THE COURT OF APPEAL

Record No. 2017/143

Finlay Geoghegan J.
Peart J.
Hogan J.

BETWEEN/

ALBANIABEG AMBIENT Sh.p.k.

APPLICANT / PLAINTIFF

- AND -

ENEL S.p.A. AND ENELPOWER S.p.A

RESPONDENTS / DEFENDANTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 26th day of February 2018

1. This appeal from the judgment of McDermott J. in the High Court presents a difficult and complex point of private international law concerning the enforcement of foreign judgments outside of the context of the Brussels/Lugano system and which, to date, at least, has not been frequently explored by our courts. McDermott J. delivered his judgment on the 8th March 2006: see *Albaniabeg Ambient Sh.p.k. v. ENEL S.p.A.* [2016] IEHC 139.

2. In that judgment McDermott J. refused to grant the plaintiff, Albaniabeg Ambient Sh.p.k. ("Albaniabeg"), liberty to serve out of the jurisdiction to seek to enforce a judgment of an Albanian court in this jurisdiction against the two defendants, ENEL S.p.A. and ENEL Power S.p.A. ("ENEL"). McDermott J. refused that application on the basis that the defendants had no assets within the jurisdiction and were not likely to have such assets in the near future. As the judge concluded that the plaintiff did not stand to gain any practical benefits if enforcement proceedings were to be commenced within this

jurisdiction, he refused to grant them leave to serve such proceedings out of the jurisdiction on the defendants. Albaniabeg has accordingly appealed to this Court against that decision.

3. It is next necessary to set out the background to this application. The plaintiff is an Albanian company which is engaged in the supply of energy and related services. Its parent company is, however, a major Italian corporation, BEG S.p.A. The defendants are both Italian companies, and the second company is a subsidiary of the first. ENEL is in fact a well known major Italian multi-national energy company with a global reach and an annual income of some €80bn. Save where the context otherwise requires, I shall for convenience refer to the defendants as ENEL.

4. The present application arises from an application brought by ENEL on the 10th November 2014 pursuant to Ord. 12, r. 26 seeking to have set aside an Order of the High Court (Hedigan J.) of the 21st July 2014 granting the plaintiff liberty to serve proceedings outside the jurisdiction pursuant to the provisions of Ord. 11, r. 1(q). ENEL also seeks an order dismissing the proceedings on the grounds that the Court does not have jurisdiction or ought not to assume jurisdiction to hear and determine them. The order of Hedigan J. granting the plaintiff liberty to serve out of the jurisdiction was made *ex parte*.

The background to the application

5. The background to this application is a decidedly unusual one. The plaintiff seeks to enforce in this jurisdiction the judgment of the Tirana District Court of Albania delivered on 24th March 2009 against the defendants in the amount of some €433m.. The defendants (and moving party) resist this application saying that they as have no assets within this jurisdiction and are most unlikely to have such assets, this Court should not lend its assistance to what is (they say) a fruitless and oppressive application. How, then, did this application come about?

6. Sometime in 1996 the plaintiff's parent company (at the time the Italian company BEG S.p.A.)("BEG") sought and obtained a concession for the construction and operation of a hydroelectric power plant in the Kalivac region of Albania. During the period in which BEG was endeavouring to obtain this concession, the defendants allegedly expressed their interest in purchasing electricity generated by the power plant and the right to supply it to consumers in Italy. A final cooperation agreement was concluded between BEG and ENEL in February 2000. This agreement provided, *inter alia*, that the parties would establish a special purpose vehicle, Albaniabeg, (namely, the plaintiff company) for the purpose of implementing the terms of the concession.

7. Subsequent to the entry into force of this agreement, ENEL, it is alleged, undermined the completion of the power plant by various acts and omissions which were intended to delay and disrupt its construction. The plaintiff also claimed that ENEL entered into direct competition with it in Albania in breach of an exclusivity agreement between the plaintiff and defendants. It is said that as a result the project was not completed in 2003 as originally envisaged. The plaintiff then issued proceedings in the Tirana District Court in which damages were claimed for, *inter alia*, tort and unfair competition. It appears that ENEL submitted to the jurisdiction of that Court.

8. Following submissions of the parties, the Tirana District Court delivered what is said to be a final and conclusive judgment on the 24th March 2009. It ordered that the defendants pay to the plaintiff (i) the sum of €25,188,500.00 in damages for tort and unfair competition for the period prior to 2005 and (ii) a sum to be calculated on a formula devised by a Court-appointed panel of experts which would form part of the final judgment of the Court for damages for tort and unfair competition for the years 2005 to 2011. On the application of this formula the sum calculated by the panel in damages for those years

amounted to €407,903,370.00. The total sum in damages awarded by the Tirana District Court amounted to €433,091,870.

9. ENEL then appealed against this judgment to the Tirana Court of Appeals. On the 28th April 2010, the Tirana Court of Appeals affirmed the judgment of the Tirana District Court in its entirety. This judgment was in turn appealed by ENEL to the Albanian Supreme Court, but on the 7th March 2011 that Court affirmed the judgment. ENEL subsequently applied to the Supreme Court requesting it to reconsider its judgment. This application was refused on the 17th June 2011. It does not appear to be disputed that this judgment has not been discharged by ENEL, despite repeated demands for payment.

10. ENEL then applied to the European Court of Human Rights in September 2011 claiming that the judgment in the Albanian Courts had been obtained by the plaintiff in breach of the defendants' rights under the Convention. This application was rejected on the 22nd May 2014, apparently on the basis that not all domestic remedies had been exhausted.

The Italian proceedings

11. This, however, is not entirely the full story, since to understand the full context of the Albaniabeg proceedings in this jurisdiction, it is next necessary to detail the Italian proceedings concerning the parties. In November 2000 BEG commenced arbitration proceedings against ENEL Power before a Tribunal of the Chamber of Commerce in Rome claiming contractual damages for a purported breach of the 2000 cooperation agreement. In December 2002 the Tribunal ruled in favour of ENEL Power and it found that the cooperation agreement had not been breached. Appeals were brought by BEG to the Rome Court of Appeals in 2009 and the Italian Supreme Court in 2010 which were rejected and the ruling of the Tribunal was upheld.

