Neutral Citation Number: [2021] EWCA Civ 1802

Case No: A2/2021/0951

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGHOURT OF JUSTICE, QUEEN'S BENCH DIVISION
Mrs Justice Eady
[2021] EWHC 1169 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 December 2021

Before :

LORD JUSTICE NEWEY
LORD JUSTICE ARNOLD
and
LORD JUSTICE STUART-SMITH

- -

Between :

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

- -
- -

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

Hearing date : 23 November 2021

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Approved Judgment

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 at 10:30am on 2 December 2021

Lord Justice Arnold:

Introduction

1. This is an appeal by Lars Windhorst against an order of Eady J dated 6 May 2021 dismissing (i) an appeal by Mr Windhorst against an order of Master Eastman dated 17 August 2020 ("the Registration Order) registering a judgment of the Landgericht (Regional Court) Bielefeld, Germany dated 10 March 2003 in favour of Albert Levy ("the 2003 Judgment") and (ii) an application by Mr Windhorst for a stay pursuant to CPR rule 83.7(4). The appeal raises issues as to the interplay between Council Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation") and Council Regulation 1346/2000/EC of 29 May 2000 on insolvency proceedings ("the Insolvency Regulation"). I should explain that it is common ground that (i) it is those Regulations that apply to the present case, and not their successors, and (ii) the issues in this case are unaffected by Brexit.

Factual background

2. Mr Windhorst is a German businessman who became well-known in the early 1990s as a result of his interests in the trade, production and sale of software, electronic devices and components, particularly in Asia.

3. In mid-1999 Mr Levy entered into an agreement with Mr Windhorst, whereby Mr Levy would make an investment of $2 million in Mr Windhorst's companies and would receive a substantial share-holding in return. Although Mr Levy duly made the agreed payment, he complained that Mr Windhorst failed to keep his side of the bargain. Mr Levy brought a claim in unjust enrichment in the Landgericht Bielefeld. In the 2003 Judgment, Mr Levy's claim was upheld and Mr Windhorst was ordered to re-pay Mr Levy the sum of $2 million plus interest.

4. Towards the end of the 1990s Mr Windhorst's businesses got into difficulties. He sought to resolve matters by entering into various agreements with creditors, but those attempts were unsuccessful. In the autumn of 2004 Mr Windhorst filed an application to open insolvency proceedings under German law, explaining that he faced claims of around €81 million from some 55 creditors and was unable to meet his debts. On 14 January 2005 the Amtsgericht (District Court) Charlottenburg in Berlin opened those proceedings.

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

> "The creditors waive all claims against Mr Windhorst.
>
> In return for this waiver, the creditors will receive a quota of 1.9129% of all established or yet to be established claims, unless they are subordinated or secured in value.

> Insofar as payments are provided for in this Constructive Part, such payments shall be made one month after the order by which the insolvency court confirms the insolvency plan becomes final."

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

7. It is common ground that, under German law, whilst the court order approving the Insolvency Plan meant that it became binding on the parties by virtue of section 254(1) Insolvenzordnung (Insolvency Statute), that did not automatically render the 2003 Judgment unenforceable: see the decision of the Bundesgerichtshof (Federal Court of Justice) dated 25 September 2008 in Case I ZB 205/6 *Counterclaim for enforcement after discharge of residual debt*. It was, however, open to Mr Windhorst to apply to have enforcement of the 2003 Judgment declared inadmissible pursuant to section 767 Zivilprozessordnung ("ZPO", Code of Civil Procedure).

8. Notwithstanding their earlier dispute, there is evidence of positive relations between Mr Windhorst and Mr Levy resuming in or around 2012. It is common ground that, since his fortunes have begun to improve, Mr Windhorst has made some payments to Mr Levy, and has promised to make further payments.

9. By letter dated 7 September 2018 Mr Levy's lawyers notified Mr Windhorst of Mr Levy's intention to enforce the 2003 Judgment in the United Kingdom. Given this indication of Mr Levy's position, on 18 April 2019 Mr Windhorst made an application under section 767 ZPO before the Landgericht Bielefeld, seeking a declaration that the 2003 Judgment was unenforceable in the light of the Insolvency Plan.

