

ENGLAND AND WALES / JUDGMENT

De La Hija v Lee

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Neutral Citation Number: [2017] EWHC 634 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION Case No: HC-2016-003289 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 3/4/2017 Before: MASTER CLARK

- ----- Between: GERARDO MORENO DE LA HIJA Claimant
- and - CHRISTOPHER FRANK CARANDINI LEE Defendant
- -----
- ----- Madeleine Heal (instructed by Manuel Martin & Associates) for the Claimant Jessica Simor QC and Jonathan Fowles (instructed by Kobalt Law LLP) for the Defendant and Lady Birgit Lee Hearing dates: 6, 10 March 2017
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Judgment

Master Clark: The application 1. In this application, the claimant seeks an order, pursuant to CPR 3.1(7), revoking the order dated 3 February 2014 of Master McCloud (“the 2014 order”). That order ordered the stay of enforcement until further order of an EEO certificate dated 13 June 2011 (“the EEO”) made by the Commercial Court of Burgos, Spain (“the Burgos court”). 2. 3. 4. The application is made in paragraph (3) of an application notice dated 23 June 2016 (and amended on 20 July 2016). The applicant, Gerardo Moreno de la Hija, is the judgment creditor named in the EEO. I refer to him as the claimant. The named respondent to the application is the well known actor, Sir Christopher Frank Caradini Lee, who, sadly, died on 7 June 2015, aged 93. I refer to him as the deceased. His executrix is his widow, Lady Birgit Lee, to whom probate was granted on 18 December 2015. At the first hearing of the application before me, on 6 March 2017, I made an order substituting Lady Lee as a defendant in these proceedings in her representative capacity. The proceedings for enforcement were commenced in the Queen’s Bench Division (no. FJ14/14), and the 2014 order was made in that Division. The application was originally listed before Master Eastman on 26 October 2016, but at its first hearing he transferred it to the Chancery Division. At the first hearing of the application before me, the claimant’s counsel initially also sought the revocation of what she referred to as Master McCloud’s order dated 5 January 2016. This is a direction in a letter of that date that “the stay granted on 03/02/14 shall remain in force until the conclusion of the Spanish proceedings”. However, at the adjourned hearing on 10 March 2017, her position had altered and she no longer seeks an order in respect of the direction of 5 January

2016. European Enforcement Orders 5. To understand the legal context in which the 2014 order and the various subsequent challenges in Spain to the EEO and the judgment on which it is based were made, it is necessary to turn to Council Regulation (EC) No. 805/2004 “creating a European Enforcement Order for uncontested claims” (“the regulation”) and the national provisions relating to it. The following provisions of the regulation are directly relevant: SUBJECT MATTER, SCOPE AND DEFINITIONS “CHAPTER I 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 ... 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 ... on uncontested claims. A claim shall be regarded as uncontested if: ...
 - (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; ... CHAPTER II EUROPEAN ENFORCEMENT ORDER ... Article 6 Requirements for certification as a European Enforcement Order
1. A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a European Enforcement Order if: ...
 - (c) the court proceedings in the Member State of origin met the requirements as set out in Chapter III where a claim is uncontested within the meaning of Article 3(1)(b) or (c); ... 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 ...
 - (b) withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation. ... Chapter III CLAIMS PROCEDURES Article 12 Scope of application of minimum standards
1. A judgment on a claim that is uncontested within the meaning of Article 3(1)(b) or (c) can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin met the procedural requirements as set out in this Chapter. ... Article 14 Service without proof of receipt by the debtor
1. Service of the document instituting the proceedings or an equivalent document and any summons to a court hearing on the debtor may also have been effected by one of the following methods:
 - (a) personal service at the debtor's personal address on persons who are living in the same household as the debtor or are employed there; ...