12. The plaintiff has attempted to seek enforcement of the Albanian judgment in a number of other jurisdictions, namely, New York, the Netherlands, France and Luxembourg. No application has, however, been made seeking the enforcement of the judgment in Italy, doubtless because of the difficulties involved in such an application in view of the earlier Tribunal decision and the two judgments of the Italian courts to which I have referred.

Order 11 of the Rules of the Superior Courts

13. It is important to state first that Albania is neither an EU Member State (and, hence, not a party to the Brussels Regulation (EU) No. 1215/ 2012 (recast) which applies to all 28 Member States) and nor is it a party to the Lugano Convention (which applies to the EU 28 Member States, together with Iceland, Norway and Switzerland). The application to enforce a judgment rendered by a court of that State is accordingly governed by standard common law principles and by the provisions of Ord. 11 of the Rules of the Superior Courts. At the outset it may be appropriate to comment on the differences between the two types of systems.

14. The Brussels/Lugano system involves the application of fixed and non-discretionary rules as to jurisdiction in which the concepts of exorbitant jurisdiction and *forum conveniens* are excluded and in respect of which judgments are entitled to near automatic enforcement (with strictly limited exceptions) in other Member States (or, as the case may be, Contracting States) on a full faith and credit basis. The position at common law regarding jurisdiction and enforcement is not entirely dissimilar, but there are nonetheless important differences between the two systems. Chief among these are that the jurisdictional bases upon which Irish courts may assume jurisdiction may be exorbitant and are mitigated by considerations of *forum conveniens*. The grounds upon which a judgment

debtor may resist enforcement of the foreign judgment are also somewhat broader than those available under the Brussels/Lugano system.

15. It is next necessary to consider the provisions of Ord. 11 themselves. Ord. 11, r. 1 provides that:-

> "...service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever:- ...
>
> (q) the proceeding is brought to enforce any foreign judgment".

16. Ord. 11, r.2 provides:

> "Where leave is asked from the Court to serve a summons or notice thereof under rule 1, the Court to whom such application shall be made shall have regard to the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence, and particularly in cases of small demands where the defendant is resident in England, Scotland, or Northern Ireland, to the powers and jurisdiction, under the statutes establishing or regulating them, or of the Courts of limited or local jurisdiction in England, Scotland or Northern Ireland respectively".

17. Ord. 11, r. 5 provides:

> "Every application for leave to serve a summons or notice of a summons on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under r. 1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in r. 2 specified; and no

leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

18. It is true that as this is an application under Ord. 11, r. 26, the moving party should normally carry the burden of proof. As I explained, however, in a judgment delivered by me as a judge of the High Court, *Cornec v. Morrice* [2012] IEHC 376, [2012] 1 I.R. 804, 812-813 (in the context of the not dissimilar procedure which was obtained under s. 1 of the Foreign Tribunals Evidence Act 1856), this is necessarily true of all orders obtained *ex parte*:

> "The first issue which arises was already the subject of a ruling by me in the course of the proceedings, namely, the status of the original *ex parte* order. The present application comes before me formally as a motion on the part of Mr. Garde and Ms. Tallant to set aside an order made by me *ex parte* pursuant to s. 1 of the Act of 1856. The application is made *ex parte* precisely because that is the procedure contemplated by the Act of 1856 and Ord. 39, rr. 39-44 RSC. While I duly made the orders sought, I duly made it clear at the time that the order simply had a provisional status and that the moving party (Ms. Morrice) would carry the burden of making the application afresh in the event that the addressees of the order (Mr. Garde and Ms. Tallant) sought to have it set aside.
>
> The Act of 1856 is, of course, a pre-Constitution statute which must, where necessary be read in a fashion which would make it conformable to the modern understanding of the requirements of fair procedures as prescribed by Article 40.3. It is absolutely clear that the courts cannot constitutionally make an order *ex parte* finally affecting the rights of the parties. An abundance of contemporary authority attests to this point: see, *e.g.*, the judgment of Keane C.J. in *DK v. Crowley* [2002] 2

I.R. 744, that of Finlay Geoghegan J. in *Chambers v. Keneflick* [2005] IEHC 402, [2007] 3 I.R. 526 and my own judgments in *Doyle v. Gibney* [2011] IEHC 10, [2012] 1 I.L.R.M. 314 and *Re Custom House Capital Ltd. (No.1)* [2011] IEHC 399.

It was for this reason that I indicated that the *ex parte* procedure did not and could not finally affect the rights of Mr. Garde and Ms. Tallant and the fact that an initial order was made in favour of Ms. Morrice created no presumption in her favour."

19. Accordingly, therefore, it is the party who obtained the *ex parte* order for service out of the jurisdiction under Ord. 11 (in this instance, Albaniabeg) who must carry the burden of demonstrating that the order in question had been properly granted. It is only fair to add that both sides accepted that this was so.

The traditional common law approach

20. The traditional common law approach was summed up by McDermott J. who said in his judgment that there was "a disinclination to assert jurisdiction over foreign defendants at common law." This approach is summarised in the classic and well-known judgment of Farwell L.J. in *The Hagen* [1908] P. 189, 210 as follows:

"During the present sittings Vaughan Williams L.J. and myself have on more than one occasion had to consider Order XI and we have had many authorities discussed and fully considered by the Court, and the conclusions to which the authorities led us I may put under three heads. First, we adopted the statement of Pearson J. in *Societe Generale de Paris v Dreyfus Bros.* (1885) 29 Ch. 239 at 242, that "it becomes a very serious question whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked and whether this Court ought, to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country and I for one say, most distinctly,

that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction". The second point which we considered established by the cases was this, that if on the construction of any of the sub-heads of Order XI, there was any doubt it ought to be resolved in favour of the foreigner; and the third is that in as much as the application is made *ex parte*, full and fair disclosure is necessary, as in all *ex parte* applications, and a failure to make such full and fair disclosure would justify the court in discharging the order even though the party might afterward be in a position to make another application."

