Neutral Citation Number: [2006] EWHC 2226 (QB)

Case No: QB/2005/PTA/0897

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/09/2006

Before :

MR JUSTICE JACK

- -

Between :

(1) DAVID CHARLES ORAMS	**Appellants**
(2) LINDA ELIZABETH ORAMS	
- and -	
MELETIOS APOSTOLIDES	**Respondent**

- -
- -

Miss Cherie Booth QC, Mr Bitu Bhalla, Mr Ramiz Gursoy and Ms Angela Ward (instructed by **Vahib & Co**) for the Appellants
Mr Thomas Beazley QC and Mr Colin West (instructed by **Holman Fenwick & Willan**) for the Respondent

Hearing dates: 18 - 21 July 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JACK

Mr Justice Jack :

Introduction.

1. These appeals raise the question of the enforceability in England of judgments of the courts of the Republic of Cyprus concerning land within the Turkish Republic of Northern Cyprus. The Turkish Republic is not recognised by the United Kingdom or by any country save Turkey, but it has de facto control of the area which it occupies. The appeals have an importance which extends far beyond the parties to them.

2. On 9 November 2004 the respondent to the appeals, Meletios Apostolides, obtained a judgment in default of appearance in the Nicosia District Court in Cyprus against the appellants, David and Linda Orams. On 19 April 2005 judgment was delivered in the District Court refusing to set aside the earlier judgment on the ground that there was no valid defence to the claim. On 21 October 2005 those judgments were registered in, and declared enforceable by, the Queen's Bench Division of the High Court pursuant to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The appeals are against those registrations.

3. The situation with which the court is concerned can only be understood in the context of the recent history of Cyprus. I shall set it out as briefly as I may and with the intention of avoiding controversy. The Republic of Cyprus came into being in 1960 when the United Kingdom gave up its sovereignty of the island with the exception of the two sovereign base areas of Akrotiri and Dhekelia. This was achieved by, among other instruments, the Treaty of Establishment entered into by the United Kingdom, Greece, Turkey and the Republic itself. The constitution of the Republic was intended to provide a balance between the Greek and Turkish communities on the island. Within three years the bi-communal government of the island had effectively failed. In March 1964 a United Nations peace keeping force, UNICYP, arrived. A Turkish Cypriot administration came into being in the area then under Turkish Cypriot control. In July 1974 there was a coup against the government of the President, Archbishop Makarios. The aim of the coup was to secure union with Greece. On 20 July 1974 the Turkish army invaded the north of the island and secured control of the area now under the administration of the Turkish Republic. One outcome of this was the effective expulsion of Greek Cypriots from much of the area that was occupied. Turkish Cypriots in the unoccupied area left for the occupied area. The Turkish authorities set up an administration for that part of the island. The Turkish Republic of Northern Cyprus, the TRNC was declared in 1983. The TRNC has not been recognised by any country save Turkey. It has control over the relevant area, and the Republic of Cyprus does not. During the negotiations for the accession to the European Union of Cyprus together with nine other countries, it was hoped that a settlement could be reached between the Greek and Turkish communities so the whole island might be brought fully within the EU. But this had not occurred prior to the Treaty of Accession which also brought the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic into the European Union. The Treaty was signed on behalf of the Republic of Cyprus on 16

April 2003. A plan had been put forward, called the Annan Plan because it was proposed by the Secretary General of the United Nations of that name, which was intended to resolve the dispute between the Greek and Turkish Communities. The plan was rejected by the Greek community in a referendum held on 24 April 2004. It was accepted by the Turkish community. The result was that the practical division of the island remained unchanged. It had been decided by the European Council on 13 December 2002 prior to the Treaty of Accession that 'in the absence of a settlement the application of the *acquis* to the northern part of the island shall be suspended until the Council decides unanimously otherwise, on the basis of a proposal by the Commission.' The decision was given effect by Protocol No 10 to the Treaty of Accession. The Protocol provided that 'the application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.' It is agreed that 'the *acquis*', also called 'the *acquis communautaire'*, refers to the entire body of legislation of the European Union. It includes all treaties, legislation and the decisions of the European Court.

4. I can now come to those involved. Mr Apostolides is a Greek Cypriot, who lived in the area which is now under the control of the TRNC, where his family owned land at Lapithos in the district of Kyrenia. As a result of the invasion he had to flee. Mr and Mrs Orams are British and live in Hove in Sussex. In 2002 they purchased 2,400 square feet of land, which was part of land which had come into the ownership of Mr Apostolides. It then had a partly built house on it and the lemon trees which had formerly been on it were gone. They purchased it from a Turkish Cypriot, who was the registered owner under the law of the TRNC. He had purchased it from another Turkish Cypriot who, they were told, had left a property in the south of the island and had acquired it from the TRNC. Mr and Mrs Orams paid £50,000. They spent a further £160,000 building their villa, adding a swimming pool and making a garden. In April 2003, following the easing of restrictions on travel to the TRNC, Mr Apostolides visited Lapithos and saw the property. Early in October 2004 he introduced himself to Mrs Orams and they had a pleasant conversation.

The proceedings in Cyprus

5. It is helpful to state at this point that the civil procedure of the courts of the Republic of Cyprus broadly follows that of England in 1954, that being the relevant date as I understand it.

6. On Tuesday, 26 October 2004 Mr Apostolides issued a specially endorsed writ in the District Court of Nicosia naming Mr and Mrs Orams as defendants. It gave their English address. It claimed an order that they demolish the villa, the swimming pool and the fence around their property in Lapithos, that they deliver Mr Apostolides free occupation of the land, and damages for trespass. Mr Apostolides relied on his title to the land.

7. On the evening of the same day service of the writ was effected on Mrs Orams on behalf of herself and her husband at their villa. It is accepted the service was good. The circumstances may be nonetheless of some importance because they may be relevant to whether Mrs Orams had sufficient time in which to arrange for an appearance to be entered. I will return to that.

8. The time limit for entering an appearance was ten days from the service of the writ. The last day was therefore 5 November. On 8 November an application was made on behalf of Mr Apostolides for judgment to be entered in default of appearance. The application was supported by an affidavit sworn on that day by Mr Apostolides at the Cyprus High Commission in London. On 9 November judgment in default of appearance was entered. On 10 November a certificate was obtained in the form prescribed by Annex V to Regulation 44/2001. On 9 November Mr Mentes, the lawyer instructed on behalf of Mr and Mrs Orams, attended at the District Court with the intention of entering an appearance on their behalf. The judgment had already been entered.

9. The judgment required Mr and Mrs Orams to demolish the villa, the pool and the fencing, to give Mr Apostolides possession of the land, and to pay CY£7,654.83 special damages, CY£294.41 mesne profits monthly from December 2004 until delivery up, and CY£380.50 costs, all with interest at 8%.