10. The declaratory proceedings are contested by Mr Levy, who argues that the payments made by Mr Windhorst to Mr Levy amount to an acknowledgment of the debt under the 2003 Judgment and thus the waiver in the Insolvency Plan has been rescinded. Mr Windhorst contends that that they are no more than a recognition of a moral obligation, legally to be characterised as a gift. Mr Levy has also questioned the jurisdiction of the German courts to determine this issue, given that he does not seek to enforce the 2003 Judgment in Germany, but in the United Kingdom (where, he says, more of Mr Windhorst's assets are now located).

11. On 17 June 2019 the Landgericht Bielefeld made an interim order suspending enforcement of the 2003 Judgment, pending determination of the declaratory proceedings, subject to Mr Windhorst providing security in the sum of $2.2 million. It is common ground that Mr Windhorst did not provide this security.

12. On 9 October 2019 the Landgericht Bielefeld dismissed the application on jurisdictional grounds.

13. Mr Windhorst has filed an appeal against that decision, which is currently pending before the Oberlandesgericht (Higher Regional Court) Hamm. On 19 February 2020 that Court made a further interim order again staying enforcement of the 2003 Judgment pending determination of the appeal, but now subject to Mr Windhorst providing

security in the amount of $3.44 million. The Court explained that its preliminary view was that the German courts were likely to have jurisdiction pursuant to Article 22(5) of the Brussels I Regulation or Article 24(5) of the successor Regulation. It is again common ground that Mr Windhorst has not provided this security.

14. In April 2020 Mr Levy applied for the interim order to be lifted, saying that he would not seek to enforce the 2003 Judgment in Germany and arguing that the German courts were not competent to decide the issue of its enforceability. There was also an application by Mr Windhorst. By a decision of 27 May 2020 the Oberlandesgericht Hamm refused both applications and continued the interim order. It maintained its preliminary view that the German courts had jurisdiction.

15. At the time of the hearing before Eady J the next hearing before the Oberlandesgericht Hamm was scheduled for September 2021, but since then it has been postponed to January 2022. As matters stand, it appears likely that the Oberlandesgericht Hamm will reverse the Landgericht Bielefeld's decision that it has no jurisdiction. If so, the German courts will then need determine the merits of Mr Windhorst's application and of Mr Levy's defence to that application. This may involve the matter being remitted to the Landgericht Bielefeld.

16. In the meantime, Mr Levy applied on 21 July 2020 to register the 2003 Judgment in the Queen's Bench Division of the High Court of England and Wales pursuant to the Brussels I Regulation. In accordance with Article 41 of the Regulation, the application was made without notice. In support of the application Mr Levy relied upon a certificate in the form set out in Annex V to the Brussels I Regulation by the Landgericht Bielefeld dated 28 February 2020 stating that the 2003 Judgment "is enforceable in the Member State of origin".

17. In accordance with Article 43(1),(5) of the Brussels I Regulation, the Registration Order provided that Mr Windhorst could appeal within one month from service. Mr Windhorst did appeal, and it was that appeal which came before Eady J. Accordingly that was the first occasion on which there was an *inter partes* hearing of the matter. In the alternative Mr Windhorst applied for a stay. The judge dismissed both the appeal and the application for a stay. Permission to appeal was granted by Newey LJ. Pursuant to Article 44 of the Brussels I Regulation, the judge's judgment may only be contested on a point of law.

Relevant provisions of the Brussels I Regulation

18. The Brussels I Regulation provides, so far as relevant:

> "**SCOPE**
>
> *Article 1*
>
> 1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> 2. The Regulation shall not apply to:
>
> …

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

…

JURISDICTION

Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

…

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

RECOGNITION AND ENFORCEMENT

Recognition

Article 33

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

…

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

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

Enforcement

Article 38

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

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

RELATIONS WITH OTHER INSTRUMENTS

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

…"

Relevant provisions of the Insolvency Regulation

19. The Insolvency Regulation provides, so far as relevant:

"**GENERAL PROVISIONS**

Article 3

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall

be presumed to be the centre of its main interests in the absence of proof to the contrary.

…

Article 4

Law applicable

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

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

…

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

…

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

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

…

Article 17

Effects of recognition

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

otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

...

