Neutral Citation: [2017] IEHC 159

THE HIGH COURT

[2015 No. 43 FJ]

IN THE MATTER OF THE JURISDICTION OF COURTS AND ENFORCEMENT OF JUDGMENTS ACT 2012

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLES 33, 38 AND 47 OF COUNCIL REGULATION NO. 44/2001/EC

AND

PURSUANT TO ORDER 42A OF THE RULES OF THE SUPERIOR COURTS 1986 (AS AMENDED)

AND

IN THE MATTER OF A JUDGMENT OF THE TRIBUNAL OF VARESE OF THE REPUBLIC OF ITALY ENTITLED CASE NO. 3367/2001

BETWEEN

HAIER EUROPE TRADING SRL

PLAINTIFF/RESPONDENT

AND

MARES ASSOCIATES LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Baker delivered on the 23rd day of February, 2017.

1. On 26th January, 2015 the Tribunal of Varese of the Republic of Italy ("the Italian Court") in an application to strike out proceedings gave judgment against Mares Associates Ltd. ("Mares") in favour of Haier Europe Trading SRL ("HET"), and awarded HET costs in the amount of €50,000.00, plus general expenses, VAT and the social security contributions required by law. The total amount of the costs award was €72,956.00 including VAT.

2. Mares appealed the decision of the Italian Court on 4th June, 2015 but did not seek a stay on the award of costs. It is in respect of the judgment for costs that this application arises.

3. Mares is a company registered in Ireland and HET applied to the Master of the High Court for an order that the judgment of the Italian Court be recognised and enforced in accordance with Articles 33, 38 and 47 of Council Regulation 44/2001/EC, the Brussels Regulation. The Regulations of 2012 are not applicable. On 16th July, 2015 the Master made an order under the Brussels Regulation and pursuant to Order 42A of the Rules of the Superior Courts 1986, as amended, the relevant parts being as follows:

> "1. There be an Order of recognition of the Judgment and Order of the Tribunal of Varese of the Republic of Italy of 26 January 2015 in accordance with Article 33 of Council Regulation 44/2001/EC
>
> 2. There be a Declaration that the said Judgment and Order is enforceable in this jurisdiction in all its terms pursuant to Article 38 of Council Regulation EC 44/2001
>
> 3. There be an Order restraining the Defendant from disposing of or otherwise dealing with its assets up to a maximum sum of €72,956.00 until further order of this Court
>
> 4. There be an Order directing the Defendant to disclose to the Plaintiff the identity and location of all financial institutions with which the Defendant holds accounts
>
> 5. There be an Order directing the Defendant to provide the Plaintiff with a list of all assets held by the Defendant

4. The Master also gave directions as to service, that a copy of his order, together with an enforcement notice be served on Mares by registered post, and that execution of the order would not issue until the time for an appeal had expired.

5. The three protective measures were enforceable immediately upon the making of the order of the Master. Mares has lodged an appeal to the substantive parts of the order.

6. This judgment is given in the application by Mares for a stay on the enforcement of the Italian costs award pending an appeal to the Italian court, listed for hearing, or at least by way of a first listing, in the spring of 2017. The application is made primarily because Mares frankly says that there are not sufficient funds in the company to discharge the order, and it fears that a petition to wind up the company would have the consequential effect that it was no longer able to pursue the appeal of the substantive matter in the Italian courts.

The proceedings in Italy

7. The Italian proceedings arise from a contractual relationship between Mares and various companies in the Haier Group, including HET, to provide agency services. Mares argues that in breach of contract substantial fees by way of commission were not paid by HET and the claim is made for a sum of €15 million.

8. The substantive proceedings had a complex history in the Italian courts, and the initial order of the Tribunal of Varese made on 20th March, 2008 dismissed the claim of Mares for want of jurisdiction. That decision was reversed on 24th May, 2011 by the Court of Appeal of Milan. The Supreme Court of Cassation rejected the appeal of HET on 6th May, 2013 and the proceedings were then remitted for hearing to the Tribunal of Varese.

9. On 26th January, 2015 the Tribunal of Varese dismissed the claim of Mares and awarded costs to HET. Mares have appealed the order of the Tribunal of Varese.

