Case No: A3/2011/2083

Neutral Citation Number: [2012] EWCA Civ 196
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION, COMMERCIAL COURT
David Steel J
2010 Folio 445

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/02/2012

Before:
THE MASTER OF THE ROLLS
LORD JUSTICE HOOPER
and
LORD JUSTICE TOULSON

- -

Between:

MERCHANT INTERNATIONAL COMPANY LIMITED	**Respondent**
- and -	
NATSIONALNA AKTSIONERNA KOMPANIIA NAFTOGAZ	**Appellant**

- -
- -

Mr Alexander Layton QC and Mr Michael Fealy (instructed by **Simmons & Simmons LLP**) for the **Appellant**
Mr Michael Beloff QC and Mr Robert Palmer (instructed by **Hogan Lovells International LLP**) for the **Respondent**

Hearing date: 8 February 2012

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Judgment

Lord Justice Toulson:

Introduction

1. The defendant, Naftogaz, appeals against a decision of David Steel J refusing to set aside a judgment for US$24,719,564 obtained by the claimant, MIC, in default of defence.

2. The action was brought to enforce a debt established by a judgment of the Supreme Commercial Court of Ukraine (SCCU) on appeal from the Commercial Court of the City of Kiev.

3. After the English judgment was obtained Naftogaz applied successfully to the SCCU to set aside its previous ruling and to remit the case to the Kiev Commercial Court for a new trial.

4. Naftogaz thereupon applied to the Commercial Court to set aside the English judgment. In a reserved judgment dated 14 July 2011 [2011] EWHC 1820 (Comm) David Steel J held that there had been a flagrant breach of the principle of legal certainty inherent in article 6 of the European Convention and he refused to set aside the English judgment. He gave permission to appeal with the observation that the case involved an important arguable point on the issue of public policy.

Power to set aside a default judgment

5. The relevant provisions of the Civil Procedure Rules about default judgments are in Parts 12 and 13. Part 12 sets out when and how a default judgment may be obtained.

6. Part 13 provides mandatory and discretionary grounds for setting aside a default judgment. CPR 13.2 sets out grounds on which the court must set aside a default judgment, none of which apply in this case. CPR 13.3 is headed "Cases where the court may set aside or vary judgment entered under Part 12" (which includes a judgment entered in default of defence). It provides:

> "1. In any other case, the court may set aside or vary a judgment entered under Part 12 if –
>
> (a) the defendant has a real prospect of successfully defending the claim; or
>
> (b) it appears to the court that there is some other good reason why –
>
> (i) the judgment should be set aside or varied; or
>
> (ii) the defendant should be allowed to defend the claim.
>
> 2. In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking

to set aside the judgment made an application to do so promptly."

Facts

7. Naftogaz is an energy company wholly owned by the state of Ukraine. It is the legal successor to a company called Ukrgazprom.

8. Fourteen years ago, in December 1997, Ukrgazprom entered into a contract with the Russian oil and gas company Gazprom by which Gazprom was to supply Russian national gas to Ukrgazprom. As part of the contractual arrangements Ukrgazprom agreed to pay certain debts of a Gazprom subsidiary, Surgutgazprom, to a Russian company called Severstudstroy. There were a number of supplemental and side agreements. Annex 12, dated November 20 1998, between Gazprom and Ukrgazprom, had the effect of amending the amount to be paid by Ukrgazprom to Severstudstroy. There was also a side agreement between Ukrgazprom and Severstudstroy dated 21 December 1998.

9. By a contract of assignment dated 28 December 1998 Severstudstroy assigned its contractual rights against Ukrgazprom to MIC. MIC is a company incorporated under the laws of Delaware, USA.

10. MIC received no payment from Naftogaz. In January 2002 it brought a claim against Naftogaz in the Kiev Commercial Court. Over the next four and a half years there were various judgments and appeals. Eventually on 21 April 2006 the Kiev Commercial Court gave judgment in favour of MIC for what was described as a debt of $9,733,334, a penalty of $19,551,581 and costs. On 29 June 2006 the SCCU varied the Commercial Court's order by reducing the penalty element of the judgment to $14,981,180. On 7 September 2006 the Supreme Court of Ukraine refused to permit a Cassation appeal to review the SCCU's judgment dated 29 June 2006. It further ruled that its judgment was final and could not be appealed.

11. MIC was unable to enforce its judgment in the Ukraine because a law, no 2711, was passed in 2005 suspending execution of judgments against energy companies. The suspension has been extended and remains in force.

