

## 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 EUROPEAN TRADING SRL

PLAINTIFF/RESPONDENT

AND

MARES ASSOCIATES LIMITED

DEFENDANT/APPELLANT

**JUDGMENT of Ms. Justice Baker delivered on the 1st day of June, 2017.**

1. This judgment is supplemental to a judgment delivered by me on the 23rd of February, 2017 [2017] IEHC 159, and deals with the form of the order and the question of costs, which unusually has given rise to an amount of disagreement between the parties.
2. The Master of the High Court made an order recognising a judgment of an Italian court and orders for the enforcement of the judgment in this jurisdiction. By the principal judgment I determined that enforcement be stayed pending disposal of the appeal of the respondent, Mares, against an order of the Italian court.
3. At para. 74 of that judgment I said as follows:
 

"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."
4. The principal judgment was given pursuant to Article 46(1) of Regulation 44/2001, by which the enforcing court has a power to stay proceedings if an ordinary appeal has been lodged in the country of origin:
 

"The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin...." (Emphasis added)
5. The order which the Irish court, as the receiving court, makes therefore is an order by which it stays "the proceedings", and such a stay may be granted only if an appeal has been lodged in the Member State of origin (Italy). The precondition was satisfied.
6. Looked at through this prism it seems that the appropriate order to be made under Article 46(1) is an order staying any further enforcement "proceedings" in Ireland. Logically it would seem that the stay on enforcement would continue until the appeal of the order sought to be enforced has been concluded in Italy. At that point, the order in regard to which the enforcement declaration was made will be spent.
7. A number of judgments of the Court of England and Wales have been relied upon by the parties in support of their submissions as to the correct approach that I should now take to the form of the order and to the costs of the application before me.
8. In *Banco Nacional de Comercio Exterior S.N.C. v. Empresa de Telecomunicaciones de Cuba S.A.* [2007] EWHC 2322 Tomlinson J. held that the correct relief under Article 46(1) of the Regulation was a stay of the further prosecution of an appeal against recognition and enforcement of the foreign judgment, and that such a stay must logically be determined before the court determined the substance of the appeal. Tomlinson J. was invited to reconsider this position in *DHL GBS (UK) Ltd. v. Fallimento Finmatica* [2009] EWHC 291 but considered that he was not required to do so on the facts of the case.
9. Tomlinson J. was giving a decision in an appeal of an order made ex parte by which a decision of a court of Turin be registered as judgment of the English court. An appeal against the judgment of the Turin court was pending and Tomlinson J. noted that although the judgment debtor had sought a stay of enforcement of the Turin judgment under Article 46(1):
 

"... what is in fact sought is a stay of these appeal proceedings i.e. the appeal against recognition and registration of the Turin judgment as a judgment of the English Court. Whilst the appeal is pending, enforcement is precluded, although not conservatory measures – see Article 47.3. In fact, Irwin J. granted a domestic freezing order against ETECSA at the same as directing registration and thus recognition of the judgment. In view of the nature of the jurisdiction conferred upon the court by Article 46.1 the application for a stay of these proceedings, i.e. of this appeal, should logically be considered first before any consideration of the question of whether the order of Irwin J. as to registration should be upheld or set aside. If the appeal is first resolved, there will remain no proceedings capable of being stayed."
10. However, a different approach was taken by Coulson J. in *British Seafood Ltd. v. Kruk and Kruk* [2008] EWHC 1528 and it is that

difference in approach that gives rise to the disagreement between the parties as to the correct approach that I should take to the question.

11. Coulson J. was considering the effect of the reactivation in Poland of civil proceedings where it was accepted he would have no alternative but to stay enforcement proceedings in England. The approach he took was to deal with the appeal from the order of the Master of the English court by which registration for enforcement for that judgment was directed.

12. The initial argument before the court was that the appeal from the order of recognition should be adjourned pending the conclusion of the civil proceedings in Poland. He rejected that approach and dealt with the substantive appeal, viz. there was a ground on which he might set aside the registration of the judgment in England.

13. Coulson J. then dealt with the matter on the basis that the question before him, whether he should stay enforcement pending the conclusion of the litigation in Poland which included an ongoing criminal investigation, and he concluded that he should, taking the view with regard to the civil appeal which was not yet concluded in Poland "it would again be quite wrong to make an order other than to stay these proceedings" until the appeal in Poland had been resolved.

14. No reference was made to the judgment of Tomlinson J. in *Banco Nacional de Comercio Exterior S.N.C. v. Empresa de Telecomunicaciones de Cuba S.A.*

15. However, Tomlinson J. considered the import of the judgment when he later revisited the question in *DHL GBS (UK) Limited v. Fallimento Finmatica S.P.A.* Counsel argued that he had been wrong in *Banco Nacional de Comercio Exterior S.N.C. v. Empresa de Telecomunicaciones de Cuba S.A.* to assume that the court had power to stay an appeal against recognition. Tomlinson J. considered due to the fact that a stay was not granted that he did not need to decide the point but did take a view that the judgment creditor "should be allowed to know sooner rather than later whether the English court would afford recognition to a judgment of a court of a Member State obtained in breach of an arbitration provision".

