[2020] IEHC 689

THE HIGH COURT

[Record No. 2019/16 FJ.]

BETWEEN

HENRY ALEXANDER BROMPTON GWYN-JONES

APPLICANT

AND

RICHARD WILLIAM MCDONALD

RESPONDENT

JUDGMENT of Mr.Justice Barr delivered electronically on the 22nd day of December, 2020

Introduction

1. On 31st October, 2017, the respondent obtained a judgment against the applicant in the Sofia City Court in the Republic of Bulgaria in the sum of €425,926, together with costs of circa €16,500, plus interest pursuant to Bulgarian statute law from 2nd March, 2016 until payment. That judgment was confirmed by a judgment of the Court of Appeal in Bulgaria on 6th December, 2018. By a judgment delivered on 10th October, 2019, the Supreme Court of Cassation in Bulgaria refused to permit the applicant any further appeal against the original judgment or the determination of the Court of Appeal.

2. In this application, the applicant seeks a number of reliefs, which can be summarised in the following way:-

   (a) The applicant seeks an order from the court refusing recognition or enforcement of the judgment obtained by the respondent against him in the Courts of Bulgaria, on the grounds that to do so would be contrary to public policy in Ireland; in particular, because it would enable the respondent to perpetrate a fraud on the applicant.

   (b) In the alternative, the applicant seeks an order from the court staying the recognition or enforcement of the Bulgarian judgment against him, pending the outcome of arbitration proceedings currently pending before the International Court of Arbitration of the ICC, wherein the arbitral tribunal will determine the liabilities of the parties in connection with a series of contracts concerning the purchase of a shopping centre in Sofia, Bulgaria and related contracts, including certain loan contracts on which the Bulgarian judgment was grounded.

Background

3. In order to properly understand the grounds on which the applicant moves the application herein, it is necessary to set out the background to the commercial disputes between the parties. It is the applicant's case that in or about 2007, he was approached by the respondent with an investment proposition concerning investment in the development of a shopping centre in Sofia, Bulgaria. In essence, the applicant states that he was told by the respondent that in order to proceed with the venture, it would be necessary for them to make an investment of €20m. It was represented to the applicant that if he were to put up €15m, the respondent stated that he would put up the remaining €5m from his own funds. The applicant maintains that he agreed to this proposal and put up the funds

via a company controlled by him called Gort Holdings Ltd, which was registered in Guernsey.

4. The applicant states that he made that investment relying on the representations that had been made by the respondent, in particular, that he would have "*skin in the game*" by investing €5m of his own money. In addition, it was a requirement of the bank which was providing the mortgage over the purchase of the shopping centre, that a personal guarantee would be given by the applicant. Accordingly, he gave a personal guarantee to Piraeus Bank (Bulgaria) of €20m. The applicant states that he only provided that personal guarantee on the basis of the fraudulent representations made to him by the respondent.

5. It is the applicant's case that in the events which transpired, the respondent did not invest €5m of his own funds in the project and the applicant has lost the entire of his investment, which is said to stand at present at €22m and he also remains personally liable on foot of the guarantee to Piraeus Bank.

6. That is a greatly simplified version of the dispute between the applicant and the respondent herein concerning the purchase of the shopping centre, which was known as Burgas Plaza. The complexity of the arrangements actually entered into, can be seen by virtue of the fact that in a second set of arbitration proceedings commenced by the applicant in January, 2020 arising out of the collapse of the whole Burgas Plaza investment, those proceedings were instituted against eleven separate respondents. However, for the purposes of this judgment, the simple outline of the essential dispute between the parties as given above, will suffice.

7. The judgment issued by the Sofia City Court, which is at the heart of the present application, arose out of two simple loan contracts. The first of these was a written contract entered into between the applicant and the respondent on 28th March, 2011. It provided that the respondent would lend the applicant the sum of €122,000, which was to be repaid by 31st December, 2011. It was a very brief contract running to only eight short paragraphs. It was signed by each of the parties. The second loan agreement was dated 26th April, 2011. Under it, the respondent lent the applicant the sum of €303,926, which was to be repaid by 31st December, 2011. It had the same terms as the previous agreement and was also signed by each of the parties. Each of the loan agreements contained an exclusive jurisdiction clause, which gave jurisdiction to the Courts of Bulgaria to determine any disputes arising out of the contract. Each of the contracts provided that it was to be governed by the law of Bulgaria.

8. It was accepted by the applicant that he had entered into these loan agreements. He stated that they were in connection with certain advertising contracts that had been entered into in relation to the rental of advertising space within the Burgas Plaza Shopping Centre, whereby the respondent's company would have that advertising space for rent and it was envisaged that the loan would be repaid from the profits that would accrue due to the rental of such space.

9. When the loans were not repaid by the applicant, the respondent instituted proceedings before the Bulgarian Courts. On 5th October, 2017, a hearing was held before the Sofia City Court, where both parties were legally represented. The applicant's lawyers submitted that the loan contracts had to be seen in the context of a complex series of contracts, which had been entered into between companies controlled by the applicant and the respondent respectively in relation to the entire Burgas Plaza project. The court did not accept that submission. On 31st October, 2017, the Sofia City Court granted judgment to the respondent on foot of the contracts of loan in the sum of €425,926, together with costs and interest.

10. The applicant appealed that judgment to the Court of Appeal in Bulgaria. A hearing was held in that court on 5th November, 2018. On 6th December, 2018, the Court of Appeal delivered a written judgment, wherein it affirmed the judgment of the Sofia City Court.

11. The applicant sought to have a further appeal to the Supreme Court of Cassation in Bulgaria. However, on 10th October, 2019, that court refused to allow any further appeal in the matter.