21. While this is certainly a classic re-statement of the common law position to the construction of Ord. 11, it must, I think, be viewed in the context of its time. In 1908 both aviation and telecommunications were in their infancy and the concept of a large internal market with free movement of capital and services within Europe would have seemed far-fetched. To that extent, therefore, the burden on a foreign defendant in travelling from either Italy or Albania to answer proceedings in an Irish court is not now as great as it would have been when these words were first uttered by Farwell L.J. in *The Hagen.*

22. Other factors must also be taken into account. In particular, the speed with which large funds can now be electronically transmitted from jurisdiction to jurisdiction and the fact that Dublin has in the last three decades increasingly become a major financial centre are considerations which cannot be discounted. As Lord Neuberger said for the English Court of Appeal in *Linsen International Ltd. v. Humpuss Trnasportasi Kimia* [2011] EWCA Civ 1042:

"In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted."

23. The common law orthodoxies which are reflected in Ord. 11 nonetheless remain clear: they permit the Irish courts to exercise a world wide jurisdiction in 19 specified categories of cases clearly delineated in the Order itself. In some instances, jurisdiction may be assumed by reference to relatively slender connecting factors. It is for this reason that the exercise of a potentially exorbitant jurisdiction is tempered by the requirements of rr. 2 and 5 which require the Irish courts to consider "the comparative cost and convenience of the proceedings in Ireland" and that they are satisfied the case is a "proper one" for service out of the jurisdiction. The jurisdiction under Ord. 11 remains ultimately a discretionary one.

24. The discretionary nature of the Ord. 11 jurisdiction has one further implication which is highly relevant to the present case, namely, that the courts will not generally grant leave for service out unless it is clear that the plaintiff has nonetheless at least some prospect of obtaining a benefit thereby. It reflects a more general principle, namely, that a court will not act in vain.

25. This is reflected in some of the contemporary English case-law. Thus, in *Insurance Corporation of Ireland v Strombus International Insurance Co* [1985] 2 Lloyd's Rep 138, 144, where, in the context of a claim for a negative declaration of non-liability by insurers, Mustill L.J. said that the court should be careful not to bring a foreigner to that jurisdiction as a defendant, where no positive relief is claimed against him unless it can be shown that a "solid practical benefit" would ensue. More recently, in *Tasarruf v. Mevduati Sigorta Fonu v. Demirel* [2007] EWCA Civ. 799, [2007] 1 W.L.R. 2508, Sir Anthony Clarke M.R. observed while *Insurance Corporation of Ireland* was a very different case, nevertheless:

> ".....we accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdiction unless it is just do so and that it

will ordinarily not be just to do so unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective."

26. All of these authorities must be re-assessed in the light of the judgment of the Supreme Court in *Irish Bank Resolution Corporation v. Quinn* [2016] IESC 50, [2016] 3 I.R. 197. (This judgment was delivered on 28th July 2016, *i.e.*, several months after the decision of the High Court in the present case.) That was a case where an Indian company, Mecon, sought to set aside an order made under Ord. 11, r. 1(h) joining it to proceedings in Ireland on *forum conveniens* grounds having regard to the existence of similar litigation between the parties in India. While that case accordingly did not concern an application to serve out with a view to enforcing a foreign judgment under Ord. 11, r. 1(q), counsel for Albaniabeg, Mr. Gallagher S.C., urged that this Court should nonetheless have regard to certain passages in the judgment of Clarke J. which, it was submitted, cast new light on the nature of the Court's jurisdiction in Ord. 11 cases.

27. Clarke J. stated ([2016] 3 I.R. 197, 201-202):

"It was accepted by both parties at the hearing before this Court that one of the factors which a court granting leave ought properly take into account is whether there is a sufficient basis established for the case against the foreign defendant who is sought to be joined. The principle behind that requirement is that a court, by granting leave, requires a foreign defendant to come to this jurisdiction to defend proceedings. An Irish court should not do so unless there is a sufficient basis established for bringing the case in the first place."

28. Clarke J. then went on to state ([2016] 3 I.R. 197, 210):

"It is clear, for reasons which will be briefly addressed in due course, that, so far as the claim which is said to warrant the granting of leave to serve outside the

jurisdiction is concerned, it is necessary that the Court be satisfied that there is a claim which comes within one of the relevant sub-paragraphs of Ord.11 and which is shown to be reasonably capable of being proven so as to justify the proceedings being maintained in this jurisdiction rather than somewhere else. In that context it is not necessary for the Court to resolve any issues as to the substance of the case (whether of fact or law) save to the minimal extent necessary to determine whether the claim is reasonably capable of being proven. In the main the assessment will be based, therefore, on evidence or materials put forward by the plaintiff [on] the fact that the plaintiff's claim may be denied, however strenuously, will not normally mean that there is nonetheless a sufficient claim which requires to be determined. The fact that the claim is contested however strongly is irrelevant to the question of whether leave to serve outside the jurisdiction should be granted.

There may, however, be some cases where an argument or evidence or materials are put forward by the relevant defendant which would, unless countered or explained, provide a knockout blow to the case. For example the defendant might draw attention to (or give evidence in respect of) a contract on which the claim was founded and point out that the defendant was not a party to the contract but that, rather, a different but similarly named person or entity was a party to the contract. If correct, such an assertion would, in an appropriate case, clearly mean that there would be no claim against the named defendant capable of being proven and the order granting leave would have to be set aside. However, the plaintiff might be able to point to some reason or further evidence which might explain how the named defendant was arguably said to be liable under the relevant contract notwithstanding the points relied on. Doubtless other examples could be given.

However, the overriding consideration is that the starting point of an assessment of whether the plaintiff has established a sufficient case must be an assessment of the claim as pleaded together with such evidence as the plaintiff may put forward. Defence evidence which goes no further than establishing that the claim is disputed will not be relevant. There may, however, be limited cases where the defence evidence might, unless explained or countered by sufficient argument, amount to a knockout blow. In such a case the defence evidence may be relevant not merely to assert the immaterial fact that the claim is contested but to assert the highly material fact that the claim is unstateable.

