

THE HIGH COURT

[2020 No. 6141P.]

BETWEEN

JOE DONOVAN

PLAINTIFF

AND

OCM EMRU DEBT CO DAC

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 2nd day of October, 2020

1. In 2006 the plaintiff, Mr. Joe Donovan, bought a villa in Marbella called *Calle Wagner* for about €3 million. The purchase price was paid with money borrowed from Anglo Irish Bank Corporation plc ("*Anglo*"). Shortly before the purchase, Mr. Donovan gave a general power of attorney to his Spanish lawyer, Don Carlos Martín Granados. Mr. Donovan's ownership of the property was duly registered in the Land Registry of Marbella, as was a form of mortgage in favour of Anglo dated 15th December, 2009.
2. Shortly after 28th January, 2018 Mr. Donovan received a letter of that date from the defendant, OCM EMRU DEBT CO DAC ("*OCM*"), an Irish registered company with an address at Merrion Square, Dublin. OCM referred to the mortgage of 15th December, 2009 which had, it was said, been modified on 13th August, 2010 by means of a public deed. Anglo Irish Bank Corporation plc, it was said, had changed its name first to Anglo Irish Bank Corporation Limited and then to Irish Bank Resolution Company Limited which, it was said, had been put into special liquidation on 7th February, 2013. The mortgage loan, it was said, had been transferred by Irish Bank Resolution Company (In Special Liquidation) to National Asset Loan Management Limited on 3rd December, 2015, and, on 12th July, 2016, by National Asset Loan Management Limited to OCM. OCM asserted that the balance outstanding on the mortgage loan as of 15th January, 2018 was €3,557,358.17. Invoking the Spanish Mortgage Law (*Legislación Hipotecaria*) and the Spanish Civil Procedural Act (*Ley de Enjuiciamiento Civil*), OCM demanded payment of the full amount within seven days, failing which, it was said, foreclosure proceedings would be initiated without further notice or requirement in accordance with the provisions of section 517 *et seq.* of the Spanish Civil Procedure Act.
3. On 5th April, 2018, OCM commenced proceedings for mortgage foreclosure in the First Instance Court of Marbella. The documents were duly served on Mr. Donovan at his address in Cork and he instructed a Spanish lawyer, Don Antonio Flores, to contest the proceedings. Mr. Flores entered an appearance on behalf of Mr. Donovan but did not contest the proceedings. It is now said that Mr. Flores omitted to file a piece of procedural paperwork within the time allowed by the Spanish civil procedure.
4. In the meantime, Mr. Donovan commenced criminal proceedings in Spain against some of the directors of Irish Bank Resolution Corporation Limited and his former Spanish lawyers who had signed the form of mortgage of 15th December, 2009. Mr. Donovan's complaint was that his former Spanish lawyers had exceeded their authority on the ground that the power of attorney, although on its face a general power of attorney, was limited to

completing the loan documentation and the purchase of the property and did not authorise the execution of the mortgage, and that his signature had been forged on a later document purporting to confirm the authority of the attorney to sign the mortgage.