10. The application to the Master to recognise and enforce the Italian order was made on 16th July, 2015, after the lodgement on 4th June, 2015 of the appeal against the Italian judgment, but before its first hearing in Italy on 10th November, 2015.

The Brussels Regulation
11. The Brussels Regulation furthers the policy of judicial cooperation in civil matters and the free movement of judgments between Member States.

12. Article 33(1) provides for the recognition in Member States of judgments given in another Member State. The proposition is broadly stated:

> "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

13. Certain saver provisions are provided, in that a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. (Article 34)

14. Enforcement is under Article 38(1), and it too is stated as a broad proposition:

> "A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there."

15. Thus enforcement is not automatic, the judgment is not automatically recognised and self-executing in each Member State, and application to the enforcing State must be made.

16. Article 40 provides that the procedure for the making of an application for enforcement shall be governed by the law in the enforcing Member State.

17. The Court of Justice of the European Union ("CJEU") in Draka NK Cables Ltd, AB Sandvik international, VO Sembodja BV and Parc Healthcare International Limited v Omnipol Ltd. Case C-167/08, [2009] ECR 1-03477, on a reference for a preliminary ruling concerning the interpretation of Article 43(1) of the Brussels Regulation held that the principle of legal certainty requires in all Member States "a uniform application of the legal concepts and legal classifications developed by the Court". The Court described the principle objective of the Convention (the Brussels Convention 1968, or Brussels (I) the precursor of the Brussels Regulation) as an attempt to simplify the enforcement process which was as a result required to be "very summary, simple and rapid" (para. 26), while acknowledging that the person against whom an enforcement order was made had to be given an opportunity to bring an appeal.

18. The CJEU described the procedures envisaged by the Regulation as an "autonomous and complete system, independent of the legal systems of the Contracting States, including the matter of appeals". The rules relating to enforcement and recognition are to be interpreted strictly.

Irish rules of recognition and enforcement
19. The Irish procedure for the making of an order of recognition and enforcement is provided by O.42A of the Rules of the Superior Courts, S.I. 307 of 2013. Application is to the Master of the High Court.

20. Order 42A, r.11 provides for the service of the notice of the making of an order of recognition and enforcement together with the relevant order.

21. The service of two documents is envisaged, and O.42A, r.12 provides that the notice of the making of the relevant order, the "notice of enforcement", shall state:

> "(a) full particulars of the judgment or decision declared to be enforceable and the relevant order;
>
> (b) the name and address of the party making the application and his address for service;
>
> (c) the protective measures (if any) granted in respect of the property of the person against whom judgment was given;
>
> (d) the right of the person against whom the relevant order was made to appeal to the High Court against the relevant order, and
>
> (e) the period within which an appeal against the relevant order may be made."

22. Order 42A, r.13 provides for an appeal against the order of the Master, and execution may not issue on a judgment until the expiration of the one month period from the date of service allowed for an appeal by Article 43(5) of the Brussels Regulation. No provision exists for the extension of time.

23. In *Rhatigan v. Textiles y Confecciones Europas S.A.* [1990] 1 I.R. 126, the Supreme Court identified the three principles which govern the procedure for enforcement under the then relevant Convention of 1968, which is in materially similar terms to the Brussels Regulation. At p. 135 of his judgment Griffin J. identified three principles:

> "1. The law of the state in which enforcement is sought governs the entire procedure for making the application for enforcement, of which the furnishing by the applicant of an address for service of process forms part;
>
> 2. At the latest, notice must be given no later than the date when the decision authorising enforcement is served;
>
> 3. The sanction for failure to comply with the requirements of art. 33 must be determined by the law of the state in which enforcement is sought."

24. This dicta firmly places the procedure for making an application for recognition and enforcement within the enforcing court, the Court of Ireland, and is consistent with the express provisions of Article 40 of the Brussels Regulation.

Applications to the Irish court
25. The Master made an order of recognition and enforcement together with the ancillary protective measures on the 16th July, 2015,

but his order incorrectly described the particulars of the judgment the subject matter thereof. The error arose because the documents lodged by HET in support of the application included a figure for VAT which it is accepted was wrongly included. The error was noted and following correspondence between the solicitors for the respective parties, application was made *ex parte* to Eagar J. on 18th September, 2015 who amended the order to reflect the correct figure, €59,800.00.