.....The Court is not engaged in some assessment of the relative strengths of the plaintiffs' and defendants' case. Rather the Court has to determine whether there is a sufficient basis for the proposition that the plaintiff may have a claim under one of the qualifying categories in Ord.11 which could justify bringing the defendant to this jurisdiction to answer the claim concerned. The bar is a low bar. It is simply designed to prevent a defendant being brought to this jurisdiction to answer an unstateable claim which has no reasonable prospect of being capable of proof. The suggestion that there was something wrong with reliance on evidence which was not subject to being tested is, in the context of the precise issue with which the Court was concerned, misplaced. The Court was concerned with whether there was a claim sufficient to warrant proceedings being brought. The time to test whether that claim can actually be made out is at the trial when there will be every opportunity to test the credibility of any evidence proffered. Except in quite extraordinary circumstances it is difficult to envisage on what basis it could be contended that there should be a

testing of evidence purely designed to meet a very low threshold of demonstrating that the plaintiff has a claim which is reasonably capable of proof."

29. For my part, I do not think that the test articulated by Clarke J. in *Quinn* greatly changes our existing understanding with regard to the application of Ord. 11. I propose to revert to a consideration of the potential impact of these passages later in this judgment.

30. Against this background, one may agree with McDermott J. when he stated that a plaintiff such as the present one must generally establish (i) that it has a good arguable case; (ii) that it is likely to obtain a practical benefit from the proceedings and (iii) that it satisfies the comparative cost and convenience requirements of Ord. 11, r. 2. The application of these criteria to the facts of the present case may be considered in turn.

Whether the plaintiff has demonstrated the existence of a good arguable case

31. The plaintiff's claim is for summary judgment by which it seeks to enforce the award upheld by the Albanian Supreme Court. The defendants have indicated an intention, should it become necessary, to defend the application on its merits, including on the basis that:-

(a) The Albanian judgment was repugnant to the basic principles of international law and national justice;

(b) The judgment was contaminated by egregious breaches of fair procedures;

(c) The plaintiffs cause of action was *res judicata* having already been determined in Italy; and

(d) An unqualified judgment sum (to the extent that it has not been quantified precisely by the Albanian Court, but was one which must be determined by reference to a formula determined by a panel of non-judicial experts) is unenforceable in Irish law.

32. At common law a judgment delivered by a foreign court is generally unimpeachable on its merits: see Binchy, *Irish Conflict of Laws* (Dublin, 1987) at 603-609. As Binchy observed, however, a defendant can nonetheless set up a range of defences to enforcement of that foreign judgment. These include: fraud vitiating the foreign judgment or where the judgment was obtained by a breach of fair procedures or where enforcement of that judgment would be contrary to public policy. There is also a requirement that an *in personam* foreign judgment must be for a definite sum: see Binchy at 602-603. As Davitt P. said in *Rainsford v. Newell-Roberts* [1962] I.R. 95, 97:

> "Generally a valid foreign judgment *in personam* may be enforced by an action here for the amount of the judgment debt, provided that the judgment is for a definite sum of money and is final and conclusive."

33. It is neither necessary nor appropriate to express any view as to the scope of any possible defences which might be available to the defendants. It is sufficient for present purposes to record that in view of the final nature of the Albanian Supreme Court judgment and the fact that it was a monetary sum, it is clear that – as McDermott J. found - the plaintiff has established that it has a good arguable cause of action in seeking to enforce the foreign judgment within the meaning of Ord. 11.

Whether the plaintiff will obtain a practical benefit from the enforcement proceedings

34. In his judgment McDermott J. summarised the considerations which inform the proper exercise of this jurisdiction in the following terms:

> "The Court in exercising its discretion on this application must take into account a number of relevant factors. The Court must consider whether there is some other available forum which has competent jurisdiction and is appropriate for the trial of the action. It must consider whether the case may more suitably be tried there in the

interests of the parties. It must take a broad view of this issue and take account of the relevant factors including convenience, expense, the availability of witnesses, the governing law and the place of residence and business of the defendants. There must be a sound basis for the hearing of the proceedings in Ireland and the application should not be granted if the initiation of proceedings in this jurisdiction is a "mere device" to ensure that the defendants are brought before Irish courts. In summary, the Court must be satisfied that the case is a fit, proper and suitable one for determination in this jurisdiction. (Per Fitzgibbon LJ. in *McCrea v. Knight* [1896] 2 I.R. 619 at 625; *Intermetal Group Ltd. v. Worsale Trading Ltd.* [1998] 2 I.R. 1 per Murphy J.; *Analog Devices B.V. v. Zurich Insurance Co.* [2012] 1 I.R. 272, per Fennelly J.)."

35. One could not but agree with this helpful statement of principle. The real question in this appeal comes down to this: would the enforcement of the Albanian judgment in this jurisdiction serve any useful purpose given the absence of any assets on the part of ENEL in this jurisdiction? Is it sufficient for this purpose that there is a possibility – even if that possibility is a remote one – that such assets might be moved here at some stage in the future? Alternatively, would the fact that an Irish court was prepared to recognise the Albanian judgment and perhaps thereby prompt courts in other jurisdictions to follow a similar path suffice for this purpose? Or should the courts take the view that enforcement proceedings should only be commenced where there is at least some prospect of recovery, as otherwise scarce court time and resources (along with associated costs for the litigants) is likely to be wasted on a fruitless exercise?

Whether the defendants must have assets within the jurisdiction

36. So far as the question of whether there are assets within the jurisdiction is concerned, I agree that it is not a precondition to the exercise of the court's discretion that the

proposed defendants should have *already* assets within the jurisdiction against which a judgment may be enforced. If, for example, Albaniabeg could show that ENEL were likely to receive a significant payment in this jurisdiction from a third party at some stage in the near future, the case for permitting the service out of proceedings under Ord. 11, r. 1(q) in those circumstances would be a strong one.

37. But what, then, is the situation in the present case? This issue was considered by the English Court of Appeal in *Tasarruf* and by Kelly J. in *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK* [2014] IEHC 115.

