



**THE COURT OF APPEAL
CIVIL**

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**Neutral Citation No. [2022] IECA 5
Court of Appeal Record No. 2020/205
High Court Record No. 2018/14 FJ**

**Costello J.
Whelan J.
Murray J.**

**IN THE MATTER OF REGULATION (EU) NO. 1215/2012
AND
PURSUANT TO ORDER 42A OF THE RULES OF THE SUPERIOR COURTS
(JURISDICTION, RECOGNITION AND ENFORCEMENT OF JUDGMENTS) 2017
AND
IN THE MATTER OF A JUDGMENT OF THE SOFIA CITY COURT, REPUBLIC
OF BULGARIA**

BETWEEN

HENRY ALEXANDER BROMPTON GWYN-JONES

APPLICANT/APPELLANT

- AND -

RICHARD WILLIAM MCDONALD

RESPONDENT

Court of Appeal Record No. 2021/33

High Court Record No. 2019/16FJ

**Whelan J.
Murray J.
Barniville J.**

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RESPONDENT

(Judgment No. 3)

JUDGMENT of Mr. Justice Murray delivered on the 17th day of January 2022

1. While these two appeals have not been consolidated, and indeed were heard before differently constituted courts, the applications now before each court present some common issues and were heard one after the other. That being so, it has been decided to deliver a single judgment addressing the applications in both actions. Insofar as applicable to the first appeal (the principal judgment in which appears at [2021] IECA 206), Whelan J. and Costello J. are each in agreement with this judgment and the orders I propose and in respect of the second appeal ([2021] IECA 303), Whelan J. and Barniville J. similarly agree with both this judgment and the proposed orders.
2. The appellant describes his principal application as being for '*a stay pending the lodgement of an appeal within the statutory time limit for leave to appeal to the Supreme Court and thereafter pending determination of the appeal by the Supreme Court*'. What he actually seeks is an interim order restraining the enforcement of the two final judgments of the Bulgarian courts, subject of the respective actions. Given that Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (*'the Recast Regulation'*) is intended to comprehensively regulate the recognition and enforcement of judgments of the courts of member states to which it applies, and given that at this point the respondent has the benefit of the two final judgments which he is, *prima facie*, entitled to execute in this jurisdiction in accordance with that Regulation, the jurisdiction to make the orders sought must appear in that instrument. The relevant provision enabling orders suspending enforcement is Article 44, the scope of which I addressed in my second judgment (at para. 51 and following).

3. Both parties proceeded on the basis that the test for the grant of such relief is that described in *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 IR 152, as applied to orders in the nature of an injunction pending appeal in *C v. Minister for Justice and Equality* [2016] IESC 48 at paras. 4.6-4.7; [2016] 2 IR 680 at p. 695. I will approach the matter on that basis, while noting – but without deciding – that this assumes that the test is a matter for national procedural law. That agreed test has two elements – the identification of arguable grounds of appeal, and the determination of whether the balance of justice leans in favour or against the grant of the order sought.
4. The test posited in *Okunade* requires that before an interim order of the kind in issue here is granted, an applicant must establish that they have an arguable case (see para. 104 of the judgment of Clarke J. (as he then was)). The parties to this application accepted that this means that for the purposes of an application of the kind in issue here, the appellant has to establish arguable grounds of appeal (see *C. v. Minister for Justice and Equality* at para. 4.7). If the appellant cannot establish arguable grounds of appeal, their application for a suspensory order must fail, and the question of balancing the interests of justice as between the parties does not arise.
5. It is less than usual for this court to refuse an application for a stay pending appeal to the Supreme Court on the basis that the applicant has not established arguable grounds of appeal. In this case it might be said that it would be surprising if the appellant had no arguable ground of appeal, given that there are now two detailed judgments of the High Court considering his applications, and two extensive judgments of this court referencing a large body of authority and considering all of the various issues presenting themselves in the case. Somewhere in the midst of all of that analysis, it might be said,

there must be at least one arguable point. Were the position otherwise, it would hardly have been necessary to engage in the detailed discussion of principle contained in these decisions in the first place. If there is an arguable point, it might be said, the appellant should at least be allowed to seek leave from the Supreme Court to make it without suffering execution in the meantime.