10. On 15 November 2004 an appearance was entered on behalf of Mr and Mrs Orams. It was not conditional. On the same day an application was issued on their behalf that the judgment be set aside. The application was supported by affidavits from Mrs Orams and Mr Mentes. Following a hearing at which Mrs Orams gave oral evidence judgment was delivered by District Judge Efrem on 19 April 2005 dismissing the application. It was a substantial judgment, 36 pages in translation. The judge held that by reason of the merger of the Kyrenia district with the Nicosia district in 1974 and the land at Lapithos being in the Kyrenia district, the court – that is the District Court at Nicosia, had jurisdiction to try the case (page 20 of the translation). She considered the English case of *Hesperides Hotels v Muftizade* irrelevant because the court was there concerned with its jurisdiction over foreign real property, namely the hotels. Here, as she held, the court was concerned with real property over which it had jurisdiction. She cited the decision of the European Court of Human Rights, *Loizidou v Turkey* [1997] 23 EHHR 513, as authority that ownership of land in the north of Cyprus remained with its original Greek Cypriot owners. That defeated the submission that the court should take account of the de facto situation in the north (page 22). She then turned to whether Mr and Mrs Orams had shown an arguable defence (page 23). The onus to establish a good or prima facie arguable defence was on Mr and Mrs Orams (page 25). The basic argument that Mr and Mrs Orams owned the property under the title deed issued by the TRNC was answered by *Loizidou*. The judge also cited *Xenides-Arestis v Turkey,* Application no. 46347/99, judgment 22 December 2005, and other ECHR cases to like effect. She held that Mr Apostolides had not lost his right to the land (page 27). She held that the conduct of Mr and Mrs

Orams towards the property amounted to trespass (page 30). She held that neither 'local custom' nor the good faith of Mr and Mrs Orams could provide a defence (page 31). She held that Regulation No 44/2001 was irrelevant because it was concerned with the recognition and execution of judgments in other jurisdictions and was irrelevant to the question of setting aside the judgment obtained by Mr Apostolides (page 33). The judge held that no prima facie or arguable defence had been shown and so the application to set aside the judgment must be dismissed (page 33). By its order given on 19 April 2005 and drawn up on 26 April 2005 the District Court ordered that the application for setting aside the judgment should be dismissed, and awarded costs to Mr Apostolides.

11. Mr and Mrs Orams have appealed against the judgment of District Judge Efrem of 19 April 2005 to the Supreme Court of Cyprus. The appeal has still to be heard. In the written address filed on behalf of Mr and Mrs Orams and dated 25 November 2005 emphasis is laid on Protocol 10 to the Treaty of Accession and Regulation No 44/2001.

The English proceedings.

12. The procedure for the enforcement of judgments between Member States of the European Union is provided by Regulation No 44/2001. Article 53 provides that a party seeking recognition or applying for a declaration of enforceability must provide a copy of the judgment in question together with an Annex V certificate. Section 1 of Part 74 of the Civil Procedure Rules makes further provision as to the manner in which a judgment is enforced in the High Court. In the present case an application was made in respect of the judgments of the Nicosia District Court of 9 November 2004 and 19 April 2005 on 18 October 2005. Article 41 of the Regulation provides that the party against whom registration is sought shall not be entitled to make any submissions at this stage. By orders of Master Eyre made on 21 October 2005 it was ordered that the judgments be registered and be declared enforceable. On 22 November those orders were served on Mrs Orams at the Nicosia District Court. They were served on Mr Orams at Hove on 31 December 2005. Article 43 provides for the orders of Master Eyre to be appealable by Mr and Mrs Orams. Notice of appeal was served on behalf of Mrs Orams on 22 December 2005. It is agreed that Mr Orams is to be treated as a party to that appeal. So although I am dealing with what is designated an appeal by Article 43, it is in fact the first time that the issues raised by the application for registration are being considered by the court. Article 44 and Annex IV provide that a judgment on an appeal under Article 33 may be the subject of a single further appeal on a point of law.

The issues on the appeals.

13. I will list the issues as I have distilled them from the submissions which have been made, under short headings:

(1) issues arising from the situation of the land;
(2) issues arising in connection Article 6 of the European Convention on Human Rights;
(3) issues arising on Article 1 of Protocol No 1 to the European Convention on Human Rights;
(4) issues arising from the fact that the judgment of 9 November 2004 was a default judgment and Article 34.2 of Regulation 44/2001.
(5) issues in connection with the entry of appearance and Article 24 of Regulation 44/2001.

Issues arising from the situation of the land.

14. I will first look further at the provisions relating to the application of European law to the Republic of Cyprus, second at the manner in which the European Court has approached the land problem, before coming to the terms of Regulation 44/2001 and their application in these appeals.

15. By Article 2 of the Treaty or Act of Accession whereby the Republic of Cyprus became a member of the European Union it was provided that:

> From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.

So Community law, the *acquis*, was made to apply in the Republic of Cyprus. But as I have stated this was subject to Protocol No 10. I will set out the preamble and Article 1 of the Protocol:

> "THE HIGH CONTRACTING PARTIES.
>
> REAFFIRMING their commitment to a comprehensive settlement of the Cyprus problem, consistent with relevant United Nations Security Council Resolutions, and their strong support for the efforts of the United Nations Secretary General to that end,
>
> CONSIDERING that such a comprehensive settlement to the Cyprus problem has not yet been reached,
>
> CONSIDERING that it is, therefore, necessary to provide for the suspension of the application of the *acquis* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control,

> CONSIDERING that, in the event of a solution of the Cyprus problem this suspension shall be lifted,
>
> CONSIDERING that the European Union is ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded,
>
> CONSIDERING that it is necessary to provide for the terms under which the relevant provisions of EU law will apply to the line between the abovementioned areas and both those areas in which the Government of the Republic of Cyprus exercises effective control and the Eastern Sovereign Base Area of the United Kingdom of Great Britain and Northern Ireland,
>
> DESIRING that the accession of Cyprus to the European Union shall benefit all Cypriot citizens and promote civil peace and reconciliation,
>
> CONSIDERING, therefore, that nothing in this Protocol shall preclude measures with this end in view,
>
> CONSIDERING that such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus.
>
> *Article 1*
>
> 1. The application of the *acquis* shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.
>
> 2. The Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension referred to in paragraph 1."

16. The first case in the European Court of Human Rights is *Loizidou v Turkey* [1997] 23 EHRR 513. The applicant, a Greek Cypriot, had owned property in northern Cyprus and alleged that Turkish forces had prevented her from returning to it. She alleged that Turkey was responsible for continuing violations of Article 1 of Protocol No 1 and of Article 8 of the Human Rights Convention. The majority of the Court held that that the denial of access and subsequent loss of control of the property was imputable to Turkey, and that there had been a breach of Article 1 of Protocol No 1. It was held unanimously that there had been no breach of Article 8 because the applicant had not established that the property had been her home. Among other submissions Turkey relied on Article 159 of the Constitution of the TRNC. That provided that all immovable properties, buildings and installations which were found abandoned on 13 February 1975 when the Turkish Federated State of Cyprus was proclaimed or which were later considered by law as abandoned or ownerless and situated within the

boundaries of the TRNC on 15 November 1983 should be the property of the TRNC, and the Land Registry Office should be amended accordingly. As to this the Court stated:

> "44. In this respect it is evident from international practice and the various, strongly worded resolutions referred to above that the international community does not regard the "TRNC" as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus – itself bound to respect international standards in the field of the protection of human and minority rights. Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely.
>
> 45. The Court confines itself to the above conclusion and does not consider it desirable, let alone necessary in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the "TRNC". It notes, however, that international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, "the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory".
>
> 46. Accordingly, the applicant cannot be deemed to have lost title to her property as a result of Article 159 of the 1985 Constitution of the "TRNC. No other facts entailing loss of title to the applicant's properties have been advanced by the Turkish Government nor found by the Court. In this context the Court notes that the legitimate Government of Cyprus have consistently asserted their position that Greek Cypriot owners of immovable property in the northern part of Cyprus, such as the applicant, have retained their title and should be allowed to resume free use of their possessions, whilst the applicant obviously has taken a similar stance.
>
> 47. It follows that the applicant, for the purposes of Article 1 of Protocol No. 1 and Article 8 of the Convention, must still be regarded to be the legal owner of the land. The objection *ratione temporis* therefore fails."

