping mall in Bulgaria known as Burgas Plaza. He says that on foot of those representations he caused an initial sum of €15M to be advanced for the acquisition, this being subsequently supplemented by further but smaller investments.

He says that he caused these advances to be made on foot of assurances by the respondent that he would invest €5M in the project, the agreement being that the interests would be held as to 60% by the appellant or his nominated company, and 40% by the respondent or his nominated corporate vehicle. As further funds were required, it is said that the parties agreed that they would be invested in the same proportion as the original advances.

3. The resulting joint venture was effected via a Maltese special purpose vehicle, Burgas Holdings Limited ('BHL'), the respective investments and interests of the appellant and the respondent in BHL being made and to be held in the case of the former by a Guernsey registered company Gort (Holdings) Limited ('Gort'), and in respect of the latter by an Isle of Man entity, Bridgewater (IOM) Ltd, later substituted by Balkan Holdings Limited ('Balkan') (later renamed MRP Brazil Limited). The appellant is the ultimate beneficial owner of Gort. He describes the respondent as a director and '*substantial shareholder'* in Balkan.

4. The appellant contends that the respondent failed to advance the monies as he had promised to do. The respondent, in reply, adopts the position that he never told the appellant that he would or had invested €5M of his own funds in the project, saying that he borrowed from the company that ultimately held the interest in Burgas Plaza which loan was then applied by it as part consideration against the sum payable. The appellant, in response, contends that these loans were a sham allowing the respondent to acquire an equity interest in Burgas Plaza which far exceeded his minimal contribution. He says that had the respondent not represented to him that he would and did make this investment, the appellant would not have recommended to the board of directors of Gort that it become involved in the project and would not have given in connection with it (as he did) a personal guarantee to Piraeus Bank (Bulgaria) in the amount of €20M. He says that project was not a success and the appellant

says that he has lost all or a substantial part of his investment (which, with interest, he most recently values at €26M). He also has an exposure on foot of the personal guarantee.

5. The appellant having in September 2014 become aware of the facts of this deceit (as he alleges it to be), a number of legal actions have followed. In November 2014 Gort obtained *ex parte* from the High Court of Justice of the Isle of Man a worldwide freezing order against the assets of Balkan and for reasons explained in a lengthy and detailed judgment of 22 February the following year, Deemster Gough J. refused an application by Balkan to discharge that order. That interim relief was granted on foot of an intended arbitration proceeding before the ICC, that arbitration commencing in December 2014 and being subsequently compromised on terms set out in an order of the Manx High Court the following October. The settlement followed the appointment of a receiver over the assets of Balkan when it failed to discharge 60% of the interim costs awarded against it in the Manx proceedings. The appellant has not recovered anything from Balkan. He says, accordingly, that he remains at a loss in respect of the funds of which – he claims – he was thus defrauded.

6. On January 28 2020 the appellant and Gort commenced a second ICC arbitration against the respondent and ten corporate entities. I will explain the basis for and claims in this second arbitration later. In August 2020 the ICC decided that it would permit the claimants to proceed only against the respondent and one of those entities. That order was appealed and the appeal was rejected by a Paris court in April 2021. The respondent challenges the jurisdiction of this arbitral tribunal to hear and determine the claim.

7. At the same time, the respondent initiated litigation against the appellant in Bulgaria. In those proceedings (‘*the first Bulgarian proceedings’*) the respondent sought to recover

monies due on foot of loan contracts entered into between the appellant and respondent on March 28 and April 26 2011. The appellant was represented in those proceedings, contending unsuccessfully that the loan contracts had to be seen as part of the various contractual arrangements entered into in relation to the Burgas Plaza project and that the obligation under the loan contracts was performed by other agreed means and/or should be the subject of some form of deduction or set off. On October 31 2017 the respondent obtained judgment in the first Bulgarian proceedings in the Sofia City Court in the sum of €425,926 together with costs and interest. This was confirmed by decision dated December 6 2018 of the Court of Appeal, Sofia Civil Division, the Bulgarian Supreme Court of Cassation ('SCC') thereafter (on October 10 2019) refusing to entertain a further appeal from that decision. The loan contract on foot of which the judgment the subject of this application was granted is identical to that on foot of which the judgment the subject of this application was obtained. All of the agreements were governed by Bulgarian law and were subject to the exclusive jurisdiction of the Bulgarian courts.

8. In a reserved judgment delivered in December 2020 ([2020] IEHC 689), Barr J. refused the appellant's application for orders refusing to enforce or recognise the judgment of the Sofia City Court in the first Bulgarian proceedings. The appellant had contended in those proceedings (as he does here) that enforcement of that judgment would be contrary to public policy and/or should be stayed pending the outcome of the second ICC arbitration. That ruling has been appealed to this court. The appeal is pending.

The judgment of November 11 2016

9. The judgment the subject of this appeal was obtained in a second set of proceedings instituted by the respondent against the appellant in Bulgaria, arising from a third alleged loan agreement pursuant to which, the respondent claimed, he had lent to the appellant a

sum of €110,700. The respondent said that that agreement was entered into on April 18 2011.

10. The evidence is that on November 19 2015 the documents initiating these proceedings were sent by courier to Ballynatray House in Youghal, County Cork. They were signed for by a '*N. O'Riordan'*. In his first affidavit grounding this application, the appellant describes this property as his '*home address'*. The appellant says that he was not present at his residence at this time, that he was not aware that legal documents were delivered, that he did not authorise '*N. O'Riordan'* to accept the documents and that he personally never received them. He says little about '*N. O'Riordan'*, stating neither whether a person of that name was at the property at the relevant time nor, if he was (the appellant describes the person as '*Mr. O'Riordan'*), whether he has sought or obtained any explanation from him as to the circumstances in which he signed for such correspondence and failed to advise the appellant of it. In his application to set aside the judgment before the Bulgarian Courts his lawyers assert that '*N. O'Riordan'* is not a member of the appellant's family, and is not a worker, employee or employer.

11. The Sofia City Court has certified that the document instituting the proceedings or an equivalent document was served on the appellant on 19 August 2016. The evidence before the High Court was to the following effect:

(i) On 19 August 2016 the document initiating the proceedings was sent to the appellant's home address by the office of the Courts Service in Cork. It was sent by registered post and was purportedly accepted at that address on that date. The appellant says he was not in Ireland on this date and he exhibits a number

of documents corroborating his assertion that he was outside the jurisdiction at that time. He avers that while he cannot dispute that '*someone may have accepted and signed for a registered letter'*, he says that he did not authorise anyone to do so and was unaware that any legal document had been delivered on this occasion. He says that he was '*not furnished'* with a copy of any letter or document of that nature. While he explains in his grounding affidavit that he instructs lawyers and accountants to look after his business affairs he says that he would not be expecting to receive any documentation of this kind at the property. He does not aver to taking any steps to ascertain who signed for that document or as to how it was signed for at his home but never received by him. In the proceedings brought to resist recognition or enforcement of the judgment delivered in the first Bulgarian proceedings, the appellant describes this property in Cork as his '*family home'*.

(ii) On November 11 2016, judgment was granted by the Sofia City Court in the amount of €119,522.24 (being the sum of €110,799 in respect of the amount claimed together with costs as measured). The appellant says he was not aware of the proceedings on that date and was, therefore, not represented before the court. He says that had he been aware of the proceedings he would have instructed Bulgarian lawyers to defend the claim (as he did the first Bulgarian proceedings).