38. In *Tasarruf*, Sir Anthony Clarke M.R. rejected the submission that it was a necessary precondition to the exercise of jurisdiction that assets be within the jurisdiction. He took the view that a conclusion to the contrary would deprive a plaintiff of bringing proceedings if there was a belief, hope or expectation that assets belonging to the defendant would or might arrive in the jurisdiction. In addition, a plaintiff might wish to obtain judgment and seek enforcement by compelling a person who has the right to call upon assets of the defendant outside the jurisdiction to call for such assets. The Court nevertheless made it clear that the discretion to permit service out for the purposes of Ord. 11 should not be exercised in favour of a plaintiff "unless it can be shown that a 'solid practicable benefit' would ensue". As Sir Anthony Clarke M.R. said ([2007] 1 W.L.R. 2508, 2516):

> ". ... we accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdiction unless it is just to do so, and that it will ordinarily not be just to do so unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective....Thus a claimant seeking to enforce a foreign judgment by action does not have to show that there are assets in the

jurisdiction. To require him to do so would be tantamount to constrain the rule as if it were limited in that way. A claimant must show that he has a good arguable case in the action, that is that he has a good arguable case that judgment should be given based upon the foreign judgment. He must in our opinion ordinarily show further that he can reasonably expect a benefit from such a judgment. Otherwise there will be no useful purpose in the proceedings."

39. The plaintiff in *Tasarruf* had sought to enforce three judgments in its favour which had been granted by the Turkish Courts. These judgments were based on a finding that Mr. Demirel was guilty of fraud, but the defendant resisted enforcement in the English courts on the basis that he had no assets within that jurisdiction. The English Court of Appeal observed that in such cases it is often difficult to locate a defendant's assets and further noted that judgment debtors were often reluctant to advertise the nature and whereabouts of their assets.

40. Mr. Demirel had been involved in business in Turkey on a large scale. He had not kept his assets in Turkey and made use of the international banking system. He used an international bank to procure the setting up of trusts to shelter his assets in the Cayman Islands. The Court accordingly concluded that it was "not unlikely" that he might use the international banking system of which London was a central part, adding ([2007] 1 W.L.R. 2508, 2519):

"It is we think a reasonable possibility that one of these days Mr. Demirel will have assets in London, either in the form of physical assets or in the form of claims against other institutions. In these days of global business we should, in our opinion, be somewhat less parochial than once we were."

41. The Court was also mindful of the fact that a time limit of six years applied to the bringing of the action from the date upon which the judgment became enforceable. If the

appeal were allowed, no action could be brought in future because it would be statute-barred and Mr. Demirel would then be able to bring funds to London free of the risk of execution. The Court further noted that if judgment were obtained in England, use could properly be made of the various methods of, and aids to, enforcement, including an oral examination of the judgment debtor as to the nature and whereabouts of his assets. In affirming the judgment of the High Court, the English Court of Appeal thus concluded that there was a reasonable prospect that the claimant could obtain a real benefit from the action in England to enforce the Turkish judgment and that England was the proper place to bring the claim under the equivalent rule.

42. In his judgment in the High Court McDermott J. concluded that the facts of *Tasarruf* were quite different from the present case:

> "I am satisfied that the facts of this case are entirely distinguishable from those in *Tasaruff* which concerned a judgment based on a finding of fraud and the removal of assets by the defendant from Turkey. In this case the judgment obtained does not involve a history of fraud, deception or the removal or hiding of assets by the defendants so as to avoid execution of judgment. However, the principles set out in the judgment have been found to be persuasive in this jurisdiction."

43. One way or the other, *Tasarruf* must be viewed as a case where on the facts of that case the English Court of Appeal thought that there was a real prospect that the plaintiff bank would obtain a real benefit by seeking to enforce the judgment in that jurisdiction. As McDermott J. noted, the decision appears to have been influenced by the finding of fraud and by deception in the hiding of assets from execution.

44. It is worth noting, however, that in *Linsen International* (a judgment to which I have already made passing reference) the English Court of Appeal refused to permit service out of the jurisdiction to enforce a judgment giving effect to an arbitral award where the

relevant company had assets in that jurisdiction. The judgment, however, makes no reference to the earlier decision in *Tasarruf.* It may be noted that in *Parbulk II AS v. PT Hampuss Intermoda Transportasi TBK* [2011] EWHC 3143 (Comm) Gloster J. observed that the two judgments were not readily reconcilable, although she did not find it necessary to reconcile the two decisions.

45. Before considering the reasoning in these English cases it is necessary next to consider the judgment of Kelly J. in *Yukos Capital S.A.R.L.* which is, to date, the leading Irish authority on this point. In that case the applicant was a Luxembourg company which sought to enforce an international arbitration award in Ireland against a Russian corporation. The respondent challenged the leave granted to the applicant to issue and serve proceedings on the grounds that there was no proper basis for the exercise of the High Court's jurisdiction under Ord. 11 on the grounds that it had no assets within the jurisdiction and did not transact business here.

46. In his judgment Kelly J. accepted the principles adumbrated in the judgment of the English Court of Appeal in *Tasarruf,* including the proposition that the presence of assets was not a *necessary* precondition to the exercise of the discretion to permit service out of the jurisdiction. Kelly J. rather held that the Court must determine whether, in the absence of assets in, or likely to be, in the State, some "solid practical benefit" would ensue if the award were to be enforced. Kelly J., having considered the evidence, set aside the order of the High Court which had granted leave. One aspect of the case was that the plaintiff had sought to enforce the award in a variety of "respectable" jurisdictions, including France and Singapore. The French application had failed and the application for enforcement in Singapore was pending. On this point Kelly J. observed:

> "The discretion which falls to be exercised must take into account the fitness, propriety and suitableness of the case.

It is a case with no connection with Ireland. There are no assets within this jurisdiction. There is no real likelihood of assets coming into this jurisdiction. This is the fourth attempt on the part of the applicant to enforce this award. There is little to demonstrate any "solid practical benefit" to be gained by the applicant. The desire or entitlement to obtain an award from a "respectable" Court has already been exercised in the Courts of France and is underway in the Courts of Singapore.

The respondent has already had to undertake a defence of the proceedings in Russia and in France and has been successful to date in so doing. It would be unjust to require the respondent to yet again defend its position. The respondent should not be forced to come into a third state (Ireland) which is foreign to it and reargue its case again. It is not appropriate for this Court to assume jurisdiction."

