Neutral Citation Number: [2020] EWCA Civ 480

Case No: A2/2019/1902

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (Chancery Division)
Business and Property Courts
Mr Justice Fancourt
[2019] EWHC 1818 (Ch.)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2020

Before:

LADY JUSTICE KING
LORD JUSTICE HENDERSON
and
LADY JUSTICE ASPLIN

- -

Between:

Islandsbanki HF and Others	**Appellant**
- and -	
Mr Kevin Stanford	**Respondent**

- -
- -

Mr Joseph England (instructed by **Harrison Drury and Co Ltd**) for the **Appellant**
The Respondent was unrepresented and did not appear before the court

Hearing date: 11th March 2020

- -

Judgment Approved by the court

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00 p.m. on Thursday 2 April 2020

Lady Justice Asplin:

1. This appeal raises two closely related questions of law: whether purported execution of a foreign judgment registered in the High Court pursuant to the terms of the Lugano Convention can be execution issued in respect of the judgment debt, for the purposes of section 268(1)(b) of the Insolvency Act 1986, if the execution occurred before the period for appealing the registration of the judgment has expired and, if not, whether the defect can be cured.

2. The Appellant, Islandsbanki HF ("IB") appeals against the order of Fancourt J, dated 19 July 2019, dismissing IB's appeal against the order of Insolvency and Companies Court Judge Jones, dated 22 February 2019 (as varied on 13 March 2019). By that order, ICC Judge Jones dismissed IB's bankruptcy petition in respect of the third respondent, Mr Kevin Stanford, which had been presented on 6 April 2017 (the "IB Petition") in respect of a debt of approximately £1.3 million, and instead adjudged Mr Stanford bankrupt upon a petition which was second in time, having been presented by Her Majesty's Revenue and Customs ("HMRC") on 22 August 2017 in respect of a debt of around £7 million. Unusually, in this case, three bankruptcy petitions had been presented in relation to Mr Stanford, the third in time having been presented by Shineclear Holdings Limited, a company registered in the British Virgin Islands which is controlled by Kaupthing Bank, in respect of debt for around £6 million.

3. IB is the only party represented before the court on this appeal. Mr Stanford's trustees in bankruptcy, Messrs Mark Wilson and Robert Armstrong of RSM Restructuring Advisory LLP, were appointed with effect from 15 March 2019. In a letter from their solicitors, DLA Piper UK LLP, dated 6 March 2020, they confirmed, amongst other things, that they did not intend to appear or be represented before the court but would abide by its decision.

4. Although a bankruptcy order has already been made against Mr Stanford, IB appeals for two main reasons. First, had an order been made on the IB petition, the presentation of which preceded HMRC's petition by some four months, the powers contained in sections 339 – 342 of the Insolvency Act 1986, (setting aside transactions at an undervalue and preferences) would have been available to his trustees in bankruptcy in respect of transactions which post-dated the presentation of the IB petition, rather than HMRC's petition on 22 August 2017, and section 284 (dispositions of property made by the bankrupt rendered prima facie void) would have taken effect from the presentation of the IB petition. It appears from the evidence filed on behalf of Kaupthing Bank, the largest supporting creditor, and by Mr Stanford himself, that there may be a number of substantial transactions prior to August 2017 which would be susceptible to challenge. They are of particular significance in this case as the three petition debts total in excess of £14 million and Mr Stanford currently has insufficient funds to pay them. Secondly, the costs of the IB petition are considerable.

Background

5. The IB petition is based on an unpaid Icelandic judgment debt from 2013 which together with interest, is now in excess of £1.5 million sterling equivalent. The judgment was given against Mr Stanford in the Reykjanes District Court in Iceland on 26 June 2013 for ISK 74,095.630.000 plus legal costs of ISK 132,900.00 (the "Icelandic judgment"). A certificate was issued by the Icelandic court on 16 October 2013,

pursuant to Articles 54 – 58 of the Lugano Convention. IB applied to register the Icelandic judgment in England and Wales on 16 March 2016. A registration order was sealed on 23 March 2016 (the "Registration Order").

6. The Registration Order included the following:

> ". . .
>
> 2. The defendant has permission within one month...after service on him of notice of registration of the judgment to appeal against the registration and execution on the judgment will not issue until;
>
> (a) after the expiration of that period, or
>
> (b) in the event of an appeal, after the appeal has been determined."

Nevertheless, a writ of control was issued on 30 March 2016 in the Queen's Bench Division of the High Court, pursuant to CPR Part 74, purportedly to enforce the Icelandic judgment which was the subject of the Registration Order (the "Writ of Control").