(iii) On 26 June 2017, a notification of that judgment was sent to the appellant via the Courts Service. It too was sent by registered post and was signed for. The appellant says that he was not in Ireland on that date (again exhibiting various documents corroborating his claim that he was outside the jurisdiction at that

time). He tenders no evidence to explain how it came about that a registered letter was signed for at his home but he was not advised of it.

(iv) The appellant had two weeks from receipt of notice of this judgment to appeal it to the Sofia Court of Appeals. He never availed nor sought to avail of any such appeal when he says he did become aware of the judgment. No evidence has been adduced before this court as to whether an application could have been made to extend the time for such an appeal. That judgment was thereafter declared enforceable on 10 July 2017.

(v) On 30 October 2017, the respondent's solicitors wrote to the appellant at his address in Youghal. While he was not present in Ireland on that date, he was made aware of *this* correspondence. However, he says that he believed that this correspondence referred to another claim brought against him by the respondent in the Bulgarian courts (a reference to the first Bulgarian proceedings, which were then pending judgment). He passed the matter to his solicitors who wrote to the respondent's lawyers, obtaining a response on November 8 forwarding a copy of the judgment the subject of this appeal. This, the appellant says, was the first time he learnt of that judgement.

(vi) On 8 February 2018 the appellant applied to the SCC to set aside the judgment of the Sofia City Court on the grounds that he was not aware of the proceedings when the judgment was granted. That application was made not on the merits, but only on the basis that the appellant had not been duly served with the proceedings. It was neither alleged in this application that the judgment had been obtained by fraud nor that the underlying proceedings were captured by a binding arbitration clause. No evidence has been tendered to this court as to

whether the Bulgarian courts would have jurisdiction to entertain a claim to set aside a default judgment on any of these grounds.

(vii) On 3 April 2018, the respondent's solicitors wrote to the Under Sheriff for the County of Waterford enclosing a *fieri facias* they had obtained. On 24 April the Under Sheriff served the appellant with an application for payment of €119,620.21 on foot of the *fieri facias*.

(viii) On April 27, the SCC issued a decision that it had accepted jurisdiction to consider the appellant's application to set aside the judgment. The appellant thereafter advised the Under Sheriff of this decision. The appellant's application to have the judgment set aside was heard by the SCC on June 12 and on July 16 he applied to the High Court for an interim order restraining the respondent from causing any execution to occur on foot of the Bulgarian judgment. That interim order was granted by Cross J. on that date.

(ix) The SCC delivered its decision on the appellant's set aside application on 17 July. That judgment specifically addressed the issue of service, concluding that service in accordance with the law of this jurisdiction had been established by certificates under Article 10 of Regulation (EC) No. 1393/2007 and that there had been no allegations made nor evidence adduced as to what it termed '*procedural violations of the Irish law by the services done through the Court'*.

(x) On December 27 2018 a further appeal was lodged by the appellant with the SCC. That further appeal was determined on 25 January 2019, the appellant's application being refused. Another, further, purported appeal from that decision was rejected on 25 March 2019.

Regulation 1215/2012

12. The Recast Brussels I Regulation (Regulation (EU) No. 1215/2012) ('*the Recast Regulation'*) applies to civil and commercial matters and provides for uniform rules governing jurisdiction in disputes and the enforcement and recognition of judgments arising from such claims. It replaced Regulation (EC) No. 44/2001 ('*the Brussels I Regulation*'), continuing a regime originally introduced by the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and later Conventions ('*the Brussels Convention'*). To that end the Recast Regulation perpetuates the pre-existing system of mutual recognition and enforcement while removing the requirement under the Brussels I Regulation of *exequatur* by which a declaration of enforceability was required as a precondition to recognition in a receiving state. The intent – reflected in Recital 26 and Article 36 of the Recast Regulation – is that judgments given in one Member State should be recognised in all others without the need for any special procedure, those judgments being treated as if they had been given in the Member State addressed.

13. In facilitating the free circulation of judgments within the European Union the Recast Regulation and its predecessors thus sought to simplify the procedure for, and to reduce the number of grounds which operate to prevent, recognition and enforcement (Case 166/80 *Klomps v. Michel* [1981] ECR I-1593 at para. 7). Such exceptions now appear in Article 45(1) of the Recast Regulation and, when construed together with Article 46, enable refusal of both recognition and enforcement where *inter alia* (a) this is manifestly contrary to public policy in the receiving state and (b) a judgment has been obtained in default of appearance and there has been a failure to serve the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his defence.

14. Article 45(1) falls to be construed having regard to Article 45(3) and Article 52. The former makes it clear that '*the jurisdiction of the court of origin may not be reviewed'* proceeding to stress that '*[t]he test of public policy ... may not be applied to the rules relating to jurisdiction'*. Article 52 – with striking emphasis - precludes review by the court of the receiving state of the substance of the underlying judgment:

> '*Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed'*.

15. Three specific consequences of relevance to this appeal follow from the text of these provisions when read in the light of the underlying objectives of the Recast Regulation as a whole. First, the circumstances in which the receiving court will refuse to recognise and enforce a judgment to which the Recast Regulation applies will, by definition, be exceptional (Case C-414/92 *Solo Kleinmotoren Gmbh v. Boch* [1994] ECR I-2237 at para. 20). Second because the exceptions provided for in Article 45(1) may not be applied to review either the jurisdiction of the issuing court to hear the proceedings, nor the substance of the underlying decision in those proceedings, the court asked to recognise or enforce a judgment to which the Recast Regulation applies may not review the accuracy of the findings of law or fact made by the courts of the State of origin (Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-1935 at para. 36). Third, it logically follows from the rationale for the system of mutual recognition and enforcement that the onus is on the party seeking to avoid recognition and enforcement to establish the facts or circumstances which require the application of one or other of these exceptions.

The provisions governing service

16. Article 45(1)(b) provides that on the application of any interested party the recognition of a judgment shall be refused:

> '*where the judgment 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'*

17. The first of these conditions being obviously satisfied here, this case requires a consideration of the meaning and application of the remaining requirements of the provision. In this regard, it is important to observe that a defendant may be '*served*' with proceedings for the purposes of Article 45(1)(b) even though that service might be technically defective, if any defects are remedied and/or are not such as to infringe the rights of defence. This follows from the fact that Article 34 of the Brussels I Regulation (the predecessor to Article 45(1)(b) of the Recast Regulation) did not replicate the requirement that proceedings be '*duly served'* previously incorporated in Article 27 of the Brussels Convention (Case C-283/05 *ASML Nederland BV v. Semiconductor Industry Services GmbH*, [2006] ECR I-12041 at para. 18).

18. However, and conversely, even if there has been perfect '*service'*, Article 45(1)(b) will still enable the receiving court to refuse recognition or enforcement if in the particular circumstances of the case the rights of defence have been impeded by reason of defendant having insufficient time to prepare and organise his defence prior to the hearing of the proceeding (see Dickinson and Lein, '*The Brussels I Regulation Recast',* Oxford, 2015 at para. 13.326). The provision is thus properly understood as addressed to function rather

than form: the relevant inquiry is not whether there was or was not technically correct service, but whether in all of the circumstances the defendant has had sufficient notice of the proceedings so as to afford him a proper opportunity to present his response to the claim prior to the entry of judgment.