47. It may also be observed that in *O'Flynn v. Carbon Finance Ltd.* [2015] IECA 95 this Court made a passing reference to *Yukos*, saying that it "was decided on very particular facts and where the only proposed defendant was one out of the jurisdiction."

48. As I have already indicated, there is no *ex ante* rule which precludes service out simply by reason of the absence of assets in this jurisdiction and to that extent I respectfully agree with the views expressed in *Tasarruff.* Insofar as *Linsen International* is authority for the contrary proposition, I would, with respect, decline to follow it. The real theme which emerges from modern conflict of laws analysis is that old statements of principle regarding the barriers to bringing foreign defendants to this jurisdiction to defend proceedings must be re-interpreted in the light of modern conditions, not least, the ease of modern travel and communications and the ease with which large sums can quickly be transferred by electronic means to a variety of jurisdictions. This point was well expressed

by Gascon J. for the Canadian Supreme Court in *Chevron Corporation v. Yaiguaje* [2015] 3 S.C.R. 69, 105 when he said:

> "In today's globalised world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the [State] before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality."

49. The underlying principle, nevertheless, remains that there must be some prospect that a judgment creditor will obtain a benefit from commencing enforcement proceedings in respect of the foreign judgment in question. While, as Clarke J. said in *Quinn*, the bar regarding the grant of leave under Ord. 11 is a low one, it is nonetheless not asking too much of that litigant to demonstrate that it stands to obtain some practical benefit from those enforcement proceedings, even if that benefit is an indirect or prospective one. I think that conclusion is warranted by two separate considerations.

50. First, there are considerations of costs. The cost implications are obvious, because if Albaniabeg is correct, every foreign judgment creditor in whose favour an award has been made in a commercial dispute could – in principle, at least - seek enforcement in the Irish courts by reason of the status of Dublin as a global financial centre, regardless of whether there was any prospect of recovery or material benefit (even if indirect), thus increasing the costs for both themselves and the judgment debtor.

51. Second, the courts are under a duty to manage their own affairs such that scarce judicial resources are conserved and are best utilised for the benefit of all litigants. Those resources are generally not well utilised where judicial energies are expended on an issue with no real connection with Ireland and where the prospects of a judgment creditor recovering assets in Ireland are remote or tenuous. It is, of course, true that Irish courts frequently try cases where the plaintiff has no hope of effective recovery against the

defendant who may be indigent or even insolvent. But these are cases where the litigants are domiciled or otherwise based within the State or where the litigation has significant connections within Ireland, so that there is no question of Ord. 11 leave being required. The situation with regard to Ord. 11 is quite different, because by definition the litigation will involve foreign defendants who are then obliged (should leave be granted) to engage with Irish courts in a manner not necessarily of their choosing.

Whether Albaniabeg stand to gain a practical benefit if the judgment is enforced in Ireland

52. It is next necessary to consider the evidence adduced in the High Court on the question of whether either of the ENEL defendants had assets within the State or were likely to have some assets or otherwise to do business in this jurisdiction. In effect, the argument was that ENEL S.p.A. (the first defendant) may do so because it had engaged in the listing of a number of debt securities in the Irish stock exchange since in or about 2000. It was claimed that, because Ireland is a favourite location for debt listing, securitisation and asset repackaging transactions, it is likely that the first defendant would opt to list further notes on the Irish stock exchange against which execution of the judgment sought to be enforced would be possible.

53. McDermott J. surveyed the evidence advanced by the parties as to the debt listing issue and concluded that there was no evidence that bonds issued on the Irish Stock Exchange ("ISE") by ENEL constituted assets in its hands in this jurisdiction. These were simply debt securities which happened to be issued out of Ireland, but which were subject to either English or New York jurisdiction or choice of law clauses. As he put it:

> "The fact that bonds are listed on the Irish Stock Exchange in respect of the first named defendant does not establish a close connection between it and this jurisdiction, or the presence, or likely presence of assets within the jurisdiction from

which execution could be obtained. The evidence is that none of the funds receivable by the first defendant in respect of these bonds are received or receivable in Ireland. The funds are not payable directly to the first named defendant on the issuing of a bond, but are conveyed through international or national intermediaries operating outside this jurisdiction. The evidence is also that it is unlikely that any such funds would be receivable within the jurisdiction in the future. There is no evidence that the issuing of the bonds has any connection with this jurisdiction. Indeed, eight of the bonds are subject to the laws of the United Kingdom and the jurisdiction of the courts of England and Wales: one of the bonds is subject of the laws of New York and the jurisdiction of the New York courts. There is no evidence that the second defendant has any bonds listed on the Irish Stock Exchange."

54. For my part, I agree with every word of this elegant summary of the position with ISE listed securities.

55. The other claim made by Albaniabeg was that both defendants are members of the ENEL group of companies which has a presence in Ireland through a registered branch of ENEL Ingegneria e Riceria S.p.A. (EIR), a subsidiary of the first defendant ENEL S.p.A. It was claimed that EIR had total assets of €282,833,779.00 and liabilities of €230,333,390.00 as of December 31st, 2012. In his judgment McDemott J. gave the following summary of the evidence:

"In his second affidavit Mr. Fritz [on behalf of Albaniabeg] states that EIR is the wholly owned subsidiary of the first defendant ENEL S.p.A. and is a member company of the ENEL group of which both defendants are members. It is claimed that the parent and sole shareholder of EIR, the first defendant ENEL S.p.A., would be entitled to any dividend declared by EIR. It is therefore suggested that because of the links between the first defendant and EIR it may be open to the plaintiff post

judgment to seek to lift the corporate veil between the two entities to enable enforcement as against the assets of EIR. It is further claimed that the defendants would only be able to engage "more fully in this regard following discovery in aid of execution".

