Neutral Citation Number: [2018] EWHC 1374 (Ch)

Case No: CH-2017-000197

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/06/2018

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

GERARDO MORENO DE LA HIJA	**Appellant/ Claimant**
- and -	
LADY BIRGIT LEE (As Executrix of the estate of Sir Christopher Frank Carandini Lee)	**Respondent/ Defendant**

- -
- -

Mr Stephen Acton (instructed by **Manuel Martin LLP**) for the **Appellant**
Ms Jessica Simor QC (instructed by **Kobalt Law LLP**) for the **Respondent**

Hearing dates: 9th and 10th May 2018

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. This appeal raises issues about the meaning and effect of Regulation (EC) No. 805/2004 ("the Regulation") creating a European Enforcement Order ("EEO") for uncontested claims, including judgments in default.

The facts

2. The facts as set out in Master Clark's judgment dated 3rd April 2017 are not disputed for the purpose of this appeal from her judgment. Hence I can summarise them briefly.

3. The Claimant, Mr Moreno de la Hija, brought proceedings in Burgos, Spain for damages against various defendants, including the late actor, Sir Christopher Lee (I shall refer to him and to his widow and executrix, Lady Birgit Lee, as "the Defendant", save where it is necessary to distinguish between them). The basis of the proceedings was infringement of the Claimant's alleged copyright in artwork which was made in connection with the film, *Jinnah*. (I should make it clear that the Defendant's case is that he had no connection with the artwork or its exploitation, his only connection with *Jinnah* being that he had starred in the film.)

4. The Spanish proceedings were served on an address which the Defendant says was not his home, as a result of which he says that they did not come to his notice.

5. On 6th March 2009 the Burgos court granted judgment in default, which was declared to be final on 26th May 2009. On 26th October 2009 the Burgos court authorised enforcement of the judgment against (*inter alios*) the Defendant in the sum of €710,000.

6. The Claimant applied for substituted service on the ground that no other address was known to the Claimant. As Ms Jessica Simor QC, for the Defendant, observed, this shows that the Claimant knew that the Defendant was likely to be unaware of the proceedings. The Burgos court ordered service by affixing a notice to the court's notice-board in Burgos. Needless to say, the Defendant says that this, too, did not come to his attention.

7. On 13th June 2011 the Burgos court issued an EEO in the sum of €710,000. The EEO was in the prescribed form, but was not fully completed. In particular, boxes in paragraphs 11 and 12 were ticked to confirm that the proceedings and the "summons, if applicable", had been duly served, but the boxes in paragraphs 11.1, 12.1 and 13 were not ticked. These paragraphs require the court of origin to state whether service has been effected in compliance with Articles 13 or 14 and, if not, whether non-compliance has been cured in accordance with Article 18 (these Articles are set out below).

8. On 14th October 2013 the Burgos court rectified the EEO to correct an error in the Defendant's name and to add enforcement costs of €213,000. The incomplete boxes were not filled in.

9. On 20th January 2014 the EEO was registered with the High Court. Two days later Manuel Martin, the Claimant's solicitors, wrote to the Defendant enclosing a copy of the EEO and saying that they would proceed with enforcement unless they heard from him by 31st January 2014. The Defendant's case is that this is the first time he became aware of the judgment. He replied asking for 28 days so that he could instruct solicitors. Manuel Martin refused this request and stated that they would proceed to enforce the EEO without further notice, unless the sum was paid by 7th February 2014.

10. On or about 29th January 2014 the Defendant instructed Kobalt Law LLP. There was an initial telephone conversation between representatives of the two firms on 30th January 2014 which was clearly very bad-tempered. I am in no position to apportion blame between the two firms. I merely note that thereafter there was a breakdown in communications which was of no assistance to either party and that the subsequent correspondence on both sides was regrettably ill-tempered. Like much ill-tempered correspondence, it did little to advance either party's position in these proceedings.

11. On 3rd February 2014 Kobalt Law applied without notice to Master McCloud for a stay of the EEO pursuant to Article 23 of the Regulation. The witness statement in support included the following:

> "10. … The Spanish Court proceedings did not amount to an 'uncontested claim' ... under any of the provisions of Art 3(1) of [the Regulation].
>
> 11. On 3 February 2014 the Defendant's solicitors instructed [Atencia], a law firm in Spain, to make an application to the Court in Spain to set aside the Judgment referred to in the EEO.
> …
>
> 12. The Defendant respectfully requests that the Court orders a stay of the enforcement proceedings in relation to the EEO. Such a stay will enable the Defendant to continue with his application to the Spanish Court for the Spanish Judgment to be set aside."

