UNAPPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2023/327
High Court Record Numbers: 2023/872P, 2023/59/COM
Neutral Citation: [2025] IECA 24

Faherty J.
Power J.
Butler J.

BETWEEN/

ARNE VIGELAND

PLAINTIFF/ APPELLANT

- AND -

ZURICH INSURANCE PUBLIC LIMITED COMPANY

DEFENDANT/ RESPONDENT

JUDGMENT of Ms. Justice Butler of the 6th day of February 2025

Introduction:

1. This is the appellant's appeal from the decision of the High Court (Twomey J. [2023] IEHC 630) acceding to the respondent's motion, setting aside service of and dismissing these proceedings on the grounds that under the Lugano Convention (2007) the Norwegian Courts have exclusive jurisdiction in respect of the issues raised. Apart from a claim for damages in respect of which counsel quite frankly conceded it would be an "*uphill struggle to establish a basis for damages*", the proceedings seek a negative declaration that the appellant is not personally liable for the payment of a cost order made against a company called SJI

Equities Limited ("SJI Equities") in proceedings in Norway. The respondent has taken steps before the Norwegian Courts seeking to make the appellant so liable.

2. There is clearly an extensive history of litigation which brings the parties to this point which I will summarise in due course. There is also a large measure of agreement between the parties both as to that history and as to the applicable law. The dispute between them is relatively net and centres on the meaning of Article 22(5) of the Lugano Convention and whether proceedings seeking what would in this jurisdiction be termed a 'non-party costs order' are concerned with the enforcement of the existing costs order within the meaning of that article.

3. Because of the extent of the agreement between the parties, I will initially outline the history of this application and of the proceedings to date and then the applicable law before moving to the more difficult issue of the meaning of Article 22(5) and its application to the facts to this case. Rather than summarising the High Court judgment at the outset, I will deal with the relevant portions of that judgment as I analyse the issues.

Factual Background and the Norwegian Proceedings:

4. In 2018, proceedings were issued in Norway by an Irish registered company called SJI Equities against a Norwegian company called RenoNorden ASA and a number of former directors of that company ("the RenoNorden proceedings"). Those proceedings related to losses sustained as a result of an unsuccessful investment made in RenoNorden, not by SJI Equities but by a related company, SJ Investments, which is registered in Belize. According to the judgment of the Norwegian District Court dated 24th February 2023, the appellant is one of two directors of SJ Investments and owns 40% of its shares. The other 60% are owned by a Belizean foundation in which the appellant holds most of the roles and which has an address stated to be "care of" the appellant's private address in Norway. SJI Equities is a

subsidiary of SJ Investments, and the appellant was at all material times the sole director of SJI Equities.

5. It appears that SJ Investments transferred its right to pursue the claim against RenoNorden and its directors to SJI Equities for one euro. The appellant signed the assignment of this claim on behalf of both companies. The appellant states that this was done due to potentially more favourable tax treatment in Ireland of any compensation that might have been obtained. However, the respondent believes, and the Norwegian courts appear to have accepted, that transferring the claim from a company based in Belize to a company based in a Lugano Convention country (i.e. Ireland) prevented the director defendants in the RenoNorden proceedings seeking and obtaining security for costs. This transfer also avoided the potential execution of any adverse judgment against SJ Investments, an operating company with income and assets. SJI Equities has never been capitalised or held a bank account and all the costs of running the litigation in Norway were met by the Belizean parent company.

6. The RenoNorden proceedings were ultimately unsuccessful and on 9th December 2022 an order was made by the Borgarting Court of Appeal directing SJI Equities to pay NOK 11,349,923.80 in legal costs to seven former directors of RenoNorden ASA. That sum has subsequently been increased to over NOK 12 million but either way the amount is very substantial being approximately 1 million euro. The RenoNorden directors held insurance with the Norwegian branch of Zurich Insurance PLC, which is a company registered in Ireland. That insurance covered their legal costs in the ongoing litigation. Pursuant to the terms of the insurance policy, Zurich has now been subrogated to the directors' entitlements under the costs order. Subsequent to the conclusion of the proceedings, the appellant attempted to place SJI Equities into voluntary liquidation in Ireland. Although he was unable

to do so, he resigned as a director on 27th January 2023 since which time the company has no directors.

7. In the circumstances described above, the respondent believes that it is entitled to demand that the appellant be made personally liable for the costs of the proceedings under the relevant Norwegian law which is, somewhat confusingly, called the Swedish Disputes Act. Consequently, it took steps in Norway to recoup the costs personally against the appellant. On 1st February 2023 the respondent applied to the relevant District Court for an arrest or attachment order requiring certain of the appellant's assets to be frozen and held as security for its claim against him ("the arrest order"). An *ex parte* order was granted on 2nd February 2023 and that was upheld following an *inter partes* hearing on 24th February 2023. The appellant appealed to the Court of Appeal which rejected his appeal on 28th March 2023. These judgments are exhibited, in translation, on this application.

8. It is potentially significant that under Norwegian law for an arrest to be ordered, the claimant must prove that it has a "*main claim*" and that "*grounds for protection*" exist – i.e. that there is a risk a debtor's behaviour will make enforcement significantly more difficult. At both levels of jurisdiction, the Norwegian courts accepted that the respondent's main claim was "*probable*" and had been "*proven*" to the extent required for the making of the arrest order. The Norwegian District Court set out the basis in Norwegian law for what would in Ireland be termed a 'non-party costs order', i.e. the enforcement of legal costs against someone other than a party to the proceedings. It confirmed that in the particular circumstances the respondent's claim was a tort claim as codified in the Swedish Disputes Act against the decision maker in a company. It rejected the appellant's argument that liability in respect of non-party costs, which would involve making an individual liable for the debts of a company, would fall to be dealt with under Irish company law on the basis that SJI Equities is an Irish company. It noted that "*the alleged claim for damages arises*

from a judgment handed down by a Norwegian Court and was decided according to Norwegian law. The legal costs were also incurred in Norway by the use of Norwegian lawyers." The Norwegian Court of Appeal, in the knowledge that proceedings had subsequently been instituted in Ireland, held that liability was regulated by Norwegian law and not by Irish law.

9. The courts expressly did not make the arrest order on the basis that the RenoNorden proceedings had little prospect of progress or that the appellant would have known this to be the case from the outset. Instead, they found for the respondent on an alternate basis, namely that it was probable that the appellant was the real decision maker and licensee of both the SJI Equities and SJ Investments. The Court of Appeal held that the dispositions, i.e. the transfer of the claim from SJ Investments to SJI Equities, formed a basis for liability as it led to the companies isolating themselves from responsibility for costs in a way that created a clear risk for the defendants, and that the appellant was connected to and responsible for these dispositions.

10. On 24th March 2023 the respondent issued a summons against the appellant before the District Court in Norway seeking damages in the sum of NOK 12,044,522.30 (i.e. the amount of the costs judgment) together with the interests and costs. The basis for the claim is that as "*the real decision maker*" in SJ Investments and SJI Equities, the appellant can be held liable for the respondent's costs claim under the general rules of Norwegian tort law.