7. In fact, the Writ of Control states that it is in respect of a judgment of the Reykjanes District Court dated 18 January 2013 in the sum of ISK 7,542,463.00 rather than the Icelandic judgment. This point, amongst others, was taken by Mr Burkitt, on behalf of Mr Stanford, before ICC Judge Jones and is recorded, along with other matters in what the ICC Judge describes as "a troubling catalogue of errors", at [30] of his judgment. The ICC Judge concluded, however, as follows:

> "31. So far as the validity of the Writ of Control is concerned, I observed during the hearing on 20 December 2018 that this could be investigated by reviewing the court file in the Queen's Bench Division pending the next return date. That would have been the appropriate course but on 22 February Mr Burkitt accepted that no further enquiries have been made. In those circumstances, I conclude that Mr Stanford has not satisfied the burden upon him of challenging the authenticity of the Writ of Control."

None of the matters contained in the ICC Judge's catalogue are the subject of this appeal.

8. Following the issue of the Writ of Control, a notice of enforcement was issued to Mr Stanford dated 1 April 2016 under which Mr Stanford was required to pay or agree a payment arrangement with the enforcement officer in respect of £447,875.71 plus interest accruing at the rate of £78.10 daily thereafter, by 11.59 pm on 14 April 2016. In a box entitled "If you do not pay" it was stated that: "[I]f you do not pay or agree a payment arrangement by the date above, an enforcement agent will visit you and may seize your belongings – this is called 'taking control'. These belongings may then be sold to pay the money you owe. ..."

9. On 13 April 2016, the High Court Enforcement Officers engaged by IB attended Mr Stanford's home in order to take control of property in purported compliance with the Writ of Control. They were unable to access the house but entered a garage containing

several valuable cars, including a number of Ferraris. Mr Stanford's solicitors had written to the High Court Enforcement Officers prior to attendance and did so again on 13 April 2016, having been provided with a copy of the Writ of Control. The solicitor's letter enclosed a copy of an agreement confirming the sale of a large number of assets within the property and stated that there was, therefore, nothing to execute against.

10. In May 2016, Mr Stanford and IB entered into a standstill agreement in relation to the enforcement proceedings until 13 October 2016 in which Mr Stanford acknowledged that he owed IB ISK 165.804.818 pursuant to a judgment of the Reykjanes District Court.

11. After various attempts to enforce, the High Court Enforcement Officer certified that the Writ of Control was "unsatisfied in whole" on 14 February 2017. The IB petition was presented thereafter. IB accepts that the purported execution pursuant to the Writ of Control was premature in the sense that it took place before the period for appealing the Registration Order had expired. However, Mr England, on behalf of IB, submits that the requirements of section 268(1)(b) Insolvency Act 1986 were satisfied, nevertheless, or in the alternative, it was open to the court to remedy the defect.

The Decisions Below

12. As I have already mentioned, ICC Judge Jones dismissed the IB petition. He held that in this case, "the time specified for an appeal [against the Registration Order] was extant because there had been no service of the Registration Order." He went on to state that the question was "whether the foreign judgment [the Icelandic judgment] relied upon by the Writ of Control was capable of being enforced" and that the answer to that question had to be applied to the requirements of section 268(1)(b) of the Insolvency Act 1986 for the purposes of the bankruptcy proceedings. See [22] of the ICC judgment. Having already set out articles 47(3) and 43(5) of the Lugano Convention 2007 and section 4A of the Civil Jurisdiction and Judgments Act 1982 as amended (the "1982 Act"), the ICC Judge concluded as follows:

> "25. . . . ***Section 4A(3)*** [of the 1982 Act] makes enforcement of a judgment once registered subject to ***Article 47(3)*** [of the Lugano Convention]. The reference to ***section 4A(2)*** being subject also to "*Article 47(3) . . . section 7 . . . and. . . . rules of court as to the manner in which and conditions subject to which a judgment registered under the Lugano Convention may be enforced*" is not to be construed as enabling Rules of Court to override or otherwise alter the agreement between signatories to the treaty. The power to make rules is to give effect to the revised Lugano Convention. This is both its ordinary meaning and purposive construction.
>
> 26. There is a binding prohibition against enforcement until time for appeal has expired. No jurisdiction to enforce exists during the prohibited appeal period unless the protective measure applies. Breach of that prohibition cannot be described as a procedural defect for the purposes of the Civil Procedure Rules. Even if that was wrong, and I do not suggest it might be, plainly the Court should not exercise its power under CPR Part 3, Rule 3.10 to invalidate the execution to give effect to the revised

> Lugano Convention. Equally the court should not exercise any inherent power to waive or ignore the breach."

He went on to decide, therefore, that there had been "no enforcement for the purposes of s.268(1)(b) of the [Insolvency] Act [1986]" and that the Writ of Control was invalid. See [28] of the ICC judgment.