12. I refer to this evidence because Mr Stephen Acton, for the Claimant, alleges that it is misleading. Atencia accepted instructions on 3rd February 2014 (the same day as the application to Master McCloud) to set aside the original judgment and the EEO but did not make any application to the Burgos court until 20th February 2014. Mr Acton submits that as at 3rd February 2014 there was no application which was capable of being "continued".

13. Master McCloud made an order staying the EEO until further order. Kobalt Law forwarded the order to Manuel Martin under cover of a letter which stated:

> "Please note that any application your firm will try to make will be countered by a wasted costs order against you personally. Further please be advised that an application has been made to the Spanish Courts for revocation of the spurious order/judgment issued by the Burgos Court incorrectly."

14. Mr Acton submits that this letter is misleading in its statement that an application had already been made to the Burgos Court. He also relies on the unwarranted threat to seek a wasted costs order (a threat which was repeated in several subsequent letters) as a reason for delay on the part of the Defendant in applying to set aside Master McCloud's order.

15. Manuel Martin asked Kobalt Law for sight of the application notice, the evidence in support and a note of the hearing before the Master. Kobalt Law refused this request, contrary to CPR r. 23.9. No transcript or note has ever been produced of the hearing or of Master McCloud's judgment. In these circumstances, I agree with Mr Acton that I should assume that Master McCloud granted the stay on the basis requested by the Defendant, i.e. that a challenge had already been commenced in Spain.

16. Thereafter the Defendant made three challenges in Spain:

    i) The first was a challenge to the original judgment which was made by application to court on 20th February 2014. This was dismissed by the Burgos court and an appeal was dismissed by the Spanish Constitutional Court. That challenge cannot be taken any further.

    ii) The second was a challenge to the order for enforcement made on 26th October 2009. That challenge was dismissed by the Burgos court but an appeal is pending to the Constitutional Court.

    iii) The third was a challenge to the EEO, which was dismissed by the Burgos court. An appeal is pending to the Constitutional Court and has been consolidated with the appeal arising from the second challenge.

17. The Defendant also applied to the Constitutional Court to suspend the EEO pending the outcome of the outstanding appeal. This application was dismissed on the ground that the Defendant had failed to show that he would suffer irreparable harm if the application were dismissed. The court added that "the stay or limitation referred to in [Article 23] could take effect by operation of law in the State of enforcement". However, as I have said, the substantive appeal itself has not yet been determined.

18. In the meantime, Sir Christopher Lee died on 7th June 2015 and in due course his widow was granted probate.

19. The proceedings were transferred to the Chancery Division and the Claimant applied to Master Clark under CPR r. 3.1(7) to set aside or revoke Master McCloud's decision. I will summarise the basis of her decision, after I have set out the key provisions of the Regulation.

The Regulation

20. The Regulation begins with a long preamble. I will not over-burden this judgment with lengthy extracts from it, but will summarise the main points which I take from it:

i) The Regulation is part of the Council's programme to abolish *exequatur* (i.e. the process whereby a judgment given in one jurisdiction must be registered in the country of enforcement before it can be enforced in the latter country). Instead, the court of one Member State ("the court of origin") will be able to grant an EEO which will be enforceable in any other Member State ("the court of enforcement").

ii) The preamble expressly refers to the right to a fair trial under Article 47 of the Charter and states that minimum standards should be established in each State to ensure that there is either "full certainty" or "a very high degree of likelihood" that the proceedings will have come to the notice of the defendant before judgment is entered.

iii) Recital (17) provides:

> "The courts competent for scrutinising full compliance with the minimum procedural standards should, if satisfied, issue a standardised European Enforcement Order certificate that makes that scrutiny and its result transparent".

iv) Recital (18) provides:

> "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 certification as a European Enforcement Order are fulfilled to enable a judgment to be enforced in all other Member States without judicial review of the proper application of the minimum procedural standards in the Member State where judgment is to be enforced."

21. Chapter 1 comprises Articles 1 to 4 and is headed "Subject matter, scope and definitions." Article 1 provides:

> "The purpose of this Regulation is to create a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments … throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement."

22. Article 3(1)(b) provides:

> "This Regulation shall apply to judgments … on uncontested claims.
>
> A claim shall be regarded as uncontested if … the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; …"

23. Chapter 2 comprises Articles 5 to 11 and is headed "European Enforcement Order". Article 5(1) provides:

> "A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition."