12. The UK proceedings were begun on 13 April 2010. The particulars of claim are simple. They recited the various orders of the Ukrainian courts to which I have referred and continued:

> "6. The defendant has accordingly been finally and conclusively adjudged by the Commercial Court of the City of Kiev and/or the Supreme Commercial Court of Ukraine to be liable to pay the claimant the total sum of US$ 24,719,564.
>
> 7. The defendant is accordingly indebted to the claimant in the said amount which the claimant claims in this action."

13. At that date those statements were uncontrovertible. MIC also applied for and obtained a freezing order in respect of Naftogaz's shares in a UK oil company.

14. On 6 May 2010 Hamblen J continued the freezing order after a hearing at which both parties were represented.

15. Naftogaz declined to permit its solicitors to accept service of the proceedings, and service was finally effected under the Hague Convention in September 2010.

16. Naftogaz applied to set aside service of the proceedings on the ground that the claim would circumvent Law 2711, but its application was dismissed on 28 January 2011 by Judge Mackie QC. Naftogaz then acknowledged service and stated that it intended to defend the proceedings, but no defence was served and judgment in default was obtained on 28 February 2011.

17. On 11 February 2011 Naftogaz applied to the SCCU to review the decisions of the Kiev Commercial Court and the SCCU dated 21 April 2006 and 29 June 2006 on the basis of "newly discovered circumstances", namely that according to documentary evidence from the Delaware Corporation Register annexed to the application the claimant had been granted the status of good standing under the law of Delaware by upgrading its status from lack of standing on 30 January 2002 and accordingly had lacked legal capacity to enter into the assignment agreement dated 28 December 1998. Naftogaz applied at the same time for suspension of enforcement of the judgments of the Kiev Commercial Court and the SCCU until completion of the review. In its application it informed the SCCU that MIC had applied to the Commercial Court in the UK for recognition and enforcement of the judgments.

18. On 22 February 2011 Naftogaz filed a supplemental petition with the SCCU for a review of the decisions of the Kiev Commercial Court and the SCCU on the additional grounds, said to be newly discovered, that annex 12 had not been signed on behalf of Ukrgazprom by the person identified on the document as its signatory, namely its chairman Mr Klyuk.

19. On 23 February 2011 the SCCU decided to accept the application for a review of its judgment and fixed a hearing date for considering the application on 23 March 2011. It also suspended enforcement of the judgment pending consideration of the application.

20. On 23 March 2011 MIC made written submissions to the SCCU in which it set out the history of its incorporation with supporting documentation from the Delaware Corporation Registry. It explained that it had good legal status at the date of the assignment and that it had been duly authorised to carry on business under its charter until 1 March 2001. It then became inoperative but the charter was revived on 30 January 2002.

21. On 7 April 2011, the SCCU made an order, based on the statement of Naftogaz that it had recently learned that MIC lacked capacity to enter into the assignment agreement and on the excerpt from the Delaware Corporation Register produced by Naftogaz, that the judgments of the Kiev Commercial Court and the SCCU dated 21 April 2006 and 29 June 2006 should be repealed and the case remitted for a new trial at first instance.

22. On 14 April 2011 Naftogaz issued its application in the English proceedings to set aside the judgment in favour of MIC on the basis of the SCCU's order of 7 April 2011 setting aside the previous Ukrainian judgments. The application was heard by David Steel J on 10 and 24 June and dismissed on 14 July 2011.

23. Evidence of events since David Steel J's judgment has been put before the court by Naftogaz on this appeal without objection by MIC.

24. On 3 November 2011 the Kiev Commercial Court gave a fresh judgment, this time in favour of Naftogaz.

25. As to the ground on which the case had been reopened, i.e. the capacity of MIC to enter into the assignment agreement, the court accepted that the Delaware documents showed that at the relevant time MIC had full civil legal capacity and was not restricted in the execution of any transactions.

26. However, the court found that the gas supply contract between Gazprom and Ukrgazprom was governed by Russian law and that annex 12 was void under Russian law because it was not signed by the person recorded as its signatory on behalf of Ukrgazprom. The debt supposedly assigned to MIC was therefore not a valid debt.

27. In its written submissions to the court on that issue MIC pointed out that the signature on annex 12 was the same as the signature on several of the other contractual documents and said that it was the signature of Ukrgazprom's deputy chairman, Mr Marchuk, acting under a power of attorney dated 31 December 1997. Secondly, it pointed out that annex 12 had the seal of Ukrgazprom, the authenticity of which had not been disputed. Thirdly, it observed that Naftogaz's arguments had been put forward in its defence dated 14 March 2002 and had previously been rejected by the Ukrainian courts.

