THE HIGH COURT

[2009 No. 1EEO]

BETWEEN

VIVIEN WHITE

PLAINTIFF/RESPONDENT

AND

PETER MELLING

DEFENDANT/APPLICANT

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of January, 2018

1. In the within motion dated 22nd November, 2016, Mr. Melling (hereafter referred to as "the defendant") seeks an order vacating an Order of the High Court (Hedigan J.) made on 18th April, 2016. On the said date, Hedigan J. ordered "pursuant to O. 42, r. 24(a) of the Rules of the Superior Courts that [Ms. White hereafter "the plaintiff"] be at liberty to issue execution against [the defendant] on foot of a judgment entered in her favour against [the defendant] on 7th July, 2006 by the Guildford County Court in England in the sum of GBP £55,680.80 plus a Court Fee in the sum of GBP£35.00 plus costs in the sum of GBP£75.00 and with any further interest becoming due having the Order certified as a European Enforcement Order on 11th August 2008 pursuant to the *European Communities (European Enforcement Order)* Regulations 2005 that the said judgment be enforceable in the State."

2. The defendant seeks to have the Order of Hedigan J. vacated on the basis of alleged failure on the part of the plaintiff to disclose material facts to the Court on 18th April, 2016, including that the said judgment had already been compromised within the State.

3. The background to the Order made by Guildford County Court on 7th July, 2006 is as follows: The plaintiff was successful in a claim brought by her against the defendant and one Russell Kane, to the Employment Tribunal (England and Wales) in 2006 for unfair dismissal. In a judgment dated 4th May, 2006 the London South Employment Tribunal, under reference 2300987/2006, determined that the plaintiff was unfairly dismissed. The Employment Tribunal awarded the plaintiff in total Stg£55,583.34.

4. In its "Reasons for the Tribunal's Judgment", dated 5th May, 2006, the Employment Tribunal found:

- The plaintiff commenced employment with the defendant on 1st September, 2004;
- That the effective date of termination was 28th November, 2005;
- Albeit the plaintiff was told that the respondents (including the defendant) were ceasing to trade in England there was no evidence to substantiate that fact;
- In the absence of such evidence there was no justifiable potentially fair reason for dismissal;
- No consultation preceded the dismissal and no attempt was made by the defendant to follow any statutory procedures. The dismissal was therefore automatically unfair.

5. The Employment Tribunal also found that "the respondents [including the defendant] did not appear at the hearing and were not represented. A letter from them and copied to the Tribunal admits the Claimant's claim".

6. On 7th July, 2006, judgment was entered in the plaintiff's favour in Guildford County Court by way of "Order for recovery of an award". On 11th August, 2008, the Order was certified as a European Enforcement Order as by Guildford County Court.

7. Subsequently, the plaintiff instructed her then solicitors, A & L Goodbody, to register a judgment mortgage over the property of the defendant at 58 Delbrook Manor, Dundrum, Dublin 16. This process was duly completed on 16th February, 2009.

8. On 2nd March, 2016, the plaintiff's solicitor, Mr. Kieran Friel of McHale Muldoon Solicitors, filed a praecipe for *fieri facias* in the Central Office of the High Court. The Central Office refused to permit the plaintiff to issue execution on foot of the Order of 7th July, 2006 on the basis that same was more than six years old. Consequent on this, Mr. Friel applied *ex parte* to the High Court pursuant to O. 42, r. 24(a), following which leave was granted by Hedigan J.

9. In his grounding affidavit to the within application, sworn 21st November, 2016, (and in his later affidavits) the defendant takes issue with the fact that the plaintiff instituted proceeding against him for unfair dismissal. Specifically, he disputes that the plaintiff was ever employed by him. At paras. 6 – 27 of his affidavit of 21st November, 2016, the defendant sets out, *inter alia*, details of his business ventures both in this jurisdiction and in the UK. In particular, reference is made to his interest in Irish Remax Estate Agents via a company Prusmetto Estate Agents Limited trading as Remax Estate Agents- the vehicle used to promote the defendant's interests in the real estate business in this jurisdiction. The defendant's Irish operation ceased in 2006. The defendant avers that Prusmetto Estate Agents Limited was dissolved on 9th November, 2007.

10. The defendant avers that in 2004 he and others were introduced to "jurisdictional franchise holders in the U.K." with a view to purchasing regional Remax franchises in London and the South of England. It is averred that on foot of this the plaintiff came to Dublin in early 2004 to meet with the defendant and others. The purpose of the meeting was the plaintiff's proposed retention as a consultant to assist the defendant's soon to be incorporated company, Remax Properties Plus (U.K.) Limited, to source investors in the UK for the company. According, to the defendant, the plaintiff had experience in real estate in the UK and South Africa and operated a real estate agency in Surrey via Vision Investment Properties Limited, a UK registered company. The defendant avers that the plaintiff's proposed role was "as a retained Consultant" until an assessment could be made as to the viability of the business. The plaintiff was to be paid a retainer fee of Stg£50,000 payable over a twelve month period, with the plaintiff being responsible for her own income tax, VAT and insurance from her retainer. If the business venture proved to be successful then the plaintiff was to be offered a partnership to include an agreed shareholding and directorship. It is averred that following communications between the plaintiff and the defendant in August, 2004, it was agreed that the plaintiff would be retained as a Consultant with a "salary" of Stg£50,000 with commission at 50% "until the £50,000 salary level had been earned by the office and thereafter 70%/30% split which may increase to a larger percentage on [the plaintiffs] side if her numbers justified it."

11. The defendant avers that notwithstanding strenuous efforts made by the Irish operation in Ireland and the plaintiff to secure and attract suitable monetary investors, the defendant's company, Remax Properties Plus (U.K.) Limited never commenced trading. Ultimately, in 2005 a decision was made by the Irish directors of the company to cease operations in London. It is averred that the plaintiff, as the "retained consultant", was a party to that decision. Remax Properties Plus (U.K.) Limited was ultimately dissolved. The defendant goes on to state:

> "I say that since [the plaintiff] was retained as UK based Consultant in September 2004, and as a direct consequence of our inability to secure adequately capitalisation, the [plaintiff] suffered regular delays in the payment of fees and expenses for consultancy services and as a result the [plaintiff] threatened to pursue a claim against the Irish directors of Remax Properties Plus (U.K.) Limited in the UK Employment Tribunal."