5. Mr. O'Donovan, by his Spanish lawyers, applied to the Spanish courts to stay the civil proceedings pending the outcome of the criminal proceedings. It is not useful to go into the detail of the various applications made to the Spanish courts but eventually, on 16th July, 2020 the Spanish court confirmed an auction decree which had been made in respect of the property as final. Mr. Donovan's advice from his Spanish lawyer – and the premise of these proceedings – is that the Spanish court order is final and cannot be overturned.
6. These proceedings were commenced by plenary summons issued on 2nd September, 2020 by which Mr. Donovan claims:-
 - "1. *An order restraining the defendant, its servants or agents, from selling, conducting the sale of, taking any steps in relation to the sale of, or otherwise disposing of the plaintiff's property at Calle Wagner, 120 Sierra Blanca, Marbella, Malaga, Spain.*
 2. *A declaration that any security purportedly held by the defendant in respect of the plaintiff's property at Calle Wagner, 120 Sierra Blanca, Marbella, Malaga, Spain is void and/or invalid.*
 3. *Damages for negligence, breach of duty (including statutory duty) and breach of contract.*
 4. *Damages in lieu of equitable relief.*
 5. *Such further and other order as to this Honourable Court shall seem proper.*
 6. *Costs."*
7. On the same day application was made for short service of a motion for an interlocutory injunction in the terms of para. 1 of the plenary summons and by leave of the court a motion was issued originally returnable for 10th September, 2020. The stated urgency for the motion was that the sale of the property was imminent. The case which Mr. Donovan would make is set out in his grounding affidavit. It is, variously, that the authority conferred by the 2006 power of attorney was limited to the purchase of the property, and did not extend to the creation of any mortgage or charge; that no mortgage was ever executed in favour of Anglo; that the loan facility in connection with the purchase of the property was released or redeemed in 2007 by further borrowings by a company associated with Mr. Donovan; that the power of attorney had been revoked; and that Mr. Donovan's purported signature dated 2nd December, 2009 on a fax sent to him by Mr. Granados in September, 2009 seeking confirmation of authority to execute the mortgage had been forged.

8. OCM did not engage with the substance of Mr. Donovan's motion but countered with a motion issued on 11th September, 2020 originally returnable for the following Monday, 17th September, 2020 for an order dismissing or staying the proceedings on the grounds that under Regulation (EU) 1215/2012 (*"the Brussels I Regulation (recast)"*) the court has no jurisdiction, alternatively should decline jurisdiction, to deal with these proceedings.
9. The affidavit of Mr. Eoin Donnellan grounding OCM's application sets out the history of the Spanish proceedings, civil and criminal, and, by reference to legal advice, what Mr. James Doherty S.C. on the hearing of the motion characterised as a cascade of reasons in support of the proposition that the court has no jurisdiction to deal with the proceedings, or should decline jurisdiction.
10. It is said, firstly, that in proceedings which have as their object rights in rem in immovable property, Article 24 of the Brussels I Regulation (recast) confers exclusive jurisdiction on the courts of the Member State in which the property is situated. Secondly, it is said that under Article 29 the court should of its own motion stay these proceedings until the jurisdiction of the courts first seised had been established, or under Article 30 should decline jurisdiction in favour of the Spanish courts. Thirdly, it is said, the Spanish courts have already determined the validity of OCM's security over the property and its entitlement to an order for sale and the court is bound by Chapter III of the Brussels I Regulation (recast) to recognise the order of the Spanish court without any special procedure. Fourthly, it is said, where the jurisdiction of the court first seised has been established, Article 29(3) requires any other court to decline jurisdiction in favour of that court. Fifthly, it is said, the security document on which OCM relied expressly provides that the Spanish courts shall have exclusive jurisdiction, and that in any event Spanish law provides for the exclusive jurisdiction of the Spanish courts to deal with disputes arising out of or connected with property in Spain.
11. Mr. Donovan, in a short replying affidavit, makes a number of points. He first of all criticised Mr. Donnellan's affidavit as comprising largely hearsay and legal argument but there is no issue as to the fact and outcome of the Spanish proceedings (which is dealt with in the affidavit sworn by Mr. Donovan to ground his motion) and much of what Mr. Donovan has to say in his second affidavit is also legal argument. It is not objectionable for either Mr. Donnellan or Mr. Donovan to shortly set out their respective positions based on the legal advice which they have taken.
12. Mr. Donovan suggests that motion only goes to whether the court can deal with his injunction application and that the Spanish proceedings can have no effect on his claim against the defendant for damages. He takes issue with what he says is an assumption, on which much of Mr. Donnellan's affidavit is based, that the jurisdiction of the Spanish courts derived from the mortgage document. That assumption or argument, he says, deliberately ignores the fact that he never signed the mortgage. He cannot, he says, be bound by a jurisdiction clause in a mortgage which was not executed by him or validly executed on his behalf. Moreover, he says, security over the Spanish property for his "*purported indebtedness*" was released in 2007 by Anglo by an agreement made in

Ireland, and if that is disputed, it can be resolved by an Irish court. Acknowledging that these are properly matters for legal submission, Mr. Donovan asserts that the object and nature of the proceedings is fundamentally *in personam*, and that the subject matter and objectives of these proceedings and the Spanish proceedings are fundamentally different, such that there is no risk of conflicting judgments. He does not attempt to identify what that alleged fundamental difference is.