26. Thereafter, the order of Eagar J. and a notice of enforcement containing the correct figures were served on Mares.

The present application: application for a stay
27. Article 46 of the Brussels Regulation provides for an application for a stay to the court having seisin of an appeal from the order of recognition and enforcement. It is this jurisdiction that is invoked by Mares.

28. Mares argues that it will suffer an overwhelming prejudice should a stay not be granted on the enforcement of the order of the Italian Court, and that the balance of justice is served by the fact that HET has sufficient safeguards in place by virtue of the making of the protective orders by the Master. It says that absent a stay the probability is that HET would present a petition for the winding up of Mares, and that such an order would have the catastrophic and overwhelming consequence that it would not be possible for Mares to pursue its appeal in Italy. It is argued that the comity of courts requires that an Irish court would sufficiently respect the appellate process in the Italian Court by granting a stay so that the appeal may proceed to a hearing.

29. Certain matters relating to the Italian process have arisen for consideration in the hearing. It is clear that Mares is out of time to now lodge an application for a stay in the Italian Court. HET suggests that particular note should be taken of the fact that an appeal of the order for costs was not lodged in Italy, nor was there an application for a stay and makes the argument that the true import of the order sought would be to subvert the Italian judgment and to fail to recognise and duly enforce it in accordance with the Brussels Regulation.

30. The evidence of Mares is that at the time it lodged an appeal to the substantive decision of the Tribunal at Varese it had not foreseen that HET would seek exequatur in Ireland in regards to the costs award and that it now could find itself without a remedy in either jurisdiction.

Is there a valid appeal?
31. HET makes a preliminary procedural objection that the application must fail for being out of time. Mares accepts that an application for a stay is contingent upon there being an extant and valid notice of appeal under Article 43 of the Regulation and O.42A, r.13.

32. HET argues that the applicant is out of time, and that time began to run when service of the notice of enforcement and the order was effected on 21st August, 2015. Mares argues that time did not commence to run until the order of Eagar J., and the second amended and correct notice of enforcement was served on 25th September, 2015, and that it is within time.

33. That argument requires me to consider the nature of the jurisdiction exercised by Eagar J. when he made the order *ex parte* on 18th September, 2015. The order was expressed to be made pursuant to O.28, r.11, the so-called "slip rule". HET argues that the legal principles governing the making of an order under the slip rule envisage that the amending order is to be read as subsidiary and ancillary to the primary order which it amends, and that the amendment relates back to the primary order. Because of this, it is said time cannot be said to re start for an appeal following the making of an order under the slip rule.

Authorities regarding the slip rule
34. In *Lough Swilly Shell Fish Growers Co-Operative Society Limited & Anor. v. Bradley and Anor.* [2013] IESC 16, [2013] 1 I.R. 27 the Supreme Court made observation with regard to the running of time for the making of an appeal when a substantive order has been amended under the slip rule or in the inherent jurisdiction of the court. O'Donnell J. said the following:

> "24. It is clear in my view, that a party cannot seek to avoid the consequences of the time limits for the appeal of orders of the High Court by the simple stratagem of seeking to speak to the minutes of the order and then if a further order is obtained, to appeal that order. Logically, the only appeal which could be brought against the order made on the 1st of June 2011 is an appeal against the Court's amendment of the order and possibly an appeal against the Court's decision not to reopen the argument (insomuch as that was truly raised)."

35. That judgment is authority *inter alia* for the proposition that the time limits for the bringing of an appeal are reckoned from the date of a primary order as a matter of domestic law.

36. In an earlier case McMahon J., in *Doran & Anor v. District Judge Reilly & Ors.* [2010] IEHC 266, considered the power of correction under the slip rule:

> "21. When the judge is exercising a power to correct an error under the slip rule, in my view, the judge cannot be said to be acting judicially in any real sense of the word. It is doubtful if the judge can even be described, in many such instances, as making any "decision", as the word is used in this context. Rather he/she is, when the error is brought to his/her attention, making a correction. To suggest otherwise, when he/she is alerted to the error, is in my view, forcing the natural meaning of the word to accommodate an artificial argument. Can one seriously say that a judge who made an order sentencing someone to thirty days imprisonment, and which is transposed incorrectly in the order to "three days", is making a "decision" of any kind, when he makes the correction? I think not. The decision has already been made; the correction is just that, a correction."