24. Article 6(1)(c) provides:

> "A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a European Enforcement Order if … the court proceedings in the Member State of origin met the requirements as set out in Chapter III where a claim is uncontested within the meaning of Article 3(1)(b) …"

25. Article 9 provides for the EEO certificate to be in the form annexed to the Regulation. (This is the form which was in fact used, but not completed: see paragraph 7 above.)

26. Article 10 provides that the EEO certificate shall:

> "upon application to the court of origin, be … withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation."

27. Chapter 3 comprises Articles 12 to 19 and is headed "Minimum standards for uncontested claims proceedings". Article 12 provides:

> "A judgment on a claim that is uncontested within the meaning of Article 3(1)(b) or (c) can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin met the procedural requirements as set out in this Chapter."

28. Article 13 provides for service with proof of receipt by the debtor.

29. Article 14 provides:

> "(1) Service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been effected by one of the following methods:
>
> (a) personal service at the debtor's personal address on persons who are living in the same household as the debtor or are employed there;
>
> …
>
> (c) deposit of the document in the debtor's mailbox;

…

(2) For the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty."

30. Article 18 provides for methods of curing non-compliance with the minimum standards.

31. Article 19 provides:

"(1) Further to Articles 13 to 18, a judgment can only be certified as a European Enforcement Order if the debtor is entitled, under the law of the Member State of origin, to apply for a review of the judgment where:

(a)(i) the document instituting the proceedings or an equivalent document or, where applicable, the summons to a court hearing, was served by one of the methods provided for in Article 14; and

(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part;

or

(b) the debtor was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part,

provided in either case that he acts promptly.

(2) This Article is without prejudice to the possibility for Member States to grant access to a review of the judgment under more generous conditions than those mentioned in paragraph (1). "

32. Chapter 4 comprises Articles 20 to 23 and is headed "Enforcement". Article 20 provides:

"(1) Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

A judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement.

(2) The creditor shall be required to provide the competent enforcement authorities of the Member State of enforcement with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) a copy of the European Enforcement Order certificate which satisfies the conditions necessary to establish its authenticity; and

(c) where necessary, a transcription of the European Enforcement Order certificate or a translation thereof into the official language of the Member State of enforcement …"

33. Article 21 provides:

"(1) Enforcement shall … be refused in the Member State of enforcement if the judgment certified as a European Enforcement Order is irreconcilable with an earlier judgment given in any Member State … provided that:

(a) The earlier judgment involved the same cause of action and was between the same parties; and

(b) the earlier judgment was given in the Member State of enforcement … and

(c) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin.

(2) Under no circumstances may the judgment or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement."

34. Article 23 provides:

"Where the debtor has

- challenged a judgment certified as a European Enforcement Order, including an application for review within the meaning of Article 19, or

- applied for the rectification or withdrawal of a European Enforcement Order certificate in accordance with Article 10

> the competent court or authority in the Member State of enforcement may, upon application by the debtor:
>
> (a) limit the enforcement proceedings to protective measures; or
>
> (b) make enforcement conditional on the provision of such security as it shall determine; or
>
> (c) under exceptional circumstances, stay the enforcement proceedings."

Master Clark's judgment

35. The Defendant submitted that any challenge to Master McCloud's order had to be made either under CPR r. 23.10 or by way of appeal. Master Clark rejected that submission and held that, if Master McCloud had made an error, such error was sufficiently fundamental to justify revocation of her order under CPR r. 3.1(7). (On this appeal, the Defendant accepts that Master Clark had jurisdiction under r. 3.1(7); accordingly I do not need to consider this issue.)

36. Master Clark held that Master McCloud did not have jurisdiction to stay the EEO under Article 23 because of a simple timing problem:

> "It is clear that the defendant had not commenced his challenge at the date of the order, since he had been unable to do so in the time scale for payment stipulated by the claimant. The defendant's counsel did not argue that the English court had an inherent jurisdiction to stay enforcement on a *quia timet* basis. She urged me to construe "challenge" in a broad purposive way, so as to include a clear intention to challenge, but did not provide any authority for doing so. In my judgment, the wording of the regulation, although capable of producing manifestly unjust results, is clear; and that since there was no subsisting challenge on 3 February 2014, the Master had no jurisdiction under art 23 to make the 2014 order."

