Neutral Citation Number: [2021] EWHC 1168 (QB)

Case No: QA-2020-000205

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2021

Before :

MRS JUSTICE EADY

- -

Between :

LARS WINDHORST	**Appellant**
- and -	
ALBERT LEVY	**Respondent**

- -
- -

Adam Al-Attar and Paul Fradley (instructed by **Quinn Emmanuel Urquhart & Sullivan LLP**) for the **Appellant**
Nora Wannagat (instructed by **ZIMMERs Solicitors**) for the **Respondent**

Hearing date: 26 April 2021

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Approved Judgment

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MRS JUSTICE EADY DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii.
The date and time for hand-down is deemed to be 10.30 am on Thursday 6th May 2021.

Mrs Justice Eady:

Introduction

1. The appellant's appeal raises questions as to the court's approach to the registration in this jurisdiction of a judgment of a German court under Council Regulation (EC) 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Judgments Regulation"). In particular, the court is asked to consider whether that registration should be set aside when the judgment debt in question was subsequently included within a binding insolvency plan, which is to be recognized in this jurisdiction pursuant to Council Regulation (EC) 1346/2000 on Insolvency Proceedings ("the Insolvency Regulation"). Although this matter comes before the court by way of an appeal against a registration order made by Master Eastman on 17 August 2020 ("the registration order"), this is the appellant's first opportunity to raise his objections.

2. The registration order concerns the judgment of the Regional Court Bielefeld, Germany, of 10 March 2003 ("the 2003 Judgment"). The appellant says the registration order should be set aside as the 2003 Judgment is no longer enforceable, having been waived as part of a binding insolvency plan, which came into effect by order of the Local Court of Charlottenburg, Germany, on 31 August 2007 ("the Insolvency Plan"), and which this court is bound to recognize under the Insolvency Regulation. In the alternative, the appellant applies for a stay of execution of the 2003 Judgment, under CPR rule 83.7(4). Those arguments are resisted by the respondent, who submits that, under the Judgments Regulation, the grounds on which the registration order can be set aside are limited, but that, in any event, the 2003 Judgment continues to be recognized as enforceable under German law and should not be treated any differently by this court. The respondent further contends that the circumstances of this matter do not render the enforcement of the 2003 Judgment unjust such as to warrant any stay of execution.

3. Given the continuing need to reduce the transmission of the coronavirus, and consistent with the overriding objective and with the agreement of the parties, the oral hearing in this matter was conducted remotely by MS Teams. These remained, however, public proceedings and the mode of hearing, along with details of access, was published in advance in the cause list. No issues of connectivity or audibility arose during the hearing.

The Background

4. The factual background is not the subject of any significant dispute and is set out in the statements of the parties' respective, German-qualified, lawyers: Joachim Lehnhardt, for the appellant; Marion Küllmer, for the respondent. Those statements also explain some aspects of German law relevant to these proceedings; as acknowledged during the hearing, there is again little dispute between the parties in this regard.

The 2003 Judgment

5. As described in the documents before me, the appellant is a German businessman who became known in the early 1990s in respect of his interests in the trade, production and sale of software, electronic devices and components, particularly in Asia.

6. In mid-1999, the respondent entered into an agreement with the appellant, whereby the respondent would make an investment of $2 million in the appellant's companies and would receive a substantial share-holding in return. Although the respondent duly made the agreed payment, he complained that the appellant failed to keep his side of the bargain and, in 2003, pursued a claim of unjust enrichment for re-payment of this sum in the Regional Court Bielefeld, Germany. In the court's judgment of 10 March 2003, the respondent's claim was upheld and the appellant was ordered to re-pay to the respondent the sum of $2 million plus interest. This is the 2003 Judgment with which the present appeal is concerned.

The Insolvency Plan

7. More generally, towards the end of the 1990s, the appellant's businesses were in difficulties. He had sought to resolve matters by entering into various restructuring agreements with creditors but those attempts were unsuccessful and, in the autumn of 2004, the appellant filed an application to open insolvency proceedings under German law, explaining that he faced claims of around €81 million from some 55 creditors and was unable to meet his debts. On 14 January 2005, the Local Court Charlottenburg, in Berlin, opened those proceedings.

8. On 14 February 2005, the respondent applied for inclusion of the 2003 Judgment debt in the German insolvency proceedings and participated (through his lawyers) in the creditors' meeting on 18 August 2005. At that meeting, the proposed Insolvency Plan was put forward, on the following terms:

> "The creditors waive all claims against Mr Windhorst.
>
> In return for this waiver, the creditors will receive a quota of 1.9129 % of all established or yet to be established claims, unless they are subordinated or secured in value.
>
> Insofar as payments are provided for in this Constructive Part, such payments shall be made one month after the order by which the insolvency court confirms the insolvency plan becomes final."

9. At the resumed hearing before the Local Court Charlottenburg, on 25 August 2005, it was recorded that the majority of creditors had voted in favour of the Insolvency Plan, which was duly approved by the court. Subsequently, on 31 August 2007, the insolvency proceedings were terminated, given the court's approval of the Insolvency Plan.