6. While all of this may have a superficial appeal, the respondent (who has now been seeking to have judgments of the Bulgarian courts issued in 2016 and 2017 enforced in this jurisdiction for over two years) argued that in fact no arguable grounds of appeal had been established. In a context in which the court must give effect to the obligations imposed by the Recast Regulation to enable swift recognition and enforcement of judgments of the courts of other Member States, and indeed given that the court is under an unusual and express obligation to do so '*without delay*' (Article 48), the respondent is entitled to have the grounds of appeal relied upon in support of a further suspension of enforcement examined with a view to determining whether an arguable ground of appeal has in reality been identified. If this court concludes that such a ground has not been established then the test, to which the parties have agreed, governs this application and precludes the court from granting a stay.

7. That said, this court should not easily conclude that an appellant has failed to establish arguable grounds of appeal for the purposes of an application of this kind. Apart from being properly conscious that it is evaluating its own judgment, the appellant has a right to seek leave from the Supreme Court to appeal decisions of this court and ideally it is that court which, in the course of considering an application for such leave, should determine arguability when the issue arises. However, there will be cases in which it

is so clear that that an appellant does not enjoy the right to an arguable appeal that it would be wrong to subject a respondent to an interim injunction for any period, no matter how short. This is such a case.

- 8.** Across the two judgments I have delivered in this matter, the issues can be categorised under three broad headings – (a) the issue of service (which is relevant only to the first judgment), (b) the issue of public policy (which while common to both judgments, arises in the second judgment in a context where the argument underlying the public policy objection could have been but was not raised before the trial court in Bulgaria) and (c) the issue of whether the proceedings ought to have been stayed pending the outcome of the latest application to the Bulgarian Supreme Court (‘the SCC’) to set the judgments aside (while this was only argued as a ground of appeal in the second judgment, as matters have developed it is now relevant to both). To surmount the first hurdle of the *Okanade* test, the appellant must merely establish an arguable ground on *one* of these issues, as if he succeeds on any of them the respondent will not be in a position to execute both of the judgments here (although it should be noted that, depending on the ground, it is possible that the arguable ground would apply only to one of the Bulgarian judgments and not the other).
- 9.** Bearing this in mind, and giving the appellant the benefit of any doubt on each of these three issues, it is my firm view that he has not made out any arguable ground of appeal on any of them.
- 10.** Regarding the issue of service, the central point made on this question in the judgment in the first appeal was (at para. 36) that if a defendant who claims that he was not aware

of proceedings that have been properly served in accordance with the law of the receiving state, wishes to contend that his rights of defence were impaired so as to enable him to resist enforcement of a default judgment, it is incumbent on him to explain how it came about that he did not become aware of the judgment. As I observed in the first decision, this is a matter of basic common sense. The law requires this, as the person seeking to resist enforcement of proceedings that have been properly served must show that his lack of awareness of the proceedings was not as a result of his own default. I can see no credible basis on which this is wrong, and none was suggested by counsel. Were the position otherwise, the Recast Regulation would, in cases in which personal service was neither required by the law of the member state addressed nor effected upon the defendant, be inoperable as even proof of due and proper service by a claimant and would be insufficient to ensure enforcement. The defendant would simply have to state that he did not become aware of the proceedings. I outlined the authorities establishing this proposition in the course of the judgment on the first appeal and no ground has been identified by reference to these authorities regarding how and why the Supreme Court could determine otherwise.

- 11.** Nor has the appellant explained by reference to the evidence how it could be concluded that he had discharged that burden. I outlined in my judgment (at para. 38) how the evidence was that the proceedings were signed for at the appellant's home by an identified person in November 2015 and were served by registered post in August 2016 being again accepted there. Yet, no evidence was adduced explaining how it happened that the appellant was never advised of the proceedings in spite of them being delivered to his home in this way. He does not identify the persons who did receive the papers and does not state what inquiries he made of those persons in order to understand why

he was never advised of the proceedings. The persons do not give evidence explaining why they accepted these documents but (as is presumably said to be the case) never advised the appellant of them. Although the appellant adduced voluminous evidence purporting to show that he was not in Ireland on the dates the documents were served he studiously avoided explaining the most basic question of all – how did it happen that no-one told him of the documents served and signed for at his home?

