Neutral Citation Number: [2023] EWHC 1378 (KB)

Appeal No: KA-2022-000228

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE
ROYAL COURTS OF JUSTICE
KING'S BENCH DIVISION

ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
FOREIGN PROCESS SECTION
(MASTER COOK)

IN THE MATTER OF COUNCIL REGULATION (EC) NO. 44/2001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2023

Before :
MR JUSTICE KERR

- -

Between :

(1) MR DAMON LAWRENSON **(2) MR JOHN LEE**	**Appellants**
- and -	
CRÉDIT IMMOBILIER DE FRANCE DÉVELOPPEMENT	**Respondent**

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- -

Mr William Buck (instructed by **Napthens LLP**) for the **Appellants**
Mr Turlough Stone (instructed by **Brodies LLP**) for the **Respondent**

Hearing date: 3rd May 2023

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Approved Judgment

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This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 09:30am on 9 June 2023.

Mr Justice Kerr :

Introduction

1. This appeal is against an order made without notice and without a hearing by Master Cook, sealed on 12 October 2022. He granted the respondent's application to register a notarial deed (**the Deed**) executed in France in 2008. The Deed records the terms of a charge over a property in France acquired in 2008 by the English appellants. It is an "authentic instrument" under Council Regulation 44/2001 (EC) (**the Judgments Regulation**).

2. An authentic instrument is a creature of many civil law jurisdictions. It must be formally certified by a notary public. In some jurisdictions, including France, a notarial deed can be enforced directly by the creditor without a court judgment. In France, a creditor may proceed directly to enforcement measures on the strength of a notarial deed formally recording the debtor's obligations, albeit subject to judicial supervision in the event of a challenge by the debtor.

3. Under the Judgments Regulation, authentic instruments can be registered in England for the purpose of enforcing against UK based assets of the debtor. Broadly, they are treated as equivalent to a judgment of a court in an EU member state, which can be registered here under the Judgments Regulation (under a saving provision applicable where the judgment or authentic instrument was made before "IP [implementation period] completion day", 31 December 2020).

4. Under the Judgments Regulation, the domestic court must register most foreign judgments, authentic instruments or court settlements if the correct formalities are observed; unless to allow enforcement in this country would be manifestly contrary to public policy. The public policy exception has been discussed in several judgment cases (see the 2023 White Book, vol. 1, at 74.7.3 and 74x.10.5) but, it appears, in only one authentic instrument case in Scotland (see at 74.11.1, *Baden-Württembergische Bank AG, Petitioner* [2009] CSIH 47).

5. The appellants say the papers filed *ex parte* under CPR Part 74, as amended, and consequently the Master's order, were defective in that (i) the Master's order wrongly referred to the Deed as a "judgment"; (ii) the wrong property was named as the one charged and the wrong notarial deed produced; and (iii) the Master was not told about extensive and ongoing litigation in France challenging the effects of the Deed and the respondent's rights under it.

6. I will address the issues in that order. They correspond to, respectively, the third, first and second grounds of appeal. There were two other grounds of appeal but they were not actively pursued before me. The appeal is governed by Part 52 of the CPR, subject to a modification in rule 74.8(2) providing that the appellant (not being

entitled to be heard below) does not need permission to appeal nor to rely on evidence in any appeal.

7. I must therefore consider the extensive written evidence from the parties, most of which was not before the Master. I must allow the appeal only if the decision below was wrong or marred by a serious procedural irregularity such that it would be unjust to allow the decision to stand (CPR rule 52.21(3)). The appeal court's powers are the broad powers set out in rule 52.20.

8. Under those provisions, I can affirm, set aside or vary the order below or remit the matter back for further consideration. However, by article 57(1) of the Judgments Regulation:

> "[t]he court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed."

Facts

9. In January and March 2008, the appellant UK nationals bought two properties in France for development and rental. One was at Les Jardins de St-Benoît, near Narbonne (**the St-Benoît property**). The other was at Le Haut du Val, Bellême, near Le Mans, about 800 kilometres to the north (**the Bellême property**). The dealings referred to below relate to the St-Benoît property except where indicated otherwise.

10. Each was purchased with a mortgage from a predecessor in title of the respondent, secured on the property. I refer to the predecessor in title as "the respondent" as nothing turns on this. The **St-Benoît loan** was for €253,076 recorded in a notarial deed (i.e. **the Deed**) dated 31 January 2008, with annual interest at 4.95 per cent. The **Bellême loan** was for €177,090, recorded in a different notarial deed dated 4 March 2008, with annual interest at 4.95 per cent.

11. From 2010 to 2013 there was correspondence between the parties over whether the price paid for the St-Benoît property had been much too high. The respondent did not wish to engage with the appellants on this topic. The appellants got into difficulties with the mortgage repayments and defaulted on the mortgage repayments from August 2011. The respondent indicated that it would take enforcement action unless the arrears were made good.

12. On 7 October 2013, the respondent served a foreclosure notice on the appellants (**the 2013 notice**), requiring outstanding sums to be paid within eight days, failing which enforcement action would be taken before an enforcement judge. If payment were not made, the appellants would be required to appear before that judge and a process of forced sale of the St-Benoît property would commence. Such a notice expires two years after service unless it is renewed.

13. The appellants served a defence to the 2013 notice, saying they had not been properly served; the respondent had not completed necessary formalities; and the notice did not justify the amount claimed. On 16 March 2015, about 18 months later, the court at Narbonne dismissed the appellants' objections to the 2013 notice, ordered the sale of

the Saint-Benoît property and fixed the amount payable as €411,348.15 plus interest (**the March 2015 judgment**).

14. On 1 June 2015, the respondent took over the mortgage business of its predecessors in title, which had been parties to the agreements and notarial deeds in respect of the St-Benoît loan and the Bellême loan. It is not disputed that in the subsequent English registration proceedings and this appeal nothing turns on those changes in the name and legal personality of the mortgagees, which acquired the relevant rights and liabilities of the predecessors.

15. On 5 October 2015, the appellants issued a claim in the Narbonne court alleging breach of duty by the respondent (**the October 2015 claim**). It was alleged that the respondent had owed a duty of care to the appellants, who lacked experience of investing in the French property market, to provide appropriate information, advice and warnings. This could be described as a collateral challenge to the outcome of the enforcement process following the March 2015 judgment.

16. The appellants had also appealed against the March 2015 judgment. The Montpellier Court of Appeal dismissed that appeal on 3 December 2015 (**the December 2015 judgment**). However, the respondent accepted that the amount then due and recorded in the appellate court's judgment should be reduced from the sum of €411,348.15 stated in the March 2015 judgment, to €315,048.15; though with a higher rate of interest, 7.95 per cent, than that stipulated in the March 2015 Judgment to accrue until payment.

17. That lesser sum is indeed recorded in the appellate judgment, but with the higher rate of interest accruing up to payment. The reason for the reduction in the amount due was not made clear in the appeal court's judgment. It appears to result from deducting the notional sale price of the property. It was not the result of any payment made by the appellants. The substituted higher rate of interest appears to have resulted from a previously made error.

18. The December 2015 judgment also included a provision permitting a forced sale of the St-Benoît property at a minimum price of €120,000. This was far less than the appellants had paid to acquire the property and was about €133,000 less than the appellants had borrowed from the respondent to acquire it. They had, indeed, not fared well in their foray into the French property investment market.

19. The respondent did not seek to sell the St-Benoît property and has not done so since, to realise in part its security. It is not suggested that it was obliged under the December 2015 judgment to do so. The appellants say the respondent does not wish to be burdened with the property for fear that it would be unable to find a buyer willing to pay the minimum of €120,000 set by the Montpellier Court of Appeal in the December 2015 judgment.