13. On appeal, Fancourt J upheld the ICC Judge's decision. The citation of his detailed and careful ex tempore judgment is [2019] EWHC 1818 (Ch). He concluded that the question of law to be decided was the true construction of the relevant provisions of the Lugano Convention, of section 4A of the 1982 Act and of section 268 of the Insolvency Act 1986. In summary, the Judge held that:

(i) the Lugano Convention contains a bar on enforcement during the period specified for the appeal against the registration of a foreign judgment: ([18]);

(ii) there is no provision in the Lugano Convention for a State in which enforcement is sought to disapply or abridge the effect of Article 47(3) or the period of time specified in Article 43(5): ([19]);

(iii) section 4A of the 1982 Act purports to give effect to the relevant parts of the Lugano Convention and on its proper construction provides that no enforcement of a "Lugano judgment" may take place during the period for appeal against registration and does not confer a power to vary the effect of Article 47(3) of the Lugano Convention: ([20] and [21] – [23]);

(iv) CPR Part 74 does not contain a power to abrogate the prohibition on enforcement during the appeal period nor any power to abridge the time of one month specified in Article 43(5) of the Lugano Convention: ([24]);

(v) the power in CPR r 3.10 cannot be used to cure the Writ of Control which was issued in derogation of the terms of section 4A of the 1982 Act: ([25] – [29]);

(vi) furthermore, the power in Rule 12.64 of the Insolvency Rules 2016 cannot enable the court to waive unlawfulness under the Lugano Convention and the 1982 Act: ([30] and [31]);

(vii) the Writ of Control was prima facie valid until set aside and was accordingly voidable rather than void, albeit that the debtor had a right to have it set aside *ex debito justitiae* (as a matter of justice, without having to advance a substantive case on the merits): ([32]);

(viii) the Writ of Control was not liable to be set aside only because of a procedural irregularity which could be cured but because it had been issued "unlawfully" in breach of the Lugano Convention and contrary to section 4A of the 1982 Act: ([33]);

(ix) enforcement which was forbidden by the terms of the Lugano Convention and section 4A of the 1982 Act is not "execution" for the purposes of section 268(1)(b) of the Insolvency Act 1986 and the court has no discretion to waive the defect in relation to the Writ of Control: ([35] – [37]); and

(x) rather than hold that the Writ of Control was invalid, the ICC Judge should have "set aside the writ and any execution levied pursuant to it" but the ICC Judge reached essentially the right conclusion, nevertheless: ([38]).

Grounds of Appeal

14. IB appealed on four grounds, although in his oral submissions, Mr England did not pursue the fourth. The first ground has numerous strands. In summary, it is said that the Judge erred in law in holding that CPR r 3.10 and/or Rule 12.64 of the Insolvency Rules 2016 cannot be used to validate a writ of control issued in derogation of the Lugano Convention because: (a) there is no prescribed sanction for execution prior to the end of the one month period for appealing a registration order, whether under Article 47(3) or CPR r 74.9; (b) IB is not seeking to vary the Lugano Convention but to cure defective execution or a procedural irregularity arising in the domestic insolvency proceedings; and (c) the writ was voidable rather than void and had not been set aside. Therefore, the error of procedure did not invalidate what followed unless the Court ordered otherwise; and in any event, the court had a discretion or power to waive the defect under CPR r 3.10(b); and the Judge did not apply the "Vinos" principle properly or at all. Mr England also referred to the court's inherent jurisdiction and to CPR rules 3.1(2)(m) and 3.1(7) as the potential source of the discretion upon which he seeks to rely.

15. Secondly, it is said that the Judge erred in his construction of section 4A of the 1982 Act and the Lugano Convention.

16. Thirdly, it is said that the Judge's construction of section 268(1)(b) of the Insolvency Act 1986 was wrong and that, in fact, IB had satisfied that sub-section.

17. As I have already mentioned, Mr England did not pursue the fourth ground of appeal before us. I will set it out, nevertheless, for the sake of completeness. It was said that the Judge was wrong to hold that the execution was unlawful and accordingly, that section 268(1)(b) had not been satisfied, where the Registration Order was received by Mr Stanford with the IB petition on 22 May 2017, because the one-month period for appealing ran from that date and no steps to enforce the Registration Order were taken, nor was any appeal filed in the one month period.

Relevant provisions

18. Before turning to Mr England's submissions on behalf of IB, it is helpful to have the relevant provisions in mind. First, pursuant to section 267(2)(c) of the Insolvency Act 1986, subject to a number of other requirements, a creditor's bankruptcy petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented, the debt is a debt which "the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay". Section 268(1) of the 1986 Act provides that for the purposes of section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either of the two alternatives set out in section 268(1)(a) or (b) is satisfied. In this case, it is the alternative in (b) which is relevant. It is that:

> "(b) execution or other process issued in respect of the debt on a judgment or order of any court in favour of the petitioning creditor, or one or more

> of the petitioning creditors to whom the debt is owed, has been returned unsatisfied in whole or in part."

19. In this case, it is said that section 268(1)(b) was satisfied by means of execution which took place pursuant to the Writ of Control which was based upon the Icelandic judgment. It is relevant, therefore, to turn next to the means by which the Icelandic judgment was recognised in England and Wales. The Lugano Convention is concerned with the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and applies in relation to the Icelandic judgment. It provides in its preamble that the Contracting Parties had determined "to strengthen in their territories the legal protection of persons therein established" and: "CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of the courts, to facilitate recognition, and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements".

