



Neutral Citation Number: [2019] EWCA Civ 648

Case No: A2/2018/0275 A2/2018/0277

IN THE COURT OF APPEAL (CIVIL
DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2019

Before:

LADY JUSTICE SHARP
LADY JUSTICE
ASPLIN
and
SIR RUPERT JACKSON

Between:

Howard Kennedy

Appellant/
Cross-
Respondent

-and-

The National Trust for Scotland

Respondent
/ Cross-
Appellant

Mr Greg Callus (instructed by **Penningtons Manches LLP**) for the **Appellant/ Cross-
Respondent**

Mr David Glen (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent/
Cross-Appellant**

Hearing dates: 25/07/2018-26/07/2018

Approved Judgment

Lady Justice Sharp, Lady Justice Asplin and Sir Rupert Jackson:

1. This is the judgment of the court.

INTRODUCTION AND OVERVIEW

2. These appeals are concerned with a number of complex issues in relation to the jurisdiction of the courts of England and Wales in relation to claims in tort, including defamation, brought against a defendant domiciled in Scotland where damage is suffered in Scotland, England and Wales and further afield and the operation of the CPR in relation to deemed service of proceedings in Scotland. They are, in more detail: whether the doctrine of forum non conveniens applies in circumstances in which proceedings are issued in England and Wales against a party domiciled in Scotland in relation to harm allegedly suffered both within the United Kingdom and abroad, despite the Brussels Recast Regulation 2012/2015 (the "Regulation") and the rule in *Owusu v Jackson* [2005] QB 801; whether if the doctrine applies, the claim should have been stayed on the basis that Scotland was clearly the more appropriate forum; whether, if not, the claim must be confined to damage suffered in England and Wales and claims for global damage in Scotland, Italy, France and Brazil should have been struck out; and whether the Claim Form was validly served. The appeals are from the order of Sir David Eady, sitting as a judge of the High Court. The citation for his judgment is [2017] EWHC 3368 (QB); [2018] EMLR 13.
3. These issues arise out of a photo shoot which took place at Craigevar Castle in Aberdeenshire on 23 September 2012. The castle is owned by the National Trust of Scotland ("NTS"). Mr Kennedy took a series of photographs of a nude model for commercial purposes. He says that he had entered into an oral contract with the NTS' photo librarian which expressly authorised that activity and that the photo shoot was overseen by NTS employees at the castle. He has produced a cheque for £200 which the NTS cashed around the time of the shoot. No defence has been filed, but in evidence for the CPR Part 11 application (disputing the jurisdiction of the court) the NTS disputes Mr Kennedy's account and in a witness statement filed on behalf of the NTS by its solicitor, *it* is stated that it "does not recognise the existence and terms of any contract (oral or otherwise) which sanctioned [Mr Kennedy] to take photographs of the nature which he took."
4. Some four years later, in February 2016, this episode came to the attention of the daughter of Lord Sempill who had given the castle to the NTS. She protested about the use of the castle for the nude photo shoot and the matter was taken up by a journalist. On 24 February 2016 the journalist was given a statement made by or on behalf of the NTS which was reported in the *Scottish Mail* on Sunday of 28 February 2016. Thereafter, the NTS also issued a press release which denied that the taking of the photographs had been authorised. The press release was sent to BBC Radio Aberdeen, Original FM, a local commercial radio station for the north east of Scotland, *The Press and Journal*, an Aberdeen based newspaper, *The Scotsman* and a reporter on the *Metro* newspaper.
5. The press release constitutes the words complained of in Mr Kennedy's claim. Mr Kennedy contends that the press release is defamatory of him, was published by the NTS negligently in circumstances in which it owed him a duty of care, and in breach of the NTS' statutory obligations under the Data Protection Act 1998 (the "DPA

1998"). He seeks damages, including special damage for loss of business, as well as an injunction and other relief under section 14 of the DPA 1998.

6. The parties themselves exchanged letters on 26 February and 1 March 2016 after which Mr Kennedy instructed solicitors and a formal letter of claim was sent to the NTS on 17 May 2016 which complained, amongst other things, of the extensive republication of the NTS' allegations in local and national newspapers. *It* was also said that Mr Kennedy's business appeared to have suffered considerable damage and particularly in respect of a falling demand for the training courses he provided.
7. The NTS also instructed solicitors who sent letters dated 27 May and 28 June 2016 which raised the issue of jurisdiction and suggested that it would not be appropriate for such a claim to be tried other than in Scotland. Nothing further was heard from Mr Kennedy or his solicitors until a letter of 6 January 2017, enclosing draft Particulars of Claim. It was claimed that the impact of the publications upon Mr Kennedy's business and reputation had been monitored. Further, it was acknowledged that the issue of *forum non conveniens* could arise but it was argued that by analogy with the approach in *Lennon v Scottish Daily Record & Sunday Mail Ltd* [2004] EWHC 766 (Ch); [2004] EMLR 16, the publications complained of also had a substantial English readership and Mr Kennedy had a substantial business reputation *in* England. It was also noted that Mr Kennedy enjoyed a number of advantages in suing in England including the possibility of higher damages, the availability of conditional fee agreements and "after the event" insurance and the absence of a risk of "high-cost" jury trials.
8. The NTS' solicitors responded by a letter dated 24 January 2017 in which they rejected Mr Kennedy's claim and reiterated the reasons why Scotland was the most appropriate forum for the dispute. The Claim Form was issued on 24 February 2017 in the High Court in London, just as the one year limitation period in relation to the defamation claim was about to expire. Nothing further was done in order to progress the matter until a letter from Mr Kennedy's solicitors dated 26 May 2017 was received by the NTS. A further draft of the Particulars of Claim was enclosed and *it* was stated that they would be served, together with the Claim Form no later than 23 June 2017. Changes to the draft Particulars of Claim were explained on the basis of a change of approach to the issue of jurisdiction in light of three foreign republications of the words complained of.
9. Eventually, following further correspondence, on 18 August 2017, the NTS' then solicitors indicated that they were not instructed to accept service. As a result, Mr Kennedy's solicitors attempted to serve the proceedings on the NTS at its registered office in Edinburgh, by first class post on 23 August 2017 pursuant to CPR r 6.3(1)(b). The documents arrived the following day but the NTS contended that this was not effective service because they said that the six month validity of the *Claim* Form had expired at midnight on 24 August 2017 and by reason of CPR r 6.14, service would be deemed to have occurred on 25 August being two days after the documents were committed to the first class post.
10. By an application notice dated 29 September 2017, the NTS sought orders that the court had no jurisdiction to try the claim because the Claim Form was not served on the NTS within 6 months of the date of its issue and further, or alternatively, the claim should be stayed on the grounds of *forum non conveniens* on the basis that Scotland was the more appropriate forum for the trial of the action. Mr Kennedy, in turn, issued his own

application dated 11 October 2017 seeking either a declaration that the Claim Form and Particulars of Claim had been served validly within the requisite time or alternatively, seeking retrospective relief from the requirements of CPR r 7.5(2) under CPR r 6.15(2), 6.27, 7.6, 3.9 or 3.10.

