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Judgment: approved by the Court for handing down | *Delivered:* **14.02.06**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

BETWEEN:

HEIDLAND WERRES DIEDERICHS

Plaintiff/Respondent

and

FLEXIQUIP HYDRAULICS LIMITED

Defendant/Appellant

_____

HIGGINS J

[1] This is an appeal from the decision of Master Wilson dated 16 April 2004 whereby he ordered the registration of a foreign judgment against the appellant in the Queen's Bench Division of the High Court in Northern Ireland.

[2] Heidland Werres Diederichs (the respondent) are Insolvency Practitioners in Cologne (Koln), Germany. They were appointed to supervise the liquidation in Germany of Flexhydro Gmbh, a private German company which, apparently, distributed goods supplied by the appellant Flexiquip Hydraulics Ltd, of Altoner Road, Lisburn, Northern Ireland (the appellant). It appears that in 1999 the appellant acquired a 90% interest in Flexhydro GmbH. Subsequently Flexhydro GmbH went into liquidation.

[3] In April 2002 the respondent issued proceedings against the appellant in Germany. These proceedings (the klage) were served on the appellant at their premises in Lisburn on 28 May 2002. The documents were in German and no translation was provided. The appellant took no action, allegedly on the ground that the documents were in German without a translation.

[4] On 16 April 2003 the District Court of Cologne (Koln) granted a default judgment against the appellant for the sum of 64,327.18 Euros, with interest. This judgment was served on the appellant at their premises in Lisburn. It was in German with no translation. On 30 March 2004 the respondent's Belfast solicitors applied ex parte under section 4 of the Civil Jurisdiction and

Judgments Act 1982, for registration of this judgment with the Queen's Bench Division of the High Court in Belfast. On 16 April 2004 Master Wilson granted the application. The appellant appeals against that order by summons issued on 11 June 2004.

[5] On 11 May 2004 the Belfast solicitors acting on behalf of the respondent wrote to the appellant enclosing a Notice of Registration of a Foreign Judgment and a copy of the Order of Master Wilson dated 16 April 2004. The Notice of Registration stated that the appellant had the right to appeal the order within one month of service of the Notice upon them.
The order of Master Wilson was in these terms –

> "IT IS ORDERED that the judgment dated 16th April 2003 of the District Court of Cologne in the Federal Republic of Germany whereby it was ordered that the plaintiff, the above named Heidland Werres Diederichs having an address for service in Northern Ireland c/o Mills Selig, Solicitors, 21 Arthur Street, Belfast, BT1 4GA do receive from the defendant the above named Flexiquip Hydraulics Ltd having its registered office at Altoner Road, Lisburn, County Antrim BT27 5QB, the sum of (EURO) 64,327.18 together with interest thereon from 20th June 2001 until date of payment at 5% above the base rate and costs be registered in the Queen's Bench Division in Her Majesty's High Court of Justice in Northern Ireland pursuant to the Civil Jurisdiction and Judges Act 1982 for payment by the said Flexiquip Hydraulics Ltd to the said Heidland Werres Diedrichs of the above mentioned sums or the sterling equivalent at the time of payment.
>
> AND IT IS ORDERED that the above named Flexiquip Hydraulics Ltd shall have a period of one months after service upon it within the jurisdiction of notice of registration of the said judgment pursuant to Order 71 Rule 29 of the Rules of The Supreme Court (Northern Ireland) 1980 to appeal against such registration and no application to enforce the said judgment shall be made until after expiration of that period or any extension thereof granted by the Court or if an appeal be made against the said registration until such appeal has been disposed of.
>
> AND IT IS FURTHER ORDERED that the cost of and incidental to this application and to registration of the

said judgment be taxed and added to the judgment as registered."

[6] On 9 June 2004 German Solicitors (Fellman of Cologne) acting on behalf of the appellant lodged an appeal against the default judgment ordered by the Cologne District Court on 7 March 2003. Apparently the rules of procedure of the Cologne District Court require an appeal to be lodged within 4 weeks. The appeal in this case was lodged over one year after the date of the default judgment. On 5 August 2004 the appeal was dismissed on the ground that it was out of time. The judgment of the Court noted that the appellant had been served with a copy of the default judgment on 8 April 2003. It also records – "The possible objection of the defendants that the serviced writ had not been translated was not raised, even though this possibility was suggested". The respondents solicitor in an affidavit dated 12 October 2004 deposed that "the defendant (the appellant in these proceedings) was invited to raise objection but declined to do so". A request by Fellman for "reinstatement into the previous position" (which I understand to be similar to an application to set aside the default judgment) was refused because it should have been made before 6 May 2003.