37. These authorities show that an order made under the slip rule is to be treated as subsidiary and ancillary to the primary order, and the making of such a subsidiary or ancillary order does not restart time for the making of an appeal.

38. Also relevant is the judgment of Carroll J. in *Paper Properties Ltd. v. Power Corporation Plc & Anor.* [1996] 1 I.L.R.M. 475 which concerns an order for enforcement of a foreign judgment under O. 42A of the Rules, where a typographical error was found in the order. The typographical error was the reference to "defendants" in its plural form, an error regarding on whom service was to be effected. Carroll J. directed the plaintiff to apply to the Master under the slip rule and said that "if it is a typographical error, that is the end of that issue". She therefore recognised that were the matter to be accepted by the Master as coming within the slip rule that service of the order of recognition and enforcement was effective.

39. Carroll J. expressly left over the possibility that service would not have been correctly effected if indeed the Master did intend service on both defendants. The reporter's addendum to the judgment in the Irish Law Reports Monthly reports that the Master did

make an order requiring service on one defendant only, as a consequence of which, when the matter came back before Carroll J. she dismissed the appeal, she already having found that service on the first defendant was effective.

40. The judgment of Carroll J. is not authority for the proposition that service would have been sufficient had the order under the slip rule made any amendment to the substantive particulars in that order. She did not need to engage the question of the material correctness of the documents served and did not therefore answer the question posed in the present case, whether the materially correct judgment was served.

41. In *Abama & Ors v. GAMA Construction Ireland Ltd & Anor* [2011] IEHC 308 Dunne J. was considering *inter alia* the question of whether the Brussels Regulation had any application to the proceedings, or whether the domestic doctrine of forum non conveniens fell for consideration. She quoted with approval a dicta in the judgment of Clarke J. in *Goshawk Dedicated Limited & Ors v. Life Receivables Ireland Limited* [2008] IEHC 90, that "traditional common law jurisdiction has, at a minimum, been substantially eroded by the provisions of the Brussels Convention and the Brussels Regulation". Both *Abama & Ors v. GAMA Construction Ireland Ltd* & Anor and *Goshawk Dedicated Limited & Ors v. Life Receivables Ireland Limited* concerned the question of whether an Irish court would assume jurisdiction, or whether the Brussels Regulation had conclusively determined the question of jurisdiction, and Dunne J. held that the basis of jurisdiction provided under the Regulation could not be ousted by a failure of procedures laid down by national law. This judgment points to the supremacy of Community law in the matter of recognition and enforcement.

42. The decision of Dunne J. was upheld by the Court of Appeal in July, 2015; [2015] IECA 179.

Discussion on the time issue

43. The question whether Mares is out of time to appeal, and the operative date from which time ran for the making of an appeal from the order of the Master, involves a consideration of two matters: First, whether the rule and principle providing for the amendment of a typographical or clerical error in an order under the slip rule can be regarded as relevant to the autonomous and independent regime for the recognition and enforcement of European judgments under the Regulation. Second, whether the requirement for service of the order of recognition and the notice of enforcement requires that I conclude that the proofs required for service of the order and the notice of enforcement were not met until the order made by Eagar J. and the corrected notice of enforcement was served.

44. The starting point must be the proposition advanced by Carroll J. in *Paper Properties Ltd. v. Power Corporation Plc & Anor.*, namely that in order to properly effect service of a notice for the purposes of the Brussels Regulation the "full particulars" of the relevant part of the judgment were required to be served.

45. Carroll J. took the view that neither the notice of enforcement nor the order of the Master was defective, as she considered that the matters omitted were not relevant. In this regard she said the following:

> "It seems to me that full particulars of the part of the judgment sought to be enforced is what is required, not a lot of detail which has no relevance."

46. The facts omitted were that a notice of appeal to the domestic court had been lodged by the defendants, and had been dismissed. She considered that the absence of a mention of the fact that £7,000 security for costs was to be paid out for the solicitors for the plaintiff, and that leave to appeal to the House of Lords had been refused, were not relevant elements of the order or the part of the order or judgment sought to be enforced.