- (c) deposit of the document in the debtor's mailbox; ...
- 2. For the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty. ... MINIMUM STANDARDS FOR UNCONTESTED 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. Chapter IV ENFORCEMENT 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.
- 2. The creditor shall be required to provide the competent enforcement authorities of the Member State of enforcement with:
 - (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
 - (b) a copy of the European Enforcement Order certificate which satisfies the conditions necessary to establish its authenticity; and
 - (c) where necessary, a transcription of the European Enforcement Order certificate or a translation thereof into the official language of the Member State of enforcement ... Article 21 Refusal of enforcement ...
- 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.” 6. CPR 74.27 to 74.33 contains the national procedural rules relating to EEOs, of which only CPR 74.33(1) is relevant: “Where an EEO certificate has been lodged and the judgment debtor applies to stay or limit the enforcement proceedings under Article 23 of the EEO Regulation, such application must be made in accordance with Part 23 to the court in which the EEO is being enforced.” 7. The relevant practice direction, PD 74B, also provides: “Rule 74.33 – Stay or limitation of enforcement 7.1 Unless the court orders otherwise, an application must be accompanied by evidence of the application in the court of origin, including – (1) the application (or equivalent foreign process) or a copy of the application (or equivalent foreign process) certified by an appropriate officer of the court of origin; and
- (2) where that document is not in English, a translation of it into English – (a) (b) certified by a notary public or person qualified to certify a translation in the Member State of the court of origin under Article 20(2)(c) of the EEO Regulation; or accompanied by written evidence confirming that the translation is accurate. 7.2 The written evidence in support of the application must state – (1) (2) (3) that an application has been brought in the member state of origin; the nature of that application; and the date on which the application was filed, the state of the proceedings and the date by which it is believed that the application will be determined.”

Background

- 8. The factual background to the application is complex and I set it out as briefly as possible. The Spanish claim 9. On 20 June 2007, the claimant brought a claim in the Burgos court (case no. 548/07 – “the Spanish claim”). The defendants to that claim were (1) The Quaid Project Ltd; (2) Mr. Juan Aneiros (“on the representation of Christopher Lee Webb”) and (3) the deceased.
- 10. The Spanish claim is based on the claimant’s copyright in a painting made by him pursuant to a contract dated 17 February 2004, to which the parties were the claimant and Juan Aneiros (who is or was the deceased’s son-in-law), described as a sole trader trading as ‘Christopher Lee Webb’. The particulars of claim, judgment and order are in the bundle only in Spanish, though the evidence includes a summary of the particulars of claim by the deceased’s solicitor. From this, it appears that the claim relates to use of the painting for the artwork of a film entitled “Jinnah” (“the film”), on the inside, the cover and the menu of the DVD of the film. This, it is said, was use outside the terms of the consent given by the agreement, and in breach of it and in infringement of the claimant’s copyright.

11. The basis of the claim against the deceased is unclear, but cannot be contractual, because he was not a party to the relevant contract. The witness statement dated 3 February 2014 of the deceased's solicitor, Stefano Lucatello, states that the deceased's only involvement (contractual or otherwise) in the film (in which he had a starring role) was as an actor.
12. The particulars of claim show the address of all 3 defendants as 37 Elsynge Road, London SW18 2HR ("Elsynge Road"). Mr Lucatello's evidence is that this is Mr Aneiros' residential address, and has never been the address of the deceased. 13. It is common ground that the claim was not served on the deceased at his home address or any other address with which he has a connection. His case is that he had no knowledge of it before receiving the EEO under cover of the claimant's solicitors' letter dated 22 January 2014. Following apparently unsuccessful requests to the English Consulate in Madrid and the (presumably Spanish) Ministry of Justice as to the address of the deceased, the Burgos court ordered service by the affixing of notices on the Court's notice board. Not surprisingly, the proceedings did not come the deceased's notice by this means, and judgment in default in the sum of 710,000 euros was granted on 20 March 2009. The judgment was then published in the Official State Bulletin, and in the absence of any appeal by the deceased, declared final on 26 May 2009.
14. By an order of 26 October 2009, the Burgos court authorised enforcement of the judgment. Again, the claimant applied for service of the judgment by the affixing of notices on the court's notice board on the basis that no other address was known for the judgment debtors; and that application was granted. The EEO
15. On 13 June 2011, the EEO was issued by the Burgos court. The initial EEO misspelt the deceased's middle name, showed his address as Elsynge Road and stated the date of the judgment as 26 April 2010 (no judgment of this date has been produced by the claimant). The EEO was also not fully completed: boxes 11.1 (confirming that service of the originating process was in compliance with the regulation), 12.1 (confirming that service of the "summons, where applicable" was in compliance with the regulation and 13.1 (confirming that service of the judgment was in compliance with the regulation) were not completed. Finally, boxes 13.3 and 13.4, which confirm that it is possible for the debtor to challenge the judgment and that he had failed to do so (compliance with article 19 of the regulation) were also not completed.
16. On 14 October 2013 on the claimant's application, the EEO was rectified to correct the misspelling of the deceased's middle name and to add "enforcement costs" in the sum of 213,000 euros. No judgment in respect of the sum has been served on the deceased, nor was it in the evidence before me.
17. On 9 January 2014, the EEO was submitted to the High Court (Queens Bench Division), and on 20 January 2014 it was sealed by it.
18. The first occasion on which the claimant's solicitors wrote to the deceased was 22 January 2014, enclosing the EEO and requiring payment of the total of 923,000 euros within 14 days. This letter was sent to the deceased's home address of Flat 3, 45 Cadogan Square, London.