[7] The Export Sales Manager (the Manager) of the appellant company has deposed in an affidavit dated 7 December 2004, that the appeal against the default judgment lodged by Fellman, was made without instruction from the appellant. In his affidavit he stated that in February 2002, the defendant decided not to retain Fellman to work for them further. The reason for this was to avoid service of documents in Germany on Fellman, and to require any documents to be served on the appellant direct, in Northern Ireland. After becoming aware of the order of Master Wilson, the Manager wrote to Fellman on 8 June 2004 asking for advice as to "whether the claim had been properly served and, if so, asking for his thoughts on the merits of an appeal". Fellman replied on 9 June 2004 that he would have to look into the court files but that he would require to use the power of attorney that that been given to him previously. The Manager said he thought this was reasonable and went on to state "he also indicated however that he had written to the court and lodged and appeal. This was not in accordance with his instructions. I did not pick up on this point when I received the fax of the 9 June 2004 ". The Manager exhibited the fax to Fellman dated 8 June 2002 and the reply by Fellman dated 9 June 2002. It is necessary to set out these two documents in full.

"**REF: CLAIM BY WERRES**

Dear Mr Fellman

Actually I have been back at Flexequip since October 2002. Unfortunately the problem of Flexequip Gmbh has not yet disappeared completely.

Basically Werres is still pursuing his claim for underpaid share capital at the time of the GmbH registration on 18.02.99. In your letter dated 10.02.02 we decided that you should stop working for us so that Werres would have to pursue this claim in Northern Ireland.

Documents received since 10.02.02: I

P. 3-7: original claim from Werres (we took no action because Werres referred to the assets of "Flexhydro", a company name which we do not recognise)

P. 8-10: Werres sends copy claim to Gummersbach, but premises are closed

P. 11-13: Werres sends claim through Northern Ireland Courts Service (again, no action taken by us for reason above and that claim is not in English)

p. 14-16: Werres has claim translated into English and registered with Miss Selig (Belfast solicitors)

What we are trying to establish urgently is:

- In your opinion, has this claim been properly served on Flexequip Ltd or can we dispute this?
- If the claim is properly served, can we appeal? If so, how?
- How do we know if will take any action against us for other losses of the GmbH if he is successful with this claim?

If we are forced to Pay, our argument is:

1. The stock in the GmbH was effectively a loan to the GmbH, so the claim has no basis (see your letter GNF/Ab/OO/04725 about "kapitalersetzendes Darlehen")

2. We have never received any liquidator's report on how he distributed the assets, especially as we are

> largest creditor. Are we legally entitled to such a report before we pay?
>
> 3. Is Werres also chasing Busam for his share?
>
> 4. Is the liquidator going to use this money for his own costs or distribute to the creditors (in which case he could deduct this money off our claim)."

Fellman replied on 9 June in the following terms -

> "In the above matter I refer to your letter dated 8th June 2004 and our telephone calls. I have written again to the court and appealed against the default judgement of the I.andgericht Koln, dated 7th March 2003. Further I have asked the court to grant as (sic) restoration to the original position of the proceedings.
>
> I have explained to the court that you have not received any documentation translated into the English language and for that reason you did not know what the papers were the court had served on you.
>
> Finally I informed the court that I would give more detailed reasons after having had the possibility to look into the court file.
>
> Please understand also that I need money on account in this matter. I enclose a fee note for £ 2,000.00 and would ask you to transfer that amount to my underneath mentioned account."

[8] In his affidavit the Manager deposed that Fellman said he would need money if he was going to take up the case again, but the appellant declined to pay any money. He went on to depose that at that stage they only wished to receive Fellman's advice on a net issue, namely whether in his view the proceedings had been properly served, and if so the merits of an appeal. At paragraph 6 of his affidavit the Export Manager continued –

> 6. ……His brief was for advice and I expressly understood that he would not take the case up again on our behalf by way of appeal or otherwise and felt that he understood this also as we did not put him in funds for this purpose.