19. Council Regulation (EC) No. 1393/2007 on the service in member states of judicial and extra judicial documents in civil and commercial matters ('the Service Regulation') applies where certain judicial or extrajudicial documents have to be transmitted from one Member State to another for service there. It replaces an earlier instrument to like effect – '*the first Service Regulation'* (Council Regulation (EC) No. 1348/2000) - and requires each member state to designate transmitting agencies, receiving agencies and a central body responsible for assisting the transmitting agencies. As their description suggests, the transmitting and receiving agencies are (respectively) the bodies competent for the transmission of documents to be served in another Member State, and receipt of such documents from such a State.

20. The first Service Regulation was implemented in this jurisdiction by a number of provisions of the Rules of the Superior Courts and Circuit Court Rules, including S.I. No. 883/2004, Circuit Court Rules (Service in Member States of Judicial and Extra-Judicial Documents in Civil or Commercial Matters). These were subsequently amended by S.I No. 375/2009, Circuit Court Rules (Service in Member States of Judicial and Extra-Judicial Documents in Civil or Commercial Matters), the latter reflecting the coming into effect of the Service Regulation.

21. Order 14B Rule 8 of the Circuit Court Rules designates the mode of service of proceedings issued in another Member State and, at the times relevant to these proceedings and for the

purposes of the service in issue here, identified the County Registrar for the county of Cork as '*Receiving Agent'*. It states as follows:

'*When properly received, the County Registrar as Receiving Agency, shall serve the document or documents by registered post or by particular form requested by the Transmitting Agency, unless such a method is incompatible with Irish law, in accordance with Article 7 of the Regulation.*'

22. In so providing, Order 14B Rule 8 reflects Article 7(1) of the Service Regulation:

'*The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State'.*

23. The evidence before the High Court in this case included certificates of service as provided for in Article 10 of the Service Regulation and as issued from the Cork Courts Office confirming completion of service by registered post at Ballynatray House on August 19 2016 and June 26 2017. The appellant has advanced no basis on which this court could conclude other than that these referred respectively to the document initiating the proceedings or an equivalent document and the judgment of the Sofia City Court. This is what is in the certificate issued by that court pursuant to Article 53 of the Recast Regulation. Indeed, the appellant has said nothing from which the court could conclude that the

proceedings were not served in this way, focussing instead on the fact that they did not come to his attention.

24. Before looking to the appellant's substantive argument in the light of the foregoing, it is convenient to address two narrower issues he raises around the operation of these provisions. The first point arises from the text of Order 14B of the Circuit Court Rules. He says that at the time of the purported service of the proceedings service by registered post was not authorised by, and was thus '*incompatible with'*, Irish law and that, accordingly, the service by that means on August 19 2017 was ineffective. The argument is without foundation and is based upon a misreading of the provision. Order 14B Rule 8 is properly read as authorising (a) service by registered post or (b) service in a form requested by the transmitting agency, provided that the form so requested by that agency is not incompatible with Irish law. The service effected on the relevant date fell within the first of these alternatives and was thus effective. Indeed, absent a request from the Bulgarian transmitting agency (and there was none) the only method of permissible service was by registered post.

25. For similar reasons, an argument advanced by the appellant and based upon Order 9 Rule 2 of the Rules of the Superior Courts insofar as it required personal service of a summons on a defendant save where it appears by affidavit that the defendant is personally within the jurisdiction and that due and reasonable diligence has been exercised in endeavouring to effect such service, is also misconceived. Order 9 Rule 2 governs service of domestic legal proceedings. The method for serving proceedings initiated in another member state for the purposes of the Recast Regulation is prescribed by Order 14B Rule 8 of the Circuit Court Rules and the question here is therefore (a) whether the proceedings in issue here were served in accordance with the requirements of that provision and (b) if so, the relevance of

the appellant's claim notwithstanding that service, he was unaware of the proceedings when they came before the Sofia City Court.

26. Although not referred to by the parties, the provisions of Article 19(4) of the Service Regulation should also be noted. It provides:

> '*Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled:*
>
> *(a) the defendant,* ***without any fault on his part,*** *did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and*
>
> *(b) the defendant has disclosed a prima facie defence to the action on the merits.*
>
> *An application for relief may be filled only within a reasonable time after the defendant has knowledge of the judgment.*
>
> *Each member state shall make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment.'*

(Emphasis added)

Service: the substantive issue

27. The substantive argument advanced by the appellant in this regard is this. Where presented with evidence that the defendant never actually received the originating document and was outside the jurisdiction at the time of the purported service – he says – the court must do more than be satisfied that service was in compliance with Order 14 of the Circuit Court Rules. It is, it is said, in addition necessary for the court to satisfy itself that the proceedings were served in sufficient time and in such a way as to enable him to arrange for his defence. This, it is said, the High Court judge failed to do.

28. In addressing the issue of service, Meenan J. noted the judgment of the SCC. It specifically considered the issue of service and found it good, commenting that the set aside request did not state any allegations about procedural violations of Irish law by the service effected through the court, and that it did not identify any evidence in this respect. Meenan J. proceeded (at para. 13):

'It seems to me that the only conclusion which I can draw from this is that service was lawfully effected of the document described as being: "the document instituting the proceedings or an equivalent document". Service by registered post does not mean that it has to be personal service. As mentioned earlier in this judgment, there is a complete lack of any information as to what happened to the document after delivery had been accepted, or whether the applicant carried out any investigation or fully established the circumstances he claims led to a situation where he did not have sight of it. The document

was served nearly four months in advance of the day when judgment was given and there is no suggestion that such a period was not adequate for the preparation of a defence.'

29. While it is the case that the period available to the appellant was ten weeks rather than the four months referred to by the trial Judge, I can see no error of law here. Three points arise.

30. First, it is clear that when Article 45(1)(b) refers to '*service'* it does not (as was suggested in the course of the appellant's oral submissions) require *personal* service and, as stated in *Klomps v. Michel* at para. 19 (addressing Article 27.2 of the Brussels Convention) there is no requirement under the relevant provisions that a court in granting judgment against a defendant who has not appeared must have '*proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant'*. Instead, the provision must be construed having regard to the Service Regulation (see *Tavoulareas v. Tsavliris* [2006] EWCA Civ. 1772, [2007] 1 WLR 1573 at para. 8 - '*the word "service" in Article 34(2) of the Judgments Regulation must .. have the same meaning as in ... the Service Regulation*; *MD v. CT* [2014] EWHC 871 at para. 11) . This, indeed, follows from Article 28 of the Recast Regulation, which envisages that service effected on a defendant will comply with either the Service Regulation or, as the case may be, Article 15 of the 1965 Hague Service Convention.

31. Thus, service in accordance with the requirements of the law of the receiving state may be service for the purposes of Article 45(1)(b), and to that extent may include modes of service which may result in a defendant not actually becoming aware of the proceedings before judgment. This is particularly liable to occur where postal service is authorised (see *Lebek v. Domino* Case C-70/15 ECLI:EU:C:2016:524 and *British Seafood Ltd. v. Kruk* [2008] EWHC 1528) or indeed where the relevant legal system enables substituted service (such as

service by public notice). Here, as I have noted, there is in my view no issue but that the proceedings were in fact served as required by national law and, to that extent, Meenan J. was clearly correct in so concluding.

32. Where, as here, service has been properly effected (or indeed where it has not been effected but the defendant has nonetheless become aware of the proceedings), the court in determining whether the defendant has had sufficient time to arrange for his defence will normally simply gauge this from the time between that service and the date of the proceedings having regard to the period required to retain lawyers, obtain advice and prepare his or her defence. However, there will be exceptional cases in which even where the time was adequate (as it was here), the particular circumstances are such that the defendant may legitimately contend that the time or mode of service was such that he or she was not in a position to prepare their defence to the action.