12. Even were the appellant to surmount the hurdle of arguability on one or other of these matters, he must also establish that he can maintain a challenge to service in this jurisdiction when he could have and did bring precisely that same challenge in Bulgaria when he sought to set aside the default judgment in that jurisdiction. As I have observed, he made three applications to the SCC to that end and failed in each. The case law of the CJEU outlined in the first judgment is clear that, having sought to have the issue of service addressed in the issuing courts and having failed in that regard, generally that is the end of the matter (*C-420/07 Apostolides v. Orams* [2009] ECR I-03571 at para. 78). I made it clear in my judgment that there were some circumstances in which this general principle might not apply. The appellant has failed to identify whether, or why, the legal analysis is wrong and has failed to explain why the exception to that principle as I formulated it might apply here. It follows that no arguable ground of appeal around the service issue has been made out.

13. I was critical in my first judgment of the lack of clarity surrounding the case made that recognition and enforcement of the Bulgarian judgments would be contrary to public policy. While at one point it was contended by the appellant that the judgments had been '*procured*' by fraud, it was clear that this was not in fact the argument he sought

to advance. Instead, from the evidence adduced and submissions made in each case, including evidence adduced following the first judgment and arising from applications subsequently made to the second arbitral body and the SCC, there were two distinct points being made.

14. The first was that the alleged fraud of the respondent regarding the acquisition of the Burgas Plaza created the opportunity for the loan contracts, which gave rise to the judgments and, accordingly, said judgments should not be enforced. In other words, had the respondent not made fraudulent representations to the appellant, the appellant would not have become involved in Burgas Plaza, and had he not become involved in Burgas Plaza he would not have entered into the loan contracts, and had he not entered into the loan contracts there would have been no judgment against him. Therefore, the argument appears to be, insofar as the public policy of Ireland leans against *'fraud'*, enforcement of the judgment must be refused.

15. The second was that the respondent fraudulently induced the applicant to agree to consent to a contract, whereby a firm set up by the respondent would purchase all advertising space in the Burgas shopping centre for resale to advertisers at a profit. The alleged fraud came in the form of a representation by the respondent that he would, in that connection, provide a series of loans to the appellant. The monies owing would not be repaid by the appellant but instead would, effectively, be set off against a share of the advertising revenue due under these arrangements to a company controlled by the appellant. In this way, it is said that the respondent agreed to advance the value of the appellant's share of the anticipated profits via the loans. In other words, as I understood the point, while the appellant received the monies under the loan agreements

repayment, which was enforced by the Bulgarian judgments, the appellant only entered into these agreements because he was told that he did not have to repay the loans as the repayment would be taken from monies due to his company.

16. It may be tempting to think that this is all so complicated that it must be at least arguable and, indeed, that the very complexity of the underlying arrangements requires that an injunction be granted so that the issues can be interrogated by the Supreme Court in determining whether to grant leave. However a moment's reflection shows that these assertions cannot conceivably afford a public policy based objection to enforcement. If they could, no judgment rendered by the courts of another Member State in a civil matter in which a substantive defence based upon fraudulent misrepresentation was or might have been advanced could be enforced in Ireland. In point of fact, the second argument was in substance advanced in the Bulgarian proceedings giving rise to my second judgment, although there the events were not presented in the language of fraud. It was rejected as not affording a defence under Bulgarian law.

17. It was for this reason that I rejected the argument in both appeals, concluding that the alleged public policy objection was in fact a defence on the merits which fell to be determined by the Bulgarian courts in the light of the applicable law chosen by the parties to govern their relationship. No reason has been advanced in the course either of the second appeal (in which the court invited the appellant to argue this issue again if he wished) or in the application for a stay as to why this was wrong, or even arguably wrong. What counsel for the appellant did say in the course of his submissions on the stay application is that my formulation of fraud as a public policy ground for orders precluding non-enforcement was *'too narrow'*, but that begs rather than answers the

question of what the appellant says the correct test is and how, in the circumstances, he could claim to have met it.