[On behalf of ENEL] Mr. Ferrara acknowledged in respect of the second point that EIR, a group company, separate from the defendants, registered a branch in Ireland in June 2012 having entered into a contractual relationship for the provision of site supervision services for a project in Wexford. EIR's only link to Ireland was in the form of that contract originally entered into in April 2012 and due to expire in December 2014. The relatively modest monthly fee for the provision of services under the Irish contract was to be received by EIR in a bank account held in its name in Italy. The contract was governed by Italian law and any disputes thereunder were to be resolved by the Courts of Rome. The service provider under the contract was Italian and clearly not either of the defendants. EIR has a standard practice when entering a contract of services in a foreign jurisdiction to establish a branch there although it remains at all times an Italian registered company. Mr. Fritz in a responding affidavit stated that EIR is the wholly owned subsidiary undertaking of the first defendant ENEL. He asserts that as the parent and sole shareholder of EIR, the first defendant would be entitled to any dividend declared by EIR. He states that it may be open to the plaintiff post judgment to seek to lift the corporate veil between the two entities. Mr. Ferrara responds that since EIR is a distinct legal entity and not one of the defendants there is no connection with this jurisdiction upon which the plaintiff can rely in these proceedings arising from the fact that EIR has an Irish branch. EIR is not a defendant to the proceedings and is a separate and distinct

Italian legal entity. No basis has been advanced as to how or why the "corporate veil" might be lifted as between an Italian company and its Italian subsidiary or how a judgment against one Italian company is enforceable against the assets of a subsidiary company under Irish or Italian law. Mr. Ferraro also queries the practicality of seeking discovery in aid of execution against defendants or directors who are not within the jurisdiction. Furthermore, he notes that any dividend declared by EIR would be declared in Italy to its shareholders. In addition, it is difficult to see how an order might be obtained by way of equitable execution against funds payable to EIR pursuant to a contract with another, particularly since EIR is not a defendant to the proceedings."

56. McDermott J. then went on to say:

"The plaintiff submitted that a judgment obtained in Ireland could be enforced against dividends payable to the first defendant by its subsidiary EIR. EIR is not a defendant in these proceedings. It has an Irish registered branch which was set up because it was providing services under contract to a company in Ireland. I am satisfied that EIR is an Italian company registered in Italy and subject to Italian law. If any dividends are payable by it to ENEL, they are payable in Italy pursuant to Italian law and I am satisfied that its dividends are not susceptible to execution in Ireland on foot of a judgment obtained from an Irish court against the first defendant. It seems to me that the appropriate jurisdiction in which to pursue such an application, if it were open, is Italy. Furthermore, apart from the Irish branch, which was opened for a limited purpose, EIR has no other connection with Ireland. It is completely unconnected with these proceedings..... In any event, the only connection between EIR and Ireland is based on the existence of a short term contract in respect of a site in Wexford which terminated in or about December 2014. The contract is

governed by the law of Italy and the monies are payable to an Italian bank account. The connection of EIR to Ireland or to these proceedings is extremely tenuous. In respect of EIR there is no basis advanced for lifting the corporate veil in this jurisdiction, in these proceedings or otherwise, and there is no evidence that there are any assets of EIR in this jurisdiction nor is there any reasonable possibility that there may be such assets within this jurisdiction, for the purpose of enforcement in that event."

57. McDermott J. accordingly concluded that "there are no assets within the jurisdiction and there is no reasonable possibility, much less real likelihood, of any assets of the defendants coming into this jurisdiction." This careful review of the evidence is really impossible to fault in any respect.

58. As it is thus clear that ENEL has no current assets within this jurisdiction and there is no evidenced of a real prospect that it will have such assets within this jurisdiction, one is therefore left with the more fundamental question as to whether it is appropriate to permit Albaniabeg to commence these enforcement proceedings on the ground that it desires the *imprimatur* of a court of an EU Member State and that simple recognition of that judgment would be sufficient to illustrate the fact that the courts of a third country (*i.e.*, Ireland) have thereby acknowledged the fact that the Albanian judgment was given in a regular fashion by a court of competent jurisdiction.

59. I should state in passing that it was not suggested that if an Irish court were to grant an order providing for the recognition or enforcement under own rules of private international law of the Albanian judgment, this then would be a "judgment" for the purposes of Article 2(a) of the Brussels Regulation (recast) which could then be enforced in other Member States under the simplified enforcement procedure provided for by

Chapter III of that Regulation. As this point was not argued before us, it is not necessary to express any view on it.

60. It is true that in *Yaiguaje* the Canadian Supreme Court agreed – or, at least, appeared to agree – that the fact that the judgment creditor should obtain the imprimatur of the courts of a third country was in itself a sufficient benefit to warrant granting leave to enforce that judgment. The Court observed that it was not unfair that the judgment debtor should be left to the remedy of defending the recognition and enforcement proceedings in respect of the foreign judgment. Indeed, Gascon J. quoted with approval from the judgment of Kelly J. in *Yukos* for this purpose. It is accordingly necessary to examine this aspect of *Yukos* in a little more detail.

61. It will be recalled that even though it was found that there was no prospect that the defendant in the *Yukos* proceedings had any assets in Ireland or was likely ever to have such assets, the plaintiff nonetheless submitted that "it would be advantageous to obtain a judgment recognising and enforcing the award in the unbiased and internationally respected Irish Court." Kelly J. noted, however, that the plaintiff had already unsuccessfully invoked the jurisdiction of the French courts for this very purpose:

> "It is difficult to discern what that advantage might be in the circumstances of this case. The applicant has already invoked the jurisdiction of the Russian Courts, being the jurisdiction where the respondent is based. It has animadverted upon the independence and impartiality of such courts. I am not called upon nor do I express any view on that topic whatsoever. But the applicant has also invoked the jurisdiction of the French Courts against whom no such criticism has been made. The French Courts are unbiased and internationally respected and operate within the European Union network of courts.

If the applicant had succeeded before the French Courts, it is difficult to see what advantage would be obtained by seeking a similar recognition and enforcement order in this jurisdiction. The fact is, of course, that the applicant has not had success before the French Courts. That failure is very likely to have triggered the current litigation. Success in France would have almost certainly avoided this litigation.