11. It was those applications which came before Sir David Eady. He considered the issue of whether the Claim Form had been validly served at paras 7 - 32 of his judgment and concluded that it had been. He set out his central reasoning at para 31, as follows:

"31. I would certainly not suggest that I have found the point easy to determine, but I have in the end come to the conclusion that in this respect I agree with the Master's reasoning (and that of Flaux J in T&L Sugars). Although it was no doubt unwise of the Claimant's advisers to go right to the wire on this, the fact remains that they had six months in which to serve the claim form and this was achieved with just hours to spare. They had six months because that is provided in CPR 7.5(2). From the moment of service it became "a claim form served within the United Kingdom". (It would have made no sense for anyone to have said on 24 August "the claim form is deemed to have been served tomorrow".) Thereafter it was to be treated *as if* served on 25 August. That is perfectly workable for procedural purposes, such as calculating due dates, but I would not accept that the "deeming" provision can of itself be taken as cutting down the period of the claim form's validity or removing the jurisdiction of the court, which are matters of substance. It would require clear and unambiguous wording to achieve that."

12. In case he was wrong, the judge went on, nevertheless, at paras 33 - 39, to consider Mr Kennedy's applications for retrospective relief and concluded that none of the applications would have succeeded on the facts. He then went on to consider alternative submissions which had been made under section 1139(1) Companies Act 2006 and related provisions to which CPR r 6.14 would have no application and concluded that if service had been deemed to have occurred after the validity of the Claim Form had expired, none of the statutory provisions referred to would have rescued him. See paras 40 - 45 of the judgment.
13. At paras 46 - 85 the judge turned to the argument that the claim should, in any event, be stayed on grounds of forum non conveniens, on the basis that Scotland would be the more appropriate forum for the trial. He had considered the preceding question of whether questions of forum conveniens were, in any event, precluded because the matter was governed by the Regulation which takes precedence over section 49 Civil Jurisdiction and Judgments Act 1982 (the "1982 Act"), at paras 46 - 57. He held that the purpose of the Regulation and the rule of general jurisdiction was to regularise issues of jurisdiction as between different states and that no such issue arose in this case because the only potential competition was between courts which were internal to the United Kingdom, namely the courts of Scotland and England and Wales; and by contrast *Owusu v Jackson* (C-281/2002) [2005] QB 801 and *Maletic v lastminute.com GmbH* (C-478-12) [2014] QB 424 were concerned with circumstances in which there was an international element. See paras 51 and 52. He concluded:

"57. The present scenario is different. AS I have noted already, there is only one Defendant and it is sued in this member state, where it is treated as domiciled. The only dispute is internal; that is to say, as between the courts of Scotland and England. There is no reason for the regulation to be engaged and I have concluded, therefore, that the court is not precluded from addressing issues of *forum non conveniens*."

14. Having considered the applicable law and the factors which he considered relevant including the republication of *the* press statement abroad and on the internet, the judge decided to grant a stay and reasoned as follows:

"81. AS so often in these cases, there are arguments both ways, but most of the connecting factors would appear to indicate Scotland as the natural forum. Two factors in particular seem to me to point clearly in that direction. The first is that the parties are domiciled or based *in* Scotland (and the Defendant should be sued there in accordance with the general jurisdiction indicated in Rule 1 of Schedule 4).

82. The second factor is that the Scottish courts can deal with all the causes of action and the principal remedies sought. They will not be confined to dealing with the "harm" alleged to have been incurred in Scotland, whereas at the moment the English courts would (by reason of the special jurisdiction) be limited to assessing damage suffered here.

83. In *Lennon*, at [28], Tugendhat J was of the view that a claim in Scotland would be of a different character from that before him, since it would in those circumstances be transformed *into* a claim about Scottish publication "with or without worldwide publication". He was confronted by a claim confined to damage suffered in England. Here, the Claimant already seeks remedies in respect of publication, not only in England, but also in Scotland, Italy, France and Brazil. The Scottish courts would thus be better suited to dealing with the claims *as already formulated*. It would not be the case here that the character of the claim would have to change fundamentally, as was contemplated by Tugendhat J.

84. Since the present claim has such real and substantial connections with Scotland, the Claimant has to my mind an impossible task to show that *nonetheless* justice requires that the case remain in England."

15. The judge also considered the question of whether, if the claim were to go ahead in England, the claim for damages should be restricted and claims for global damages in relation to Scotland, Italy, France and Brazil should be struck out: see paras 86 - 94. He concluded at para 94 that if and in so far as the claim were allowed to proceed in England (an outcome which was academic in the light of his decision to grant a stay), it should be confined to the issues arising under the special jurisdiction and on that basis it would be right to strike out the global damages claim. His reasoning was as follows:

"94. If it be right that the courts in England would only have jurisdiction by reason of Rule 3 of Schedule 4 (the special jurisdiction), it is difficult to understand why the global damages should be left in. The logical course is to recognise that the claim, as presently formulated, is intended to embrace a range of matters outside the special jurisdiction: accordingly, those should be determined under the general jurisdiction

(i.e. of the courts of the place where the Defendant is domiciled or, for that matter, where the Claimant has his "centre of interests"). If and in so far as the claim is allowed to proceed in England, it would be right to confine the issues to those properly arising under the special jurisdiction. On that rather artificial hypothesis, it would surely be right to strike out the global damages claims. Since, however, I am granting a stay, the question becomes purely academic."

16. The judge himself granted permission to appeal both to Mr Kennedy in relation to the stay and his decision in relation to the global damages claim and to the NTS in relation to whether the Claim Form was validly served in the first place. Mr Kennedy's grounds of appeal are that the judge erred in; (1) holding that the Regulation and the rule in *Owusu v Jackson* did not preclude the operation of the doctrine of forum non conveniens; (2) in ruling that the claim should have been stayed under the doctrine of forum non conveniens on the basis that Scotland is clearly the more appropriate forum for the trial of the action; and (3) in holding that the claim in England and Wales must be confined to damage suffered in England and Wales and that claims for global damage in Scotland, Italy, France and Brazil should have been struck out.
17. The grounds of NTS' cross appeal are that in ruling that the Claim Form had been served by first class post on 24 August rather than 25 August 2017, the judge: (1) failed to apply the deemed service provisions of CPR r 6.14 for the purposes of fixing the date on which a claim form was served within the United Kingdom; and (2) by so doing, wrongly concluded that the Claim Form had been served on 24 August 2017 and within the 6 month period allowed for a claimant seeking to serve proceedings outside the jurisdiction (including Scotland) under CPR r 7.5(2).
18. Mr Kennedy seeks to uphold the judge's order on additional grounds that: (1) notwithstanding that service was "within the United Kingdom" because service was effected in Scotland under CPR r 7.5(2) and not CPR r 7.5(1), on a proper construction of CPR r 6.14, on the facts of this case, the deeming provision has no application to the Claim Form; (2) even if CPR r 6.14 did apply to claim forms served in Scotland, and even if r 6.14 did apply for the purposes of temporal validity of a claim form, this would create a lacuna which is contrary to a purposive construction of the CPR, and accordingly, "within the United Kingdom" in CPR r 6.14 should be read as "within England & Wales"; and (3) if service of the Claim Form is held to be invalid by reason of expiry of the period of validity before deemed service, the Court would make an order under either CPR r 6.15(2) or r 7.6(3) to validate service retrospectively.
19. The issues are taken in the order they were argued before us.

FORUM NON CONVENIENS-APPLICATION OF THE DOCTRINE

20. Mr Kennedy's first ground challenged the judge's finding that the Regulation and the rule in *Owusu v Jackson* did not preclude the application of the doctrine of forum non conveniens. It is convenient to start with an overview of the legal framework relevant to the appeal.