Other Proceedings

12. Prior to the judgments obtained by the respondent in the Courts of Bulgaria, the applicant had taken a number of steps in relation to his overall dispute concerning the loss of his investment in the Burgas Plaza project. On 21st November, 2014, the applicant obtained an interim worldwide freezing order against the assets of a company known as MRP Brazil Ltd, which was the successor in title to Balkan Holdings Ltd, which had been the vehicle through which the respondent had purported to make his investment in the Burgas Plaza Shopping Centre. That worldwide Mareva injunction had been obtained before the High Court of the Isle of Man, which was where Balkan Holdings Ltd and subsequently MRP Brazil Ltd, were registered. On 19th December, 2014, a hearing was held before the High Court of the Isle of Man concerning the continuance of the worldwide freeing order, at which both parties were represented. The freezing order prevented MRP Brazil Ltd reducing its assets anywhere in the world below the sum of €22m. It also made certain directions in relation to disclosure of information by MRP Brazil Ltd.

13. On 22nd February, 2015, the High Court of Justice of the Isle of Man (Deemster Gough) gave a written judgment in which the learned judge stated that he was satisfied that the claimant in those proceedings, Gort Holdings Ltd, had a good arguable case that it had been the victim of deceit and that the misrepresentations and deceit had continued after the initial memorandum of understanding and through the project, including various agreements to inject further loan capital to keep the project afloat and the ultimate assignment of Balkan's interest to another company, Omega. On that basis, the court extended the continuance of the worldwide freezing order pending the outcome of arbitration proceedings between the parties that were then pending before the International Court of Arbitration of the ICC (hereinafter "*the ICC arbitration*").

The ICC Arbitration

14. On 18th December, 2014, a request for arbitration had been submitted by Gort Holdings Ltd against MRP Brazil Ltd and another company known as Bridgecorp A.D. and a company called Burgas Holdings Ltd. Those arbitration proceedings had reference number 20711/TO. Sir Bernard Eber QC was appointed as sole arbitrator.

15. On 24th June, 2015, an answer was filed on behalf of MRP Brazil Ltd to the arbitration proceedings. On 28th April, 2016, an order was made by the arbitrator deeming the claimant's case against the second respondent, Bridgecorp A.D. as having been withdrawn. On 11th September, 2016, by consent, an order was made by the arbitrator staying the arbitration proceedings upon settlement terms that had been set out in an order of the High Court of Justice of the Isle of Man dated 8th October, 2015. That settlement appears to have been reached between Gort Holdings Ltd and the receivers, who had been appointed over the business of MRP Brazil Ltd. That appears to have been the end of that set of arbitration proceedings before the ICC.

16. On 20th January, 2020, the applicant and Gort Holdings Ltd submitted a fresh request to the ICC for a further arbitration against the respondent personally and ten other corporate entities. On 26th March, 2020, an answer to the request for arbitration was filed on behalf of the respondent. In a decision made on 18th June, 2020 and confirmed on 6th August, 2020, the ICC decided that the arbitration would proceed as against the respondent and Bridgecorp A.D., but not against the third to eleventh named respondents. That arbitration proceeding had reference number 25093/TO/AZR.

17. On 1st September, 2020, the applicant appealed the exclusion of the third to eleventh named respondents from the arbitral proceedings. That appeal is pending before the courts in Paris and is due to be heard on 6th January, 2021. The applicant's lawyer in France has indicated that he would expect a judgment to be delivered within 30 days thereafter.

18. Finally, in light of the fact that the arbitral proceedings have been permitted to proceed against the respondent personally, the applicant's lawyers in France, have confirmed that they have received instructions to make a further application to the High Court of Justice of the Isle of Man seeking an extension of the worldwide freezing order to cover the assets of the respondent. In a letter furnished by Mr. Le Bars, the applicant's French lawyer, he indicated that he anticipated that such application may be made on 15th December, 2020. The court is not aware whether any such application has been made and, if so, the outcome of same.

Submissions on behalf of the Applicant

19. The essential submission made on behalf of the applicant was that he had been induced by fraudulent misrepresentations made by the respondent to invest circa €22m in the Burgas Plaza venture. In particular, he alleged that it had been fraudulently represented to him by the respondent that of the sum of €20m that was required by the sellers of the property; that if the applicant were to put up €15m, the respondent would put up €5m of his own funds. It is alleged by the applicant, that the respondent never put up the funds that he had promised. The applicant maintains that he was induced by the fraudulent

representations on the part of the respondent to make the investment; to provide the personal guarantee to Piraeus Bank and to enter into other contracts, including the loan contracts, the subject of the Bulgarian judgment. The applicant submits that all of the contracts have to be seen as a complex series of contracts that were interconnected and all were tainted by fraud on the part of the respondent. It is submitted that in these circumstances, it would be contrary to public policy for the Irish Courts to enforce the Bulgarian judgment obtained by the respondent.

20. In support of his contention that there was fraud on the part of the respondent, the applicant relies on the judgment of Deemster Gough when granting the worldwide freezing order against MRP Brazil Ltd, wherein he stated very clearly that the applicant therein, Gort Holdings Ltd, had a strong arguable case that there had been deceit and misrepresentation on the part of Balkan Holdings Ltd, which the learned judge found was a company controlled by the respondent. In this regard, the applicant relied on the findings and statements of the learned judge at paras. 76 – 84 of his judgment delivered on 22nd February, 2015.

21. The applicant accepts that he was legally represented at the hearings before the courts in Bulgaria, but states that those courts did not accept his argument that the loan contracts the subject matter of those proceedings, had to be seen as being part of a complex series of contracts that had been entered into by various companies controlled by the applicant and the respondent; all of which had been induced by and were tainted with, the fraudulent representations made by the respondent. It was submitted that while the Bulgarian courts had not acceded to that argument, it had to be recognised that the International Court of Arbitration of the ICC had, in its ruling of January, 2020, acceded to the request for arbitration made by the applicant, which named the respondent personally as a respondent thereto and also included the contracts the subject matter of the Bulgarian judgment.