There is no evidence as to when and how the claimant first became aware of the deceased's address. The deceased replied on 24 January 2014 asking for 28 days to instruct solicitors. This was refused by the claimant's solicitors, who informed him that unless a reasonable offer of payment was received within 14 days of 24 January 2014 i.e. by 7 February 2014, enforcement would proceed without further notice. This was confirmed in an email dated 31 January 2014. The stay application and the 2014 order

19. On 3 February 2014, the deceased applied to Master McCloud without notice for a stay of enforcement of the EEO. The evidence in support of the application referred to the letter dated 22 January 2014 from the claimant's solicitors. It set out that the deceased had no knowledge of the Spanish claim or the claimant, had not been served with the proceedings, and had never lived at Elsynge Road. It also set out that the only contract entered into by the deceased in relation to the film was in respect of his appearance in it. Finally, it stated that on that day, 3 February 2014, the deceased had instructed a Spanish law firm to apply to set aside the judgment, and exhibited the letter of instruction.
20. Although CPR 74.33 provides that an application to stay an EEO certificate must be made under CPR Part 23, and the general rule (CPR 23.4) is that applications must be made on notice, the deceased's solicitors did not notify the claimant's solicitors of the application. However, the court has power to deal with an application without notice if it considers it appropriate to do so (CPR 23.8), and Master McCloud was willing to deal with it without requiring service of the claimant (I have not been provided with a note of the reasons for her decision), and made the 2014 order. The order was sent by email to the claimant's solicitors on the day it was made, although they required postal service, which I assume took place a few days later.
21. Regrettably, although CPR 23.9(2) requires that where an order is made without service of the application notice, the application notice and evidence in support be served on the respondents to the application, the deceased's solicitors did not do so. The claimant's solicitors therefore sought copies from the court, which were received by them on 13 February 2014.
22. CPR 23.10 entitles a person who has not been served with an application notice to apply to set aside or vary the order made, but the application must be made within 7 days after service of the order. It seems likely that this time had expired by the time that the claimant received the application notice and evidence; although the claimant's counsel did not accept that an extension of time would have been granted to make such an application, in my judgment there is no doubt that it would have been. In the event, no application was made to set aside the 2014 order. The Spanish challenges
23. On 20 February 2014, the deceased commenced the first of three challenges in the Spanish courts ("the Spanish challenges"). The evidence as to the nature and basis of the steps taken by the deceased (and Lady Lee as his successor) is contained in a report dated 7 July 2016 ("the Atencia report") prepared by the defendant's Spanish lawyers, GVA & Atencia. This was

sent to the claimant's solicitors on 16 July 2016, and no evidence has been served by them in response to it. In addition, the evidence before me included several (but not all) of the relevant judgments (in Spanish) accompanied by English translations. Inevitably, there is not complete congruence between the meaning of the expressions used in the translations of the Spanish documents, and their meaning in English procedural law; but neither side suggested that the congruence was insufficient for present purposes. 24. Since as mentioned, the deceased died on 7 June 2015, and Lady Lee was substituted for him in the Spanish challenges, I refer to each of them as "the defendant", the identity of the defendant depending on the time of the relevant event. The first challenge