37. She then considered the Defendant's alternative argument that the EEO was manifestly lacking, because it did not state on its face that the minimum requirements for service had been complied with. She held that this failure was not a matter of the "substance" of the EEO, but of its formal validity, and accordingly the court of enforcement was not precluded from considering this by Article 21(2) (the judgment and its certification are not to be "reviewed as to their substance" by the court of enforcement). She concluded that:

> "Where the certificate itself does not make its result transparent, by, for instance, containing only the name of the debtor and the amount of the debt, the enforcing court would not in my judgment be obliged to enforce it. In this case, the

> EEO was not on its face capable of satisfying the enforcing court that the requirements of the regulation had been complied with; and Master McCloud was entitled to stay its enforcement on that ground alone, not under art 23, but under the court's inherent jurisdiction."

38. Finally, she considered two alternative hypotheses, in case her primary conclusions were wrong. The first alternative hypothesis was that Master McCloud did have jurisdiction under Article 23(c). In that event, it was necessary to consider whether the Defendant had produced satisfactory evidence of "exceptional circumstances" to justify the stay. She held that the relevant circumstances included the prospects of success of the Spanish challenges and that these amounted to exceptional circumstances.

39. The second alternative hypothesis was that, not only did Master McCloud have no jurisdiction to stay under Article 23, but that she (Master Clark) had no inherent jurisdiction to grant a stay. The court nevertheless had a discretion whether to revoke the earlier order under r 3.1(7). She declined to exercise that discretion for the following reasons:

    i) The fact that any defect in Master McCloud's jurisdiction was purely one of timing: had the application been made 17 days later, Master McCloud would have had jurisdiction under Article 23, and the court currently had such jurisdiction;

    ii) The underlying proceedings in Spain lacked merit, the Claimant had failed to effect proper service of the proceedings or the judgment and had failed to comply with the minimum procedural requirements of the Regulation. Further, the Claimant was impecunious and would be unable to return the damages if they were paid to him; and

    iii) There had been a delay of nearly 2½ years since Master McCloud's order.

40. She herself gave permission to appeal limited to the following issues:

> "(1) Whether the Master was right to hold that Master McCloud was entitled to grant the stay of the European Enforcement Order … by reason of the deficiencies on the face of the EEO identified by the Master;"
>
> (2) Whether (assuming that even if Master McCloud had no jurisdiction to grant the stay at the time when she made the 2014 order, the Master had a discretion not to revoke the 2014 order) the Master was entitled to take into account in exercising that discretion what she held to be the absence of any merits of the Spanish claim, and the failure to comply with the minimum procedural requirements of [the Regulation] as constituting exceptional circumstances within the meaning of article 23 of the said Regulation."

The issues

41. The Claimant's grounds of appeal and skeleton argument are diffuse and not easy to follow. However, Mr Acton helpfully accepted in his oral submissions that he did not challenge the facts as set out by the Master and that the grounds of appeal could not extend beyond those for which permission was given.

42. In the course of oral argument the following specific issues emerged:

    i) Was Master McCloud entitled to order a stay under Article 23? In other words, does Article 23 require a challenge to have been previously lodged in the court of origin?

    ii) Did Master McCloud have inherent jurisdiction to order a stay on the ground that the EEO was deficient on its face?

    iii) Did Master Clark have proper grounds for refusing to revoke Master McCloud's order?

    Before I turn to these specific issues, I need to consider the meaning and effect of the Regulation.

The Claimant's submissions

43. Mr Acton focused on the recitals to the Regulation and the Articles which I have set out above. The Regulation requires the legal system of the court of origin to comply with minimum standards for ensuring that the proceedings come to the debtor's attention and that the debtor has a reasonable opportunity to apply to set aside a judgment in default, and it requires that those minimum standards have actually been met in the case in question. Nevertheless, the Regulation proceeds on the premise that these requirements have been met. This is made clear by recital (18) which refers to the "mutual trust" between Member States which underpins the Regulation (paragraph 20.iv) above). Article 21(2) expressly states that the court of enforcement has no right to review an EEO (paragraph 33 above).

44. Accordingly, Mr Acton submitted, a debtor's only substantive remedy is to apply to the court of origin to set aside the judgment or the EEO. The only step which he may take in the court of enforcement is to apply under Article 23, but this depends on a challenge being pending in the court of origin.

45. In response to a question from me, Mr Acton modified his position to some extent byaccepting that the court of enforcement did have an inherent jurisdiction to reject a purported EEO which was not a genuine EEO. This would include a document which was not properly sealed by the court of origin or (as in an example discussed by the Master) one which merely stated the name of the debtor and the amount of the judgment debt but gave no other information. In such a case, the correct course would be for the debtor to apply to de-register the EEO. However, he submitted that the defects in the EEO in question were not sufficiently fundamental and, in any event, there had been no application to de-register.