47. Mares argues that until the figures are corrected and until those correct figures are contained in the documents served, that no proper service in accordance with the Brussels Regulation has been effected. HET argues that the error in the order of the Master was typographical only, was corrected by administrative action which related back to the date of the original order and that Mares could not have believed nor did in fact believe that what was recognised and intended to be enforced was the order for costs plus VAT, and that the error was de minimis. It argues that the judgment, the nature of the judgment and the content of the judgment were clearly express and identifiable from the order of the Master, and that the substance and nature of the order of the Master was not changed by the order of Eagar J.

48. That the time limit for appeals under Article 36 is strict and mandatory is clear from the judgment of the European Court in *Hoffman v. Krieg* Case 145/86, [1988] ECR 645 . The Court was clear that legal remedies under national law are precluded insofar as they seek to challenge or call into question the "effectiveness of the enforcement scheme" provided by the Convention. At para. 29 the following general proposition is stated:

> "However, the application, for the purposes of the execution of a judgment, of the procedural rules of the State in which enforcement is sought may not impair the effectiveness of the scheme of the Convention as regards enforcement orders."

49. In *Verdoliva v. J.M. Van der Hoeven BV & Ors*. Case C-3/05, the CJEU, on a preliminary ruling concerning the interpretation of Article 36 of the Brussels Convention as amended, answered the question of whether in cases of failure of, or defects in, service of a decision authorising enforcement, the mere fact that the party against whom enforcement is sought had notice of the decision by whatever means was sufficient to cause time to run for the purposes of the Convention.

50. The Court answered the question in the negative and noted that service performed a dual function: it fixes the time for appeal, and in that regard noted the strict and mandatory time limits for appeal provided in Article 36 of the Regulation, and serves to protect the rights of the party against whom enforcement is sought. In that context the Court considered that the procedural requirements for service "are more stringent than those applicable to transmission of that same decision to the applicant". Therefore failure of, or defect in, service had to be construed strictly and no subjective knowledge of the person against whom enforcement was sought could come to be considered as a factor in considering whether service was complete.

51. In *Barnaby (London) Ltd v. Mullen* [1997] 2 I.L.R.M. 341 the Supreme Court adopted the analysis of another judgment of the European Court in *Isabelle Lancray S.A. v. Peters und Sickert KG* Case C-305/88, [1990] ECR 1-2725, which was followed by the CJEU in *Verdoliva v. J. M. Van der Hoeven BV*, regarding the dual purpose of service, and that service fixed the "*terminus a quo*" for the purposes of any appeal by the party affected. The Court refused to deem service good.

52. The relevant factors which must be seen as the guiding principles in the scheme of the Brussels Regulation are as follows:

> (a) Time limits for appeal are strict and mandatory.
>
> (b) The purpose of service is to start time running for an appeal, and to ensure fairness of process to the person against

whom a judgment is enforced. Therefore the requirement of service is to be construed strictly.

(c) The test of whether the material elements of a judgment were contained in the documents served is objective. Imputed or actual knowledge of the person against whom enforcement is sought is not a relevant factor

(d) Any rule or practice in a domestic court which impairs the effectiveness of the scheme is to be precluded.

53. The matter for determination in the present application is one governed by principles of European law regarding service, and the strict construction of time limits and service, and the question of whether there was due service of the order is one that must be determined in accordance with the principles of European and not domestic law. That question can be formulated thus: When were the operative instruments served on Mares?

54. The judgments of McMahon J. in *Doran & Anor v. District Judge Reilly & Ors*. and of the Supreme Court in *Lough Swilly Shell Fish Growers Co-Operative Society Limited & Anor. v. Bradley and Anor.* are not of assistance in determining when due service was effected for the purposes of the Regulation. Those decisions are authority regarding the characterisation under domestic law of a slip rule correction. The question is that identified by Carroll J. in *Paper Properties Ltd. v. Power Corporation Plc & Anor*., namely what matters were required to be particularised in the notice of enforcement. I adopt the analysis of Carroll J., and consider that the notice required to be given for the purposes of the process requires sufficient and correct particulars of the judgment of which enforcement is sought. The jurisprudence relating to the slip rule deals with another question, namely the relation back of the rectification to the date of the primary order, and does not deal with the question which must be considered in the context of European law, namely when is sufficient notice served from which the date of appeal is to be reckoned. It is only when notice is given of the material elements of the order in respect of which enforcement is sought a time can be said to run.