22. In those arbitration proceedings, a clear allegation of fraud had been made against the respondent. Thus, it was submitted that there was a strong possibility that the outcome of the ICC arbitration proceedings would be that the loan contracts on which the Bulgarian judgments were based, had in fact been induced by the fraudulent representations made by the respondent. In such circumstances, it was submitted that the court should have regard to the allegations of serious fraud made therein and should refuse enforcement of the Bulgarian judgment pending the outcome of the ICC arbitration.

23. Mr. Sheahan SC, on behalf of the applicant, submitted that Article 45 of Regulation (EU) No. 1215/2012 of the European Parliament and the Council of 12th December, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as "*Brussels I Recast*") provided that the courts of a member state could refuse to recognise or enforce a foreign judgment if it was contrary to public policy in the state of enforcement so to do.

24. It was submitted that the prevention of fraud was part of the public policy endorsed by Irish law over many years. This had been recognised both in statute and at common law.

Statutes such as the Statute of Frauds (Ireland) Act, 1695, the Statute of Limitations, 1957 (as amended), the Courts and Courts Officers Act, 1995; the Civil Liability and Courts Act, 2004 and the Land and Conveyancing Law Reform Act, 2009, all had provisions which were designed to prevent fraud. In addition, fraud of any kind constituted a serious criminal offence in this jurisdiction. It had been originally legislated for in the Larceny Act, 1861 in s. 84 and thereafter in the Debtors (Ireland) Act, 1872 in s. 13, which were now encompassed in the Criminal Justice (Theft and Fraud Offences) Act, 2001. Fraud was also an actionable wrong at common law in the form of the tort of deceit.

25. It was submitted that it had long been established that fraud was a ground for the refusal of recognition of a foreign judgment on the basis of public policy. In England, that had been established in a case dealing with the predecessor of the current EU enforcement regime in the case of *Interdesco SA v. Nullifire Ltd* [1992] 1 Lloyd's Rep 180.

26. It was submitted that the Irish Courts would not allow recognition or enforcement of a foreign judgment where it was contrary to Irish public policy. Such public policy considerations were not closed and what was permissible in another jurisdiction, may not necessarily be consistent with Irish public policy. Counsel referred to *Sporting Index Ltd v. O'Shea* [2015] IEHC 407, where the High Court refused to enforce an English judgment based on a gambling debt, as that was contrary to the provisions of s. 36(2) of the Gaming and Lottery Act, 1956 and its enforcement would therefore be contrary to public policy in Ireland.

27. Counsel pointed out that in Article 45 of Brussels I Recast, it was provided that a court could refuse recognition "if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed". It was submitted that Irish case law had confirmed that "*manifestly*" was a threshold issue that highlighted how the issue involved must be fundamental with regard to the rights of the individual or the public good.

28. Counsel submitted that principles that had been identified as being contrary to public policy were those involving "*some element of illegality*", being "*injurious to the public good*" and "*offensive to the ordinary responsible and fully informed member of the public*"; see *Broström Tankers AB v. Factorias Vulcano SA* [2004] 2 I.R. 191, where that analysis had been set out and it was confirmed that the public policy relevant to enforcement actions brought before the Irish Courts was the public policy of Ireland, and not that of the seat of the arbitration, or where the award had been rendered. That case involved enforcement of an arbitral award.

29. It was submitted that the judgment which had been obtained by the respondent in the Bulgarian courts, had been obtained by an underlying fraud. It was submitted that it was clear that the contracts giving rise to the Bulgarian judgments, were not, as argued by the respondent, standalone contracts, but were in fact only entered into as part of a larger series of transactions involving the purchase of the Burgas Plaza Shopping Centre in Sofia.

30. It was submitted that the case put forward by the respondent in his replying affidavit that the applicant had borrowed money from him in standalone contracts, did not make sense. It was submitted that at all times the applicant was the person providing monies and funding for the project. The respondent had been in the weaker financial position; indeed, the respondent had never put any of the monies he had promised into the venture and further, had concealed that fact from the applicant. It was submitted that in these circumstances, the enforcement of the Bulgarian judgment, the subject matter of the present application, would facilitate such fraud and be manifestly contrary to public policy in this jurisdiction.

31. It was submitted that it was only on account of the fraudulent representations made by the respondent, that the applicant was induced personally to enter into a memorandum of understanding to establish a legal entity in Malta for the purpose of acquiring Burgas Plaza A.D.; the respondent had further induced the applicant to provide a personal guarantee to Piraeus Bank related to the acquisition of Burgas Plaza; he had induced the applicant to invest additional capital to fund the purchase of the shopping centre and to consent (in his capacity as a member of the board of directors) to the company entering into an advertising contract with a company owned and controlled by the respondent. It was that advertising contract which had ultimately given rise to the Bulgarian judgment. It was submitted that it was clearly stated by the applicant in his affidavits that he would not have entered into any of those contracts, but for the fraudulent representations made by the respondent to induce him to enter into a series of contracts and actions to acquire the shares of Burgas Plaza, such that the subsequent contracts, including the advertising contract and the related loan contracts, would not have been entered into by the applicant, but for the misrepresentation on the part of the respondent.

32. Counsel accepted that in a judgment between the same parties based on another Bulgarian judgment, being the judgment of Meenan J. in *Gwyn-Jones v. McDonald* [2002] IEHC 240, the court had refused the applicant's application for an order refusing the enforcement of a Bulgarian judgment in the sum of €119,522.24 obtained by the respondent against the applicant. However, it was pointed out that that judgment had been a default judgment and as such, the main ground on which the refusal of recognition and enforcement was sought, concerned whether or not the applicant had been validly served with the proceedings in Ireland. Counsel accepted that Meenan J. had found that the applicant had been validly served with the Bulgarian proceedings which had led to the judgment.