20. The appellants assert that because they contracted with the respondent in 2008 as consumers (which is not disputed), the December 2015 judgment became suspended and unenforceable after the expiry of two years after it was given, i.e. it became unenforceable from 3 December 2017. The respondent says that the two year period has not expired because certain events since have restarted time running; and that the December 2015 judgment remains fully enforceable.

21. Nothing of note happened for most of 2016 and 2017, but the October 2015 claim by the appellants for breach of duty remained to be adjudicated. It was determined on 9 November 2017 (a little less than two years after the December 2015 judgment) by the Narbonne court, which decided that the respondent did not owe the appellants the duties relied on and dismissed the claim in its entirety (**the November 2017 judgment**). The appellants appealed.

22. The merits of the French law issue as to whether the December 2015 judgment has become suspended and unenforceable by expiry of a two year limitation period are debated in the written evidence from French lawyers, among the papers before me. For the respondent, Maître Julien Martinet contests the appellants' proposition. For the appellants, Maître Sophie Lagayette supports the proposition. I am not equipped to nor required to resolve that disagreement.

23. On 16 April 2019, the respondent sent the appellants a statement of account recording nil interest due in respect of the financial year 2018, which corresponds to the calendar year. The same happened on 9 April 2020, in respect of the year 2019. Nothing else of note happened in 2019 or 2020 until December 2020, when the appellants' appeal against the December 2017 judgment was determined in the Montpellier Court of Appeal.

24. That court decided in a judgment dated 9 December 2020 (**the December 2020 judgment**) to uphold the November 2017 judgment. The respondent points out that the court ordered the appellants to pay a further €1,000 in damages for "abusive resistance" which may be awarded where a person "takes legal action in a dilatory or abusive manner" (in Maître Martinet's translation).

25. The December 2020 judgment was not served on the appellants at that stage. On 22 March 2021, the respondent again sent a statement of account to the appellants, recording nil interest payable in respect of the year 2020. Then, in September 2021, the December 2020 judgment was served on the appellants, which started time for an appeal running. The appellants did not appeal and it is accepted that the December 2020 judgment is now final and the breach of duty issue is closed.

26. On 7 February 2022, the respondent drew up a document, I infer for the purpose of instructing UK lawyers, later included in the documents before Master Cook. The first appellant's (Mr Lawrenson's) liability in respect of the St-Benoît loan was said to be €509,606.11, also the amount Master Cook was later told, in the witness statement of Maître Martinet, was due at the date of the application to him, subject to interest continuing to run.

27. The figure of €509,606.11 was calculated by taking the base figure awarded in the December 2015 judgment (€315,048.15); adding interest at the contractual rate of 7.95 per cent from 3 July 2014 to 7 February 2022, amounting to €190,557.96; and adding a further €4,000 damages and costs awarded in the December 2020 judgment (also recording further unspecified ("mémoire") amounts for disbursements, costs and further interest up to payment).

28. The figure of €190,557.96 is inconsistent with charging nil interest in the years 2018, 2019 and 2020, as indicated in the statements sent to the appellants and produced by them in evidence (attached to one of Maître Lagayette's reports) in this appeal. The

figure later provided to Master Cook was based on charging 7.95 per cent simple interest during (and beyond) that three year period. I do not know the explanation for this discrepancy, but there must be one.

29. On 25 February 2022, the respondent's UK lawyers wrote to each appellant demanding payment of the amounts said to be due in respect of both the St-Benoît loan and the Bellême loan. The amount in respect of the former was said to be €509,606.11. The two notarial deeds in conjunction with the agreements were, the letter stated, "directly enforceable in the UK on all your personal assets". Enforcement measures including attachment of earnings or bankruptcy proceedings would follow if payment were not made, the lawyers warned.

30. On 11 July 2022, an "Annex VI" certificate (i.e. in conformity with Annex VI to the Judgments Regulation) was signed by a Mâitre Stéphane Grosjean, a notary in Carcassonne, as competent authority under article 57(4) of the Judgments Regulation, verifying the "acte authentique" (authentic instrument). The description is (in translation) "sale containing a loan" and the date given is the date of the Deed, not of the other deed relating to the Bellême loan.

31. Realising that the 2013 notice had expired, on 9 August 2022 the respondent served on the appellants a fresh notice of attachment of rent, i.e. rental income from the Saint-Benoît property (**the August 2022 attachment**). Such a notice is necessary to permit enforcement by attachment of rental payments, though not for enforcement by other means.

32. In response, on 14 September 2022 the appellants brought a claim challenging the August 2022 attachment, alleging *inter alia* that the Deed is not enforceable due to expiry of the two year limitation period applicable to consumer agreements (**the September 2022 claim**). The September 2022 claim is described by the appellants' French lawyer, Maître Laurent Verdes, as an attempt to bring matters to a conclusion either by having the Deed declared unenforceable or ascertaining the true extent of the debt.

33. The respondent then applied on 27 September 2022 pursuant to article 38 of the Judgments Regulation for an order for the registration of "a French Notarial Deed dated 31 January 2008". The date given indicates that this referred to the Deed, relating to the St-Benoît property. A draft order was attached, again referring to the Deed and providing at paragraph 1 that "the Notarial Deed be registered as a judgment in the King's Bench Division of the High Court of Justice".

34. The application was supported by a witness statement from Maître Martinet. In that statement, he mistakenly explained that the Deed had been entered into to assist the appellants in the purchase of the Bellême property. He explained the nature of an authentic instrument in France. He stated that a copy of "the French Notarial Deed" was attached with an "apostilled" English translation.

35. At paragraph 12, he stated (with my italics):

> "On the assumption that a Notarial Deed is valid, it can only be challenged by allegations of forgery, under Article 1371 of the Code. As a matter of French law, a Notarial Deed has executory force and can be enforced directly without the requirement to first obtain a

> Court judgment (Article 19 of the Notaries Act 1803). It is on this basis that the Application is made to register the Notarial Deed *without the Applicant having obtained a judgment in its favour from the French Courts.*"

36. At paragraph 17, he stated:

> "As at the date of the Application, the total debt outstanding under the Notarial Deed and owed by the Respondents jointly and severally is EUR 509,606.11 (the "Debt") [JM1/206]. Interest is also payable on the Debt at a rate of 4.95% per annum pursuant to the financial conditions of the Notarial Deed. As at the date of the Application, interest has accrued in the sum of EUR 173,637.27 and continues to accrue at a daily rate of EUR 42.72."

37. The reference to "JM1/206" was to the French document drawn up on 7 February 2022, referred to above. The figures in it clearly related to the St-Benoît property (though different figures for the Bellême property followed). But Maître Martinet cites an annual rate of 4.95 per cent rather than the 7.95 per cent set out in the "JM1/206" document.

38. That document did refer, in passing and in French only, to the 2015 judgment which was given on an appeal by the appellants rather than an action by the respondent. Otherwise, Master Cook was spared the complexities of the ongoing French litigation I have outlined above and was told that the application to register was made "without the Applicant having obtained a judgment in its favour from the French Courts".

39. Maître Martinet's statement continued, asserting that the appellants had breached the terms of the Deed, that "the Debt remains outstanding in full and no resolution has been reached with the [appellants]". The statement was verified, in the usual way, by a statement of truth signed by Maître Martinet.

40. The deed relating to the Bellême property was mistakenly appended to the witness statement (at pages 145 to 203 of the exhibit) and meticulously translated into English. The Deed, relating to the St-Benoît property, was not provided to the court, nor translated. The date of the Bellême property deed was 4 March 2008, rather than 31 January 2008 but that inconsistency would only be apparent if the exhibit were examined with care and in detail.

41. The "Annex VI" certificate signed on 11 July 2022 (already mentioned), did not name the property to which it related but did state the date of the "sale containing a loan" (*vente contenant prêt*) as 31 January 2008, the date of the Deed, relating to the St-Benoît property. It was translated into English as required. Again, the internal inconsistencies within the exhibit to Maître Martinet's witness statement were not easily to be seen.