13. The written submissions of Mr. James Doherty S.C. and Mr. John Lavelle, filed in support of OCM's motion, replicated the cascade through the Brussels I Regulation (recast) but in his oral presentation Mr. Doherty started at the end. There is, he submitted, an order of a Spanish court, acknowledged by both sides to be a final order, for the sale by public auction of *Villa Wagner*.

14. Recital (26) to the Brussels I Regulation (recast) provides that:-

"Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed."

15. Article 36 of the Brussels I Regulation (recast) provides that:-

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

16. Article 52 prohibits the court from reviewing the substance of the judgment of the Spanish court.

"Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed."

17. Mr. Donnellan, at para. 7 of his affidavit grounding this application, summarised or synopsised Mr. Donovan's principal claim as being for an order declaring void or invalid OCM's security over the property. Mr. Donovan, at para. 8 of his affidavit in reply, contests this, suggesting that the principal purpose of the proceedings is to protect his unencumbered interest in the Spanish property. I cannot see any difference. The object of the Spanish proceedings was to have the property sold. The object of the Irish proceedings is to prevent the sale. A declaration in the terms sought that the mortgage held by OCM over *Villa Wagner* – with or without an injunction restraining OCM from selling it – would be diametrically opposed to the judgment and order of the Spanish court that the property is to be sold.

18. Mr. Hayden argues that OCM is domiciled in Ireland and so subject to the jurisdiction of the Irish court. That is broadly correct, but it is subject to the provisions of the Brussels I

Regulation (recast). The effect of the declaration and order now sought, it is said, would not interfere with the order of the Spanish court but only OCM's ability to enforce it. I cannot agree. An order restraining an Irish citizen or corporation from enforcing a judgment properly obtained in a Member State would leave the principle of mutual recognition of judgments in tatters. In my firm view it is simply not possible to "recognise" a judgment for the purpose of enjoining the party who has obtained it from relying on it or enforcing it. Moreover, in principle, the only logical basis upon which it could be contemplated that such an order might be made would be that the order of the Member State court ought not to have been made. That would not be possible without embarking on a review of the substance of the Spanish order – which is plainly and ambiguously prohibited by Article 52.

19. One of the arguments made on behalf of Mr. Donovan is that the only issue on this application is whether the court has jurisdiction to deal with his injunction application. Again I cannot accept that argument. The claim for damages as well as the claim for an injunction is, as Mr. Doherty puts it, anchored on the claim for a declaration that the security is void. The primary object of Mr. Donovan's application for an interlocutory injunction is to prevent the sale of the property until the hearing of the action. An award of damages, it is said, would not be an adequate remedy. If, for the sake of argument, the court were to prevent the sale, the question of damages would not arise. If, on the same basis, the court were to refuse the application for an interlocutory injunction and the action proceeded to trial, the issue would be whether and what damage might have been occasioned by the sale of the house. That would necessarily entail a review of the substance of the Spanish order. The notion that OCM might be ordered by the Irish court to pay to Mr. Donovan the proceeds of sale of the property which the Spanish court has ordered are to go to OCM would be utterly inconsistent with the principle of mutual recognition.
20. The excursus through the provisions of the Brussels I Regulation (recast) almost inevitably prompted a response *seriatim* to the arguments made. On the view I take of the case, these are all really issues that might have arisen if Mr. Donovan had moved in Ireland against OCM before OCM moved against him in Spain, or if Mr. Donovan had moved in Ireland against OCM after OCM moved against him in Spain but before the Spanish proceedings had concluded, but in deference to the industry of counsel I will deal with the points briefly.
21. It is submitted on behalf of Mr. Donovan by Mr. Martin Hayden S.C. and Mr. Hugh McDowell, and not contested on behalf of OCM, that it is an established principle of European law that Articles 24 to 30 of the Brussels I Regulation (recast), being exceptions to the ordinary rules governing jurisdiction in Articles 4 to 8 (principally, I think, Article 4(1)) are to be construed narrowly. This, I accept, is well established and the submission is abundantly justified by reference to the cases cited by counsel: Case C-73/77 *Sanders v. Ronald van der Putte* and *Hassett (A minor) v. South Eastern Health Board* [2007] 1 I.R. 644.

