ECJ Judgment: Apostolides

Yesterday, on 28 April 2009, the ECJ delivered its judgment in case C-420/07 *(Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*).

The **background** of the case is – shortly summarised – as follows:

Mr. Apostolides, a Greek Cypriot, owned land in an area which is now under the control of the Turkish Republic of Northern Cyprus, which is not recognised by any country save Turkey, but has nonetheless *de facto* control over the area. When in 1974 the Turkish army invaded the north of the island, Mr. Apostolides had to flee. In 2002, Mr. and Mrs. Orams – who are British citizens – purchased part of the land which had belonged to Mr. Apostolides' family. In 2003, Mr. Apostolides was – due to the easing of travel restrictions – able to travel to the Turkish Republic of Northern Cyprus. In 2004 he issued a writ naming Mr. and Mrs. Orams as defendants claiming to demolish the villa, the swimming pool and the fence they had built, to deliver Mr. Apostolides free occupation of the land and damages for trespass. Since the time limit for entering an appearance elapsed, a judgment in default of appearance was given. Against the judgment by default, an application was issued on behalf of Mr. and Mrs. Orams that the judgment be set aside. This application to set aside the judgment, however, was dismissed by the District Court at Nicosia on the grounds that Mr. Apostolides had not lost his right to the land and that neither local custom nor the good faith of Mr. and Mrs. Orams constituted a defence. The appeal filed by Mr. and Mrs. Orams against this judgment was rejected by the Supreme Court of the Republic of Cyprus in 2006.

On the application of Mr. Apostolides, a Master of the High Court of Justice (England and Wales) ordered in October 2005 that the judgments given by the District Court of Nicosia should be registered in and declared enforceable in England pursuant to the Brussels I Regulation. However, Mr. and Mrs. Orams appealed successfully in order to set aside the registration, *inter alia* on the ground that the Brussels I Regulation was not applicable to the area controlled by the Turkish Republic of Northern Cyprus due to Art. 1 of Protocol 10 to the Treaty of Accession of the Republic of Cyprus to the European Union. The Court of Appeal, however, hearing Mr. Apostolides' subsequent appeal, decided to stay the

proceedings and to refer to the ECJ several questions for a preliminary ruling dealing primarily with the impact of the suspension of Community law in the Northern part of Cyprus and the fact that the land concerned is situated in an area over which the government of Cyprus does not exercise effective control.

The **first question** referred to the ECJ deals with the issue whether the suspension of the application of the *acquis communautaire* in the Northern area of Cyprus – which is provided for in Art. 1 Protocol No. 10 – leads to the result that the application of the Brussels I Regulation is precluded with regard to a judgment given by a Cypriot court of the area controlled by the government, concerning, however, land situated in the Northern area. With regard to this question the Court states that Art. 1 Protocol No. 10 refers only to the application of the *acquis communautaire in* the Northern area, i.e. according to the Court, the suspension provided for by that Protocol is limited to the application of Community law in the Northern area.The present case, however, concerns judgments given by a court situated in the government-controlled area (para. 37).

Thus, the Court holds with regard to the first question:

> *1.* ***The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.***

In the following (para. 40 et seq.), the Court turns to the question whether the case falls within the material scope of the Brussels I Regulation, and thus to the

question whether the case can be regarded as a "civil and commercial matter" in terms of Art. 1 of the Regulation – which was questioned by the Commission.

In this respect, the Court states that "the action is between individuals […] [,] is brought not against conduct or procedures which involve an exercise of public powers by one of the parties to the case, but against acts carried out by individuals. Consequently, the case at issue […] must be regarded as concerning 'civil and commercial matters' within the meaning of Article 1 (1) of Regulation No 44/2001." (para. 45 et seq.)

By means of the **second question**, the referring court basically asks whether it amounts to an infringement of Art. 22 (1) – and thus justifies a refusal of recognition according to Art. 35 (1) Brussels I – if a judgment is given by a court of a Member State concerning land situated in an area of that State over which the government of this State does not exercise effective control. With regard to this question, the ECJ stresses that Art. 22 Brussels I concerns only the international jurisdiction of the Member States – not jurisdiction within the respective Member State. Since, in the present case, the land in question is situated within the territory of the Republic of Cyprus, the rule of jurisdiction laid down in Art. 22 (1) Brussels I has been observed. According to the Court, "[t]he fact that the land is situated in the northern area may possibly have an effect on the domestic jurisdiction of the Cypriot courts, but cannot have any effect for the purposes of that regulation." (para. 51)

Consequently, the ECJ holds:

> *2.* ***Article 35(1) of Regulation No 44/2001 does not authorise the court of a Member State to refuse recognition or enforcement of a judgment given by the courts of another Member State concerning land situated in an area of the latter State over which its Government does not exercise effective control.***

By its **third question** the referring court aims to know whether it constitutes a ground for refusal of recognition under Art. 34 (1) Brussels I if a judgment given by the courts of a Member State concerning land situated in an area over which its government does not exercise effective control cannot be enforced – for practical reasons – in the area where the land is situated. This question is answered in the negative by the ECJ basically on the ground that Art. 34 Brussels

I has to be interpreted strictly (para. 55): A refusal of recognition can therefore, according to the Court, only be justified "where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle." (para. 59)

Further, the Court refers – even though this question has not been raised explicitly by the referring court – to Art. 38 Brussels I, pointing out that the Court "may extract from the wording formulated by the national court […] those elements which concern the interpretation of Community law, for the purpose of enabling that court to resolve the legal problems before it." (para. 63)

According to the Court, Art. 38 Brussels I might be of relevance in the present case since the enforceability of a judgment in the Member State of origin constitutes a precondition for its enforcement in the State in which enforcement is sought (para. 66). However, the Court holds that "[t]he fact that claimants might encounter difficulties in having judgments enforced in the northern area cannot deprive them of their enforceability and, therefore, does not prevent the courts of the Member State in which enforcement is sought from declaring such judgments enforceable." (para. 70).

Thus, with regard to the third question, the Court holds:

> *3.* ***The fact that a judgment given by the courts of a Member State, concerning land situated in an area of that State over which its Government does not exercise effective control, cannot, as a practical matter, be enforced where the land is situated does not constitute a ground for refusal of recognition or enforcement under Article 34(1) of Regulation No 44/2001 and it does not mean that such a judgment is unenforceable for the purposes of Article 38(1) of that regulation.***

By means of the **fourth question** the referring court essentially aims to know whether the recognition or enforcement of a default judgment may be refused on the basis of Art. 34 (2) Brussels I due to the fact that the defendant was not served with the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence, where he was able to commence proceedings to challenge that judgment before the courts of the Member State of origin. In this respect, the Court states that Art. 34 (2) Brussels I

Regulation does not necessarily – unlike Art. 27 (2) Brussels *Convention* – require the document instituting the proceedings to be duly served, "but does require that the rights of the defence are effectively respected." (para. 75)

The rights of the defence *are* respected where the defendant does in fact commence proceedings to challenge the default judgment and where those proceedings enable him to argue that he was not served with the document instituting the proceedings. Since in the present case the Orams commenced such proceedings to challenge the default judgment, the Court holds that Art. 34 (2) Brussels I cannot be relied upon (para. 79):

> *4.* ***The recognition or enforcement of a default judgment cannot be refused under Article 34(2) of Regulation No 44/2001 where the defendant was able to commence proceedings to challenge the default judgment and those proceedings enabled him to argue that he had not been served with the document which instituted the proceedings or with the equivalent document in sufficient time and in such a way as to enable him to arrange for his defence.***

See with regard to this case also our previous posts on the reference as well as on the AG opinion.