IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2020] EWHC 250 (QB)

No. IX GNC 647/18 and EEOP 46/19

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 21 January 2020

Before:

JOHN KIMBELL QC
(sitting as a Deputy Judge of the High Court)

B E T W E E N :

OAKFIELD FOODS LTD — Applicant

- and -

ZAKLAD PRZEMYSLU MIESNEGO BIERNACKI SP Z O O — Respondent

MR B. DYE (instructed by Clyde & Co) appeared on behalf of the Applicant.

MISS D. GILBERT (instructed by IMD Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

JOHN KIMBELL QC SITTING AS A DEPUTY HIGH COURT JUDGE:

1 On 2 December 2019 an enforcement officer employed by a company called the High Court Enforcement Group Ltd (which I will refer to as "**HCEG**") attended the registered office of Oakfield Foods Ltd of 3 Elstree Gate, Elstree Way in Borehamwood with a writ of control issued by this court. I will refer to Oakfield Foods Ltd simply as "Oakfield." Oakfield is a meat importer. It buys raw and cooked products from around the world and supplies retail outlets and manufacturers of meat products in the UK.

2 The writ of control stated that it had been issued on 21 October 2019 on the application of IMD Solicitors. It states that it is in respect of the principal sum of £149,100.43 which Oakfield is said to owe pursuant to a European Order for Payment issued in June 2018 ("**the EOP**"). The creditor under the EOP was identified as Zaklad Przemyslu Miesnego Biernacki Sp z o o, ("**Biernacki**"). The EOP was said to have been issued by the Regional Court in Poznań, which is a city in Western Poland.

3 The total sum demanded by HCEG under the writ of control was £182,882.77. Oakfield paid this sum by bank transfer under protest. HCEG agreed orally to hold the money transferred rather than paying it over to Biernacki for 14 days pending the issue of an application by Oakfield to stay execution or to set aside the writ of control and/or to set aside or otherwise challenge the EOP and an order for repayment of the sum to Oakfield.

4 An application was issued on 13 December 2019, i.e. within the agreed two weeks. That application came before David Pittaway QC, sitting as a Deputy High Court Judge. He heard counsel for Oakfield and he read the witness statements of Mr Michael Phillis, together with exhibits MP1 to 9. Having heard submissions from counsel for Oakfield, he ordered as follows,

> "1. Until the determination of Oakfield's application dated 13 December 2019 or further order of a court, enforcement of Biernacki's European order for payment dated 1 June 2018 (the "EOP") and the warrant of control (inaudible) execution hearing are stayed.
>
> "2. HCEG be joined as a party to these proceedings pursuant to CPR Part 19.2(2).
>
> "3. Until the determination of Oakfield's application dated 13 December or further order of the court, Biernacki and HCEG must preserve intact the sum of £182,887.72 paid by Oakfield into HCEG's account on or about 2 December and do not charge it or any of it or pay it or any of it away out of HCEG's account.
>
> "4. There should be a return date for Oakfield's application for this order on 13 January 2020, time estimate half a day.
>
> "5. On or by 6 January 20120, the senior master shall cause a search or further search to be made of foreign process files in the matter for the service of Biernacki's EOP to be undertaken and if a file is found shall enable the parties to copy the file."

5 The application duly came before me on the return date as provided in para. 4 of his order.

6 On that application, Mr Brian Dye, of counsel, appeared for Oakfield, instructed by Clyde & Co, and Daniella Gilbert, of counsel, appeared for Biernacki, instructed by IMD Solicitors. HCEG did not attend and I was told that their position was that they were neutral and would abide by any order the court made. I was also told that they wished to save the costs of attending.

The challenge to the writ of control

7 Oakfield sought an order setting aside the writ of control. I will return to what Mr Dye called his technical argument for setting aside the writ of control towards the end of this judgment.

The challenge to the EOP

8 Oakfield also sought a declaration that the EOP was a nullity or was, at the least, unenforceable because the declaration of enforceability issued by the Regional Court in Poznań was based on a service error. The error relied upon was that, according to Mr Dye, Oakfield had validly refused service of the EOP and the that this had been mistakenly overlooked by this court when it certified that service of the EOP had in fact taken place.

The application for a stay

9 As a fallback position, Oakfield also sought a further stay pending the outcome of Oakfield's challenge in Poland to the EPO, which I will come to.

10 Biernacki for its part, sought dismissal of the application and the lifting of the stay, preventing HCEG paying over the sum of £182,000 to Biernacki.

The evidence

11 Oakfield relied on the evidence of Mr Phillis that had already been before Mr David Pittaway in the December hearing, a witness statement of Pavani Reddy of Clyde & Co dated 9 January 2020 and the witness statement of Ian Pearl dated 13 January 2019. Biernacki relied on a witness statement of Klaudia Fusiek dated 9 January 2020.

12 Following the hearing and with the agreement of the parties, I inspected file EEOP46/19 and informed the parties of what I had discovered, which was, in short, not very much. In particular, on inspection of that particular file, which is the only file that I have looked at and which I believe the parties had already themselves inspected, it was clear that it did not contain any of the following items:

a. The letter of the Regional Court of Poznań dated 23 October 2019, which I will come to later.
b. Any explanation as to why it appears that the High Court certified that Oakfield had been served with the EPO on 31 December 2019.
c. The Annex 2, statement of refusal, dated 3 December 2018 signed by Mr Mark Glass of Oakfield.