Legal framework

21. Under the heading "General provisions", article 4(1) of the Regulation provides that, subject to specific exceptions, a person domiciled in a Member State shall be sued in the courts of that Member State. The only exceptions to that rule of general jurisdiction are set out in sections 2 - 7 of Chapter II of the Regulation. There are, for example, rules of special jurisdiction at section 2 of Article 7. Article 7(2) provides that in matters relating to tort, delict or quasi-delict, a person domiciled *in* a Member State may be sued in the courts of "the place where the harmful event occurred or may occur." This phrase includes both the place where the damage occurred and the place of the event giving rise to damage: *JSC BTA Bank v Ablyazov* (No 14) [2017] QB 853 at paras 66-88 per Sales U.

22. The 1982 Act enacted in United Kingdom law the original 1968 Brussels Convention (the "1968 Convention") and the subsequent amendments to it including the Regulation. It also contains jurisdictional rules in relation to courts within the United Kingdom: see section 16 and schedule 4 of the 1982 Act. Rules 1 - 3 contained in Schedule 4 mirror the structure of the Regulation. In summary, subject to the Rules, a person domiciled in a part of the United Kingdom shall be sued in the courts of that part; he may be sued in the courts of another part only by virtue of rules 3 - 13 of the Schedule; and specifically relevant here, a person domiciled in a part of the United Kingdom may be sued, in relation to matters relating to tort, delict or quasi delict, in the courts for the place where the harmful act occurred or may occur. The provisions of Schedule 4 are subject to section 49 of the 1982 Act, which remains in force. Section 49 of the 1982 Act provides as follows:

"Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the grounds of forum non conveniens or otherwise, where *to* do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention."

23. By section 16(3) of the 1982 Act, the principles laid down by the CJEU *in* connection with Title II of the 1968 Convention or Chapter II of the Regulation are relevant when determining any question as to the meaning or effect of any provision contained in Schedule 4 of the 1982 Act. Section 16(3) provides:

"(3) In determining any question as to the meaning or effect of any provision contained in Schedule 4-

(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention or Chapter II of the Regulation and to any relevant decision of that court as to the meaning or effect of any provision of that Title or that Chapter 7; and

(b) without prejudice to the generality of paragraph (a), the reports mentioned in section 3(3) may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances."

Submissions

24. Mr Greg Callus, on behalf of Mr Kennedy, submitted that the judge erred in concluding that the claim could be stayed on grounds of forum non conveniens. His essential submission was that the discretion in section 49 of the 1982 Act was precluded by reason of the rule in *Owusu v Jackson*. In this respect, Mr Callus submitted that the operation of section 49 of the 1982 Act had been dramatically constrained by *Owusu v Jackson*. We were referred to paras 37 to-53 of the CJEU's decision. In short, Mr Callus submitted that those paragraphs showed that there was a "general rule" that the forum non conveniens discretion is precluded whenever the Regulation "bites". Relying on para 46, he argued that this general rule applies even where no other Member State may have jurisdiction.
25. However, Mr Callus accepted that jurisdiction would only be established under Article 4(1) of the Regulation where the claim had "internationalelements" sufficient to engage the Regulation. In the absence of such elements, the claim would be "purely domestic" and section 49 of the 1982 Act would subsist. This exception was derived from *Owusu v Jackson* itself, from *Cook v Virgin Media* [2015] EWCA Civ 1287; [2016] 1 WLR 1672, and from *Maletic v lastminute.com GmbH*. In this respect, he advanced two main criticisms of the judge's finding that the claim was purely domestic.
26. The first criticism was that the judge had erred by restricting *the* meaning of "elements" in "international elements" to the parties' domicile and preferred forum. In fact, "international elements" has a wider meaning, and encompasses all elements of the cause of action and other factors which might give a case an international character.
27. In support of his first criticism, Mr Callus referred to para 33 of *Koelzsch v Luxembourg* [2012] QB 2010 to the effect that the Regulation and Rome I/II Regulations should be construed as a unified legal system; and suggested that in the absence of any Regulation decisions on this issue, regard could be had to two decisions which had considered what constituted an "international element" for the purposes of Article 3(3) of the Rome I Regulation (EU/2008/593). The first decision was that of Blair J in *Banco Santander Totta SA v Companhia De Carris De Ferro De Lisboa SA* [2016] 4 WLR 49. The second decision that of the Court of Appeal (Longmore, Floyd, Simon JJ) in *Dexia Crediop SPA v Comune di Prato* [2017] EWCA Civ 428. It is sufficient to note at this stage that the factors considered in those two decisions were more wide ranging than the two factors considered by the judge here.
28. Relying on the broad approach in *Banco Santander* and *Dexia*, Mr Callus submitted that there were sufficient "internationalelements" in this case to engage the Regulation. First, Mr Callus argued that a claim involving a publication online is intrinsically international. In support of this proposition, he took us to *eDate Advertising GmbH v Le.xx International Vertreibern GmbH* [2012] QB 654, and in particular, para 45. Second, the words complained of had been published by "potential co-defendants" in Italy, France, and Brazil. The places of publication, languages of publication, and nationality of the publishers were all foreign. Mr Callus submitted that however one defines "elements", it should include elements which would found the jurisdiction of other Member States. Third, Brazilian law is in issue under the DPA 1998.
29. Mr Callus' second criticism was that the judge had only considered the actual parties to the case before him, and the preferred jurisdiction of those parties, rather than

considering the potential co-defendants, and the range of potential jurisdictions thereby engaged. In this respect, Mr Callus referred us to para 25 of the judgment of Lord Dyson MR in *Cook v Virgin Media Limited*, where the Master of the Rolls said (emphasis added):

"25. The legal position has been well summarised in Civil Jurisdiction and Judgments by Professor Adrian Briggs (2015) 6th ed at para 2.28 which is headed "International Scope". The whole section is relevant. But it is sufficient to refer to the last para:

"The result is that if a matter is demonstrably wholly internal to the United Kingdom, so that the only jurisdictional question which *may arise* is as to the part of or a place within the United Kingdom which has jurisdiction, it is not one in which the Regulation is designed to have any role. The point may be illustrated this way. Suppose a defamatory statement is made by a person domiciled in the United Kingdom about another such person, and is published *in* newspapers in England and Scotland. If the question is whether the claimant may or must sue in England or Scotland, or whether the courts of England and Scotland may stay proceedings on grounds of forum non conveniens in favour of the other jurisdiction, the Regulation has no role in answering the question, for the matter before the court is wholly internal to a single Member State. But as soon as the claim is broadened to include complaint of publication by a person outside the United Kingdom, *whether the defendant or another*, it appears that the Regulation would then apply to all aspects of the jurisdiction of the court."