> 7. It now appears from exhibit AJC1 to Mr Curry's affidavit that the Cologne court has taken this inquiry by Herr Fellman to be a full appeal against the original 2003 judgment or, in the alternative, that Herr Fellman did lodge an appeal but without instruction or authority to do so. It was a surprise to me to see in the exhibit to Mr Curry's affidavit that an appeal had been held in Cologne on 5 August 2004. We already knew such an appeal would be pointless as it was out of time. However, we never had a proper opportunity to defend the proceedings given that the documents were not served on us in English.
>
> 8. At the time the appeal is supposed to have been lodged, we were and are contesting the contention that the proceedings were served on us correctly. If Herr Fellman presented an appeal on our behalf this was not on our instruction. For this reason I do not feel that any appeal should have any adverse effect on the present application.

[9] The Manager's fax to Fellman dated 8 June 2004 containing the instructions to Fellman, is headed "Claim by Werres". The instructions confirm that the appellant sought advice as to the validity of service and, if the claim was properly served, whether the default judgment could be appealed and if so, how. The same instructions confirm that the original claim from Werres had been served upon them, but that they took no action because "Werres referred to the assets of 'Flexhydro' a company name which we do not recognise". He then informed Fellman that a copy claim had been sent to Gummersbach (in Germany) but the premises were closed and that Werres had then sent a claim through the Northern Ireland Court Service. It is alleged that no action was taken for the same reasons as before and because the claim was not in English.

[10] After inquiring about the service of the proceedings and the prospects of an appeal the Export Manager asked Fellman whether Werres would take action against them for other losses of the GmbH (that is Flexhydro) if the present claim by the respondent was successful.
In the opening lines of the fax the Export Manager informed Fellman that the "problem of Flexequip GmbH has not yet disappeared completely". He then stated that Werres was still pursuing his claim for the underpaid share capital at the time of the GmbH registration on 18.02.99 (this is correct – see translated copy of claim exhibited in the affidavit of Emma Hunt). At the end of the fax the Manager set out his argument if the appellant should be forced to the judgment. This was to the effect that the stock in GmbH was effectively a loan and referred to the words "kapitalersetzendes Darlehen" which appear in an earlier letter by Fellman. He then enquired whether the appellant would be entitled to a liquidator's report on how Werres distributed the assets and whether Werres was also chasing another party, Busam, for his share.

[11] In his reply dated 9 June 2004 Fellman stated in the first paragraph that he had written again to the court and appealed against the default judgment and that he had asked the court to grant "restoration to the original position". In the second paragraph he stated what he had explained to the court and in paragraph three wrote that he had informed the court that he would give more detailed reasons later.

[12] The appeal lodged by Fellman was heard on 5 August 2004 and dismissed and an order made accordingly. The translated appeal documents indicate that three judges heard the appeal. It was declared inadmissible as the appeal was lodged out of time. The judgment states –

> The judgment by default of the district court Cologne from 7 March 2003 was served on the defendants on 8 April 2003. The service was carried out duly. The possible objection of the defendants that the serviced writ had not been translated was not raised even though this possibility was suggested. An infringement of the granting of legal hearing is therefore not the case.
>
> According to §§ 341 par.1, 339 par. 1ZPO (Judicial Code) an appeal within the set time-limit of 4 weeks, which was then 6 May 2003 should have been received. The appeal of the defendant, however, was received only on 9 June 2004 at the district court Cologne.

[13] In the original claim there are two references to "Flexhydro". In the default judgment there is one reference to "Flexhydro" and another in the appendix. The claimant Dr Werres (the appellant in these proceedings) is described as the "Insolvenzvewalter uber das Vermogen der Flexhydro GmbH". These are the only references to Flexhydro. It would appear that the appellant has translated, correctly, the last five words as "the assets of Flexhydro GmbH" and referred to this in his fax to Fellman dated 8 June 2004. The defendant is described as "Flexequip Hydraulics Ltd., Altoner Road, Lisburn BT27 5QB County Antrim, Nord-Irland" in both the claim and the default judgment.

[14] On 11 June 2004 the appellant issued a summons out of the High Court making application –

> (1) That, pursuant to Article 37 of Schedule 1 to the Civil Jurisdiction and Judgements Act 1982 and Order 7, rule 30 of the Rules of the Supreme

> Court (Northern Ireland) 1980, an appeal be allowed against the Order of Master Wilson dated Friday 16 April 2004 whereby it was ordered that the judgment dated 16 April 2003 of the District Court of Cologne in the Federal Republic of Germany be registered against the Plaintiff in the Queen's Bench Division in Her Majesty's High Court in Northern Ireland and that the Order be set aside.