22. The importance to these proceedings of the requirement for a narrow interpretation is said to be that it prevents OCM from succeeding in its argument that the proceedings have as their object rights *in rem*. I do not follow. It seems to me that the requirement for a narrow interpretation dictates the parameters of the examination of the object of the proceedings rather than precludes such examination. It is submitted that the injunctive relief is ancillary to the object of the proceedings and arises because the plaintiff's property rights are engaged, which are not necessarily capable of being compensated in damages. Reference is made to *Allied Irish Banks plc v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549. I will come immediately to the object of the proceedings, but I observe at this point that if the plaintiff's property rights are engaged, and the object of the proceedings is to preserve those rights, this rather suggests that the object of the proceedings is rights *in rem*.

23. The first issue is whether the proceedings have as their object rights *in rem* in immovable property. Mr. Hayden relies on the judgment of McCracken J. in *Abrahamson v. The Law Society of Ireland* [1996] 1 I.R. 403, at p. 414:-

"A decision in rem is one which determines once and for all, the status of a particular res or thing. It is not a determination that depends upon the relationship between the parties to the action."

24. Mr. Hayden also relies on the decision of the Court of Justice of the European Union in Case C-417/15 *Schmidt* which, it is said is directly analogous. The plaintiff in that case, an Austrian resident, in an action in an Austrian court, sought to set aside a gift which he had made in Austria, of Austrian immovable property, to his German resident daughter. Ms. Schmidt contested that the jurisdiction of the Austrian court which referred a question whether proceedings concerning the avoidance of a contract of gift on the ground of the donor's incapacity to contract and the registration of the removal of an entry evidencing the donee's right of ownership fell within the scope of Article 24(1).

25. The Court noted, at para. 31, that:-

"... according to the settled case-law of the Court, the difference between a right in rem and a right in personam lies in the fact that the former, existing in corporeal property, has effect erga omnes, whereas the latter can be claimed only against the debtor (judgment of 17 December 2015, Komu and Others, C-605/14, EU:C:2015:833, paragraph 27 and the case-law cited)."

26. As has been submitted, the court found that while the latter part of the claim – the rectification of the land register – fell within Article 24(1), the claim for rescission did not. The clear link between the two claims did not mean that the whole proceeding should be regarded as falling within Article 24(1), rather Article 24(1) required to be read narrowly and with a precise focus on each distinct claim in the proceedings to which it was said to apply. At para. 34 the court said:-

"However, it is settled case-law that it is not sufficient that the action concerns a right in rem in immovable property or that the action have a link with immovable property in order to attract the jurisdiction of the court of the Member State in which the property is situated. On the contrary, the action must be based on a right in rem and not a right in personam (see, to that effect, order of 2 April 2001, Gaillard, C-518/99, EU:C:2001:209, paragraph 16)."