30. Mr Callus submitted that the words "may arise" and "defendant or another" make clear that the various permutations of whom Mr Kennedy could sue, and in which jurisdictions, were matters that engaged the Regulation from the outset. In his written submissions, Mr Callus set out several permutations as to how the claim might have been, or could be brought and invited us to consider a number of jurisdictional issues which could have arisen in such circumstances.
31. Finally, Mr Callus relied on *Maletic v lastminute.com GmbH* for the proposition that an "international element" will exist where the defendant's tortious acts are "inseparably linked" with the tortious acts of potential co-defendants in other jurisdictions. He argued this case was the "tortious equivalent" of *Malefic v lastminute.com GmbH* as the NTS' wrongful acts were jointly committed *with* the foreign media publishers.
32. In response, Mr David Glen on behalf of the NTS submitted that Mr Kennedy had to overcome two distinct hurdles. First, his claim had to have an "international element" so as to engage the Regulation. Second, he had to show that the judge's grant of a stay on grounds of forum non conveniens was inconsistent with the Regulation.
33. In relation to the first hurdle, Mr Glen argued that in determining what constitutes an "international element" for the purposes of the Regulation, one cannot read across from the Rome I Regulation. Article 3.3 of the Rome I Regulation concerns the materially different context of displacing the parties' choice of law. In contrast, the intrinsic purpose of the Regulation is to regularise the international jurisdiction of the courts of Member States. It follows that for the Regulation to be engaged, there had to be competing jurisdictions in play, though not necessarily competing Member State

jurisdictions. We were taken to Official Journal of the European Communities 1979 "Report on the [1968] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters" and in particular para C 59, p.8 which in so far as relevant says this:

"As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States.

It alters the rules of jurisdiction in force *in* each Contracting State only where an international element *is* involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State *which* involves only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, than an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, of where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where the identical or related proceedings had been brought in the courts of another State (Article 21 to 23)..."

34. In Mr Glen's submission, Mr Callus' reliance on potential co-defendants was misplaced. The court had to consider the claim actually before it, rather than theoretical jurisdictional disputes which might have arisen if Mr Kennedy had chosen to pursue his complaint against different defendants in different jurisdictions. Mr Glen argued that Mr Callus had misinterpreted the passage from *Briggs on Civil Jurisdiction and Judgments* (6th ed) endorsed in *Cook v Virgin Media* at para 25.
35. The reality, Mr Glen submitted, is that Mr Kennedy has chosen to bring his claim only against the NTS *in* respect of all of his alleged losses. The only jurisdictional issue confronting the court at first instance was therefore purely internal. There are no other co-defendants. This is sufficient to distinguish this case from *Maletic v lastminute.com GmbH*, where the existence of concurrent claims against different defendants was central to the CJEU's approach.
36. In any event, Mr Glen submitted that Mr Kennedy could not overcome the second hurdle as the grant of a stay in this case was not inconsistent with the Regulation. *Owusu v Jackson* did not establish a general rule precluding the forum non conveniens discretion whenever the Regulation is engaged. The ratio of that decision was that the 1968 Convention (now the Regulation) precluded a court of a Member State from declining jurisdiction conferred on it by article 2 (now article 4(1)) on the ground that a non-contracting state would be a more appropriate forum: see para 46. We were referred to para 47 of *Owusu v Jackson*, where the CJEU declined to answer the broader question of whether the 1968 Convention precluded the application of forum non conveniens in all circumstances.

37. Even assuming the Regulation is engaged, Mr Glen submitted there was no inconsistency, as article 4(1) would be satisfied irrespective of whether the claim is heard in England or Scotland: either way the NTS is being sued in the Member State of its domicile. That is sufficient to set this case apart from *Owusu v Jackson*. In support of his position, Mr Glen also referred us to *Lennon v Daily Record* [2014] EWHC 359 (QB); [2004] EMLR 18 and *Sunderland Marine Mutual Insurance Co Ltd v Wiseman & Ors* [2007] 1 CLC 989; [2007] EWHC 1460 (Comm); [2007] 2 All RR. (Comm) 937.

Discussion

38. It is convenient to start with the CJEU's decision in *Owusu v Jackson*. That decision was concerned with an accident in Jamaica. The claimant, a British national domiciled in the United Kingdom, struck his head, when swimming, against a submerged sandbank. The claimant brought proceedings in the English courts against the UK-domiciled lessor of his holiday villa for breach of implied terms and against several Jamaican companies in tort. The defendants invited the court to decline jurisdiction in favour of the courts of Jamaica on the basis of *forum non conveniens*.
39. Two questions were referred to the CJEU, which can be found at para 22 of the decision:

"(1) Is it inconsistent with the Brussels Convention, where a claimant contends that jurisdiction is founded on article 2, for a court of a contracting state to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that state in favour of the courts of a non-contracting state, (a) if the jurisdiction of no other contracting state under the 1968 Convention is in issue, (b) if the proceedings have no connecting factors to any other contracting state? (2) If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?"

40. As to the first question, the CJEU noted that application of the *forum non conveniens* doctrine undermines the predictability of the rules of jurisdiction (and in particular article 2), the legal protection of persons in the EU, the uniform application of the rules of jurisdiction, and therefore the principle of legal certainty which is the basis of the 1968 Convention. See paras 40-43.
41. Accordingly, the CJEU answered the first question *in the affirmative*: it was inconsistent with the 1968 Convention for a court of a contracting state to decline to hear proceedings brought against a person domiciled in that state in favour of the courts of a non-contracting state where a claimant contends that jurisdiction is founded on article 2. The CJEU's answer to the first question can be found at para 46:

"46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state."

42. However, the CJEU refused to answer the more general second question of whether the 1968 Convention precludes the application of forum non conveniens in an circumstances. See paras 47-52.
43. In light of that refusal, we do not consider that *Owusu v Jackson* can stand as authority for the general rule for which Mr Callus contends. Notwithstanding the generality of the considerations set out by the CJEU at paras 40- 43, the court's ultimate conclusion was essentially premised on the "mandatory nature of the fundamental rule of jurisdiction contained in article 2 of the Brussels Convention". See para 45. To put it another way, the forum non conveniens discretion was precluded *because* it derogated from article 2. That reflects the specific wording of the first question referred to the CJEU.
44. It follows that we agree with Mr Glen that in order for Mr Kennedy to succeed he must show that the judge's stay was inconsistent with the Regulation. In this task, we consider that he faces an insurmountable difficulty. This is for the simple reason given by Mr Glen. Even assuming the Regulation is engaged, the terms of article 4(1) of the Regulation are satisfied irrespective of whether the claim is heard in England or Scotland. This is because article 4(1) simply requires a person domiciled in a Member State to be "sued in the courts of that Member State". It does not matter which "courts" the action is brought in provided they are courts of the relevant Member State - in this case the courts of the United Kingdom.
45. The reason for the Regulation's "indifference" was succinctly expressed by Tugendhat J in *Lennon v Scottish Daily Record & Sunday Mail Ltd* at para 15 when he said:
- "15. Put simply, the position always was, and remains, that no legislation allocating jurisdiction within the United Kingdom will be inconsistent with the Brussels Convention, or the Lugano Convention or the Regulation, because those instruments allocate jurisdiction between Member States. Scotland and England and Wales are two separate jurisdictions, but they are parts of the United Kingdom, not separate Member States. See Collins and Davenport 110 LOR 325 and Dicey & Morris (13th ed.) para 12--014."
46. A similar point was made by Langley J at para 38 of *Sunderland Marine v Wiseman* where he said that "the EC Regulation is directed to United Kingdom jurisdiction, not to jurisdiction within the United Kingdom". This also accords with the position summarised by Professor Briggs QC, and endorsed by the Court of Appeal (Lord Dyson MR, Floyd, Simon UJ) in *Cook v Virgin Media* at para 25: see para 29 above.
47. That the forum non conveniens discretion will be precluded where it is inconsistent with the Regulation is not merely a product of the rule in *Owusu v Jackson*. The position is also mirrored in domestic law by section 49 of the 1982 Act, which effectively precludes the grant of a stay unless it is "not inconsistent" with the Regulation.
48. On either basis, however, it is necessary to show that the grant of a stay would be tantamount to a court of a Member State declining to exercise a mandatory rule of jurisdiction under the Regulation. In our view, that is not the case here.