10. It is common ground that whilst the court order approving the Insolvency Plan meant that it became binding on the parties (see section 254(1) of the German Insolvency Statute), that did not automatically render the 2003 Judgment unenforceable. Under

German law, however, it was then open to the appellant to apply to have the enforcement declared inadmissible, pursuant to section 767 Zivilprozessordnung ("ZPO"), the German code of civil procedure (in this regard, both parties direct me to the decision of the Bundesgerichtshof (the German Federal Supreme Court) of 25 September 2008, docket no. IX ZB 205/06, where this process is explained at paragraphs 8-10 of the ruling).

Events Post-Dating the Insolvency Plan and the Declaratory Proceedings

11. Notwithstanding their earlier dispute, there is evidence of positive relations between the appellant and the respondent resuming in or around 2012 and it is accepted that, as his fortunes have begun to improve, the appellant has since made some repayment of monies to the respondent, with the promise of further payments to be made. The respondent relies on this as rescinding the waiver under the Insolvency Plan to the extent it applied to the 2003 Judgment; the appellant says it is no more than a recognition of a moral obligation, legally to be characterised as nothing more than a gift.

12. In any event, by letter dated 7 September 2018, the respondent's lawyers notified the appellant of his (the respondent's) intention to enforce the 2003 Judgment in the United Kingdom. Given this indication of the respondent's position, on 18 April 2019, those acting for the appellant made an application under section 767 ZPO before the Bielefeld District Court, seeking a declaration that the 2003 Judgment was unenforceable in the light of the subsequent insolvency plan.

13. The declaratory proceedings are contested by the respondent, who argues that payments relating to the 2003 Judgment that have since been made by the appellant amount to an acknowledgment of the debt. The respondent also questions the jurisdiction of the German courts to determine this issue, given that he does not seek to enforce the 2003 Judgment against the appellant's assets in Germany, but seeks to enforce in the United Kingdom (where, he says, more of the appellant's assets are now located).

14. On 17 June 2019, the Bielefeld District Court made an interim order suspending enforcement of the 2003 Judgment, pending determination of the declaratory proceedings, subject to the appellant providing security in the sum of $2.2 million. It is common ground that the appellant never provided this security.

15. Subsequently, on 9 October 2019, the court dismissed the proceedings on jurisdictional grounds.

16. The appellant has filed an appeal against that decision, which is currently before the Court of Appeal, Hamm. On 19 February 2020, that court made a further interim order again staying enforcement of the 2003 Judgment pending determination of the appeal, but now subject to the appellant providing security in the amount of $3.44 million. It is again common ground that the appellant has not provided this security.

17. In April 2020, the respondent applied for the interim order to be lifted; making clear he would not seek to enforce the 2003 Judgment in Germany and arguing that the German courts were not competent to decide the issue of its enforceability. By its decision of 27 May 2020, the Court of Appeal, Hamm, refused this application and

continued the interim order, explaining its preliminary view that the German courts were likely to have international jurisdiction.

18. I understand that the next hearing in the declaratory proceedings in Germany has now been listed for September 2021.

19. In the meantime, pursuant to the respondent's application in this jurisdiction, by the registration order of 17 August 2020, the 2003 Judgment was registered in the Queen's Bench Division of the High Court of England and Wales.

The Judgments Regulation – The Scheme and the Parties' Submissions on the Approach to be Adopted at the Appeal Stage

20. The Judgments Regulation makes provision to simplify formalities so as to achieve rapid and simple recognition and enforcement of judgments across the different states bound by its terms; this includes the United Kingdom, which remains a "member state" for these purposes. It is founded upon mutual trust in the administration of justice across those states, which justifies judgments given in one jurisdiction being recognized automatically in others, without the need for any procedure except in cases of dispute; see recital (16) and article 33(1).

21. That principle of mutual trust also underpins the scheme introduced for enforcement, albeit that allows for a potential second stage; as explained at recitals (17) and (18):

> "(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.
>
> (18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected."

22. The two stages, provided by Section 2 of Chapter III of the Judgments Regulation are helpfully explained by Murray J in *Percival v Motu Novu LLC* [2019] EWHC 1391 (QB), at paragraphs 7-24. In summary:

    i) The first stage is governed by articles 39-42 and provides that the judgment to be registered will be declared enforceable immediately upon the completion of the formalities laid down by articles 53 and 55 (an authentic copy of the judgment must be produced, along with a certificate of enforceability issued by the member state from where the judgment originated that conforms with annex V ("an annex V certificate") and, if required, translations of those

documents). This is an *ex parte* process, that is effectively no more than a check of the documentation; the party against whom enforcement is sought has no right to be heard at this stage.

ii) The *inter partes* stage is introduced by article 42, which requires service of the declaration of enforceability (here, the registration order of 17 August 2020) on the party against whom enforcement is sought; article 43 then permits an automatic right of appeal.

23. Upon such an appeal, pursuant to article 45, the court is only able to revoke a declaration of enforceability on one of the grounds specified by articles 34 and 35; under no circumstances can it review the substance of the judgment in question.