The Irish Proceedings:

11. Whilst the appeal in the arrest proceedings was pending before the Norwegian Court of Appeal and before the respondent had issued the summons described in the preceding paragraph, the appellant issued a plenary summons in these proceedings against the respondent on 27th February 2023. The plenary summons claims two substantive reliefs. The

first is damages for tortious interference arising out of the respondent's attempts to make the appellant personally liable in respect of the costs order and the interim relief obtained by the respondent from the courts in Norway. The second is a declaration that the appellant is not personally liable for any loss or damage incurred by the respondent in respect of the Norwegian proceedings, including by reason of the costs order against SJI Equities and the appellant's role in and actions in respect of SJ Investments and SJI Equities. The plenary summons is endorsed to the effect that the Irish High Court has jurisdiction to hear and determine the proceedings under Article 2(1) of the Lugano Convention as the respondent is a public limited company registered in the State and that no proceedings concerning the same cause of action between the parties were pending before any other Contracting State to the Convention. The respondent entered a conditional appearance on 27th March 2023.

12. On 6th June 2023, on the appellant's application, the Norwegian District Court stayed the respondent's proceedings until a decision is made regarding jurisdiction in these proceedings. In making this order, the court found that the two sets of proceedings involved the same subject matter or dispute, rested on the same basis and were between the same parties.

13. The appellant served a statement of claim on 9th June 2023. The statement of claim sets out the background to the claim by reciting the history of the RenoNorden proceedings in Norway, that fact the SJI Equities did not discharge the costs order against it and the subsequent arrest proceedings taken by the respondent before the Norwegian courts. It recites that the Irish proceedings were issued three days after the Norwegian District Court had made an interim arrest order but notes that "*the seizure proceedings, which sought interlocutory-type relief, were not conclusive as regards jurisdiction*". This is not disputed by the respondent. It then recites the issuing of proceedings in Norway by the respondent on the 23rd of March 2023 "*despite the within proceedings having issued*". Apart from reciting

the factual and legal history, the statement of claim does not elaborate on the legal basis for the claim. In fact, under the heading "*claim*" it effectively repeats the relief already set out in the plenary summons which is then replicated as the relief in this statement of claim.

14. On 10th July 2023, on foot of the respondent's application, these proceedings were entered into the commercial list in the High Court and directions were given regarding the bringing and hearing of the motion the subject of this appeal. The respondent's motion seeks an order under O.12, r.26 of the Rules of the Superior Courts setting aside the service on it of the plenary summons and/or an order dismissing the proceedings both based on a want of jurisdiction and because the Norwegian courts have exclusive jurisdiction. The notice of motion also sought an order under O.19, r.28 striking out the proceedings on the basis that they are frivolous and vexatious. The respondent did not proceed with this latter element of its application.

The Lugano Convention:

15. The parties are agreed that the resolution of the issues on this appeal depends on the interpretation and application of Article 22(5) of the Lugano Convention. They are also largely agreed on the application of other provisions of that Convention to the facts of this case. I propose to outline briefly the structure of the Lugano Convention focusing on those Articles which are relevant to the application of Article 22(5) before looking at the case law cited by the parties relevant to this issue.

16. The "new" Lugano Convention of 2007 is an agreement between the European Union on behalf of its member states and three states belonging to the European Free Trade Association namely Norway, Iceland and Switzerland. It replaces an earlier (1988) Convention of the same name. Because Denmark has availed of an opt-out from EU measures in respect of judicial cooperation, it is separately a party to the Lugano Convention,

but this is not relevant for present purposes. Effect was given to the 2007 Lugano Convention in this jurisdiction by the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act, 2012.

17. The Lugano Convention is a double convention dealing, on the one hand, with jurisdiction in respect of legal proceedings as between contracting states and, on the other, with the recognition and enforcement of judgments issued by the courts of another contracting state. The terms of the Lugano Convention largely mirror those of Regulation (EU) No. 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Brussels I Recast Regulation")) dealing with the same issues as between EU member states *inter se*, albeit that at the time the Lugano Convention was adopted an earlier version of the Brussels I Regulation 2001 (Council Regulation (EC) 44/01) was in force. For this reason, most of the jurisprudence concerning provisions of the Lugano Convention are to be found in texts and judgments discussing the Brussels I Regulation in either its original or recast form.

18. Jurisdiction is dealt with under Title II of the Lugano Convention and the fundamental rules are to be found in Articles 2 and 3. Under Article 2(1) subject to the rules of the Convention "*persons domiciled in a State bound by this Convention*" shall be sued before the courts of that state. This is subject to Article 3 which provides that a person domiciled in a contracting state may be sued in another state only under the rules set out in sections 2 to 7 inclusive of Title II. These provisions establish a default position under which a defendant may only be sued in their "*home*" jurisdiction unless one of the other rules under the Convention applies. The rules which depart from the default position can be permissive, where plaintiff is given a choice of jurisdiction in which to sue, or mandatory, where exclusive jurisdiction is conferred on the courts of a particular state because of that state's particular connection with the litigation or its subject matter.

19. Two of these sections are potentially relevant in this case. Section 2 deals with what is called "*special jurisdiction*", and, under Article 5, a plaintiff is given a choice to sue in a state other than the state of the defendant's domicile in certain circumstances. These include at Article 5(3) in the case of tort: "*the courts of the place where the harmful event occurred*" and at Article 5(5) in the case of a dispute arising out of the operations of a branch or agency, in the courts where the branch or agency is situated. The respondent argues that under these provisions it was open to the appellant to sue the respondent in Norway and that no reason has been offered by the appellant as to why he has chosen instead to issue proceedings in Ireland. This is correct insofar as it goes but it adds little to the issues the court must consider. Article 5 gives the plaintiff a choice of jurisdiction in certain circumstances but does not oblige the plaintiff to sue in a state in which it has this option nor to explain why it has chosen not to do so. Excepting cases where exclusive jurisdiction is conferred on the courts of a particular contracting state (see further below), a plaintiff is always entitled to rely on the default position and sue in the place of the defendant's domicile and is never obliged to provide reasons for doing so.

20. Section 6 deals with exclusive jurisdiction. Under Article 22 exclusive jurisdiction, regardless of domicile, is conferred on certain courts in particular circumstances. The provision relied on by the respondent is Article 22(5) which confers exclusive jurisdiction:-

> "*in proceedings concerned with the enforcement of judgments, [on] the courts of the State bound by this Convention in which the judgment has been or is to be enforced*."

21. Sections 8 and 9 contain provisions which set out the procedural steps a court must take in cases where an issue arises as to which country's courts have jurisdiction over proceedings. Of these, Articles 25 and 27 are relevant to this case. Article 25 provides as follows: -

"*Where a court of a State bound by this Convention is seised of a claim which is principally concerned with a matter over which the courts of another State bound by this Convention have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction*."