42. The respondent's solicitor, Mr Jared Oyston, in his evidence in this appeal stated:

> "[w]hile "it is accepted that Martinet 1 in support of the Registration Application did not exhibit a translation of the Notarial Deed that the Respondent sought to have registered … this error should not affect the Court's ability to uphold the Order. In particular, the Annex VI certificate was provided (in both French and English) and it sets out all of the correct details in respect of the Notarial Deed sufficient to identify it accurately".

43. Mr Oyston explained in the same witness statement that he considers:

> "the registration process is an administrative and quasi-automatic process which, provided the required procedural steps are taken, results in the Order being made. … The existence of the French proceedings was thus entirely irrelevant to the registration process. … I believe that no duty of full and frank disclosure applies in respect of the matters [the appellants say] should have been disclosed".

44. On 12 October 2022, Master Cook's order (made five days earlier) was sealed. It followed exactly the wording of the draft order, which was based on the pro forma template used where a judgment, rather than an authentic instrument, is registered. Thus, the Master ordered that "the Notarial Deed be registered as a judgment in the King's Bench Division of the High Court of Justice".

45. Maître Martinet explains in his evidence in this appeal that he understood from Mr Oyston:

> "that the Registration Application will not result in execution of any measures against the Borrowers' assets; it is a preliminary and solely procedural, step. If that is correct, then the Registration Application could not possibly be excessive or abusive, I believe (because the Borrowers would have the protections afforded to any judgment debtor in relation to enforcement actions taken by a creditor)."

46. This was supplemented by Mr Stone's observation in argument that the respondent accepted that an "account" would have to be taken to determine the exact amount of the appellants' obligation to pay pursuant to the Deed as a registered authentic instrument. The Deed, while directly enforceable, was conclusive as to the existence of the appellants' obligation to pay but not conclusive as to the quantum of the appellants' obligation.

47. The appellants then appealed, on 18 November 2022. Since then, in France the September 2022 claim has made some progress. A hearing was held on 6 January 2023 in Créteil. On 27 January 2023, that court decided (among other things) that the action should proceed in the Narbonne court, within whose jurisdictional area the property in question is located; where it should be heard by the enforcement judge in real estate (not movable property) matters.

48. An appeal to the Paris Court of Appeal against that decision has been brought and is due for hearing in about February 2024. That court can reduce the amount of interest chargeable. On 27 February 2023, Maître Verdes wrote to the court in Narbonne, referring to the March 2015 judgment and pointing out that the property sales envisaged in that judgment had not taken place and that the 2013 notice had expired. The appellants contend that the properties should be sold before other means of enforcement are allowed.

49. The respondent has also recently started proceedings in Narbonne seeking a declaration that the 2013 notice is invalid, which would enable the respondent to seize the St-Benoît property and start the process of selling it by auction. This action is listed to be heard in Narbonne on 19 June 2023. Maître Verdes suggests that the bringing of this claim indicates the respondent is aware it should sell the property before seeking to enforce by other means.

50. Maître Martinet contends that the 2013 notice has expired but its continuing existence on the public register is sufficient to interrupt the two year limitation period. These

arguments will no doubt continue to be aired before the French courts for some time. It is clear that there is ongoing litigation in France concerning the parties' current rights and obligations under the transaction ultimately going back to execution of the Deed in 2008.

Issues, Reasoning and Conclusions

The relevant Judgments Regulation provisions

51. The parties agree that the Judgments Regulation (EC) No. 44/20010 applies and not the recast Judgments Regulation (EU) No. 1215/2012. That is because article 66(2) of the latter provides that the former, earlier version, to which I am referring as the Judgments Regulation, shall continue to apply to authentic instruments executed before 10 January 2015, as the Deed was.

52. Chapter III of the Judgments Regulation deals with recognition and enforcement of judgments. A judgment is broadly defined in article 32 but it must be given by a "court or tribunal" of a member state (**originating state**). It must normally be recognised in the courts of other member states unless that would be "manifestly contrary to public policy" in the member state where recognition is sought (**receiving state**) (article 34(1)).

53. There are exceptions in the case of certain default judgments and where judgments in different states are irreconcilable (article 34(2)-(4)). Under no circumstances may a foreign judgment be reviewed as to its substance (article 36). By article 37(1), a court in the receiving state may stay the recognition proceedings if "an ordinary appeal" against the judgment in the originating state has been lodged.

54. Subject to those caveats, judgments must be recognised and enforced in receiving states on application by an interested party; but in the case of the United Kingdom, enforcement is in the part of the UK where the judgment is registered (article 38). The judgment is declared enforceable immediately, on completion of required formalities. The other party may not make submissions on the application (article 41).

55. However, the other party (whom for convenience I will call **the debtor** and the enforcing party **the creditor**, though the provisions are not limited to debt claims) may appeal – indeed, either party may appeal (article 43) - and until the time limit for an appeal (one month with no extension of time where the debtor is domiciled in the receiving state) has expired, no enforcement measures other than "protective measures" may be taken (article 47).

56. The procedural rules governing an application for the remedy of "declaration of enforceability" (the phrase used in article 43(1) and elsewhere) and on appeal (article 40(2) and, on appeal, article 43(3)) are those applicable under the national procedural law of the receiving state, i.e. in the case of England and Wales, the Civil Procedure Rules 1998, as amended.

57. An appeal must be the only remedy (article 44). The substance must not be considered on appeal (article 45(2)). The appellate court or tribunal can only refuse registration (see article 45(1)) on narrow grounds set out in articles 34 and 35. For

present purposes, the only relevant ground is the possibility of registration being manifestly contrary to public policy.

58. The formalities required must be (see article 56) the minimal ones specified in articles 53 to 55: the creditor must produce an authentic copy of the judgment; a certificate of authenticity from the originating state court or tribunal (in the form at Annex V to the Judgments Regulation); and a certified translation if required by the procedural rules of the receiving state.

59. Chapter IV then deals with authentic instruments and out of court settlements, together. We are not concerned with the latter here. By article 57(1), an authentic instrument "shall … be declared enforceable" in the receiving state on an "application made in accordance with the procedures provided for in Articles 38, et seq…". A "declaration of enforceability" may be revoked or refused only if enforcement is "manifestly contrary to public policy" in the receiving state.

60. By article 57(4), "Section 3 of Chapter III shall apply as appropriate". The formalities are similar to those required for a judgment, but are those found in Annex VI rather than Annex V. Section 3 of Chapter III consists of articles 53 to 56, already mentioned. They prescribe the minimal formalities needed for a "declaration of enforceability" in the case of a judgment.

61. The practical difference between the "Annex V" formalities in the case of a judgment and the "Annex VI" formalities for an authentic instrument is that, in the former case, the document is issued by the relevant court or tribunal as "competent authority"; while in the latter case the competent authority can be (in France) a *notaire* or notary public, as in this case.

The nature and effect of an authentic instrument

62. It is not necessary to go deeply into the jurisprudential nature of an authentic instrument. The appellants cited the commentary of the late Professor Jonathan Fitchen, formerly of Aberdeen University, in *Authentic Instruments and European Private International Law in Civil and Commercial Matters: Is Now the Time to Break New Ground?* (2011) Journal of Private International Law, vol. 7 no. 1 at page 33:

> "An authentic instrument is a public document by which an agent of the state in question formally and authoritatively records declarations made by the parties so as to constitute those declarations as legal obligations: thereafter the authentic instrument is admissible as conclusive evidence of these obligations in proceedings and may also be sufficient, depending upon the legal system in question and upon the nature of the parties' declarations and the verifications made by the relevant state agent, to allow its 'creditor' immediate access to the actual enforcement provisions of that state without first needing to secure a court judgment. … [T]here are national variations upon the 'state agents' who may create an authentic instrument … . [T]he authentic instrument is a creature of civil law legal systems; it is unknown within the common law and cannot be so created by any UK notary acting as such."