[15] The evidence in support of the appeal was provided by way of an affidavit sworn by the appellant's solicitor. He deposed –

> 2. The above entitled proceedings relate to an action which was commenced in Germany. The German proceedings were served on the Defendant, in German, at its premises in Lisburn on 28 May 2002. On 25 July 2002 a letter which appeared to summarise the claim, again in German, was sent to the Defendant's old premises which had been closed by the liquidator. This letter consisted of one page which appeared to summarise the case and ask the Defendant to respond. Neither the proceedings nor this letter were in English, nor was there any translation included for the benefit of the Defendant. In light of this, the Defendant did not take any action.
>
> 3. A default judgment was then obtained by the plaintiff against the defendant in Germany on 16 April 2003 in the district Court of Cologne where the defendant was order to pay the sum of 64,327.18 together with interest to the Plaintiff. This judgment was served on the defendant at its premises in Lisburn in April 2003. Again, the judgment was in German and no translation was provided. In light of this, the Defendant continued to take no action.
>
> 4. At no stage has the Defendant been provided with a copy of the proceedings or of the judgment in English.
>
> 5…….

> 6. By reason of matters aforesaid, the Defendant believes that the judgment has not been properly registered against it in this jurisdiction as neither the German proceedings not he German judgment have been duly served on it n accordance with the requisite provisions of the Community and international law. The defendant has not seen the application for registration lodged on behalf of the Court by the Plaintiff but believes that the application may have been procedurally irregular.

[16] Thus the appellant maintains that the default judgment is not properly registered in Northern Ireland as the initial German proceedings (the Klage or plaint as it was referred to) and the default judgment of the District Court of Koln were not served on the appellants in accordance with the Civil Jurisdiction and Judgments Act 1982 and the Rules of the Supreme Court (NI) 1980, as amended. The appellant's solicitors informed the respondent's solicitors of their opinion of these matters by way of correspondence dated 9 June 2004 and invited them to consent to the registration being set aside. The respondent's solicitor did not agree to this course of action.

[17] By Article 220 of the EEC Treaty of 1957, the original Member States (which included Germany) agreed to enter into negotiations with a view to simplification of the recognition and enforcement of judgments of courts and tribunals. These negotiations led to the Brussels Convention of 1968 which came into force in 1973. A Protocol on the interpretation of the 1968 Convention by the European Court came into effect in 1975. It was agreed that States that subsequently became member states, would accept the 1968 Convention as a basis for their negotiations to join the EEC. The United Kingdom acceded to the Brussels Convention of 1968 on joining the EEC in 1972 and subsequently negotiated the amendments necessary to the Convention and the Protocol. The Civil Jurisdiction and Judgments Act 1982 (the 1982 Act), inter alia, gives effect to the agreements on the Brussels Convention in the law of the United Kingdom, in relation to jurisdiction and the enforcement of judgments in civil and commercial matters. In particular, the 1982 Act provides for the recognition and enforcement of judgments of other Contracting States of the EEC, now the EU, and its successor. Section 4 of the 1982 Act provides –

> "(1) A judgment, other than a maintenance order, which is the subject of an application under Article 31 for its enforcement in any part of the United Kingdom shall, to the extent that its enforcement is authorised by the appropriate court, be registered in the prescribed manner in that court.

> In this subsection "the appropriate court" means the court to which the application is made in pursuance of Article 32 (that is to say, the High Court or the Court of Session).
>
> (2) Where a judgment is registered under this section, the reasonable costs or expense of and incidental to its registration shall be recoverable as if they were sums recoverable under the judgment
>
> (3) A judgment registered under this section shall, for the purposes of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment had been originally given by the registering court and had (where relevant) been entered.
>
> (4) Subsection (3) is subject to Article 39 (restriction on enforcement where appeal pending or time for appeal unexpired), to section 7 and to any provision made by rules of court as to the manner in which and conditions subject to which a judgment registered under this section may be enforced."

[18] In 1988 the then member states concluded a Convention at Lugano, (the Lugano Convention) which provides a regime separate from, but parallel to, the Brussels Convention. Following the Treaty of Amsterdam in 1997 the Council of Europe, on 22 December 2000, adopted Regulation 44/2001, which is now the principal instrument in what is known as the Brussels – Lugano Regime, for the recognition and enforcement of judgments. Regulations 44/2001 is known as 'The Regulation' or 'Brussels I' (to distinguish it from Brussels II which relates to jurisdiction in matrimonial proceedings. The Regulation was brought into effect in the United Kingdom by the Civil Jurisdiction and Judgments Order 2001 (IS 2001/3929) and came into force on 1 March 2002. The Lugano Convention remains in force between certain other Member states.