Article 27 provides as follows: -

"*(1) Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*

(2) Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

22. It is undisputed that the reference to proceedings involving the same cause of action in Article 27(1) refers to substantive proceedings. Thus, although the respondent had acted first in time by taking steps seeking preliminary measures in Norway, the appellant's substantive proceedings were issued in Ireland before the respondent's substantive proceedings issued in Norway. This in turn meant that when the respondent's proceedings were issued before the District Court in Norway, it was obliged under Article 27(1) to stay its proceedings until such time the jurisdiction of the Irish courts was determined. The respondent places some reliance on the fact that in moving his application for a stay in Norway, the appellant asserted that the Norwegian proceedings involved the same cause of action as the earlier proceedings in Ireland. The respondent contends that in meeting this application, the applicant is now attempting to differentiate between the two sets of proceedings. I will return to this point.

23. Independently of the stay application, the Irish courts are, in any event, obliged under Article 25 to consider whether the claim in the Irish proceedings is one principally concerned with a matter over which the Norwegian courts have exclusive jurisdiction under Article

22(5) and, if so, to decline jurisdiction. This would be the case even if proceedings had not been or had not yet been issued in Norway.

24. There was some discussion during the hearing as to whether the use of the term "*principally concerned*" in Article 25 represented dilution of the term "*concerned*" as used in Article 22(5). Counsel for the respondent ultimately agreed that "*principally concerned*" under Article 25 was most likely intended to cover situations where proceedings raised a number of different causes of action, only some of which potentially fell within Article 22. Even though the word "*concerned*" is common to both, I am satisfied that Article 25 should not be read as lessening the extent to which proceedings must be concerned with the enforcement of a judgment in order to come within Article 22(5).

25. Finally, although Article 32 falls within Title III on recognition and enforcement, it provides a definition of "*judgment*" which applies to the Convention as a whole. That definition includes "*the determination of costs*". It was accepted by the appellant that the costs order made by the Borgarting Court of Appeal in Norway on 9th December 2022 is a judgment for the purposes of the Lugano Convention. The issue is whether the proceedings in Ireland concern the enforcement of that judgment.

General Principles:

26. The parties were also agreed on a number of general principles. The respondent accepted that as the party seeking to invoke an exception from the default rule under the Convention that jurisdiction lies with the courts of the place of the defendant's domicile, the onus lay on it to establish that the claim fell within Article 22(5) (see *Handbridge v. British Aerospace Communications Ltd* [1993] 3 IR 342 and, more recently, Cregan J. in *Von Geitz v. de Rothschild (Suisse) S.A.* [2023] IEHC 224). The Supreme Court in *Handbridge* stated that the entitlement to avail of an exception to the general rule must be established

"*unequivocally*" but it does not appear to be suggested that this alters the standard of proof which the respondent must meet in order to discharge the onus which lies upon it. As Cregan J. points out in *Von Geitz*, the relevant standard of proof is the balance of probabilities.

27. The respondent also accepted that as a general principle of the interpretation of EU law instruments, any derogation from or exception to a general rule must be interpreted strictly. As the CJEU put it in *Reichert v. Dresdner Bank AG* Case C-261/90 the equivalent provision of the 1968 Brussels Convention "*must not be given a wider interpretation that is required by its objective*". The rationale for that conclusion – that it would result in the parties being deprived of their choice of forum and potentially coming before courts of a country which is not the domicile of any of them – does not apply to this case as the respondent wants the case to proceed in Norway which is the place of the appellant's domicile. Nonetheless the principle is well established and applies here.

28. Thirdly, it was not disputed that whether the claim made in the proceedings is covered by Article 22(5) is a question of law and not a matter for the court's discretion. The appellant complained that some of the respondent's arguments verged on contending for Norway as the *forum conveniens* which, as he correctly pointed out, was irrelevant in deciding whether Article 22(5) applied. Linked to this, the appellant argued that, as a consequence, the strength or merits of the claim made by him in these proceedings was also irrelevant.

29. The respondent did not disagree in principle but pointed to the decision of the CJEU in *E.ON Czech Holding AG v. Dedouch* Case C-560/16 in which the court emphasised that similar or identical rules in the Brussels I Regulation were intended to ensure that in certain instances the courts of the country most closely connected with the subject matter of the proceedings had exclusive jurisdiction and to prevent conflicting judgments in that regard. The court stated at paras. 29 and 30 of its judgment: -

"*29. Furthermore, as is apparent from recital 12 of that regulation [Regulation No 44/2001], the rules of jurisdiction derogating from the general rule of jurisdiction of the courts of the Member State in which the defendant is domiciled supplement the general rule where there is a close link between the court designated by those rules and the action or in order to facilitate the sound administration of justice.*

30. In particular, the rules of exclusive jurisdiction laid down in Article 22 of Regulation No 44/2001 seek to ensure that jurisdiction rests with courts closely linked to the proceedings in fact and law ... in other words, to confer exclusive jurisdiction on the courts of a Member State in specific circumstances where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them by reason of a particularly close link between those disputes and that Member State ...".

30. Whilst this rationale applies equally to the Lugano Convention, it needs to be borne in mind that the objective of ensuring that jurisdiction vests exclusively in the country most closely linked to the proceedings is reflected in the rules which confer exclusive jurisdiction on the courts of contracting states in particular circumstances. In deciding which courts have jurisdiction in this case, the court is not evaluating the claim in order to decide which country should have jurisdiction but is examining the claim under those rules to ascertain which country actually has jurisdiction. Put simply, under the Lugano Convention the Irish courts have jurisdiction over these proceedings as they have been brought against an Irish registered company unless the claim made is one covered by Article 22(5). The only issue is whether Article 22(5) applies so as to confer exclusive jurisdiction on the Norwegian courts and thereby oust the default jurisdiction of the Irish courts.

31. This point is important as, if it were a matter solely for the discretion of the court, it would be very difficult to see any rational basis for the Irish courts accepting jurisdiction in

respect of this claim. Notwithstanding the appellant's assertion that Irish company law would be relevant to a decision whether an individual can be made personally liable for the debts of an Irish registered company, it is clear that in circumstances relating to a debt on foot of a Norwegian costs order, that question must be determined by reference to the applicable Norwegian law which allows such liability to be imposed in certain circumstances. However, whilst the applicable law may be a relevant factor to consider in an analysis of *forum conveniens*, it does not factor into the question of whether Article 22(5) applies as issues such as this have already been incorporated into the rules themselves.

32. Finally, there was some debate between the parties as to the nature of the proceedings instituted by the respondent in Norway on 23rd March 2023. On the face of it, the summons seeks damages under Norwegian tort law in an amount equivalent to the costs order against SJI Equities. The claim is summarised at section 3.4 of the summons as follows: -

> "*(The appellant) has acted in a manner that clearly gives rise to liability for damages and he may be held personally liable for the legal costs that SJI Equities has been ordered to pay.*"

The appellant described this as a tort claim in an entirely new set of proceedings and, consequently, not what would classically be understood as enforcement action. The appellant also says that the High Court recognised this in describing the High Court proceedings as relating to "*the issue of whether an order should be granted by a court against [the appellant] to pay the costs order*" which the appellant contends is not the test under Article 22(5).