20. The Lugano Convention provides, amongst other things, that a judgment given in a state bound by the Convention shall be recognised in the other contracting states without any special procedure being required, and a judgment enforceable in one state shall be enforceable in another if, on the application of any interested party, it has been declared enforceable there: see Articles 33 and 38. As the Judge pointed out, in England and Wales, references in the Lugano Convention to a "declaration of enforceability" are to be read as references to an order registering the foreign judgment.

21. Article 36 provides that: "under no circumstances may a foreign judgment be reviewed as to its substance" and Articles 34 and 35 contain the limited grounds upon which a foreign judgment may be refused recognition. Article 43 contains the provisions relating to appeals against declarations of enforceability (registration orders). It provides at Article 43(5) as follows:

> "An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a State bound by this Convention other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance."

Article 47(3) provides that:

> "During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought."

22. The Explanatory Report by professor Fausto Pocar in respect of the Lugano Convention states, albeit in the context of Article 39 (which is concerned with applications for registration orders or declaration of enforceability outside the United Kingdom), the view of the ad hoc working party, that where internal jurisdiction is involved it was better not to make rules for every specific aspect of the matter within the Convention

itself. See paragraph 144. Article 43(5) is addressed in the Explanatory Report at paragraph 153 in the following way:

> ". . . In the case of an appeal against a declaration of enforceability, on the other hand, there has to be a time-limit beyond which, if the party against whom enforcement is sought has not appealed, the judgment can be enforced. Article 43(5) therefore sets a time-limit of one month from the date of service of the declaration of enforceability. . . Article 43(5) states that no extension of the time indicated in the Convention may be granted on account of distance, and that rule takes the place of any national provision there may be to the contrary."

23. At paragraph 161 it also states that the previous provision in the 1988 Convention that during the time specified for an appeal and until any such appeal had been determined, no measures of enforcement could be taken other than protective measures against the property of the party against whom enforcement was sought, had been retained in Article 47(3) and that a new provision had been inserted in Article 47(1) making it clear that protective measures may be ordered before the declaration of enforceability is served. At paragraph 162 it is noted that:

> "[I]n some legal systems protective measures are taken as the first step in the process of enforcement, but a generalisation of this approach might have interfered with national procedural law, departing from the principle usually followed, which was that enforcement was left to the law of the individual States and was not changed by the Convention."

24. The Lugano Convention had direct effect in English law. Nevertheless, the terms of the Convention in relation to enforcement of foreign judgments, including Article 47(3), were inserted into the 1982 Act at section 4A by means of the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131). Section 4A provides, where relevant, as follows:

> ". . .
>
> (2) A judgment other than a maintenance order registered under the Lugano Convention shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the registering court and had (where relevant) been entered.
>
> (3) Subsection (2) is subject to Article 47(3) of the Lugano Convention (restriction on enforcement where appeal pending or time for appeal unexpired), to section 7 (interest on registered judgments) and to any provision made by rules of court as to the manner in which and conditions subject to which a judgment registered under the Lugano Convention may be enforced."

25. The rules concerning enforcement of foreign judgments in England and Wales are to be found in CPR Part 74. They include the rules in relation to applications for registration of foreign judgments. In particular: CPR r 74.6(1) provides that a

registration order must be drawn up by the judgment creditor and served on the judgment debtor personally, by any of the methods of service permitted under the Companies Act 2006, or in such other manner as the court may direct; and CPR r74.6(3) sets out the matters which must be stated in the registration order. Those matters include:

> "(c) the right of the judgment debtor –
>
> . . .
>
> (ii) in the case of registration following an application under the 1982 Act or the Lugano Convention, to appeal against the registration order;
>
> (d) the period within which such an application or appeal may be made; and
>
> (e) that no measures of enforcement will be taken before the end of that period, other than measures ordered by the court to preserve the property of the judgment debtor."

26. CPR r74.8 is concerned, amongst other things, with appeals against the granting or the refusal of registration of a foreign judgment under the Lugano Convention. CPR r74.9 is headed "Enforcement". It provides, where relevant, as follows:

> ". . .
>
> (2) In relation to a judgment to which the Judgments Regulation does not apply, no steps may be taken to enforce the judgment –
>
> (a) before the end of the period specified in accordance with rule 74.6(3)(d), or that period as extended by the court; or
>
> (b) where there is…an appeal under rule 74.8, until the application or appeal has been determined."

27. Mr England also referred us to a number of other provisions in the CPR which he sought to pray in aid, if necessary. CPR r 3.10 is headed "General power of the court to rectify matters where there has been an error of procedure". It provides that:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b)The court may make an order to remedy the error."