13 Having informed the parties that the file did not contain any of those three items, Mr Dye submitted a short supplementary skeleton, as did Miss Gilbert. Mr Dye's skeleton was accompanied by a further short witness statement by Pavani Reddy of Clyde & Co, in which reference was made to the possibility of relevant documents being held onto other court files with the indices SFP2018 11226 and SFP2018 2359. I am obviously not in a position today to decide what, if anything, those files may or may not contain.

14 Miss Gilbert, in her skeleton addendum served today, submits that the file 11226 essentially became obsolete because a new file was opened. She submits that there is no evidence that a file was opened in the incorrect name of Oak (Foods) Limited, as suggested as a possibility by Miss Reddy. It seems to me there is a limit to how far the court can take its own enquiries and at the end I need to form a view on whether I can properly decide the application on the current evidence that I have. I have formed the view that I can decide the application without further inspection of the files, certainly by me, for the reasons which I will give now.

The legal framework

15 Before considering the parties' submissions, I need to say something about the legal framework governing European orders for payment and their enforcement. EOPs are the creation of Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12 December 2006 ("**The EOP Regulation**"). EOPs arise out of the objective of the European Union to create and develop what is referred to in the First Recital to the Regulation as,

> "An area of freedom, security and justice in which the free movement of persons is ensured."

16 The Recital continues,

> "For the gradual establishment of such an area, the Community is to adopt, *inter alia*, measures in the field of judicial cooperation in civil matters having cross-border implications and needed for the proper functioning of the internal market."

17 Recital 9 of the Regulation says this,

> "The purpose of this Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement."

18 It is perhaps worth noting in Recital 10,

> "The procedure established by this Regulation should serve as an additional and optional means for the claimant, who remains free to resort to a procedure provided for by national law. Accordingly, this Regulation neither replaces nor harmonises the existing mechanisms for the recovery of uncontested claims under national law."

19 Recital 27 states as follows,

> "A European order for payment issued in one Member State which has become enforceable should be regarded for the purposes of enforcement as if it had been issued in the Member State in which enforcement is sought."

20 The Recital goes on to refer to an important principle of EU law, which is this,

> "Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions for issuing a European order for payment are fulfilled to enable the order to be enforced in all other Member States without judicial review of the proper application of minimum procedural standards in the Member State where the order is to be enforced. Without prejudice to the provisions of this Regulation, in particular the minimum standards laid down in Article 22(1) and (2) and Article 23, the procedures for the enforcement of the European order for payment should continue to be governed by national law."

21 Article 1 of the Regulation corresponds and reflects Recital 9 by stating that the purpose of the Regulation is to simplify, speed up and reduce the cost of litigation in cross-border cases. The Regulation applies only to civil and commercial matters.

22 There are a number of exclusions, which are not relevant to these proceedings. There is no dispute that this is indeed a cross-border case involving a creditor in Poland and an alleged debtor in England. But it is perhaps worth emphasising that it is clear that the procedure was designed only for what is referred to as uncontested pecuniary claims.

23 Article 5 provides a definition, including that the Member State of origin means the Member State in which the European order for payment is issued and the Member State of enforcement is the Member State in which enforcement of the European order for payment is sought. Importantly in this case, for a reason which I will come to later, Article 6 refers to jurisdiction and says this, in its original format,

> "For the purposes of applying this Regulation, jurisdiction shall be determined in accordance with the relevant rules of Community law, in particular Regulation EEC no. 44/2001."

That now has been replaced by the recast Brussels Regulation, EU Regulation 1215/2012, but the substantive point remains the same.

Jurisdiction

24 The EOP Regulation does not itself lay down any new rules for jurisdiction. It simply provides a mechanism for a collection, as it refers to in Article 4, of pecuniary claims for specific amounts which have fallen due and are uncontested. I have referred to jurisdiction because at the very end of Mr Dye's submissions at the hearing, he submitted that in relation to the underlying dispute between Oakfield and Biernacki, it would be Oakfield's position that the court in Poland did not have jurisdiction because, under the terms of the sales agreement between it and Biernacki, there was a choice of court provision providing for disputes to be referred to the courts of England and Wales. I have not seen any of the contracts and Mr Dye was not pressing the point; he merely wanted to alert me to the fact that, should the matter proceed as ordinary civil proceedings outside the confines of the European order for payment procedure, one of the first points that Oakfield would be taking would be as to jurisdiction. By way of balance in relation to that, I should perhaps say that the position Biernacki take in relation to jurisdiction is different. They say in their application for the EPO that the meat that was sold from Biernacki to Oakfield was delivered in each case on Incoterms CIF/CIP under cover of CMR notes and delivery took place in Poland. Birenacki says that the Polish courts therefore have jurisdiction.

25 I do not need to resolve that dispute today, but simply note that jurisdiction appears to be one of the matters likely to be in dispute if the matter goes further.

26 Article 7 provides the procedure for applying for a European order for payment and refers to one of a number of standard forms which are annexed to the Regulation and any applicant has to fill in Form A which provides for a number of codes and boxes in order that it can be processed, one presumes mechanically, by a computer. It does allow for evidence to be submitted in support of the claim and additional statements, if necessary.