Decision on time question

55. The order as originally served incorrectly recorded the amount of the judgment, and could not be said to be an order which properly reflected the decision of the Italian court. While as a matter of domestic law an application to amend the order could be made by administrative step under the slip rule, and as a matter of domestic law the order made under the slip rule relates back to the original order and is to be read in conjunction with it, the processes and procedures relating to enforcement and the question of whether service was "due service" is a matter of European law, and is to be construed strictly and objectively.

56. The running of time in EU law for the purpose of an appeal requires that the substance of the relevant domestic order be served. The essential and material elements, "full particulars of the part of the judgment sought to be enforced is what is required, not a lot of detail which has no relevance", to borrow the words of Carroll J., must be contained in the documents served. The knowledge of the receiver, whether actual or imputed is irrelevant. The documents must be a materially complete record of the judgment.

57. It is difficult to conceive of a more essential element than the amount of a money judgment. The incorrect figures were contained in the first notice of enforcement and corrected thereafter. It matters not, in my view, whether the correction was made under the slip rule or by consent, or indeed as an administrative step, as the correction related to a material element of the judgment sought to be enforced.

58. It is conceded by HET that it did require to make the application under the slip rule in order to bring its proofs into compliance with the Brussels Regulation, and therefore as a matter of procedural correctness and European law, what were required to be served were the order of recognition and the notice of enforcement in a corrected form. While it is correct to say as a matter of Irish law that an amendment made under the slip rule is deemed to be part of the original or primary order to which it is an amendment, or as described by Laffoy J. in *Kelly v. Dickson* [2012] IEHC 522, "an inevitable consequence", and while as a consequence the operative date of the recognition order is July, 2015, the enforcement notice served in July was not a notice which fully recorded the "relevant order".

59. Having regard to the strict and mandatory nature of the time limits, I consider that as a matter of construction the Brussels Regulation must be interpreted as requiring that the relevant notices contain sufficient and correct particulars of the judgments sought to be enforced, and just as it is important that the time limits be clear and certain, it is also important that the judgments sought to be enforced be clear and correct.

60. I consider then that the first question in this application must be answered in favour of Mares, namely that it is within time to lodge an appeal of the making of the enforcement order.

The application for a stay

61. I turn now to consider the application for a stay on the primary order of enforcement. Mares argues that a stay is necessary to do justice between the parties and that special circumstances exist which warrant the granting of a stay pending the hearing of the appeal in the Italian court. It is not contested that Mares has no assets and it is said that the commercial activity of Mares was directed entirely to its agency work on behalf of HET, and the HET group of companies, and that the impecuniosity from which it now suffers derives from the matters complained of in the proceedings.

62. Mares says that the prejudice is overwhelming as the effect of refusing a stay would be that the company would be wound up and therefore unable to prosecute the appeal in the substantive action in Italy.

63. HET argues that I should take account of the fact that Mares did not lodge any appeal to the award of costs in Italy. The affidavits of Italian laws adduced before me suggest that it is not possible for a dissatisfied litigant to lodge an appeal of a costs order except on the day of the making of the order, and that costs always follow the event.

64. I cannot on an application grounded wholly on affidavit resolve a number of factual disputes that have arisen in the course of this case, namely whether a stay is likely to have been granted in Italy, or whether Mares could have applied for a stay in Italy following service on it of the notice of enforcement in Ireland on 21st August, 2015.

65. It is clear from Article 45 of the Brussels Regulation that the foreign judgment may not be reviewed as to its substance by the enforcing court, but Community law does recognise the jurisdiction in the enforcing court to grant a stay in Article 46 of the Regulation, so the granting of a stay in itself is not an impermissible departure from the State's obligations under the Regulation.