63. The respondent cited a passage from the pre-Brexit edition of *Dicey, Morris and Collins on the Conflict of Laws* (15th ed., 2012), at 14-245:

> "An authentic instrument is a document which has been formally drawn up or registered as such. It must be drawn up by a public official, usually a civil law notary. Under the law of certain

> Member States, such as Germany, the instrument takes effect as an express, conclusive, and enforceable, statement of a party's indebtedness, but which is obtained without the institution of court proceedings."

64. The respondent also mentioned an analogy with a mortgagee's power of sale in this jurisdiction and with the process of "summary diligence" (meaning summary enforcement) in Scotland, described as follows by the editors of *Gloag and Henderson on the Law of Scotland* (15th ed., 2022) a 48.04(2):

> "Summary diligence is the execution of diligence proceeding on registration of a document in the appropriate public register. Summary diligence is available in the following cases: … (b) where a deed imposing an obligation contains the debtor's consent to registration for execution, the deed may be registered in the Books of Council and Session or in the Sheriff Court Books and the creditor may carry out diligence on the basis of an extract thereof".

65. The French legal experts gave written evidence in this appeal as follows on authentic instruments in France with particular reference to this case (with numbering and detailed code citations omitted). Maître Verdes noted:

> "… [A] notarial deed is a form of document qualified as being an "authentic instrument". It is therefore a legally binding document, drafted by a notary and signed by the parties or authorized representatives in the presence of a notary who also countersigns the documents.
>
> But that does not make it enforceable automatically. An enforceable title is required for enforcement proceedings of the notarial deed without the authorization of a judge.
>
> ….
>
> … [A] notarial deed may be used to recover sums without the appeal of the judge only if it bears the order for enforcement (i.e. the enforcement formula) affixed by the notary. It is not disputed that the Deed in respect of the Property bears the appropriate order for enforcement.
>
> However, a creditor having a notarial deed with the order for enforcement … cannot enforce without following specific procedures under the control and with the authorization of a judge. In other words, a simple contract written and signed by the parties without a notary is not enforceable by itself. It must be submitted to a judge (the 'first judge') to be enforceable. Once it is enforceable, one party can try to enforce according to specific procedures under the control and the authorization of another judge (called the "*juge de l'exécution*"). A notarial deed is enforceable by itself and does not need the "first judge" to declare its enforceability. However, like for the simple contract, the notarial deed is subject to specific procedure before the 'juge de l'exécution' that will authorize the freezing and seizing of assets and will determine the exact amount of debt due.
>
> Thus, a creditor benefiting from a notarial deed bearing the enforcement clause may freeze sums directly from his debtor without first the authorization of a judge. However, such freezing must be notified to the debtor soon after the freezing taking place, so that the debtor can after start an action before the judge to free the sums to be frozen. This means that the freezing can be challenged by the debtor and that any freezing is subject to control by a judge. There is no right of the creditor to freeze sums and to enforce the freezing at their own choice.
>
> Further, a creditor, having in his hands a notarial deed or a judgement, cannot take possession and seize a property without following a specific procedure before a judge called "juge de l'exécution" who will allow the sale of the property on auction for a minimum price. There is here, again, no right on the part of a creditor, even with a notarial deed, to enforce it without a judicial procedure having been followed and permission given by a judge.
>
> … [A] creditor benefiting from a notarial deed can freeze movable assets without the authorization of a judge but the debtor can then dispute the fact that the moveable assets have

been frozen in order to prevent the assets from being disposed of and to effectively 'free' the assets. However, a creditor benefiting from a notarial deed cannot seize and sell immovable assets without the prior authorization of a judge.

Also, it is forbidden under French law that a creditor takes possession of the main residence of a debtor. It can sell it on auction (with the authorization of the judge) but cannot just take possession.

Furthermore, a creditor can seize another property of a debtor only if he can demonstrate that the property which is the subject of the loan and which has been mortgaged is not enough to pay the debt. In other words, the creditor shall sell on auction first the property mortgaged in order to be able to seize any other property of the debtor."

66. Maître Martinet added the following comments to that account:

"Mr Verdes correctly summarises the procedural position in relation to the seizure of real estate property. However, I would make the following additional points:

… the seizure of real estate property is supervised by a judge irrespective of whether the seizure is based on a notarial deed or a judgment;

… the same conditions apply to that supervisory process whether it is based on a notarial deed or a judgment; and

… the involvement of the Court simply recognises that the stakes are high in relation to real estate property, especially where it is also residential property.

…

Mr Verdes implies that, because the Respondent has not yet seized the properties at Bellême and St Benoît and sold them at auction, the Respondent may not seize any other assets.

However, in making this implication, … the restriction on seizing non-mortgaged properties applies only if the mortgage from which the creditor benefits is sufficient to discharge the debt owed in full. It is clear from the valuations of the properties in this case that their value is insufficient to discharge the debt due to the Respondent and that the restriction therefore does not apply."

67. On execution procedures, Maître Lagayette answered as follows the question whether, as a matter of French law, during the course of the French proceedings the respondent is permitted to take action to recover the alleged debt before the issue of enforceability has been determined:

"In France the recovery steps which would be taken are done via a French bailiff. The bailiff instructed by the creditor would then undertake whatever seizure he or she is instructed to do. Usually, the bailiff would ask to be provided with the enforceable title which forms the basis of the recovery action so that this title can be referred to in the formal notices which are served and the formal documents drawn up by the bailiff.

Depending on the step undertaken, the bailiff would notify the debtor before or after the step is undertaken (sometimes both) and this notification would inform the debtor of the legal means through which to challenge this step.

In other words, there are legal safeguards in place in order to prevent unjustified actions on the parts of creditors and to protect parries. If the challenge to the seizure is successful then the seizure would be declared null and void.

> Therefore, should an instance occur whereby a creditor would attempt recovery of the debt whilst the question of its enforceability is still under determination then the debtor would be able to bring that information to the attention of the judge in charge of reviewing the validity of the recovery action undertaken.
>
> This is what happened as far as the CIFD's seizure of rent of August 2022 is concerned; … The debtor used the legal means mentioned in the notice informing him of the seizure … Parties were able to put their legal arguments forward … There was a hearing and a decision… The decision handed down can be appealed if one of the parties is not satisfied. … It is not until this entire process has been dealt with that the seizure can be considered as final and definitive. …"

Registration of authentic instruments in national courts; the public policy exception

68. The Court of Justice has considered the scope of the public policy exception in at least three judgment cases. In Case 145/86 *Hoffmann v. Krieg* [1988] ECR 645 (decided under the Brussels Convention of 1968) the scope of the public policy exception was not directly tested as the case was decided on other grounds but the court at [21] endorsed the view expressed in a report[1] among the *travaux préparatoires* that it "ought to operate only in exceptional cases".

69. In Case C-7/98 *Krombach v. Bamberski* [2000] ECR I-1935, another Brussels Convention case, a judgment in France was obtained at a hearing the defendant (Krombach) had been ordered to attend personally. The procedural rules provided that having failed to attend in person, he could not attend by counsel. He was convicted in his absence, without hearing his counsel, of responsibility for the death of the claimant's daughter, sentenced to 15 years in custody and ordered to pay the deceased's father (Bamberski) 350,000 French francs.

70. After the judgment was registered in Germany, the Federal Court made a reference to the Court of Justice asking questions which the latter characterised as asking in essence "how the term 'public policy in the State in which recognition is sought' … should be interpreted" ([18]). The Luxembourg court decided at [37]:

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

71. The Court of Justice decided at [40] that the German court was entitled to find that recognition of the judgment would be contrary to public policy where the judgment was obtained without the defendant having the right to be heard unless he attended the hearing personally.