CPR r 3.1, to which Mr England referred in his oral submissions, lists the court's general powers of management and at CPR r 3.1(2)(m) states, where relevant, that the Court may: "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. . ." and CPR r3.1(7) provides that a

power of the court to make an order under the Rules includes a power to vary or revoke it.

28. Furthermore, IR 12.64 of the Insolvency Rules 2016, provides as follows:

> "Formal defects
>
> No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."

Submissions

29. Mr England emphasised that the focus in this matter is upon the execution process in the form of the Writ of Control and neither upon the Registration Order by which the Icelandic judgment was recognised pursuant to the terms of the Lugano Convention nor the Lugano Convention itself. No application to set aside the Writ of Control was ever made and at the time that the High Court Enforcement Officers visited Mr Stanford's property and subsequently certified that the Writ of Control was "unsatisfied in whole" it was voidable and not void. He says, therefore, that the execution effected pursuant to it was valid and sufficient to satisfy section 268(1)(b) of the Insolvency Act 1986 which should have been construed broadly, and, in any event, any defect can be cured by an exercise of discretion pursuant to CPR r3.10(b).

30. Mr England also submits that the Judge was wrong to construe Article 47(3) of the Lugano Convention and section 4A of the 1982 Act in the way he did. He says that the Judge adopted a narrow construction instead of construing the Article broadly in accordance with its purpose which is to enable the rapid enforcement of foreign judgments, to enhance mutual trust between the contracting States, to avoid all but the minimum of intervention in the domestic laws of those States and to prevent irreversible execution in respect of foreign judgments before the period for any appeal has expired or the appeal has been determined.

31. In particular, he emphasises that Article 47 is concerned with striking a fair and proportionate balance between the interests of the applicant who should not be kept out of his money and the respondent whose rights on appeal should not be undercut by allowing irreversible measures of enforcement to take place in advance of the determination of an appeal. In this case, he says that there were no "irreversible" measures of enforcement because none of Mr Stanford's property was seized by the High Court Enforcement Officers.

32. Mr England submits, furthermore, that: remedying the premature nature of the Writ of Control would go purely to the procedure by which the Icelandic judgment is to be executed; the procedure for execution is a matter for the domestic court (*Deutsche Genossenschaftsbank v Brasserie du Pecheur* [1985] ECR 1981 at [18] and *Cyprus Popular Bank Public Co Ltd v Vgenopoulos & Ors* [2018] QB 886 at [54]); and therefore, remedying the defect does not undermine the terms of the 1982 Act or the Lugano Convention.

33. If necessary, Mr England also says that, in any event, the steps taken pursuant to the Writ of Control are sufficient to amount to "other process" for the purposes of section 268(1)(b).

Construction of the Lugano Convention and section 4A of the 1982 Act and "irreversible measures"

34. In my judgment, it is quite clear from the terms of the Convention itself when read as a whole that its purpose, amongst other things, is to create a single regime in relation to the enforcement of foreign judgments in contracting States but that the details of "measures of enforcement" in the sense of execution should be a matter for the domestic courts in the jurisdiction in question. This is consistent with the passages from the Explanatory Report to which we were referred. It is also consistent with the decision of this court in the *Cyprus Popular Bank* case and, in particular, the passage from the decision of the European Court of Justice in *Capelloni v Pekmans* (Case 119/84) [1986] 1 CMLR 388 at [16] quoted at [52] of the *Cyprus* case.

35. Although measures of enforcement/the details of execution are a matter for the national court, because it is recognised, no doubt, that the manner in which such matters are dealt with will differ from jurisdiction to jurisdiction, Articles 43(5) and 47(3) when construed purposively create an overarching principle applicable in every contracting state. It seems to me that that principle is consistent with the purposes of the Convention itself which include the rapid enforcement of foreign judgments, enhancing mutual trust between contracting states and maintaining the balance between the rights of the creditor and the debtor by preventing irreversible execution before the time to appeal a registration order has expired.

36. It seems to me, therefore, that it does not assist Mr England that it is clear that measures of enforcement/the details of execution are matters for the particular national jurisdiction in which the foreign judgment is declared enforceable/is registered. That does not mean that the manner of enforcement in a particular jurisdiction can derogate from the overarching provisions of the Convention itself.

37. Furthermore, in my judgment, the Judge's construction of Article 47(3) and section 4A of the 1982 Act was correct and is entirely consistent with the preamble to the Convention and its purpose. It is clear that the underlying policy of Articles 43(5) and 47(3) is that a fair and proportionate balance must be struck between the interests of the party which applies for a registration order having obtained a judgment in a foreign jurisdiction to which the Convention applies, and the defendant/debtor whose rights of appeal are prescribed by law and should not be undermined by allowing irreversible measures of enforcement. It is for this very reason that execution is not permitted until the period for an appeal against the registration order has expired or the appeal has been dealt with. That underlying policy is clearly reflected in paragraphs 153, 161 and 162 of the Explanatory Report to the Lugano Convention.