12. The plaintiff duly pursued this option.

13. At paras. 28 – 42 of his affidavit, the defendant acknowledges and accepts:

> (a) Receipt of a notice of hearing from the Employment Tribunal dated 10th April, 2006;
>
> (b) That he was aware of the scheduled hearing of the Employment Tribunal on 4th May, 2006;
>
> (c) That the Employment Tribunal delivered judgment and that the said judgment, together with a Certificate of Correction, was received by him; and
>
> (d) That he did not attend, nor was he represented at the hearing.

14. It is also established that on 2nd May, 2006, the plaintiff wrote to defendant advising that the Tribunal hearing would take place but that should she be paid in full her outstanding salary and expenses owed she would withdraw her application. Reference was made to ACAS having approached the defendant to settle the matter out of court but that ACAS had not heard from the defendant.

15. The defendant wrote to the plaintiff on the same date advising that he would not be available to attend the Tribunal on 4th May, 2006. He stated, inter alia, as follows:

> "You were also involved in all aspects of the business model and you personally negotiated with both of us and accepted the position that you would receive a shareholding and salary in the company, provided that we secured the financial backing from investors to capitalise the company. However you were also told and fully understood that if we failed in our attempts to secure the finance then we would reluctantly have to cease our operations in England. This we did and you were informed of our decision.
>
> We do not know what more we can do for you, except to again confirm to you and the Tribunal that we will pay you in full from our own personal resources when we raise the money to do so.
>
> We are sending a copy of this communication to the Tribunal offices for their perusal and we will extend our apologies for taking up their time with an issue that is not in dispute except in so far as the length of time it will take to pay you."

16. The plaintiff responded to this correspondence by email on 2nd May, 2006. On 3rd May, 2006, the defendant wrote "without prejudice" to the plaintiff, stating, *inter alia*:

> "I can only repeat that I am doing my utmost to conclude the equity release I referred to … and I am prepared to give you my solicitors undertaking that you will be paid for the receipt of these funds which will be held in his client account." This letter was copied to the Employment Tribunal.

17. On 20th June, 2006, the plaintiff's legal representatives ("Just Employment") wrote to the defendant enclosing a copy of the Employment Tribunal's Judgment and requesting the discharge of stg£55,583.34. It was stated that if the said sum was not received by 4th July, 2006, enforcement proceedings would be commenced without further reference to the defendant.

18. At paras. 40-41 of his affidavit, the defendant avers to his interaction with the Employment Tribunal subsequent to the receipt of its judgment. In particular, the defendant refers to correspondence to the Tribunal on 23rd June, 2006 wherein he states as follows:

> "We are receipt of the judgment of the Tribunal and we wish to lodge with you our attention to appeal this via our UK solicitor who will represent us."

19. The defendant went on to advise the Tribunal that the plaintiff had been employed Remax Properties Plus (U.K.) Limited and was aware that if the company did not attract sufficient investors it would not be able to trade. He queried why the UK company having been wound up did not justify termination of employment in the circumstances. He also queried as to why he and Mr. Kane should be held personally liable since it was the company that had employed the plaintiff. He stated that "we will pay [the plaintiff] the agreed amount of Stg£31,618.82. I do not believe that we have a legal or statutory obligation to so do."

20. The defendant sought sufficient notice of the appeal date so that he and Mr. Kane could make the appropriate travel arrangements and have sufficient time available to consult with their legal advisors.

21. It appears that the defendant's letter was treated by the Employment Tribunal as an application to review its judgment. On 13th October, 2006, the Employment Tribunal advised as follows:

> "1. The Respondent failed to enter an appearance of the Application and failed to attend the hearing. The case was therefore decided on the available evidence at the time.
>
> 2. The Application for review is out of time and no reason for its lateness nor request for an extension has been made.
>
> 3. The Application is therefore dismissed."

22. No appeal was lodged by the defendant to set aside the Judgment of the Employment Tribunal of 4th May, 2006 or its subsequent refusal of the application for a review.

23. As already referred to, the next step in the plaintiff's proceedings against the defendant was the conversion of the Employment Tribunal's Judgment into an Order of Guildford County Court on 7th July, 2006 and the subsequent grant by Guildford County Court of the European Enforcement Order Certificate.

24. There can be no doubt but that the defendant was aware of the issuing of the European Enforcement Order Certificate given the contents of a letter sent to the defendant by the plaintiff's then solicitors, A&L Goodbody, on 12th July, 2008. The letter reads as follows:

> "We enclose herewith copy European Enforcement Order by way of service on you. Should we fail to receive the sum of £55,791.30 sterling from you within seven days from the date of this letter or alternatively, a reasonable payment proposal, we will have no option to enforce our client's judgment against you without further warning".

25. At para. 41 of his affidavit, the defendant states:

> "On receipt of this correspondence, I requested Mr. Jeremiah Doyle, Solicitor to deal with the matter on my behalf. Unfortunately, I later learned that Mr. Doyle had left the profession without dealing with the matter."

The function and scope of a European Enforcement Order Certificate

26. As set out in *Delaney and McGrath*, Civil Procedure in the Superior Courts" (3rd Ed. Round Hall), "[…] the enforcement of uncontested claims within the EU is governed by Regulation (EC) No. 805/2004 ["the Regulation"]… creating a European Enforcement Order of uncontested claims."

27. The Regulation dispenses with the requirement for any intermediate measures to be taken prior to enforcement in the Member State in which enforcement is sought. Accordingly, there is no need to seek approval of the judgment in the courts of the Member State in which the judgment is sought to be enforced. The Regulation applies to "civil and commercial matters" and applies only to judgments given, court settlements approved or authentic instruments after the entry into force of the Regulation.