28. As to the first and second points, the court in its judgment dated 3 November 2011 held that it was sufficient to make the contract void that the annex was signed on behalf of Ukrgazprom by a person who was not identified on the document as the authorised signatory. As to the third point, the court regarded it as immaterial that the issue had been considered and decided differently in the earlier proceedings. It said that:

> "…the court may not renounce the consideration of all circumstances of the case in their entirety, guided by the law, only for the reasons that the case has been considered by the courts on repeated occasions and over a long period of time, and the arguments adduced by the parties had already been considered at the trial of this and other cases…Under the procedural rules, the Commercial Court shall assess the evidence in accordance with its own convictions and, therefore, the court may not base its decision on any conclusions reached by some other courts, because the opposite would result in a violation of the requirement for the court to examine all circumstances of the case at first hand."

29. It also said that:

> "…the court can see no legal grounds for limiting the fresh trial of this case only to the verification of how the newly discovered circumstances affected the merits of the decisions, which have already been set aside."

30. As to the principle of legal certainty, the court referred to the decisions of the Strasbourg Court in *Pravednaya v Russia*, application no 69529/01, 18 November 2004, and *Lizanets v Ukraine*, application no 6725/03, 31 May 2007, and to the Report on the Rule of Law adopted by the Venice Commission in March 2011, from which it quoted the statement:

> "However, the need for certainty does not mean that rules should be applied so inflexibly as to make it impossible to take into account the dictates of humanity and fairness."

31. The court continued:

> "In so far as recovery of money from the respondent in favour of the claimant does not meet the requirements of laws and would lead to their violation, not their enforcement, that recovery cannot be deemed to be a consequence of a fair hearing to ensure humanity and fairness. It is therefore impossible to conclude that a claim must be allowed out of consideration for ensuring legal certainty, i.e. for the sake of protecting one aspect of the principle of the supremacy of the law (legal certainty) at the cost of ignoring another aspect (legality)."

32. The court concluded that MIC's claim should be dismissed.

33. MIC appealed to the Kiev Commercial Court of Appeal, but its appeal was dismissed on 27 January 2012.

European Convention

34. Article 6.1 provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

35. There is no issue as to the independence of the Ukrainian courts, but there is an issue as to the fairness of the procedure by which the judgment in favour of MIC was set aside by the SCCU after MIC had obtained judgment against Naftogaz in England.

36. Article 1 of Protocol 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the

> conditions provided for by law and by the general principles of international law…"

37. MIC relies on that provision, as well as article 6 and public policy, in its opposition to the present appeal.

Judgment of David Steel J

38. The judge summarised the rival submissions. Naftogaz submitted that as the Ukrainian judgment against it had been set aside and a new trial had been ordered, there was no foreign judgment, let alone a final and conclusive judgment, which could be recognised or enforced in England. Accordingly the English proceedings should be set aside.

39. MIC's response was that the English court should not recognise the decision of the SCCU dated 7 April 2011. No other course would be consistent with English public policy and/or with the duty of the court under section 6(1) of the Human Rights Act 1998 not to act in a way which was incompatible with MIC's rights under article 6 of the Convention and article 1 of Protocol 1. The power to set aside was discretionary and it was right for the court not to do so in all the circumstances.

40. Naftogaz disputed that there had been a breach of the Convention or Protocol 1 and asserted that any such allegation was premature, since the case had been remitted for fresh consideration and there had been no final determination of the matter in the Ukraine. In any event, Naftogaz submitted that MIC's challenge was misconceived since the fact remained that there was no final and conclusive judgment as a matter of Ukrainian law which could continue to form the basis of the English action. Naftogaz adopted the commentary on *Carl Zeiss (No 2)* [1967] 1 AC 853 in *Res Judicata, Estoppel and Foreign Judgments*, Barnett (2001), paragraph 2.41, which summarised the position as follows:

> "Accordingly, a foreign judgment will not operate as a res judicata in England unless it is a res judicata before the foreign court according to the foreign law."

Even if the setting aside of the original judgment fell foul of article 6 (contrary to Naftogaz's submission) the fact remained that there was no Ukrainian judgment left to recognise and the only remedy available to MIC would be to complain to the Strasbourg court, as MIC has done.

41. David Steel J considered that it was question begging to argue, as Naftogaz did, that since the Ukrainian courts had set aside the previous judgment, there was no judgment left to enforce and the English default judgment must therefore be set aside. The question in his view was whether the judgment setting aside the earlier judgment should itself be recognised. It was well established that a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy. He concluded that it would be contrary to public policy and contrary to the court's duty under section 6 of the Human Rights Act to give recognition to a judgment which itself contravened the Convention.

42. He held that the judgment of the SCCU dated 7 April 2011, setting aside the earlier Ukrainian court judgments, involved a clear disregard of the principle of legal certainty, because it allowed the entire case to be reopened by reference solely to the issue of MIC's status to enter into the assignment agreement, and it did so without considering whether the material relied upon could with reasonable diligence have been available at the earlier hearing. This in his view involved a flagrant breach of article 6.