17. Paragraph 45 relates to what is sometimes called the *Namibia* exception. That is the exception to the principle that the acts, including the laws of a state which lacks international recognition are of no effect, which exception may give effect to acts such as the registration of births, deaths and marriages, and perhaps other transactions

between persons in the territory controlled by the unrecognised state. In its Advisory Opinion on the legal consequences for states of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) the International Court of Justice stated in paragraph 125, quoted in part by the European Court:

> "125. In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

18. In paragraph 44 the European Court was rejecting the submission made on behalf of Turkey that the exception enabled or obliged it to recognise the effect of Article 159 of the 1985 Constitution. In the course of its finding that there was a breach of Article 1 of Protocol No 1 the Court stated:

> "62. With respect to the question whether Article 1 is violated, the Court first recalls its finding that the applicant, for purposes of this Article, must be regarded as having remained the legal owner of the land
>
> ……..
>
> 64. Apart from a passing reference to the doctrine of necessity as a justification for the acts of the "TRNC" and to the fact that property rights were the subject of intercommunal talks, the Turkish Government have not sought to make submissions justifying the above interference with the applicant's property rights which is imputable to Turkey.
>
> It has not, however, been explained how the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the complete negation of the applicant's property rights in the form of a total and continuous denial or access and a purported expropriation without compensation.
>
> Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention.

> In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 of Protocol No. 1. ”

19. The case of *Cyprus v Turkey* [2002] 35 EHRR 30 concerned a number of allegations made against Turkey by the Republic of Cyprus arising from the Turkish invasion and occupation of northern Cyprus. One issue was the homes and property of displaced persons. In paragraphs 82 to 102 of its judgment the Court considered whether the judicial organs set up by the TRNC were to be simply disregarded. It considered the *Namibia* case and *Loizidou* in that context. It held, in paragraph 98, that they could not be simply disregarded, but whether they might afford a remedy had to be approached on a case by case basis. Under the heading of alleged violations relating to homes and property, the Court stated in paragraph 171 that Turkey did not dispute the assertion that it was not possible for displaced Greek Cypriots to return to their homes in the north. The Court held that in those circumstances the question of domestic remedies within the TRNC did not arise. The Court concluded in relation to Article 8:

> “174. The Court would make the following observations in this connection: firstly, the complete denial of the right of displaced persons to respect for their homes has no basis in law within the meaning of Article 8(2) of the Convention; secondly, the inter-communal talks cannot be invoked in order to legitimate a violation of the Convention; thirdly, the violation at issue has endured as a matter of policy since 1974 and must be considered continuing.
>
> 175. In view of these considerations, the Court concludes that there has been a continuing violation of Article 8 of the Convention by reason of the refusal to allow the return of any Greek-Cypriot displaced persons to their homes in northern Cyprus.”

20. In relation to the case under Article 1 of Protocol No 1 the Court stated:

> “183. The Commission, essentially for the reasons set out by the Court in the above-mentioned judgment [*Loizidou*], concluded that during the period under consideration there had been a continuing violation of Article 1 of Protocol No. 1 by virtue of the fact that Greek-Cypriot owners of property in northern Cyprus were being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.
>
> 184. The Court agrees with the Commission’s analysis. It observes that the Commission found it established on the evidence that at least since June 1989 the “TRNC” authorities

> no longer recognised any ownership rights of Greek Cypriots in respect of their properties in northern Cyprus. This purported deprivation of the property at issue was embodied in a constitutional provision, "Article 159 of the TRNC Constitution", and given practical effect in "Law no. 52/1995". It would appear that the legality of the interference with the displaced persons' property is unassailable before the "TRNC" courts. Accordingly there is no requirement for the persons concerned to use domestic remedies to secure redress for their complaints."

In paragraph 186 the Court recalled the finding in *Loizidou* that title had not been lost by the operation of Article 159 of the TRNC Constitution. In paragraph 186 it stated that its reasoning in *Loizidou* applied generally to displaced Greek Cypriots who were unable to have access to their property. The Court held that there was a continuing violation of Article 1.

21. The judgment in *Xenides-Arestis v Turkey* was delivered by the European Court of Human Rights on 22 December 2005. The applicant was a Greek Cypriot who had been forced to leave her home and property in Famagusta by Turkish military forces in August 1974. The Court recorded that on 23 April 2003 new measures were adopted by the TRNC regarding crossings between northern and southern Cyprus. It recorded that on 30 June the Parliament of the TRNC had enacted a law setting up an 'Immovable Property, Determination, Evaluation and Compensation Commission'. It recorded the failure of the Annan Plan as a result of its rejection in the Greek Cypriot referendum. It followed its decisions in *Loizidou* and *Cyprus v Turkey* and in two further cases to hold that breaches of Article 8 and of Article 1 of Protocol No 1 were made out. The Court then considered the application of Article 46 which relates to the execution of the Court's judgments. It referred to the widespread nature of the problem of Greek Cypriot property in northern Cyprus, and to the fact that the Court had approximately 1,400 property cases pending before it brought primarily by Greek Cypriots against Turkey. The Court stated:

> "39. Before examining the applicant's individual claims for just satisfaction under Article 41 of the Convention and in view of the circumstances of the instant case, the Court wishes to consider what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterates that by virtue of Article 46 of the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers of the Council of Europe. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the

> Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], no. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V).
>
> 40. The Court considers that the respondent State must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it, in accordance with the principles for the protection of the rights laid down in Article 8 of the Convention and Article 1 of Protocol No. 1 and in line with its admissibility decision of 14 March 2005. Such a remedy should be available within three months from the date on which the present judgment is delivered and redress should be afforded three months thereafter."

Having considered the submissions made to it in relation to compensation the Court concluded:

> "50. In the circumstances of the case, the Court finds that the question of compensation for pecuniary and non-pecuniary damage is not ready for consideration. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the respondent Government and the applicant (Rule 75 § 1 of the Rules of Court) and in the light of such individual or general measures as may be taken by the respondent Government in execution of the present judgment. Pending the implementation of the relevant general measures, which should be adopted as provided for in paragraph 40 above, the Court will adjourn its consideration of all applications deriving from the same general cause."

22. I have mentioned the European Court's reference to the Immovable Property Commission set up by the TRNC. The effect of the law setting up the Commission is described in the expert report made for the purpose of the present appeals by Professor Dr Zaim Necatagil who represented Turkey in the three cases just considered. He states that the Commission was set up following the admissibility decision of the European Court in *Xenides-Arestis* of 14 March 2005. He states that the law setting up the Commission 'is presently under the consideration of the European Court of Human Rights which will decide whether it constitutes, under the Convention system, adequate and effective domestic remedies.' He states that the Commission has seven members of whom two are non-Cypriot and jurists of high

standing. He states that the Commission is fully functional and has been receiving applications from members of the Greek Cypriot community.