Article 25

Recognition and enforceability of other judgments

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

…

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

…"

CPR rule 83.7

20. CPR rule 83.7 provides, so far as relevant:

"(1) At the time that a judgment or order for payment of money is made or granted, or at any time thereafter, the debtor or other party liable to execution of a writ of control or a warrant may apply to the court for a stay of execution.

…

(4) If the court is satisfied that—

(a) there are special circumstances which render it inexpedient to enforce the judgment or order; …

…

then, … the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit…"

The judgment below

21. So far as Mr Windhorst's appeal against the Registration Order is concerned, the judge's reasoning, in summary, was that the 2003 Judgment was enforceable under German law unless and until it was declared inadmissible pursuant to an application under section 767 ZPO. Although the English courts were required by the Insolvency Regulation to recognise the Insolvency Plan, that meant no more than giving it the same effect as under German law: Article 17(1). It followed that it was not necessary for her to decide whether the powers of the court on an appeal against a declaration of enforceability were limited to deciding whether any of the grounds specified in Articles 34 and 35 of the Brussels I Regulation applied.

22. As for Mr Windhorst's application for a stay, the judge considered that the facts that Mr Windhorst's application under section 767 ZPO was still pending and that Mr Levy had stated that he sought to enforce in the UK rather than Germany "might well" amount to special circumstances. She concluded, however, that the special circumstances of the case did not render it unjust to grant a stay of enforcement for reasons she expressed as follows:

> "67. … The 2003 Judgment remains enforceable because the appellant has not obtained a declaration to the contrary from the German courts. On his own case, it was open to the appellant to apply for such a declaration at any stage upon the recognition of the Insolvency Plan by the Local Court Charlottenburg. On his April 2019 application under section 767 ZPO, the German courts have declined to make an interim declaration in his favour unless he provides security for (essentially) the sum owed on the judgment debt. For his part, the appellant has chosen not to provide the security so ordered. The special circumstances thus largely arise from the choices made by the appellant; they do not render it inexpedient or unjust for the 2003 Judgment to be enforced. I therefore refuse to grant the stay of execution sought by the appellant in this case.
>
> 68. For completeness, had I considered that the special circumstances of this case meant that it was unjust for the 2003 Judgment to be enforced in this jurisdiction, I would have considered granting a stay of execution on condition of a similar provision for security as in the German declaratory proceedings. That would be necessary to ensure that the appellant was not treated more favourably in respect of his obligations under the 2003 Judgment in this jurisdiction than he would be in Germany."

Grounds of appeal

23. Mr Windhorst appeals on three grounds. Ground 1 is that the judge was wrong to refuse a stay, essentially because (i) the court is obliged to recognise the Insolvency Plan and (ii) the issue as to the enforceability of the 2003 Judgment having regard to the Insolvency Plan has not yet been determined by the German courts.

24. Ground 2 is that it is open to an appellant against the registration of a foreign judgment to raise issues as to the enforceability of the judgment, and Articles 34 and 35 of the Brussels I Regulation are not an exhaustive code in this respect.

25. Ground 3 is that the judge was wrong to refuse to set aside the Registration Order because the 2003 Judgment is not enforceable as a result of the Insolvency Plan.

26. Although counsel for Mr Windhorst placed ground 1 at the forefront of his argument, it seems to me that logically grounds 2 and 3 come first.

Ground 2

27. Article 45 of the Brussels I Regulation provides that a court with which an appeal is lodged "shall refuse or revoke a declaration of enforceability *only* on one of the grounds specified in Articles 34 and 35 [emphasis added]". Mr Levy contends that this means what is says, and precludes the court from refusing a declaration of enforceability on any other ground. This interpretation receives support from two judgments of the Court of Justice of the European Union stating that the list of grounds for dispute set out in Articles 34 and 35 is "exhaustive in nature": see Case C-139/10 *Prism Investments BV v van der Meer* [2011] ECR I-9511 at [33] and Case C-157/12 *Salzgitter Mannesman Handel GmbH v SC Laminorul SA* [EU:C:2013:597], [2014] 1 WLR 904 at [28].