27 Article 8 provides that it is for the court seized of the application in the Member State of origin that examines whether the requirements set out in Articles 2, 3, 4 6 and 7 are met. In other words, the gateway court is in the Member State of origin and it is for that court to determine whether the basic requirements are met for the issue of an EOP. Indeed, that court must reject the application if those requirements are not met or that the claim is clearly unfounded. There is a Form D which the court, if it is going to refuse the application, can fill in to inform the applicant of that outcome. If, on the other hand, the court of origin is satisfied that the conditions in the EOP Regulation are all satisfied, it issues a European order for payment on Form E, as set out in Annex 5, and it usually does so within 30 days.

28 Article, 12(2) says this,

> "The European order for payment shall be issued together with a copy of the application form."

It is clear that what is being referred to there is, first of all the European order for payment in standard Form E and the application in standard Form A.

29 Article 12(3) is important because it states that in the European order for payment, the defendant is advised of options. One is – and there are only two of them – to pay the amount indicated in the order to the claimant; or,

> "To oppose the order by lodging with the court of origin a statement of opposition, to be sent within 30 days of service of the order on him."

30 That is further dealt with in Article 16 which sets out yet another standard form, standard Form F as set out in Annex 6, which is the statement of opposition to the European order for payment. It is a feature of the scheme that in that statement of opposition it is not necessary for the defendant to indicate why he contests a claim. All that is required in standard Form F is to say that he does contest the claim. That is then submitted to the Member State of origin and it is for the Member State of origin to decide what it should do. In most cases, it seems that a claim is transferred at the first instance to the ordinary civil courts for resolution and orders will be made possibly for re-service and re-issue and then any application for challenge to jurisdiction can be made by the defendant. That is made clear from Article 17(1) which says,

> "If a statement of opposition is entered within the time-limit laid down by Article 16(2), the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in any event."

Clearly there are some claimants who want to have a go at recovering a debt under an EOP Regulation but then indicate that they do not want to take it further if that is contested, otherwise the ordinary rules apply, including, no doubt, as to jurisdiction.

31 Article 18 is an important provision for this application. It provides, in para. 2, that,

> "The formal requirements for enforceability are governed by the law of the Member State of origin" (in this case, Polish law).

32 Article 20 provides a system of review, even after the time limit laid down in Article 16(2) has expired and sets quite a high threshold of *force majeure* type extraordinary circumstances. Article 20 does not directly impinge on the application today because Mr Dye submitted that his client has not yet got to Article 20 because his challenge to the enforceability of this EOP is based on the fact that when it was served, it was not all in English as required and that service was properly refused for that reason. He relied on the case law which I will come to in a second which provides that the EOPs are unenforceable in those circumstances and the time limit for a review under Article 20 has not even begun to run.

33 Article 21 provides that the enforcement procedures shall be governed by the law of the Member State of the enforcement and immediately provides afterwards as follows,

> "A European order for payment which has become enforceable shall be enforced under the same conditions as an enforceable decision issued in the Member State of enforcement."

34 The next paragraph is important to Mr Dye's technical point,

> "For enforcement in another Member State, the claimant shall provide the competent enforcement authorities of that Member State with:
>
> (a) a copy of the European order for payment, as declared enforceable by the court of origin, which satisfies the conditions necessary to establish its authenticity; and
>
> (b) where necessary, a translation of the European order for payment into the official language of the Member State of enforcement."

35 Article 22(3) is an important provision. It says this,

> "Under no circumstances may the European order for payment be reviewed as to its substance in the Member State of enforcement."

36 Article 23 provides for a freestanding European stay in circumstances where the defendant or debtor has applied for a review in accordance with Article 20. It provides a discretion to stay enforcement proceedings, but that is not relied upon by Mr Dye here because he says there is no Article 20 review yet commenced.

The role of the Service Regulation

37 That is the basic framework for the EOP in this case. Although the EOP contains two articles which are concerned with service, namely Articles 13 and 14, it is common ground that the mechanics of service of the EOP, the application of the EOP, are governed by Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2007 ("**the Service Regulation**").

38 Article 2 of the Service Regulation creates transmitting and receiving agencies in each Member State. Under Article 2(4) the following provision exists,

> "Each Member State shall provide the Commission with the following information:
>
> (a) the names and addresses of the receiving agencies referred to in paragraphs 2 and 3 above;
> (b) the geographical areas in which they have jurisdiction;
> (c) the means of receipt of documents available to them; and
> (d) the languages that may be used for the completion of the standard form set out in Annex I."

Article 3 (inaudible) essential body and there are then various articles concerned with the transmission and service of judicial documents from one Member State to the other.

39 Annex II to the service regulation contains a pro forma document in all the languages of the Member States. In the English version, it creates a one side of A4 statement (which I will refer to as the Annex II statement). It is enclosed with any document which is to be served under the Service Regulation, including any EOP. It says as follows,

> "The enclosed document is served in accordance with Regulation (EC) No. 1393/2007. You may refuse to accept the document if it is not written in or accompanied by a translation into either a language which you understand or the official language or one of the official languages of the place of service.
>
> "If--" (and these are the crucial words) "If you wish to exercise this right, you must refuse to accept the document at the time of service directly with the person serving the document or return it to the address indicated below within one week stating that you refuse to accept it."

40 The paragraphs below these words are pre-filled by the relevant agency in the Member State, in this case the Foreign Process Section in the Royal Courts of Justice. I will come to precisely what was included in the pre-filled section of the EOP in this case shortly. I should say the boxes are, first of all, identity, then address, street and number, place and post code, country, telephone and then fax and email marked with an asterisk, being optional.