23. With that by way of background I can come to the relevant provisions of Regulation 44/2001 'on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'. The Regulation is the successor to the Brussels Convention of 1968 and follows it closely in many respects. I will first set out some paragraphs from the preamble to the Regulation:

> (2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.
>
> (6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.
>
> (10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third state.
>
> (12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.
>
> (16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.
>
> (17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

> (18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

24. Article 2 provides the primary rule as to jurisdiction, that persons domiciled in a member state shall be sued there. Article 3 provides that such persons may only be sued in another state by virtue of the rules set out in Sections 2 to 7 of the jurisdiction chapter. Section 6 is headed 'Exclusive jurisdiction'. It consists of one Article, Article 22. That provides:

> 22. The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> 1. In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

Paragraph 1 continues with a provision relating to tenancies. Paragraphs 2 to 5 contain provisions relating respectively to companies, public registers, patents, trade marks and so on, and the registration of judgments.

25. Article 25 provides:

> 25. Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 33.1 provides:

> 33. 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

Articles 34.1 provides:

> 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;

Article 35 provides:

> 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.

Section 6 of Chapter II consists of Article 22, quoted above, which provides for exclusive jurisdiction in respect of immovable property to vest in the courts of the member state where it is situated.
Article 36 provides:

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

Article 45 provides:

> 45. 1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration or enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.
>
> 2. Under no circumstances may the foreign judgment be reviewed as to its substance.

The effect is that, unless a ground specified in Article 34 or 35 is made out, the declaration of enforceability remains.

26. The submission by Mr Tom Beazley Q.C. on behalf of Mr Apostolides is straightforward. The Republic of Cyprus and the United Kingdom are both Member States of the European Union. The Regulation applies between them in relation to the judgments of the Nicosia District Court. The judgment does not conflict with Article 21.1 and so the Article 35.1 does not require that the judgment should not be recognised. Therefore Article 45 requires that the appeal be dismissed. It is submitted that there is no conflict with Article 22.1 because the land is not situated in another Member State, that is, a Member State other than Cyprus. The land is in fact within the territory of the Republic of Cyprus although not within the area it controls. That is clear, it is submitted, from the Treaty of Accession and Protocol 10. Further, because the case does not fall within Article 22.1 or any other exception permitted by Article 45.1, Article 35.3 prohibits this court from examining the jurisdiction of the Cyprus court.

27. The submission made by Miss Cherie Booth Q.C. on behalf of Mr and Mrs Orams rested on the suspension of the *acquis* in those areas of the Republic of Cyprus over which its government does not exercise effective control. That is the area which is within the control of the TRNC, and includes the land involved in the present appeals.

Miss Booth submitted that the effect of the Protocol was to take the area in the control of the TRNC out of the application of Regulation 44/2001 – Outline Submissions, paragraph 4.15. Put at its starkest, this comes to saying that the registration proceedings are misconceived and of no effect because they are made under a legal instrument which does not apply. The submissions which I heard did not perhaps take it so far, but that is, I think, the logical end point.

28. In support of her submission Miss Booth relied on *the Commission of the European Communities v United Kingdom [2003] ECR I-9481, Jersey Produce Marketing Organisation Ltd v The State of Jersey and Another* [2005] ECR I-9543 and *KappAhl Oy* [1998] ECR I-8069. These cases in the European Court are concerned with the construction of limitations on the application of particular aspects of Community law to particular territories. They show that treaty provisions providing for the admittance of a state to the European Union may prevent the application of Community law or aspects of it, to a particular territory such as, in the first case, Gibraltar. But they do not help further. Mr Beazley relied on *R v MAFF ex parte Anastasiou (Pissouri) Ltd* [1994] ECR I-3087. That case concerned an 'agreement establishing an association between the European Economic Community and the Republic of Cyprus' providing for preferential arrangements for citrus fruits and potatoes originating from Cyprus. The agreement provided for the originating status of products to be certified by the 'customs authorities of the exporting State'. It was held that Member States were precluded from accepting certificates from the TRNC and the de facto division of Cyprus did not warrant a departure from the provisions of the agreement, the only Cypriot State which was recognised being the Republic of Cyprus. I do not find this of assistance beyond its emphasis on the lack of status of the TRNC.

29. Mr Beazley submitted that the purpose of Protocol 10 was to prevent the Republic of Cyprus from being found in breach of Community law by reason of matters occurring in northern Cyprus and beyond its control. He is probably right that this was a purpose. I was not, however, referred to any material which showed what the function of the Protocol was other than a practical solution to the admission of the Republic of Cyprus to the European Union while the division of the island remained. It is for that purpose that I have set out the preamble to the Protocol. In my view there is no reason to limit the intended effect of the Protocol as Mr Beazley suggests. If there was a single, defined intention on the part of the parties to the Treaty of Accession and its Protocols it may equally have been to provide in practical effect that the area controlled by the TRNC should not the subject to Community law for any purpose. It must be doubted whether the question which faces this court was in the minds of any of those who were involved with the content of the Treaty and its Protocols at that time.

30. I fully recognise the difficulty of the problem. I have concluded, however, that the correct analysis is that the effect of the Protocol is that the *acquis*, and therefore Regulation 44/2001, are of no effect in relation to matters which relate to the area controlled by the TRNC, and that this prevents Mr Apostolides relying on it to seek to

enforce the judgments which he has obtained. Just as, in accordance with Mr Beazley's submission, Mr Apostolides could not rely on the *acquis* against his own government in connection with his human rights arising from matters relating to the area controlled by the TRNC, he cannot rely on the *acquis* against Mr and Mrs Orams to enforce his judgments against them. Whether or not that is right is a matter of law. But it is the answer which avoids the conflict which must otherwise arise in cases such as the present between the de facto situation in northern Cyprus and its system of law, and the enforcement of judgments such as the present against the new 'owners' of Greek Cypriot property, who have assets elsewhere in the European Union. That, it seems to me, is an international problem ill-suited to be resolved by private litigation. The cases which I have cited in the European Court of Human Rights show that compensation can be obtained at a higher level of litigation, with the State of Turkey as the defendant. They show also the development through the influence of that court of a scheme to provide compensation. These practical considerations support the conclusion that Protocol 10 is to be given the effect I have found that it should have.

31. I do not think that the case for Mr and Mrs Orams on this aspect of the appeal can be put in any other way. The land is within the Republic of Cyprus. There is no conflict with Article 22.1 of the Regulation. It is not within the territory of another Member State. The cases in the European Court of Human Rights show that the laws of the TRNC cannot be relied on by Mr and Mrs Orams to deprive Mr Apostolides of his title to the land. In any event that would involve a review of the substance of the judgment of the District Court of 19 April 2005, contrary to Article 36. So on these matters I accept the submissions of Mr Beazley.

32. Before leaving this aspect of the appeals there are two further matters I should mention. First, Mr Beazley did not accept that the judgments of the Nicosia District Court were wholly related to 'immovable property' in the sense that it is used in Article 22.1. He did not develop the submission, but I understand it to be that the orders for costs stood separately and were enforceable regardless of the position under the Article. I do not consider that orders for costs can be separated from the underlying dispute which gives rise to them. If the subject matter of an action falls within Article 22.1, all the orders which are made in it are to be treated as falling within the Article. Jurisdiction cannot be divided unless the subject matter of the dispute should itself be divided. That is not the case here.

33. The second matter is something which requires mention, but no more than that. I heard no argument as to the manner in which the judgments might be enforced against Mr and Mrs Orams in England. In so far as they provide for the payment of money there would not seem to be any difficulty. In so far as they provide for action by Mr and Mrs Orams in relation to their property within the TRNC, the position may be more complex. It is the case of Mr and Mrs Orams that it would be contrary to the law of the TRNC for them to act as the judgments require.