28. Against this, Mr Windhorst points out that Article 38(1) only requires enforcement of a "judgment given in another Member State and enforceable there", and argues that it must follow that enforcement may be denied on grounds such as: (i) the judgment was not given in a civil or commercial matter within the meaning of Article 1; (ii) the judgment was not given in a Member State; (iii) the judgment is not enforceable in the Member State of origin; or (iv) enforcement would be contrary to Articles 67 or 71(1). This contention receives support from academic literature and appears to have been common ground in *Percival v Motu Novu LLC* [2019] EWHC 1391 (QB) at [19]-[24].

29. I agree with the judge that it is not necessary to decide this question, because it only becomes relevant if Mr Windhorst succeeds on Ground 3. For the reasons given below, this is not the case. I would only observe that there may possibly be a distinction between a contention that the judgment is not enforceable in the Member State of origin and the other potential objections mentioned in the preceding paragraph. This is because Article 54 requires the party seeking enforcement to produce a certificate in the form set out in Annex V, which requires the court in the Member State of origin to certify that the judgment "is enforceable in the Member State of origin". This might be thought to indicate that enforceability in the Member State of origin is a matter for the courts of that Member State, and is not a matter which should be reviewed by the courts of the Member State where enforcement is sought: compare the Opinion of Advocate General Kokott in Case C-420/07 *Apostolides v Orams* [2009] ECR I-3571 at paragraph 98 and the judgment of the CJEU in that case at [68].

Ground 3

30. Even if it is open to the courts of England and Wales to review the enforceability of the 2003 Judgment, I agree with the judge that it is "enforceable" within the meaning of Article 38(1).

31. As the judge noted, the CJEU held in Case C-267/97 *Coursier v Fortis Bank SA* [1999] ECR I-2543:

> "25. The Brussels Convention is intended to facilitate the free movement of judgments by establishing a simple and rapid procedure in the Contracting State where enforcement of a foreign decision is applied for. That enforcement procedure constitutes an autonomous and complete system (see to that effect Case 148/84 *Deutsche Genossenschaftsbank* v *Brasserie du Pêcheur* [1985] ECR 1981, paragraph 17, and Case C-172/91 *Sonntag* v *Waidmann* [1993] ECR I-1963, paragraphs 32 and 33).
>
> 26. Thus, under Article 34 of the Brussels Convention, the procedure for obtaining authorisation for enforcement is carried out with the utmost speed, without the party against whom enforcement is sought being able, at that stage of the procedure, to make submissions.
>
> 27. Under Article 36 of the Brussels Convention, the party against whom enforcement is sought may make submissions only at a later stage in the procedure, namely in an appeal against the decision authorising enforcement before one of the courts mentioned in Article 37(1) of the Convention.
>
> 28. Thus, the Court has held that the Brussels Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is sought (see *Deutsche Genossenschaftsbank*, cited above, paragraph 18, and Case 145/86 *Hoffmann* v *Krieg* [1988] ECR 645, paragraph 27).
>
> 29. In those circumstances, it follows from the general scheme of the Brussels Convention that the term 'enforceable' in Article 31 thereof refers solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin.
>
> 30. That interpretation is supported by the Report on the Convention of 26 May 1989 (OJ 1990 C 189, p. 35). According to paragraph 29 of that report, although the expression 'when it has been declared enforceable' in Article 31 of the Brussels Convention replaced the expression 'when the order for its enforcement has been issued' which appeared in its original version in order to bring the convention into line with the Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1988 L 319, p. 9), those two expressions may be considered virtually equivalent.

> 31. It follows that a decision such as the contested judgment, which bears a formal order for enforcement, must, in principle, be covered by the rules on enforcement in Title III of the Brussels Convention.
>
> 32. As regards a judgment such as the insolvency judgment which concerns a matter expressly excluded from the purview of the Brussels Convention, it is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of that judgment within its territory.
>
> 33. The answer to the question submitted must therefore be that the term 'enforceable' in the first paragraph of Article 31 of the Brussels Convention is to be interpreted as referring solely to the enforceability, in formal terms, of foreign decisions and not to the circumstances in which such decisions may be executed in the State of origin. It is for the court of the State in which enforcement is sought, in appeal proceedings brought under Article 36 of the Brussels Convention, to determine, in accordance with its domestic law including the rules of private international law, the legal effects of a decision given in the State of origin in relation to a court-supervised liquidation."