18. But if this *was* wrong, the appellant faces even more fundamental difficulties. The first limb of the argument presents an obvious issue of causation: it is not evident to me that in Irish law loan agreements of the kind in issue would be unenforceable simply because they had been preceded by an alleged fraudulent misrepresentation in respect of an anterior transaction. Certainly, the evidence tendered to this court in the first appeal provided no factual basis on which any specific connection could be made between the alleged fraud in relation to the acquisition of the Burgas Plaza, and the execution of the loan agreements (pursuant to which, it must be repeated, the appellant received and did not repay the loan amounts). Following delivery of that judgment, the appellant sought (and was granted) liberty to admit further evidence in the second appeal. Included in that evidence was a settlement agreement presented in April 2021 to the panel appointed to hear the first arbitration in which Gort and MRP *inter alia* acknowledged that the personal loans subject of these proceedings were '*relevant and directly related*' to the dispute subject of the first arbitration. However, that proves nothing *vis-à-vis* the respondent (who was not a party to this agreement). The arbitrator expressly declined to adopt various declarations in the settlement agreement (including this one) as part of his approving order.

19. On the facts, the second limb of the argument – the alleged fraudulent misrepresentation surrounding the making of the loans – is unsubstantiated by any evidence from any person involved in the relevant events. None of this was evidenced by anything in writing and all of it was inconsistent with the actual loan agreements themselves. So,

as a matter of evidence and fact, the public policy argument as presented was not substantiated.

20. In the second appeal, the appellant must in addition surmount a further hurdle. He must establish that, never having raised the claim of fraud before the Bulgarian courts, it is still open to him to raise the issue for the first time at the point at which enforcement was sought. The case law relied upon by the appellant himself (*Interdesco SA v. Nullfire Ltd.* [1992] 1 Lloyd's Rep. 180) makes clear that he cannot, and indeed it would be surprising having regard to the purpose and function of the Recast Regulation if the position were otherwise. Again, nothing has been said in the course of the application for a further order restraining execution to explain why any of this is wrong.

21. The final issue relates to the question of a stay, pending the outcome of the application to the SCC, to set aside the decrees sought to be enforced. In my judgment on the second appeal I explained that the only legal mechanism, by which such a stay on enforcement could be obtained, depended on a stay being granted on *these proceedings* pursuant to Article 51 of the Recast Regulation. Counsel accepted in the course of this application for a stay pending appeal that this was correct. However, Article 51 is applicable only to an '*ordinary appeal*' and the legal authorities (including decisions of the CJEU) make it clear that set aside applications of the kind in issue here and presently pending before the SCC are not such ordinary appeals. Were the position otherwise, the process of enforcement enabled by the Recast Regulation would be significantly undermined, as many jurisdictions (including this jurisdiction) allow for applications to set aside judgments to be brought without there being any applicable time limit. No authority has been identified as to why this was wrong. The argument

that was raised by counsel – that there was room for Irish domestic law to apply ‘*fair procedures*’ and ‘*natural and constitutional justice*’ so as to enable enforcement to be stayed pending the outcome of a set aside application in the State of origin – is utterly misconceived. The suspension of enforcement is governed by and only by the Recast Regulation. Fair procedures are accommodated by the recognition by the Regulation that if a stay is granted by the courts of the issuing State, enforcement will not be possible in another jurisdiction. No stay has been granted by the Bulgarian courts (and as I explain shortly, the applicant has not sought such a stay).

22. It follows that the appellant has in neither proceeding established an arguable ground of appeal such as to enable the court to grant an order of the kind now sought. However, if I am mistaken in this regard I believe it clear on the facts of this application that the interests of justice do not warrant the grant of such an order. The factors to be taken into account in this regard were outlined by Clarke J. in *Okunade* and were approved in the context of applications for interim relief pending appeal in *C. v. Minister for Justice and Equality*, as follows:

‘The court should consider where the greatest risk of injustice would lie. But in doing so the court should:

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case.'