46. Given that the Defendant has applied under Article 23(c), he must show, not merely that he had lodged a challenge in Spain, but also that there are "exceptional circumstances". Mr Acton submitted that these cannot include the merits of the underlying proceedings or the certification of the judgment, since the court of enforcement is precluded by Article 21(2) from reviewing those matters. He initially accepted that it was difficult to give me an example of what might constitute an exceptional circumstance, but he then suggested that this might include a case where the refusal of a stay would have a catastrophic effect on the debtor because it would drive him into bankruptcy.

The Defendant's submissions

47. Ms Simor drew attention to recital (17) (paragraph 20.iii) above), which requires the EEO to state on its face whether, and how, the court of origin has fully complied with the minimum procedural standards. There is no point in requiring the EEO to state these matters, unless the court of enforcement is entitled to satisfy itself that the certificate is duly compliant. In the present case it is apparent on the face of the EEO that there has not been compliance with the requirements. Although it would have been open to the Defendant to apply to de-register the EEO, he could instead apply for a stay.

48. The discretion under CPR r. 3.1(7) is a matter of domestic procedural law and is not contrary to the Regulation. Master Clark exercised her discretion properly in refusing to set aside the order of Master McCloud, for the reasons given in her judgment. "Exceptional circumstances" under Article 23(c) include the merits of the challenge to the judgment and its certification. Although Article 21(2) prohibits judicial review in the court of enforcement, it does not prevent the court of enforcement from having regard to the likelihood of success of any challenge in the country of origin as a relevant factor in the exercise of a discretion. Indeed the Constitutional Court, in refusing to suspend the EEO, accepted that this was a matter for the English court (see paragraph 17 above).

49. Finally, Ms Simor submitted that Master McCloud was entitled to order the stay pursuant to Article 23. (Logically, this submission should have come first, but I imagine that it was demoted for forensic reasons.) Ms Simor fastened on Master Clark's conclusion that a literal reading of Article 23 was capable of producing a "manifestly unjust" result, if the debtor did not become aware of the EEO until it had had been registered in the country of enforcement. She submitted that European legislation had to be read so as to achieve its purpose. If the Regulation did not comply with the right to a fair trial as recognised by Article 47 of the Charter, then the Regulation itself was non-compliant. She referred me to *Digital Rights Ireland Ltd v. Communications Minister* [2015] QB 127 as an example of a case where the ECJ held a Directive to be invalid as being contrary to the Charter.

The meaning and effect of the Regulation

50. Neither Counsel was able to refer me to any authority, whether domestic or in the ECJ, which considers the power of the court of enforcement to reject or stay an EEO. The only authorities to which I was referred are cases which look at the matter from the point of view of the court of origin.

51. In *G v. de Visser* [2013] QB 168, proceedings in Germany were served by affixing a notice to the notice-board of the regional court. The court of origin asked the ECJ whether the procedure for service complied with the Regulation. The ECJ held at [64]:

> "It is therefore apparent from the very wording of Regulation No 805/2004 that a judgment by default issued in circumstances where it is impossible to ascertain the domicile of the defendant cannot be certified as a European Enforcement Order. That conclusion also follows from an analysis of the objectives and scheme of that regulation. The regulation institutes a derogation from the common system of recognition of judgments, the conditions of which are, as a matter of principle, to be interpreted strictly."

52. *De Visser* is of assistance in confirming that service by affixing a copy to the notice-board of the court of origin does not comply with the minimum standards. However, it does not directly answer the question whether the court of enforcement is able to take this point of its own motion.

53. In *Zulfikarpašić v. Gajer* [2017] I.L. Pr. 16 the Croatian court referred to the ECJ the question whether a writ of execution certified by a notary in Croatia satisfied the requirements of the meaning of the Regulation. In concluding that the answer was in the negative, the ECJ said in relation to the Regulation:

> "38 [I]t is apparent from the wording of art.1 of the regulation that that regulation seeks to ensure, for uncontested claims, the free circulation of judgments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement.
>
> 39 According to recital 10 of that regulation, that objective cannot, however, be attained by undermining in any way the rights of the defence ….
>
> 40 Moreover, it is apparent from recital 3 of Regulation 805/2004 that the principle of mutual recognition of judicial decisions constitutes the cornerstone for the creation of a genuine judicial area. That principle is based in particular on mutual trust in the administration of justice in the Member States to which recital 18 of that regulation refers.