33. The scope of the inquiry required in this situation was explained in *Klomps v. Michel* as follows (at para. 19):

> '*As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless, the court must consider whether, in a particular case, there are exceptional circumstances which warrant the conclusion that, although service was duly effected, it was, however, inadequate for the purpose of enabling the defendant to take steps to arrange for his defence and, accordingly, could not cause the time stipulated by Article 27, point 2, to begin to run'*

34. These '*exceptional circumstances'* afford the legal basis on which a party who has been properly served with proceedings under the Service Regulation but who was not in fact aware of the proceedings prior to the entry of judgment in the courts of another Member State, may seek to assert a claim for non-recognition or enforcement (Dicey and Morris, '*The Conflict of Laws'* (15th Ed. 2012) at para. 14-233). The court in *Klomps v. Michel* explained the relevant factors (at para. 20):

> '*In considering whether it is confronted with such a case the court in which enforcement is sought may take account of all the circumstances of the case in point, including the means employed for effective service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgment from being given in default. If, for example, the dispute concerns commercial relations and if the document which instituted the proceedings was served at an address at which the defendant carries on his business activities the mere fact that the defendant was absent at the time of service should not normally prevent him from arranging his defence, above all if the action necessary to avoid a judgment in default may be taken informally and even by a representative.'*

35. This leads to the second point. The determination of whether the defendant has in any given case been afforded his rights of defence requires a factual rather than a legal inquiry. This must be conducted on a case by case basis and independently of the procedural laws of either the issuing or receiving State. However, in undertaking that analysis the court is entitled to take account of whether the defendant was responsible for the failure of a duly served document to reach him. It is for this reason that in Case C-49/84 *Debaecker v. Bouwman* [1985] ECR 01779, the CJEU observed that the '*behaviour'* of a defendant was one matter

that could be assessed by the court in the Member State in which enforcement was sought and in the light of which it determined whether service was effected in sufficient time. The point was repeatedly made in *British Seafood v. Kruk* (see paras. 25, 27(c), 32 and 33) where service by post that was good under English law was found compliant with the relevant provisions of the Brussels I Regulation even though the appellant contended that it had never become aware of the proceedings : the appellant had been advised at an early stage that it was required to arrange for their defence to, or to challenge, a payment order made in the Polish courts if it wished to prevent it from being validated, and it ought to have made arrangements by which post sent to an old address was forwarded to its new registered office.

36. This is just common-sense: if a defendant who did not receive notice of proceedings that have been properly served in accordance with law wishes to contend that his or her right of defence was impaired so as to enable them to resist enforcement of a default judgment, it is incumbent on them to establish that their failure to become aware of the proceedings was not as a result of their own default. This, indeed, is why Article 19(4)(a) of the Service Regulation expressly imposes such a requirement as a precondition to a right to an appeal on the merits in proceedings in which a default judgment has been obtained ('*without any fault on his part'*).

37. Third it follows that in this case (as the passage I have cited above from the judgment of Meenan J. suggests) any consideration of whether the appellant's rights of defence were thus infringed by the entry of a default judgment in November 2016 on foot of proceedings (a) delivered to his home and signed for in November 2015, (b) served by registered post at the same address in August 2016 and (c) followed by a judgment appealable on its merits

which was also delivered to that same address by registered post, requires some explanation of how the appellant, notwithstanding the delivery of the proceedings in this way, never became aware of the documentation. In this case, at the very least, this would require evidence from which it could be deduced that the appellant's ignorance of the proceedings was due to circumstances that were both explained, and reasonable.

38. In this case, the appellant has failed:

(i) to explain whether he knows or has sought to ascertain who '*N. O'Riordain'* was, whether such a person received the documentation in November 2015 and why that documentation was never communicated to the appellant;

(ii) to explain what steps were taken by him to determine who had accepted the registered post delivered on August 19 2016 and (if he has ascertained who did accept it) has failed to state that and why that person did not advise him of the correspondence.

(iii) similarly, to identify what he did to ascertain who had accepted registered post delivered on July 17 2017 serving him with the judgment of the Sofia City Court (having regard to the fact that he had two weeks from that service to appeal against the decision on the merits).

(iv) to lay any evidence on the basis of which the court could conclude that the appellant had taken the reasonable and prudent steps necessary to ensure he was aware of correspondence and papers delivered to his home (and see in this regard *British Seafood Ltd. v. Kruk*).

39. In the absence of such evidence, the court cannot be satisfied that the appellant's asserted lack of knowledge of the proceedings was such as to engage or infringe his '*rights of defence'*. This conclusion reflects the concern expressed by Meenan J. at para. 13 of his judgment. Therefore, his case insofar as it was based upon Article 45(1)(b), must fail.

Service: the final condition of Article 45(1)(b)

40. Meenan J. noted the language expressing the final condition in Article 45(1)(b) – '*unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'* observing (at para. 6) that this '*could mean where, as in this case, the defendant/applicant did commence proceedings to challenge the judgment then this Court could not consider the matter of service'*.

41. To understand the operation of this part of the Article it is necessary to revisit the allocation of function in respect of default judgments as between the courts of the transmitting and receiving Member States. Where an application for such judgment is made, the Recast Regulation envisages in the first instance that the court of the Member State in which the proceedings are brought will, when determining whether to grant judgment in proceedings served in another Member State, satisfy itself that the proceedings have been served. This obligation arises from the combined effect of Article 28(3) of the Recast Regulation and Article 19(1) of the Service Regulation.

42. If the defendant in the State in which enforcement is sought challenges the recognition or enforcement of that judgment, he has the facility (subject to the terms of Article 45(1)(b)) to contest the fact of service and the adequacy of the opportunity afforded to him to prepare

his defence. In other words, the fact that the court issuing the judgment has satisfied itself when so doing that there has been good service does not affect the power of the court in the receiving state to examine service. This is referred to by the CJEU as '*a double review'* (see *ASML Nederland BV v. Semiconductor Industry Services GmbH* at para. 29) Accordingly, as it is put by Briggs (*Civil Jurisdiction and Judgments* (6th Ed. 2015) at para. 7.19), (a) the defendant must have been properly served according to the law of the adjudicating court but (b) it is thereafter for the court called upon to recognise the judgment to decide for itself whether the defendant was served in such a way, and in sufficient time, as to reasonably allow him to take steps to defend himself.

43. It is for this reason that Delaney and McGrath '*Civil Procedure'* (4th ed. 2018) (in a passage relied upon by the appellant) say that it is for the court in which recognition of the default judgment is sought to carry out an examination as to whether the defendant was served with the relevant proceedings in sufficient time to arrange for his defence (at para. 26-204) and it is in that same context that a similar statement (also relied upon by the appellant) appears in the judgment of the court in *Klomps v. Michel* (a case decided under the Brussels Convention and prior to the addition of what now appears as the final clause of Article 45(1)(b)).

44. However, the language in that final clause ('*unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'*) imports a distinct inquiry. It was introduced into the Brussels I Regulation with a view to reversing the effect of the decision of the CJEU in Case C-123/91 *Minalmet GmbH v. Brandeis Ltd.* [1992] ECR I-5661, in which it had been determined that a failure to undertake proceedings to challenge a procedural irregularity in service in the courts of the issuing state did not

preclude the issue being addressed in the courts of the receiving state. The effect of the clause is that a defendant who fails to avail of an appeal mechanism in the issuing State may not rely upon the exception in Article 45(1)(b). This has been more recently held to extend to a failure to exhaust the appeal provided for by Regulation 19 of the Service Regulation (*Lebek v. Domino*).