49. The upshot is that we consider the judge was correct to find that he was not precluded from granting a stay. We note that the judge did not appear to arrive at his conclusion on the preclusion issue on the basis set out above, namely the absence of conflict between the grant of a stay and a mandatory provision in the Regulation. We also note that no Respondent's Notice was filed by the NTS seeking to uphold the judge's decision on that basis. Nonetheless the point was subject to argument, both in written and oral submissions. We consider that its resolution in the NTS' favour is fatal to Mr Kennedy's first ground of appeal.
50. Given our conclusion on this issue, it is not necessary to consider whether the judge's conclusion can also be supported for the reasons he gave, namely that the Regulation was not *engaged* as the dispute was internal to *the* United Kingdom. However, in light of the detailed argument before us we do so.
51. In order for the jurisdiction rules of the Regulation to be engaged, the existence of an "international element" is required. That requirement has been clearly endorsed by the CJEU in *Maletic v lastminute.com GmbH* at para 26 and by this Court at paras 21 to 26 in *Cook v Virgin Media*.
52. In our view, the question of whether a claim has the necessary "international element" is one which must be answered as at the date of the hearing, in light of how Mr Kennedy has constituted his claim. In this respect, we consider Mr Callus' reliance on the words "may arise" and "defendant or another" at para 25 of the judgment of Lord Dyson MR in *Cook v Virgin Media Limited* to be misplaced. Rather, we agree with the views expressed by the judge below at paras 54- 56 as to the proper meaning of those words, and in particular that the "defendant or another" probably referred to a case such as *Maletic v lastminute.com GmbH* involving co-defendants.
53. As the claim must be considered as brought, it follows that *Maletic v lastminute.com GmbH* does not assist Mr Kennedy. The centrality of multiple co-defendants in that case is evident from the CJEU's analysis at paras 28 (emphasis added):
- "28. If, as stated in para 26 above, the international character of the legal relationship at issue need not necessarily derive from the involvement, either because of the subject matter of the proceedings or the respective domiciles of the parties, of a number of contracting states, it must be held, as the European Commission and the Portuguese Government have argued, that Regulation No 44/2001 is applicable a fortiori in the circumstances of the case at issue in the main proceedings, *since the international element is present not only as regards lastminute.com, which is not disputed, but also as regards TUI.*"
54. Further support for that view is found in *Briggs on Civil Jurisdiction and Judgments* (& *ed*) itself:
- "Although the European Court has indicated that a requirement of internationality still applies to define or limit the material scope or operation of the Regulation, it may be satisfied by an inessential point of contact with a foreign country, such as where a claim is advanced a local defendant at the same as a claim is made against a co-defendant who is not local [footnote: *Maletic v lastminute.com GmbH*]. This appears to

mean that the answer [in *Maletic v lastminute.com Gmbll*] would have been the opposite, and the Regulation would not have applied, if the non-local co-defendant had not been sued, or had been sued but in separate proceedings."

55. Nor do we agree with Mr Callus' submission that the judge took an unduly narrow view of what constitutes an "international element" in light of the Rome I Regulation decisions in *Banco Santander* and *Dexia*. It is true that the CJEU has said that the EU instruments that deal with applicable law and jurisdiction are to be treated as part of a coherent system, and "interpreted as consistently and uniformly *as possible*" (emphasis added). See *Koelzsch v Luxembourg* at para 32. It does not follow, however, that the Regulation meaning of "elements" in "international elements" (a term absent from the Regulation itself but adopted in the CJEU's case law) has the same meaning as "elements" for the purpose of Article 3.3 of the Rome I Regulation. Although such an argument was made in *Banco Santander* (see para 381), neither Blair J nor the Court of Appeal in *Dexia* specifically addressed that argument. In our view, Mr Glen is correct to say that Article 3.3 of the Rome I Regulation deals with a materially different question. On this issue, it *is* not possible to read across from the Rome I Regulation.
56. It is correct that in *Owusu v Jackson*, the CJEU held at paras 25 to 26 that the necessary "international element" need not derive from the involvement of the competing jurisdictions of several Member States. However, that only takes Mr Callus' argument so far. *Owusu v Jackson* was not concerned with a claim where all of the competing jurisdictions were internal to a Member State. Like Lord Dyson MR in *Cook v Virgin Media* at para 22, we do not consider that *Owusu v Jackson* assists us with the question of whether the Regulation is engaged in the circumstances of this case.
57. Taking a step back, Mr Kennedy has chosen to bring his claim exclusively against the NTS for all of the alleged damage. As the judge found at para 51, the only potential competition is between the courts of Scotland and England and Wales, i.e. internal to the United Kingdom. In our view, the claim as formulated appears to fall squarely within the example given by Professor Briggs QC, as endorsed at para 25 of *Cook v Virgin Media*, of circumstances where the Regulation will not be engaged. We therefore agree with the judge's conclusion at para 57 that there is no reason for the Regulation to be engaged on the facts here.
58. To conclude our discussion of *this* part of the appeal, we consider that the judge was correct to find that the discretion to order a stay on grounds of forum non conveniens was available to him.

Global damages

59. Mr Kennedy's third ground concerns whether the judge erred in holding that the claim in England and Wales must be confined to damage suffered in England and Wales and that the English claims for global damage in Scotland, Italy, France and Brazil would have been struck out had the claim not otherwise have been stayed.

Submissions

60. Mr Callus submitted that though the judge regarded the issue of global damages as "academic" as he had decided to grant a stay, in fact his reasoning on the global

damages issue "fed into" his conclusions on whether to grant the stay. Mr Callus therefore invites us to consider *the* issue of global damages first, which we now do.

61. Mr Callus advanced what amounted to six criticisms of the judge's approach to this issue. Four of these were raised in argument before us and two others, in his written submissions. First, he argued that the judge's conclusion was contrary to the ratio of *Shevill* as expressed at p.64C-F, namely that all of the courts of a Member State enjoy general jurisdiction under Article 4(1) of the Regulation. That the claim also fell within the *domestic* special jurisdiction provision under Rule 3(c) of Schedule 4 of the 1982 Act was irrelevant.
62. Second, it was submitted that the judge's application of a sub-national or intra-UK version of the rule in *Shevill* ignored the rationale for the rule. This includes the principle of proximity - the presumed competence of a court of special jurisdiction to hear a claim for damage in that jurisdiction - and predictability - that a defendant can reasonably foresee before which court he may be sued. Relying on *Color Drack GmbH v Lexx International Vertreibs GmbH* [2010] 1 WLR 1909, and in particular paras 42 to 44, Mr Callus submitted that all of the courts of the Member State in which the defendant is domiciled are presumed to have sufficient proximity and it is inherently predictable that the defendant might be sued there.
63. Third, relying on *eDate Advertising GmbH and Bolagsupplysningen OU v Svensk Handel AB* (C-194/16) [2018] QB 963; [2018] EMLR 8, Mr Callus argued that Mr Kennedy would be entitled to global damages, as the "centre of his interests" was in England.
64. Fourth, Mr Callus submitted that if it is left standing, the judge's reasoning would mean that global damages could only be awarded in a defendant's domicile, namely a particular Sheriffdom. This was because section 20 of the 1982 Act similarly requires the court to have regard to the CTEU's case law when applying Schedule 8 of the 1982 Act, which deals with the allocation of jurisdiction *within* Scotland. Mr Callus termed this the "kaleidoscope problem". It was suggested that this fragmentation runs counter to the trend of consolidation of claims in the authorities.
65. Fifth, Mr Callus suggested that allowing a global damages claims under Rule 1 of Schedule 4 of the 1982 Act (general jurisdiction) but refusing it under Rule 3 of Schedule 4 (special jurisdiction) was contrary to the statement of the Lord President in *Bank of Scotland v Seitz* [1991] ILPr 426 at paras 8 and 29 that the general and special jurisdiction provisions under the 1982 Act are "equal".
66. Finally, Mr Callus submitted, albeit briefly, that confining the English courts' jurisdiction to damages suffered in England was contrary to sections 13, 14 and 15(1) of the DPA 1998.
67. In response, Mr Glen firstly submitted that the judge's conclusion was not contrary to the ratio in *Shevill*. Here Mr Callus was conflating the court's approach under the Regulation with *its* approach under the 1982 Act.
68. Second, he argued that the real driver behind the rule in *Shevill* is a concern to prevent forum-shopping; and he referred us to para 67 of the CTEU's decision in support of that