41 Then there is a declaration of the addressee which has to be signed and dated, which is as follows,

> "I refuse to accept the document attached hereto because it is not written in or accompanied by a translation into either a language which I understand or the official or one of the official languages of the place of service.
>
> I understand the following languages …"

And then there is series of boxes which can be ticked. At the very bottom there is signature box.

42 So that is the way in which a person who is served with an application for an EOP and, indeed, the EOP itself can elect to declare that he does not understand the language in which it is written and to return it to the relevant address.

43 The final piece of legal framework relates to Article 2(4) in the service regulation which requires Member States to provide the Commission with certain information. It is a matter

of public record, and I was not referred to it by either party, and it can be found within a few seconds on Google, that the position as regards the United Kingdom is as follows:

a. The transmitting agency is the High Court Queen's Bench Division Foreign Process Section.
b. The receiving agency is the High Court Queen's Bench Division Foreign Process Section.
c. The means of receipt of documents under Article 2(4)(c) are fax and post.
d. The accepted languages are English and French.

Facts of this case

44 I turn now to the facts of this case.

45 On 10 May 2018, a lawyer acting for Biernacki filled in Form A in Polish and submitted it to the Regional Court in Poznań. It would appear that in or around the time this was done, an English translation was prepared and obviously, when I am stating what Annex A states, I am referring to a translation into English, which appears to be certified by a stamp, although the date on that stamp is not entirely clear to me, but it must have been 2018. In any event, Annex A in translation was submitted by an advocate on behalf of Biernacki and it sets out that under six invoices dating from July 2017 to December 2017, the price of beef delivered by Biernacki to Oakfield, sums remained unpaid. As I have already mentioned, the application also says that the meat was delivered in Poland under CMR notes and on incoterms conditions under which place of delivery was Poland and risk transferred to Oakfield there.

46 Somewhat surprisingly, perhaps, Annex A box 11 also contained the following words,

> "I hereby state that there have been many trials to amicably solve the dispute, but due to the fact that the debt has not been repaid by the defendant, this action was necessary."

47 I say that is somewhat unusual because that suggests there is a dispute and this is not, in fact, an uncontested payment, but there it is. It may be that a view was formed by Biernacki or those advising Biernacki in Poland that actually what had been said in the course of those attempts disclosed that there was in substance no dispute to the claimed price for the beef sold and supplied.

48 The words from box 11 that I have just quoted are consistent with what Mr Phillis says in his original witness statement. In para. 6 he said this,

> "Oakfield and Biernacki are in dispute as to the quality and merchantability of meat exported by Biernacki to Oakfield and as to whether Biernacki is legally responsible to indemnify Oakfield in respect of the costs of purchasing substitute meat in circumstances in which Oakfield have rejected Biernacki's deliveries on grounds of quality and unmerchantability."

49 I have to say, having read that and the section from Annex A I have just referred to, it does seem to me this was always a rather unpromising case for a pursuit under the European order for payment. However, that is something that is ultimately a matter for the court in the Member State of origin to deal with and possibly the court properly seized once any jurisdiction dispute is resolved. In any event, the Regional Court issued the EOP on 1 June

2018 and the documents were transmitted to the receiving agency in the High Court in London and were received, as far as I can see, on 13 November 2018.

50 The documents then appear to have been sent by post and arrived at Oakfield's registered offices on Thursday, 29 November 2018. Mr Phillis in his witness statement says that pages 1 to 59 of exhibit MP1 contain what he believes was received by Oakfield, and he puts it in those terms because Clyde & Co, who are now acting on behalf of Oakfield, were not at that time acting. Instead a firm of solicitors called OGR Stock Denton ("**OGR**") were acting, but on the basis of the file received by Clyde & Co from OGR Mr Phillis says that he can be certain – or as certain as he can be – that what was received by Oakfield was, as Mr Phillis puts it, a confused bundle of documents, including a whole number of CMR notes and invoices, almost all of which are in Polish.

51 More importantly for these purposes – and I do not have any reason to doubt that Mr Phillis is right that what was received was pages 1 to 59 of exhibit MP1, I did not understand Miss Gilbert to contend otherwise - what was received at that time in relation to the EOP itself was that Form A was entirely in Polish and without any translation and in relation to Form E, one page is in English and two pages are in Polish, which does also suggest that, almost certainly, English translations were prepared for documents but, for whatever reason, they were not received by Oakfield.

52 I am further satisfied that that must be the case, that is to say that there is a lack of required full documentation in English because of the reaction of Oakfield. Mr Mark Glass filled in, having, it seems, I assume, spoken to his solicitor, OGR, Annex II, protesting that the documents Oakfield had received were not all translated into English. He signed what I have referred to as the Annex II declaration or statement on 3 December 2018. He initially sent a version to his solicitor earlier in the day where he had not identified the languages which he speaks. He was obviously advised to correct it and a final version where he has ringed English as the only language which he understands was sent at 15:54 on 3 December which, as it turns out, is a Monday.

53 At 16:53 on the same day Mr Pearl of OGR says this by email,

> "Dear Mark, Just to confirm, I am sending the certificate to the court by special post today, so it should be received tomorrow."