Whilst enforcement usually takes place against assets, the seeking of recognition and enforcement of an award in a country where the losing party may have no assets in order to obtain the *imprimatur* of a respected court upon the award is acceptable: See Redfern & Hunter on *International Arbitration* para. 11.14 and footnote 15). But having sought and failed to obtain such imprimatur from the French Courts, such failure is, in my view, a matter capable of being taken into account when considering the exercise of the discretion to permit service out in this country.

In *Tridon Australia Pty Limited v. ACD Tridon Inc.* [2004] NSWCA 146, Giles J.A. took the view that there was a discretion not to enforce a declaratory award as a judgment and said as follows:-

> "Enforcement is a plain word, and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s. 33 of the Act is a procedure with a purpose, the purpose of enabling the victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are

binding on the parties, and bind them for the balance of the arbitration and beyond that."

In *West Tankers Inc v. Allianz SpA* [2011] EWHC 829, Field J. drew guidance from that decision and said:-

> "Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award."

Whilst those observations refer to declaratory awards, they do, it seems to me, underscore once again, the necessity to be able to demonstrate some material benefit to be gained by having the award enforced. I am unable to discern the existence of the supposed befit to be gained by the applicant."

62. It is thus clear from a review of the entirety of the relevant passage from the judgment that while Kelly J. allowed that in some circumstances it might be appropriate to permit enforcement proceedings on the basis that the fact that a neutral, internationally respected court might give its *imprimatur* to a foreign judgment or award was a sufficient benefit for the judgment creditor, the general tenor of this passage nonetheless is that a court should hesitate to allow enforcement proceedings on that basis alone. In *Yukos* Kelly J. found that it was not appropriate to grant leave in such a case, because the judgment creditor had already applied to the French courts for recognition on this very basis and failed.

63. So far as the present case is concerned, this will now be the fifth jurisdiction in which the plaintiff has applied for the recognition and enforcement of the Albanian judgment. The other four jurisdictions (New York, The Netherlands, Luxembourg and France) are all highly respected venues for the resolution of international commercial disputes. While there may well be cases where a court would be prepared to grant leave for Ord. 11 purposes simply for the purpose of simply enabling a judgment creditor to obtain the *imprimatur* of the Irish courts in the manner which I have indicated, nevertheless - as *Yukos* indicates - it would be rarely correct to do so for this *sole* purpose when enforcement proceedings have been determined or are pending in the courts of other third country jurisdictions. This is especially so having regard to the questions of comparative cost and convenience which I now propose to consider.

Considerations of comparative cost and convenience

64. Ord. 11, r. 2 requires the courts to have regard to the comparative costs and convenience of proceeding in Ireland. The plaintiff is an Albanian company, the defendants are Italian. If leave were to be granted for the enforcement of the Albanian judgment in this jurisdiction it is clear that an Irish court would have to consider a number of matters in the light of the prospective defences which ENEL proposes to raise. These issues include the regularity of that judgment, the manner in which it was obtained, whether fair procedures were observed, the method of calculation of the award involving the use of a judicial expert panel and the implications of the Italian arbitration decision.

65. Any such enforcement proceedings in the Irish courts would thus entail the hearing of witnesses and evidence concerning the underlying dispute and an examination of the issues that arose between the parties before both the Italian and Albanian courts. It would be necessary to explain how the Italian arbitration and the Italian courts came to a conclusion which was at odds to that of the Albanian courts. All this would involve, as

McDermott J. observed in his judgment, witnesses "giving evidence as to matters of fact, or as expert witnesses, for example on matters of law, would have to travel from Albania and Italy." At least some of this evidence would presumably have to be given in either Italian or Albanian. Furthermore, the proceedings are likely to be complex and not straightforward. A relatively lengthy and costly enforcement hearing cannot be excluded.

66. Enforcement proceedings have already issued in a variety of other jurisdictions. I agree with McDermott J. that it cannot be fair to the defendants to require them to attend in yet another foreign jurisdiction to defend yet a further round of enforcement proceedings having regard to the overall cost implications of such fresh proceedings and the lack of any real prospect of achieving any purpose by seeking to secure the enforcement of the Albanian judgment here. This is especially so when the subject matter of the dispute has no connection with Ireland whatever.

Conclusions

67. In summary, therefore, I am of the view:

68. First, there is no *ex ante* rule which requires the presence of assets within the jurisdiction before leave to commence enforcements proceedings under Ord. 11, r. 1(q) can be granted. Any other conclusion would fly in the face of modern realities in terms of globalisation, communications and the speed of banking transactions.

69. Second, a plaintiff must demonstrate the existence of a good arguable case prior to obtaining leave. As the plaintiff is the beneficiary of an as yet unsatisfied final judgment from the Albanian courts, this test is clearly satisfied.

70. Third, the judgment creditor must nonetheless generally show some prospect of securing a material benefit, even if that benefit is indirect and prospective only. There are no assets of the defendants in Ireland and there is no evidence to demonstrate that there is

such a reasonable prospect or possibility that there will ever be any assets of the defendants in Ireland. The plaintiff cannot therefore satisfy this test.

71. Fourth, while the court may well have a jurisdiction to grant leave for Ord. 11, r. 1(q) purposes where the *sole* purpose of the application is to ensure the *imprimatur* of the foreign judgment by an Irish court, even if there is no actual material benefit, cases of this kind are likely to remain unusual, even exceptional. Leave should not normally be granted in such cases where enforcement proceedings have already been determined or are pending in other third country jurisdictions.

72. Fifth, regard must be had to the issues of comparative cost and convenience in the manner required by Ord. 11, r. 2. The proceedings have no connection with Ireland and enforcement proceedings would require the Irish courts to embark upon complex and potentially lengthy and costs enforcement proceedings without any obvious material benefit to the plaintiff, however indirect or prospective.

73. Sixth, for all of the reasons stated, I agree with the trial judge in respect of the measured and careful way in which he weighed all the relevant considerations in this difficult and complex case. For all of these reasons, I am in agreement that the judgment creditor has not shown that enforcement proceedings in this State would presently be *conveniens* in the sense of showing that such proceedings would be suitable or appropriate for this jurisdiction to determine.

74. I would accordingly dismiss the appeal and affirm the decision of the High Court.

Approved

Gerard Hogan

26th February 2018