38. Not only is the Convention directly effective in English law, it is also put into effect by section 4A of the 1982 Act. Both Article 47(3) of the Convention and section 4A(3) which makes express reference to it, are unequivocal. They state that during the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, **no** measures of enforcement may be taken other than protective measures against the property of the

party against whom enforcement is sought. The ordinary and natural meaning of those provisions is quite clear.

39. Furthermore, in my judgment the reference to rules of court in section 4A(3) of the 1982 Act is of no assistance to Mr England. As the ICC Judge pointed out at [25] of his judgment, the reference to rules of court is to rules which give effect to section 4A(2) and (3) and, as a result, to Article 47(3) of the Lugano Convention and not to rules of court which might be used to override or alter those provisions. In other words, it seems to me that on a proper construction of section 4A(3), the reference to rules of court is to the relevant provisions of CPR Part 74 itself and not to the provisions of CPR Part 3 as Mr England would have it.

40. In my judgment, therefore, Article 47(3) and section 4A(3) impose an express prohibition. It is for that reason that CPR 74.6(3) provides that a registration order must contain reference to the period in which an appeal against registration can be lodged and that no measures of enforcement can be taken before the end of that period and the reason why that prohibition was repeated in the Registration Order itself at paragraph 2. Accordingly, any attempt to remedy the premature issue and execution under the Writ of Control by means of an exercise of the discretion under CPR r3.10(b) or the use of CPR r3.1(2)(m) or 3.1(7) (or the inherent jurisdiction of the court, for that matter) would fundamentally undermine Article 47(3) and section 4A(3) in a way which is impermissible.

41. It seems to me that the circumstances are different from those which were addressed by the House of Lords in *Phillips & Anr v Symes & Ors (No3)* [2008] 1 WLR 180. In that case the question was whether in the light of Swiss proceedings, the English court must decline jurisdiction over English proceedings and impose a stay. That question was dependent upon which court was first seised of proceedings within the meaning of Article 21 of the 1968 Lugano Convention. That, in turn, was dependent upon whether the court had power by virtue of CPR r3.10 and 6.9 to determine that the service of documents on a particular date, constituted sufficient service for the court then to be seised of the proceedings as definitively pending before it, and, if so, whether the court ought in its discretion to exercise that power. See the opinion of Lord Brown of Eaton-Under-Heywood, with whom Lords Rodger, Bingham and Mance and Baroness Hale agreed, at [8] and [30].

42. Lord Brown held that it was at least arguable that pursuant to CPR r 3.10(b), the court could simply order that the second and third defendants were to be regarded as properly served. The "error of procedure" was the omission of the English language claim form from the package of documents which were served. See [31]. Lord Brown went on to note that the effect would be to alter the jurisdictional precedence under the Lugano Convention but concluded that the question of seisin was one for the national court applying its own procedural rules, that the discretion should only be exercised in exceptional circumstances and that the circumstances in that case were indeed exceptional. See [35] – [38].

43. It seems to me that in that case, although the exercise of discretion to remedy the error of procedure had the effect of altering the jurisdictional precedence prescribed by the Lugano Convention, it did not have the effect of undermining or contradicting the terms of the Convention itself. It merely had the effect of altering the facts to which the provisions of the Convention applied. In this case, by contrast an exercise of the

discretion under CPR r3.10(b) in order to validate the Writ of Control, despite the fact that it was issued during a period in which execution was prohibited by Article 47(3), would have the effect of undermining the Convention itself.

44. Furthermore, I do not consider that the issue of the Writ of Control and the attempts to enforce it before the period referred to in Article 47(3) and section 4A(3) had expired was merely an error of procedure, in any event. I shall return to this aspect of the matter below.

45. Lastly, in this regard, it is no answer, in this case, to contend that enforcement was unsatisfied, so no damage was done and nothing irreversible took place and accordingly, the purpose of the Lugano Convention was not contravened. Article 47(3) and section 4A cannot be construed on a different basis depending upon whether there are goods which are seized and sold or whether, by chance, there are none available to the enforcement officer.

Consequences of the Writ of Control being voidable

46. Although I have already decided that the prohibition in Article 47(3) and section 4A(3) cannot be undermined by the exercise of a discretion to remedy the defect in the Writ of Control, for the sake of completeness, I should address Mr England's other submissions.

47. In relation to the status of the Writ of Control, Mr England referred us to *Cardiff County Council v Lee (Flowers)* [2016] EWCA Civ 1034. He submitted that the circumstances in this case are analogous to those under consideration in the *Cardiff* case, that the Writ of Control remained valid until set aside and that, in the circumstances of this case, the court should have remedied the fact that the Writ was issued prematurely by exercising its discretion pursuant to CPR r3.10(b).

48. In the *Cardiff* case, the question was whether the court could validate a warrant of possession where a landlord who sought to enforce his right of possession because of an alleged breach of the terms of a suspended possession order had not complied with CPR r83.2. The non-compliance consisted of a failure to apply to the court for permission to issue the warrant with the result that the landlord did not provide the court with information which is required to be given on such an application.