[19] The Regulation noted the necessity for a rapid and simple system for recognition and enforcement of judgments. Chapter III (Articles 32 – 56) sets out the regulations relating to recognition and enforcement of judgments. Chapter III opens Article 32 which provides.

Article 32

For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1 of Chapter III is headed Recognition and contains Articles 33 - 37

Article 33

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

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:
1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35
1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36
Under no circumstances may a foreign judgment be reviewed as to its substance.

Chapter VI includes transitional provisions Article 66 of which provides -

Article 66
1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

(a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;

(b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

ANNEX II makes provision for the courts to which applications referred to in Article 39 may be submitted.

Annex II states -
The courts or competent authorities to which the application referred to in Article 39 may be submitted are the following:
- in the United Kingdom:

(c) in Northern Ireland, the High Court of Justice, or in the case of a maintenance judgment, the Magistrate's Court on transmission by the Secretary of State;

Article 38
1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39
1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40
1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.

2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Article 53 shall be attached to the application.

Article 34 (2) is in similar but not exact terms to Article 27(2) of the Brussels Convention which applied to proceedings commenced before of 1 March 2002.
Section 3 Chapter III makes the following common provisions –

Article 53
1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.

2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54
The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55
1. If the certificate referred to in Article 54 is not

> produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.
>
> 2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.
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> Article 56
> No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative ad litem.

[20] Order 71 of the Rules of the Supreme Court (NI) contains the rules made under Section 48 of the 1982 Act. The procedure for making an application for registration of a judgment under section 4 of the 1982 Act is contained in Rules 24 to 26. Rule 24 provides that the application shall be made ex parte. Rule 25(a) sets out the evidence necessary in support of an application. It provides –

> Rule 25. - (1) An application for registration under section 4 of the Act of 1982 must be supported by an affidavit-
>
> (a) exhibiting-
>
> (i) the judgment or a verified or certified or otherwise duly authenticated copy thereof together with such other document or documents as may be requisite to show that, according to the law of the State in which it has been given, the judgment is enforceable and has been served;
>
> (ii) in the case of a judgment given in default, the original or a certified true copy of the document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document;
>
> (iii) where it is the case, a document showing that the party making the application is in receipt of

legal aid in the State in which the judgment was given;

(iv) where the judgment or document is not in the English language, a translation thereof into English certified by a notary public or a person qualified for the purpose in one of the Contracting States or authenticated by affidavit;

(b) stating-

(i) whether the judgment provides for the payment of a sum or sums of money;

(ii) whether interest is recoverable on the subject or part thereof in accordance with the law of the State in which the judgment was given, and if such be the case, the rate of interest, the date from which interest is recoverable, and the date on which interest ceases to accrue;

(c) giving an address within the jurisdiction of the Court for service of process on the party making the application and stating, so far as is known to the deponent, the name and the usual or last known address or place of business of the person against whom judgment was given;

(d) stating to the best of the information or belief of the deponent-

(i) the grounds on which the right to enforce the judgment is vested in the party making the application;

(ii) as the case may require, either that at the date of the application the judgment has not been satisfied, or the part or amount in respect of which it remains unsatisfied.

(2) Where the party making the application does not produce the documents referred to in paragraphs (1)(a)(ii) and (iii) of this rule, the Court may-

(a) fix time within which the documents are to be produced; or

(b) accept equivalent documents; or

(c) dispense with production of the documents.

[21] Rule 30 make provision for appeals against the registration of a foreign judgment –

> 30. - (1) An appeal under Article 37 or Article 40 of Schedule 1 or under Article 37 or Article 40 of Schedule 3C to the Act of 1982 must be made by summons to a judge.
>
> (2) A summons in an appeal to which this rule applies must be served-
>
> (a) in the case of an appeal under the said Article 37 of Schedule 1 or under the said Article 37 of Schedule 3C, within one month of service of notice of registration of the judgment, or two months of service of such notice where that notice was served on a party not domiciled within the jurisdiction;
>
> (b) in the case of an appeal under the said Article 40 of Schedule 1 or under Article 40 of Schedule 3C, within one month of the determination of the application under rule 24.
>
> (3) If the party against whom judgment was given is not domiciled in a Convention territory and an application is made within two months of service of notice of registration, the Court may extend the period within which an appeal may be made against the order for registration.