28. For the purposes of this Judgment, the relevant provisions of the Regulation are as follows:

> "Article 1
>
> Subject matter
>
> The purpose of this Regulation is to create a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement.
>
> …
>
> Article 3
>
> Enforcement titles to be certified as a European Enforcement Order
>
> 1. This Regulation shall apply to judgments, court settlements and authentic instruments on uncontested claims.
>
> A claim shall be regarded as uncontested if:
>
> (a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or
>
> (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or
>
> (c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or
>
> (d) the debtor has expressly agreed to it in an authentic instrument.
>
> 2. This Regulation shall also apply to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders.
>
> …
>
> Article 6
>
> Requirements for certification as a European Enforcement Order
>
> …
>
> 2. Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.
>
> …
>
> Article 10
>
> Rectification or withdrawal of the European Enforcement Order certificate

1. The European Enforcement Order certificate shall, upon application to the court of origin, be

(a) rectified where, due to a material error, there is a discrepancy between the judgment and the certificate;

(b) withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation.

2. The law of the Member State of origin shall apply to the rectification or withdrawal of the European Enforcement Order certificate.

3. An application for the rectification or withdrawal of a European Enforcement Order certificate may be made using the standard form in Annex VI.

4. No appeal shall lie against the issuing of a European Enforcement Order certificate.

…

Article 19

Minimum standards for review in exceptional cases

1. Further to Articles 13 to 18, a judgment can only be certified as a European Enforcement Order if the debtor is entitled, under the law of the Member State of origin, to apply for a review of the judgment where:

(a) (i) the document instituting the proceedings or an equivalent document or, where applicable, the summons to a court hearing, was served by one of the methods provided for in Article 14; and

(ii) service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part;

or

(b) the debtor was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly.

2. This Article is without prejudice to the possibility for Member States to grant access to a review of the judgment under more generous conditions than those mentioned in paragraph 1.

Article 20

Enforcement procedure

1. Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement.

A judgment certified as a European Enforcement Order shall be enforced under the same conditions as a judgment handed down in the Member State of enforcement.

…

Article 21

Refusal of enforcement

1. Enforcement shall, upon application by the debtor, be refused by the competent court in the Member State of enforcement if the judgment certified as a European Enforcement Order is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties; and

(b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin.

2. Under no circumstances may the judgment or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement.

…

Article 23

Stay or limitation of enforcement

Where the debtor has

- challenged a judgment certified as a European Enforcement Order, including an application for review within the meaning of Article 19, or

- applied for the rectification or withdrawal of a European Enforcement Order certificate in accordance with Article 10, the competent court or authority in the Member State of enforcement may, upon application by the debtor:

(a) limit the enforcement proceedings to protective measures; or

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings.

29. As the aforesaid provisions make clear, there is no jurisdiction in the Member State in which the judgment is sought to be enforced to review the original judgment. Thus, insofar as the case is made in the three affidavits sworn by the defendant in the within application that the determination of the UK Tribunal was wrong because the plaintiff provided incorrect evidence, and that accordingly the Order of Guildford County Court cannot be enforced, that argument cannot succeed before this Court. In order to make such an argument, the defendant was or is obliged, pursuant to the Regulation, to challenge or review the Enforcement Order in the UK courts.

30. Moreover, this is also in accordance with the principle of comity of courts. More particularly, if it is the defendant's case that the European Enforcement Order has ceased to be enforceable or that its enforceability has been suspended or limited, it was open to the defendant, pursuant to Article 6(2) of the Regulation to apply to the court of origin for the requisite certificate. This was not done by the defendant at any relevant time.

31. I should add at this juncture that the Court is satisfied that the claim which was the subject of the Enforcement Order was an uncontested claim for the purpose of the Regulation.

32. Article 21 of the Regulation sets out the grounds for the refusal of enforcement. It is not been suggested in the within application that the provisions of Article 21 apply to the Order of Guildford County Court. Even if such an argument could be made, it would have to be made to a court in the U.K. It is noteworthy, that Article 21(2) provides that under no circumstances may a judgment or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement.

33. There is also no evidence that the defendant sought to review the judgment in the UK pursuant to Article 19. In any event, given the defendant's averments, there is no suggestion that he was not afforded sufficient time to arrange his defence or that he was otherwise prevented by *force majeure* or extraordinary circumstances from defending the claim. Any such assessment, of course, fell to be conducted by the courts in the country of origin, and not by this Court.

34. Equally, there is no evidence of the defendant having sought to challenge the European Enforcement Order in the UK, pursuant to the provisions of Article 10 of the Regulation.

35. Thus, the provisions of Article 23, which provide for a stay or a limitation on enforcement by a court in the country of enforcement, cannot assist the defendant in the absence of any evidence that he embarked on such a challenge or applied for rectification in the country of origin. While such mechanisms are provided for in the Regulation, it is again noteworthy Article 10(4) provides that "no appeal shall lie against the issuing of the European Enforcement Order certificate".

36. In all the circumstances of this case, insofar as the defendant advances on affidavit, or insofar as it might otherwise be suggested, that the substantive matters which gave rise to the Order of Guildford County Court should be reviewed in this application, there is no jurisdiction in this Court to go behind the European Enforcement Order certificate in issue in the proceedings.

37. The principal thrust of the defendant's argument before this Court is that there was a lack of candour on the plaintiff's part when the ex parte application was made to the High Court on 18th April, 2016 pursuant to Order 42 r. 24(a) for leave to execute. It is contended that the plaintiff should have brought certain matters to the attention of the Court.

38. At para. 45 of his affidavit sworn on 21st November, 2016, the defendant alleges that the plaintiff failed to disclose the following:

> "a. The fact that the matter had in fact been resolved through negotiation and a valid and binding Settlement Agreement had been executed between the parties;
>
> b. That there had been an initial substantial payment made to the Respondent on foot of the Settlement Agreement;
>
> c. That the purported [Judgment] of the UK Tribunal had in fact been compromised by the Settlement Agreement; and
>
> d. That the matter was no longer susceptible to enforcement pursuant to a European Enforcement Order and/or pursuant to the European Communities (European Enforcement Order) Regulations 2005 and therefore not as such enforceable in the State."