43. He referred to the decision of the Amsterdam Court of Appeal in the case of *Yukos v Rosneft*, which was followed by Hamblen J in the Commercial Court at [2011] EWHC 1461 (Comm), as an example of a court refusing to recognise a decision of a foreign court which purported to set aside an arbitration award in circumstances where that judgment infringed the requirements of a fair trial.

44. In reaching his overall conclusion that he would not set aside the default judgment, David Steel J took also into account that the preceding, supposedly final, judgment of the Ukrainian court had been in existence for five years and that the proceedings to enforce it in England had begun a year before the application to set aside. He also had in mind the observations of the Strasbourg Court in *Pravednaya* and *Lizanets* that the requirements of article 6 had to be approached with particular sensitivity where, as here, the outcome favoured a state-owned entity.

Arguments on the appeal

45. The parties' key arguments were the same as their arguments before the judge. Mr Layton QC submitted that the judge fell into fundamental error by framing the question which he had to answer in the wrong way. He had asked himself whether the court should recognise the judgment of the SCCU dated 7 April 2011, as though Naftogaz was seeking to bring enforcement proceedings against MIC in the UK. He ought instead to have asked himself whether, at the time when the matter was before him, MIC had a Ukrainian judgment which it could call on the English court to enforce. For that to be so, there had to be a judgment which the Ukrainian courts would then recognise as a final judgment giving MIC the right to payment of the sum claimed. A Ukrainian judgment could not give rise to res judicata in the English court if it would not be so recognised in the Ukraine. The fact was that at the date of the hearing before David Steel J the SCCU had determined that the previous judgment in favour of MIC should be set aside. Accordingly, in the eyes of the Ukrainian courts, MIC had no enforceable judgment against Naftogaz and therefore there was nothing for an English court to continue to enforce. Whether the SCCU's judgment dated 7 April 2011 was open to challenge at Strasbourg was immaterial for present purposes. What mattered was that the SCCU had given it and that in the eyes of the Ukrainian courts there was therefore no enforceable judgment in MIC's favour.

46. Mr Layton cited *Schibsby v Westenholz* (1870) LR 6 QB 155, 159 (Blackburn J), *Carl Zeiss* [1967] 1 AC 853, 919 (Lord Reid) and *Adams v Cape Industries* [1990] 1 Ch 433, 513 (Slade, Mustill and Ralph Gibson LJJ) for the proposition that an English court will not give greater effect to a foreign judgment than it would have in the eyes of the foreign court. He observed that the same principle can be seen in the Hague Convention on Choice of Courts Agreement, June 2005, article 8(3), which provides:

> "A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin."

47. At the lowest, Mr Layton submitted that Naftogaz had in these circumstances an arguable defence and the judgment in default ought therefore to have been set aside.

48. As to the Convention, Mr Layton submitted that David Steel J erred in two respects: first, in entertaining the question whether the judgment of the SCCU dated 7 April 2011 involved a breach of it and, secondly, in determining that it did. As to the first point, Mr Layton submitted that whereas the courts of a Convention State may be required to consider whether the proceedings in a non-Convention State involved what would have been a breach of the Convention in a Convention State (*Pellegrini v Italy* (2002) 35 EHRR 2), it is not for the courts of a Convention State to judge whether there has been a breach of the Convention in another Convention State.

49. For this proposition Mr Layton relied on *Lindberg v Sweden*, application no 48198/99, 15 January 2004. It was a rather complex case. Mr Lindberg was a Norwegian national living in Sweden. He was appointed by the Norwegian Ministry of Fisheries to be a seal hunting inspector and served on board a vessel on a seal hunting expedition from Tromso in Norway. He made a report which contained accusations of breaches of seal hunting regulations issued by the Ministry and he shot footage to support his allegations. Clips were shown on television in Norway and Sweden and extensive excerpts from his report were published in the press. A series of defamation proceedings were brought in Norway by nineteen crew members against Mr Lindberg and various media organisations, including the Bladet Tromso. The Sarpsborg City Court found as against Mr Lindberg that a number of his statements were defamatory and ordered him to pay compensation to the plaintiffs. Leave to appeal was refused by the Norwegian Supreme Court. Mr Lindberg lodged an application with the former European Commission of Human Rights, alleging violations of article 6, 10 and 13, but it was declared inadmissible by reason of being out of time.

50. Another court in Norway made a similar finding of defamation against the Bladet Tromso and its former editor. Their application for leave to appeal was refused by the Norwegian Supreme Court and they too lodged an application with the Strasbourg court. This application was in time and led to a judgment in *Bladet Tromso v Norway*, application no 21980/93, 20 May 1999, in which the court found that there had been a violation of article 10.