41 The principle of mutual trust between the Member States is, in EU law, of fundamental importance given that it allows an area without internal borders to be created and maintained, founded on the high level of confidence which should exist between the Member States ….

42 That principle results, under art.5 of Regulation 805/2004, in the recognition and enforcement of judgments which have been certified as European Enforcement Orders in the Member State of origin, in the other Member States.

43 The preservation of the principle of legitimate expectations, in a context of the free circulation of judgments as noted in paras [38] and [39] of this judgment, requires a strict assessment of the defining elements of the concept of "court", for the purposes of that regulation, in order to enable the national authorities to identify judgments delivered by other Member States' courts. Compliance with the principle of mutual trust in the administration of justice in the Member States of the EU which underlies that regulation requires, in particular, that judgments the enforcement of which is sought in a Member State other than that of the Member State of origin have been delivered in court proceedings offering guarantees of independence and impartiality and of compliance with the principle of *audi alteram partem* ….

47 According to art.12 of Regulation 805/2004, a judgment on a claim that is uncontested within the meaning of art.3(1)(b) or (c) of that regulation can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin have met the minimum standards referred to in Ch.III of that regulation.

48 Article 16 of that regulation, read in the light of recital 12 thereof, provides for the communication of "due" information to the debtor in order to enable him to arrange for his defence and thus ensure the *inter partes* nature of the proceedings leading to the issuing of the enforcement order capable of giving rise to a certificate. Those minimum standards reflect the EU legislature's intention to ensure that proceedings leading to the adoption of judgments on uncontested claims offer adequate guarantees of respect for the rights of the defence ….

49 A national procedure whereby a writ of execution is adopted without service of the document instituting the proceedings or the equivalent document, and whereby information is provided, in that document, to the debtor about the claim, having the effect that a debtor is aware of the claim only when that writ is served on him, cannot be classified as *inter partes*.

> 50 In the light of the foregoing considerations, the answer to the first part of the question is that Regulation 805/2004 must be interpreted as meaning that, in Croatia, notaries, acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an "authentic document", do not fall within the concept of "court" within the meaning of that regulation."

54. The issue in that case was whether a document certified by a notary was sufficient; in the present case it is whether an incomplete certificate is sufficient. Nevertheless, although the issue was a different one, *Zulfikarpašić v. Gajer* assists in indicating the approach to be taken. On the one hand, the Regulation expressly recognises the right to a fair trial. On the other hand, it places the responsibility for meeting these minimum standards solely on the court of origin and prohibits the court of enforcement from carrying out any judicial review. The court of origin is required to produce a certificate which, if valid on its face, must be accepted by the country of enforcement. However, not every document purporting to be an EEO will genuinely be an EEO.

55. In *Collect Inkasso v. Konjarov*, 28th February 2017 (case C-289/17), the proceedings were personally served on the debtor but failed to mention the address of the court where the proceedings would be heard. The ECJ held:

> "36 The minimum standards set out in Chapter III of Regulation No 805/2004 express the EU legislature's intention to ensure that procedures leading to the adoption of judgments concerning uncontested debts offer adequate guarantees of respect for the rights of the defence in the Member State of origin …, taking account of the fact that, in principle, there is no review thereof in the Member State of enforcement.
>
> 37 Indeed, as follows from the case-law of the Court, those minimum standards, which include indication of the address of the institution concerned, seek to ensure, in accordance with recital 12 of Regulation No 805/2004, that the debtor is informed, firstly, about the court action against him, the requirements for his active participation in the proceedings to contest the claim at issue and, secondly, the consequences of his non-participation in sufficient time and in such a way as to enable him to arrange for his defence. In the specific case of a decision delivered in default, for the purposes of Article 3(1)(b) of Regulation No 805/2004, those minimum procedural standards thus seek to ensure the existence of adequate guarantees of respect for the rights of the defence …."

Once again, this shows the ECJ taking a strict approach to compliance with the minimum requirements, albeit on a reference the court of origin (Estonia).

56. Does the court of enforcement have the right to reject a purported EEO? In my judgment Mr Acton was right to accept that the country of enforcement retains some

residual control over what it accepts as an EEO, albeit that such control must not amount to a review of the underlying proceedings or their certification. Article 20(2) requires the creditor to provide a copy of the EEO "which satisfies the conditions necessary to establish its authenticity" (paragraph 32 above). In order to be valid, the EEO must show on its face in what way the minimum standards have been complied with. This will be achieved if the court of origin has ticked the right boxes on the prescribed form. I agree with Ms Simor that the obvious reason for requiring this is to enable the court of enforcement to satisfy itself, not that the court of origin has actually complied with those minimum standards, but that the court of origin *has certified* that it has done so.