39. The background to the settlement relied on by the defendant is set out in his affidavit:-

> "I received a letter from Guardian Recovery Limited, a debt recovery company…on or about 19th September, 2012, informing me that that company was handling a debt on behalf of their client, New Leaf Homes [otherwise the plaintiff] in the amount of st£116,896.59
>
> …
>
> I say that I instructed Mr. John O'Donovan of Orpen Franks Solicitors in December 2012 to address this matter with Guardian Recovery Limited on my behalf. I say and believe that Mr. O'Donovan subsequently and in accordance with my instructions negotiated a settlement of the alleged debt and as a consequence thereof any claim arising in respect of a European Enforcement Order made by Guildford County Court on 11th August, 2008 was in fact compromised by a binding settlement agreement entered into on 16th May, 2013.
>
> …
>
> I say that I was shocked to receive a Summons for the Attendance of a Debtor dated 21st April, 2016 and understand that this Summons was issued on foot of a [High Court] Order of the Honourable Mr. Justice Hedigan made on application ex parte on 18th April, 2016.
>
> …

I say that this Summons being prosecuted in the District Court, has been adjourned on three occasions to date

…

I say that as a consequence of the matters aforesaid the purported Decree is said to stand in the amount of €120,636.59 including €65,957.95 due per Decree; Interest in the amount of €52,892.64, and €1,786 Sherriff Fees and Expenses was lodged by Solicitors acting for [the plaintiff] with the Dublin County Sherriff on the 26th July, 2016.

…

I say that Mr. Tom Leonard from the said Dublin County Sherriff's Office presented himself to my wife at my family home at about 1:30pm on the afternoon of 21st October 2016 last and requested her to have me contact him. I say that my wife was not at any time involved in any of the matters concerning the activities of the companies involved, my wife had and has no involvement whatsoever in such matters and was shocked at what is being pursued by [the plaintiff] and is now fearful that her home and possessions may be taken by the Sherriff for the purposes of satisfying the said purported Decree.

…

I say that as a mark of my bona fides in terms of my commitment to the obligations arising under the terms of the settlement, I made a payment of GBP£5,000 to [the plaintiff] by Banker's Draft on 25th October, 2016 last in Dublin District Court

…

I say that as [the plaintiff's] claim has already been compromised by a binding Settlement Agreement entered into on 16th May, 2013, her enforcement proceedings against me were misconceived and wrong. Furthermore, I say and believe and I am so advised that notwithstanding my outstanding debt to [the plaintiff] on foot of the binding Settlement Agreement, [the plaintiff] ought to have sought satisfaction of the Settlement Agreement by way of proceedings seeking specific performance."

40. The letter from Guardian Recovery Limited of 19th September, 2012, referred to by the defendant, reads as follows:-

"Our client: New Leaf Homes

Debt Due: £116,896.59 including debt recovery charges

We wrote to you on 11th September 2012 regarding the making of payment to settle the debt due to New Leaf Homes by you. We are extremely disappointed to note that you have not responded to our letter by making a payment.

If you are unable to settle this sum in full you must contact our collections department urgently…to discuss a suitable payment arrangement.

It is in your interest to settle this debt without delay. Do not continue to ignore these demands for payment as you place yourself at risk of further statutory interest and debt recovery charges being applied and the debt valuing increasing because of these.

Please contact our collections department to make payment by card or direct bank transfer…or alternatively payment may be made by cheque or postal order. All cheques must be payable to Guardian Recovery Limited…"

41. The defendant contends that his then solicitor, Mr. John O'Donovan of Orpen Franks acted on his behalf "in good faith" and an arrangement was duly made.

42. In his affidavit sworn 18th November, 2016, Mr. O'Donovan avers:-

"I say that having spoken with Mr. Mick Scahill of Guardian Recovery Limited in or about May 2013, I learned that his company had been instructed by [the plaintiff] to recover the alleged debt of £116,896.59. Further to several telephone conversations I had with the said Mr. Scahill in the period February to May 2013, I say that I successfully negotiated the terms of a binding Settlement Agreement of [the plaintiff's] claim. Moreover, I say that I wrote to Mr. Scahill by Registered Post on 16th May 2013 recording the terms of the revised Settlement Agreement. Specifically, I say that the revised Settlement Terms were that:

a. [The defendant] would make an immediate payment of st£10,000. A cheque for that amount which had been made payable to Orpen Franks on behalf of [the defendant] would be enclosed, endorsed in Guardian Recovery Limited's favour along with a separate letter authorising the encashment of that cheque by Guardian Recovery Limited;

b. A further payment of st£20,000 would be made on or before 31st December, 2013;

c. Provided [the defendant's] circumstances had not materially improved within the next 12 months, this total of st£30,000 [would] be accepted by [the plaintiff] in full and final settlement of all claims against [the defendant] and that [the plaintiff] would take such steps as were necessary to release the judgment mortgage which she had registered against [the defendant's] property 58 Dellbrook Manor, Dundrum, Dublin 16."

43. In her replying affidavit of 9th December, 2016, the plaintiff denies that any settlement was ever entered into between herself and the defendant and she describes the correspondence exhibited by Mr. O'Donovan "as a series of unilateral statements of terms, to which no reply or acceptance is exhibited".

44. The plaintiff also avers:-

"Notwithstanding the fact that there was no agreement to the purported terms of settlement and that the said terms lack

certainty, I say and believe that at no point has the Defendant complied with the express terms that it claims constitute the said Agreement. In circumstances where consideration has not been provided, the purported Settlement Agreement is no way binding on your Deponent."

45. In her third replying affidavit sworn 18th July, 2017, the plaintiff exhibits correspondence which passed between herself and Mr. O'Donovan on 4th July, 2013.

46. On that date, Mr. O'Donovan wrote to the plaintiff in the following terms:

> "The content of the letter you received from Guardian Recovery Limited is correct. An associate of Mr. Melling's provided us on his behalf with a sterling cheque made payable to our firm for £10,000 sterling. We in turn endorsed that cheque in favour of Guardian Recovery Limited. However we understand that it has not been possible for them to encash the cheque and they are now returning it to us whereupon it is our intention to lodge it to our euro account and then ultimately to buy a sterling bank draft.
>
> While I note your instructions as to making any further payments directly to you, for our part we have been dealing with Guardian Recovery who we understand acted on your behalf and had authority to do so. We have entered into a settlement arrangement with them and we do not wish do anything which would jeopardise this arrangement.
>
> …
>
> As far as we are concerned Guardian were acting on your behalf, had authority to enter into the arrangements we agreed and are only concern is the protection of our own client's interests to ensure that the money now paid is in accordance with the settlement terms agreed and subject to the final payment being made later this year in full and final settlement of our client's liability to you."