51. In the meantime the plaintiffs had applied successfully to enforce the Sarpsborg City Court's judgment against Mr Lindberg in Sweden. Mr Lindberg opposed the execution of the judgment in Sweden invoking article 10, but his objection was overruled and the first instance court's decision was upheld by the Swedish Court of Appeal and the Swedish Supreme Court. The decision of the Swedish Supreme Court was given on 16 December 1998, i.e. five months before the judgment of the Strasbourg court in *Bladet Tromso v Norway.* Mr Lindberg then complained to the Strasbourg court about the Swedish courts' refusal to prevent the enforcement in Sweden of the Sarpsborg City Court's judgment against him in respect of his involvement in publications which the Strasbourg court had itself held to be protected by article 10. He complained under article 13, in conjunction with article 10, that the Swedish Supreme Court had failed to carry out a proper review of his claim that the

Sarpsborg City Court's judgment violated his rights under article 10. He also complained that the Swedish recognition and enforcement of the Norwegian judgment entailed a violation of article 10 taken on its own. The Strasbourg court declared his application to be inadmissible.

52. The court observed that there was a distinction between Mr Lindberg's entitlement to rely on article 10 and that of the press. In its *Bladet Tromso* judgment the court had considered that the press could reasonably rely on Mr Lindberg's report without being required to carry out its own research into its accuracy, but Mr Lindberg himself was in a different position. In so far as he claimed that the outcome of the proceedings against him in Norway violated his article 10 rights, his proper avenue of redress was to make an application to Strasbourg against Norway, but he had failed to do so in time. In those circumstances the Strasbourg court was not prepared to address directly his complaints about the libel case in Norway. To adopt a contrary approach would give Mr Lindberg an undue possibility of reopening matters already finally settled and so risk upsetting the coherence of the division of roles between national review bodies and the European court, which together provided a system of collective enforcement under the Convention. Accordingly, Mr Lindberg could not pray in aid the *Bladet Tromso* judgment to underpin his argument that the Swedish authorities had violated article 10. In considering whether he had been afforded an effective remedy in Sweden against the Swedish authorities' recognition and enforcement of the Norwegian judgment, the court noted that the Swedish courts had reviewed the matter at three levels.

53. The court observed that comparable issues had previously been examined in the context of complaints about the enforcement in a Convention State of a judgment by a court of a non-Convention State and had attached decisive weight to the question whether there had been a "flagrant denial of justice". The court continued:

> "However, the court does not deem it necessary for the purposes of its examination of the present to case to determine the general issue concerning what standard should apply where the enforcing State as well as the State whose court gave the contested decision is a Contracting Party to the Convention and where the subject-matter is one of substance (i.e. here, the freedom of expression) rather than procedure. In the particular circumstances it suffices to note that the Swedish courts found that the requested enforcement (in respect of the award of compensation and costs made in the Norwegian judgment) was neither prevented by Swedish public order or any other obstacles under Swedish law."

54. The court concluded that the Swedish courts had reviewed the substance of Mr Lindberg's complaint against the requested enforcement of the Norwegian judgment to a sufficient degree to provide him with an effective remedy for the purposes of article 13.

55. Mr Layton submitted that the case of *Yukos v Rosneft*, which David Steel J regarded as a precedent for his decision, was distinguishable and irrelevant for present purposes. The explanation for that case was that an international arbitral award, which is susceptible to enforcement under the New York Convention, has arguably an

international currency which is not necessarily destroyed by an order of annulment made by a court of the country which is the seat of the arbitration, as Lord Collins made clear in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at paragraph 129. The situation is not comparable to one where a judgment of a foreign court is set aside by a later judgment of the foreign court. When a decision of a foreign court has been set aside by that court itself, like Humpty Dumpty it cannot be put together again by someone else.

56. If, contrary to Mr Layton's argument, it was obligatory or permissible for the English court to consider the question whether there had been a violation of the Convention by the Ukrainian courts in setting aside the earlier judgments of the Ukrainian courts, he submitted that there was no violation. The decision of the SCCU dated 7 April 2011 was a procedural decision permitting reconsideration of MIC's claim in accordance with Ukrainian law, and the decision of the Kiev Commercial Court dated 3 November 2011 was a reasoned decision properly open to it.

57. Mr Beloff QC supported the judge's reasoning. He submitted that the case is an example of the well known principle that an English court will not give force to a judgment of a foreign court in circumstances where to do so would be contrary to public policy, and that this applies where the foreign proceedings in question offend against what the English court regards as fundamental requirements of substantial or natural justice. Dicey, Morris and Collins summarise the principle in *The Conflict of Laws* 14th ed, 2006, 14R-141, 14R-151, in two rules:

> "A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition would be contrary to public policy.
>
> A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice."