27. The court – following the opinion of Advocate General Kokott – found that the fact that the contract for which a declaration of invalidity is sought concerned immovable property is irrelevant to the question of validity, the immovable nature of the property being only of marginal significance in that context. The court found, at para. 30, that the exclusive jurisdiction of the courts of the Member State in which the immovable property is situated does not encompass all actions concerning rights *in rem* but only those which both come within the scope of the Regulation and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with protection for the powers which attach to their interest. To the answer to the question asked – that the Austrian court did not have exclusive jurisdiction under Article 24(1) – the court added that it clearly had special jurisdiction under Article 7(1) as the court of the place for the performance of the obligation in question.
28. It is submitted on behalf of Mr. Donovan that the object of the Irish proceedings is to determine the relationship between the plaintiff and the defendant by reference to the fraudulent execution of the mortgage over the Spanish property, and the damage caused to the plaintiff as a result. I cannot agree. It seems to me that the plain object of the Irish proceedings is to rescue the Spanish property from OCM by having the High Court declare that it has no interest in the property and to restrain OCM from exercising the powers which attach to the interest of the mortgagee in the property. The action is founded on the assertion that Mr. Donovan is the owner of the property free from encumbrances and, at the same time, that, by reason of the alleged invalidity of the mortgage, OCM had no estate, right, title or interest in the property. In my clear view, is an action *in rem* with the object of establishing once and for all the status of the property.
29. I emphasise, however, that in my view the issue of exclusive jurisdiction does not arise. It is acknowledged (and it is no great concession) that the Spanish court had jurisdiction to deal with an action on foot of a Spanish mortgage for the sale of immovable property in Spain, that Mr. Donovan submitted to that jurisdiction by entering an appearance, and that the Spanish court has made a final order.
30. In support of the answer offered to OCM's Article 29 and Article 30 arguments, Mr. Hayden refers to the judgment of Finlay-Geoghegan J. in *Popely v. Popely* [2006] 4 I.R. 356 in which the court considered the meaning of the immediate predecessor of Article 29 of Brussels I Regulation (recast), which was Article 27 of Council Regulation EC/44/2001. In that case the court was concerned – not for the first, or I suppose, the last time – with

the use in European legislation of apparently familiar words to describe quite different concepts. At p. 364 of the report Finlay-Geoghegan J. said:-

"[T]he phrase 'the same cause of action' in article 27 must be given an autonomous meaning for the purposes of article 27. This must be construed in accordance with all the language versions of Council Regulation E.C./44/2001. In the French and Italian texts the concept of the same cause of action is expressed in a double form. In French, the phrase used is 'le même objet et la même cause'. Notwithstanding that the English language version of article 27 does not distinguish between the 'object' and the 'cause' of action in the same way as the French, Italian and other language versions, it must be construed in the same manner. The European Court of Justice so held in relation to the German version in Gubish Maschinenfabrik K.G.v. Palumbo (Case 144/86) [1987] E.C.R. 4861 (para. 14). Accordingly, to constitute the 'same cause of action' within the meaning of article 27 two actions must have the same 'cause' and same 'object' as defined by the European Court of Justice. In The Tatry (Case C-406/92) [1994] E.C.R. I-5439, the European Court of Justice stated at para. 39:-

'For the purposes of article [27] ... the 'cause of action' comprises the facts and rule of law relied on as the basis of the action.'

Further in the same judgment it also stated at para. 41:-

'The 'object' of the action' for the purposes of article [27] means the end the action has in view.'"

31. *Gubish Maschinenfabrik K.G. v. Palumbo (Case 144/86) [1987] ECR 4861* affords a good example. Mr. Palumbo, a resident in Rome, who had ordered a machine from Gubish in Flensburg, and who had been sued in the Regional Court in Flensburg for the price of the machine, commenced proceedings in the District Court in Rome for a declaration that the contract was inoperative on the ground that his order had been revoked, or that it should be set aside for lack of consent, or that it should be set aside because Gubish had not complied with the time limit for delivery. The District Court in Rome dismissed an objection of *lis pendens* but the appellate court referred a question as to whether the concept of *lis pendens* in Article 21 of the Brussels Convention of 27th September, 1968 covered a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court on another Contracting State. At paras. 16 and 17 the court said:-

"16. In particular, in a case such as this, involving the sale of tangible moveable property, it is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question whether the contract is binding therefore lies at the heart of the two actions. If it is the action for rescission or discharge of the contract that is brought subsequently, it may even be regarded as simply a

defence against the first action, brought in the form of independent proceedings before a court in another Contracting State.