[22] The process for proper service of judicial documents in another Member State is now governed by Council Regulation (EC) No 1348/2000 which supercedes the 1965 Hague Service Convention. Paragraph 10 of the Preamble of 1348/2000 provides –

> For the protection of the addressee's interests, service should be effected in the official language or one of the official languages of the place where it is to be effected or in another language of the

> originating Member State which the addressee understands.

[23] Regulation 1348/2000 requires Member States to establish Transmitting and Receiving Agencies for the transmission and service of judicial documents between member states. Under Article 8 a Receiving Agency shall inform the addressee that he may refuse to accept the document to be served if it is in a language other than the official language of the Member State addressed or in a language of the Member State of transmission which the addressee understands. In Northern Ireland the Transmitting (and Receiving Agency) is the Master (Queen's Bench and Appeals). Article 8 states –

> 1. The receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than either of the following languages:
>
> (a) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected; or
>
> (b) a language of the Member State of transmission which the addressee understands.
>
> 2. Where the receiving agency is informed that the addressee refuse to accept the document in accordance with paragraph 1, it shall immediately inform the transmitting agency by means of the certificate provided for in Article 10 and return the request and the documents of which a translation is requested.

[24] Service of the original the plaint (the klage) on the appellant was effected through the Transmitting Agency in Northern Ireland, namely the Master (Queen's Bench and Appeals). Following service the Transmitting Agency returned to the Landgericht in Koln, the "judicial documents in relation to Flexequip Hydraulic Ltd with the Certificate of Service duly completed". The Certificate of Service is dated 25 October 2002.
Service of the default judgment was effected through the Northern Ireland Transmitting Agency. Following service the Master (Queen's Bench and Appeals) returned to the Landgericht in Koln "the judicial documents in relation to Flexiquip Hydraulics Ltd with the Certificate of Service duly completed".

[25] The summons under Rule 30, issued on 11 June 2004, was supported by an affidavit sworn by the appellant's solicitor. This acknowledged that the "German proceedings, in German" were served on the appellant at its Lisburn premises on 28 May 2002. The deponent then referred to a letter received on 25 July 2002 which appeared to summarise the case and requested the appellant to respond. The deponent stated "Neither the proceedings nor this letter were in English nor was there any translation included for the benefit of the [appellant]. In light of this the [appellant] did not take any action in response." The affidavit then acknowledged service of the default judgment in April 2003 and stated "Again, this judgment was in German and no translation was provided. In light of this the [appellant] continued not to take any action." Paragraph 4 states – "At no stage has the [appellant] been provided with a copy of the proceedings or the judgment in English." Paragraph 6 states –

> By reason of matters aforesaid, the [appellant] believes that the judgment has not been properly registered against it in this jurisdiction as neither the German proceedings nor the German judgment have been duly served on it in accordance with the requisite provisions of Community and international Law. The [appellant] has not seen the application for registration lodged on behalf of the Court (sic) by the [respondent] but believes that the application may have been procedurally irregular.

[26] It transpired that the assertion expressed in the last sentence of that paragraph related to whether the requirements of Order 71 relating to translations of the documents had been served. It was suggested that the Receiving Agency did not inform the appellant that he could refuse to accept the document to be served, as is required by Article 8 (1) of 1348/2000. The Certificate of Service relating to the default judgment and dated 8 April 2003, does comply with the requirement of Article 8(1).

[27] Subsequently the Manager swore an affidavit in response to that sworn by the respondent's solicitor. This relates to the appeal entered by Fellman. In that affidavit he deposed that the appeal lodged by Fellman was without instruction. The affidavit is dated 7 December 2004. The fax from Fellman dated 9 June 2004 stated that he had "appealed against the default judgment". The appeal was heard in August and Fellman represented the appellant. This begs the question that, if the appellant did not wish the appeal to be instituted or pursued, why was Fellman not instructed to withdraw the appeal. The Manager suggests this matter was not noticed. His affidavit states – "I did not pick up on this point". The letter from Fellman is quite clear. The failure to

instruct Fellman not to proceed with the appeal is more consistent with the appellant being content to allow the appeal to proceed and to await the outcome. The averment in the affidavit dated 7 December 2004 is inconsistent with (if not a contradiction of) what is known about the appeal instituted and pursued by Fellman through to August 2004.