25. The first challenge (Amparo appeal no 4306/2014) on 20 February 2014 sought to set aside the proceedings, on the ground that service on the defendant of them was irregular and invalid. This was rejected by the Burgos court on 22 May 2014, on the ground that service was in accordance with the relevant national civil procedure law. This rejection was appealed to the Spanish Constitutional Court on grounds that two specific requirements of the Spanish Constitution were violated. That appeal was rejected on 25 February 2015; and no further steps are being taken to pursue the first challenge. The second challenge
26. The second challenge (Amparo appeal no 4657/2014) on 21 February 2014 sought to set aside the order of 26 October 2009 providing for the enforcement of the judgment under the Spanish Civil Procedure Act ("SCPA"), on the grounds of the "irregularity of the notifications throughout the enforcement proceedings". This challenge was rejected by the Burgos court on 3 June 2014.
27. The defendant brought a constitutional appeal (recurso de amparo) of this order on 15 July 2014 to the Spanish Constitutional Court, again on the grounds of violation of Spanish constitutional law. Permission to proceed with the appeal was granted on 30 November 2015, and the appeal is pending. The defendant also applied in that appeal for a stay of enforcement in those appeal proceedings. This application was determined under Spanish procedural law, and refused on 1 February 2016, on the ground that the defendant had not shown she would suffer irreparable harm if the stay were not granted. The third challenge
28. The third challenge (amparo appeal no 442/2015) by the defendant sought the withdrawal of the EEO under article 10 of the regulation on two grounds:
 - (1) That the judicial decision on which the EEO was based was not enforceable under the regulation and the SCPA;
 - (2) That in the Spanish proceedings the "minimum standards for uncontested claims procedures" provided for in Chapter III of the regulation (which does not permit service by public notice) were not met. This challenge was rejected by the Burgos court on 3 June 2014, again on 31 July 2014 on an application to it for "reversal" and again on 2 December 2014 on an extraordinary application to set the proceedings aside.

29. A constitutional appeal (recurso de amparo) to the Spanish Constitutional Court on 23 January 2015 against the orders of the Burgos court was given permission to proceed on 30 November 2015. This appeal also included a petition to suspend the enforceability of the EEO. That was refused on 1 February 2016, again under Spanish procedural law, on the ground that the defendant had not shown irreparable harm if a stay were not granted. However, the court added: “The foregoing is in addition to the fact that because this recurso de amparo has been admitted, as has Recurso de amparo no 4657-2014, relating to the terms of the order whose certification is the subject matter of this appeal, the certified decision could be regarded as having been challenged for the purposes of Article 23 of the Regulation (EC) No. 805/2004 and the stay or limitation referred to in that article could take effect by operation of law in the State of enforcement.”
30. The two appeals have been consolidated and are due to be heard within the next 12 months. Revoking an order under CPR 3.1(7) – the legal principles
31. CPR 3.1(7) provides: “A power of the court under these Rules to make an order includes a power to vary or revoke the order.”
32. The principles applicable to an application to revoke an order pursuant to CPR 3.1(7) are set out in *Tibbles v SIG PLC* (trading as Asphaltic Roofing Supplies) [2012] 1 WLR 2591, paras. 39, 41-42 per Rix LJ, cited with approval by the Supreme Court in *Thevarajah v Riordan and others* [2016] 1 WLR 76, paras. 15, 18-19 per Lord Neuberger.
33. They can be summarised as follows (see [39]):
 - (1) CPR r 3.1(7) is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. It is not possible or desirable to formulate an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. (2) (3) (4) Subject to that, however, the primary circumstances in which the discretion may be appropriately exercised, are normally only where (i) there has been a material change of circumstances since the order was made; the facts on which the original decision was made were (innocently or otherwise) misstated; there has been a manifest mistake on the part of the judge in the formulation of his order: see *Edwards v Golding* [2007] EWCA Civ 416. (ii) (iii) In the case of misstatement, factors going to discretion include:
 - (i) whether the misstatement was an omission or a positive misstatement; (ii) whether the misstatement concerned argument as distinct from facts; (iii) whether the misstatement (or omission) is conscious or unconscious; (iv) whether the facts (or arguments) were known or unknown, knowable or unknowable;