proposition. In any event, even if proximity and predictability were the "drivers", it was predictable for the NTS to be sued in Scotland.

69. Third, Mr Glen submitted that Mr Callus' "centre of interests" argument was not substantiated on the evidence or the factual findings below. Mr Kennedy had not claimed in his evidence in the Court below that his centre of interest was England, and the judge had, understandably, made no such finding.
70. Finally, Mr Glen submitted Mr Callus' fragmentation argument was manifestly contrived and ignored the provisions of the 1982 Act. Here Mr Kennedy had purported to invoke article 4(1) of the Regulation but then relied on the internal rule of special jurisdiction in Rule 3 of Schedule 4 to justify his decision to sue in England, but without any restriction on the width of his claim. *H* there was a risk of fragmentation here, it had arisen because of Mr Kennedy's decision to sue the NTS in England rather than its place of domicile, Scotland.

Discussion

71. Before turning to our conclusions, it is convenient to turn briefly to the relationship between the 1982 Act and the Regulation and *also* to the CJEU's decisions in the *Shevill* line of cases.
72. Section 16(3)-(4) of the 1982 Act provides that appropriate weight is to be given to principles laid down by the CTEU when determining any question as to the meaning or effect of any provision contained in Schedule 4. In *Kleinwort Benson v Glasgow City Council* [1999] 1 AC 153 at p. 163 D - G, Lord Goff explained that it would only be in a rare case where a provision of Schedule 4 bears a materially different meaning from the corresponding provision in Title II of the 1968 Convention (now Chapter II of the Regulation). Lord Goff said (emphasis added):

"(1) I wish first to stress that, although the European Court of Justice declined to provide the guidance asked for by the Court of Appeal, nevertheless it is clear that the courts of this country, in considering questions which arise under Schedule 4 to the Act of 1982, must have regard to the principles laid down by the Court of Justice in connection with Title II of the Brussels Convention, and any relevant decisions of the court as to the meaning and effect of any provision of that Title: see section 16(3) of the Act. A contrast is therefore drawn with section 3(1), which provides that any question as to the meaning or effect of the Convention is to be determined "in accordance with the principles laid down by and any relevant decisions of the European Court." Even so, too much should not be read into this distinction, which appears to be drawn only to accommodate the fact that Schedule 4 forms part of the national law, and because there are parts of Schedule 4 which do not correspond with Title II of the Convention. *It will however, be a rare case in which a provision of Schedule 4 bears a materially different meaning from the corresponding provision in Title II: see O'Malley and Layton, European Civil Practice* (1989), p. 984, para. 41.09. It follows that your Lordships' House should, in cases arising under Schedule 4, take the relevant decisions of the European Court of Justice fully into account."

73. The limits of the interpretive obligation in section 16 of the 1982 Act were discussed by Lord Dyson MR in *Cook v Virgin Media*. It was argued by the claimant there that the rule in *Owusu v Jackson* would apply even in a purely domestic case by reason of section 16. At paras 30 to 31, lord Dyson MR noted (referring to *Kleinwort Benson*) that the 1982 Act *did* not require the United Kingdom courts to decide disputes before them by applying absolutely and unconditionally the interpretation of the 1968 Convention provided to them by the CJEU. He said (emphasis added):

"30. I cannot accept these submissions for the reasons advanced by Ms Wyles and Mr Sweeting. Schedule 4 rules are not a mirror of Chapter II of the Regulation. They reproduce the provisions of the Regulation with modifications. The provisions have been tailored to make them appropriate to UK domestic law. The domestic nature of the schedule 4 rules was emphasised by the ECJ in *Kleinwort Benson v City of Glasgow DC* (Case C-346/93) [1995] ECR I-615. In that case, the court said that the principal purpose of the 1982 Act was "to render the Convention applicable in the United Kingdom"; but "it also provides for the allocation of civil jurisdiction as between the separate jurisdictions within the United Kingdom (England and Wales, Scotland, Northern Ireland)". AS Professor Briggs said at para 2.312 (*loc cit*), the rules set out in schedule 4 apply in relation to the international jurisdiction of the UK courts as well as where there is no international question of jurisdiction, but simply a question as between the national jurisdictions of England, Scotland and Northern Ireland.

31. In *Kleinwort Benson*, the court said that it did not have jurisdiction to give a preliminary ruling on the interpretation of articles 5(1) and (3) of the Brussels Convention where the issue was the true interpretation of the 1982 Act in an intra-UK jurisdiction case to which the Convention did not apply. *The 1982 Act did not require the UK courts to decide disputes before them "by applying absolutely and unconditionally the interpretation of the Convention provided to them by the [ECJ]" (para 20)*. In a case where the Convention did not apply, the court of the member state in question was "free to decide whether the interpretation given by the ECJ was equally valid for the purposes of the application of the national law based on the Convention" (para 22)."

74. We turn to *Shevill*. In that case, the claimant brought English proceedings for an alleged libel in a French newspaper with a small circulation in England and Wales. The defendants sought a stay on the grounds that the place where the "harmful event" occurred, within the meaning of article 5(3) of the 1968 Convention, was France.
75. In summary, the CJEU held that a victim of a libel distributed in several Member States can sue for the whole of the damage arising from the unlawful act before the courts of the place of a causal event and the courts of the defendant's domicile. In contrast, the courts of one of the places where damage arose cannot hear proceedings for compensation for damage arising in other contracting states - what has been referred to in these proceedings as "global damages". See para 42.

76. The principal reasons for precluding a claim for global damages in the court of the place where the damage was suffered (as opposed to the place of the causal event or the defendant's domicile) were summarised by Advocate General Dannon at paras 73 - 76:

"73. First, the courts of the place where the damage arises are best placed to assess the harm done to the victim's reputation within their judicial district, and to determine the extent of the damage.

74. Secondly, the adoption of such a criterion avoids the occurrence of concurrent litigation in different forums: see para 6 of the judgment in *Effer [S.p.A. v. Kanter (case 38/81) [1982] E.C.R. 825]*. Its effect is that the competence of each of them is restricted to the damage arising within their respective judicial districts.