33. The respondent counters that the Norwegian proceedings seek to achieve an equivalent outcome to the making of a non-party costs order in Ireland in the type of circumstances approved by the Supreme Court in *Moorview Developments Ltd v. First Active PLC* [2019] 1 IR 417. In *Moorview* lengthy and complex proceedings were prosecuted by a group of

companies, all of which were grossly insolvent. At the conclusion of the trial of the main proceedings the defendants were granted a non-suit in respect of all claims. Following delivery of final judgment, the defendants issued a motion in the proceedings seeking to join the appellant and to make him personally liable for the costs of the proceedings on the basis that he was the moving party behind the companies and responsible for funding the proceedings. The jurisdiction to join the appellant as a defendant to the proceedings for the purposes of making such an order was disputed (it being accepted that he could not be joined as a plaintiff without his consent). The High Court found, and the Supreme Court agreed, that such jurisdiction existed under O. 15, r.13 of the Rules of the Superior Court and section 53 of the Supreme Court of Judicature (Ireland) Act 1877. Order 15, r.13 allows for the joinder of additional parties to proceedings at any stage on such terms as appear to the court to be just if their presence is necessary to enable the court "*effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter*".

34. The respondent argues that the differences between the national procedures for achieving this outcome in Ireland and in Norway are irrelevant and that the Lugano Convention has to be interpreted autonomously in a manner that allows for both, and indeed presumably other, national procedures. The respondent did not provide evidence by way of an expert opinion from a Norwegian lawyer as to the enforcement of costs judgments against non-parties in that jurisdiction. The respondent takes the position that this was at the very least unnecessary, if not inappropriate, because Article 22(5) does not fall to be interpreted by reference to Norwegian law but in an autonomous way capable of dealing with the various internal procedures in the contracting states.

35. Whilst it is certainly correct that Article 22(5) has to be given an autonomous interpretation, it does not follow that expert evidence as to the law in the competing jurisdiction is either unnecessary or inappropriate. I note, for example, that expert evidence

as to the meaning in Swiss law of a jurisdiction clause in a contract between the parties was accepted and considered by Cregan J. in *Von Geitz* (above). It would, I think, have been of assistance to have had such evidence in this case. Nonetheless, it is possible to ascertain the relevant legal basis for the Norwegian proceedings from the judgments already delivered in the application for interim relief. It seems clear from those judgments that the Norwegian equivalent of the *Moorview* non-party costs order which the Irish courts may issue, is provided for by section 20-7 of the Swedish Disputes Act and the general principles of Norwegian tort law as summarised by the Norwegian Supreme Court in the decision cited in those judgments.

Analysis of the Case Law:

36. None of the cases opened to the court involved a factual scenario similar to this case, although both sides argued that statements of principle in the European case law favoured their arguments. The appellant also argued on the basis of the decision in *Masri v. Consolidated Contractors International (UK) Ltd.* [2009] Q.B. 450 that the issue of whether it is possible to make him personally liable for the costs order is a separate issue to the procedural steps that would be required to execute that judgment against him in the event that he can be made so liable. I propose to look initially at the three CJEU judgments before turning to the UK case law.

37. The first of these cases, *Reichert* (above), concerned the analogous provisions of the Brussels Convention 1968 but for ease of reference I will use the nomenclature of the Lugano Convention. The Reicherts were German residents who owned property in France, the legal ownership of which they transferred to their son. They also owed money to a German bank. The bank issued proceedings before the French courts in the region in which the property was situated challenging the transfer on the basis that it was intended to defraud it by

reducing the debtor's estate to which the bank, as a creditor, might otherwise have had recourse (known as an *action paulienne*). It is not clear from the judgment that proceedings had even been issued in respect of the debt but certainly the bank had not obtained a judgment. In circumstances where the Reicherts challenged the jurisdiction of the French court to hear the bank's claim, the court made a reference to the CJEU asking, *inter alia*, whether the *action paulienne* came within the scope of the exception in Article 22(5).

38. On answering this question in the negative, the court pointed out that Article 22(5) was an exception to the general rules set out Article 2 and therefore should not be given a wider interpretation then was required by its objective. In looking at that objective as regards Article 22(5) it stated at para. 26: -

> "*From that point of view it is necessary to take account of the fact that the essential purpose of the exclusive jurisdiction of the courts of the place in which the judgment has been or is to be enforced is that it is only for the courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement.*"

39. The CJEU also quoted the explanation of "*proceedings concerned with the enforcement of judgments*" from the Jenard Report. It went onto consider the *action paulienne* in light of the exclusive jurisdiction under Article 22(5) as follows at para. 28: -

> "*As has been stated ... above, an action such as the action paulienne under French law seeks to protect whatever security the creditor may have by requesting the court having jurisdiction to render the transaction whereby the debtor has effected a disposition in fraud of the creditor' s rights ineffective as against the creditor. Although it thus preserves the interests of the creditor with a view in particular to a subsequent enforcement of the obligation, it is not intended to obtain a decision in proceedings relating to "recourse to force, constraint or distraint on movable or*

immovable property in order to ensure the effective implementation of judgments and authentic instruments" and does not therefore come within the scope of [Article 22(5)]."

40. The parties both relied on these passages to different effect. The appellant emphasises the references to Jenard and to "*force, constraint or distraint*" to argue that the judgment effectively confines the scope of Article 22(5) to proceedings involving the mechanics of enforcement, in the sense of the execution of a judgment under Irish law. The respondent points to the fact that there was no judgment the enforcement of which was an issue in the proceedings. Thus, the court's analysis focussed on the fact that the proceedings were aimed at preserving an asset as security against which a later judgment, not then in existence, might be enforced. Thus, even if the *action paulienne* could be characterised as paving the way to more effective enforcement of a subsequent judgment, it is necessarily of a preliminary nature when no judgment existed of which enforcement could have been sought.

41. The next judgment in chronological sequence is *Reitbauer v. Casamassima* Case C-722/17. The plaintiffs in that action were tradespeople who had done work renovating a house in Austria at the request of a couple who were resident in Italy. The house was registered in the sole name of one of the partners in the couple, whom I will refer to as the debtor, the other partner being the defendant. The defendant and the debtor appear to have separated in 2014 following which the defendant issued proceedings in Italy claiming repayment from the debtor of a significant loan, the funds of which had been used in the purchase of the house. The debtor acknowledged the defendant's claim against her as part of a settlement before the Italian courts in May 2014 and undertook to register a mortgage on the Austrian property to secure the loan. In June 2014 a pledge was duly entered in the land registry in favour of the defendant. This which ranked in priority to other debts.

42. Meanwhile the tradespeople, who had not been paid in full for the work done on the house, issued proceedings which resulted in a series of judgments in their favour. These judgments post-dated the debtor's formal acknowledgement of the defendant's loan in the Italian proceedings and only became enforceable after the pledge had been registered.

43. In 2016 the defendant applied to the Austrian courts for the compulsory sale of the property. The proceeds of the judicially ordered sale were just sufficient to discharge the outstanding loan to the defendant with nothing left over to discharge the judgments of the tradespeople. The plaintiffs initially brought avoidance proceedings (equivalent to an *action paulienne*) in Austria against both the defendant and debtor on the basis that the transaction between them ensured that the debtor's assets would not be sufficient to meet the creditors' claims. These proceedings were dismissed in 2017 because, as both the defendant and the debtor were resident outside Austria, the Austrian courts lacked jurisdiction.