58. Mr Beloff submitted that it is a fundamental aspect of the rule of law that an unsuccessful party should not be able to re-open litigation on the basis of points which he advanced or could reasonably have advanced in the original litigation. He submitted that this is not only a matter of English public policy but it is also an established part of Strasbourg jurisprudence.

59. The principle was recognised by the Strasbourg court in *Brumarescu v Romania*, application no 28342/95, 28 October 1999, and was reiterated in *Pravednaya v Russia*, *Lizanets v Ukraine* and *Agrokompleks v Ukraine*, application no 23465/03, 6 October 2011. In *Pravednaya* the court stated:

> "24. The right to a fair hearing before a tribunal as guaranteed by article 6.1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, in its relevant part, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which

requires, among other things, that where the courts have finally determined an issue, their rulings should not be called into question.

25. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of a rehearing and a fresh decision of the case. Higher courts' power of review should be exercised for correction of judicial mistakes, miscarriages of justice, and not to substitute a review. The review cannot be treated as an appeal in disguise, and the mere possibility of two views on the subject is not a ground for re-examination. Departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character.

26. The Court should be especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection.

27. The procedure for quashing of a final judgment presupposes that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome of the proceedings. The person applying for rescission should show that there was no opportunity to present the item of evidence at the final hearing and that the evidence is decisive."

60. In *Agrokompleks* the court at paragraph 151 described the reopening of a finally settled legal issue, based on the State's disagreement with it but disguised as a newly discovered circumstance, as a flagrant breach of the principle of legal certainty enshrined in article 6.1. The court also found that the existence of a debt established by the original judgment came within the beneficiary's "possessions" within the meaning of article 1 of Protocol 1. The quashing of the judgment therefore amounted to an interference with the right to peaceful enjoyment of possessions and constituted a violation of article 1 of Protocol 1, by preventing the originally successful party from relying on a binding judicial decision and depriving it of the opportunity to receive the money for which judgment had been given in its favour.

61. In summary, Mr Beloff submitted that the judge was right, applying common law principles, to disregard the judgment of the SCCU dated 7 April 2011 and to continue to give effect to the earlier judgment in MIC's favour. The judge was also right to refuse Naftogaz's application to set aside the default judgment applying the Convention and the Human Rights Act. The decision of the SCCU involved a breach of article 6 of the Convention and article 1 of Protocol 1, since the previous Ukrainian

judgment in favour of MIC was a possession protected by the Protocol. The English judgment was also a possession protected by the Protocol. For all of those reasons it was right for the English court to recognise the continued existence of the debt.

62. In response, Mr Layton submitted that the setting aside of MIC's earlier judgment by the SCCU on 7 April 2011, whether right or wrong in terms of Convention principles, was nevertheless a legal fact. It had consequences as a matter of Ukrainian law. Moreover the English judgment was not an independent property right attracting the protection of article 1 of Protocol 1. By refusing to set it aside the English court was in substance giving continuing effect to a judgment which had ceased to have effect under Ukrainian law. This was justified neither by common law principles nor by the Convention.

Discussion

63. In developing the law regarding res judicata and foreign judgments, as in many branches of the common law, the courts have applied a combination of principle and practical sense. The process is well illustrated by the judgments of the House of Lords in *Carl Zeiss*, where the particular topic under consideration was the then relatively new concept of issue estoppel based on a foreign judgment. As Lord Reid explained at 917, at one time foreign judgments were regarded as being of evidential value but not conclusive. From the latter part of the nineteenth century they came to be regarded as equally conclusive with English judgments, subject to certain qualifications. In *Carl Zeiss* the House of Lords gave a cautious welcome to the possibility of issue estoppel based on a foreign judgment but stressed the need to tread carefully in various respects. Lord Reid observed at 919 that although estoppel is a matter for the lex fori, the lex fori ought to be developed in a manner consistent with good sense.

64. The development of human rights law has raised a number of fresh questions in relation to private international law, and the process of absorption of human rights law into private international law is far from complete. There are some quite difficult and complex problems, some of which are discussed in an illuminating article by Professor James Fawcett on *The Impact of Article 6(1) of the ECHR on Private International Law*, 2007, 56 ICLQ 1. It is wise to proceed one step at a time.

65. This being an application to set aside a judgment of the English court under CPR 13.3, I begin by considering whether Naftogaz had any defence at the time when the judgment was entered.