17. *In those procedural circumstances it must be held that the two actions have the same subject-matter, for that concept cannot be restricted so as to mean two claims which are entirely identical."*
32. It is submitted on behalf of Mr. Donovan that these proceedings do not involve the same cause of action or object as the Spanish proceedings and that there is no risk of irreconcilable judgments. It is said that the Irish proceedings are fundamentally directed at the defendant rather than the Spanish property, and that the object of the injunction is to prevent damage from the fraudulent mortgage occurring. I accept that these proceedings are directed "at" OCM inasmuch as it is the only defendant, but the object of the proceedings is not to be confused with the subject of the proceedings.
33. In Irish law terms, a cause of action on the part of a mortgagee for the realisation of security is not the same as a cause of action on the part of a mortgagor to set aside the security, but they are two sides of the same coin. In the language of the Court of Justice in *Gubish* the subject-matter of the two actions is identical. The question as to whether the mortgage is binding lies at the heart of both actions. The object of the one is to have the property sold. The object of the other is that the property should not be sold. I do not accept that the plaintiff's purpose in seeking an injunction is ancillary to the damages claim.
34. It is submitted that the focus of the Spanish proceedings is (*recte.* was, because those proceedings have concluded) a very narrow one, pertaining only to the right of the defendant to sell the Spanish property under the mortgage document. Whether broad or narrow, that was certainly the focus of the Spanish proceedings. Having entered his appearance in the Spanish proceedings, Mr. Donovan was entitled to make any case he had as to why the property should not be sold. On the evidence, he decided to do so but by mishap entirely on his side he did not do so. While it is true that the Spanish court has not ruled on the validity of the mortgage, the simple reason for that is that no issue was raised. The premise of the order which has been made is that the mortgage is valid and was transferred to OCM and that OCM is entitled to an order for sale.
35. On the view I have taken of the Article 24(1) issue, no issue could ever have arisen under Article 29.
36. As to OCM's argument that the mortgage provides that it is to be governed by common Spanish law and that the parties thereby submitted to the jurisdiction of the courts for the location of the property, Mr. Donovan argues that since he did not sign the mortgage he cannot be bound by anything in it. The answer to that is to be found in Article 25(1) which provides that if the parties have agreed that a court or the courts of a Member State shall have jurisdiction to settle any disputes, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the laws of that Member State. The scheme of the Regulation is that any dispute as to the

substantive validity of a purported agreement is to be determined by reference to the law of the Member State upon which jurisdiction was purportedly conferred. What this means is that unless Mr. Donovan could show that the mortgage is void as a matter of Spanish law, it is binding on him. For whatever reason, Mr. Donovan did not challenge the validity of the mortgage in the Spanish civil courts and the order which has been made is premised on its validity.