54 Just before I refer to what Mr Pearl means by special post, I want to say something about the Annex II document, which is that it was pre-filled in by the Royal Courts of Justice officers and the identity of the person to whom the Annex II declaration had to be returned is this. The words pre-filled in as the person / place to return the declaration are: "The Senior Master, for the attention of the Foreign Process Section." The address is: "Royal Courts of Justice, Room E16, Strand, London, WC2A 2LL. Country: United Kingdom". The telephone number is then written in; it is not clear by whom. A fax number is not given, nor is an email address provided.

55 It is clear that OGR were instructed to return the signed declaration on behalf of Oakfield. OGR its seems chose to do this via the DX. OGR's GX log book was exhibited and it shows that on 3 December 2018, under tracking number 505012843649 a package was sent to the senior master, for the Attention of Foreign Process or Processor. A DX number that was recorded as having been used is 44450 and the DX receiving exchange is the Strand. That was one of three packages prepared for dispatch in the DX that day by OGR.

56 So, I have no hesitation in accepting the evidence of Oakfield, that the package and the Annex II declaration was addressed and prepared for dispatch by DX on 3 December. Miss Gilbert took the point that the email referring to it being sent by special post was sent rather late in the day, at seven minutes to five, but it is not unknown for-- I do not know what time the DX exchange closes or, indeed, how close the local DX exchange for OGR's office in Dollis Hill is - it may have been open until six o'clock - but I have no reason to disbelieve Mr Pearl when he says it should be dispatched today for arrival at the court the following day.[1]

57 Mr Dye urged me, on the basis of that evidence, to find on the balance of probabilities that the package arrived at the RCJ and has been lost. I decline to do so for these reasons:

a. First, while I fully accept that it was prepared for dispatch in accordance with a tracking system and a log book, there is no evidence that the package actually arrived at room E16 at the RCJ.[2]
b. Secondly, no acknowledgement of receipt has ever been issued for the Annex II declaration and no trace of it has been found on any of the files inspected to date.
c. Thirdly, the wrong DX number was used; the DX number for the Foreign Process Section is DX44459, not 44450.
d. Fourthly, the Foreign Process Section in the High Court itself confirmed to the Poznań Regional Court that service had been effected on Oakfield. Obviously, had the Annex II declaration been received by those working in room E16 at the RCJ that would not have happened and instead the Annex II declaration would have been transmitted.

58 Mr Dye referred me to s. 7 of the Interpretation Act and that provides as follows,

> "Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

59 The difficulty with that submission is that it does not apply to the DX. There are provisions in the **White Book** which do create a deemed service provision for the DX, for the benefit of the DX system, for example the procedure of the Supreme Court creates such a rule, but s. 7 of the Interpretation Act 1978 does not assist Mr Dye because Oakfield's then solicitors chose to use the DX instead of by post. Had they used the ordinary post and had they maintained a post logbook showing it had been correctly addressed to the address in Annex II, then that would have been a different matter, but they did not.

60 More fundamentally, it seems to me, Annex II has to be construed within the context of the EU law framework in which it comes into existence. It is, as many things are relating to this European order for payment, somewhat formulaic and somewhat rigid. It is a form that is deliberately filled out in a particular way and it seems to me, looking at it through the eyes of the Service Regulation and the information that the UK has provided to the Commission

[1] Subsequent to the handing down of this judgment Oakfield produced a DX tracking record showing that the package arrived at the DX office on the Strand and was collected by a member of HMCTS staff authorised to collect parcels sent to DX 44450. The consequences of this new evidence are dealt with in a separate judgment dealing with Oakfield's application that this judgment be reconsidered in light of the new evidence.
[2] See now fn. 1 and the further judgment referred to therein.

in accordance with Article 2(4) of that regulation, it seems to me to be clear that Oakfield was informed was that it had to return the declaration to the senior master at room E16 at the address given, and that address included a postcode. So, it seems to me that the two safe ways in which OGR, on behalf of Oakfield, could proceed were either to return it by post using the correct postcode, in which case they would have the benefit of s. 7 of the Interpretation Act or, alternatively, to file the statement by hand by attending at room E16, handing the document over and getting a receipt.

61 I cannot read what is said in Annex II as provided to Oakfield as inviting or suggesting that the DX was a means by which the document could be filed. That is not to say, of course, that for practical purposes and on a day-to-day basis it may be that if the proper DX address is used it might be, for all I know, that those working in room E16 accept documents in the DX and provide acknowledgements of receipt. I just do not know if that is the position and I have no evidence on it. It may be the case, but it does seem to me that OGR, on behalf of Oakfield, took a risk in using the DX when - no DX number is given on the form and then they have made, themselves, a mistake by using the wrong DX number in any event.

62 At the very least, it seems to me, that OGR ought to have checked, having used the DX or indeed if they had used a private courier, that the documents had been safely received because it had to be returned within a week. I had no evidence from Mr Pearl or anyone else that OGR ever checked or sought confirmation of receipt by the court. They seem to have simply assumed that because it was not returned to them by the DX as refused, that it must have been delivered safely.