66. To that question the clear answer is that it did not. Its failure to serve a defence was not through oversight. It had no defence that it could plead. MIC had a judgment in its favour which was conclusive within the meaning of that term under the English authorities. As Naftogaz knew, MIC had been trying to take steps to obtain judgment in England for over ten months (from issuing the proceedings on 13 April 2010 to obtaining judgment on 28 February 2011).

67. The basis of the application to set aside was that Naftogaz had subsequently obtained a judgment from the SCCU setting aside the previously final judgment.

68. In my judgment it was proper for David Steel J to consider whether the judgment of the SCCU dated 7 April 2011 violated the principles of substantial or natural justice as understood by the English courts and with MIC's Convention rights. That question is one and the same, because there is no difference in substance between the principle of legal certainty as it is understood by the English courts and the principle as expressed by the Strasbourg court. As the Strasbourg court said in *Pravednaya*, it is part of the common heritage of the Contracting States.

69. Mr Layton submitted that it was wrong for David Steel J to consider this question but I disagree.

70. As to the Strasbourg jurisprudence, I do not read *Lindberg* as establishing the wide principle for which Mr Layton contended, namely that the courts of a Convention State should never concern themselves with the question whether there has been a breach of a party's Convention rights in another Convention State but should regard that question as a matter exclusively for the other Convention State and the Strasbourg court. The facts of *Lindberg* were particularly unusual and complex. After referring to cases where a Contracting State had to consider enforcement of a judgment given by a court of a non-Contracting State in proceedings claimed to be at variance with due process, the court expressly declined to consider the general question what standard should apply where both states were Contracting States. The court contented itself with finding that on the particular facts the Swedish courts had reviewed the substance of Mr Lindberg's complaint against the enforcement of the Norwegian judgment to a sufficient degree. The sentence on which Mr Layton particularly relied (about the risk of upsetting the coherence of the division of roles between national review bodies and the European court) came in an earlier part of the judgment in which the court was spelling out the limit of its own role, in that it was not prepared to allow Mr Lindberg's complaint to be effectively an out of time complaint against the original decision of the Norwegian court. He was not being allowed a second bite of the same cherry. In any case it would be no part of the role of the Strasbourg court to prohibit the English court from considering whether the setting aside of the English judgment would contravene the principle of legal certainty. I can see that the undesirability of having conflicting decisions of different Convention States, particularly if the matter is on its way to Strasbourg, may be a factor relevant to the exercise of the English court's exercise of its discretion on the facts of a particular case, but that is another matter.

71. In so far as Mr Layton sought to suggest that it is wrong as a matter of English law for an English court to consider whether a judgment of a court of a Convention State contravened the Convention, the decision of this court in *Maronier v Larmer* [2003] QB 620 is to the opposite effect. In that case it was held that the courts of this country should apply a strong presumption that the procedures of other Convention States comply with article 6, but the court concluded that in that particular case there had been a breach of article 6.

72. The factual basis for concluding that there was a breach of the principle of legal certainty was very strong. There was no credible basis for suggesting that Naftogaz could not have investigated the status of MIC at the time of the assignment during the original litigation and it does not appear that any was put forward. The assertion that MIC lacked legal capacity to enter into the assignment was based on a partial record obtained from the Delaware Corporation Registry, which was corrected by the fuller

version produced by MIC prior to the order dated 7 April 2011. It could not on any threshold examination have been described as decisive evidence not previously available through the exercise of due diligence (applying the test in *Pravednaya*). If, as it seems, the SCCU's rules prevented it from making that threshold assessment, an order setting aside the judgment and directing a retrial without such an assessment was a negation of the principle of legal certainty.

73. It is clear from the judgment of the Kiev Commercial Court dated 3 November 2011 (after the judgment of David Steel J) that it carried out no assessment whether there had been newly discovered circumstances of a decisive nature which could not have been ascertained with due diligence during the original proceedings, for it considered itself to be bound to conduct a new trial disregarding all findings made in the original proceedings.

74. The position so far reached is this:

> 1. The judgment obtained by MIC on 28 February 2011 was properly obtained and Naftogaz had at that stage no defence to MIC's claim;
>
> 2. The subsequent judgment of the SCCU relied upon by Naftogaz to deprive MIC of the English judgment offended against the principle of legal certainty regarded by the English courts as a fundamental part of the rule of law and regarded by the Strasbourg court an integral part of article 6.

75. That brings me at length to the critical question whether in those circumstances David Steel J was properly entitled to refuse to set aside the English judgment.

76. Mr Layton's submission was that the judgment of the SCCU dated 7 April 2011 trumped all other considerations, whatever they might be, because the English judgment was parasitic upon the continued existence of a Ukrainian judgment which the Ukrainian courts would regard as valid. His alternative submission was that even if hypothetically there might be some extreme circumstances which might lead an English court justifiably to refuse to set aside an English judgment based on a foreign judgment which the foreign court had set aside, such as bribery, they would have to be of that gravity and there were no such circumstances in this case.