44. The plaintiffs then filed opposition to the distribution of the proceeds of the compulsory sale to the defendant. Two grounds of opposition were raised. The first was that the defendant's claim against the debtor, which was the subject of the settlement before the Italian courts, no longer existed because the debtor had a counter claim against him (albeit one she had not pursued) for damages of at least the same amount. The second was based on the same grounds as the avoidance action. The defendant contended that the Austrian courts did not have jurisdiction regarding the opposition proceedings and a reference was made to the CJEU asking whether a dispute regarding the distribution of the proceeds of a judicially ordered sale of property came within the scope of Article 22(5). In particular, the referring court queried "*whether the rules of jurisdiction should be examined having regard to the proceedings considered in general and abstract terms or in (the) light of each ground of opposition raised in the specific case*" (judgment at para. 30). Again, the provisions in issue

were those of the Brussels I Recast Regulation but for convenience I will use the nomenclature of the Lugano Convention.

45. In answering the questions referred, the CJEU took the view that although viewed as a whole, the opposition proceedings were linked to the enforcement proceedings, because the grounds of opposition could be very diverse, their proximity to the enforcement proceedings could vary significantly (para. 41). Consequently, it was necessary to examine each of the grounds of opposition to determine the application of the derogation from the general rule rather than making an overall analysis of the opposition proceedings as a whole (paras. 42 and 43).

46. In conducting that detailed analysis, the CJEU then held that an examination of the merits of the ground relating to the counter claim departed "*from question relating to the implementation of the enforcement as such*". This conclusion was, in my view, unsurprising as the asserted counter claim related to a claim the debtor might have had but did not pursue against the defendant in response to his claim against her which resulted in the settlement approved by the Italian courts. It went to the validity of the outcome of proceedings which had already concluded before the Italian courts. The CJEU went on to say at para. 54: -

> "*In addition, as is apparent from the case-law of the Court, the specificity of the connection required by [Article 22(5)] … means that a party cannot make use of the jurisdiction conferred by that provision on the courts of the place of enforcement in order to bring before those courts, by way of an exception, a dispute which falls within the jurisdiction of the courts of another Member State …*".

To a certain extent, this is the opposite of what is happening in this case. The plaintiffs in *Reitbauer* were relying on the exclusive jurisdiction of the Austrian courts in relation to enforcement (i.e. the court ordered sale) to bring a dispute regarding the validity of the Italian

settlement within the jurisdiction of the Austrian courts. This clearly was a matter which properly fell to the jurisdiction of the Italian courts.

47. As regards the second ground of opposition, which the plaintiffs acknowledged did not contest the acts of the authorities responsible for enforcement, the CJEU held that:- "*proceedings of that kind do not present the degree of proximity required with such enforcement to justify the application of the rule of exclusive jurisdiction*" provided for in Article 22(5) (see para. 55). The language used in both paras. 54 and 55, namely "*specificity of the connection required*" by Article 22(5) and "*the degree of proximity required with such enforcement*" reinforces the earlier conclusion that a specific examination of the proceedings is required, rather than a general or overall assessment.

48. Interestingly, although the plaintiffs did not succeed in establishing that the Austrian courts had exclusive jurisdiction over the opposition proceedings under Article 22(5), the court held that the Austrian court did have jurisdiction under the equivalent of the special rules as to jurisdiction in Article 5(1)(a) of the Lugano Convention. This allows a person to be sued in a State other than that in which they are domiciled in matters relating to contract, where they can be sued in the courts of the place of the performance of the obligation in question. Thus, the second ground of opposition which was premised on the plaintiffs' contractual rights against both the defendant and debtor could be pursued in Austria.

49. The third of the CJEU cases, *Supreme Site Services v. SHAPE* Case C-186/19 involved particularly unusual circumstances in that the defendant was an international organisation (the Supreme Headquarters of the Allied Powers in Europe) through which the plaintiffs provided fuel to the NATO joint forces command in Afghanistan. In 2013 the plaintiffs reimbursed an amount which had been overpaid to them into an escrow account held in Belgium. In 2015 the plaintiffs brought an action in the Netherlands against SHAPE and the joint forces command for non-payment for fuel supplied and sought that the amounts claimed

be taken from the escrow account. SHAPE contested the Dutch court's jurisdiction to hear the substantive claim in the main proceedings on the basis that, as an international organisation, it had an immunity from jurisdiction. The plaintiff then issued a second set of proceedings seeking interim measures to garnishee the funds held in the Belgium escrow account, which order was granted by the Dutch courts and executed by the Belgian courts. Finally, SHAPE brought proceedings to lift the garnishee order and for an injunction to prohibit further proceedings, again on the basis of its immunity from jurisdiction, also characterised as an immunity from execution.

50. Thus, on the facts, the core jurisdictional issue was not really one as between the Dutch and Belgian courts (which was in any event the subject of a bilateral convention) but as to whether SHAPE was, as claimed, immune from jurisdiction and execution by virtue of its status as an international organisation. The Dutch courts initially took the view that SHAPE was immune, as a result of which the plaintiffs appealed to the Dutch Supreme Court which referred questions to the CJEU. These asked, firstly, whether the claim against SHAPE came within the scope of Regulation 1215/2012 (Brussels I Recast) and, if so, whether the lifting of a garnishee order levied on the authority of a judge came within the exclusive jurisdiction provisions equivalent to Article 22(5). Although not relevant to this case, in answering the first question, the CJEU distinguished between circumstances in which an international organisation is exercising public powers, in which case it does not fall within the scope of the civil and commercial matters covered by the Regulation and disputes arising out of a legal relationship of a contractual nature governed by a private law, which would be capable of falling within that scope.

51. As the interim garnishee order granted in the Netherlands had been executed in Belgium, the issue under Article 22(5) was whether SHAPE's interim proceedings seeking the lifting of that order on the grounds of its immunity fell within the exclusive jurisdiction

of the Belgian courts. In answering that question the CJEU reverted to an examination of the issues in the main proceedings stating at para. 73: -

> "*… It must be stated that proceedings, such as those ongoing in the main proceedings, which do not concern per se the enforcement of judgments within the meaning of [Article 22(5)] are not covered by the scope of that provision and therefore do not fall within the exclusive jurisdiction of the courts of the Member State in which the interim garnishee order was executed*."

Again, in my view, this outcome is unsurprising. To have reached the opposite conclusion the CJEU would have had to treat the execution by the Belgian courts of a garnishee order - granted by way of interim measures while the substantive issue remained live in the main proceedings before the Dutch courts - as effecting a transfer of exclusive jurisdiction to determine the immunity issue raised in the Dutch proceedings from the Dutch to the Belgian courts. This would be surprising, to say the least. The main proceedings were not themselves enforcement proceedings nor could they be in circumstances where the contractual claim for payment in the main proceedings had not reached the point of a judgment at the time the garnishee order was applied for and executed. In circumstances where this case, like *Reichert*, is dealing with proceedings in advance of the granting of any judgment of which enforcement could be sought, they do not to my mind support the appellant's argument that proceedings seeking a non-party costs order in respect of a costs judgment already granted cannot be proceedings concerned with the enforcement of that judgment. The applications in issue in both *Reichert* and *SHAPE* were obviously preliminary and ancillary as no substantive judgment existed.