34. If I am right in my conclusion that the effect of Protocol 10 is that Mr Apostolides cannot rely on Regulation 44/2001, that is determinative of the appeals in favour of Mr and Mrs Orams. I should nonetheless consider the further grounds which were raised for refusing recognition to the judgments and for according it.

Issues arising on Article 6 of the Human Rights Convention

35. The submission on behalf of Mr and Mrs Orams was that the judgments should not be enforced because they were contrary to public policy in England, which is a ground of non-recognition provided by Article 34.1 of the Regulation. It was submitted that Article 6 of the Convention required not simply that a state should provide an opportunity for trial in accordance with the Article but also a means of execution of a judgment. That is established by the decision of the European Court of Human Rights in *Immobiliare Saffi v Italy*, judgment of 28 July 1999. It was submitted that Article 6 was engaged because 'the issue of an order that is impossible to enforce is manifestly unfair and contrary to Article 6(1)' – Outline Submissions, paragraph 6.7. It is said that the judgment of the Nicosia District Court cannot be enforced in the area where the land is situated. That is true. There is no means of enforcing the judgment in Lapithos. It is further the case of Mr and Mrs Orams that to comply with the judgment would put them in breach of the law of the TRNC. But the right to a means of execution included in Article 6 is a right which is vested in Mr Apostolides as the judgment creditor. It would seem that he would be unable to bring a case before the European Court against the Republic of Cyprus for failing to provide a means of execution because the situation is excepted by Protocol 10 to the Treaty of Accession. But on any view there are no rights vested in Mr and Mrs Orams under Article 6 which are in play here. No question of the enforcement of the judgments being contrary to public policy arises in connection with the Article.

Issues arising in connection with Article 1 of Protocol No 1 to the Human Rights Convention.

36. It is asserted that recognition of the judgments would be contrary to public policy and so, in accordance with Article 34.1, they should not be recognised, because by them the property of Mr and Mrs Orams is being expropriated contrary to Article 1 of Protocol No 1 to the Convention. In my judgment that misunderstands the nature of the Nicosia proceedings. In those proceedings the court considered whether Mr Apostolides had title to the land or whether Mr and Mrs Orams did. The court held in favour of Mr Apostolides and that Mr and Mrs Orams were trespassers. They were not title holders whose title was being expropriated; they were not owners whose property was being taken from them; they were trespassers who were to be treated as such. Article 1 is simply not engaged.

Issues arising in connection with the judgment of 9 November 2004 being a default judgment

37. Article 34.2 of Regulation 44/2001 provides:

> 34. A judgment shall not be recognised:
>
> 1. ……..

> 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.

38. For recognition to be refused the words of the Article require:

(1) that the judgment was given in default of appearance;
(2) that the defendant was not served with, here, the writ in sufficient time and in such a way as to enable him to arrange his defence; and
(3) that the defendant did commence proceedings to challenge the judgment when it was possible for him to do so.

39. The third requirement was not present in the equivalent Article in the Brussels Convention, Article 27.2. Under that Article a defendant could ignore the proceedings and a default judgment provided he could establish the second requirement.

40. Mr Beazley submitted that it had been the position under Article 27.2 of the Brussels Convention, and is the position under Article 34.2 of the Regulation, that, where the defendant applied to have the default judgment set aside and failed, the 'flaw' of default was cured and a defendant could not rely on the Article. This would have the effect of posing a fourth requirement, namely that the defendant shall not have failed in an application to have the judgment set aside.

41. There are thus two main issues arising in connection with the default judgment:

(1) Is the second requirement of Article 34.2 – not being served in sufficient time etc. - made out?
(2) Are Mr and Mrs Orams barred from relying on the Article by the failure of their application to have the default judgment set aside on the ground that they had no sufficiently arguable defence to the claim?
Both of these questions raise matters which are difficult and are not covered, at least directly, by the jurisprudence of the European Court.

<u>The second requirement of Article 34.2</u>

42. It is now accepted that service was good in accordance with the law of the Republic of Cyprus. There is also no dispute that the judgment entered on 9 November 2005 was entered in accordance with that law. It remains the duty of this court as the court which is asked to enforce the judgment to consider whether the second requirement of Article 34.2 is established. The period which the court should consider as the period which was available to enter an appearance is the period between service and

the entry of the default judgment: *TSN Kunstoffrecycling GMBH v Jurgens* [2002] EWCA Civ 11, [2202] 1 WLR 2459. Service was effected on Tuesday, 26 October 2004. The default judgment was entered on Tuesday, 9 November, leaving an interval of 13 days including two weekends in which to enter an appearance.

43. I must now return to the question of what happened in connection with the service of the writ on Mr and Mrs Orams. My findings are based on the oral evidence of Mrs Orams and Mr Candounas, the lawyer acting for Mr Apostolides, and the relevant witness statements. Those included a witness statement from Mr Mentes, the Turkish Cypriot lawyer instructed by Mrs Orams to act for her husband and herself in the proceedings. He did not give evidence. Mrs Orams made a statement in support of her application to have the default judgment set aside, which was dated 15 November 2005. Paragraphs 4 and 5 deal with what she did after she had been served. Even taking account of possible translation difficulties (from English to Turkish and back) they fail to set out in a coherent way what she did. That is a matter of drafting, and would not seem to have been her responsibility. Mr Mentes is referred to as 'an advocate of mine who knew Greek'. It is stated that her husband told her to contact him. But it is then stated that she talked to three to five people in Lapithos who could not read Greek. Mr Mentes's statement also made on 15 November 2005 begins 'The Defendants/Petitioners are the customers of my office. Being foreigners they, from time to time, consult me in the TRNC and obtain legal opinion on the local laws and regulations.' Yet Mrs Orams evidence to me was that she had no dealings with Mr Mentes before 5 November 2004, and that he was recommended to her by a friend. These evidential difficulties were compounded by the fact for much of her time in the witness box Mrs Orams was very emotional, which made it more difficult to test her evidence. Mrs Orams made a further statement dealing with the service of the writ and what she did in consequence, which is dated 19 July 2005. I have concluded that I should accept Mrs Orams' evidence that she had no contact with Mr Mentes prior to 5 November 2005. First, there is nothing apart from the witness statements to suggest that Mr and Mrs Orams had previously used any lawyer in Cyprus apart from Mr Osman who had acted in the purchase of the land. Second and more important, I do not think that Mrs Orams' account of her search for a lawyer who could act for her is an invention. If she and her husband were already using Mr Mentes, she would surely have gone to him sooner. It is possible that Mr Mentes – who, I think, drafted the statements of 15 November 2004, thought, incorrectly, that Mr and Mrs Orams had previously used his partnership.

44. My further findings of fact are as follows. On Tuesday, 26 October 2004, the day the proceedings were issued, two persons, Mr Tyrimos, a court process server and a Greek Cypriot from Nicosia, and Mr Fevzi, a Turkish Cypriot who was employed in the office of Mr Candounas, approached Mrs Orams while she was watering her garden at dusk. They were filmed on video by Mr Candounas who had walked through an orchard with Mr Apostolides to secure a vantage point. I was shown the film. It was not informative. It showed it as being fully light, but a video camera will adjust for fading light. Mr Tyrmamos asked Mrs Orams in English if she was Mrs Linda. When she said that she was, he told her that he had some papers for her. He did not say who he was. He put them into her hand. They were in Greek which she does

not know. She asked him who he was and what were the papers. He did not answer at first. Then he said that he did not know what they were, and that he did not speak Greek but only English and Turkish. He said he was just the messenger. All of that was untrue. Then he produced a pen and asked her to sign for them. Mrs Orams was alarmed by what was happening. Her husband was not there but on the way to the airport returning to England. She pretended that he was present and said that she would fetch him. Her intention was to go into the house and close the door, and then to telephone a friend. But when she said she would fetch him, Mr Tyramos said 'No problem, no problem', and the two men left hurriedly. No doubt their conduct was partly a reflection of nervousness at being where they were with the task they had. Mrs Orams realised that the papers they had left with her were of a legal and official nature. She did not know that she had been served with a writ. All that was in English were her name and her husband's name and their address.