63 It seems to me, if one is looking at the closest domestic analogy to returning Annex II for the purposes of being transmitted under the Service Regulation, it is para. 5.1 in the practice direction to CPR Part 5 because that deals with documents being filed at court. It seems to me, although Miss Gilbert, I think, relied at various points and, to a certain extent Mr Dye referred me to CPR Part 6 to do with service, that is not the proper analogy here. The proper analogy, if any analogy is needed at all, is that this declaration did not need to be served on anyone; it needed to be filed at court in a particular office, namely the Foreign Process Section of the High Court in E16, for onward transmission to the Regional Court in Poznań. To the extent that the English procedure governs that, it is very clear in para. 5.1 that the date on which a document is filed at court must be recorded on the document and this can be done by seal or a receipt stamp. Neither of those have been attained in this case for declaration relied upon by Oakfield. Paragraph 5.2 provides,

> "Particulars of the date of delivery at a court office of any document for filing and the title of the proceedings in which the document is filed shall be entered in court records, on the court file or on a computer kept in the court office for the purpose. Except where a document has been delivered at the court office through the post, the time of delivery should also be recorded."

64 So, the position is that had OGR sent a runner to deliver this Annex II or given it to a courier to deliver, then the time of delivery would have been recorded. If they had decided to use post then that would not have happened but it would have been entered in on the court system.

65 Then there is a provision dealing with filing by fax, para. 5.3, setting out the restrictions on that. Paragraph 5.4 says this,

> "Where the Court orders any document to be lodged in Court, the document must, unless otherwise directed, be deposited in the appropriate office of that Court."

It seems to me that makes it clear that when the court says, as it does in Annex II, that the document must be returned to E16, it means it and any person not complying with the rules and not depositing the document at the appropriate office does so at great risk to the interests of their client.

66 Notwithstanding Mr Dye's eloquent submissions on the facts of this case, I decline to find, on the evidence currently available, that the Annex II declaration signed by Mr Glass on 3 December 2018, on the balance of probabilities, arrived at room E16.[3] It seems to me that the evidence is very much to the contrary. The evidence strongly suggests that it did not arrive for whatever reason. What is clear is that, at least on the basis of the files inspected to date, it has not been found and no trace of it has been found. Nor was it ever recorded.

67 I therefore reject Mr Dye's submission insofar as it is based on the factual allegation that the Annex II declaration was received by the Foreign Process Section of the High Court.

68 Even if I had been satisfied that on the balance of probabilities the Annex II document had arrived at the RCJ or had arrived at E16 and had somehow or other been missed, I do not accept that it would have been open for this court to declare that the EOP in this case was not enforceable.

69 It seems to me that under the EOP regulation and, in particular, Article 22(3), it is for the court of the Member State of origin to review the substance of any EOP. I have already quoted Article 23(3), but what it says is that,

> "Under no circumstances may a European order for payment be reviewed as to its substance in the Member State of enforcement."

70 In support of his submission that this court does have jurisdiction to declare an EOP unenforceable, Mr Dye referred me to the case of *Moreno de la Hija v Lee* [2018] EWHC 1374 (Ch), reported [2019] 1 WLR 175. That was a case not concerned with an EOP but rather with a predecessor or analogous European instrument known as an EEO, a European Enforcement Order, created under Regulation 805/2004. In that case it was held ultimately by David Halpern QC, sitting as a deputy High Court judge, that the EEO in that case was not a proper EEO and the court enforcement ought not to give effect to it.

71 The reason why Mr David Halpern was persuaded to hold that it was not a proper EEO was very peculiar to the facts of that case. The issuing court had not certified that the minimum standards provided for in that particular regulation had been complied with. In other words, although it looked like an EEO, in legal terms the court of origin had not certified it to be such and therefore it was open to the English court to declare that it was not an EEO even though it might have looked like one at first glance.

72 It seems to me not to be analogous to the situation in this case. The position is that the EOP in this case was issued properly in Poland and, as far as the Polish court was concerned, it received a certificate back from the High Court here saying that service had been effected on 31 December 2018 and it then proceeded to declare the EOP enforceable. Then it was re-

[3] In the separate judgment referred to in fn 1, I was invited to reconsider this conclusion in light of the discovery of a DX tracking record. I held that this conclusion stands.

transmitted back to England for enforcement. It seems to me there is no basis on which I, looking at the EOP in this case, can say that it is not an EOP. It plainly is. Mr Dye's client's complaint is a different one and it arises out of the fact that when the EOP and the EOP application form was originally served by post, some of the documents were not translated into English.

73 It seems to me, even if I had been satisfied that there had been some sort of mistake in the court here, it is not for the courts of the state of enforcement to start declaring that EOPs are not enforceable. That is something that only the court of origin can do.

74 So, for that extra and further reason of law, I reject the application to declare this EOP unenforceable and to set it aside.

The application for a stay on enforcement

75 I turn then to Oakfield's alternative application, which is for, in effect, a continuation of the stay, albeit on slightly different terms suggested by Mr Dye. This is based on the fact that Oakfield have launched proceedings in Poland challenging the EOP. Those proceedings were issued on 1 July 2019. I have been provided with a translation of that application. This is an application in the proceedings themselves, that is to say in the proceedings concerning the EOP using the Polish case name IX GNC 647/18. The claimant is named as Biernacki and the defendant is named as Oakfield. There follows what is said to be a pleading by the defendant. It is a 17-paragraph document which sets out the story of the application for the order for payment from the perspective of Oakfield. It sets out the importance of Article 8(3) and the option of the addressee to refuse to accept a document on the basis of lack of (inaudible). It says in paragraph 7,

> "The defendant disputes that the European order for payment became enforceable."