52. The appellant complains that although both *Reitbauer* and *SHAPE* were opened to the trial judge, neither is mentioned in the judgment. There is no positive obligation on a trial judge to refer in their judgment to every authority opened in argument. The availability of

digital resources has significantly increased the amount of material and number of judgments available to legal researchers and consequently the number of cases cited in argument. There are already a large, perhaps an overly large, number of reserved judgments issued by the Superior Courts each year and those judgments are of ever-increasing length and complexity. A trial judge must consider and address the issues raised in the case and the arguments made on those issues. Provided that is done, failure to make express reference to all of the judgments cited in support of those arguments does not necessarily undermine the conclusions reached.

53. I will now turn briefly to two English decisions, one of which was relied on by the appellant and the other by the respondent. *Masri v. Consolidated Contractors International (UK) Ltd. [2009] QB 450* involved the appointment of a receiver by way of equitable execution to receive revenues due to a defendant, against whom the claimant had obtained judgment in English proceedings. The facts are complex but, simply put, involved a dispute regarding a share of an interest held by the defendant companies in an oil concession in Yemen. The defendants initially disputed jurisdiction but ultimately submitted to the jurisdiction of the English courts which held against them in the substantive proceedings. They then instituted proceedings in Yemen for negative declarations regarding their liability to the claimant and the enforceability of the judgment of the English court. These proceedings, analogous to the appellant's Irish proceedings, were discontinued by order of the English courts. The trial judge then made the order, described above, appointing the receiver.

54. The first half of the judgment of the English Court of Appeal (delivered by Lawrence Collins L.J.) deals with the main issue in the case, namely, in circumstances where the English courts had personal jurisdiction over a defendant, whether it was appropriate to make an order for the appointment of a receiver in respect of foreign assets. The court concluded

that in the circumstances of the case the trial judge had not exceeded the permissible limits of international jurisdiction in making such an order.

55. The second half of the judgment deals with a number of issues raised by the defendants regarding the personal jurisdiction over them to grant the orders in question. Under this heading the defendants relied on Article 22(5) and passages of the Jenard Report to argue that the receivership order and a related freezing order were "*proceedings relating to enforcement*". It is somewhat difficult to ascertain from the judgment the purpose of this argument and indeed Lawrence Collins L.J. notes at para. 124 that that there was no suggestion that execution might take place in a state to which the Brussels I Regulation or the Lugano Convention applied. Consequently, he stated "*the very fact that it is not possible to identity a State where there might be actual execution underlines the inapplicability of Article 22(5)*". However, the passage on which the appellant relies is in the preceding paragraph and is as follows: -

> "*I am satisfied that neither the receivership order nor the freezing order is within Article 22(5). First, it seems to me clear from the Reichert case that Article 22(5) is concerned with actual enforcement, and not with steps which may lead to enforcement. I do not accept that the receivership order dispossesses the judgment debtor, not does it amount to a recourse to force. It is plain from the context of the Jenard Report and the Reichert decision that what is contemplated is actual execution*."

56. *Masri* is distinguishable from *Reichert* and *SHAPE* in that judgment had already been granted such that the nature of the proceedings the subject of the court's analysis (i.e. the appointment of a receiver) could not be decided by reference to the fact that there was no substantive judgment of which enforcement could be sought. The court characterised the appointment of a receiver as a step which might lead to enforcement rather than as the actual

execution of the judgment itself. As I have previously observed, it is difficult to understand why the issue was being considered at all, in circumstances where it was not suggested that exclusive jurisdiction lay with the courts of any other state. For this reason, I regard the passage as, at best, *obiter*. Nonetheless, the appellant relies on this case to distinguish between the decision whether he can be made the subject of a non-party costs order, which he characterises as a preliminary step on the road to enforcement, and proceedings which lead to an order enforcing the judgment, which he characterises as the actual mechanics of enforcement.

57. The respondent disputes the relevance of *Masri* and, in any event, points out that in this jurisdiction an application joining a non-party to proceedings for the purposes of making a non-party costs order would be a step required in relation to enforcement. It contends that the fact there may be a number of steps taken to enforce a judgment does not have a bearing on which is the court most closely linked to the judgment and to the enforcement of that judgment. Further, the rationale of the Court of Appeal in *Masri* was that neither the appointment of a receiver by way of equitable execution nor the freezing injunction disposed the defendants of their goods, they merely served to protect the assets and, to that extent the judgment mirrors *Reichert* and *SHAPE* but differs from this case.

58. I agree with the respondent's argument that it does not follow simply because a step is required in advance of direct execution in order to enforce the existing judgment against the appellant, that the proceedings are not concerned with the enforcement of a judgment within the meaning of Article 22(5). Article 22(5) envisages that proceedings, other than those in which the judgment was granted, may be required in order to enforce a judgment. If this were not the case and the only enforcement covered by the article was the execution of the judgment by steps taken in the context of the existing proceedings, then there would be no need for Article 22(5) because the court that issued the costs judgment would necessarily

remain seised of the proceedings for the purposes of making any further orders required to enforce it. Therefore, whether proceedings fall within the scope of Article 22(5) is not determined by the fact that one or more steps – including the issuing of further proceedings - may be required to secure enforcement of a judgment, but by the nature of those steps.

59. Finally, the respondent relies on the decision in *Integral Petroleum SA v. Petrogat FZE* [2019] 1 WLR 574 which concerned a jurisdictional challenge to an application by the claimant for committal of a number of third parties for contempt of court for breach of an injunction. The issues raised concerned the application of the equivalent of Article 22(5) under the Brussels I Recast Regulation. The argument made was that the equivalent provision to Article 22(5) did not apply to committal proceedings as they were not "*proceedings concerned with the enforcement of judgments*". The third parties relied on *Reichert* and the Jenard Report to contend that Article 22(5) was limited to enforcement against property. Moulder J. did not agree, stating at para. 31 of the judgement: -

> "*Whilst I note the narrow approach expressed by the European Court in Reichert's case … to the interpretation of the provision, the nature of the proceedings in Reichert's case was very different and there is nothing in the Article or in its objective which in my view would limit it to enforcement proceedings directed only at property. Committal proceedings are in my view both coercive and punitive in nature but they are directly concerned with the enforcement of court orders and if the committal proceedings result in an order to commit an individual to prison being made, they involve the use of force or constraint*."

He drew a distinction between the appointment of a receiver in *Masri*, which could be said to "*pave the way for execution*", and committal proceedings which he regarded as being directly concerned with the enforcement of the order in question. The object and purpose of the provision did not warrant the drawing of an arbitrary line between measures against

property and measures against persons such as committal proceedings, as both were concerned with the enforcement of judgments.

60. Although the circumstances in *Integral* are very different to the facts of this case, it follows from the court's acceptance that Article 22(5) applied to enforcement against the third parties personally and was not limited to enforcement against property, that the narrow analysis of the CJEU in *Reichert* and its adoption of the Jenard Report in that regard does not necessarily reflect the full extent of what is covered by "*proceedings concerned with the enforcement of judgments*".