72. In *Orams v. Apostolides* [2011] QB 519, decided under the Judgments Regulation, the issue was whether the suspension of the application of the "acquis communautaire" (the body of European Union legislation) in the northern area of Cyprus, not controlled by the government of Cyprus recognised by the EU, meant that an English court could refuse to register two judgments obtained in the northern area.

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[1] The *Jenard Report*, Official Journal, 1979, C59, p.51.

73. On a reference from the Court of Appeal, the Court of Justice effectively gave a negative answer. The latter court decided that for the public policy exception under article 34(1) to be applied, recognition of the judgment would have to infringe a fundamental principle amounting to a manifest breach of a rule of law regarded as essential in the legal order of the receiving state or of a right recognised as being fundamental within that legal order.

74. The Court of Appeal then held that recognition of the two judgments was not contrary to a public policy operating in the United Kingdom (per Pill LJ at [63]; Lloyd LJ and Sir Paul Kennedy agreed). Accordingly, the two judgments were enforceable in this country and the Master's decision to that effect was restored.

75. The public policy exception was considered in Scotland in *Baden-Württembergische Bank AG, Petitioner* [2009] CSIH 47), an authentic instrument case. The objector to registration relied principally on delay in enforcement by the bank concerned and (on appeal) on the contention that the bank should have obtained an order in a German court and that the process in Germany had been conducted unfairly.

76. The Inner House of the Court of Session rejected those contentions in a brief judgment (Lord Reed giving the opinion of the court). The objections did not raise a relevant public policy ground for objecting to registration of the authentic instrument, which recorded the terms of a charge over land in Germany to secure indebtedness for which the appellant was responsible.

77. The public policy exception has also been discussed in learned texts. Mr Buck for the appellants submitted that it was wrong glibly to equate an authentic instrument with a judgment. Professor Fitchen differentiated the two thus in his 2011 article (*op. cit.* at p.40):

> "Although the enforcement potential of an authentic instrument is sometimes equated with a court judgment, it is important not to overstate the similarity. An authentic instrument and a judgment may each allow the creditor to access the state's actual enforcement procedures; however, this is as far as the similarities extend. A judgment is possessed of "executory force" because it is a res judicata. The executory force of an authentic instrument is different. It is not based on res judicata and possesses no such quality of res judicata. The executory force of an authentic instrument is derived from the formal and accurate recording by the civil law notary of declarations by the parties including the debtor's express acceptance of, and consent to, such an eventuality. The executory force of an authentic instrument is never a consequence of any process equivalent to the judicial determination of the rights of the parties: the civil law notary is not a judge and would be the first to correct any such misapprehension."

78. And in his book, *The Private International Law of Authentic Instruments* (2020, Hart Publishing), he referred at pp.169 to three kinds of public policy objection to the enforceability of an authentic instrument[2]: injury to public policy caused by bringing the enforcement request; injury to national public policy arising from the legal relationship from which the enforcement request arises; and injury to public policy due to conflicting expectations and requirements relating to authentication procedures.

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[2] Derived from an article written in 1975 by Professor Geimer: see R Geimer, *Vollstreckbare Urkunden ausländischer Notare* [*Enforceable Deeds of Foreign Notaries*] D Not Z (1975) 461 at 477-78.

79. On the first of these (the only one possibly relevant to this appeal), Professor Fitchen wrote in the same work at p.70-71:

> "A subtler form of public policy violation associated with the bringing of the enforcement claim is here suggested as possible connected to exceptional cases in which the differential between the authentic instrument the parties drew up in the Member State of origin and the enforcement procedures of the Member State of enforcement should be so gross as to violate the procedural rights of the debtor if the creditor is permitted to so enforce. This proposition is suggested only for the grossest forms of procedural differential in which allowing or continuing enforcement would violate the debtor's rights. It is not enough that enforcement in a different legal system reveals differences in the respective procedural laws of each venue; such differences are inherent in the provisions of EU private international law that shift enforcement claims from the State of origin to the enforcement venue assuming a level of procedural equivalence between the legal systems that is sometimes lacking on the facts. The issue typically arises via an authentic instrument containing an arrangement that is comparatively harmless in the place where it is created, because it is understood and appropriately regulated there by domestic civil procedure, but will pose difficulties in an enforcement State possessed of enforcement of an authentic instrument without the possibility of any corrective intervention, should such a foreign authentic instrument be presented for enforcement in that venue."

Registration of an authentic instrument in the United Kingdom (England and Wales)

80. Mr Stone has explained that when the Judgments Regulation came into force, two domestic statutory instruments were made to implement it in this country. One related to judgments: the Civil Jurisdiction and Judgments Order 2001. The other related to authentic instruments and court settlements: the Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001.

81. The pre-January 2015 version of the former provided, by paragraph 2(2) of Schedule 1 (given effect by article 3):

> "A judgment registered under the Regulation shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the registering court and had (where relevant) been entered."

82. Paragraph 8 of the same Schedule then provided for the formalities that had to be undertaken to obtain registration of the judgment in this country.

83. The second of the two 2001 orders, dealing with authentic instruments and court settlements, provided (materially here) at article 2(1) that with necessary modifications, "Schedule 1 to the 2001 Order shall apply, as appropriate, to authentic instruments … as if they were judgments".

84. Article 2(2) then provided:

> "In the application of paragraph 2(2) of Schedule 1 to the 2001 Order to authentic instruments and court settlements, for the words 'as if the judgment had been originally given' there shall be substituted 'as if it was a judgment which had been originally given'".

85. And article 2(3) then provided that the same formalities as those required for judgments "shall apply to authentic instruments as if they were judgments".

86. Thus, the domestic law regime enacted to apply the Judgments Regulation in domestic law did treat authentic instruments as if they were judgments, in the sense that the two orders made in 2001 provided for the same registration procedure to apply to judgments and authentic instruments alike.

87. Mr Stone traced certain amendments to the two 2001 Orders arising from Brexit-related legislation. The regime is now different because the Judgments Regulation and its successor no longer apply in domestic law. It is unnecessary to recite the detail of these provisions since the law as it stood up to January 2015 applied in the present case.

88. Part 74 of the Civil Procedure Rules is entitled "Enforcement of Judgments in Different Jurisdictions". In recent years, it has been amended considerably to deal with Brexit related developments. Mr Stone has demonstrated that by various amending provisions (the detail of which I do not recite here) the version of Part 74 applicable to this case is the version that was in force before 10 January 2015, when the new recast Judgments Regulation of 2012 started to apply to authentic instruments created from that date onwards.

89. In the applicable version of Part 74, Section I dealt with "Enforcement in England and Wales of Judgments of Foreign Courts". Rule 74.4 provided that the application must be supported by written evidence exhibiting the judgment; a certified translation if it is not in English; the name of the judgment creditor and debtor; the "grounds on which the judgment creditor is entitled to enforce the judgment" (rule 72.4(2)(c)); and the amount and rate of interest.

90. Rule 74.6 and rule 74.8 dealt with, respectively, registration orders (and service of the order on the judgment debtor) and appeals, in terms that mirrored the requirements of the Judgments Regulation. Rule 74.9 prohibited enforcement before the time for appealing (here, one month) had expired. Rule 74.11 then provided (at the relevant time for present purposes):

> "The rules governing the registration of judgments under …. the Judgments Regulation apply as appropriate and with any necessary modifications for the enforcement of –
>
> (a) authentic instruments which are subject to –
>
> …
>
> (iii) article 57 of the Judgments Regulation; … ."

The first issue: registration of the Deed as a "judgment"

91. Mr Buck, for the appellants, submitted that the order made is straightforwardly erroneous because it refers to the Deed as a "judgment", following the respondent's draft. The Deed is not a judgment, it is an authentic instrument. The respondent purports to be entitled to enforce this "judgment" against the appellants' UK assets, threatening to bankrupt them, he says.