24. Articles 34 and 35 set out various grounds on which a judgment shall not be recognized; at article 36 it is again reiterated that:

> "Under no circumstances may a foreign judgment be reviewed as to its substance."

25. I do not set out the provisions of article 34 and 35, because the appellant does not seek to argue that his grounds of appeal fall within any of the circumstances identified by those provisions. It is his submission that the potential bases of challenge to a declaration of enforceability cannot be so limited. In this respect, he relies on the decision of Murray J in *Percival v Motu*, who held (see paragraph 37) that the objections that might be raised at the second, *inter partes*, stage of the process "*must necessarily be capable of going beyond the grounds*" provided by articles 34 and 35 (and see the reasoning (drawing on academic commentary) upon which this conclusion is based, at paragraphs 19-24).

26. More specifically, it is the appellant's case that a precondition for a declaration of enforceability under the Judgments Regulation must be that the judgment in question is enforceable in the jurisdiction in which it was given; as article 38(1) provides:

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

27. The meaning of enforceability for these purposes was considered by the European Court of Justice ("ECJ") in C-267/97 *Coursier v Fortis Bank SA* [2000] I.L.Pr. 202. The bank in that case had secured a judgment against Mr Coursier in France but was precluded from enforcing it under French law by reason of Mr Coursier's subsequent insolvency. When Mr Coursier moved to work in Luxemburg, however, the bank commenced proceedings in that jurisdiction for an attachment of earnings order in respect of the debt owed pursuant to the French judgment, something Mr Coursier sought to resist on the basis that the judgment was no longer enforceable under French law. Considering this question under the earlier iteration of the Judgments Regulation, the ECJ made clear that for these purposes enforceability of a judgment in the state of origin is a precondition for its enforcement in the state in which enforcement is sought (see paragraph 23). As for whether a judgment was "enforceable", however, the ECJ further explained as follows (see paragraphs 24-33):

"[24] … the question whether a decision is, in formal terms, enforceable in character must be distinguished from the question whether that decision can any longer be enforced by reason of payment of the debt or some other cause.

[25] The [Judgments Regulation] is intended to facilitate the free movement of judgments by establishing a simple and rapid procedure in the Contracting State where enforcement of a foreign decision is applied for. That enforcement procedure constitutes an autonomous and complete system.

…

[28] … the Court has held that the [Judgments Regulation] 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 execution is sought.

[29] In those circumstances, it follows from the general scheme of the [Judgments Regulation] that the term "enforceable" … refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. …

[31] It follows that a decision such as the contested judgment, which bears a formal order for enforcement, must, in principle, be covered by the rules on enforcement in … [the Judgments Regulation].

[32] As regards a judgment such as the insolvency judgment which concerns a matter expressly excluded from the purview of the [Judgments Regulation], it is for the court of the State in which enforcement is sought, in appeal proceedings brought under [the Judgments Regulation], to determine, in accordance with its domestic law including the rules of private international law, the legal effects of that judgment within its territory.

[33] The answer to the question submitted must therefore be that the term "enforceable" … is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought, in appeal proceedings brought under the [Judgments Regulation], to determine, in accordance with its domestic law including the rules of private international law, the legal effects of a decision given in the State of origin in relation to a court-supervised liquidation."

28. I note at this stage that *Coursier v Fortis* was decided prior to the coming into force of the Insolvency Regulation and Mr Coursier could not rely on its provisions (as to which, see below) to resist the application made against him in Luxemburg. The appellant says this is relevant as application of the Insolvency Regulation would have been likely to have led to a different result in Mr Coursier's case. The respondent does not disagree but says that result would have reflected the application by the Luxemburg court of the applicable French law; the respondent argues that this cannot assist the appellant as German law is not to the same effect.

29. In any event, the appellant says that the question of enforceability is one that arises in the present case. Given that it is a pre-condition to the applicability of the Judgments Regulation, notwithstanding that it is not a point identified by either article 34 or 35, the appellant contends this must provide a proper basis of objection on appeal, regardless of the limitation specified by article 45 (and see per Murray J in *Percival v Motu,* at paragraph 21). Although the jurisprudence of the European Union suggested the court could only revoke a declaration of enforceability on the grounds specified by articles 34 and 35, in *Coursier v Fortis*, Advocate General La Pergola had allowed that an appeal might be based on wider issues of enforceability (see paragraphs 13-15 of the Advocate General's Opinion); provided the issue raised would not conflict with the underlying purpose of the Judgments Regulation (to achieve the rapid recognition and enforcement of judgments across the different states), the court should consider itself bound by the decision in *Percival v Motu* in this regard.