47. The plaintiff's response on the same date was in the following terms:

> "…I must make it quite clear that I have not heard of any settlement agreement made on my behalf. Nothing has been agreed with me and therefore no settlement agreement stands as far as I am concerned and nothing is in writing from [Guardian Recovery Limited] to this effect so unless it has something to do with the fees they are claiming it will be charging etc, I do not know what is going on.
>
> So I would be very careful to stand on anything you have agreed with them if it is without my express written agreement.
>
> Their contract has expired and unless it is agreed in writing that it continues and unless it is agreed that any monies are to be paid direct to me, I will be reporting them to the Office of Fair Trading.
>
> …
>
> I insist that you pay me direct and leave me with any dispute that I may have with an instructed body. I will not allow [Guardian Recovery Limited] to handle my money in the light of their company reputation having changed names and gone in receivership after they stopped trading via Clear Debt Solutions.
>
> I have the right to change Debt Collection Companies and may well be doing so if this agreement is not entered into transparently and ethically.
>
> I am the claimant and they have no rights to my money. They only have the right to Collect it subject to certain conditions and my condition is that the monies paid and any settlement is agreed with me first.
>
> Should you ignore this instruction and you pay them, and they go insolvent and I do not receive my money from Peter Melling, then my original Tribunal Award and European Enforcement Order still stands, as I will not accept any settlement agreed with any third party done without my express permission, consent and approval in writing.
>
> In my opinion that would be fair. They have no authority over me to make a settlement without my consent."

48. It is common case that the cheque for stg£10,000, being a third party cheque, was returned to Mr. O'Donovan by Guardian Recovery Limited some time prior to 16th May, 2013.

49. On 27th September, 2013, Mr. O'Donovan wrote to Guardian Recovery Limited advising that he had now cashed the cheque for stg£10,000 which had been returned and that a bank draft had been drawn in favour of Guardian Recovery Limited. He advised that because of conversion rates, the bank draft was for an amount of stg£9,737 which was enclosed with the letter. Guardian Recovery Limited were asked to note that the enclosed draft was being sent in accordance with the terms of settlement set out in the letter of 16th May, 2013, "on the understanding that you have authority to accept same on behalf of [the plaintiff]".

50. On 10th November, 2015, Sinclair Goldberg Price Limited wrote to the defendant on behalf of the plaintiff with reference to the Judgment obtained on 7th July, 2006 and the subsequent charge which had been placed on the defendant's property. The defendant was advised that in default of payment of the outstanding amount (stg£98,426.47), there would be an application for an order for sale of the defendant's property.

51. In response to this letter, on 17th November, 2015, Orpen Franks wrote to Sinclair Goldberg Price Limited advising that a full and final settlement agreement had been reached with Guardian Recovery Limited in May 2013, on foot of which a payment of stg£10,000 had been made by the defendant and accepted by the plaintiff. It was stated that the further payment of £20,000, as had been agreed, had not been paid because the plaintiff withdrew instructions from Guardian Recovery Limited and that since that time nothing further had been heard from the plaintiff or Guardian Recovery Limited. The writer advised:-

> "We are satisfied that a binding Settlement Agreement was reached with your client, the terms of which our client is still prepared to implement."

52. Sinclair Goldberg Price Limited responded on 19th November, 2015, stating:-

> "Guardian has advised that our client agreed to a settlement offer of £50,000; this agreement was set in place on 20.03.2013 for an initial payment of £10,000 within fourteen days, followed by a second payment of £20,000 to be made by the end of June that year and a final payment of £20,000 within 12 months.
>
> Your client failed to adhere to the aforementioned arrangement and only paid after both Guardian and yourselves pursued Mr. Melling for said payment. You confirmed to Guardian Recovery that Mr. Melling would make the first initial payment on 16.04.13; this payment was not made until 07.10.13 when due to conversion rates our client received £9,737.
>
> Your client breached this arrangement and this offer is now off the table. Your client Mr. Melling is required to make payment of £88,000 forthwith; we are instructed to discuss and negotiate an acceptable instalment agreement. The balance is required in full and is [non] negotiable."

53. Mr. O'Donovan responded on 24th November, 2015, advising that it was correct that there had been an initial agreement on 20th March, 2013 but that Sinclair's recollection of the agreed terms was incorrect. After citing the contents of the letter of 16th May, 2013 to Guardian Recovery Limited, Mr. O'Donovan went on to advise:-

> "The sum of £10,000 was paid and accepted by Guardian Recovery Limited/your client on foot of those agreed terms.
>
> The fact that the further £20,000 not paid by our client by 31st December 2013 was entirely as a result of issues which arose between your client and Guardian Recovery Limited.
>
> We are quite satisfied that the terms of our letter of 16th May 2013 constitute a binding settlement between the parties on foot of which your client accepted the first payment of £10,000.00.
>
> It is surprising to say the least that two years have now elapsed without further contact from your client on this matter. However in the circumstances our client is still prepared to implement the terms of the settlement and will pay a further £20,000 sterling on foot thereof."

54. Sinclair Goldberg Price Limited responded on 1st December, 2015, advising, *inter alia*:-

> "As you correctly state, our client had previously instructed Guardian Recovery Limited but whilst negotiations were taking place with your client she withdrew her instructions as she was not satisfied the level of service provided. In any event, whether or not she had accepted a settlement figure from your client is irrelevant since no payment was made in accordance with the terms agreed with Guardian. We are in receipt of the case notes relating to this matter and these confirm that an initial payment of £10,000.00 was offered to be paid within 14 days of 20 March 2013, followed by a second payment of £20,000.00 to be made by the end of June 2013 and the remaining balance of £20,000 to be paid within 12 months. Regardless-and whilst your client failed to adhere to these payments-our client at no point agreed to a settlement figure of £50, 000 and there is no documentation to suggest otherwise."