92. No bailiff or enforcement officer would be able to go behind the wording of the Master's order, says Mr Buck. The order proclaims that the Deed is "registered as a judgment in the King's Bench Division of the High Court of Justice". Yet, the definition of a "judgment" in (the then) rule 74.2(1)(c), he points out, did not include an authentic instrument. It was as follows:

> "(c) 'judgment' means, subject to any other enactment, any judgment given by a foreign court or tribunal, whatever the judgment may be called, and includes
>
> (i) a decree;
>
> (ii) an order;
>
> (iii) a decision;
>
> (iv) a writ of execution or a writ of control; and
>
> (v) the determination of costs by an officer of the court; … ."

93. Mr Buck's point is that the Deed was not "given by a foreign court or tribunal". It was not created by a judicial determination but by a notary. He relies also on the observations of Professor Fitchen on the differences between a judgment and an authentic instrument.

94. He suggested in the course of oral argument that the registration procedure for an authentic instrument should be different. After registering the authentic instrument, the judgment creditor would have to issue a separate claim (under CPR Part 8 or Part 7) seeking a declaration that the authentic instrument is enforceable. The respondent had not followed the procedure in article 57 of the Judgments Regulation because it had applied to register the Deed as a judgment and not as an authentic instrument.

95. For the respondents, Mr Stone submits that the wording of the order is correct and should not be changed. Although the draft order and the sealed order referred to registration as a "judgment in the King's Bench Division", the application clearly referred to the Deed as an authentic instrument and was in substance an application for registration of the Deed as such.

96. In his detailed written argument, Mr Stone stated that the Deed "is not a judgment, although its effect is that it is enforceable as if it were a judgment"; and later, in slightly more detail:

> "[The respondent] sought registration of the Notarial Deed as an 'authentic instrument'. The fact that the Registration Order itself registers the Notarial Deed 'as a judgment' does not alter that fact or create any confusion: whilst, as mentioned, the Notarial Deed is not a judgment (and this is common ground), as a matter of French law it is enforceable as if it were a judgment, and the effect of the Registration Order is to declare it to be similarly enforceable in this jurisdiction by virtue of the [Judgment] Regulation."

97. Mr Stone submitted, further, that the procedure was correct. The registration process is the same whether the application is to register a judgment or an authentic instrument. In both cases, it is governed by article 38 et seq. of the Judgments Regulation and, in this jurisdiction, by Part 74 (as it then stood) of the CPR; rule 74.11 stating unambiguously that rules governing the registration of judgments under

the Judgments Regulation apply as appropriate and with any necessary modifications to the enforcement of authentic instruments.

98. Later in his written argument, Mr Stone said that:

> "there is no question of [the respondent] seeking to obtain relief in this jurisdiction to which it is not entitled as a matter of French law. As matters presently stand, [it] has the benefit of a directly enforceable instrument, the validity of which has not been impugned by any judgment of a French Court, which is presently enforceable as a result of the Appellants' acknowledged default of their payment obligations, and which is supported by a judgment of a French appellate court confirming that the Appellants are liable for a substantial and fixed sum, with interest accruing thereon until payment."

99. He went on to submit that the judgment debtor is fully protected at the execution stage from any levying of execution in amounts greater than the judgment creditor is entitled to. In oral argument, he accepted that the appellants would be entitled to a judicial process of some kind in this country to determine how much could be taken in execution. I shall return to this point in the context of the third issue concerning non-disclosure of the French court proceedings.

100. I agree with both parties that the instrument that was registered by the Master's order was not a judgment. The Master's order was, therefore, inaccurate at least in the terminology used. The scheme of the EU and domestic provisions is to provide for mutual recognition of authentic instruments to the same extent as judgments, as if they were judgments. That does not mean, as the respondent rightly concedes, that an authentic instrument *is* a judgment.

101. However, the appellants are not correct in submitting that where the instrument to be registered is an authentic instrument, a further claim must be brought after registration to have it declared enforceable. The respondent is correct that the registration process is the same for a judgment and an authentic instrument. Registration is what makes the instrument enforceable in this country, whether it is a judgment or an authentic instrument.

102. In my judgment, the procedure followed in this case was the correct procedure, except that the draft order (and then the sealed order) misdescribed what the respondent was applying to register. The application notice and the supporting evidence did not suggest that the application was to register a judgment. The vice lay in the draft order, where the misdescription occurred.

103. The simple remedy is to vary the sealed order by replacing "*registered as a judgment in the King's Bench Division of the High Court of Justice*" with "*registered in the King's Bench Division of the High Court of Justice as an authentic instrument*". That will eliminate any risk of confusion or injustice arising from the order misleading someone involved in the enforcement process about the juridical nature of what is being registered.

The second issue: failure adequately to identify the correct loan agreement

104. The second issue, as formulated in the grounds of appeal, is whether as the appellants contend, the order and related evidence in support of the application were "flawed in

that there was a failure to identify the correct loan agreement such that the Order and Application refers to a purported loan agreement which does not exist".

105. The respondent accepts that the evidence supporting the application mistakenly referred to a notarial deed charging the Bellême property to secure a loan to purchase that property. The deed produced and translated related to that property. However, the Annex VI certificate of Maître Grosjean gave the date of the Deed, 31 January 2008, relating to the St-Benoît property. That certificate did not state, and was not required to state, the address of the property.

106. The amounts stated by Maître Martinet to be due and owing, including interest, and the rate of interest continuing to run, were based on the loan secured on the St-Benoît property, not the Bellême property. They were derived, as I have said, from the December 2015 judgment, to which reference was made *en passant* in the "JM1/206" document referred to in his witness statement.

107. The appellants submitted that, while they accepted that the error was accidental, it was part of a failure of disclosure that was "material and serious" (as Mr Buck put it in his skeleton argument). The failure to identify the correct property, while accidental:

> "still amounts to the misleading of the Court (and to any objective bystander and indeed to the Appellants themselves as they too were unsure as to which property the Application actually related) as to what was the subject matter of the Application."

108. Mr Stone submitted that, while the respondent has apologised to the court for the error, it was purely inadvertent and no harm has been done. The Annex VI certificate referred to the correct property, which is what matters. The sums claimed were the sums charged against the correct property. The error has been easily rectified and no one has been materially misled. The error does not invalidate the process or undermine the correctness of the Master's order.

109. In my judgment the mistaken references in the evidence before the Master to the Bellême property, while regrettable and remiss, are not such that the order should be set aside on the basis of material non-disclosure or misleading the court or anyone else. I think the mistakes made are comparable to the error in *Landhurst Leasing plc v. Marcq* [1997] Lexis Citation 5020 (transcript, 4 December 1997).

110. There, the Court of Appeal was not persuaded that a registration order should be set aside because of material non-disclosure, where the evidence supporting the application for registration of a Belgian judgment mistakenly did not include the point that £140,525 out of a debt of £475,000 had been recovered through the sale of one of the cars provided by the plaintiff to the defendant under finance leasing arrangements. The non-disclosure was inadvertent.

111. Beldam LJ said at the seventh page of the transcript:

> "Where there has been a simple mistake, the Court in the exercise of its discretion takes account, not only of the need to encourage compliance with the rules, but also considers whether injustice would be caused if the order obtained were continued, or if a new order was made. In the present case the only purpose of discharging the original order would be to compel the plaintiff to incur the considerable expense of reapplying to register the

> judgment. Mr Lord could point to no injustice, inconvenience or disadvantage to the defendant in such a course."

112. The position here is analogous, so far as the error in identifying the wrong property is concerned. The Master would not have been deterred from making the order if the correct property had been fully identified. There was no improper attempt to mislead the court by confusing the two properties. On the contrary, the evidence supported the existence of a debt founded on a correctly certified authentic instrument secured on a property, albeit not the right one.