45. The theory underlying this is that if a party against whom a default judgment has been entered has the right to appeal against the decision, their rights to defence have not in fact been impaired thereby. This was explained by the CJEU in Case C-420/07 *Apostolides v. Orams* [2009] ECR I-03571 (at para. 78):

> '*... the rights of the defence that the Community legislature wished to safeguard by Article 34(2) of Regulation No. 44/2001 are respected where the defendant did in fact commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.'*

46. It follows that the effect of this clause is not merely that a failure to exhaust a right of appeal will preclude reliance upon Article 45(1)(b), it also means that where a defendant does invoke that right (as the appellant has done here) and fails in the court of the Member State of origin, he will ordinarily have no basis for relitigating the issue of service in the courts of the receiving state.

47. I say '*ordinarily'* because circumstances may arise in which the facility to apply in the jurisdiction of origin may not afford a sufficient implementation of the right of defence.

This may be the case if the defendant does not have sufficient information from the documentation furnished to him to exhaust that appeal, and it is possible that it would be the case if the court in the state of origin either could not, or failed to, address the requirement that the rights of defence of the defendant have not been infringed by the manner of service as imposed by the final clause of Article 45(1)(b). As it is explained by Dicey and Morris '*Conflict of Laws'* at para. 14-233 '*[a] defendant should not be penalised either unless the steps which were open to him to take were not, in effect, steeper and more difficult than would have been the case if he had been properly notified of the institution of the proceedings and had had an opportunity to participate'*.

48. This reflects the limits of a fundamental principle underlying the Recast Regulation, that is that individuals are required to use all the legal remedies made available by the law of the Member State of origin *save* where specific circumstances make it too difficult or impossible to avail of those remedies (Case C-559/14 *Meroni v. Recoletos Ltd.* ECLI:EU:C:2016:349 at para. 48). Similarly it may follow that where a defendant has instituted proceedings in the courts of the Member State of origin to review the judgment but that review either did not permit the full inquiry required by the final clause of Article 45(1)(b) (which requires a consideration not merely of service but of whether the rights of defence have been impaired because of the timing or manner of service), or has addressed the appeal in such a manner that the right to a fair hearing has been denied, the courts of the member state addressed may consider whether there has been service. Thus, the Advocate General in her opinion in *Apostolides v. Orams* (at para. 121) noted that the defendants in that case had the opportunity of commencing proceedings to challenge the default judgment and availed themselves of that opportunity. Therefore, she said, recognition and enforcement could not be refused on the basis of irregularities in service, at least '*where the*

right to a fair hearing is not undermined because of particular circumstances such as the organisation of the appeal proceedings'.

49. However, absent these exceptional circumstances if a defendant can and does bring such a challenge in the courts of the state of origin but fails in it, then the court of the receiving State does not have a role in revisiting for a third time the question of service. This was what happened in *Apostolides v. Orams* where the CJEU said (at para. 80):

> '*... the recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No. 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.'*

50. While this may require qualification where the conditions set out in Article 19(4) of the Service Regulation are in fact met (see *Lebek v. Domino* at para. 47), this only arises if the defendant establishes that his lack of awareness of the proceedings was not due to any fault on his part and, as I have observed, he has not on the facts established this here.

51. In his Petition to the SCC the appellant impleaded generally his rights of defence and of fair trial (at para. 8), urging that court that (a) the appellant never authorised any person to receive court communications on his behalf at Ballynatray House, (b) that he was not present in the jurisdiction when the documents were delivered there on November 19 2005, 19 August 2016 and 26 June 2018 and (c) that these documents were never received by the appellant. Issues were also raised to the effect that the first delivery did not constitute service

for the purposes of the Service Regulation, and around the detail of service of the other documents.

52. The SCC in its ruling records the circumstances under which Article 303(1) item 5 of the Bulgarian Civil Code enables the SCC to set aside what the court refers to as '*enforced vicious judgments'.* These include where the party has, as a consequence of violation of the court rules, been deprived of an opportunity to take part in a trial and where the party has not participated either personally or through an attorney due to some '*peculiar unexpected circumstances'.* The court in its ruling identified the appellant's complaint as being that he had not participated personally and was not represented because he had not been called to court in compliance with the requirements of the Service Regulation, stressing that under Bulgarian law it was a matter for the person seeking set aside to establish the facts on the basis of which their requests were grounded. It proceeded to find:

(i) It had been established that the three services of court papers had been delivered to an authorised person.

(ii) The set aside application did not state any allegations about procedural violations of Irish law by the service being effected through the court, nor did it give any evidence in that regard.

(iii) The allegation that the service by registered mail with a return slip under the provisions of Article 14 of the Service Regulation as not having been effected to a person who had turned his or her legal age and was at the address in the capacity of his family member or of someone hired by him for work were '*pointless*', as they were not supported by evidence.

(iv) Therefore, there was no violation of the relevant procedural rules ensuring the appellant's participation in the trial.

53. I would note that the decision of the SCC appears to be addressed only to an allegation of procedural violation, not the proposition that having regard to the fact that the appellant was not aware of the proceedings his rights of defence were, for that reason alone and irrespective of whether there had been non-compliance with the requirements as to service, impaired. However, this seems to reflect the application made to it (and indeed the grounds relied upon as recorded in correspondence from the appellant's Bulgarian lawyers of May 3 2018). While not the subject of any evidence or submission before this court, the final clause of the relevant provision relied upon by the Bulgarian Court as recited by it in its ruling ('*peculiar unexpected circumstances'*) would appear to have enabled such a contention to be advanced and, if it did not, presumably that court or another in that jurisdiction would have had the power conferred by Article 19(4) of the Service Regulation to which I have referred earlier. That being so, and in the absence of any contention to the effect that there was an exceptional circumstance that rendered the set aside procedure in Bulgaria inadequate for the purpose provided for in Article 45(1)(b), it would follow from the considerations I have outlined above that the High Court – for this reason – ought to have refused the appellant's application.

Public policy

54. The originating notice of motion issued by the appellant on 12 July 2018 invokes only Article 45(1)(b) of the Recast Regulation. There was no reference to any argument as to '*public policy'* in the appellant's affidavits. Insofar as I can ascertain, no attempt was ever

made to amend the application. However, no objection appears to have been taken to the issue being raised.

55. Article 45(1)(a) of the Regulation enables non-recognition of a judgment:

> '*if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed'*

56. The argument insofar as based upon this provision travels back to the circumstances giving rise to the Isle of Man proceedings and related ICC arbitration. As I have summarised them earlier the appellant, it is said, was the victim of a fraud carried out by the respondent as a result of which the appellant, as the ultimate owner of Gort, is at a loss of (as most recently asserted) €26M. The loan contract the subject of the Bulgarian proceedings was, it is contended, part of a series of transactions all of which arise out of and were enabled by the larger fraud and deceit I have earlier described. Therefore, the appellant says, the judgment enforcing that loan contract should not be recognised here as to do so is to further the fraud and in so doing to act contrary to Irish public policy.