75. Thirdly, the aim of providing legal protection can only be satisfied if the rules governing jurisdiction are foreseeable, a requirement to which the court referred in its judgments in *Jakob Handte et Cie. G.m.b.H v. Traitements Mecano-Chimiques des Surfaces SA. (TMCS) (Case C-26/91) [1992] E.C.R. I-3967* and *Custom Made Commercial Ltd. v. Stawa Metallbau G.m.b.H (Case C-288/92) [1994] E.C.R. I-2913*. The defendant will be in a position to know precisely, on the basis of the place in which the newspapers are distributed, before which court or courts it risks being sued and the pleas on which it may be able to rely in its defence, having regard to the applicable law.

76. Lastly, in this area more than in any other, the restrictive interpretation of the rules of special jurisdiction calls for the solution which I am proposing. It should in that regard be borne in mind, as the court held in *Kalfelis v. Bankhaus Schroder, Munchmeyer, Hengst & Co. (Case 189/87) [1988] E.C.R. 5565, 5585, para. 19*:

"that a court which has jurisdiction under article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based."

77. Advocate General Dannon also noted that a contrary solution, favoured by German authors, would encourage forum-shopping. At paras 65 to 67, he said (emphasis added):

"65. Whilst the solution advocated by the German authors has the undeniable merit of avoiding a multiplicity of competent forums, *it* appears primarily to be prompted by a desire to protect the victim, who would thus not be obliged, in order to obtain compensation for the whole of the damage suffered, to sue in each of the courts of the contracting states in whose judicial district damage had arisen.

66. However, I scarcely need to repeat that both the courts of the place of the causal event and those of the defendant's domicile already constitute two central forums having unlimited jurisdiction.

67. Besides, particularly in cases such as the present, where the victim would be able, in practice, to sue in any of the courts of any of the contracting states - it is undeniable that a newspaper published in one contracting state is distributed in practically all the other states - such a

solution would appear to conflict with the spirit of the Convention, which certainly does not favour "forum-shopping" but seeks instead to ensure the proper organisation of the attribution of special jurisdiction. It is obvious that the victim, confronted with such a system, would be bound to choose the forum in which he felt that he would be best compensated for the damage suffered by him."

78. The CJEU's judgment in *eDate Advertising* was handed down together with its judgment in *Olivier Martinez and Robert Martinez v MGN Limited* (C-161/10). In the first case, an Austrian company had posted material on its website concerning X, a German who had been convicted of murder some years previously. X brought proceedings in the German courts for a privacy injunction against eDate. In the second case, an English newspaper had published an item saying that a French actor was dating an Australian pop singer. The actor and his father brought proceedings before the French courts for infringement of their right to privacy.
79. In brief summary, the CJEU adapted its ruling in *Shevill* to ensure the protection of personality rights in 'the age of the Internet'. It therefore ruled that for the purposes of article 5(3) of the Regulation, material is "distributed" wherever it is or has been accessible. Importantly, the CJEU also established, on the basis of article 5(3) that in Internet cases only, a claimant could bring proceedings for global damages in the Member State in which his centre of interests is located. See paras 37 to 52.
80. In *Bolagsupplysningen*, the CJEU clarified that although in *Shevill* it had ruled that a claimant could sue for defamation in each Member State where there was publication and damage to reputation, an application to rectify incorrect information and to have content taken down from the Internet was a single and indivisible application, and {following *Shevill* and *eDate*) could only be made in the jurisdiction where the court was able to rule on the entire claim for damages.
81. We turn to the criticisms made of the judgment *below*. The first criticism was that the judge's ruling was contrary to *Shevill*. Particular reliance was placed on the italicised words in the following passage from *Shevill* at para 42 (emphasis added):

"On those grounds, the court, in answer to the questions referred to it by the House of Lords, by order of 1 March 1993, hereby rules:

(1) On a proper construction of the expression 'place where the harmful event occurred' in article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the victim of a libel by a newspaper article distributed in several contracting states may bring an action for damages against the publisher *either before the courts of the contracting state of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation*, or before the courts of each contracting state in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the state of the court seised."

82. In our view, this first criticism is misplaced. The CJEU's decision in *Shevill* must be read in its proper context. That case was concerned with enforcement under the Regulation and was not concerned with the allocation of jurisdiction *within* a Member State. AS such, there can be no conflict between the judge's reasoning and the decision in *Shevill*. This is not a case which engages the Regulation. In so far as *Shevill* is applied in a domestic forum under section 16(3) of the 1982 Act, the terms of that decision must be read with necessary modifications.
83. We also disagree with Mr Callus' second criticism, namely that precluding global damages for courts of domestic special jurisdiction is contrary to the objectives underpinning *Shevill*. It seems to us that those objectives (of avoiding concurrent litigation, preventing forum-shopping, and ensuring that the defendant can know before which court or courts it risks being sued and the nature of the defences on which it may be able to rely) are all applicable to a "sub-national" model of the rule. AS the judge below found at para 93, *Shevill* provides a perfectly defensible framework for bringing consistency to jurisdiction issues within the United Kingdom. Further, as Lord Goff explained in *Kleinwort Benson*, it will only be in a rare case that a provision of Schedule 4 bears a materially different meaning from the corresponding provision in Title II of the 1968 Convention (now Chapter II of the Regulation) . We do not consider this is such a case. Moreover, Mr Callus' argument that the objectives of proximity and predictability are presumed to be satisfied in all of the courts of the Member State is itself premised on an application of the Regulation - which does not apply here.
84. In our judgment, Mr Callus' centre of interests argument must also be rejected. As Mr Glen submitted, Mr Kennedy made no such claim in his evidence and the judge, understandably, made no such finding. We should add that we do not consider that there are sufficient grounds, either on the judge's factual findings or the evidence, to support such a claim, namely that the centre of Mr Kennedy's interests was in England.
85. In our view, there is nothing in Mr Callus' fourth criticism that the judge's conclusion would lead to further fragmentation. The rules governing jurisdiction within Scotland are found in Schedule 8 of the 1982 Act. Although section 20(3) of the 1982 Act sets out the same interpretive obligation as found *in* section 16(3), it does not follow that the same interpretation must be given to Schedules 4 and 8. In any event, we are concerned here with the former Schedule only.
86. The suggestion that the judge's ruling is inconsistent with *Bank of Scotland v Seitz* must also be rejected. In our view, the point made by the Lord President in that case was simply that the claimant has a *choice* between the general and special jurisdiction rules in the 1982 Act where both apply. It was therefore wrong to suggest, as the defendant did in that case, that the special rules of jurisdiction were subordinate to the general rules of jurisdiction in the sense that a claimant can *only* be sued in the courts of the place of his domicile: see para 8.
87. In relation to the sixth criticism, which concerned the DPA 1998, reliance was placed on section 15(1) of the DPA 1998. This provides that:
- "(1) The jurisdiction conferred by sections 7 to 14 is exercisable in England and Wales by the High Court or the county court or, in Northern Ireland, by the High Court or a county court or, in Scotland, by the Court of Session or the sheriff."

88. Section 13(1) of the DPA 1998 is also relied on by Mr Callus. It reads as follows:

"(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage."

89. The point briefly mentioned by Mr Callus, but not developed in argument, was that there is no suggestion in the language of either provision that compensation under the DPA 1998 would be restricted to damage occurring in part of the United Kingdom.