55. Following service on the defendant of the Summons for Attendance of a Debtor, on 9th June, 2016, Orpren Franks wrote to the plaintiff's solicitors acknowledging receipt of the summons and advising that the defendant was currently unable to deal with the matter for medical reasons. The letter went on to state:

> "However, our client acknowledges that the within matters will have to be dealt with so is requesting a one month adjournment to allow him to prepare for same. In that regard we understand that Banks Bentley & Cross, Accountants and Banking consultants, on behalf of Mr. Melling have already written to you and advised that they are instructed to prepare a statement of affairs for Mr. Melling."

56. In his second replying affidavit sworn 31st January, 2017, the defendant maintains his position that a concluded agreement had been entered into. He states:

> "I say and believe that it is fact this Honourable Court was not required to recognise a [Judgment] when the matter had been settled, and part performed, and also where [the plaintiff] has failed to exercise whatever rights may exist at this remove, in circumstances where [the plaintiff] appears to recognise that she may be in a position to seek whatever remedy is deemed appropriate in the United Kingdom, and this is not a contest on jurisdiction rather whether or not this Honourable Court will grant Liberty to [the plaintiff]… to enforce a [Judgment] in this jurisdiction which is spent in that it has been compromised and which in any event is suspect and might be stated to have been obtained through misrepresentation of specific facts to the initial Tribunal and/or as a result of a reckless disregard for the facts or facts presented as alternate facts as to the truth always intended to unjustly enrich [the plaintiff].
>
> …
>
> Furthermore, on in the alternative, I say and believe that in any event the matter had been compromised and settled, and I say that in any event there was no requirement on my part, your Deponent herein, to have the said European Enforcement Order either rectified or withdrawn as alleged by [the plaintiff]."

The parties' submissions

57. On the defendant's behalf, it is submitted that the plaintiff's failure when making the *ex parte* application on 18th April, 2016 to advise the High Court of either the settlement or the payments made on foot of same deprived the Court of the opportunity of exercising its discretion having regard to material facts. In emphasising the necessity for full and fair disclosure, counsel relies, *inter alia*, on the *dictum* of McDermott J. in *Albaniabeg Ambient Sh.p.k. v. Enel S.p.A.* [2016] IEHC 139 who quoted Vaughan Farwell L.J. in *The Hagen* [1908–10] All ER Rep 21, at p.189:

> *"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."*

58. Counsel also cites *Bambrick v. Cobley* [2005] IEHC 43 where Clarke J. opines on the requirement for candour in the following terms:

"Lack of candour:

It is said that the plaintiff inappropriately failed to disclose in the grounding affidavit (upon which the court was moved to grant the interim injunction) the fact that there had been detailed discussions (as evidenced in the correspondence referred to earlier in the course of this judgment) concerning the terms upon which monies might be retained to meet the possible claim.

…

The Law.

I n Re: John Horgan Livestock Limited [1995] 2 I.R. 411 at 416 and 418 Hamilton C.J. in the Supreme Court approved of the criteria adopted by Murphy J. in the High Court in that case which in turn were derived from the criteria set out by Lord Denning in Third Chandris Shipping Corporation -v -Unimarine SA [1979] 2 All ER 972 at 984. The relevant criteria are as follows:-

> *'i. The plaintiff should make full and frank disclosure of all material matters in his knowledge which are material for the judge to know.*
>
> *ii. The plaintiff should give particulars of his claim against the defendant stating the grounds of his claim and the amount thereof and fairly stating the points to be made against it by the defendant.*
>
> *iii The plaintiff should give some grounds for believing that the defendant had assets within the jurisdiction. The existence of a bank account is normally sufficient.*
>
> *iv The plaintiff should give some grounds for believing that there is a risk of the assets being removed or dissipated.*
>
> *v The plaintiff must give an undertaking in damages in case he fails'*

…

Lack of Candour

In Tate Access Floors Inc. -v- Boswell [1990] 3 All ER 303 Sir. Nicholas Brown-Wilkinson V-C identified full and frank disclosure as being 'the golden rule' when he said:-

> *'No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the ex parte order and may, to mark its displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief.'*

…

It therefore seems clear that there is a clear obligation on a plaintiff moving for a mareva type injunction to make full disclosure to the court of all matters relevant to the exercise of the courts discretion. Two questions therefore arise:-

(a) Did the plaintiff in this case fail to make appropriate disclosure; and

(b) If he did so fail what consequences should flow."

59. Counsel contends that there was an obligation on the plaintiff in the *ex parte* application to set out the points (namely the settlement) which would militate against leave to execute being granted. Moreover, as provided for in Article 20 of the Regulation, "the enforcement procedures shall be governed by the law of the Member State of enforcement". It is submitted that the relevant law is that laid down Clarke J. in *Bambrick* as to the requirement for candour. In the instant case, the absence of candour meant that Hedigan J. had no knowledge of disputed facts. Therefore, he was unable to exercise any discretion.

60. It is submitted that it is for this Court to decide one whether the plaintiff failed to make appropriate disclosure on 18th April, 2016. The defendant contends that if that question is decided in the affirmative, the Order of 18th April, 2016 should be vacated. Whether or not the plaintiff wishes to revisit the matter at a later stage is a matter for the plaintiff. Counsel also submits that the Court must decide what consequences should follow if there is found to have been a lack of candour on the part of the plaintiff.

61. The plaintiff contends, contrary to the defendant's arguments, that the application on 18th April, 2016 did not involve the exercise of any discretion since what was involved was the mere seeking of liberty to execute a European Enforcement Order which had already been made. It is submitted that such an application does not require the Court to delve into the merits of the matter or the extent to which the debt has been satisfied. It is contended that these matters fall to be adjudicated in the District Court in the context of the execution of the Judgment by way of an application for instalment orders, as is currently before the District Court. Counsel stresses that if the Enforcement Order had been made within six years of the plaintiff's attempt to execute the Judgment in 2016 no court application would have been necessary.

62. It is the plaintiff's further contention that the defendant has not established the relevant criteria for a concluded contract as alleged. In the first instance, there is no dispute capable of being compromised given that the European Enforcement Order issued in 2008. Payment of a debt does not constitute evidence of a settlement. Secondly, contrary to the defendant's contention, the contents of the letter of 16th May, 2013 cannot constitute settlement terms.