30. For the respondent, it is observed that the approach adopted in *Percival v Motu* stands in contrast to numerous references to the contrary in decisions of the European Court, which has consistently held that the grounds of challenge to a declaration of registration, as laid down by articles 34 and 35, are exhaustive and must be interpreted restrictively; see, for example, C-139/10 *Prism Investments BV v Van Der Meer* [2012] I.L.Pr. 13, at paragraph 33, and C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* [2014] 1 W.L.R. 904, at paragraph 28. In any event, the respondent contends that, applying the test laid down in *Coursier v Fortis,* the 2003 Judgment plainly remains enforceable in formal terms under German law, further noting that the courts (both domestically and at EU level) have only allowed enforceability to be questioned in the most obvious of cases (as was the case in *Percival v Motu*, and see, also, *La Caisse Regional du Credit Agricole Nord de France v Ashdown* [2007] EWHC 528).

The Insolvency Regulation

31. Judgments in bankruptcy and insolvency proceedings fall outside the scope of the Judgments Regulation (see article 2(b)). This reflects the initial difficulties experienced in seeking to negotiate uniform rules in an area where there was so much divergence between member states (see the discussion of this background, at paragraph 21 of the Opinion of Advocate General La Pergola in *Coursier v Fortis*; again, for these purposes, the United Kingdom is still to be treated as a "member state"). The Insolvency Regulation was the product of the further negotiations that were required; it does not purport to harmonise insolvency laws but to lay down a set of jurisdictional rules and choice of law rules applicable to insolvencies throughout the European Union. It is intended to dovetail with the Judgments Regulation. Thus in this case, although excluded from the Judgments Regulation, it is common ground that the Insolvency Plan falls within the scope of the Insolvency Regulation.

32. The purpose of the Insolvency Regulation is explained at recital (22):

> "This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. …"

33. A court has jurisdiction to open insolvency proceedings if the debtor has his or her "*centre of main interests*" in that member state; see article 3. In the present case, there is no dispute that the Local Court Charlottenburg had jurisdiction to open insolvency proceedings in relation to the appellant, which it did on 14 January 2005.

34. By article 4(1), it is made clear that:

> "Save as otherwise provided by this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of the proceedings'."

35. The requirement of mutual recognition of such proceedings is then provided by article 16(1):

> "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings."

36. The effect of such recognition is set out at article 17(1):

> "The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, …"

37. Further, by article 25(1) it is provided:

> "Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. …"

38. Thus, as the authors of Moss et al, '*The EC Regulation on Insolvency Proceedings*' (2nd edn) explain, at paragraphs 8.315-8.316:

> "8.315 The Regulation in earlier Articles provides for the automatic recognition of judgments opening insolvency proceedings (Article 16), [and] of the effects of insolvency proceedings (Article 17) …. Article 25 completes the picture by providing for the general recognition and enforcement of judgments relating to the conduct and closing of insolvency proceedings, where the judgment opening those proceedings has to be recognized under Article 16. …
>
> 8.316 Article 25(1) also specifically provides for the recognition of compositions approved by the court whose judgment opened the proceedings. Accordingly, pursuant to Article 25, a composition between the [debtor] and its creditors approved by the court in the main proceedings can, without further formality, have binding effect between the [debtor] and the creditors in all other Member States …."

39. In the present case, it is accepted that the Insolvency Plan, approved by the Local Court Charlottenburg on 25 August 2005, is a "*composition*" for the purposes of article 25(1) of the Insolvency Regulation, and that that composition was approved by the court whose judgment concerning the opening of the insolvency proceedings was to be recognized in accordance with article 16.

The Power to Grant a Stay – CPR rule 83.7

40. Should the 2003 Judgment be recognized in this jurisdiction, it is agreed that this court has the same enforcement powers in relation to the 2003 Judgment as it would for a domestic judgment (Civil Jurisdiction and Judgments Order 2001/3929, paragraph 2(2)). It is equally common ground that, pursuant to the Judgments Regulation, the execution of the 2003 Judgment will be governed by the law of England and Wales, albeit that does not mean it should be granted rights which it would not have in the country of origin; as the Court of Justice of the European Union ("CJEU") held in C-420/07 *Apostolides v Orams* [2009] E.C.R. I-3571,

> "66. … although recognition must have the effect, in principle, of conferring on judgments the authority and effectiveness accorded to them in the Member State in which they were given …, there is however no reason for granting to a judgment, when it is enforced, rights which it does not have in the Member State of origin (see the Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1979 C 59, p. 48)) or effects that a similar judgment given directly in the Member State in which enforcement is sought would not have."

41. Turning then to the relevant civil procedural rules in this country, CPR rule 83.7 provides:

> "(1) At the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution.
>
> …
>
> (4) If the court is satisfied that—
>
> (a) there are special circumstances which render it inexpedient to enforce the judgment or order; …
>
> …
>
> then, … the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit…"

(and, as to the application of this provision in the case of a court order made in another jurisdiction, see *Michael Wilson & Partners Ltd v Sinclair (No 2)* [2017] EWCA Civ 55; [2017] 1 W.L.R. 3069)

42. Before a stay of execution is granted pursuant to CPR rule 83.7(4), it is thus required that the court must be satisfied that there are "*special circumstances*" and that it is "*inexpedient*" that the judgment be enforced, meaning that enforcement would be "*unjust"* (see *Canada Enterprises Corp Ltd v MacNab Distilleries Ltd* [1987] 1 W.L.R. 813, at p 818B). In *Burnet v Francis Industries plc* [1987] 1 W.L.R. 802, 811C, Bingham LJ, considering the predecessor to CPR rule 83.7 in the context of crossclaims, described an order for a stay as "*unusual*" and said the requirement of special circumstances is strictly insisted upon.