45. The next day, Wednesday, Mrs Orams was able to speak to her husband. They decided he should remain in England and she would deal with the matter. She began by trying to speak to her Turkish builder, which she was not able to do until Friday, 29 October. He agreed to try and find someone to help. On Monday, 1 November, he advised her to seek advice from a Maronite lawyer, Mr Liatsos. Mrs Orams was not able to obtain an appointment to see him until the next day, Tuesday. He translated the bones of the writ. But he said he was not qualified to act for her in the action. He suggested she go to the lawyer who had acted in the purchase of the land. That was Mr Osman. She found he had effectively retired and his practice had been taken over by his daughter. She was able to see her the next day only to be told that she was not qualified to work in the courts of the Republic of Cyprus. Mrs Orams was finally recommended to Mr Gunes Mentes. He could not see her until 5 pm on Friday 5 November. He explained to her for the first time that there was a time limit on entering an appearance, namely 10 days. He said that he would have the writ translated and would attend at the District Court on the following Monday to enter an appearance. Mrs Orams gave Mr Mentes a written retainer in English. He did not in fact attend at court until Tuesday 9 November. He has not explained why that was. A judgment in default had been entered by Mr Candounas on behalf of Mr Apostolides on that day. Mr Mentes discovered that when he went to the Registrar's office. The Registrar refused to accept his retainer because it was in English.

46. The next question is how should the court approach the issue whether the writ was served 'in sufficient time and in such a way as to enable [the defendant] to arrange for his defence'. Does the court take account of the circumstances relating to service and perhaps the defendant's situation, and then ask whether the time available, here 13 days, should have been sufficient? Or should the court also take account of such difficulties as actually occurred? What on any view must be left out of account is time lost through the inaction of the defendant, or his lawyer, or a failure to act as might be reasonably expected of him in the circumstances.

47. No decisions were cited which deal directly with that question, but there are decisions which may throw light upon it.

48. It is as well, however, to begin with the Jenard Report on the Brussels Convention. The Report states with regard to Article 27.2:

> "Where judgment is given abroad in default of appearance, the Convention affords the defendant double protection.
>
> First, the document must have been duly served. In this connection reference must be made to the internal law of the State in which the judgment was given, and to the international conventions on the service abroad of judicial instruments. …..
>
> Secondly, even where service has been duly effected, recognition can be refused if the court in which recognition is sought considers that the document was not served in sufficient time to enable the defendant to arrange for his defence."

49. In *Klomps v Michel* [1981] ECR 1593 the proceedings were started by the service of an order for payment on the alleged debtor in the Republic of Germany. That was done by lodging the order at the post office with written notice of it being left at the address supplied for the debtor by the creditor. German law then allowed three days or until the court issued an order for its enforcement, there six days, for the debtor to respond. The debtor then had a week in which to lodge an objection to the enforcement order. In fact four months went by before the debtor objected, and he claimed that he habitually resided in the Nederlands. His objection was dismissed as out of time and the German court held that according to German law he was habitually resident at the address were service was effected. The creditor sought to enforce the order against the debtor in the Nederlands. The Dutch court referred the issues arising under Article 27.2 of the Brussels Convention to the European Court. The court held that Article 27.2 was intended to ensure that a judgment was not recognised under the Convention if the defendant had not had an opportunity of defending himself in the original court. It held that the court in which enforcement was sought 'must take account only of the time, such as that allowed under German law for submitting an objection to the order for payment, available to the defendant for the purpose of preventing the issue of a judgment in default … .' It held that the dismissal by the German Court of the objection to the enforcement order as inadmissible on the ground that the objection was out of time meant that the decision given in default remained intact. It was then for the Dutch court as the court where enforcement was sought to make the examination prescribed by Article 27.2. It stated that a decision as to service by the German court left it to the Dutch court to make a factual examination whether the time was sufficient to enable the defendant to arrange for his defence. The Dutch court had asked whether it was sufficient that the document reached the habitual residence of the defendant in good time or must it also be examined whether service there was sufficient to ensure that the document would

reach the defendant in good time. The European Court stated that the Dutch court was asking whether the enforcing court must proceed on the assumption that a defendant is able to prepare his defence as soon as the document which instituted the proceedings reaches his habitual residence. The court held:

> "19. In this connection it must be stated first of all that Article 27, point 2, does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant. Having regard to the exceptional nature of the grounds for refusing enforcement and to the fact that the laws of the Contracting States on the service of court documents, like the international conventions on this subject, have as their objective the safeguarding of the interests of defendants, the court in which enforcement is sought is ordinarily justified in considering that, following due service, the defendant is able to take steps to defend his interests as soon as the document has been served on him at his habitual residence or elsewhere. As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless the court must consider whether, in a particular case, there are exceptional circumstances which warrant the conclusion that, although service was duly affected, it was, however, inadequate for the purposes of enabling the defendant to take steps to arrange for his defence and, accordingly, could not cause the time stipulated by Article 27, point 2, to begin to run.
>
> 20. In considering whether it is confronted with such a case the court in which enforcement is sought may take account of all the circumstances of the case in point, including the means employed for effecting service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgment from being given in default. If, for example, the dispute concerns commercial relations and if the document which instituted the proceedings was served at an address at which the defendant carries on his business activities the mere fact that the defendant was absent at the time of service should not normally prevent him from arranging his defence, above all if the action necessary to avoid a judgment in default may be taken informally and even by a representative.
>
> 21. The reply to that part of the fourth question should therefore be that the court in which enforcement is sought

> may as a general rule confine itself to examining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time for his defence. However the court is also required to consider whether, in a particular case, there are exceptional circumstances such as the fact that, although service was duly effected, it was nevertheless inadequate for the purpose of causing that time to begin to run."

The reference in paragraph 19 to 'exceptional circumstances' relates to the court's ability to consider the circumstances of service in the context of whether the defendant had sufficient time to arrange his defence.

50. In *Debaecker v Bouwman* [1981] ECR 1779 Mr and Mrs Debaecker had let a property in Antwerp to Mr Bouwman, who left without giving notice or a forwarding address. He had established his residence at the premises and was registered as a citizen of Antwerp. He was served with the writ by service at the police station in Antwerp in accordance with Belgian law. Later he terminated the tenancy by a letter to the claimants' lawyer and gave a new address. A judgment in default of appearance was obtained subsequently. It was sought to enforce the judgment in the Nederlands. The European Court stated that:

> '[Article 27.2] takes account of the fact that certain Contracting States make provision for the fictitious service of process where the defendant has no known place of residence. The effects that are deemed to follow from such fictitious service vary and the probability of the defendant's actually being informed of service, so as to give him sufficient time to prepare his defence, may vary considerably, depending on the type of fictitious service provided for in each legal system.'