- (5) However, where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.
- (6) The successful invocation of the rule is rare: such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation. Promptness in applying is an important factor in the exercise of discretion – the court is unlikely to assist an applicant once much time has gone by. (7) The basis of the application
34. The basis of the application has altered twice since it was first issued. The application notice, as issued, stated as follows: “No grounds were shown by the Defendant pursuant to CPR 74.33 to stay or limit the enforcement proceedings under Article 23 of Regulation (EC) No. 805/2004 (the EEO Regulation). Service of the document instituting the Spanish proceedings having been effected on the Defendant in accordance with Article 14 of the EEO Regulation, the judgment in the Spanish proceedings could not be reviewed. The court in Burgos certified that there is no possibility of challenging the judgment. Applications by the Defendant dated 15 July 2014 and 23 January 2015 respectively to the Constitutional Court of Spain First Chamber for a Constitutional Appeal (recurso de amparo) were dismissed on 1 February 2016.”
35. This was factually inaccurate in four material respects: (1) Service on the defendant was not in accordance with art 14 of the regulation, which does not permit service by notices on a court notice board; and, in any event, provides that there can be no effective service where, as here, the debtor’s address is unknown: see *G v de Visser* Case C-292/10; [2013] QB 168;
- (2) The judgment is capable of being reviewed, and is being reviewed by the Spanish Constitutional Court;
- (3) The Burgos court has not certified that there is no possibility of challenging the judgment;
- (4) The two constitutional appeals have not been dismissed.
36. The application notice was supported by a witness statement dated 27 June 2016 of the claimant’s solicitor (who is also a qualified Spanish “abogado”), Manuel Martin, inaccurately stating that (1) (2) (3) service had been in accordance with article 14 of the regulation; the constitutional appeals had been dismissed; the constitutional court had concluded that there were no grounds for further delaying enforcement of the Burgos court’s judgment. 37. 38. Following receipt of the Atencia report, the application notice was amended to refer to the stay applications in the appeals, but the other inaccuracies were not corrected. No explanation has been given by Mr Martin as to the genesis of that error, which, given Mr Martin’s dual qualification, would appear to be at best grossly negligent, and, until corrected by the defendant, capable of misleading the court. In the claimant’s counsel’s skeleton argument for the first hearing before me, the only basis on which the application was

pursued was on the first of the grounds stated in the application notice, namely that Master McCloud had no jurisdiction to make the order she made, because the conditions required by Article 23 of the regulation were not satisfied. However, the fact, if established, that the Master was wrong to make the order she did, is neither necessary nor sufficient for the court to revoke its order, as is clear from Tibbles.

39. At the hearing itself, the claimant's counsel accepted that the applicable principles to the application were set out in Tibbles. She then put forward for the first time orally submissions directed towards showing that the circumstances of this case justified the court exercising its power to revoke. Issues in the application 40. In these circumstances, at the conclusion of the adjourned hearing of the application on 10 March 2017, the following issues arose for determination:
- (1) Whether arguments not previously made can found a power to revoke; and, if so, whether the claimant is entitled to rely on this factor;
 - (2) Whether or not this application falls within any of the categories identified in Tibbles:
 - (i) Whether there was a material misstatement of fact at the hearing on 3 February 2014; (ii) Whether there has been a material change in circumstances since February 2014; (iii) Whether there was a manifest error in the formulation of the 2014 order.
 - (3) Whether, in all the circumstances, the 2014 order should be revoked Arguments not previously made 41. As can be seen above, in Tibbles itself, the court contemplated a misstatement concerning argument as capable of justifying the power to revoke. The claimant's counsel relied upon *Collier v Williams* [2006] 1 WLR 1945, in which Dyson LJ (at [120]) said that jurisdiction under r.3.1(7) "should not normally be exercised unless the applicant is able to place material before the court, whether in the form of evidence or argument, which was not placed before the court on the earlier occasion" (emphasis added). 42. She also relied upon *Edwards v Golding*, in which, Buxton LJ after citing from *Collier*, said (at [24]): "The basis of that jurisprudence is that the jurisdiction under order 3.1(7) is not a substitute for an appeal. There must be additional material before the court in the form of evidence or, possibly, argument. I would reserve the issue of whether additional argument in itself is enough to attract the jurisdiction of rule 3.1(7), but the general thrust of *Collier* is that the case before the court before which rule 3.1(7) is moved must be essentially different from one of simple error that could be righted on appeal."
43. The claimant's counsel then sought to rely on the following additional arguments which she said were not placed before Master McCloud, because the deceased wrongly applied to the Master without notice to the claimant: (1) that the mere prospect of a challenge (as opposed to a subsisting challenge) to a judgment certified as an EEO in the court of origin or application for rectification or withdrawal of an EEO does not satisfy the first pre-condition in Article 23; that a challenge or application for withdrawal in the court or origin is not an 'exceptional circumstance' under the second pre-condition in Article 23(c); and that no evidence of exceptional circumstances justifying a stay of enforcement was before Master