33. Counsel further accepted that the judge had also dealt with the issue of refusal of recognition of the judgment on grounds of public policy and had refused to make any such order on the basis that the judgment before him concerned a claim between the applicant and the respondent personally, whereas the proceedings before the High Court of Justice of the Isle of Man were between Gort Holdings Ltd and MRP Brazil Ltd. However, counsel submitted that this Court was entitled to take notice of the fact that that judgment had been delivered on 19th May, 2020 and that on 18th June, 2020, the ICC had decided that the request for arbitration could proceed against the respondent

personally, which direction had been confirmed on 6th August, 2020. Those arbitral proceedings clearly raised the issue of fraud in connection with the full series of contracts entered into between the parties and various corporate entities controlled by them, including the loan agreements, the subject matter of the Bulgarian judgment. Thus, it was submitted that the circumstances of this case were not on all fours with the issues that were presented for the determination of Meenan J. in the previous case.

34. In relation to the arbitration proceedings before the ICC, it was submitted that the principle of comity of courts, required that the Irish Courts should have regard to the fact that there was a valid dispute pending before the ICC in relation to the contracts the subject matter of the Bulgarian judgment. In addition, there was evidence before the court from the Opinion furnished by Mr. Le Bars, the applicant's French lawyer, that there was provision in Bulgarian law for a judgment to be reopened, in the event that there were new grounds on which to allege that there had been fraud leading to the obtaining of that judgment. It was submitted that in the event that the ICC arbitration found that the loan contracts were either induced by fraud, or tainted by fraudulent representations made by the respondent, the necessary application would immediately be made to the courts in Bulgaria to reopen the matter.

35. In these circumstances, it was submitted that even if this Court was not prepared to refuse the recognition or enforcement of the Bulgarian judgment on grounds of public policy; it was submitted that it would be reasonable and in accordance with the dictates of justice, for the court to place a stay on the enforcement of the Bulgarian judgment against the applicant in this jurisdiction, pending the outcome of the ICC arbitration.

36. Finally, it was submitted that the court should have regard to the financial standing of the respective parties. The applicant was a man of very considerable assets within this jurisdiction. In that regard, a valuer's report had been exhibited in relation to his property in County Cork, which was valued at €26m. In addition, he had deposed to the fact that he had substantial other assets within the jurisdiction. Accordingly, there was no question, but that the respondent would be in a position to enforce the Bulgarian judgment against his assets in this jurisdiction, in the event that the ICC arbitration should be determined against the applicant.

37. It was submitted that conversely the respondent was a citizen of New Zealand, who had resided in Bulgaria for some time, but did not appear to reside there anymore. He had given an address in England in the affidavits sworn by him in the within proceedings, but it appeared that he was currently resident in Brazil, where he was pursuing other interests through his company, MRP Brazil Ltd, where he was involved in the construction of a building known as Trump Towers in Rio de Janeiro. The court was also urged to have regard to the fact that MRP Brazil Ltd had been ordered to pay 60% of the costs in connection with the Mareva injunction proceedings, but had not been able to do so and had been put into receivership. Those costs had never been paid to the applicant.

38. It was submitted that in these circumstances, there was a very real risk that if the court permitted the respondent to enforce the Bulgarian judgment against the applicant in this

jurisdiction, the assets would be dissipated and the outcome of the arbitration proceedings, insofar as they concerned these loans, would be rendered nugatory. In these circumstances, it was submitted that the balance of justice lay in favour of granting either an injunction preventing the enforcement of the Bulgarian judgment pending the outcome of the ICC arbitration, or placing a stay on the enforcement of that judgment pending the outcome of those proceedings.

Submissions on behalf of the Respondent

39. On behalf of the respondent, Mr. Costello BL submitted that, in essence, the issue before the court was a simple one: The respondent had entered into loan agreements with the applicant in March and April, 2011. Those were standalone agreements and were not connected to any other contracts that had been entered into either between the parties personally, or between corporate entities controlled or connected to them. The respondent had obtained a judgment from the Sofia City Court on foot of the loan agreements. The applicant had been legally represented in the proceedings before that court. The applicant had exercised his right to appeal that judgment to the Court of Appeal. He had also exercised a further right to petition the Supreme Court of Cassation in Bulgaria to allow him to make a further appeal in the matter; which had been refused. The applicant did not like the fact that the Bulgarian courts had not acceded to his submission that the loan agreements were connected to other contracts entered into by other corporate entities. It was submitted that this application was merely an effort to get over the fact that the Bulgarian courts had made a ruling against the applicant and, accordingly, he sought to prevent recognition or enforcement of the Bulgarian judgments on the same grounds that he had raised before the Bulgarian courts.

40. It was submitted that insofar as the applicant alleged that there had been fraudulent misrepresentation on the part of the respondent, it was important to note that that allegation was strongly contested by the respondent. Furthermore, the allegation of fraud concerned contracts that had been entered into by other corporate entities. Those contracts were totally separate to the simple loan agreements the subject matter of the Bulgarian judgment.

41. It was submitted that the applicant had tried to run the same argument before Meenan J. in the earlier proceedings in *Gwyn-Jones v. McDonald* in respect of the default judgment that had been obtained by the respondent against the applicant in the Bulgarian courts; which argument had been unsuccessful before the High Court on that occasion.

42. In relation to the court's jurisdiction to refuse to recognise or enforce a validly obtained foreign judgment on grounds of public policy, it was submitted that the exception provided for in Article 45(1) of the Brussels I Recast, was only available in specific and limited circumstances. It had been established in a number of decisions of the Court of Justice of the European Union that the exception provided for in Article 45(1) (and Article 34 of the previous regulation) could only be relied upon in exceptional cases and the court of the state in which enforcement was sought could not review the accuracy of the findings of law or fact made by the court of the state of origin; recourse to the public policy clause could only be envisaged where recognition or enforcement of the judgment

given in another member state would be at variance to an unacceptable degree with the legal order of the state in which enforcement was sought, inasmuch as it would infringe a fundamental principle; the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement was sought; see Apostolides v. Orams (C-420/07) [2009] ECR I-03571 and *Krombach v. Bamberski* (C-7/98) [2000] ECR I-1935.

43. It was submitted that the circumstances of this case fell far short of the circumstances which would be necessary in order to justify the refusal of recognition of a judgment obtained in another member state on grounds of public policy on the criteria set out by the CJEU decisions mentioned above.