32. The CJEU's subsequent judgments in *Apostolides v Oram*, *Prism v van der Meer* and *Salzgitter v Laminorul* are consistent with this approach. Indeed, in *Prism v van der Meer* the CJEU held that Article 45 was to be interpreted as precluding the court considering an appeal under Articles 43 or 44 from refusing or revoking a declaration of enforceability on the ground that the judgment had been complied with in the Member State of origin.

33. As the judge also noted, *Coursier v Fortis* was decided under the Brussels Convention, the predecessor to the Brussels I Regulation, before the Insolvency Regulation came into force. I agree with the judge that this makes no difference in the present case. Pursuant to the Insolvency Regulation the English courts must recognise the Insolvency Plan. As recorded above, it is common ground that, under German law, the Insolvency Plan does not render the 2003 Judgment unenforceable unless and until Mr Windhorst obtains a declaration under section 767 ZPO. Thus it is common ground that the 2003 Judgment currently remains formally enforceable.

34. The judge relied in this context upon Article 17(1) of the Insolvency Regulation, saying that it merely required the courts of England and Wales to give the Insolvency Plan the same effects as it has in Germany. Counsel for Mr Windhorst submitted that this reasoning overlooked Article 25(1) of the Insolvency Regulation, which was the applicable provision once the Insolvency Plan had been approved by the judgment of the Amstgericht Charlottenburg on 25 August 2005. While I agree that Article 25(1) is the relevant provision, I do not accept this submission. The first sentence of Article 25(1) simply has the effect that the judgment of the Amstgericht Charlottenburg approving the Insolvency Plan, and hence the Insolvency Plan, must be recognised. It

does not require the courts of England and Wales to give the Insolvency Plan any greater effect than it has under German law. Although there was some debate during the course of argument about the meaning and effect of the second sentence of Article 25(1), it is not necessary to consider this in the present case since Mr Windhorst is not attempting to enforce any judgment of the Amstgericht Charlottenburg.

Ground 1

35. Mr Levy accepts that registration of the 2003 Judgment pursuant to the Brussels I Regulation does not exclude the English courts' power to order a stay of execution pursuant to CPR rule 83.7(4).

36. Although Mr Windhorst contends that the Insolvency Regulation obliged the judge to order a stay, that contention seems to me to be untenable for essentially the same reasons I have given in relation to ground 3.

37. Mr Windhorst contends in the alternative that the judge's exercise of her discretion was legally flawed because she failed to recognise that the effect of refusing a stay was to put Mr Levy in a better position than he was in Germany even though she herself had held that the Insolvency Plan should be given the same effect as it had in Germany. In Germany Mr Levy's ability to enforce the 2003 Judgment depends upon the outcome of Mr Windhorst's application under section 767 ZPO, which has yet to be determined. If a stay is refused, Mr Levy will be able to enforce the 2003 Judgment in full in the UK even if it subsequently turns out that Mr Windhorst's section 767 ZPO application is successful and the 2003 Judgment is declared unenforceable. That would be manifestly unjust.

38. Counsel for Mr Levy had no real answer to this argument, and I accept it. As she pointed out, however, the logic of the argument supports the judge's alternative conclusion at [68] that the stay should be conditional upon the provision of security in the same amount as ordered by the Oberlandesgericht Hamm. After all, Mr Windhorst could already have obtained a stay of enforcement in Germany if he had provided the security. In addition, both parties should have permission to apply to the High Court to discharge or vary the stay in the event that the Oberlandesgericht Hamm concludes, contrary to its preliminary opinion, that the German courts lack jurisdiction to determine Mr Windhorst's application under section 767 ZPO.

Conclusion

39. For the reasons given above I would dismiss Mr Windhorst's appeal against the Registration Order, but allow his appeal against the refusal of a stay and grant a stay conditional on the provision of security in the sum of $3.44 million with permission to apply. I would invite the parties to try to agree the mechanics and timing for the provision of security.

Lord Justice Stuart-Smith:

40. I agree.

Lord Justice Newey:

41. I also agree.