76 It cites case law of the Court of Justice of the European Union, which I will turn to in a second, in support of the proposition that if there is a procedural irregularity affecting the service of a European order for payment and the application of the order, the order does not become enforceable and the period of time which the defendant may lodge a statement of opposition cannot start to run. That is case C-21/2017 *Catlin Europe SE v O. K. Trans Praha*.

77 As Miss Gilbert observed, there is something of an oddity about this pleading because, whilst she accepted that one should not view the document through the lens of English pleaders, when one gets to para. 14 of the pleading one sees what appears, to English eyes anyway, to be a prayer for relief. It says this,

> "For all these reasons, the defendant requests that proper service of the translation of the pleading and attachments and European order for payment into English which will enable the defendant to refer to its content and to prepare a defence in a prescribed time limit."

78 So, on its face, it does not actually end up with a punchline that the court is asked to declare that the EOP in this case is not enforceable. It = is rather odd because one would expect to see that, because it is Mr Dye's main contention, that it is not enforceable.

79 But it seems to me that I have to be cautious in looking at these proceedings and I am entitled to take notice of the fact that in other jurisdictions different procedural rules apply and that where in England we might expect to see a very clear pleading for the full relief

sought, it may be that in Poland that is not necessary and further relief can be added as the case proceeds. In any event, I am satisfied that, reading the pleading as a whole and in particular having regard to paragraph 14 which I have quoted from above, the purpose of the application is to challenge the enforceability of the EOP, even if what I have referred to as prayer for relief may seem somewhat restrictive in its terms.

80 The question then arises for this court, as the court of enforcement, what should be done given the fact that a challenge to the enforceability has been made in the court of origin? It seems to me the answer to that question is fairly straightforward. Unless I were to conclude that the application that has been made has absolutely no prospects of success, then it seems to me that the proper thing to do would be to stay a further enforcement pending the resolution of those proceedings.

81 I am satisfied it is the appropriate course in this case because, as a result of the application that was made on 1 July 2019, the Regional Court in Poznań sent a letter dated 23 October 2019 to the High Court, Queen's Bench, Senior Master. It set out in very polite terms that an application had been made challenging the EOP and sought some information about how it came about that service was certified. What is says is,

> "Meanwhile, based on the information obtained from the addressee, a service attempt was made on 3 December 2018" (having noted already that it is said that they were served on 31 December) "when employees of the defendant addressee supposedly refused to accept the correspondence due to the fact that it was in a language they did not understand at signed Appendix II. Information (inaudible) addressee about his right to refuse to accept a document. Therefore, the court requested an explanation when service occurred and whether the addressee refused to accept the correspondence and, if so, when that happened."

82 The letter is understandable response to the application launched by Oakfield in Poland. Very unfortunately, for reasons which I am afraid are not clear to me, the letter that I have just quoted from appears not to be on any file in this court. It was written in Polish and translated into English. I have seen a picture of it, which appears to have been taken in Poland but, having inspected the main court file EEOP46/19, I have already informed the parties that this letter does not appear to be in it. It may be that it was misfiled or never arrived, but it seems to me that what one can conclude from the fact that the letter was drafted and, on assumes, sent, was that the Regional Court in Poznań wishes to enquire further into this matter in seeking the assistance of the senior master in understanding how service came to be certified on 31 December. In those circumstances, until the English court has responded to that letter, it would seem to me quite inappropriate to assume that the application is bound to fail and that enforcement should follow without any restriction.

83 I should also, for the sake of completeness, mention that I am satisfied that Mr Dye is right when he refers to the CJEU case of C-21/17 *Catlin Europe SE v O. K. Trans Praha*. In that case, the Fifth Chamber dealt with the interaction of the service regulation and the EOP regulation and, importantly, held at para. 43 that,

> "According to the court's case law, in the case of irregular service, including irregularity due to the failure to provide translations, the European order for payment has not validly become enforceable and the period in which the defendant may lodge a statement of opposition has not started to run"

84 They then refer by analogy to an earlier decision of *Eco Cosmetics* which Mr Dye also provided to me in copy. The conclusion reached in that case in para. 57 is that in the case of a procedural irregularity affecting the service of a European order for payment together with the application, the order does not become enforceable and the period that the defendant lodge a statement of opposition cannot start to run. I accept Mr Dye's submission that Article 20 and Article 23 are not yet engaged. His submission, which I accept, is that on the basis of this case Oakfield has, at the very least an arguable case that time has not yet started to run, so Oakfield is still entitled today to serve a notice of opposition.

85 As to my jurisdiction to stay enforcement, I did not understand Miss Gilbert to dispute the proposition referred to in the *Moreno* case that the court here has an inherent jurisdiction to stay enforcement and, indeed, under the EOP Regulation itself, the procedure for enforcement is governed by the law of this court. This court has wide and well-known discretion to stay and impose conditions on enforcement of all of the enforcement orders, including the writ of control, in this case. It is well established that there is a jurisdiction to control enforcement, even after, as has occurred in this case, the writ of control has been executed and payments have been made.

The challenge to the Writ of Control

86 Before I conclude by setting out the order that I propose to make with the assistance of the parties, I need to deal with one final submission, which was Mr Dye's submission which he called his technical point. The technical point was based on Article 21(2) of the EOP Regulation, which I have already quoted, but what it provides is that when it comes to enforcement, the claimant must provide the enforcement authorities – that is to say the English court in this case – with,

> "A copy of the European order for payment, as declared enforceable at the court of origin, which satisfies the conditions necessary to establish its authenticity and a translation."