63. Furthermore, insofar as the letter can be categorised as an offer, it is neither clear nor unequivocal given that the plaintiff's

acceptance is conditional on what might happen regarding the defendant's circumstances between May, 2013 and April, 2014. At best therefore, the defendant's offer was illusory, vague and incomplete.

64. It is further contended that in as much as the defendant relies on the contents of the letter of 16th May, 2013 as constituting an agreement, same does not in any event satisfy the Statute of Frauds which requires a contract which is to be executed after a year to be in writing and signed by the party charged thereunder.

65. The plaintiff also makes the case that even if Guardian Recovery Limited had authority to negotiate a settlement on the plaintiff's behalf (which is denied), part payment of a liquidated debt does not bind the creditor as a matter of law. Authority for this proposition is found in the rule in *Pinnels* case [1602] 560 Rep 117A as upheld in *Foakes v. Beer* [1884]UKHL 1, and followed in this jurisdiction in *Bergin v. Farrell* (High Court, Carroll J. unreported 17th December, 1999) and *Truck & Machinery Sales Ltd V Marubeni Komatsu Ltd* [1996] 1 IR 12.

66. The plaintiff further contends that, aside from the fact that the Court does not have jurisdiction to go behind the European Enforcement Order, if there was a suggestion the plaintiff had in some way misled the Court on 18th April, 2016 it would be expected that Orpen Franks Solicitors, who acted for the defendant in 2013, would have made reference in their letter of 9th June, 2016 to the alleged binding settlement agreement. It is submitted that the issue of an alleged agreement is only raised by the defendant's present solicitors in correspondence in August/September, 2016.

67. In response to the plaintiff's submissions, counsel for the defendant contends that even if the issue of the concluded settlement is in doubt, or not agreed, it remains the position that the matter of the settlement, even if disputed, was not disclosed to the High Court on 18th April, 2016. It is the defendant's submission that had Hedigan J. been apprised of the settlement, irrespective of its merits, he would have adjudicated on the issue of whether a settlement had in fact been arrived at.

Considerations

68. Order 42B of RSC, which governs European Enforcement orders states, at r.2, that Orders 42, 45 and 46 of the Rules "insofar as they apply to a domestic judgment, shall apply to a judgment which has been certified as a European Enforcement Order in the Member State of origin..." and "any reference to a 'judgment' shall, where the context so admits, include a reference to such a judgment which has been so certified." Order 42, r.1 provides:

> "Where any person is by any judgment directed to pay any money….it shall not be necessary to make any demand thereof, but the person so directed shall be bound to obey such judgment or order upon being duly served with the same without demand."

69. Order 42, r.3 provides that a judgment for the recovery or payment of money may be enforced by "execution order", which, pursuant to Order 42, r. 8, includes an order of "*fieri facias*", as was sought in the present case on foot of the "Praecipe for *Fieri Facias*" dated 2nd March, 2016 and lodged in the Central Office for issuing by the appropriate officer.

70. Order 42, r. 10 provides that the necessary proofs for the purposes of execution are the original or an attested copy of the judgment or order for the payment of money, together with "a certificate signed by the party or his solicitor, containing such sum as the party demands to be due to him after all just and equitable deductions", for the purpose of the said sum being entered in the body of the execution order " as the sum to be levied on foot of the sum adjudged by the judgment or order".

71. It is common case that the application was refused by the Central Office on account of the expiry of six years from the date of the relevant judgment or order, which in this case was 7th July, 2006.

72. Accordingly, pursuant to Order 42, r. 24(a), the plaintiff applied *ex parte* for leave to issue execution. Order 42, r.24 provides that "[t]he court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried…".

73. While it is certainly the case that executing a duly certified European Enforcement order, or indeed any domestic order, for the payment of monies within six years of the date of the underlying court order is effectively an administrative matter, execution where a period of six years has elapsed requires leave of the Court. It is clear from the provisions of Order 42, r. 24 that the Court retains a discretion as to whether to grant leave *ex parte* or to direct the trial of an issue or question affecting the rights of the parties.

74. In his affidavit grounding the *ex parte* application, sworn 15th April, 2016, Mr. Friel exhibited the Original European Enforcement Order, a certified copy of the UK Employment Tribunal Judgment, a certified copy of the Order of Guildford County Court of 7th July, 2006, the Praecipe for Fieri Facias, the intended Fieri Facias, a certificate from the Bank of Ireland as to the euro equivalent of the sums set out in the Order of 7th July, 2006 and the letter from the Property Registration Office confirming the registration of a Judgment Mortgage on the defendant's property.

Mr. Friel, went on to aver:

> "I say and believe and am instructed that to date [the defendant] has failed to discharge the entirety of the debt due to [the plaintiff]. In light of the foregoing, I say and believe that [the plaintiff] is entitled to issue execution against [the defendant] on foot of the said order.
>
> …
>
> I say and believe that the said Order of Guildford County Court remains valid and enforceable and has not been appealed or satisfied. Furthermore, I say and believe the said Order has been declared to be enforceable in this jurisdiction pursuant to European Communities (European Enforcement Order) Regulations 2005. In light of the foregoing, I say and believe there is no reason why the Applicant should not be entitled to issue execution on foot of the said Order.
>
> In the circumstances, I pray this Honourable Court for an Order pursuant to Order 42, r. 24(a) of the Rules of the Superior Courts 1986 granting leave to the Applicant to issue execution against the respondent.
>
> In the alternative, if the Court feels that there is a necessity for the Respondent Debtor to be put on Notice of the present Motion, I pray this Honourable Court for an Order providing for directions regarding the further prosecution of the action."

75. The question which arises in this application is whether the averment in Mr. Friel's affidavit that the defendant had not discharged the 2006 Order in its entirety was misleading of the Court in circumstances where the defendant contends that the matter was compromised post the Order, namely on 16th May, 2013.

76. In all the circumstances of this case, I am not satisfied that it was incumbent on the plaintiff to advise the Court that the matter had been resolved through negotiation and that a valid and binding settlement agreement had been executed between the parties, as contended for by the defendant. The evidence relied on by the defendant in this regard does not persuade the Court to find that there was an obligation on the plaintiff to advise the Court that the matter had been settled.