43. The principles to be taken into account when deciding whether or not a stay should be ordered on the basis of a crossclaim have been considered by the courts on a number of occasions, see per Andrew Smith J in *Dar Al Arkan Real Estate Company and Anor v Al Refai* [2015] EWHC 1793, as summarised recently by Andrew Henshaw QC in *JSC VTB Bank v Skurikhin* [2019] EWHC 69 (Comm), at paragraph 13:

> "(i) the nature of the claim giving rise to the judgment in respect of which a stay is sought;
>
> (ii) the relationship (if any) between the claim giving rise to the judgment and the cross-claim;
>
> (iii) the strength of the cross-claim;
>
> (iv) the size of the cross-claim (a consideration which Bingham LJ [in *Burnet v Francis Industries plc*] thought would be rarely, if ever, decisive);
>
> (v) the likely delay before the cross-claim is determined;

> (vi) the prejudice to the judgment creditor if a stay is granted; and
>
> (vii) the risk of prejudice to the party making the cross-claim if a stay is refused."

44. Whilst resisting the application for a stay of execution, the respondent reminds me that article 46(3) of the Judgments Regulation provides that the court may order that enforcement is to be conditional on the provision of such security as it may determine, which has been held to extend to an order for security to be provided by the judgment debtor, so that the judgment creditor is not prejudiced by the delay; *Peterit v Babcock International Ltd* [1990] 1 WLR 350 (although see the commentary in *Dicey, Morris and Collins on Conflict of Laws* (15 edn) at paragraph 14-216 and footnote 823).

The Appellant's Case

45. In seeking that the registration order be set aside, the appellant's case can be summarised as follows:

(1) Following the approach laid down by Murray J in *Percival v Motu*, the appellant must be entitled to raise grounds of objection other than those provided by articles 34 and 35 of the Judgments Regulation; in particular, the court should revoke the registration order if satisfied that the 2003 Judgment did not meet the precondition of enforceability (per *Coursier v Fortis*, paragraph 23) and/or to give effect to the Insolvency Plan.

(2) It is the appellant's primary submission that the 2003 Judgment is not enforceable in the sense required by article 38 of the Judgments Regulation. He says that, for these purposes, enforceability has an autonomous meaning, and, applying the ratio of *Coursier v Fortis* (paragraph 33), it is for this court to determine, in accordance with domestic law (which includes the rules of private international law), the legal effect of the decision in the state of origin of the court-supervised insolvency. As the Insolvency Plan is a judicial act with automatic effect throughout the European Union, it should be held to deny enforceability, in this relevant sense, to the 2003 Judgment.

(3) Alternatively, if formal enforceability is to be determined by reference to the national law of the state from which the judgment originates, accepting that the 2003 Judgment is enforceable as a matter of German law, registration should nevertheless be set aside so as to give effect to the Insolvency Plan, as this court is required to do by reason of the Insolvency Regulation.

(4) The fact that the Insolvency Plan said nothing about the formal enforceability of the 2003 Judgment was irrelevant; formal enforceability was distinct from actual execution. The appellant was not seeking to rely on a defence that took the form of a non-judicial act, such as a contractual settlement (in contrast to the case of C-139/10 *Prism Investments BV v Van De Meer* [2012] I.L.Pr. 13), but was relying on a judicial approval of the Insolvency Plan, which was itself automatically effective throughout the European Union and did not require any further investigation by the court such as would delay the system of rapid enforcement required by the Judgments Regulation (and contrast also the circumstances before

the CJEU in *Salzgitter*, where it was held that an appeal under the Judgments Regulation could not require the court in the jurisdiction in which enforcement was sought to carry out an assessment as between conflicting judgments given by the same court in the original jurisdiction).

46. In the alternative, the appellant asks that the court should exercise its discretion to stay execution given the special circumstances of this case. On this application, he contends:

(1) The grant of a stay is consistent with the scheme of the Judgments Regulation, which specifically envisages that execution will be governed by English law.

(2) Moreover, the Judgments Regulation requires that the 2003 Judgment be given the same effect as it would have in Germany; it is not required that it should place the respondent in a better position in this jurisdiction but that is what execution of the 2003 Judgment would do.

(3) Allowing execution of the 2003 Judgment would be irreconcilable with the court's obligation to recognize the effects of the Insolvency Plan, and, given the purpose and effect of the Insolvency Plan, allowing the 2003 Judgment to be executed in this country, some 17 years after it was handed down and 13 years after the Insolvency Plan became binding, would be unjust.

(4) The terms of CPR rule 83.7(4) expressly authorise the court to grant a stay "*absolutely*" and this would be appropriate in this case. The effects of the Insolvency Plan are permanent; as such, the reasons why a stay would be appropriate are not time limited.