The third issue: non-disclosure of the French proceedings

113. The third issue, as formulated in the grounds of appeal, is that the registration application "constituted an abuse of process in that there was a failure to disclose the existence of ongoing proceedings in France as to the issue of the enforceability of the loan arrangements."

114. Mr Buck contended, first, that the Judgments Regulation affords greater protection to a debtor under a judgment (i.e. a decision, etc, of a court or tribunal) than to a debtor under an authentic instrument. Under the Judgments Regulation, registration of an authentic instrument may only be refused if to register it would be manifestly contrary to public policy in the receiving state (article 57(1)).

115. A judgment, by contrast, may not be recognised where it was obtained in default and the debtor has not been served timeously, unless the debtor has failed to apply to set the judgment aside (article 34(2)); or where it is irreconcilable with a judgment in the receiving state between the same parties (article 34(3)); or in a third state meeting the recognition requirements (article 34(4)). These distinctions bear out Professor Fitchen's account of the differences between judgments and authentic instruments, Mr Buck argued.

116. A creditor should not, he said, be able to avoid restrictions (of which those in article 34 are an example) by applying to register an authentic instrument instead of a judgment founded on it. To avoid abuse, the court should be clear that registration of an authentic instrument only determines the terms of the original bargain but leaves open questions of quantum and enforceability, e.g. due to the limitation issue still extant in the ongoing French proceedings.

117. It would be contrary to public policy, Mr Buck submitted, to allow the French proceedings to be circumvented in this way. This underlined the importance of disclosing fully the state of the litigation in France which, Mr Buck submitted, would have or should have impelled the Master to refuse registration by invoking the strong public policy exception, or at least to defer it until after the conclusion of the French proceedings.

118. That, Mr Buck submitted, is the backdrop to what he says was a woeful breach of the duty to make full and frank disclosure. The procedure is *ex parte*, bringing the duty into play. It has been recognised that the duty applies to applications to register a judgment: see the *Landhurst Leasing plc* case, already mentioned. The Master should have been told about the judgments arising out the Deed and the ongoing proceedings.

The respondent had not explained why it did not choose to register one or more of those judgments.

119. In oral argument, Mr Buck spoke eloquently of the dangers of allowing a creature alien to our law and jurisdiction to be parachuted in without adequate safeguards. There was a real risk, he submitted, of abusive enforcement in amounts above what the French courts would allow; particularly where the instrument is misdescribed as a judgment. The Master's order should, at the very least, be qualified in a way that adequately protects the debtor's interests.

120. Mr Buck noted the concession made in oral argument by Mr Stone that an "account" would need to be taken, but complained that it was inadequate because its scope was wholly unclear. No such concession was made, he pointed out, when applying to the Master, nor in the letter before claim of 25 February 2022. That letter threatened full enforcement and bankruptcy. The amount claimed in Maître Martinet's statement was €509,606.11, and counting.

121. Those threats have never been rescinded, Mr Buck submitted. Only at the appellate stage has Maître Martinet stated his understanding from Mr Oyston that registration would not itself "result in execution of any measures against the Borrowers' assets" but is merely "a preliminary and solely procedural, step", leaving "the protections afforded to any judgment debtor in relation to enforcement actions taken by a creditor."

122. Mr Stone accepted that the respondent was subject, below, to the duty of full and frank disclosure in the normal way because the proceedings are *ex parte* (*Brink's Mat Ltd v. Elcombe* [1988] 1 WLR 1350, per Ralph Gibson LJ at 1356F to 1357G). But he insisted that the duty did not embrace any obligation to disclose the French proceedings: they were simply irrelevant. The process of registration was essentially administrative rather than judicial.

123. The role of the Master was to check compliance with the formalities. He could not consider the substance of the dispute, as the Judgments Regulation makes clear. He could not refuse to register the Deed applying the public policy exception. Only the appellate court can do that and anyway there is no basis here for discerning a manifest breach of English public policy.

124. As for safeguards, it was always obvious that recognition (by registration) is different from enforcement (i.e. execution), for judgments as well as authentic instruments. In his written argument, Mr Stone submitted that, just as in France the actual process of enforcing an authentic instrument is subject to judicial control, in this jurisdiction:

> "were action to be taken by [the respondent] to execute the Notarial Deed (by, for instance, an attachment of earnings order, charging order, or similar process of execution), the debtors would be able to contest such action, the execution of an authentic instrument in England being subject to English law and the jurisdiction of the English Courts: *Apostolides v. Orams* [2010] EWCA Civ 9, [2011] [QB] 519 at [69] …."

125. I interject that what the Court of Justice said at [69], in answering a question about possible non-enforceability of a judgment in the originating state (a possibility it rejected on the facts) was this:

> "Regulation No 44/2001 merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which enforcement is sought …. unless for the purposes of the enforcement of a judgment the application of the procedural rules of the member state in which enforcement is sought may impair the effectiveness of the scheme laid down by the Regulation as regards enforcement orders by frustrating the principles laid down in that regard, whether expressly or by implication, by the Regulation itself."

126. Mr Stone also pointed out that Schiemann LJ in the *Landhurst Leasing plc* case (at the seventh and eighth pages of the transcript) made a similar point, noting that enforcement, in the sense of execution under domestic law, may be inhibited under the rules of the receiving state after registration, to give effect to a part payment or post-judgment agreement between debtor and creditor.

127. In considering the scope of the duty of full and frank disclosure here, Mr Stone asked me to bear in mind that what is required to perform the duty depends on the context. Here, the duty is conditioned by the absence of any discretion, other than in a wholly exceptional case, to withhold registration; the prohibition against taking steps to enforce until after expiry of the one month time limit for appealing; and the protection afforded to the debtor by the right of appeal.

128. Further, he submitted:

> "… there is no question of [the respondent] seeking to obtain relief in this jurisdiction to which it is not entitled as a matter of French law. As matters presently stand, [the respondent] has the benefit of a directly enforceable instrument, the validity of which has not been impugned by any judgment of a French Court, which is presently enforceable as a result of the Appellants' acknowledged default of their payment obligations, and which is supported by a judgment of a French appellate court confirming that the Appellants are liable for a substantial and fixed sum, with interest accruing thereon until payment."

129. And, Mr Stone added, the appellants do not deny that their assets in France (i.e. the two properties) are insufficient to discharge their indebtedness.

130. I turn to my reasoning and conclusions on this third issue. The first point is that it cannot conceivably be contrary to public policy to register and subsequently enforce an authentic instrument in this country, merely because it requires no judgment to be obtained before proceeding to enforcement measures. The scheme of the Judgments Regulation, the domestic law rules giving effect to it and the *Baden-Württembergische Bank AG* case all make that much clear.

131. There would have to be something wholly exceptional (as demonstrated by the differing outcomes in *Kromberg v. Bamberski* and *Apostolides v. Orams*) for the public policy exception to be applied in a particular case. In both judgment cases and authentic instrument cases, public policy is satisfied by the debtor's right of appeal and the protection against enforcement measures (i.e. execution) up to the deadline for appeal and pending determination of any appeal.

132. Next, the debtor has no right to make submissions at the registration stage (Judgments Regulation, article 41). The procedural rules are those applicable under national law (article 40(1)), i.e. in this country, the CPR. Article 41 also precludes, as the

respondent rightly submits, any refusal to register by the first instance court applying the public policy exception or any other exception.

133. The registration process at first instance can therefore fairly be described as primarily administrative, unless there is a judicial role in determining whether the formalities have been observed. However, the duty of full and frank disclosure in *ex parte* proceedings also forms part of our national procedural law. That is not disputed and is clearly established by *Landhurst Leasing plc* and by Slade J's decision in *Haji-Ioannou v. Frangos* [2009] 2 CLC 500.