[28] It was submitted on behalf of the appellant that registration of the judgment of the District Court of Köln should be set aside as the appellant was not duly served with the document which instituted the proceedings as required by Article 27(2) of the Brussels Convention (now Article 34(2) of the Regulation). Article 34 states –

> A judgment shall not be recognised:
>
> 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

[29] Furthermore it was contended that the appellant should have been served with a translation of the Order of the Koln District Court in English. The appellant submitted that it is a requirement of due service that a translation in English of the original documents initiating the legal process should have been served on the appellant. There is no averment in that affidavit or the other affidavit that German is not understood within the appellant company. The appellant relies on the mere assertion that no translation was provided.

[30] The appellant argued that the failure to serve a translation of the plaint or klage was fatal to the application to register the foreign judgment. The appellant relied on Isabelle Lancray SA v Peteres und Sickert KG 1990 ECR I-2725 as authority for the proposition for which they contended. It was submitted that in Lancray's case, service had not been effected in due form because the document initiating the proceedings had not been translated into German and that the European Court had agreed. It was submitted that this case was directly analogous with the instant proceedings.

[31] In Lancray SA v Peters und Sickert the plaintiff company (Lancray) was registered in France and the defendants (Peters) in Germany. On 18 July 1986 Lancray obtained an order from the Amtsgericht, Essen, Germany, prohibiting Peters from selling products bearing Lancray's trade mark. On 30 July 1986 Lancray applied to the Tribunal de Commerce, Nanterre, France to have the

Essen order confirmed. On the same date the competent French authorities sent to the President of the Landgericht, Essen a summons to Peters to appear on 18 November 1986 before the French court. The summons was drawn up in French and the German authorities were requested to serve the summons on Peters. On 19 August 1986 the competent German authorities certified that the summons had been served by handing them to a secretary in Peters' officers. A further summons to Peters to appear before the French court on 16 December 1986 was sent by registered mail. Peters appealed the order granted to Lancray by the Amtsgericht on 18 July 1986. The appeal was heard by the Landgericht Essen and the order was quashed. Peters did not appear at the French court on 16 December 1986. By its judgment dated 15 January 1987 the French court upheld Lancray's application for confirmation of the original order of the Amtsgericht. The judgment was served on Peters by delivery to its managing partner on 9 March 1987. On 6 July 1987 the Landgericht Essen ordered that the judgment of the French court dated 15 January 1987 be recognised in Germany and authorised its enforcement. Peters appealed the judgment of the Landgericht to the Oberlandgericht on the ground that under Article 27(2) of the Convention Lancray's application before the Landgericht, recognising in Germany the order of the French court dated 15 January 1987, should not have been granted. The Oberlandgericht allowed Peters' appeal and Lancray appealed to the Bundesgerichthof who referred to the European Court two questions on the interpretation of Article 27(2). The relevant part of Article 27(2) provides –

> A judgment shall not be recognised ……..
> (2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence ….

[32] The Bundesgerichtshof agreed with the Oberlandesgericht that the document instituting the proceedings was not served in due form. The summons was served on a secretary - that is substituted service - which in accordance with the relevant international conventions is acceptable only if the document served was accompanied by a German translation. The Bundesgerichtshof also noted that the German rules concerning the curing of defective service were not applicable as Peters did not have command of the French language.

[33] The two questions posed were –

1. Is recognition of a judgment given in default of appearance to be refused in accordance with Article 27(2) of the pre-accession version of the Brussels Convention where the document instituting the proceedings was not served on the defendant in due form, even

though it was served in sufficient time to enable him to arrange for his defence?

2. In the event that a judgment given in default of appearance is not recognised because although the defendant was served with the document instituting the proceedings in sufficient time to enable him to arrange for his defence, the service was not duly effected, does Article 27(2) of the pre-accession version of the Brussels Convention preclude recognition of the judgment even where the laws of the State in which recognition is sought permit the defective service to be cured?

[34] The Court concluded that Article 27(2) created two separate safeguards for a defendant who failed to appear. These were a requirement of due service and service within a sufficient time. Klomps v Michel 1981 ECR 1593 was referred to in which the Court observed that whether service is duly effected involved a decision based on the legislation of the State in which judgment was given and on the convention binding on that State in regard to service. In relation to the second question the Court concluded that questions concerning the curing of defective service are governed by the law of the State in which judgment was given.