### Discussion

16. I consider that the approach for which Haier contends is incorrect because of the nature of the application in respect of which I delivered judgment. The application was for a stay on the enforcement of the Italian order pending an appeal to the Italian court. It was conducted in two stages. The first question determined was whether the order of enforcement made by the Master of the High Court had to stand because the appeal by Mares was out of time. I held that it was not and accordingly, that a valid appeal existed.

17. I then went on to deal with the application for a stay under Article 46 of the Regulations, i.e. an application for a stay on the order of recognition and enforcement.

18. The power vested in the court by Article 46(1) is discretionary, described by Anthony Diamond Q.C. sitting as a deputy judge of the English High Court in *Petereit v. Babcock International Holdings Limited* [1991] WLR 350 as a:

"...general and unfettered discretion under the Convention to stay the enforcement proceedings if an appeal is pending in the State in which the judgment was obtained."

19. I accepted that Mares would suffer prejudice should a stay on enforcement not be granted and that consideration is contained at para. 61ff of my judgment. The matter I determined was whether there should be a stay on further enforcement, not on the appeal from the Master.

20. The stay exists until either the Italian appeal has concluded, or the Court of Appeal determines that I was wrong on my view of the law.

21. I do not, for that reason, consider that it is necessary for me to engage the question of whether there is a difference to be discerned in the case law of the High Court of England and Wales. The judgment of Tomlinson J. is a judgment on both the question of a stay on the appeal and on the appeal itself. The judgment of Coulson J. was given in the context where an undertaking was given that the order of the foreign court would not be enforced, and I further note that the decision of Coulson J. concluded with the court dismissing the substantive appeal but still staying the proceedings. The jurisdiction to stay is separate from that engaged on an appeal of an enforcement order, and is determined on questions of prejudice and the interests of justice.

22. The procedure for making application for a stay seems unduly cumbersome, but the principles engaged on the application derive from the perceived need to have a process to avoid the injustice of enforcing an order under appeal in the country of origin. I consider in those circumstances that the stay is until further order of the Italian court, or of the Irish Court of Appeal.

### Does an appeal lie to the Court of Appeal?

23. Order 42A, rule 15, as amended, provides as follows:

"15. Execution shall not issue on a judgment or decision in respect of which a relevant order has been made until after the expiration of the period specified in accordance with the provisions of rule 13 applicable to the proceedings concerned, or if that period has been extended by the Court, until after the expiration of any such extended period. If an appeal is made to the High Court under rule 13, execution of the judgment or decision shall not issue until after such appeal (including any further appeal on a point of law to the Court of Appeal or, where applicable, to the Supreme Court) is determined. Any party wishing to issue execution on a judgment or decision in respect of which a relevant order has been made shall produce to the appropriate officer an affidavit of service of the relevant order concerned granting leave to enforce a judgment or decision and of any order made by the Master, the High Court, the Court of Appeal or, where applicable, the Supreme Court (as the case may be) in relation to the judgment or decision."

24. A difference exists between the parties as to whether any appeal from my decision lies to the Court of Appeal. Mares contends that Haier has no right of appeal against my decision in reliance on a decision of the ECJ in *Van Dalfsen v. Van Loon* Case C-183/90 [1991] ECR I-4743, where the court determined that a decision whether to grant a stay under Article 46 did not constitute a "judgment given on the appeal" within the meaning of Article 44, and did so on the basis that "an excessive number of avenues of appeal" was not an approach that furthered or facilitated the free movement of judgments. The overriding principle of the Directive is the simple and rapid procedure for the free movement of judgments between Member States. The ECJ in that context determined that an appeal lay only against judgments deciding on the substance of the appeal lodged against the order for the enforcement of a judgment given in another contracting State.

25. Order 42A, r. 15 provides for an appeal on a point of law to the Court of Appeal. The determination I made regarding the question of whether the appeal of Mares was within time is a matter of law and is, in my view, amenable to appeal to the Court of Appeal.

26. In *Ioanna Christofi v. National Bank of Greece (Cyprus) Limited* [2015] EWHC 986 (QB), the High Court of England and Wales refused to grant an extension of time to appeal the recognition and enforcement of the Cypriot judgment. The issue was tried as a preliminary issue and the court held that had its permission been sought it "would unhesitatingly have granted permission to appeal" (p. 16). Leave to appeal was granted later by the Court of Appeal.

27. The question of whether Mares was in time with its appeal was a question of law, raised as a preliminary issue by Haier and determined against it. In my view an appeal lies to the Court of Appeal from this part of my decision, subject to the Court of Appeal making a determination otherwise.

28. *Advocate General Leger in SISRO v. Ampersand Software BV Case C-432/93* [1995] ECR I-2269 was answering the question whether the Court of Appeal for England and Wales was correct to assume jurisdiction to determine an appeal on a point of law. The view expressed was that an appeal "and challenges relating to incorrect application of the law" was admissible but not one "against decisions refusing to stay the proceedings or lifting at stay previously ordered". That approach was accepted by the court.

### **Costs**

29. Mares as sought its costs of the application for a stay, and the starting point for the determination of that question must be that Mares succeeded in obtaining a stay and costs should follow that "event". There is no reason why I should depart from that first principle.

30. I consider that it is not appropriate that a stay should be placed on the enforcement of the award of costs pending the determination of the appeal in Italy. There is no information as to when that appeal is likely to be heard and determined. A long or indeterminate stay is not in the interests of justice. There is to be a stay pending appeal to the Court of Appeal and any further stay is a matter for that Court.