44. It was submitted that while a worldwide freezing order had been granted in the High Court of Justice of the Isle of Man against MRP Brazil Ltd, the learned judge had made it clear that it was not for him to make any findings of fact in relation to the existence of fraud on the part of the respondent to those proceedings, that being a matter for determination in the arbitration proceedings. In particular, he had stated as follows at para. 42:-

> *"[…] Of course, as I have already commented, it is not for me to test the detail of the evidence of the warring factions in this matter because that will be done at the arbitration hearing. All I have to do is assess whether the claimant, Gort, has a good arguable case."*

45. Counsel accepted that the learned judge had found that the claimant in that case had a good arguable case and on that basis had granted the worldwide freezing order, but it was submitted that that fell far short of an actual finding of fraud on the part of MRP Brazil Ltd, or on the part of the respondent.

46. In relation to the arbitration proceedings pending before the ICC, counsel submitted that while the International Court of Arbitration had accepted the request for arbitration as submitted by the applicant in January, 2020, which named the respondent as a respondent in his personal capacity, that did not mean that the issue of the jurisdiction of the ICC to deal with the matter had been finally determined.

47. In this regard, counsel referred to the Opinion of Mr. Wade, the respondent's legal counsel in England, who had given the opinion that there were strong grounds for believing that the arbitral tribunal, when ultimately appointed, would be likely to refuse jurisdiction to enter upon the arbitration due to the following facts: firstly, there was no arbitration clause in either of the loan agreements which were the subject matter of the Bulgarian judgment; secondly, there were exclusive jurisdiction clauses giving jurisdiction to the courts of Bulgaria in each of those agreements; thirdly, the applicant had participated through his legal representatives in the hearings before the Bulgarian courts; and, fourthly, the respondent had never consented to any arbitration proceeding before the ICC. It was submitted that any arbitrator, including the ICC, can only have jurisdiction where there is a valid arbitration agreement between the parties that it should have

jurisdiction to enter upon the dispute. It was submitted that in these circumstances, the court was entitled to have regard to the opinion expressed by Mr. Wade that the tribunal, when ultimately appointed, was highly unlikely to accept jurisdiction in the matter.

48. In relation to the assertion by the applicant's lawyers that they had received instructions to make an application to the High Court of Justice of the Isle of Man seeking an extension of the worldwide freezing order to cover the personal assets of the respondent, the same averment had been made in the affidavit sworn by the applicant on 16th December, 2019 and, as yet, no such application had been made. Even if such an order was obtained, it was submitted that that was merely a freezing order and would only apply once the respondent succeeded in securing payment as a result of the enforcement of the Bulgarian judgment against the applicant in this jurisdiction. However, as no such order had yet been made, it was submitted that the balance of justice did not lie in favour of this Court refusing enforcement on the basis of a speculative assumption that the freezing order might be extended against the assets of the respondent.

49. In summary, counsel submitted that the issue before the court was a simple one: the respondent had obtained a valid judgment from the courts in Bulgaria; there was no basis on which to deny him the enforcement of that judgment in this jurisdiction, as an allegation of fraud in an arbitration instituted before the ICC in France, was not sufficient to establish that the enforcement of the judgment in this jurisdiction would be contrary to public policy. Insofar as it was submitted by the applicant that the court should refuse enforcement of the judgment pending the outcome of the ICC arbitration, there was no provision for anything of that nature provided for in Brussels I Recast. Accordingly, it was submitted that the court should refuse all of the reliefs sought by the applicant on this application.

Conclusions

50. The whole purpose of the original 1968 Convention on the jurisdiction and enforcement of judgments in civil and commercial matters (the Brussels Convention) and its successors, the Brussels I Regulation of 2001 and the Brussels I Recast Regulation of 2012, was to put in place a system whereby there would be harmonised rules regulating what national courts would have jurisdiction to deal with disputes in civil and commercial matters. The purpose of establishing clear rules on jurisdiction, was to enable the recognition and enforcement of judgments given in one member state by the courts in other member states covered by the regulation.

51. Once the courts of one member state had taken jurisdiction pursuant to the regulation and had given judgment in the matter, there were very limited grounds on which recognition or enforcement of the judgment could be resisted, when it was sought to have the judgment enforced in another member state. The regulation itself and the case law of the CJEU make it clear that the grounds for resisting recognition and enforcement of a judgment are extremely limited.

52. The provisions of the regulation in relation to the recognition and enforcement of judgments are very clear. The following provisions are the relevant ones in this application:-

Article 36

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

Article 39

A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

Article 45

1. On the application of any interested party, the recognition of a judgment shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

Article 46

On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist.

Article 52

Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.

53. In *Apostolides v. Orams,* the CJEU made it clear that Article 34 of Regulation 44/2001 (Article 45 in the 2012 Regulation) had to be interpreted strictly inasmuch as it constituted an obstacle to the attainment of one of the fundamental objectives of the regulation. The court further held that with regard to the public policy exception, it could only be relied upon in exceptional cases. Recourse to the public policy clause in the regulation could only be envisaged where recognition or enforcement of the judgment given in another member state would be at variance to an unacceptable degree with the legal order of the state in which enforcement was sought, inasmuch as it would infringe a fundamental principle. The CJEU held that in order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement was sought, or of a right recognised as being fundamental within that legal order; see paras. 54 – 59 of the judgment.

54. In the *Apostolides* case, the CJEU, held that the fact that a judgment had been given by the courts of a member state concerning land situated in an area of that state over which its government did not exercise effective control, and could not as a practical matter be enforced where the land was situated, did not render that judgment unenforceable before the Courts in England and Wales. The court held that the fact that the claimants might encounter difficulties in having judgments enforced in the area of the country where the land was situate, could not deprive them of their enforceability and, therefore, did not prevent the courts of the member state in which enforcement was sought from declaring such judgments enforceable.