57. It follows from the general description of the Recast Regulation I have outlined earlier that the public policy ground identified in Article 45(1)(a) must be interpreted strictly insofar as it is an obstacle to the attainment of one of the fundamental objectives of the Regulation, and may therefore be invoked only in exceptional cases (*Krombach v. Bamberski* at para. 21). The addition of the adverb '*manifestly'* to the language originally appearing in the equivalent provision in the Brussels Convention gives concrete expression to the expectation of a manifest conflict between the recognition or enforcement of the judgment

and public policy, and was intended to underscore the exceptional nature of the public policy ground with a view to improving the free movement of judgments (Case C-681/13 *Diageo Brands BV v. Simiramida-04* ECLI:EU:C:2015:137 at para. 42 per Advocate General Szpunar, cited in *Sporting Index Ltd. v. O'Shea* [2015] IEHC 407 at para. 12). It is thus engaged only by 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 fundamental within that legal order'* (*Krombach v. Bamberski* at para. 37, *Fairfield Sentry Ltd. (In Liquidation) v. Citco Bank Nederland NV* [2012] IEHC 81 at para. 106). The courts of the State in which enforcement is sought may not refuse to recognise or enforce that judgment on this basis solely 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 had it been seised of the dispute (*Apostolides v. Orams* at para. 58).

58. These principles, and the extent to which they require that a party resisting recognition and enforcement have sought to raise the question of fraud in the courts of the state from which the judgment issued, are addressed in the decision of the English High Court in *Interdesco SA v. Nullfire Ltd* [1992] 1 Lloyd's Rep. 180, upon which the appellant relies. There, the allegation was that one party had presented a deliberately false averment in a document in a nature of a pleading to a French Court. Specifically, it had asserted in the proceedings in question that a product manufactured by it and distributed pursuant to the agreement on foot of which the liability imposed by the foreign judgment arose was not defective, even though it had been party to testing which demonstrated the opposite. The obligation of recognition and enforcement of the judgment was governed by the Brussels Convention Article 27 of which provided for a public policy exception framed in terms similar to Article 45(1)(b) of the Regulation (although, as I have noted *not* including the adverb '*manifestly'*). After entry

of the judgment, the defendant had sought to have the judgment set aside by the Cour d'Appel on the basis *inter alia* that it had been procured by fraud.

59. Phillips J. declined to reverse a decision of the Master ordering registration of the judgment. Four issues of principle addressed in the decision are relevant here. First, the court concluded that an allegation of fraud *could* engage the public policy exception in the Convention. This is clearly correct, and indeed was widely understood at the time of adoption of the Brussels Convention (see para. 192 of the Schlosser Report). Second, however, he found that where the foreign court had ruled on the matters the defendant sought to raise when resisting enforcement, Articles 29 and 34 of the Convention (reflecting the provisions in respect of non-recognition or enforcement that prohibited review of the substance of a judgement now consolidated in Article 52 of the Recast Regulation) precluded the receiving court from reviewing the conclusion of the issuing court. As Phillips J. explained (at p. 187):

> '*... where the foreign Court has, in its judgment, ruled on precisely the matters that a defendant seeks to raise when challenging the judgment on the ground of fraud, the Convention precludes the Court from reviewing the conclusion of the foreign Court.'*

60. Third, where there was a remedy for an alleged fraud in obtaining the judgment in the jurisdiction in which it issued, the receiving court should ordinarily leave the defendant to pursue his remedy there. Fourth, he found that an English court should not normally entertain a challenge to a judgment to which the Convention applied where it would not permit a challenge to an English judgment.

61. Phillips J. explained (at p. 188):

'*... where registration of a Convention judgment is challenged on the ground that the foreign Court has been fraudulently deceived, the English Court should first consider whether a remedy lies in such a case in the foreign jurisdiction in question. If so, it will normally be appropriate to leave the defendant to pursue his remedy in that jurisdiction.'*

62. Much of what is said in *Interdesco v. Nullfire* also applies in this jurisdiction. Irish public policy leans against fraud to the extent that a domestic judgment that has been procured by fraud may be set aside (*Tassan Din v. Banco Ambrossiano SPA* [1991] 1 IR 569 at p. 582 per Murphy J.). The successful invocation of this jurisdiction requires proof of deliberate and purposeful dishonesty in the sense of a '*knowing and intentional deceit of the court'* (*Kenny v. Trinity College Dublin* [2008] IESC 18 at para. 54 per Fennelly J.). That fraud must be such as to have affected the judgment in a fundamental way (*id*. at para. 55). The jurisdiction will generally arise in circumstances in which it is established that a party deliberately adduced false evidence before the court, the falsity of the evidence being causative of the outcome. What is critical, however, is that the cause of action to set aside a judgment obtained by fraud is independent of the cause of action asserted in the earlier proceedings: '*[i]t relates to the conduct of the earlier proceedings, and not to the underlying dispute'* (*Takhar v. Gracefield Developments Ltd. and ors* [2019] UKSC 13 at para. 61 per Lord Sumption).

63. At common law, the Irish courts would also refuse to enforce a foreign judgment obtained by fraud (*Bussoleno v. Kelly* [2011] IEHC 220, [2012] 1 ILRM 81), and – controversially – this may have been so even where the fraud could have been, or indeed was, agitated before the foreign court (*Abouloff v. Oppenheimer & Company* (1882) 10 QBD 295). It must follow that in this jurisdiction (as in the United Kingdom) the '*public policy'* ground for the

refusal of the recognition or enforcement of a judgment now expressed in Article 45(1)(a) of the Recast Regulation will also be engaged - at least in theory - where it is established that a judgment obtained in a member state to which the recast Regulation applies was obtained in this way. However – as acknowledged by Phillips J. in *Interdesco v. Nullfire* - the conditions under which recognition of such a judgment will be refused on this basis should be no different from those applicable to a domestic 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 affected the impugned decision in a fundamental way (*Desmond v. Moriarty* [2018] IESC 34 at para. 84 per McKechnie J.).

64. This is not a case in which the appellant can plausibly say that the judgment in issue was *procured* by fraud in the sense referred to by Phillips J. in *Interdesco* or in the domestic case law. While he asserts that the fraud and deceit carried out by the respondent in inducing him to enter into certain commercial transactions '*shows that the judgment herein were* [sic.] *obtained by an underlying fraud'*, he points to no evidence tendered by the respondent which was false – in fact he appears to admit the fact of the loan agreement and the making of an advance thereunder, and suggests no basis on which the formal legal conditions for the recovery of that debt as provided for under the law of Bulgaria were not met. Instead, his point is that the loan should not have been enforced because it was connected with a fraud, that (in a sense which is not particularly clear from the papers) the loan contract was itself procured by fraudulent misrepresentation and that the evidence of this connection (comprising the material before, and conclusions of, the Manx High Court) is sufficiently strong to justify the court in refusing to recognise or to enforce a judgment in circumstances

in which but for the defendant's allegedly fraudulent scheme, the opportunity for the contract now sought to be enforced would not have arisen.

65. This is elaborated upon at different points in his evidence and submissions. Specifically, he says, the respondent arranged for a contract between a firm set up by him to purchase all advertising spaces in the Burgas shopping centre for resale to advertisers at a profit. Then, he alleges, the respondent fraudulently induced the appellant to consent to this contract by indicating that he would provide a series of loans to the appellant which would then be repaid through a share of the advertising profits generated by the company that had taken this space. Effectively, the appellant says, the respondent agreed to advance the value of the appellant's share of these anticipated profits *via* the loans, and their repayment in this manner. The appellant's French lawyer in an affidavit sworn for the purposes of the application heard by Barr J. says: '*but for the fraudulent conduct of Mr. McDonald to induce Henry Gwyn-Jones from entering into a series of contracts and actions to acquire the shares of Burgas Plaza AD such subsequent contracts including the advertising contract and these related loan contracts would not have been entered into by Henry Gwyn Jones'.* That contract it is said, was thus only entered into because of the fraudulent misrepresentations of the respondent, and those representations thus induced the appellant to enter into the contract the subject matter of the Bulgarian judgment. So, the Irish courts should – the appellant says – refuse enforcement or recognition of the foreign judgment on public policy grounds, Irish public policy leaning strongly against '*fraud'*.