Grounds of Appeal:

61. The central plank of the appellant's appeal is that the High Court erred in giving Article 22(5) and in particular the phrase "*proceedings concerned with the enforcement of judgments*" an overly broad interpretation. By referring to the phraseology repeatedly used by the CJEU in its case law, this means "*a wider interpretation than is required by its objective*" (see *Reichert* (above) at para. 25). The appellant's grounds of appeal contend that the High Court erred in holding that the Irish proceedings are concerned with the enforcement of the Norwegian costs order. It is expressly pleaded that Article 22(5) is "*aimed at the procedures and methods involved in implementing, executing and giving effect to judgments*" and not to "*more creative remedies at a remove from the original proceedings*". The legal issue framed by the appellant asks if proceedings concerning whether a person should be made liable for a judgment in proceedings in another State to which he was not a party are principally concerned with the enforcement of that judgment in the other State.

62. The appellant also relies on a concession purportedly made by the respondent that the Irish proceedings are not concerned with the enforcement of the Norwegian judgment. I do

not accept that this concession was made in the terms on which the appellant seeks to rely. It is clear from the transcript of the proceedings in the High Court that in meeting the appellant's argument that the Irish proceedings are not concerned with the enforcement of the Norwegian judgment, the respondent accepted that the outcome of the Irish proceedings could not result in the actual enforcement of that judgment, which can only be achieved in Norway. However, because a negative declaration is sought, the respondent emphatically, and in my view correctly, asserted that the Irish proceedings are designed to achieve a result which, if favourable to the appellant, would preclude enforcement of the judgment against him in Norway.

63. The appellant describes the Irish proceedings as theoretical proceedings in order to align with the analysis of an academic commentator to the effect that Article 22(5) was intended to cover "*practical enforcement, rather than the theoretical right to enforce*" (see Adrian Briggs "*Civil Jurisdiction and Judgments*" 7th Edition (Routledge, 2021) at para. 7.23). The phrase "*theoretical right to enforce*" does not seem to derive from any CJEU judgment nor from the Jenard Report on the corresponding provision of the 1968 Brussels Convention ([1979] OJ C/59 at p. 36). The language actually used by Jenard refers to "*those proceedings which can arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments …*". The report goes onto state that "*problems arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement*". The respondent argues that the application in Norway for the equivalent of a non-party costs order is designed to ensure the effective implementation of the Norwegian judgment.

64. The appellant was not really able to provide a clear explanation of what a "*theoretical right to enforce*" might be. Some of the European authorities cited involve circumstances in which the court was examining jurisdiction in the context of interim or preliminary measures

where judgment had not yet been obtained in the main proceedings. To that extent, the enforcement of a yet-to-be obtained judgment might be described as "theoretical", although I note it is not actually so described by the CJEU (see for example *Reichert* (above) and *SHAPE* (above)). However, in circumstances such as these, where the judgment in respect of which enforcement is sought in Norway already exists, the appellant ultimately accepted that these proceedings did not involve a theoretical right to enforce. Instead, counsel characterised the proceedings as asking the Irish courts to determine what he described as the legal issue as to whether the appellant, as the director of an Irish company, can be held liable for the debts of that company, namely the award of costs to the respondent.

65. This, of course, is not an accurate reflection of the question in either the Irish or the Norwegian proceedings as the claim for non-party costs against the appellant and the steps taken in Norway to recover those costs (which is the subject of the appellant's claim for damages) are not solely or even primarily based on his status as the director of the Irish company. Rather it is a claim made because of his actions in transferring the legal claim of an operative company with assets to a non-operative company without assets, both of which companies he controlled, in a manner which prevented the director defendants from obtaining security for costs and, then, in having the second company, funded by the first, unsuccessfully pursue lengthy and complex litigation causing those defendants to incur significant legal costs which the second company, as nominal plaintiff, cannot meet.

66. Perhaps ironically, the abstract question of whether the director of an insolvent company can, as a matter of principle, be made personally liable for the costs incurred by a third party in defending litigation brought by that company has already been answered positively as a matter of Irish law by the Supreme Court in *Moorview*. It is also clear from the Norwegian judgments that under Norwegian law it is, as a matter of principle, possible to make the decision maker in a company personally liable for legal costs incurred by a third

party in litigation with that company. All of this begs the question as to what is the point of the Irish proceedings, if not, as the respondent asserts to act as torpedo proceedings or as a spoiler, the mere existence of which gives rises to jurisdictional issues which will delay the resolution of the central claim against the appellant.

Article 22(5) - High Court Analysis:

67. Paragraph 28 of the High Court judgment summarises the question in the case as being whether seeking payment from Y of a costs judgment which has being obtained against X constitutes proceedings concerned with enforcement of a judgment. The High Court judge then notes that no direct authority had been opened to him on this point, which remains the case on this appeal. Consequently, he took the view that the task of the court was to "*carefully consider the terms of Article 22(5)*" to determine whether seeking payment from the appellant of the costs judgment against SJI Equities amounted to proceedings concerned with enforcement of that judgement. Neither party contends that the trial judge misunderstood the issue. He also acknowledged both that the onus lay on the respondent to establish that the case came within the exclusive jurisdiction rule set out in Article 22(5) and that Article 22(5) should not be given a wider interpretation than was required by its objective. He characterised this objective, by reference to the decision of the CJEU in *Reichert* (above) at para. 26, as being that "*it is only for the courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement*."

68. The appellant takes issue with the High Court's conclusion at para. 34 that on a plain reading of the terms of Article 22(5) in light of that objective, the proceedings are for the enforcement of a costs order, albeit not against the party named in the order but against a different party, i.e. the appellant. Much of the appellant's argument was to the effect that the

trial judge had either conflated the Norwegian proceedings with the Irish proceedings or had impermissibly decided the case by reference to the Norwegian proceedings rather than by determining the question of jurisdiction to hear the Irish proceedings exclusively by reference to the terms of the Irish proceedings. Certainly, para. 34 is a little unclear in that regard. The preceding paragraph refers expressly to the High Court proceedings, and it may be by extension that the reference to "*the proceedings*" in para. 34 is intended to mean the Irish proceedings only. If so, the reference to those proceedings involving the enforcement of the costs order, albeit against the appellant, could also have been more precise since, by seeking a negative declaration, the Irish proceedings are designed to ensure the non-enforcement of the costs order rather than its enforcement.

69. The trial judge went on to distinguish cases such as *Reichert* (above) and *Masri* (above) from this case. This was on the basis that as this case involved actual execution and was not concerned with protective measures, it did not merely pave the way for future execution of the judgment. However, the same lack of precision regarding the two different sets of proceedings is evident in para. 40: -

> "*In summary therefore, on a plain and restrictive interpretation of Article 22.5, it is this Court's view that the High Court proceedings are concerned with the enforcement of a judgment. To put it another way, the proceedings are concerned with Zurich getting paid the costs order it has obtained from the Norwegian court and is seeking that payment from Mr. Vigeland and so is seeking to 'enforce' the judgment against him. These proceedings are not seeking to 'pave the way' for a future judgment that might be obtained against Mr Vigeland, but rather they are seeking to enforce a judgment that has already been obtained, in the name of SJI Equities, against him.*"

Although no express distinction is drawn between the Irish proceedings and the Norwegian proceedings, it would seem that the reference in the first and second sentences is to the Irish proceedings whereas the positive reference in the third sentence to seeking to enforce a judgment that has already been obtained, can only be a reference to the Norwegian proceedings.