66. The provisions of domestic law providing for an application for a stay on enforcement are contained in O.42A, r.13 of the Rules of the Superior Courts, by which the High Court shall have power to stay "on such terms as it sees fit". Because application for a stay under Article 46 of the Regulation may not engage the domestic court in considering the merits of the appeal in a foreign jurisdiction,

the factors which might justify a stay are not those identified in domestic case law.

67. In *SISRO v. Ampersand Software B.V*. Case C-432/93, [1995] EUECJ C-432/93, Advocate General Léger gave an opinion that an applicant could seek a stay of proceedings pending an appeal even though he was unable to rely on any of the grounds for refusal of recognition and enforcement of the following judgment.

68. The purpose of granting a jurisdiction to the enforcing court to grant a stay is to protect the judgment debtor against any loss which might result should the judgment be reversed on appeal in the country of origin. Two judgments of the High Court of England and Wales have been relied on by Mares. In *Petereit v. Babcock International Holdings Ltd*. [1991] 1 W.L.R. 350, Anthony Diamond Q.C. sitting as a deputy High Court judge stated a general proposition that:

> "a judgment obtained in a contracting state was to be regarded as prima facie enforceable and the enforcing court should not automatically impose a stay merely because there was a pending appeal; that the purpose of articles 30 and 38 of Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 was to protect the defendant's position in an appropriate case by ensuring that, if the appeal succeeded, the defendant would be able to enforce the appeal court's order and would not be deprived of the fruits of his success because of a previous unconditional enforcement of the judgment."

69. In a more recent judgment of *Banco Nacional de Comercio Exterior S.N.C. v. Empresa de Telecomunicaciones de Cuba S.A.* [2007] E.W.H.C. 2322 (Comm), Tomlinson J. considered a case where an application for a stay had been made in the country of origin but had been rejected and held as follows:

> "13. It seems to me that in all the circumstances I should respect the fully reasoned decision of the court seised of the case. The Turin Court of Appeals has as I see it in the exercise of its discretion addressed the very same question of prejudice to the defendant in the event of a successful appeal after unconditional enforcement of the judgment as would an English court in similar circumstances regard as properly informing its exercise of discretion."

70. This case law suggests that the correct approach to an application for a stay is not that I would review the basis on which an appeal might be successful in Italy, but the question of prejudice and the balance of justice. The specific prejudice identified is that, absent a stay, as a matter of probability Mares will be subject to a petition to wind up.

71. In considering the balance of prejudice, the fact that protective measures were put in place and are not the subject matter of an application for a stay, means that the interests of HET are protected, and a factor that must weigh in my discretion is that in the substantive proceedings Mares seeks damages in the sum of €15 million, and the judgment in respect of which enforcement is sought is €58,900.

72. Further, I cannot ignore the fact that enforcement is now sought in Ireland prior to the determination of the appeal in Italy, and that the judgment sought to be enforced is a costs order. It would in my view be highly prejudicial to Mares, and entirely fatal to the continuation of its proceedings in Italy were the consequence of the enforcement to result in the winding up of Mares before it could properly prosecute its appeal in Italy.

73. I reject the suggestion that as a general rule the grant of a stay is an impermissible departure from the autonomous system of recognition and enforcement in Community law, as provision for the granting of a stay is express in Article 46.1 of the Brussels Regulation. The principle of free movement of judgments must be balanced against an equally important principle, namely that access to the courts be protected. Because the uncontroverted evidence is that the inevitable consequence of the refusal to grant a stay is that Mares will be wound up on account of its failure to discharge the costs award, the stark reality is that the refusal of the stay will have a knock-on effect on the continuation of the Italian proceedings by Mares and therefore on the access that Mares enjoys to the courts in a Member State.

Decision

74. For these reasons I determine as follows:

> (i) The appeal of Mares is not out of time
>
> (ii) Mares therefore has a valid appeal and may therefore seek a stay of the enforcement of the judgment of the Italian court pending further order.
>
> (iii) The balance of justice and a proportionate response to the respective prejudice likely to be suffered by each of the parties suggests that it is appropriate that a stay be granted on the enforcement of the judgment. Because it is not clear when the Italian court will conclude the process now before it, it is appropriate that I grant a stay on the enforcement of the judgment pending further order, and that there be liberty to apply in the light of any further order made by the court in Italy.