23. The high point of the appellant's application insofar as the interests of justice go is that if he does enjoy an arguable ground of appeal (a) no evidence has been adduced that would allow the court to conclude that the respondent has assets from which the monies

he obtains on foot of the judgments in question may be recovered from him, (b) given that the Supreme Court can determine applications for leave to appeal with relative despatch, in the event that it decides to refuse leave the respondent will not be out of those monies for much longer while on the other hand if that Court grants leave then, by definition, this will only be because it feels the appeals are, at least, arguable, (c) the prejudice by a short suspension is very limited given that the awards made in the respondent's favour carry on going interest at a rate of 10% and (d) if the respondent does proceed to execute the judgments pending application to the Supreme Court, his appeal could become moot.

24. Normally, these would be weighty considerations in favour of the order sought.

However, in this case there are significant counterveiling factors:

- (i) Even if arguable, the grounds of appeal are – on any version – exceptionally weak, and arise in a context in which even if the background is involved, the actual legal issues are clear and net. It is evident from the passage I have quoted that this is a relevant consideration in determining to grant an injunction pending appeal.
- (ii) This is particularly so in a context in which the respondent holds two judgments from the courts of a member state which are *prima facie* valid. The passage from the judgment of Clarke J. is also clear in holding that in determining whether to grant such an order, the fact that the court will be suspending the effect of a seemingly valid decision is a factor weighing against the making of such an order. It must be an especially significant consideration when the legal

starting point is that the courts in this jurisdiction must, in accordance with their obligations under EU law, swiftly and without delay, give effect to orders of the courts of another member state.

(iii) This latter factor must be viewed in the light of the history of this matter. The judgements were granted in 2016 and 2017. Since then, four applications have been made to the SCC in relation to the judgment subject of the first appeal, and the judgment subject of the second appeal has been appealed once and has been the subject of two applications to the SCC. The latest round of these various applications are pending, all others having been refused. It was only in the last applications to the SCC (made following my judgment in the first appeal) that any issue of fraud (which is the central substantive question in both appeals before this court) was raised before the Bulgarian courts. It is, on any version of the law, before those courts that these issues should – at the very least – have been first raised. Yet they were raised not there but (leaving aside the arbitral proceedings and the application in aid thereof to the courts of the Isle of Man) were agitated for the first time at the enforcement stage in this jurisdiction. Based upon that allegation of fraud, the respondent has been excluded from the *prima facie* entitlement he enjoys under EU law to enforce the judgments for over two years.

(iv) I also think it is highly relevant that the appellant could obtain a suspension of execution of the judgments in this jurisdiction as of right in accordance with Article 44(2) of the Recast Regulation were he to obtain a stay on the judgments from the Bulgarian courts. He has an entitlement to seek such a stay on foot of

the set aside application he has brought to the SCC. He has never even applied for a stay in that jurisdiction, presumably because to do so, he would be required to lodge the judgment sums with the SCC. He adopts this position in a context where, according to the evidence adduced in these proceedings, the appellant is a person of considerable means, owning a property in this jurisdiction with (according to himself) a value of at least €26M. In fact, while counsel acknowledged that this Court had the power to make any stay conditional upon the lodging in court or otherwise, the securing of the amounts outstanding the applicant did not offer to do this, and his counsel had no instructions to make such an offer.

25. Without a doubt, the most substantial point made by the appellant is his claim that if the order he seeks is not granted, any right of appeal he might have to the Supreme Court is liable to be rendered moot. However – and while stressing that this point is only reached if he establishes that he in fact enjoys an arguable ground of appeal – for three reasons I do not believe that in the circumstances of this case that objection is well founded. First, while recognising a strong counterpoint against the grant of an order preventing further enforcement, said counterpoint is not dispositive and the various other factors I have outlined above (in particular the weakness of his appeal, the fact that the respondent enjoys the benefit of judgments which are *prima facie* valid and the significance of the European scheme of mutual recognition and enforcement) outweigh it. Second, the appellant has at his disposal a ready mechanism for avoiding enforcement while also maintaining his appeal in the form of the facility to lodge the monies in the Bulgarian courts. Indeed, the evidence before the court discloses that on 3rd August 2021 the solicitors representing the respondent in the second arbitral