57. This leaves a potential gap in a case where the court of origin fails to comply with the minimum standards but wrongly ticks all the relevant boxes to certify that it has complied. On the face of the Regulation, the debtor's only remedy in such a case would be to apply to the court of origin and, once he has exhausted his remedies in that court, to apply to the European Court of Justice. Fortunately, however, I do not have to resolve that difficult issue, since it is clear on the face of the EEO in the present case that it does not certify that there has been compliance.

58. Article 23 is the only express provision which enables the court of enforcement to refuse immediate enforcement. In my judgment, the reason why the Regulation says nothing about enforcement of a defective EEO is because the Regulation is predicated on the EEO being valid and complete on its face. The deficiencies on the face of the EEO in the present case are considerably more serious than in *Inkasso*, making it impossible to tell from the face of the EEO whether the court of origin was satisfied that the minimum requirements had been satisfied.

59. Article 23 requires that "the debtor has challenged the judgment … or applied for the rectification or withdrawal of an [EEO]". This clearly means that steps have been taken in the court of origin. It cannot be sufficient that the debtor has merely instructed his lawyer to take steps. Ms Simor submits that such a reading would deprive the debtor of a fair trial, if he was unaware of the judgment until the EEO was registered in the court of enforcement. Mr Acton submits in reply that in practice there is likely to be sufficient time for the debtor to begin his challenge in the court of origin before the creditor has completed enforcement. Fortunately, on the facts before me, there is no need for me to reach any conclusion to whether Article 23 is incompatible with the Charter.

60. Article 23(1)(c) provides that a stay is to be granted only in "exceptional circumstances". This is a high hurdle for the debtor to surmount. The most relevant factor in many cases is likely to be the merits of the challenge in the court of origin. It would be surprising if the court of enforcement were not permitted to take this into account. In my judgment, Article 21(2) does not prevent the court of enforcement from doing so. I agree with Ms Simor that the prohibition of judicial review by the court of enforcement does not prevent that court from looking at the merits in order to see whether the challenge which is underway in the court of origin looks likely to succeed. In dong so, the court of enforcement is not deciding that question, but merely considering whether to grant a stay whilst that question is litigated in the court of origin.

Specific issues

(i) Did Master McCloud have jurisdiction to stay under Article 23?

61. It follows, in my judgment, that Master Clark was correct to conclude that Master McCloud had no jurisdiction under Article 23, since no challenge had yet been brought. In fairness to Master McCloud, the Defendant's evidence gave the wrong impression that the challenge had already been made. As this was a "without notice" application, the Defendant had a duty to make full and fair disclosure to the court. The Defendant's legal representatives should have told Master McCloud that no challenge had yet been made, but it does not appear that they did so.

(ii) Did Master McCloud have inherent jurisdiction to stay?

62. For the reason set out above, the court of enforcement has inherent jurisdiction to decide whether the document purporting to be an EEO is properly an EEO. In the present case, the failure to complete questions 11 to 13 means that the court of origin has not properly certified that there has been compliance with the minimum requirements. Accordingly, the purported EEO in the present case is not a proper EEO and the court of enforcement ought not to give effect to it.

63. Master McCloud therefore had jurisdiction (and, indeed, was bound) to award an appropriate remedy in order to ensure that the EEO was not enforced. The grant of a stay was an appropriate remedy. It is true that she purported to exercise her jurisdiction on a different, and erroneous, basis, but in my judgment any appeal against her order would probably have been unsuccessful, given that there was a proper basis on which she could and should have made the order.

(iii) Did Master Clark have proper grounds for refusing to revoke Master McCloud's order?

64. As the Claimant rightly acknowledges, CPR r. 3.1(7) gives the court a discretion in deciding whether or not to revoke or vary a previous order. As with any exercise of discretion, an appeal court will not interfere unless the lower court made an error of law, failed to take (and take only) the appropriate matters into account, or otherwise reached an irrational decision.

65. Article 20(1) provides that enforcement procedures are governed by the law of the court of enforcement. This allows the court of enforcement a measure of procedural discretion. I accept that in theory an exercise of procedural discretion may have so radical an effect as to subvert the Regulation, but this is not such a case.