66. None of this, in my view, presents a ground coming within Article 45(1)(a). No authority in this jurisdiction or, for that matter, anywhere else has been identified in which a foreign judgment has been aside on any analogous basis: the existing case law both at common law

and under the Recast Regulation and its predecessors have all involved foreign judgments *procured* by fraud in the sense I have explained. This is, it seems to me, unsurprising: the claim that a default judgment arising in a context in which the defendant could have raised a defence of fraudulent misrepresentation or deceit cannot be enforced because that defence is one of '*fraud'* is quite different from the proposition that the foreign court was deceived into granting the judgment. The first is an aspect of the merits of the claim, the second concerns a contamination of the process by which that claim was determined.

67. The conditions under which delictual causes of action for deceit or contractual claims for misrepresentation may arise, or according to which enforcement of an agreement will be vitiated for fraud or for that matter in which a claim on foot of a debt may be set off against a claim for fraudulent misrepresentation are matters to be determined in any given case by the court properly having jurisdiction over the claim and in accordance with the applicable law governing the relevant legal relations between the parties. In this case there has been no adjudication in the court of origin of whether, on the merits, the deceit alleged by the appellant does disclose a credible defence to the respondent's claim for judgment. However, it must follow – were the appellant entitled to rely in this application upon the '*fraud'* of which he complains as a public policy preclusion to recognition and enforcement – that he would also be able to invoke the same public policy had the Bulgarian court adjudicated on the claim and determined the issue against him. This, indeed, is the basis on which the appellant resists enforcement of the judgment in the first Bulgarian proceedings.

68. However, to acquiesce in that argument would involve the Irish courts in '*correcting'* the judgment of the Bulgarian court in precisely the manner prohibited by Article 52. It would, in effect, involve the Irish court in determining that irrespective of the provisions of

Bulgarian law, if that law did not provide for and the courts of that jurisdiction did not apply a defence based upon deceit to the claim for enforcement of the loan agreement in accordance with the conditions that would be applied to such a claim by Irish law, Irish public policy prevents the recognition of any consequent judgment. On its face, Article 52 renders any such claim inadmissible.

69. The decision in *Sporting Index Ltd. v. O'Shea*, relied upon by the appellant, shows that there will be cases in which the dividing line between the review of the substance of a foreign judgment and application of a public policy preclusion on enforcement of it may be finely drawn. There, the High Court refused to enforce a judgment obtained in England because the underlying debt arose from a gambling transaction. Irish law (s. 36(2) of the Gaming and Lotteries Act 1956) prevents enforcement of any betting contracts. English law (which appears to have governed the transaction) seemingly did not. Mac Eochaidh J. (correctly) rejected a contention based upon the judgment of Dunne J. in *EMO Oil v. Mulligan* [2011] IEHC 552 to the effect that the public policy exception in the Brussels I Regulation was limited to cases involving a breach of fundamental rights. From there, he refused to enforce the judgment. The prohibition on the enforcement of gambling debts was a rule of law regarded as essential in the legal order of the State and, he held, refusing to enforce the judgment as such involved not a *review* of the substance of the foreign court order (also prohibited by that Regulation – Articles 26 and 45(2)), but an inquiry as to what the substance of the proceedings was, and the determination (having regard to that substance) of whether the underlying liability was captured by the statutory prohibition.

70. *Sporting Index Ltd. v. O'Shea* assumes that Member States are entitled to identify particular categories of clearly defined transactions which are so objectionable to their own policy that

they will not merely refuse to enforce them within their domestic law but may also refuse to permit their enforcement if concluded pursuant to the law of another Member State and found valid by the courts of that other State in accordance with that law. The commentaries suggest other similar examples – arrangements for the commission of a criminal offence or intended to circumvent a trade embargo imposed under the law of the Member State addressed or acts facilitating the payment of a bribe (see Dickinson and Lein '*The Brussels I Regulation Recast'* Oxford, 2015 at para. 13.296). In all of these cases the public policy is specific and capable of clear and narrow expression.

71. The difficulty facing the appellant in harnessing these examples to this case lies in the generality with which the ground upon which he relies is expressed, and the certainty with which one can conclude that there is actually any clear public policy engaged by the facts. Thus, throughout, the appellant asserts a public policy mandate based upon '*fraud'*. Irish law, of course, implements rules prohibiting fraud and penalising those who engage in it *via* a variety of legal principles operative in different contexts. These operate to criminalise fraud in particular circumstances, to render fraudulent conduct a tortious wrong in particular circumstances, and to allow the unravelling of transactions contaminated by fraud under specific conditions: *'fraus omnia corrumpit'*. The types of conduct, the circumstances in which they arise, the conditions under which the relevant rules operate and the consequences attached to them vary depending on the context and the rule properly applied to it. However, I have previously noted the exceptional nature of the power conferred by Article 45(1)(a), and it follows from this that its application in any given case must be clearly defined and tailored. That was the case with the prohibition addressed in *Sporting Index*. It is also the case where a judgment is obtained by fraud in the sense in which I have defined it earlier.

72. It is not the case with the rule necessarily contended for by the appellant here. To succeed in this aspect of his claim in these proceedings the appellant must say that whatever the principles governing the vitiation of contracts for fraud may be in Bulgarian law (this being the law chosen by the parties to govern their relations), if that law and the consequent order of a Bulgarian court enforcing it did not meet the requirements imposed by Irish public policy (presumably as embodied in the Irish law of deceit or allied contractual claims or defences), the order could not be enforced. This would not represent the enforcement of Irish public policy as reflected in statute law over a limited and defined category of transaction, but the extra-territorial application of Irish law of deceit and allied contractual claims or defences across a broad and indeterminate terrain irrespective of the law governing the relevant arrangements. It is impossible to see how such a principle can be deduced from a generalised claim that '*fraud'* is contrary to public policy. Without proper explanation and definition, this is simply too vague a criterion to constitute a valid head of public policy for the purposes of the provision. When defined as I have sought to do – the negation of a judgment that does not conform with the Irish law of deceit or allied contractual claims or defences – the very formulation shows it to be inconsistent with Article 52.