49. The appellant tenant had argued that CPR r83.2(3), which provides that in certain circumstances a warrant "must not be issued without the permission of the court", was mandatory and could not be waived. Arden LJ, with whom Briggs LJ (as they then were) agreed, held that the failure to make a prior application for permission to issue the warrant was a procedural defect which the court could cure pursuant to CPR r3.10 and that it had been appropriate to do so. See [1] and [26] – [32]. Mr England says that the circumstances are directly analogous here especially as Arden LJ noted at [30] of her judgment that the warrant was not invalid unless the court so ordered, that, accordingly, it was voidable, and the court had remedied the defect and that she stated at [32] that the landlord would have ended up in the same position as if it had followed the correct procedure and, accordingly, it would simply cause extra cost and delay not to be able to remedy the matter by the use of the court's powers under CPR r3.10. Mr England pointed out that there has been no application to set aside the Writ of Control

or the Registration Order and there is no suggestion that Mr Stanford is or was in a position to pay the debt, or that there was a reasonable prospect of him doing so.

50. Arden LJ held that despite the imperative language in CPR r83.2 the sub-rule did not indicate that if there were an error of procedure it could not be remedied, that the warrant was voidable and not void and could be remedied under CPR r 3.10. See in particular, [29] and [30]. She also noted that this court had held in *Hashtroodi v Hancock* [2004] 1 WLR 3206 that there was no need to give the phrase "error of procedure" in CPR r3.10 an artificially restrictive meaning but had noted at [24] that "the general language of r3.10 cannot be used to achieve something that is prohibited under another rule. This is the principle established by *Vinos*' case".

51. In *Vinos'* case, (*Vinos v Marks and Spencer PLC* [2000] 3 All ER 784) the appellant claimed damages for personal injuries and his solicitors issued a claim form within the limitation period. However, it was only served after the expiry of the four-month period after the date of issue within which CPR r7.5 stipulated that the claim had to be served. CPR r7.6 provided that a claimant could apply for an order extending the period within which the claim form had to be served. However, where an application is made after the time for service has run out, the rules provide that the court may extend time only if certain conditions are fulfilled. They were not fulfilled in the *Vinos* case. In the circumstances, this court held that the general language of CPR r3.10 could not be used to grant an extension which was plainly excluded by the provision.

52. This court held, however, that CPR r3.1 and/or CPR r3.10 could be used to extend the deadline for service of particulars of claim, where the claim form has been served in the time prescribed by the CPR but the particulars of claim had not: see *Totty v Snowden* [2001] EWCA Civ 1415. In that case, Kay LJ stated at [34] that:

> "Rule 1 requires the court to have regard to the overriding objective in interpreting the rules. Where there are clear express words, as pointed out by Peter Gibson LJ in Vinos v Marks & Spencer, the court cannot use the overriding objective "to give effect to what it may otherwise consider to be the just way of dealing with the case". Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective. . .."

53. In my judgment, this case is materially different from the circumstances in the *Cardiff* case and is akin to the *Vinos* case itself. The general words contained in CPR r 3.10 cannot be used to side-step the express wording of CPR r 74.9(2) which makes clear that no steps may be taken to enforce the judgment during the period for appealing the registration order. It does not contain any proviso or means by which the period during which the prohibition is effective can be varied.

54. As I have already explained, nor can CPR r 3.10 be used to avoid the consequences of statute. Section 4A(3) of the 1982 Act contains an express prohibition without any qualification. Furthermore, it seems to me that the contravention of Article 47(3) of the Lugano Convention, section 4A of the 1982 Act and CPR r 74.9(2) cannot be categorised merely as an "error of procedure" such as a failure to comply with a rule or practice direction for the purposes of CPR r3.10. The same is true in relation to IR 12.64. It seems to me that the contravention was not merely a "formal defect" or "irregularity". It was fundamental.

55. I come to this conclusion despite the fact that the phrase "error of procedure" is to be interpreted broadly: see *Steele v Mooney* [2005] EWCA Civ 96 at [21] – [24] per Lord Dyson MR who gave the judgment of the court. As Lord Dyson MR pointed out at [24], the general language of CPR r3.10 cannot be used to achieve something which is prohibited under another rule. All the more so, in the case of a prohibition contained in statute.

56. It follows that for the same reasons, I do not consider that any of the other powers to which Mr England referred are of assistance to him in this regard.

57. My conclusion is also consistent with the terms of the Registration Order itself. As CPR r74.6(3)(e) provides, paragraph 2 of the Registration Order stated expressly that no measures of enforcement would be taken before the end of the one-month period for appealing the registration or until the appeal was determined, other than measures ordered by the court to preserve the property of the judgment debtor. Accordingly, it seems to me that it was inherent in the Registration Order itself that it could not form the basis of any lawful form of enforcement, including the issue of the Writ of Control, until that period had expired. Although, in my judgment, the Judge was right to decide that the Writ of Control was prima facie valid until set aside, it equally seems to me that the court was obliged to set it aside as soon as it came to its attention, in this case on the bankruptcy petition; and that the steps taken pursuant to it also had to be set aside in the same way.