[35] Relying on this case the appellants argued that the documents were not properly served. In its judgment the European Court quoted a passage from the judgment of the Bundesgericht, the German Court from whom the reference came. This stated -

> The Bundesgerichtshof agrees with the Oberlandesgericht in finding that the summons was served on Peters in time to enable it to arrange for its defence. It also finds, like the Oberlandesgericht, that service of the document which began the proceedings was not properly effected. According to the Bundesgerichtshof, the summons was not served on the recipient accepting it voluntarily, but by delivery to a secretary in the recipient's office, i.e. by way of substituted service. However, in accordance with the relevant international treaties, this would have been possible only if the document served had been accompanied by a German translation, which was not the case. The Bundesgerichtshof adds that the Oberlandesgericht found that it could not apply its national rules on curing defective service because the recipient of the document did not have a command of the foreign language used.

[36] It seems that the German Court was of the view that the substituted method of service determined that a translation was required. The European Court decided that the applicable Convention afforded double protection for a defendant - first, the document must be duly served and secondly, the document must be served in sufficient time to enable the defendant to arrange for his defence. The second protection is not relevant to this case. The court held that recognition of a foreign judgment must be refused if service was not properly effected, regardless of the fact that the defendant was actually aware of the document which instituted the proceedings. In relation to the curing of defective service the Court ruled that this was governed by the law of the State in which judgment was given, in that case, Germany. It is not clear from that decision that the European Court was laying down a precondition to due service that a default judgment be accompanied by a translation. Nor is it clear which Convention was applicable though it would seem that it was probably the 1965 Hague Service Convention. Article 5 of this Convention provides that where a document is served by a method prescribed by the internal law of the State addressed the Central Authority may require the document to be written in or translated into the official language of the State addressed (my emphasis).

[37] The operative Convention was The Regulation (44/2001) together with the EU Service Regulation 1348.2000. It should be noted that the wording of Article 34(2) of the Regulations is different from that set out in Article 27(2) of the Brussels/Lugano Convention. The word 'duly' is omitted. The reason for that is not clear but it may be a deliberate omission to preclude technical objections. It is evident the appellant was served with the document which instituted the proceedings in Germany and the default judgment that followed. The application for registration was properly made and evidenced under the Rules. Service of the original judgment was effected by the Local Transmitting Agency and the Rules complied with. However it does appear that when service of the original proceedings was effected, the appellant was not advised that the addressee could refuse to accept the document if it was not in one of the languages provided for in Article 8. This was complied with when the default judgment was served on the appellant. So far as can be ascertained it appears that the certificate of service used during service of the original proceedings was that in use under Article 5 of the 1965 Hague Service Convention. Whereas service of the default judgment was effected using the certificate appropriate for Regulation 1348/2000. The languages referred to in Article 8 are –

a) the official language of the Member State addressed ……. or,

b) a language of the Member State of transmission which the addressee understands.

[38] There is no specific requirement for translation of judicial documents when they are served. It is sufficient if the addressee is advised that he can

refuse to accept the document if it is not in one of the languages provided for in Article 8 of 1348/2000. The appellant did not refuse to accept the Cologne default judgment when it was served, though the certificate of service indicates that he was given that option. The inference I draw from the correspondence with Fellman about the German proceedings and the lack of averment that German is not understood is, that the language of the Member State of transmission (German) is understood within the appellant company. This is consistent with the service and acceptance of the default judgment and would explain why that judgment was not refused despite the opportunity to do so. If the appellant had been advised in accordance with Article 8 of 1348/2000, that he could refuse to accept service of the documents relating to the original proceedings if they were not in a language that he understood, he could not have refused to accept them as the condition precedent did not apply and probably would not have done so. The appellant's application to set aside the registered judgment is grounded in the absence of a translation and not on the failure to advise of the right to refuse service under Article 8. There is no requirement to provide a translation per se. Article 5 of the 1965 Hague Service Convention did not make it mandatory that a translation be provided. Whatever the position was in Lancray's case, Regulation 1348/2000 is now the applicable provision. It supercedes any requirement for translation that applied hitherto and provides the protection necessary for those to be served with foreign proceedings or judgments. In all those circumstances there is no good reason to set aside a properly obtained and registered judgment for lack of a translation. The appeal will be dismissed.