73. The extent to which this is so leads to a final point which, I think, demonstrates the force of this conclusion. It would appear that – for whatever reason – the arguments advanced to the City Court of Sofia in the first Bulgarian proceedings did not extend to an argument based on fraud *per se*. Instead, the claim appears to have been that the loan contracts were linked to a lease agreement in Bulgaria between other corporate entities and that having regard to performance under those agreements there had been a form of discharge of the debt. The Sofia Court of Appeals determined that there was, as a matter of Bulgarian law, insufficient

connection between the lease agreements and the loans for the latter to be affected by the former. The court said that it:

> '*could not establish the relationship between the legal relationships arising under the loan contract entered into between the natural persons Richard William McDonald and Henry Alexander Brompton Gwyn Jones and the legal relationships arising from the lease contract concluded between two commercial companies'*

74. The evidential basis relied upon by the appellant in this application may well establish that there is a *prima facie* case of fraudulent representation underlying the original investment, but it is conspicuously vague when it comes to how – exactly – the loan document sued upon by the defendant was itself procured by fraud. In this regard he avers to no relevant facts himself referring instead to the second ICC reference to arbitration which, he says, shows '*that it was that same deceit, as part of a series of complex transactions, all interrelated, which led the Applicant to enter into the contracts the subject matter of the Bulgarian Judgment which the Respondent seeks to enforce.'* Elsewhere in his submission he says that the respondent's deceit induced him personally to enter into an advertising contract with a company owned and controlled by the respondent and that it was one of these advertising contracts which forms the basis for the judgment. All of this seems to assume that the making of a fraudulent misrepresentation in the course of one of a number of related transactions vitiates all of them. There may well be circumstances in which this is so, but it is simply not possible on facts as presented here to determine whether – even on a *prima facie* basis – this is the case here. This particular aspect of the appellant's claim of fraud was not addressed in any form in the Manx decision, which forms the centrepiece of the appellant's evidence on this aspect of his application. On the basis of the evidence alone, accordingly, it is difficult to see how the appellant can succeed in this aspect of his argument.

As one English judge has recently put it, if there is room for serious argument as to whether public policy was contravened in a given case, it is most improbable that it could be said that enforcement was '*manifestly'* contrary to public policy (*The London Steamship Mutual Insurance Association Ltd. v. The Kingdom of Spain M/T 'Prestige'* [2021] EWHC 1247 at para. 49 per Butcher J.).

The ICC arbitration issue

75. The first ICC arbitration - initiated in December 2014 - arose from the provisions of a Memorandum of Understanding dated 1 December 2007 referred to as the '*Gort-Bridgecorp'* MOU which provided that any dispute arising from or connected with the Joint Venture Agreement would be settled in accordance with the Rules of Arbitration of the ICC, the governing law being that of England and Wales. The request for arbitration filed on January 28 2020 asserts that the appellant and respondent are '*the true parties to the arbitration clauses'*, each implementing their agreement with Gort and *inter alia* Balkan respectively.

76. That request states as follows:

> '*34. Mr. McDonald as executive director of Burgas Plaza … arranged for a contract between a firm set up by Mr. McDonald where he was the director to purchase all advertising spaces in the Burgas shopping centre owned by Burgas Plaza AD for resale to proper advertisers at a profit.*
>
> *35. Mr. McDonald fraudulently induced Mr. Gwyn Jones to consent to this contract by indicating that Mr. McDonald would provide a series of limited personal loans to*

Mr. Gwyn Jones that would then be repaid through share of advertising profits generated in the advertising company through this contract with [Burgas Plaza AD]. Mr. McDonald 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.

36. Mr. McDonald however failed to respect the terms of that agreement and instead has failed to pay Mr. Gwyn Jones the value of the advertising profits as agreed.

37. Mr. McDonald has sought to abusively commence legal proceedings in Bulgaria claiming those loans were not repaid by Mr. Gwyn Jones and is currently seeking to enforce in Ireland court judgments obtained by Mr. McDonald against Mr. Gwyn Jones last year ….

41. In addition by Mr. MacDonald continuing to financially benefit from that undisclosed advertising contract with Burgas Plaza AD that he sought to dissipate assets that should have been frozen and available to [Gort]. In effect, Mr. MacDonald has financially benefitted by not paying required sums pursuant to the advertising company income and is abusively attempting to avoid payment of the loans by Mr. Gwyn-Jones through the agreed offset and further abusing Mr. Gwyn-Jones by seeking to enforce the underlying loan agreements that advanced advertising income tue to Mr. Gwyn Jones'.

77. The request proceeds to seek a determination preventing the enforcement of '*any claims against claimants in any jurisdiction, including Ireland'* and seeks an order requiring the

withdrawal by the respondent of '*all applications for enforcement of any judgments in any jurisdiction against [the appellant] related directly or indirectly to this dispute'.* Thus, the appellant says, this court should not enforce the Bulgarian judgment in circumstances in which the issue of whether it was obtained as the result of a fraud is before the ICC arbitration.

78. The precise legal basis for this claim is variously expressed in the appellant's submissions as arising from '*the presence of the ICC Arbitration'*, '*the potential to do serious injustice to the Appellant, if the Respondent were allowed to enforce this judgment in Ireland'* and '*the public policy ground in Article 45(1) and Article 46.'* In that regard, the appellant stresses that the respondent's financial position is weaker than the appellant's and expresses concern that if he prevails in the arbitration and the judgment has been enforced, he may not be in a position to obtain repayment of those monies from the respondent. No authority of any kind is referred to by the appellant – or for that matter by the respondent – as to how under the Recast Regulation the court should respond to a default judgment, and which it is claimed was precluded by an arbitration agreement and, in particular whether such a claim goes to the jurisdiction of the court of origin (Article 45(3)). In fact, the issue appears to have been first raised in an affidavit of the appellant's solicitor delivered on the eve of the hearing in the High Court.

79. While noting that there is some authority questioning whether a judgment issued contrary to a contractual agreement to arbitrate engages the public policy exception (see *National Navigation Co v. Endesa Generacion SA (The Wadi Sur)* [2009] EWCA Civ. 1397, [2010] 1 Lloyds Rep. 193) having regard to the evidence adduced and submissions made in this application I will restrict myself to the following. The judgment the subject of this application arises from a loan agreement which contains no arbitration clause of any kind,

instead investing the Bulgarian courts with exclusive jurisdiction over the suit. Clauses 6 and 7 provide:

> '*Any disputes for the performance of this Agreement, including all disputes relating to or arising out of its interpretation, validity, default or termination will be resolved by written agreement between the parties, in case of failing for reaching an agreement, the dispute shall be referred to the competent Bulgarian court.*
>
> *All matters not covered by the provisions of this Loan contract shall be governed by applicable provisions of the civil and commercial law of the Republic of Bulgaria.'*

80. While the arbitration to which the appellant refers in his submissions did not commence until January 2020, it is difficult to see how he can ground any objection to the enforcement of the judgment without establishing that the claim itself is captured by a binding arbitration agreement. Irrespective of whether such a contention falls within the concept of public policy in Article 45(1)(a), I cannot on the evidence before me so conclude. The *only* evidence before the court germane to that question is the loan agreement itself. In the absence of some reasoned explanation as to how those provisions are superseded by the provisions on foot of which the ICC arbitration is to take place (and there is none) this court must give effect to the agreements before it.

81. The suggestion is further made in the notice of appeal that enforcement of the judgment should be stayed pending the outcome of the ICC arbitration. I can find no warrant for an order to that effect in the Recast Regulation, and none has been identified in the appellant's submissions. If the appellant wishes to seek a remedy in respect of the proceeds of any

enforcement action on foot of the Bulgarian judgment, he will have to seek it from the relevant arbitral tribunal.

Conclusion

82. In these circumstances the appellant must fail in his contention that Meenan J. erred in the judgment delivered and order made by him. I would affirm both. The appellant having thus been entirely unsuccessful in this appeal, the costs of the respondent should follow. This is my preliminary view. If the appellant wishes to contest it he should advise the Court of Appeal office within seven days of the date of this judgment, whereupon the court will fix a further hearing on the question of costs.

83. Costello J. and Whelan J. agree with this judgment and the order I propose.