55. In the *Krombach v. Bamberski* case, Mr. Bamberski had brought proceedings before the French courts against Mr. Krombach, alleging that he had been responsible for the death of Mr. Bamberski's daughter in Germany. Notwithstanding that Mr. Krombach was resident in Germany, the French court assumed jurisdiction due to the fact that the victim of the wrongful act was a French citizen. Criminal and civil proceedings were commenced against Mr. Krombach before the French courts. When he did not enter an appearance to those proceedings, the French court ruled him to be in contempt of court, which had the consequence that he was not permitted to enter a defence, or be defended in either the criminal or civil proceedings. By a judgment of 9th March, 1995, the Cour d'Assises imposed a custodial sentence of fifteen years on Mr. Krombach after finding him guilty of violence resulting in involuntary manslaughter. By a judgment of 13th March, 1995, the same court ruling on the civil claim, ordered him to pay compensation to Mr. Bamberski of FRF350,000.

56. When Mr. Bamberski sought to enforce the civil judgment against Mr. Krombach before the courts in Germany, the German court referred a question for the decision of the CJEU, which held that the European Court of Human Rights had on several occasions ruled that in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, was one of the fundamental elements in a fair trial and an accused person did not forfeit entitlement to such a right simply because he was not present at the hearing. The court noted that while the Brussels Convention was intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it was not permissible to achieve that aim by undermining the right to a fair hearing. Accordingly, the court answered the question by stating that the court of the state in which enforcement was sought could, with respect to a defendant domiciled in that state and prosecuted for an intentional offence, take account, in relation to the public policy clause in Article 27 of the Brussels Convention, of the fact that the court of the state of origin refused to allow that person to have his defence presented unless he appeared in person.

57. At para. 37 of its judgment, the CJEU stated the general principles in relation to the public policy exception, which were repeated in the subsequent Apostolides case, as summarised above. Thus, it is clear that in order for the public policy exception to be invoked,

recognition of the foreign judgment would have to be contrary to a fundamental rule of law in the state addressed.

58. The court notes that the wording of Article 27(1) of the Brussels Convention did not include the word "*manifestly*" before the words "*contrary to public policy*". That word was only inserted in the 2001 Regulation. The court agrees with the opinion of the authors of *Delaney and MacGrath on Civil Procedure*, 4th Ed. where it is stated as follows at para. 26-185:-

> *"The word 'manifestly' was not included in Article 27(1) of the Brussels Convention. The introduction of the word 'manifestly' into Article 34(1) of the Brussels I Regulation narrowed the availability of this ground of non-recognition."*

59. The opinion of the learned authors is supported by the opinion furnished by Advocate General Szpunar in case C-681/13 *Diageo Brands BV v. Simiramida-04 EOOD*, which was referred to by Mac Eochaidh J. in his judgment in the Sporting Index case at para. 12:-

> *"The adverb 'manifestly', added in the course of transformation of the {Brussels} Convention into the regulation {44/2001}, gives concrete expression, in the regulation, to the expectation of a manifest conflict between the recognition {or enforcement} of judgments and public policy. As is clear from the explanatory memorandum in relation to Article 41 of the proposal for a Council regulation, that change was intended to underscore the 'exceptional nature of the public policy ground' with a view to 'improv[ing] the free movement of judgments'."*

60. It is noteworthy that the test applied by the CJEU in the *Krombach* case, was on the less exacting wording of the Brussels Convention, rather than on the wording of the exception as contained in the Brussels I Regulation, or in Brussels I Recast, which is applicable in this case. The case law cited on behalf of the respondent, is strongly supportive of his submission that the public policy exception provided for in Article 45 is not applicable in this case.

61. The cases which were referred to by counsel on behalf of the applicant, are not greatly supportive of the submissions made on behalf of the applicant on this application. In the *Interdesco SA v. Nullifire Ltd* case, the Court of Queen's Bench Division in the UK refused to deny recognition of a French judgment, which the defendant submitted had been obtained by the plaintiff by means of a fraud which it had perpetrated on the French court. It was alleged that the plaintiff had fraudulently concealed the fact that it had sought certain approvals in relation to its product in the UK and that such approval had been rejected because the product had been found to be substandard. The defendant had instituted a further extraordinary appeal, known as a "*recours en révision*" before the courts in Paris. Phillips J. held that where it was alleged that the foreign judgment had been obtained by means of a fraud perpetrated on the judgment rendering court, the appropriate remedy was for the judgment debtor to seek to set aside the judgment in the country where it had been obtained. He stated as follows at para. 37:-

> *"In my judgment, where registration of a Convention judgment is challenged on the ground that the foreign court has been fraudulently deceived, the English court should first consider whether a remedy lies in such a case in the foreign jurisdiction in question. If so it will normally be appropriate to leave the defendant to pursue his remedy in that jurisdiction. Such a course commends itself for two reasons. First it accords with the spirit of the Convention that all issues should, so far as possible, be dealt with by the State enjoying the original jurisdiction. Secondly, the courts of that State are likely to be better able to assess whether the original judgment was procured by fraud."*

62. The judge held that the proper course to adopt, was to leave the defendant to seek its remedy in the appeal before the French courts. He held that the French court was best placed to decide whether there had been fraud and, if so, its implications on the French judgment. He refused to deny recognition of the judgment that had been obtained by the plaintiff before the courts in France.

63. The decision in *Sporting Index Ltd* provides some support for the applicant's argument. In that case the defendant had run up a large gambling debt with the plaintiff company in England. The plaintiff had obtained a judgment before the County Court in London against the defendant for €118,058.99, together with costs of approximately Stg£17,500. Mac Eochaidh J. refused to enforce the judgment on the grounds that it would be contrary to public policy in Ireland to do so, due to the fact that s.36 of the Gaming and Lotteries Act, 1956 provided that every contract by way of gaming or wagering was void. It further provided that no action should lie for recovery of any money which was alleged to be won or to have been paid upon a wager, or which had been deposited to abide by the event on which a wager was made. In these circumstances the judge held that it would clearly be contrary to Irish public policy as expressed in Irish statutory law, to enforce the judgment based on such a gaming or wagering contract. However, he held that the portion of the judgment which related to the costs of the English legal proceedings, was enforceable against the defendant in this country.