77. It is right to record that there has been no allegation in this case of personal impropriety or bias by any judge of a Ukrainian court, but I do not otherwise accept Mr Layton's submission, whether in its broader or narrower formulation. Under CPR 13.3 the fact that the defendant would have an arguable defence to the claim if judgment were set aside is not a mandatory ground for setting aside the judgment; the court retains a discretion, albeit one which must be judicially exercised. Many factors may come into account. Mr Layton seeks to fetter the discretion unduly.

78. An English judgment is a form of property which may have real value. The proprietary nature of a judgment was recognised by the Strasbourg court in *Agrokompleks*. To set aside a judgment properly obtained is to deprive the judgment creditor of an asset. It may be just to do so, but it may not be. Third parties may also be affected. A third party may advance money on the security of it. It is not difficult

to envisage circumstances where there could be real injustice to a judgment creditor or a third party by depriving them of the fruits of a judgment properly entered.

79. In deciding whether to exercise the court's discretion under CPR 13.3 to set aside the judgment, the court has to consider the question of what is just. In this case the court was being asked to set aside a judgment, which had been properly obtained, on the basis of a later proceeding which involved a fundamental denial of legal certainty and fair process. The judge's refusal to do so was just.

80. I do not base my decision on *Yukos v Rosneft* because that case involved consideration of the effect of the New York Convention which is not relevant in the present case.

81. A number of hypothetical situations were discussed in the course of argument involving variations of the facts. I do not consider that it is either necessary or desirable to express views about them, which would necessarily be obiter. It is axiomatic that in considering an application for the exercise of the court's discretion under CPR 13.3 it is necessary to concentrate on the facts as they are and not on the facts as they might have been.

82. For those reasons I would dismiss this appeal.

Lord Justice Hooper:

83. I would be minded to agree in its entirety with the judgment of David Steel J, however I am content to dismiss the appeal for the reasons given by Toulson LJ.

The Master of the Rolls:

84. I would also dismiss this appeal for the reasons given by Toulson LJ in his judgment.

85. The primary argument of the claimant, MIC, which was attractively advanced by Mr Beloff QC, and was the basis upon which David Steel J found in favour of the claimant, may well be right. I see considerable logical force, as well as commercial common sense, in the argument that the English court should give effect to the 21 April 2006 judgment of the Kiev Commercial Court, as varied on 29 June 2006 by the SCCU ('the 2006 judgment'), but not the 7 April 2011 judgment of the SCCU, the 3 November 2011 judgment of the Kiev Commercial Court, or the 27 January 2012 judgment of the Kiev Commercial Court of Appeal ('the 2011 judgment').

86. The defendant, Naftogaz, has not suggested that the 2006 judgment is in any way irregular or inappropriate. On the other hand, MIC has not merely argued that the 2011 judgment was in breach of Article 6 of the European Convention on Human Rights, it has established that it was flagrantly so, supported by the decision of the Strasbourg court in *Agrokompleks v Ukraine*, application no 23465/03, 6 October 2011. In those circumstances, there is obvious force that the courts in this country should recognise, and give effect to, the 2006 judgment, and not the 2011 judgment. Some support for that view may be found in the decision of this court in *Maronier v Larmer* [2003] QB 620.

87. However, I can also see the force of the argument to the contrary. As Mr Layton QC forcefully argued on behalf of Naftogaz, whatever may be said against the 2011 judgment, it has had the consequence that there is simply no foreign judgment to

enforce. In other words, one does not even get to the point of asking whether one should give effect to the 2011 judgment, once its effect is to destroy the very foundation upon which MIC's claim in the English court is based.

88. It is very tempting to resolve this difficult issue, and, indeed, in the light of the obvious common sense merit of MIC's case, to do so on the ground adopted by David Steel J. However, for the reason given by Toulson LJ at para 64 above, I think it is wiser to decide the issue between the parties on the narrower ground that the English court is being asked, on the basis of the 2011 judgment, which was flagrantly in breach of Article 6 of the Convention, to set aside a judgment in the English courts which was properly obtained and regular, indeed unassailable, when MIC obtained it. Given that the court has a discretion whether to set aside that judgment, it seems to me that, particularly bearing in mind Article 1 of the first protocol to the Convention (as to which see again *Agrokompleks*, application no 23465/03), David Steel J was right, on the unusual facts of this case, to decline to do so, albeit on a rather narrower ground than that on which he rested his conclusion. The question whether or not the ground on which he relied was correct does not have to be decided in this case.