(5) In any event, it would be manifestly unjust to permit execution in the United Kingdom in circumstances in which the German appeal proceedings remained outstanding; pending determination of those proceedings, a stay of execution should be granted.

The Respondent's Response

47. For the respondent, it is submitted, as follows:

(1) Pursuant to article 45(1) of the Judgments Regulation, the court can revoke registration only on one of the grounds specified in articles 34 and 35 which do not include matters such as subsequent insolvency proceedings or even the enforceability of the judgment (and see the respondent's observations on the approach adopted in *Percival v Motu*, summarised at paragraph 30 above).

(2) Accepting that enforceability is a precondition for the application of the Judgments Regulation, in any event, the question is whether the judgment is, in formal terms, enforceable in character (*Coursier v Fortis*, paragraphs 23-24). The answer to that question must be in the affirmative: the orders of the German courts should be accepted as conclusive in this regard.

(3) The Insolvency Plan did not change that position. Applying the Insolvency Regulation, recognition of the Insolvency Plan meant only accepting that it was to

have the same effect in this jurisdiction as in Germany (see article 17(1) Insolvency Regulation). As the Insolvency Plan under German law did not render the 2003 Judgment unenforceable, the answer must be the same in this jurisdiction: this court could not give the Insolvency Plan a wider effect than under German law.

48. On the question of a stay:

(1) Even if it was accepted that the appellant had demonstrated the requisite special circumstances, it could not be said that those circumstances rendered it inexpedient to enforce the judgment.

(2) The reason the 2003 Judgment remained enforceable in Germany was because the appellant had only recently commenced declaratory proceedings pursuant to section 767 ZPO and had then chosen not to provide the security required by the German courts (which those courts considered he was able to pay). Given that the Judgment remained enforceable as a consequence of the choices made by the appellant, letting it remain enforceable could not be said to be inexpedient or unjust.

(3) Furthermore, if an unconditional stay was granted in this jurisdiction, it would place the appellant in a better position here than in Germany. Any stay ordered by this court should, therefore, be similarly conditional upon payment of a security into court in the same amount as directed by the Court of Appeal, Hamm.

Discussion and Conclusions

The Appeal Under the Judgments Regulation

49. There is a dispute between the parties as to whether I am entitled to consider the question of enforceability raised by this appeal. The registration order was granted on the basis of the respondent's submission of the requisite documentation, which included an annex V certificate of enforceability. It is not suggested that the Master thereby erred in making the registration order, but the appellant did not have the opportunity to raise any issue as to the enforceability of the judgment at that stage and, although described as an appeal, as Murray J observed in *Percival v Motu Novu LLC* [2019] EWHC 1391 (QB), this is not an ordinary appeal under CPR Part 52; this is the first opportunity provided for the appellant to make any objection before the court.

50. That said, it is common ground that the issue of enforceability cannot be 'live' before me if I am able to revoke the registration order only on one of the grounds specified in articles 34 and 35 of the Judgments Regulation. The appellant contends that, as enforceability is a precondition for any application of the Judgments Regulation, my jurisdiction cannot be so limited. As he acknowledges, however, article 45 clearly states that the powers of the court on an appeal against a declaration of enforceability are limited to those provided by articles 34 and 35.

51. The point made by the appellant is one that has been identified in relevant academic texts and was accepted by Murray J in *Percival v Motu* (see paragraphs 19-24 and paragraph 37 of that judgment). It can also be seen as supported by the observations

of Advocate General La Pergola in *Coursier v Fortis Bank*; see, in particular, paragraph 15 of the Advocate General's Opinion, as follows:

> "15. The enforcement procedure is a summary one: the competent court … decides upon application by the interested party, without delay and without hearing the other party. The rights of the defence of the party against whom enforcement is sought are safeguarded, however, as there is provision for a hearing to be held at a later date if the respondent lodges an appeal within one or two months of service of the measure granting enforcement (depending on the addressee's State of domicile). Such an appeal may be based, inter alia, on the fact that the decision is not yet enforceable or is the subject of an appeal in the State of origin or does not fall within the scope of the Convention. The debtor can also effectively raise objections on the ground of lack of interest on the part of the creditor in bringing proceedings because of events arising after the judgment was given (for example, evidence that the debt to which the foreign judgment relates has been discharged)."

If, as the court accepted in that case, enforceability is a precondition to recognition of a judgment under the Judgments Regulation, there is plainly much to be said for the broader view taken as to the court's powers in *Percival v Motu*.

52. The pronouncements of the European Court have, however, been clear. Thus, in C-139/10 *Prism Investments BV v Van Der Meer* [2012] I.L.Pr. 13, it was stated:

> "32. … the declaration of enforceability of a judgment delivered in a Member State other than the Member State in which enforcement is sought may be the subject of dispute. The grounds for dispute that may be relied upon are expressly set out in arts 34 and 35 of [the Judgments Regulation], to which art. 45 refers.
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> 33. That list, the items of which must, in accordance with settled case law, be interpreted restrictively (see *Apostolides v Orams* (C-420/07) [2009] E.C.R. I-3571 at [55]), is exhaustive in nature."