64. In the course of his judgment, Mac Eochaidh J. referred to the decision of Dunne J. in *Emo Oil Ltd v. Mulligan* [2011] IEHC 552, where she had stated as follows at para. 21:-

> *"I think it can be seen from the authorities referred to above, that in general terms a decision based on public policy to refuse recognition to a judgment of another Member State will only arise in exceptional circumstances. The exceptions which have given rise to a refusal to recognise appear to be exceptions in which a fundamental right of an individual or entity has been engaged, such as the right to a fair trial."*

65. Mac Eochaidh J. expanded on that statement of the law as follows at paras. 22 and 23 of his judgment:-

> *"22. In assessing the extent to which public policy in the member state must be offended so as to disallow enforcement, the case law has consistently stated that*

the infringement must constitute a manifest breach of the rule of law regarded as essential in the legal order of the state in which enforcement is being sought. I do not read the dicta of Dunne J. in Emo Oil (supra) as meaning that the public policy exemption may only be invoked if the foreign trial breached fundamental rights. The learned judge notes that cases where the exemption had been invoked involved such circumstances.

23. I reject the argument that the public policy exception does not apply in the instant case. The intention of the legislature in relation to the relevant provisions of the 1956 Act is perfectly clear. The enforcement of any betting contracts is prohibited and I am satisfied that the statute constitutes a rule of law regarded as essential in the legal order of this State. There is a manifest conflict between the foreign court order arising from a gambling debt and Irish public policy as expressed in the 1956 statute. Because this rule was enacted by the Oireachtas I am bound to find that the rule is essential in the legal order of the State. The rule reflects public policy on the control of gambling. It is an essential measure in as much as the Oireachtas has considered it necessary for the purposes of controlling gambling."

66. The applicant also referred to the decision of Kelly J. (as he then was) in *Broström Tankers AB v. Factorias Vulcano SA* [2004] 2 I.R. 191, which involved the enforcement in this jurisdiction of a foreign arbitration award. It was argued on behalf of the defendant that that award should not be enforced in this jurisdiction, due to the fact that the defendant company had been placed in protection under the law of Spain, whereby it only had to repay 10% of its debts to its creditors. It was argued that if the arbitral award were enforced in full, the plaintiff would thereby be able to circumvent the relevant provisions of Spanish law. It was submitted that that would be contrary to public policy in Ireland.

67. In rejecting that argument, Kelly J. referred to the following statement on the applicability of the public policy exception to the recognition of arbitral awards as stated in Cheshire and North's *Private International Law*, 13th edition:-

> *"Some element of illegality, or that the enforcement of the award would be clearly injurious to the public good, or possibly that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public."*

68. The court is not satisfied that these cases offer any great assistance to the applicant in the present case. Indeed, it could even be argued that these decisions are supportive of the respondent's position, insofar as they make it clear that there must be a manifest conflict between enforcement of the foreign judgment and the dictates of public policy in this State.

69. The court has had regard to the decision of Meenan J. in the earlier case of *Gwyn-Jones v. McDonald*, where the learned judge held that the existence of the worldwide freezing order made by the Court of Justice of the Isle of Man was not of relevance to the proceedings the subject matter of the application before the court, due to the fact that

the Isle of Man proceedings concerned corporate entities, whereas the application before the court on that occasion, as on this occasion, concerned a judgment between Mr. Gwyn-Jones and Mr. McDonald personally; the court respectfully agrees with the conclusions of Meenan J. in that case.

70. In considering the present application, the court has to have regard to the provisions of the regulation as outlined above and to the case law of the CJEU on the public policy exception provided for in Article 45.

71. While a great deal of documentation has been put before the court covering a multiplicity of proceedings in different jurisdictions, the court is of the view that the relevant facts as they stand at present, can be summarised as follows:-

(a) The applicant maintains that he has lost his investment in the Burgas Plaza project due to deceit on the part of the respondent acting as a controller of a number of companies, including Balkan Holdings Limited, which subsequently became MRP Brazil Limited.

(b) The applicant maintains that the loan contracts on foot of which the Bulgarian judgments were given, are part of a complex series of contracts between individuals and companies all connected with the Burgas Plaza venture.

(c) The applicant has instituted fresh arbitration proceedings against the respondent personally and against a number of other companies before the ICC. The ICC has refused to allow the applicant proceed against the third to eleventh named respondents therein. The applicant has appealed that ruling to the courts in Paris.

(d) The applicant has obtained a worldwide freezing order against MRP Brazil Limited. The applicant has stated that he intends to seek an extension of that freezing order against the assets of the respondent.

(e) The respondent's position is that he denies that there has been any fraudulent misrepresentation or deceit on his part. He states that he only ever represented that he would invest €5m in the venture. He did not say that that would be from his own funds. He states that he made that payment with the benefit of a loan from the vendors of the land.

(f) The respondent submits that the loan contracts are entirely separate as they were contracts entered into between the respondent and the applicant in their personal capacities.

(g) The respondent has obtained a final and conclusive judgment from the courts in Bulgaria, which was obtained after the applicant had been legally represented in those proceedings and had exercised his full rights of appeal in respect of the judgment of the Sophia City Court. The respondent submits that in these circumstances there is no reason why the Irish courts should refuse recognition or enforcement of the Bulgarian judgment.

(h) The respondent maintains that he has strong grounds on which to contest the jurisdiction of the arbitral tribunal of the ICC to rule on the applicant's claim against him on the basis that (i) there is no arbitration clause in either of the loan agreements; (ii) there were exclusive jurisdiction clauses giving jurisdiction to the courts of Bulgaria in each agreement; (iii) the courts of Bulgaria have determined the matter conclusively and (iv) the respondent has never agreed to the matter going to arbitration before the ICC.