McCloud on 3 February 2014. (2) (3)

44. An immediate objection to this submission is that the claimant was not in fact prevented from making these arguments, because he was entitled to apply under CPR 23.10 to vary or revoke the order, but did not do so.
45. The claimant's counsel submitted that the deceased's failure to serve the application notice and evidence on the claimant prevented him from applying under CPR 23.10, as by the time they were obtained from the court the application would have been out of time. However, as I have said (in para 22 above), I have no doubt that an extension of time would have been granted. I do not therefore consider that the claimant was prevented from relying upon the arguments he now relies upon before the Master. This is not, however, conclusive as to whether the 2014 order should be revoked.
46. The defendant's counsel submitted, firstly, that the authorities did not support the proposition that arguments not previously made can found the power to revoke. However, it is clear from Tibbles itself that the categories justifying revocation are not fixed or closed, and that a "misstatement concerning argument" may do so. 47. She also submitted that where an order has been made at a without notice hearing, at which, by definition, the respondent has not put forward his arguments, then that of itself cannot justify revocation of the order made. The arguments now being put forward could, she said, have been put forward in an application under CPR 23.10 48. 49. 50. or on appeal; and the power to revoke cannot properly be used to avoid the time limits for those steps. I do not accept the general proposition that a respondent to a without notice application is confined to applying under CPR 23.10 or appealing, and is not permitted to apply to revoke the order. For instance, an application may be made to revoke an injunction made without notice on the grounds of material non-disclosure. In Edwards, the relevant facts and arguments justifying revocation showed that the Master had no power to make an order joining a new defendant because (a) there was no live action and (b) the limitation period had expired. In those circumstances, to revoke the order was "not to usurp the power of the Court of Appeal, but rather to correct a fundamental procedural error"[26]. It is necessary therefore to consider carefully the nature and genesis of the error said to have been made by the Master. The claimant's primary submission was that since there was at the date of the order no subsisting challenge to the judgment or application for withdrawal of the EEO (both of which are required to be made in the court of origin), the Master simply lacked jurisdiction to grant a stay. This, the claimant submitted, resulted in an error analogous to that in Edwards, a fundamental procedural error capable of justifying revocation of the order. I accept that the error which the claimant alleges the Master made is one which falls within the Tibbles principles as sufficiently fundamental to be capable of justifying revoking the order. I turn therefore to whether the Master in fact made an error. It is clear that the defendant had not commenced his challenge at the date of the order, since he had been unable to do so in the time scale for payment stipulated by the claimant. The defendant's counsel did not argue that the English court had an inherent jurisdiction to stay enforcement on a quia timet basis. She urged me

to construe “challenge” in a broad purposive way, so as to include a clear intention to challenge, but did not provide any authority for doing so. In my judgment, the wording of the regulation, although capable of producing manifestly unjust results, is clear; and that since there was no subsisting challenge on 3 February 2014, the Master had no jurisdiction under art 23 to make the 2014 order.