proceedings offered an undertaking that the Bulgarian judgments would not be enforced if the amounts due under the judgments were lodged to their bank account to be held to the order of the Tribunal¹. None of these courses of action were adopted. Instead, the appellant – having pursued countless appeals and applications before the courts of Bulgaria, having agitated the issues around the two Bulgarian judgments in two separate sets of proceedings in this jurisdiction, and having sought unsuccessfully to prevail on the second arbitral tribunal to issue orders preventing the respondent from enforcing the Bulgarian judgments here – seeks the unconditional benefit of orders restraining any further enforcement.² If he had an arguable ground of appeal, and if he had tendered the monies subject of the judgments, the equities of the matter might well lean in his favour. He has chosen not to do this and must abide by the consequences. Finally, I am unconvinced that even if enforcement occurred, the appeal would be moot as the appellant would enjoy (at the very least) the right to contend that an order precluding enforcement, if made on appeal, entitled him to unwind the consequence of any enforcement that had taken place.

26. It is uncommon for this court to either refuse a stay on one of its orders pending the seeking of leave to appeal its decision in a case to the Supreme Court or to refuse to continue injunctions granted, pending such an application. I think it fair to say that the reality is that in many cases, practical concerns around the efficient use of court

¹ Procedural Order No. 3 para. 372: at the hearing of the application for orders preventing further enforcement before this court there was some uncertainty as to whether this required merely the lodging of the amounts of the 2016 judgment, or all the judgments.

² The application to the second arbitral Tribunal was based on the proposition that in my first judgment this Court had ‘*encouraged an application to this Tribunal to halt enforcement*’ (see para. 73 of Procedural Order No. 2). As the second arbitral Tribunal correctly suggested this is not what the first judgment said. I said (para. 81) ‘*if the appellant wishes to seek a remedy in respect of the proceeds of any enforcement action on foot of the Bulgarian judgment, he will have to seek it from the relevant arbitral tribunal*’. I find it surprising that the appellant’s advisors chose to characterise this statement as ‘*encouragement*’ to do anything, and difficult to understand how a statement directed to the ‘*proceeds of enforcement*’ could be construed as suggesting a ‘*halt*’ of the enforcement itself.

resources (both of this court and of the Supreme Court) and the fact that applications for leave to appeal can be processed quite quickly, could strongly incline one to grant such stays. However, there are limits to the flexibility the court enjoys to accommodate these pragmatic concerns. There will be cases in which an applicant does not come near establishing the legal requirements for a stay and where this happens, this court must refuse one, inconvenient though a hearing and delivery of a consequent ruling on the issue may be for both this court and the Supreme Court. This is especially the case in circumstances in which the court in determining such an application is discharging a significant obligation under EU law. In the particular circumstances, and for the reasons I have outlined above, it is my view that this court should not lend its hand to any further suspension of the respondent's rights as they have been determined to be, even for a potentially short period of time. To do so would be quite inconsistent with both the *Okanade* test, and the obligations of the court under European law.

27. Two further issues can be addressed more briefly. First, the appellant has requested that the final approved version of the judgment in the second appeal incorporate reference to a procedural order of the second arbitral tribunal to be delivered following the delivery of the judgment. I see no difficulty with doing this, and that reference will appear in the approved judgment when issued.

28. Second, while it is accepted by the parties that the respondent should obtain the costs of both appeals and of the hearings in the High Court, the appellant contended that he should be awarded the costs of two motions that were issued in the second appeal – his motion to admit further evidence and the respondent's motion to strike out the appeal. While the appellant prevailed in each of these motions, neither assisted his position in

the appeal itself and for that reason I believe it appropriate that no order for costs should be made in respect of either motion. It is my provisional view that the costs of the application for a stay follow the outcome, and will unless the appellant files a written and reasoned objection to such an order within seven days of the date of this judgment, also be awarded to the respondent. In the event that the appellant does file such an objection, the court will, having considered same, determine how it intends to proceed to address that objection, and will advise the parties accordingly.