Section 268(1) of the Insolvency Act 1986

58. Mr England submitted, nevertheless, that it is clear that section 268(1) Insolvency Act 1986 must be interpreted broadly and therefore, that the Judge was wrong to decide that execution pursuant to the Writ of Control could not be "execution" for the purposes of section 268(1)(b) because it was unlawful as a result of section 4A(3) of the 1982 Act and Article 47(3) of the Lugano Convention. He referred us to *Skarzynski v Chalford Property Co Ltd* [2001] BPIR 673 in which Jacob J, as he then was, noted that the Insolvency Act 1986 was a "fresh start" for insolvency and that it was "not intended to include technicalities which do not matter": see [13].

59. In that case, the debtor appealed the decision of District Judge Fink refusing the debtor's application to have his bankruptcy annulled. It was alleged that the bankruptcy order ought not to have been made on two grounds, the first of which, which is relevant here, was that section 267(2)(c) of the Insolvency Act 1986 had not been satisfied because section 268(1)(b) had not been complied with. The sheriff, having executed the writ of possession and *fieri facias,* seized the debtor's goods and sold them for a sum which was much less than the debt. He did not indorse on the writ the manner in which he had executed it, in other words, what had happened by way of seizure and sale. He had set the details out in a letter instead. A bankruptcy petition based upon section 268(1)(b) was presented. As a result of the failure to indorse the writ, it was argued that "execution" was never "returned" for the purposes of section 268(1)(b).

60. Jacob J described the argument as "of the utmost technicality". He went on to hold that "returned unsatisfied" did not have the technical meaning which was contended for and that it meant proof that the execution failed to satisfy the debt. See [9] and [13]. He also held that if he was wrong about that and the section did require an indorsement on the writ, the defect could be cured pursuant to Insolvency Rule 7.55 because reporting the

result of the execution by letter rather than indorsing the writ was no more than a defective way of making a return. See [15].

61. Mr England says that the effect of the Judge's approach is to fail to construe section 268(1)(b) broadly and to allow it to be undermined by procedural defects. I disagree. It seems to me that the Judge was right to decide that enforcement forbidden by the terms of the Lugano Convention and section 4A of the 1982 Act cannot be "execution" for the purposes of section 268(1)(b) and that the reasoning in the *Skarzynski* case does not assist Mr England. The Judge was right to decide that where one statute provides that, in particular circumstances, a judgment cannot be enforced, it is not possible, nevertheless, for those very circumstances to amount to execution for the purposes of another statute.

62. The defect in the execution in this case, if it can be called a defect, was fundamental. As the Judge put it, the Writ of Control was unlawful. It could be set aside *ex debito justitiae*, that is without having to advance any substantive case on the merits. It was liable to be set aside at any time by the debtor or by the court of its own motion because it had been unlawfully issued. In effect, that was what the ICC Judge did when he refused to accept that section 268(1)(b) had been satisfied for the purposes of the bankruptcy procedure. The defect was not of the nature or magnitude of the irregularity which was under consideration in the *Skarzynski* case. It was not a mere technicality or a formal defect which might be rectified pursuant to what is now Rule 12.64 of the Insolvency Rules 2016. It went to the heart of the execution process. There are no express provisions in Article 47, section 4A of the 1982 Act or CPR 74.9 which enable the prohibition upon execution to be waived. Furthermore, as I have already decided, there is nothing in the CPR which would enable the fundamental defect in the Writ of Control to be remedied and the execution itself to be cured.

63. It follows that, in my judgment, there is no merit in Mr England's alternative argument that the steps taken pursuant to the Writ of Control could amount to "other process" for the purposes of section 268(1)(b). It seems to me that the sub-section and the phrase, in particular, cannot be construed to mean steps taken in the course of execution which is itself defective.

A question of timing?

64. In the light of the fact that Mr England did not advance his fourth ground of appeal before us, it is not necessary to consider it at any length. In essence, it was that because the Registration Order had not been received by Mr Stanford until 22 May 2017, and the one month period for appealing it ran from that date, the purported execution which took place before the one month period began to run, was not unlawful. It seems to me that this argument is hopeless. As ICC Judge Jones put it, the time specified for an appeal against the Registration Order remained extant when purported execution took place. There is a binding prohibition against enforcement until the time for appeal has expired. One cannot avoid the effect and consequences of Article 47(3) and section 4A(3) by seeking to enforce before serving the Registration Order.

65. For all the reasons set out above, I would dismiss the appeal.

Lord Justice Henderson:

66. I agree.

Lady Justice King:

67. I also agree.