51. However, the defendant’s counsel also submitted that the Master had jurisdiction to stay enforcement of the EEO, on the grounds that the EEO on its face was manifestly lacking; and, in particular, that it did not set out that the minimum requirements for service had been complied with (see para 15 above). She submitted that although art 21(2) prohibits the enforcing court from reviewing an EEO as to its substance, it does not preclude it from declining to enforce an EEO which is manifestly bad on its face. An extreme example would be an EEO containing only the name of the debtor and the amount of the debt. This, she submitted, the enforcing court could decline to enforce by granting a stay. The claimant’s counsel submitted that the enforcing court would be obliged to enforce such an EEO, by reason of the fact that article 21(2) requires any challenge to it to be brought in the court of origin. 52. In my judgment, the failures in this case to fully complete the EEO are not matters of its “substance” of the EEO, but of its formal validity. I refer in particular to recital (17) of the regulation (which should be read in conjunction with preceding recitals (11) to (16) – I do not lengthen this judgment by setting them out): “The courts competent for scrutinising full compliance with the minimum procedural standards should, if satisfied, issue a standardised European Enforcement Order certificate that makes that scrutiny and its result transparent.” Where the certificate itself does not make its result transparent, by, for instance, containing only the name of the debtor and the amount of the debt, the enforcing court would not in my judgment be obliged to enforce it. In this case, the EEO was not on its face capable of satisfying the enforcing court that the requirements of the regulation had been complied with; and Master McCloud was entitled to stay its enforcement on that ground alone, not under art 23, but under the court’s inherent jurisdiction.
53. On this basis, it is not necessary to consider the other arguments which the claimant says he would have put forward on 3 February 2014, and the absence of which justify revoking the order. 54. If, however, I am wrong in concluding that the Master lacked jurisdiction under article 23, these arguments are relevant. They are also relevant if I am wrong in concluding that the Master was entitled to stay enforcement because of the manifest deficiencies on the face of EEO; because, even if the 2014 order was wrongly made at the time, the power to revoke is a discretionary one, to be exercised with regard to the current circumstances (see para 69 below). 55. I turn to the position if, contrary to my decision, the Master did have jurisdiction under article 23. The question then would be whether the absence of these arguments resulted in her making a fundamental procedural error.

56. As for the argument that a challenge to the judgment is not an “exceptional circumstance” within the meaning of art 23(c) of the regulation, this is self evident on the wording of the article: the existence of the challenge (or an application to withdraw the EEO) is a necessary, but not a sufficient condition for the granting of a stay.
57. As for the argument that there was no evidence of exceptional circumstances justifying a stay of enforcement, the claimant would need to show that that argument is capable of justifying revocation of the 2014 order.
58. The claimant’s counsel submitted that the matters set out in the evidence in support of the stay application were matters going to the merits of the claim against the deceased, and whether the requirements as to service of the proceedings and judgment required by the regulation had been met. She relied upon article 21(2) as prohibiting the enforcing court from taking these matters into account for any purpose. She submitted therefore that this argument also undermined the jurisdiction of the Master to make the order, independently of her first argument. I agree that this is an argument that goes to the Master’s jurisdiction and for that reason capable of justifying revocation. I turn to its merits.
59. The defendant’s counsel submitted that the Master was entitled to take into account, as exceptional circumstances, the merits (lack of) of the claim, the failures to comply with the service requirements of the regulation and the manifest non- compliance with those requirements. 60. I accept the defendant’s counsel’s submission on this issue. Art 21(2) refers to a “review”. This is, in my judgment, to be construed in the context of the regulation as a whole. Article 19 refers to a review of the judgment, which is a formal act by the court (of origin) applied for by the debtor. Similarly, art 23 refers to an application for a review within the meaning of art 19 as being one of the ways of challenging a judgment. The expression is not properly to be construed broadly as referring to any process which involves consideration of the matters relied upon by the defendant in this case. It follows that in my judgment the Master would have been entitled to take into account the prospects of success of the Spanish challenges; and if she concluded that they were sufficiently high, to treat them as exceptional circumstances, had she had jurisdiction to do so under art 23. Material misstatement of fact
61. The claimant relied upon the defendant’s assertion in the application notice in the box responding to the question “Who should be served with this application?” “N/A Ex parte application” as being a material misstatement of fact. I have already referred to CPR 23.8. In addition, CPR PD 23A, para 3 provides that an application may be made without serving an application notice in certain circumstances, which include exceptional urgency, where the court gives permission, or where the overriding objective is best furthered by doing so. It cannot be said that the factual position was not made clear to the Master: the application notice referred to and identified the claimant’s solicitors. 62. I must therefore assume that Master McCloud considered whether the application was suitable for determination without service of the application notice on the claimant; and decided that it was. The defendant’s statement on the application notice was a request that the court do so, which the Master

could have declined. It was not a misstatement; and, even if it was, the Master was required to, and no doubt did form her own view. Material change in circumstances since February 2014