72. The court is of the view that it must refuse the applicant's application for it to refuse recognition or enforcement of the Bulgarian judgment. The Bulgarian courts clearly had jurisdiction to deal with the dispute. In any event, this Court cannot review the issue of the jurisdiction of the Bulgarian courts on grounds of public policy having regard to the case law of the CJEU; in particular, para. 32 of the *Krombach* judgment where it was stated as follows:-

> *"It follows that the public policy of the State in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another contracting state solely on the ground that the court of origin failed to comply with the rules of the Convention which relate to jurisdiction."*

73. Nor can this Court review in any way the correctness of the decision of the Bulgarian court not to accede to the submission made on behalf of the applicant that the loan agreements had to be seen in the context of a complex series of contracts entered into between companies controlled by the parties. Article 52 of the Regulation makes it clear that under no circumstances may a judgment given in a member state be reviewed as to its substance in the member state addressed.

74. The net issue for this Court to determine is whether it should refuse recognition or enforcement of the Bulgarian judgment due to the submission that to do so would be contrary to public policy in Ireland, because it would perpetuate, or permit the respondent to perpetrate a fraud on the applicant. The court does not regard that argument as being well founded. All the applicant has is an allegation made by him that the contract between Gort Holdings Limited and Balkan Limited and other contracts, including the personal loan contracts the subject of the Bulgarian judgment, were induced by fraudulent representations on the part of the respondent. There is no finding by any court or arbitral tribunal that a fraud has been perpetrated on either Gort Holdings Limited, or the applicant, by the respondent or by any company controlled by him.

75. The most that there is, is a judgment of Deemster Gough in the Mareva injunction proceedings in the Isle of Man that Gort Holdings Limited had a good arguable case that there had been deceit and misrepresentation of it by Balkan, which was controlled by the respondent. On that basis the court in the Isle of Man granted a worldwide freezing order against MRP Brazil Limited. However, Deemster Gough was at pains to point out that he was not making a finding of fact that misrepresentation or deceit existed, merely that the applicant in those proceedings had raised an arguable case in that regard. Thus, all there is in relation to the allegation of fraud, is the allegation made by the applicant in the

context of the arbitration proceedings before the ICC, which is partially supported by the dicta of Deemster Gough in the Mereva injunction proceedings.

76. Where a party has obtained a judgment from the courts of a member state, the courts of Ireland have to enforce that judgment unless it is clear that to do so would be contrary to public policy in Ireland. In that regard enforcement would have to be contrary to the rule of law in the state where enforcement of the judgment is sought; in this case in Ireland. The threshold in that regard is a high one: see the *Apostolides* and *Krombach* cases.

77. In the present case all that the applicant can point to is that he has instituted arbitration proceedings in which he has claimed that the contracts the subject matter of the judgment of the Bulgarian courts, are tainted by fraudulent representations made by the respondent in relation to other contracts between other parties, which he submits can be seen as forming a single series of contracts. However, at present there is only an allegation of fraud made by the applicant against the respondent. There is no finding to that effect by any court or arbitral tribunal.

78. The existence of such an allegation is not sufficient to enable this Court to conclude that it would be contrary to public policy to refuse recognition or enforcement of the judgment which the respondent has obtained against the applicant in the courts of Bulgaria. Accordingly, the court refuses the primary relief sought by the applicant herein.

79. In relation to the secondary relief, being an injunction or stay preventing the enforcement of the Bulgarian judgment pending the outcome of the arbitration proceedings before the ICC, the court is of the view that that does not constitute a valid ground on which it could refuse enforcement of the judgment obtained by the respondent in Bulgaria. Such relief is not provided for under Article 45 of the regulation.

80. Article 51 of the regulation provides that the courts of the country in which enforcement of the judgment is sought, may only stay the enforcement proceedings if it is satisfied that an ordinary appeal has been lodged against the judgment in the member state of origin, or that the time for such an appeal has not expired. As is clear from the *Interdesco* case, the power to stay the enforcement proceedings only relates to an "*ordinary appeal*" and does not apply to the situation where what might be termed an "e*xtraordinary appeal*" has been lodged: see para. 43 of the judgment.

81. In the present case, no such appeal has been lodged before the courts in Bulgaria. The applicant, through his lawyers, has only gone so far as to state that in the event that the ICC arbitration is determined in his favour, they will immediately move such an appeal before the courts in Bulgaria, seeking to set aside the judgment granted by the Sofia City Court. In such circumstances, where no such appeal has even been lodged, this court could not grant an injunction, or a stay, on the enforcement proceedings, if and when they are instituted by the respondent, on this basis. Even if such an appeal had been lodged before the courts in Bulgaria, the court would still not have jurisdiction to grant such a stay having regard to the provisions of Article 51.

82. In summary, it would defeat the purpose of Brussels I Recast, if parties could resist enforcement of a foreign judgment by pointing to the fact that they had sought to commence, or had commenced, arbitration proceedings against the judgment creditor in another state. The whole purpose of the regulation is to enable parties who have obtained judgment in one-member state to enforce the judgment in another member state quickly and easily. That aim would be defeated if the judgment debtor could avoid enforcement in one member state, by initiating arbitration proceedings on the same matter in another member state. Particularly, as the second ICC arbitration was commenced over two years after judgment had been obtained against the applicant.

83. For these reasons, the court refuses to grant an injunction or a stay preventing the recognition or enforcement of the judgment obtained by the respondent before the courts of Bulgaria pending the outcome of the second ICC arbitration.

84. Finally, even if the worldwide Mareva injunction is extended by the High Court of Justice of the Isle of Man to cover the respondent personally, that would not prevent the respondent acquiring assets by the enforcement of judgments that he has obtained; it merely takes effect to prevent him dissipating his assets below the sum of €22m. Accordingly, any extension of that injunction to cover the respondent's assets would not affect the enforcement of the Bulgarian judgment by the respondent.

85. For the reasons set out herein, the court refuses all of the reliefs sought by the applicant in his originating notice of motion.