70. Whilst this lack of clarity is unfortunate, it does not obscure the fact that the conclusion of the judgment at paras. 43 and 44 is directed at the Irish proceedings. The trial judge states that the question of whether the appellant has to meet the costs judgment against SJI Equities (i.e. the issue raised in the Irish proceedings) is concerned with the enforcement of the Norwegian judgment and that this is a matter exclusively for the Norwegian courts.

71. Insofar as the appellant contends that the High Court failed to determine the question of jurisdiction by reference to the Irish proceedings alone, the respondent makes two important points. The first is that the Irish proceedings primarily seek a negative declaration that the Norwegian judgment cannot be enforced against the applicant. The somewhat unusual and admittedly weak claim for damages arising out of the Norwegian arrest order obtained by the respondent against the appellant's assets in Norway is dependent on the appellant establishing, in line with the negative declaration, that the costs judgment cannot be enforced against him.

72. In *Analog Devices BV v. Zurich Insurance Company* [2002] 1 IR 272 Fennelly J. expressed caution regarding the treatment of proceedings seeking relief that is negative in character. He quoted both Dicey and Morris on "*The Conflicts of Law"* (13th Edition) (2000) and Kerr L.J. to this effect with the latter saying in *Saipem Spa v. Dredging VO 2 BV* [1988] 2 Lloyd's Rep 361 at p. 371: -

"*Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflicts of jurisdiction since they will obviously lend themselves to improper attempts at forum shopping*."

The appellant argues that these comments can be distinguished since the jurisdictional issue in *Analog Devices* (above) was *forum conveniens* and Fennelly J. went on to conclude that the fact the proceedings sought negative declaratory relief was "*a significant matter to be weighed in the balance*" and weighed negatively against the party that had issued the proceedings. As the application of Article 22(5) is a matter of law rather than a balancing exercise, the appellant argues that Fennelly J.'s observations as to the weight to be attached to the nature of the relief sought in the Irish proceedings are of no relevance to this case.

73. I do not agree. While it is of course correct that the issue before this court does not fall to be resolved by balancing competing factors, the fact the appellant's Irish proceedings seek negative declarations regarding the enforcement of a Norwegian judgment in Norway is relevant to understanding the nature of those proceedings. It is, I think, also important for the court to be cautious in examining proceedings seeking negative declarations which appear to have been issued in that form in order to oust the jurisdiction which would otherwise fall to the courts of another State under the Lugano Convention.

74. The applicant's contention is that a declaration to the effect that he cannot be made personally liable for the costs order against SJI Equities is materially different to the issue raised in the Norwegian proceedings seeking, pursuant to the relevant law and procedures in that jurisdiction, that he be made so liable. If this contention were correct, then in many instances it would be possible to bypass the exclusive jurisdiction provisions of the Lugano Convention by issuing negative proceedings in an alternate jurisdiction designed to prevent the courts on which exclusive jurisdiction is conferred from making the key determinations on which that jurisdiction falls to be exercised. Therefore, if the Norwegian proceedings

which seek damages personally against the appellant in an amount equivalent to the costs order against SJI Equities are properly characterised as proceedings concerning the enforcement of that judgment, it is difficult to see how Irish proceedings seeking the mirror image of that relief in the form of a negative declaration are not to be characterised in the same way. Consequently, in my view, the lack of precision in the language used by the High Court judge matters less than the appellant believes it does.

75. Related to this is the second argument made by the respondent. In his application to stay the respondent's Norwegian proceedings on the basis that the Irish courts were "*first seised*" of his proceedings in Ireland, the appellant contended that the two sets of proceedings involve the same cause of action. This is unsurprising as under Article 27(1) of the Lugano Convention the requirement that any court other than the court first seised stay its proceedings until the jurisdiction of the court first seised is established, depends on the two sets of proceedings involving, *inter alia*, the same cause of action. According to the judgment granting the stay (Norwegian District Court, 6th June 2023), the appellant asserted that his Irish proceedings which "*demanded a negative determination of personal liability towards Zurich Insurance*" were based on "*the legal grounds which have been relied on as the basis for the claim Zurich Insurance*" had brought in Norway. The court agreed that "*the main question in the case brought in Ireland*" was "*the central question also in the case*" brought in Norway. For this reason also, I am of the view that the lack of linguistic precision in the High Court judgment does not fundamentally undermine its analysis of the jurisdictional issue.

Conclusions:

76. All of this brings us to the core issue of whether proceedings claiming that an individual should (or should not) be made personally liable for an extant costs order against

a company are proceedings concerning the enforcement of that judgment. It is this claim that falls to be analysed by reference to Article 22(5), whether expressed positively as in the Norwegian proceedings or negatively as in the Irish proceedings, since both proceedings involve the same cause of action.

77. In my view the answer to this question must be that the proceedings do concern the enforcement of the Norwegian costs order. It is difficult to characterise them otherwise. In blunt terms, if the appellant were to succeed in obtaining the negative declaration sought in the Irish proceedings and assuming that this order would be respected by the Norwegian courts, then this would preclude absolutely the enforcement of the Norwegian costs order against him in Norway. It is hard to see how an order which would prevent enforcement in that manner is not "concerned" with enforcement.

78. The appellant's focus on the issue being a preliminary and ancillary one is misplaced. That language is derived from cases in which the proceedings under consideration were clearly preliminary as no substantive judgement had been obtained of which enforcement could be sought (per *Reichert* and *SHAPE*). It does not follow from the analysis in those cases that any step short of actual execution of a judgment must be characterised as preliminary and merely paving the way for enforcement. The question of non-party liability for an existing costs order is not an issue which paves the way for subsequent enforcement of a possible, future but yet-to-be obtained judgment. Rather it is directly bound up with the enforcement of an existing costs judgment in concluded proceedings in a way which provides the necessary specificity of connection and degree of proximity with enforcement (per *Reitbauer*). Consequently, this justifies the application of the rule in Article 22(5) which confers exclusive jurisdiction on the Norwegian courts.

79. For these reasons I would dismiss the appellant's appeal and uphold the decision of the High Court that the proceedings should be dismissed for want of jurisdiction and that

service of them on the respondent should be set aside. As the appellant has been entirely unsuccessful in his appeal, it would seem appropriate that an order for the costs of the appeal should be made against him and in the respondent's favour. If either party wishes to contend for an alternate cost order they may, within 21 days of the delivery of this judgment, file short written submissions (not exceeding 1,500 words) setting out their position and the other party will have a further 10 days within which to reply. If no submissions are received within this timeframe an order will be drawn up in the terms proposed.

80. This judgment has been read in advance of its delivery by my colleagues Faherty and Power JJ. who have indicated their agreement with it.