And see, to the same effect, C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* [2014] 1 W.L.R. 904, at paragraph 28.

53. These clear statements from the jurisprudence of the European Court do not appear to have been referred to in *Percival v Motu* and the respondent says I should see that case as merely of persuasive authority; I should not consider myself bound by it. For the appellant, the difficulty is acknowledged, although I am still encouraged to adopt the same approach as Murray J, applying the jurisprudence of the European Court narrowly in this regard (albeit that is a submission that might be seen to elide the word "narrowly" with "ignore" in this instance).

54. Ultimately, I have concluded that this is not a problem that I need to determine; the Gordian knot is untied in this case because it is, in any event, clear that the precondition of enforceability is satisfied.

55. As was common ground before me, it is plain that the 2003 Judgment is acknowledged to be enforceable under German law. To the extent that I am entitled to look behind the Annex V certificate in this case, the evidence before me makes clear that the 2003 Judgment remains enforceable until such time as enforcement is declared inadmissible upon an application under section 767 ZPO. The position in this regard has further been confirmed by the interim orders of the German courts, in the on-going declaratory proceedings, to the effect that enforcement should only be stayed on condition that the appellant provides security of $3.44 million.

56. That, in my judgement, provides the complete answer to the question of enforceability in this case. For the purposes of the Judgments Regulation, "enforceable" means formal enforceability in the country in which the judgment was given (C-267/97 *Coursier v Fortis Bank SA* [2000] I.L.Pr. 202 paragraph 33); it does not require proof of practical enforceability (and see C-420/07 *Apostolides v Orams* [2009] E.C.R. I-3571 and *Prism Investments BV v Van Der Meer* [2012] I.L.Pr. 13). As Advocate General Kokott observed in *Apostolides v Orams*, at paragraph 98 of her Opinion:

> "It would be inconsistent with the objective of [the Judgments Regulation] … if the declaration of enforceability were to be dependent on the factual conditions for the enforcement of the judgment in the state of where it was given. Unlike enforceability in the formal sense, a certificate of the kind referred to in article 54 of the Regulation would not automatically make it possible to confirm, in particular, whether and under what conditions a judgment is enforceable in practice in the state where it was given. Moreover, factual grounds for non-enforcement do not in any way alter the legal effect of the judgment."

57. In the present case, the appellant relies on the fact that (on his case) the parties in these proceedings are bound by the terms of the Insolvency Plan; he contends that, applying the Insolvency Regulation (as I am bound to do), requires this court to find that the 2003 Judgment must be unenforceable for the purposes of the Judgments Regulation.

58. Accepting that this court must thus recognize the Insolvency Plan, however, does no more than require that it is treated as producing the same effects as under German law (article 17(1) Insolvency Regulation). On the agreed evidence before me, that does not impact upon the enforceability of the 2003 Judgment unless and until such time as enforcement is declared inadmissible upon an application under section 767 ZPO.

59. In C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* [2014] 1 W.L.R. 904, a challenge to a declaration of enforceability was held to fall outside the Judgments Regulation notwithstanding that the judgment in question was irreconcilable with an earlier judgment given between the same parties, and concerning the same cause of action, by the same court in that jurisdiction. The

reasoning behind this strict reading of article 45 (and, thus, of articles 34 and 35) of the Judgments Regulation was explained as follows:

> "33. The sound operation of those rules which are based on mutual trust implies that the courts of the member state of origin retain jurisdiction to assess, in the context of the legal remedies established by the legal system of that member state, the lawfulness of the judgment to be enforced, to the exclusion, in principle, of the court of the member state in which enforcement is sought, and that the final outcome of the assessment of the lawfulness of that judgment will not be called into question."

And the court went on to observe that to adopt any other course would be inconsistent with the principle of mutual trust:

> "36. … Such an interpretation would allow the court in the member state in which recognition is sought to substitute its own assessment of that court in the member state of origin."

60. In the present case, the German courts thus retain jurisdiction to assess, on the basis of the legal remedies established by the legal system in that country, the question of enforceability of the 2003 Judgment in the context of the Insolvency Plan (a composition that is governed by German law, see article 4(1) Insolvency Regulation). The requirement that this court recognizes the Insolvency Plan does not change this position; under the Judgments Regulation it is not open to this court, as the court in which enforcement is sought, to substitute its assessment for that of the German courts as to the enforceability of the 2003 Judgment in the light of the Insolvency Plan. Accepting that the 2003 Judgment is enforceable under German law is thus the complete answer to the appeal: to ask this court to go behind the determination of enforceability in the original jurisdiction would be counter to the purpose of the Judgments Regulation and precluded by articles 45, 34 and 35.

61. I note that in *Percival v Motu*, the appeal was allowed, on the ground of enforceability, in respect of two of the three Italian judgments in issue because, on the basis of the agreed Italian law expert evidence before the court, those judgments were not enforceable in Italy (see paragraph 41). That is not the position in this case. On the evidence before me, the 2003 Judgment remains enforceable in Germany notwithstanding the Insolvency Plan approved by the German courts.