134. Everyone agrees that the registration process, as the gateway to enforcement, should not be used (or abused) to extract greater benefits from the litigation in the receiving state than would be permitted by the courts of the originating state. The debtor is protected against that to the extent that national rules provide safeguards against unjustified enforcement by way of execution; see *Hoffmann v. Krieg*, judgment of the court at [28]:

> "… a foreign judgment for which an enforcement [here, registration] order has been issued is executed in accordance with the procedural rules of the domestic law of the court in which execution is sought, including those on legal remedies."

135. Such rules, however, must not be such as to impair the effectiveness of the registration right created by the Regulation as regards enforcement orders "by frustrating the principles laid down in that regard, whether expressly or by implication, by the Regulation itself" (*Apostolides v. Orams*, the judgment of the Court of Justice, at [69]).

136. Further, a debtor who is aware, when served with the registration order, of arguments against immediate enforcement of the judgment (or authentic instrument), i.e. execution, must deploy those arguments by means of an appeal. The debtor cannot wait until enforcement (in the sense of execution) proceedings are brought and deploy those arguments then, unless they have first been raised in an appeal: *Hoffmann v. Krieg*, at [27]-[30]; for that would impair the effectiveness of the recognition and enforcement provisions and the scheme of the then Brussels Convention (subsequently, the Judgments Regulation).

137. Applying those propositions, does it necessarily follow that in an authentic instrument case such as this, the duty of full and frank disclosure does not apply to proceedings in the originating state arising from the authentic instrument. In my judgment, it does not, for the following brief reasons.

138. Without embarking on an exhaustive analysis of the full gamut of procedural laws governing enforcement by way of execution, I am not confident that the protection afforded to judgment debtors in this country who are subject to execution proceedings is necessarily and always sufficient where the instrument being enforced is an authentic instrument rather than a judgment.

139. No enforcement procedures have been drawn to my attention which specifically apply to enforcement (execution) of rights under an authentic instrument. Resort to analogies was therefore necessary (e.g. a mortgagee's power of sale, or summary diligence in Scotland). I infer that standard enforcement procedures using techniques

such as attachment of earnings, charging orders and so forth, do not specifically mention authentic instruments.

140. That, of itself, creates uncertainty. How would a bailiff, court official or district judge approach an application to enforce or levy execution based on registration of an authentic instrument? Would they be impressed by an argument such as that the enforceability of the entire debt is disputed and is the subject of continuing litigation in the originating state? The answer is, at best, uncertain.

141. I am concerned that a registered authentic instrument may be something of an unguided missile in the hands of the creditor. It is extremely unusual for the quantum of a debtor's liability to remain undetermined at the stage of execution. Yet, that is the position here.

142. Further, the proper forum for raising such an argument is on appeal. That is what these appellants have done. If they had not, they would have been too late because the principle of effectiveness prevents them from having a second bite of the cherry at the enforcement (execution) stage, as already explained.

143. It must therefore be the function of the appellate court, without reversing the decision to register the authentic instrument (which is impermissible because there is no public policy objection to its registration), to build in such safeguards as are needed, unless the first instance order has already done so, to ensure that the creditor does not – perhaps innocently, in good faith – obtain more from the authentic instrument than the originating state's courts would allow.

144. In the present case, the respondent chose not to register any of the judgments given in respect of the Deed, choosing instead to apply to register the Deed itself. The amount recoverable under the Deed is still being considered in the course of proceedings in France and could, in theory at least, be zero in the event that the appellants' limitation argument were to succeed (which as a matter of impression seems unlikely, but that is not a matter for me).

145. In those circumstances, the ongoing French proceedings cannot be said to be intrinsically irrelevant, as the respondent contends. The concession made by Mr Stone in oral argument to the effect that an "account" will need to be taken, also supports the proposition that at least the quantum of the appellants' liability remains to be determined. I agree with Mr Buck's observation that the scope of the respondent's concession is not clear and was not made before the Master, nor in the letters before claim dated 25 February 2022.

146. The respondent points out in this appeal that "as matters presently stand" (in Mr Stone's words), the French courts have raised no bar to enforcement measures being taken there. The concession appears not to go as far as accepting that enforcement against UK assets must await a decision of the French court as to whether the debt is now wholly unenforceable. Yet, it is obvious that on the taking of an "account", the appellants would argue that the judgment of the French court on this point should be awaited.

147. As I have said, public policy is, as a general proposition, satisfied by the debtor's right of appeal and that is the occasion on which to raise arguments against immediate

enforcement or to raise points relevant to quantum, such as the relevant interest rate or period. However, there are two reasons why the creditor – at any rate, in an authentic instrument case where the application of enforcement procedures raises uncertainties – may need to go beyond the strict formalities when applying for registration.

148. The first is that it is consistent with the overriding objective, in the public interest and in the creditor's own interest to inform the court of matters that may head off an unnecessary appeal, which consumes court resources and increases costs. Particularly because of the duty to promote the overriding objective, it is part of the duty of full and frank disclosure to inform the court below of any obvious points that are likely to be raised in an appeal, so that the Master can decide whether to make provision for those matters in the registration order.

149. If there is no relevant ongoing litigation in the originating state, the creditor need include in the application to register the authentic instrument only (together with the necessary formalities) a statement of the amount of money intended to be levied by way of execution; a breakdown of accrued interest, stating the rate and period; and a statement of the ongoing rate of interest down to payment.

150. The creditor should also include in the evidence supporting the application a brief statement of any potential complicating factors or matters derogating from the appropriateness of full and immediate enforcement by execution; for example, ongoing litigation in the originating state. These need not be described in any detail, and documents providing full details need not be exhibited; but they must be described accurately and transparently.

151. I do not think those requirements are unduly onerous or difficult or surprising. In an ordinary judgment case, it would similarly be part of the duty of full and frank disclosure to inform the Master if there were a pending appeal against the judgment sought to be registered, so that the Master could consider whether to stay the registration application under article 37; even more obviously, if the judgment had been set aside or already overturned on appeal.

152. For those reasons, I have come to the conclusion that there was a breach of the duty of full and frank disclosure. As the respondent rightly submitted, what is required to perform it is always fact specific. The Master ought to have been told in brief outline about the judgments in the French courts and the ongoing challenge to the enforceability of the debt. The position was also not helped by the potential for confusion arising from the misdescription of the Deed as a "judgment registered in the King's Bench Division…".

153. And paragraph 12 of Maître Martinet's first witness statement was phrased in a most unfortunate way which was verging on misleading: "the Application is made to register the Notarial Deed *without the Applicant having obtained a judgment in its favour from the French Courts.*" While the respondent had not "obtained" a judgment in its favour, the impression conveyed is that no judgment had been *given* in the respondent's favour, which was not correct.

154. I have considered what the appropriate remedy should be, apart from amending "judgment" to "authentic instrument" in the order. I think the appropriate remedy is to vary the order by adding a provision in it that the amount the respondent is

permitted to obtain by way of enforcement measures pursuant to the registration of the Deed will be determined at a hearing.

155. I will remit the matter back to a Master for that purpose. The hearing is a judicial one, not an administrative process. It cannot be done by a bailiff or court official. It is akin to the taking of an account or an assessment of amounts due, together with interest.

Conclusion; amendment of the order

156. For the reasons given above, I allow the appeal in part. I will not set aside the order for registration of the Deed, but I will vary the order by replacing the word "judgment" with words appropriate to describe the Deed and its nature as an authentic instrument rather than a judgment.

157. I will add a proviso, to the effect that the Deed may be enforced in this country to recover an amount of principal and interest not exceeding an amount to be determined by the court if not agreed, at a hearing before a Master of the King's Bench Division of this court, to be fixed on the application of the respondent, on notice to the appellants.

158. I will hear counsel or consider written submissions on the precise wording of the order, as varied, and on any other consequential matters arising from this judgment. I conclude by thanking counsel for the eloquence and clarity of their arguments and the diligence of their researches.