66. Master Clark's primary conclusion was that Master McCloud was right to award a stay, and hence that it would be wrong to revoke that order. I agree with both parts of that conclusion, for the reasons given above.

67. Master Clark's alternative conclusion was that Master McCloud's order should not be set aside, even if Master McCloud had been wrong to make the order. In reaching that conclusion, Master Clark took into account (i) the fact that Master McCloud would have had jurisdiction if she had heard the matter 17 days later, (ii) the merits of the challenge in the court of origin and (iii) the delay. In my judgment she was entitled to reach that conclusion on the basis of the first factor: if Master McCloud had rejected the Defendant's application, the Defendant could have renewed it 17 days later and it would have been successful. The other two factors are relevant as supporting reasons, but would not be sufficient without the first, since that would amount to an attempt to subvert the Regulation.

The conduct of the parties

68. I cannot leave this case without expressing concern about the conduct of both parties. The Claimant must have known that the Defendant probably knew nothing of the proceedings in Spain until Manuel Martin wrote on 22nd January 2014 telling him of the EEO and saying that they would proceed with enforcement unless they heard from him by 31st January 2014. Manuel Martin should not have refused the Defendant's entirely reasonable request for 28 days' grace.

69. The Defendant should not have applied to Master McCloud without giving notice to the Claimant. Having embarked on that course, the Defendant was under a duty to make full and frank disclosure, but Kobalt Law failed to tell Master McCloud that no challenge had yet been brought in Spain and the firm committed a further breach of the CPR by refusing to supply the Claimant with a copy of the application notice and the evidence in support. Kobalt Law's repeated threats to seek a wasted costs order from Manuel Martin should never have been made.

Application to appeal against Master Clark's order as to costs

70. As I stated in paragraph 41 above, Mr Acton accepted during his oral submissions that the grounds of appeal could not extend beyond those for which Master Clark gave permission. However, following circulation of my draft judgment, I received written submissions from him stating that he had not in fact abandoned his application for permission to appeal against Master Clark's order that the Defendant pay the costs of the application before her. I have to say that I had understood that he was not pursuing the application, which was not mentioned at any point in his oral submissions. Both counsel have sensibly agreed that I should deal with this application on the basis of written submissions, in order to avoid the costs of a further hearing. Rather than enter into an arid debate as to whether or not the application was formally abandoned, I will deal with it on its merits.

71. The starting point is summarised in the notes at CPR 52.1.14. Where the issue is not whether the judge made an error of law but whether she exercised her discretion improperly, an appeal court will not vary her order unless she exceeded the generous ambit within which reasonable disagreement is possible.

72. Mr Acton submits that Master Clark erred in principle in not reducing the costs to reflect the fact that the Defendant had failed to make full and fair disclosure to Master McCloud. I have already said that I agree with him that the Defendant failed to do so, but it does not follow that Master Clark erred in failing to reduce the costs which she awarded. In simple terms, it was open to her to apply the principle that two wrongs do not make a right, i.e. that the Claimant's wrongful conduct in applying to Master McCloud without making full and fair disclosure was not to be taken into account in reducing the costs awarded as a result of the Defendant's misguided application to Master Clark to set aside that order. I therefore refuse permission to appeal on the question of costs.

Postscript

73. Following circulation of my draft judgment, I received a witness statement from Mr Lucatello stating "categorically" that Master McCloud was not misled and that there was nothing in the application papers which could have misled her. Having read that statement, I have amended paragraph 61 above in order to express myself more clearly. I note that Mr Lucatello's statement does not assert positively that the Master was told that no application had yet been made in Spain, nor does he exhibit any note of the hearing.

Disposition

74. Although I regard the conduct on both sides as regrettable, this does not detract from the fundamental point in this appeal, which is that the EEO did not make clear on its face whether and, if so, how the minimum requirements of the Regulation had been satisfied. Accordingly it should never have been registered in this country and Master Clark was correct in refusing to revoke the stay imposed by Master McCloud. I therefore dismiss the appeal.

75. Both counsel have made written submissions about costs. In my judgment there is no reason to depart from the usual order as to costs. The Claimant will therefore pay the Defendant's costs of the appeal, to be assessed on the standard basis if not agreed. The Claimant has not satisfied me that there is any good reason for granting a stay of the order for costs of the hearing before Master Clark or of this appeal. I award an interim payment on account of the costs of the appeal in the sum of £25,000. I have made this award on a conservative basis because of my concern about the disproportionate conduct of this litigation.