The court later stated:

> "19. ……. it should be pointed out first that, if the circumstances to be taken into account were confined to those which were known at the time of service, there would be a danger of interpreting the requirement of service in sufficient time in such a restrictive and formalistic manner that it would in fact coincide with the requirement of due service, thus negating one of the safeguards laid down by the Convention for protection of the defendant.
>
> 20 Accordingly, in order to ascertain whether the requirement of service in sufficient time was fulfilled – that requirement being laid down precisely in order to ensure that the defendant's rights are effectively protected – regard must be had to facts which, although occurring after service was effected, may none the less have had the effect that service did not in fact enable the defendant to arrange for his defence.

> 21 That view finds further support in *Klomps v Michel*, where the Court ruled that, in ascertaining whether service was effected in sufficient time, a court might take account 'of all the circumstances of the case in point, including the means employed for effecting service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgment from being given in default'. An appraisal of the steps which had to be taken in order to prevent judgment from being given in default is bound to concern factors arising after service was effected.
>
> 22 The answer to Question 2 (a) must therefore be that the Court in which enforcement is sought may, in examining whether service was effected in sufficient time, take account of exceptional circumstances which arose after service was duly effected."

The court held that, if a defendant is subsequently notified at his new address, the plaintiff thereby ensured that the change of address was not an exceptional circumstance which prevented the service at the former address from being regarded as having been effected in sufficient time. As to the behaviour of the defendant the court stated:

> "Thus the defendant's behaviour cannot automatically rule out the possibility of taking into account exceptional circumstances which warrant the conclusion that service was not effected in sufficient time. Instead, such behaviour may be assessed by the court in which enforcement is sought as one of the matters in the light of which it determines whether service was effected in sufficient time. It will therefore be for that court to assess, in a case such as the present, to what extent the defendant's behaviour is capable of outweighing the fact that the plaintiff was apprised after service of the defendant's new address."

51. The decision of the European Court in *Pendy Plastic Products BV v Pluspunkt Handelsgesellschaft mbH* [1982] ECR 2723 emphasises that it is for the court from which enforcement is sought to apply what is now Article 34.2 regardless of any view of the court first giving the judgment.

52. The case of *Krombach v Bamberski* [2000] ECR I-1935 was concerned with the enforcement in Germany of a civil order for compensation made in connection with criminal proceedings in France. Mr Krombach was ordered to attend the hearing but did not do so and under the contempt procedure of the French Code of Criminal Procedure could not be represented by counsel. The main issue for the European Court was whether the inability of Mr Krombach to be heard could be a matter of public policy entitling the German court in which enforcement was sought to decline

to recognise the judgment. It held that it could. The judgment contains the statement that Article 27 of the Convention – now Article 34 of the Regulation, 'must be interpreted strictly in as much as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention.' It is important to have in mind also that a number of cases emphasise that the purpose of Article 34.2 (or its predecessor) is to ensure that a defendant has an opportunity to defend himself before the court first giving the judgment: see, by example, *Klomps*, paragraphs 7 and 9. That is an important principle, which must be respected.

53. I consider that the circumstances relating to service on Mrs Orams were exceptional in the sense of paragraph 19 of the judgment of the European Court in *Klomps* and so should be taken into account.

54. I have concluded in the light of the wording of the Article and the above authorities that in the circumstances of this case it is appropriate to have regard to the manner in which service was effected, and, in general terms, the situation in which Mrs Orams was then placed, in order to consider whether the thirteen days which elapsed were sufficient. It is relevant that she was not told what the writ was but was lied to by the process server in the presence of an employee of Mr Apostolides' lawyer. It is relevant that the writ was in Greek, a language that it was most unlikely she would understand. Until Mrs Orams discovered that what she had been served with was a writ, she had no reason to think that any particular action from her was required, and until she had found a lawyer to inform her she did not know that she had to enter an appearance with a limited period. It is relevant that it was served on her in the TRNC and I should take account of the reality of that for this purpose. It is relevant that in the TRNC there are now few persons who can read Greek. It is relevant that she had to find a lawyer who could act for her in the District Court of Nicosia. It was put to Mrs Orams in cross-examination that she could have come to Nicosia to find a lawyer there. She answered that '… feelings are so strong out there, that was not a course I would have considered taking. I have felt that – I would certainly not have been treated fairly over there. …… I was not going into the lion's den. …..You do not go into the enemy camp.' That was Mrs Orams' off-the-cuff response. The possibility of animosity between those on the two sides of the line which divides Cyprus should not be forgotten. It is apparent from the evidence before me that the case has in fact given rise to strong feelings. While it was not investigated in the evidence, there must be a question how easy it would have been for Mrs Orams to instruct a Greek Cypriot lawyer in the south, had she tried to do so.

55. On the other hand it may well not be appropriate to examine what Mrs Orams, and later Mr Mentes, actually did during the 13 days which were available. The question may be whether the period should have been sufficient. This is not made clear in *Debaecker*.

56. I do not think that the period to be allowed in accordance with Article 34.2 should be taken as the minimum period which a defendant might need to enter an appearance. It should be a reasonable period taking account of the possibility that difficulties may arise along the way. Thus a defendant served with English proceedings in England has 14 days in which to acknowledge service although it should ordinarily be possible to do so more quickly. That is extended to 21 days in respect of Scotland, the Republic of Ireland, Northern Ireland and France, (The period for Cyprus is of little relevance but, for the curious, it is 31 days.)

57. I have concluded that the period of 13 days was not here sufficient for the purpose of Article 34.2. I reach that conclusion on the basis of the facts relating to the service of the writ and Mrs Orams' position as some one in northern Cyprus. I have elaborated those factors. I do not think that it is as answer, as Mr Beazley suggested, that if Mr Mentes had gone to the court on Monday, 8 November, he could have entered an appearance and prevented the default judgment. I do not know why Mr Mentes did not do as he had told Mrs Orams he would: his affidavit does not refer to it. His day may have unexpectedly developed so he did not have time: I do not know, but I am not prepared to assume that he had no reason at all. But this approach assumes that it must be done as quickly as possible, which I consider is the wrong approach, as I have stated.

Are Mr and Mrs Orams barred from relying on Article 34.2 by reason of their application to have the default judgment set aside and its failure?

58. Article 34.2 does not refer to the position where a defendant is able to and does apply to have the default judgment set aside but the application fails. That is what happened here. If the defendant succeeds in the application, there will be no judgment against him and no enforcement, and he will not need the Article. If he fails, on this view he cannot rely on the Article. A defendant might fail in an application to have a default judgment set aside simply on the ground that he should have entered an appearance in time. If the defendant has made out the second requirement of Article 34.2 to the satisfaction of the enforcing court, that failure should not then prevent the defendant relying on the Article. It is where the defendant fails in his application because he does not establish a sufficient defence to the claim that he might lose his right to rely on the Article. He has then had an opportunity to defend. If Mr Beazley is right, Article 34.2 prevents recognition of a default judgment only where the second requirement is made out and either the defendant had no opportunity to apply to 'challenge the judgment' or he had an opportunity but failed on the ground not that he had no sufficient defence but because he failed to enter an appearance when he should have done. There are authorities which are relevant to the issue, but they are not decisive.