63. The claimant relied upon the fact that, in both the constitutional appeals by the defendant, the applications for stays of enforcement have been refused by the Constitutional Court. 64. She initially submitted that the defendant's applications for a stay were dismissed by the Spanish Constitutional Court because it found that the Article 23(c) condition of 'exceptional circumstances' had not been made out by her. However, it is clear from the translations provided of the relevant judgments that the Spanish Court was applying its national law to the question of whether to grant a stay, and that article 23 was not in play at all. This is not surprising as applications under article 23 can only be made to the enforcing court, not the court of origin.
65. At the second hearing, the claimant's counsel had moderated her position to submitting that the court of origin had canvassed a question relevant to this court's consideration of art 23(c) and held that there is nothing exceptional about the circumstances. 66. I have already held that Master McCloud was entitled to take into account the deceased's prospects of success in the Spanish challenges as being exceptional circumstances. I reject the submission that the decisions of the Spanish Constitutional Court refusing a stay have any relevance to the basis of the Master's decision, so as to amount to a material change in circumstances: because those decisions were based on Spanish national law, and made on the basis of the evidence presented to that court. I also note that one of the grounds set out for refusing the stay was that the stay referred to in article 23 "could take effect by operation of law in the State of enforcement" (see para. 29 above). Manifest error in the formulation of the 2014 order
67. The claimant's submissions under this heading were a repetition of her submissions as to the merits of the 2014 order. No error in formulation is identified, and in my judgment there is no such error. Whether in all the circumstances it would be right to revoke the 2014 order 68. I have held that at the date of 2014 order, the Master lacked jurisdiction under art 23, but was nonetheless entitled to stay enforcement of the EEO because of the manifest deficiencies on its face. However, if I am wrong, and the Master was not so entitled, it would nonetheless not be right in my judgment to exercise my discretion to revoke the 2014 order for the following reasons. 69. First, this court has had jurisdiction under art 23 since 20 February 2014, and will continue to do so until the final determination of the Spanish proceedings. Secondly, as I have concluded in para 60 above, the factual matters presented to the Master, namely the absence of any merits of the Spanish claim, the failure to serve the proceedings or the judgment, and the failure to comply with the minimum procedural requirements of the regulation are cumulatively properly to be regarded as exceptional circumstances which justify the grant of a stay. To these may be added that the evidence now before me shows that the claimant is wholly impecunious (qualifying for fee remission, and instructing his legal representatives under a conditional fee agreement), so that if enforcement is not stayed and the Spanish challenges succeed, there must be a serious risk

that the defendant would not recover the sums paid to him, or any costs in seeking recovery.

70. Thirdly, and in any event, there has been significant delay (nearly 2½ years) between the 2014 order and the application. As stated in Tibbles, the court is unlikely to assist an applicant once much time has gone by. During this time, the defendant has gone forward in reliance on the 2014 order, and expended time and no doubt significant amounts of money pursuing the Spanish challenges. The claimant's primary argument that the Master lacked jurisdiction is one that could have been made at any time after the 2014 order was made.
71. The claimant sought to justify not having applied to revoke the order, by relying on the fact that, by 20 February 2014, the deceased had made the first of the Spanish challenges. The claimant then made, his counsel submitted, a purely pragmatic decision based on the fact that an order setting aside enforcement by the Spanish courts would have rendered irrelevant any interim order for a stay by the English court. The difficulty with this submission is that the current position does not differ in any material respect from that on 21 February 2014, namely, the Spanish challenges are ongoing, and may result in the withdrawal of the EEO. The claimant's delay was not, therefore, in my judgment, justified. The claimant's deliberate decision to delay making this application is a further factor against revisiting the 2014 order. 72. For these reasons, therefore, I refuse the application.

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