62. In the only other judgment to which I have been taken which allowed an appeal against a registration order, *La Caisse Regional Du Credit Agricole Nord de France v Clive Ashdown* [2007] EWHC 528 (QB), there was unchallenged evidence before the court that the judgment in question had been mistranslated; contrary to the original text provided, the French court had merely determined the amount payable, it had not made any order for payment and there was no enforceable judgment debt. The position on the evidence in that case was, again, very different to that before me. Here there is a judgment debt under the 2003 Judgment that is still considered enforceable under German law.

63. For the reasons I have given, I therefore dismiss the appeal against the registration order.

The Application for Stay of Execution

64. The circumstances of the present case are unusual, in the sense that the question whether the 2003 Judgment should still be held to be enforceable under German law is presently before a German appeal court, whilst the judgment creditor has stated that he seeks to enforce the judgment debt not in Germany but in this jurisdiction. Allowing that these might well be described as amounting to special circumstances, the real question is whether those circumstances render it inexpedient – or, unjust – to permit the 2003 Judgment to be enforced.

65. In applying the civil procedural rules applicable in this jurisdiction, I start from the premise that the 2003 Judgment should not thereby grant greater rights to either party than it does in Germany. That weighs against the appellant's argument for the grant of an absolute stay: under German law, the interim holding position has been to suspend enforceability of the 2003 Judgment only on condition that the appellant pay $3.44 million by way of security. As for the respondent, his position in the German declaratory proceedings is that he does not seek to enforce the 2003 Judgment against any assets held by the appellant in that jurisdiction (he explains, this is because the appellant's assets are largely outside Germany), but he has not thereby waived his claim under the 2003 Judgment more generally. Other than the practical considerations arising from the location of the appellant's assets for enforcement purposes, I cannot see that the respondent is afforded greater rights under the 2003 Judgment by allowing that it is enforceable in this jurisdiction when that is equally the position in Germany.

66. Moreover, I am not persuaded that this court's recognition of the Insolvency Plan has any relevant impact on this position. Although the respondent accepts that he was one of the creditors covered by the Insolvency Plan, and initially bound by its terms, it is his case that the appellant has since affirmed the debt owed under the 2003 Judgment and has thereby rescinded the waiver under the Insolvency Plan. I make no finding as to the merit of that argument, but am bound to recognize that is an aspect of the case presently before the German courts, to be determined on the application under section 767 ZPO. Consistent with the position under German law, recognizing the Insolvency Plan does not mean that the 2003 Judgment is unenforceable or that its enforcement should be stayed; there is nothing in either the Judgments Regulation or the Insolvency Regulation that would require that outcome. Indeed, by virtue of article 17(1) of the Insolvency Regulation, recognition of the Insolvency Plan means only that it is to be given the same effect as it would have in Germany. So far as the 2003 Judgment is concerned, that does not require the grant of an unconditional stay of enforcement.

67. I return to the more general question whether the special circumstances of this case render it unjust not to grant a stay of enforcement. The 2003 Judgment remains enforceable because the appellant has not obtained a declaration to the contrary from the German courts. On his own case, it was open to the appellant to apply for such a declaration at any stage upon the recognition of the Insolvency Plan by the Local Court Charlottenburg. On his April 2019 application under section 767 ZPO, the German courts have declined to make an interim declaration in his favour unless he

provides security for (essentially) the sum owed on the judgment debt. For his part, the appellant has chosen not to provide the security so ordered. The special circumstances thus largely arise from the choices made by the appellant; they do not render it inexpedient or unjust for the 2003 Judgment to be enforced. I therefore refuse to grant the stay of execution sought by the appellant in this case.

68. For completeness, had I considered that the special circumstances of this case meant that it was unjust for the 2003 Judgment to be enforced in this jurisdiction, I would have considered granting a stay of execution on condition of a similar provision for security as in the German declaratory proceedings. That would be necessary to ensure that the appellant was not treated more favourably in respect of his obligations under the 2003 Judgment in this jurisdiction than he would be in Germany.

Additional and Consequential Matters

Application for Alternative Service

69. It was common ground before me that the respondent had not properly served the registration order on the appellant. The registration order had been served by post to a business address associated with the appellant; for the purposes of CPR rule 74.6, personal service was required. It was, however, not suggested that the appellant had suffered any prejudice; he was plainly aware of the registration order and had been able to exercise his right of appeal. By application of 15 April 2021, the respondent sought an order for alternative (postal) service, which was not resisted by the appellant.

70. In the circumstances, I grant the respondent's application for alternative service in the terms provided at paragraph 1 of the draft order in this regard.

Disposal Order and Consequential Matters

71. The parties are directed to seek to agree the terms of the court's order disposing of this appeal and associated applications. Should there be any points of disagreement or further matters that require determination by the court, the parties should identify these and file and serve their respective submissions in writing, within 5 working days of the handing down of this Judgment.