59. In *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661 a judgment in default of appearance was obtained in the English High Court against a German company. There was a dispute about service on the company in Germany. The European Court held that, if a defendant was not duly served, that was a sufficient ground under Article

27.2 for refusing to recognise the judgment. In the course of its judgment the court stated:

> "14. It follows that a decision given in default of appearance in a contracting State must not be recognised in another contracting State if the document instituting proceedings was not duly served on the defaulting defendant.
>
> 15. That interpretation is not invalidated by the fact that the defendant had notice of the judgment given in default and did not avail himself of the remedies provided for under the procedure of the State where it was delivered.
>
> ……..
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> 18. Furthermore, as the Court held in its judgment in Case 166/80 *Klomps* [1981] ECR 1593, paragraph 9, Article 27(2) of the Brussels Convention is intended to uphold the rights of the defence and ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the Court first seised.
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> 19. It must be emphasized in that regard that, as is apparent from the provision at issue, the proper time for the defendant to have an opportunity to defend himself is the time at which proceedings are commenced. The possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending the proceedings before judgment is delivered.
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> 20. As correctly pointed out by the national court, once a judgment has been delivered and has become enforceable, the defendant can obtain suspension of its enforcement, if suspension is appropriate, only under more difficult circumstances and may also find himself confronted by procedural difficulties. The possibility for a defaulting defendant to defend himself is thus considerably diminished. Such a result would run counter to the purpose of the provision in question."

60. In *Hendrikman v Magenta Druk & Verlag Gmbh* [1996] ECR 1-4943 Mr and Mrs Hendrikman who were resident at the Hague were sued in Germany and a judgment was obtained against them. They asserted that the goods in respect of which they were sued had been ordered by two persons without their authority, and that the same two persons had appointed lawyers to act for them in the German proceedings, again without authority. Answering questions posed by the Dutch court in which

enforcement was sought, the European Court held that, where proceedings are initiated against a person and a lawyer appears without his authority, he is powerless to defend himself and any judgment must be regarded as in default of appearance. It was for the Dutch court to determine whether those exceptional circumstances existed. That was not affected by the fact that under German law Mr and Mrs Hendrikman were entitled to apply within a month of the service of the judgment to have it annulled on the ground of lack of representation. The court stated in that connection:

> "19. That conclusion is not affected by the fact that under Paragraphs 579(4) and 586 of the German Code of Civil Procedure, Mr and Mrs Hendrikman were entitled to apply, within one month of service of the judgement and order, for their annulment on the ground of lack of representation.
>
> 20. The proper time for a defendant to have an opportunity to defend himself is the time at which proceedings are commenced. The possibility of having recourse, at a later stage, to a legal remedy against a judgment given in default of appearance, which has already become enforceable, cannot constitute an equally effective alternative to defending proceedings before judgment is given (see Case C-123/91 Minalmet v Brandeis [1992] ECR I-5661, paragraph 19)"

61. Mr Beazley relied on the decision of the Supreme Court of the Canton of Zurich delivered on 29 September 2003 in *Akay v Motorola Credit Corporation*, where the court considered the enforceability of a freezing order made by the English High Court against a Swiss corporation. The relevant Convention was the Lugano Convention, which is in relevant respects in the same terms as the Brussels Convention. It held that the fact that the defendant could apply and had applied to the English court to have the order set aside overcame the difficulty that it had been originally made without notice to the defendant. The court referred to the persuasive authority of the decisions of the European Court. It cited *Klomps* and *Calzaturificio Brennero v Wendel GmbH* [1984] ECR 3971. In my view, neither support the court's conclusion.

62. The position is stated in the Fourth Supplement to the Thirteenth Edition to Dicey & Morris, Conflict of Laws, as follows:

> A judgment in default of appearance may retain this character even if the defendant later seeks, unsuccessfully, to set it aside. The opportunity for a legal remedy after the making of the order is not equivalent, but is inferior, to having the right to be heard before the order is made. It is not there an adequate substitute; and the judgment will remain as one given in default of appearance.

Minalmet and *Hendrickman* are cited.

63. The following passage appears in Briggs and Rees, Civil Jurisdiction and Judgments, Fourth Edition, pages 509, 510:

> "Article 27(2) of the Conventions had been held to take no account of the fact that the defendant knew perfectly well of the proceedings or of the judgment, and knew that he had the right to apply to have the judgment set aside, but elected to do nothing. It followed that, if the judgment was born flawed, it remained flawed if the defendant chose to ignore it: the best defence was to do nothing. But this behaviour by defendants could produce some distinctly unattractive results; and condition (c) no places on the defendant the practical onus of challenging the judgment, so that if he did not do so when he knew that he could, the judgment may be purged of its defect and become entitled to recognition. It is expected that if the judgment is to be recognised, by reference to condition (c) [failure to take opportunity to challenge the judgment], it will still have to be shown that the defendant was placed under no substantial handicap at the point when he commenced proceedings to challenge the judgment, and that his position had not been materially weakened by the fact that default judgment had been entered against him. For if he had the right to challenge the judgment, but faced a struggle uphill which he would not have had had be been served in time to defend himself, he will have been damaged by orders made in proceedings in which he could not have played a part; and to accept this would contradict a fundamental principle of procedural fairness aimed to be secured by the Judgments Regulation. But a defendant served with a freezing injunction obtained without notice to him may well find that the judgment becomes entitled to recognition if he fails to move smartly in commencing proceedings to have it set aside."

The decision in *Hendrickman* is considered in the following paragraph but as an authority on 'default of appearance'. The passages cited above from it and from *Minalmet* are not mentioned.

64. I accept the logic of Mr Beazley's submission to the extent that a defendant who has had an opportunity to defend the action by applying to set aside a default judgment without being disadvantaged in that process by the existence of the default judgment should have no complaint. That is something which could have been expressly provided in the Brussels Convention. It could equally have been provided in Regulation 44/2001. It is the more remarkable that it is absent from the Regulation because the additional words refer to the defendant taking proceedings to challenge the default judgment. The Brussels Convention was signed in 1968. The only dicta of the European Court of which I am aware are those cited above. They suggest that a default judgment which would otherwise be unenforceable cannot be cured by

subsequent proceedings. There is nothing the other way. The reason behind those dicta is that the defendant will be at a disadvantage in the proceedings to challenge the default judgment. That may be a slight disadvantage or it may be a greater disadvantage. It seems in the present case, if it is assumed that Mr Apostolides would otherwise have applied for summary judgment under Order 14, it is broadly the difference between the application to set aside and an application for summary judgment and so one of burden of proof, though there are passages in the judgment of the District Court which suggest that may be too simple a view. The object of the Regulation is to provide a simple scheme for the 'free movement of judgments'. It would be an additional complication if Mr Beazley was right, as the passage cited from Briggs & Rees shows. I am persuaded that the better view is that Article is to be applied in accordance with its express words and no more: there is not an additional requirement as Mr Beazley submits.

65. Miss Booth submitted that the default judgment remained a default judgment because the order of 19 April 2005 took the form of dismissing the application to set the default judgment aside instead of making a fresh order in the form of the judgment. That, she submitted, was an answer even if Mr Beazley were right. I would not have accepted that submission. The matter should be considered as one of substance and not of form.

66. I therefore hold that Article 34.2 requires that the judgments shall not be recognised.

The entry of appearance and Article 24

67. Article 24 of Regulation 44/2001 provides:

> "24. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22."

68. Mr Beazley submitted that there was jurisdiction by reason of this Article because an unconditional appearance had been entered. It is clear however that it was always the intention of Mr and Mrs Orams to contest the jurisdiction of the District Court as their subsequent application shows. That brings them within the second sentence of the Article. It is no matter that they also intended to raise a defence on the merits: I refer to Briggs & Rees, pages 92 and 93.

Outcome

69. The outcome is that the appeals of Mr and Mrs Orams are allowed.