37. The last of the arguments advanced on behalf of OCM as to the want of jurisdiction to deal with these proceedings is based on the absence of any indorsement of jurisdiction on the plenary summons.
38. Order 4, r. 1A of the Rules of the Superior Courts requires that where an indorsement of claim on an originating summons concerns a claim which by virtue of *inter alia* the Brussels I Regulation (recast) the court has power to hear and determine, the summons shall be endorsed with a statement that the court has such power under the Regulation, shall specify the particular provision or provisions of the Regulation under which the court should assume jurisdiction, and shall be endorsed with a statement that no proceedings are pending between the parties concerning the same cause of action in another Member State. It is submitted that absent such an endorsement Mr. Donovan cannot rely on any provision of the Brussels I Regulation (recast). Reliance is placed on *Spielberg v. Rowley* [2014] IEHC 384 and *Schmidt v. Home Secretary* [1995] 1 I.L.R.M. 301.
39. I confess that I am not quite sure that I followed the argument in the written submission, which was not really developed in the oral hearing – which focussed on the finality of the Spanish order. In the first place, Mr. Donovan did not seek to rely on any provision of the Brussels I Regulation (recast), unless, perhaps, inferentially, on Article 4(1) which provides that persons domiciled in a Member State shall be sued in the courts of that Member State. The purpose of O. 4, r. 1A, as I understand it, is to require the plaintiff to identify with particularity any jurisdiction conferred by the Regulation by way of exception to the general rule that persons shall be sued in the courts of the Member State in which they are domiciled.
40. OCM was sued in Ireland because it is domiciled here and on no other basis. I do not understand O. 4, r. 1A to require an endorsement in such a case that the court has power to hear and determine the claim by virtue of the Regulation and an endorsement that the court should assume jurisdiction under Article 4(1). *Spielberg v. Rowley* and *Schmidt v. Home Secretary* were both cases in which the defendants sought to set aside service out of the jurisdiction effected on foot of orders obtained under Order 11. In each case the plaintiff attempted to resist the application by arguing that the court would have had jurisdiction under the Brussels Convention. I cannot see how they are relevant to this case.
41. Finally, the replying affidavit of Mr. Donovan and the written submissions filed on his behalf ask that the court is not satisfied that it has jurisdiction, it should nevertheless exercise its jurisdiction under Article 35 of Brussels I Regulation (recast) and article 8 of the European Union (Civil and Commercial Judgments) Regulations, 2015 (S.I. No. 6) to

grant protective relief pending the determination of the issue of jurisdiction between the Irish and the Spanish courts.

42. Article 35 of the Regulation allows application to be made for such provisional, including protective, measures as may be available under national law, even if the courts of another Member State have jurisdiction as to the substance of the matter. Article 8 of the Irish Regulations of 2015 allows the High Court to grant any provisional measures, including protective measures, that it has power to grant in proceedings that, apart from those regulations, are within its jurisdiction if (a) proceedings have been or are to be commenced in a Member State, and (b) the subject matter is within the scope of the Brussels I Regulation (recast).
43. The premise of this application is that there is an issue to be determined as to the jurisdiction of the Spanish court. The Spanish court had jurisdiction. It had exclusive jurisdiction. It was recognised by Mr. Donovan at the time the Spanish proceedings were instituted, and it is now acknowledged, that the Spanish court had jurisdiction. Mr. Donovan, by entering an appearance, acknowledged that jurisdiction. The Spanish court has exercised that jurisdiction and made a final order which this court is bound to, and does, recognise. There being no issue as to jurisdiction, no issue of provisional or protective measures can arise.
44. The notice of motion issued on behalf of OCM seeks a variety of orders under the Brussels I Regulation (recast) declaring that the court has no jurisdiction, alternatively that the court should decline jurisdiction, to deal with these proceedings under Articles 24, 25, 26, 27, 29, 30 and Chapter III of the Regulation and/or pursuant to O. 12, r. 26 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court setting aside the service of the summons and dismissing or staying the action and the plaintiff's motion issued on 3rd September, 2010.
45. On the view I have taken of the case, it seems to me that the appropriate order is an order on the defendant's motion issued on 11th September, 2020 declaring that the court recognises the judgment given by the Court of First Instance of Marbella in favour of the defendant for mortgage foreclosure on foot of a deed of mortgage loan dated 15th December, 2009 secured by the single-family house located in Urbanización Sierra Blanca, 120, registered in Marbella Land registry No. 3, Estate 32,860, at Volume 2,082, Book 1,056, Folio 38; declaring that the court has no jurisdiction to hear or determine any challenge to the validity of the security held by the defendant in respect of the property at Calle Wagner, 120, Sierra Blanca, Marbella, Malaga, Spain, or any claim for damages arising out of the sale of that property; and dismissing the action and the plaintiff's motion issued on 3rd September, 2020.
46. Provisionally, it seems to me that the defendant has been entirely successful and that the costs must follow the event.

47. The parties will have the opportunity within two weeks of the delivery of this judgment to make any brief written submissions they wish as to the precise form of order or the costs.