77. From the contents of Sinclair Goldberg Price Limited's letter dated 19th November, 2015 to Mr. O' Donovan, and his response of 24th November, 2015, the Court is prepared to find that there was an arrangement put in place on 20th March, 2013 between Guardian Recovery Limited and the defendant whereby the debt due to the plaintiff would be discharged by the payment of stg£10,000 by the defendant within fourteen days of 20th March, 2013, together with a further payment of stg£20,000 before 30th June, 2013 with a further payment of stg£20,000 within the following twelve months if the defendant's circumstances had "materially changed", albeit it is not stated how this material change was to be determined so as to render the defendant liable for this second stg£20,000 sum. In any event, as acknowledged by Mr. O'Donovan, the defendant failed to adhere to this agreement. It is contended however, that the terms of the settlement were re-negotiated culminating in a concluded settlement of 16th May, 2013.

78. Insofar as the defendant relies on the contents of the letter of 16th May, 2013 as evidencing a revised binding settlement, I agree with the plaintiff that, at it height, it constituted an offer made on behalf of the defendant. Mr. O'Donovan's letter of 16th May, 2013, and indeed the arrangement arrived at on 20th March, 2013, was in response to the letter from Guardian Recovery Limited dated 18th September, 2012 regarding the making of payment to "settle" the debt due to the plaintiff by the defendant. The 16th May, 2013 letter unequivocally requests Guardian Recovery Limited to "confirm" acceptance of the settlement terms outlined in the said letter. In the first instance, there is no evidence of a clear or unequivocal acceptance by the plaintiff (or any solicitor acting on her behalf) of the terms set out in the letter of 16th May, 2013. More importantly, the defendant has not exhibited any correspondence from Guardian Recovery Limited (irrespective of the issue of the express or implied authority on the part of that entity to negotiate on behalf of the plaintiff as opposed to the recovery of monies due) to evidence Guardian Recovery Limited's acceptance of what was being proffered on behalf of the defendant in the letter of 16th May, 2013.

Furthermore, even if Mr. O'Donovan concluded erroneously or otherwise that Guardian Recovery Limited was in a position to negotiate and/or accept the proposed revised settlement terms on the plaintiff's behalf, he could not have been of that mind after he received the plaintiff's letter of 4th July, 2013.

79. Mr. O'Donovan was in receipt of the plaintiff's letter before the draft of stg £9,737 was forwarded by him to Guardian Recovery Limited on 27th September, 2013. While Mr. O'Donovan duly forwarded the draft "on the understanding that [Guardian Recovery Limited] had authority to accept same on behalf of [the plaintiff]", this was in the teeth of the plaintiff having advised him to the contrary on 4th July, 2013. Moreover, I am satisfied that the mere fact of a draft for stg£9737 having been paid to the plaintiff in not conclusive evidence of a binding agreement in circumstances where the defendant was obligated to the plaintiff on foot of the Order of Guildford County Court.

80. Accordingly, for that reason, and for the other reasons set out above, the Court is not satisfied to find that Mr. O'Donovan's actions of 27th September, 2013 were in furtherance of a concluded agreement. In any event, and aside altogether from the conditionality with which the alleged revised settlement was imbued, payment of the balance of stg£20,000 by 31st December, 2013 (the second tranche of the alleged revised settlement) was never made by the defendant. I note that Mr. O'Donovan in his letter of 15th November, 2015 to Sinclair Goldberg Price Limited appears to attribute the non-payment of this sum to the fact that the plaintiff "withdrew instructions from Guardian Recovery Limited" and he states that he and the defendant had heard nothing further from the plaintiff. It seems to me however given that Mr. O'Donovan was in communication with the plaintiff there would have been no reason why he could not have contacted her at the time of the due date for payment of the second tranche, on foot of the settlement agreement contended for by the defendant.

81. I agree with counsel for the plaintiff that it is of some significance that no reference is made to any alleged revised settlement in Mr. O'Donovan's letter of 9th June, 2016 to the plaintiff's solicitors. Moreover, this appears to bear out the plaintiff's letter to Mr. O'Donovan of 4th July, 2013 refuting any entitlement on Guardian Recovery Limited's part to negotiate on her behalf and requesting that any monies paid or any settlement is agreed with her in advance. The omission of any reference in the 9th June, 2016 letter (which is written by the person who negotiated the alleged agreement on behalf of the defendant) to a concluded agreement is significant in light of the defendant's allegation, namely that at the time of *ex parte* application the plaintiff knew that the defendant believed that they had a concluded settlement and that she concealed this matter from the High Court. I also note that that in the letter of 9th June, 2016, Mr. O'Donovan acknowledges that the matters "would have to be dealt with", without any reference to the matter having been compromised, and merely requests a one month adjournment of the District Court proceedings to prepare a statement of affairs. This is approach that is also adopted by the defendant's accountants in their letter of 7th June, 2016 to the plaintiff's solicitor.

82. While the Court is not prepared to find that there was a concluded agreement of which the High Court should have been made aware on 18th April, 2016 I have some sympathy for the defendant's contention that the factual matrix post the certifying of the European Enforcement Order should have been more comprehensively set out in the affidavit grounding the *ex parte* application. In particular, I note that no reference is made to the fact that payment of stg£9737 was effected in September, 2013, albeit I note Mr. Friel's averment that he was instructed that the entirety of the debt was outstanding. It would appear therefore that Mr. Friel was not aware of this payment. While I note that Mr. Friel left it open to the Court to put the defendant on notice of the application, in fact, from the documents exhibited in Mr. Friel's affidavit, there was nothing to alert the Court to the dealings which occurred post 11th August, 2008 and which might (and I emphasise might) have persuaded the learned Hedigan J. to direct that the defendant be put on notice of the application for leave to execute so that the issues which the defendant now raises in the within application could have been aired. However, the reality of the situation is that the defendant's issues have now been litigated in the within application and this Court has not found the existence of a binding settlement such as would warrant the Court not granting leave to issue execution of the European Enforcement Order.

83. In all the circumstances therefore the Court declines to vacate the Order of the High Court of 18th April, 2016.