87 What Mr Dye said is that when you look at Form E itself the words in bold appear on p. 2,

> "In accordance with Article 12 of Regulation (EC) 1896/2006, the court has issued this European order for payment <u>on the basis of the attached application.</u>" (That is his underlining; he would emphasise the word "attached".) "By virtue of this decision, you are ordered to pay the claimant the following amount."

88 Miss Gilbert, on the other hand, submits that that cannot be the intention and she draws my attention to Article 12(2) where she submits a clear distinction is drawn between the European order for payment itself and the application form.

89 It is a short point of interpretation. I was not referred to any case law in which this point has arisen, so it seems to me it is a matter for me to apply ordinary principles of the construction of EU regulations and EU law to the question of whether what is referred to as European for payment in Article 21(2) means the order for payment and the application or just the order itself.

90 First and foremost, among those well-known principles, are that one should adopt a purposive teleological approach to interpretation as well has having regard to the words of the regulation as a whole. It seems to me, given that the purpose of the regulation is to simplify, speed up and provide a somewhat mechanistic procedure for recovery of

uncontested claims, it seems to me quite extraordinary if, having already served the application in Form A and E initially, and having then had service of both those documents – that is to say Form A and Form E – confirmed by the enforcing courts to the court of origin, to require the court of origin then to re-send the application as well as the European order for payment, is inconsistent with this being a speedy and convenient mechanism.

91 To required re-service would seem to me to be a completely pointless exercise. By definition, when one has got to the point of enforcement in the ordinary case, the debtor would have already received a copy of the application and the order by the time it comes to enforcement and-- the transmitting agency will have, by definition, have already certified that service has been achieved of both those documents, no proper or reasonable purpose, it seems to me, would be served by requiring the court of origin to re-send the original Form A again. The transmitting agency already has on its files the application to which it relates. So, to require yet another copy to be submitted to the same agency does not appear to me to make any sense.

92 So, I accept Miss Gilbert's submission that there is a clear distinction overall in the regulation between the order for payment itself, its Form E and Form A, which is the application form. It seems to me that the wording in Form E is somewhat unfortunate, but it is clearly based on the fact that at the earlier stage of issuing and serving the order for payment, it must be accompanied by the application. Mr Dye's point is a different one, which is that the issue I have to decide is whether, when it comes to the later stage in enforcement, is it really necessary, on its proper interpretation, for the application to be re-sent? I am firmly of the view that that is not necessary and would be a misreading of Article 21(2).

93 The conclusion is that I reject the application to set aside the writ of execution. It remains in force. I am, however, acceding to Mr Dye's application that, as he put it in his submission, the ring be held pending the resolution of the application made by his client in Poland. As I have said, I find the case that is there advanced arguable based on the *Catlin* case. Having decided it is arguable, it seems to me the right thing to do is to leave that to unfold in Poland.

94 I should say this, however, that Miss Gilbert made a powerful submission that it would be wrong simply to allow matters to continue without some sort of discipline applied to Oakfield and leaving it up to Oakfield as to when and if it pursues the proceedings in Poland.

95 So, what I propose to do is order as follows. I will just set out what order I propose to make and I will invite the parties to go away and draft the order and hopefully agree it; if it cannot be agreed, send any dispute to me. What I envisage is as follows, that the £182,882.77 be paid into court by HCEG within 14 days, as discussed during the hearing. It seems to me it is inherently undesirable for either party to bear the risk of HCEG having financial difficulties. I have got no reason to think that they will, but it seems to me inherently unattractive for a private company to hold the money and the safer course is for that money to be paid into court and then the court maintains control over it. I order them to make that payment and it seems to me to follow thereafter, unless they wish to make any application, that they should cease to be a party to these proceedings and hopefully that will be welcome to them because they do not have to have more to do with these proceedings or incur any costs in relation to them. Assuming that is paid within 14 days, at that point upon receipt into the court funds office HCEG will cease to be a party to these proceedings, subject to any application they wish to make.

96 All further enforcement of the EOP by any person is stayed pending the outcome of Oakfield's challenge to the EOP by virtue of its application 1 July 2019. The parties have liberty to inspect – or re-inspect – files SFP2018/11226 and 2018/2359.

97 Fourthly, Oakfield is to formally notify the senior master of the existence of the letter dated 23 October 2019, apparently sent by the Regional Court in Poznań to the senior master, in Polish and in English and to enquire whether the senior master is prepared to answer it to treat it as having been sent or whether she requires the Polish court to re-submit it.

98 Finally and fifthly, to deal with Miss Gilbert's point that the matter cannot just be left to float, I am proposing to order that Oakfield notify Biernacki's English solicitors every four to six weeks of progress in the application challenging the EOP. I put it in that way rather than mechanically, setting, for example, the last working day of each month. I want to create some flexibility and I appreciate things do not always work very fast and it may be that Oakfield do not have very much to report every occasion, but at the end of each month there should be a two-week window of when some chasing ought to be done and, it seems to me, Biernacki's English solicitors are entitled to know what progress, if any, has been made and what intentions Oakfield have as to how they wish to proceed or intend to proceed with that application. That way, it seems to me, Miss Gilbert's client's concerns that the matter cannot simply be in the hands of Oakfield are, to some extent, abated and her clients will receive regular updates as to what is going on.

99 That concludes the formal part of the judgment.