90. Read in isolation, section 13(1) of the DPA 1998 sets out an individual's right to compensation in respect of all the damage he or she has suffered as a consequence of a breach of the DPA 1998. The question raised by Mr Callus' submission is whether the jurisdiction in section 15 to award "that damage" identified in section 13, is circumscribed by a domestic application of the rule in *Shevill* under the 1982 Act.

91. In our view, it is so circumscribed. Although we were not referred to any authority on this point, it seems to us that Mr Kennedy's data protection claim qualifies as a "personality right" of the kind present in *Martinez*. In the CJEU's joint judgment in *eDate* and *Martinez* it said at para 39 (emphasis added):

"39. As is clear, the *Shevill* case law covers infringements of personality rights where there is a tension between freedom of information and the right to privacy or to one's own image. It has a wide scope and is not confined exclusively to the print media, since its scope also encompasses other means of communication such as information broadcast via television or radio. It also covers a wide range of infringements of personality rights, be they defamation in the sense usually attributed to this type of harm in continental legal systems, or the defamation typical of common law systems: see Sanchez Santiago and Izquierdo Peris, "Difamar en Europa: las implicaciones del asunto Schevill" (1996) 23 Revista de Instituciones Europeas No 1, p 168."

92. A claim for breach of statutory duty under the DPA 1998 is one which involves a similar tension between freedom of information and the right to privacy. The DPA 1998 was intended to implement Directive 95/46/EC. Article 1 of that Directive, which is headed "Object of the Directive", makes clear that one of its fundamental goals is to ensure the protection of individuals' rights to privacy:

"1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1."

93. The effect of this is not however to deny an individual their entitlement to compensation under section 13(1) of the DPA 1998. To the contrary, an individual is entitled to full compensation before courts having general jurisdiction.

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94. In conclusion, we consider that the judge's was correct to find at para 94 that if the claim were allowed to proceed in England, it would have been right to confine the issues to those properly arising under the special jurisdiction and therefore to strike out the global damages claims.

FORUM NON CONVENIENS-THE STAY

95. Mr Kennedy's second ground challenges the judge's ruling that the claim should have been stayed under the doctrine of forum non conveniens, on the ground that Scotland is clearly the more appropriate forum for the trial of the action. In the light of the conclusions already reached as set out above, this ground can be dealt with more shortly.

Submissions

96. Mr Callus accepted that the hurdle for challenging an exercise of *discretion* is a high one. Nonetheless, he submitted that the judge fell into error at paras 81 to 82 of his judgment. In particular, he argued that the judge's conclusion was essentially premised on the two factors the judge identified, namely the parties being domiciled in Scotland and *the* fact the Scottish courts could award global damages. As to the first factor, in his written submissions Mr Callus argued that it was difficult to see how the domicile of the parties could be a significant factor. In his submission, this was contrary to the "equal weight" rule in *Bank of Scotland v Seitz*. As to the second factor, Mr Callus relied on his submissions that the judge had erred on the global damages issue and submitted that this error had infected the judge's reasons for granting the stay.
97. On this basis, Mr Callus submitted that it was for us to exercise the discretion for ourselves. He made a number of submissions as to why substantial justice could only be achieved if the claim were heard in England. In this respect, he relied chiefly on what he said were legitimate juridical advantages of the claim being heard in England rather than Scotland. For reasons, which will become clear, it is unnecessary to set these out in detail.
98. Mr Glen submitted that there is no basis for interfering with the judge's conclusions on forum on any of the grounds advanced. Mr Glen first took us to the observations of Lord Mance at para 69 and Lord Neuberger at paras 93 to 94 in *VTB Capital plc v Nutritek International Corp* [2013] 2 All E.R. (Comm) 937 which are to this effect: an appellate court should refrain from interfering with a judge's evaluative judgment as to the more appropriate forum unless satisfied that a significant error had been made.
99. Mr Glen submitted that to suggest *that the* judge only relied on the two factors identified at paras 81 and 82 of his judgment, domicile and global damages, is overly reductive. The judge actually arrived at his conclusion after a careful analysis of the facts, which he had set out in the preceding paragraphs of his judgment. As to the parties' domicile, Mr Glen submitted this was a legitimate consideration given that it was more predictable that the NTS would be sued in Scotland, where it was domiciled, rather than in England. Mr Glen also relied on his submissions on global damages in relation to the further suggestion that the judge's determination of the global damages issue had 'infected' his reasoning on the stay.

Discussion

100. In *VIB Capital pie v Nutritek International Corp.* at para 69, Lord Mance said this (emphasis added):

"69. In short, Arnold J's analysis and exercise of his discretion cannot in my view be faulted in any substantial respect, and I see no basis on which this court would be justified in setting aside his exercise of his discretion and re-exercising the discretion for ourselves, still less in arriving at a different conclusion from his. *The case is one in which an appellate court should refrain from interfering, unless satisfied that the judge made a significant error of principle, or a significant error in the considerations taken or not taken into account.*"

101. To like effect, Lord Neuberger said at para 94:

"94. Lord Templeman in *The Spiliada* [1987] AC 460, 465 said that the determination of the appropriate forum is "pre-eminently a matter for the trial judge", because "commercial court judges are very experienced in these matters", and "an appeal should be rare and the appellate court should be slow to interfere". This case was in the Chancery Division, whose judges entertain such issues less commonly than their commercial court colleagues, but their experience and expertise are such that the same conclusion applies. As Tomlinson LJ said [2013] 1 All ER (Comm) 819, para 117 of his judgment in *Alliance Bank*, an appellate court "should hesitate long before interfering with the judge's assessment" on such an issue."

102. We think Mr Glen is right to say, that Mr Callus' analysis of the judge's reasoning is overly reductive and we do not consider that the judge's exercise of his discretion can be faulted. Focusing however on the two points made by Mr Callus in this regard, as we have explained above, *Bank of Scotland v Seitz* was directed at a particular question which does not arise here; and as we have already said, in our judgment *the* judge's conclusions on the issue of global damages were correct.

WAS SERVICE OF THE CLAIM FORM INVALID?

103. The NTS' cross-appeal is primarily concerned with whether the service of the Claim Form was invalid. The cross-appeal gave rise to a further issue raised by Mr Kennedy in a Respondent's Notice. This *is* that if service of the Claim Form was invalid, the judge should have made an order under either CPR r 6.15 or r 7.6(3) to validate the service of the claim form retrospectively.

Legal framework

104. The material part of CPR r 7.5 provides as follows:

"(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of service	Step required
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 *within* 6 months of the date of issue."

105. The relevant words in Section IV are to be found in CPR r 6.40(2):

"(2) Where a party serves a claim form or other document on a party in Scotland or Northern Ireland, it must be served by a method permitted by section II (and references to jurisdiction' in that Section are modified accordingly) or Section III of this Part and r.6.23 (4) applies."

106. Further, CPR r 6.3(2) provides that a company may be served by any method permitted under CPR Part 6 including by first class post (or by any method permitted under the Companies Act 2006). The question with which the judge was concerned and which arises on this appeal is the way in which these provisions relate to CPR r 6.14. CPR r 6.14 provides that:

"A claim form served within the United Kingdom in accordance with this Part is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1)."

107. It is *also* relevant to note that section 7 of the Interpretation Act 1978, provides that:

"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Submissions

108. Mr Glen's argument proceeded as follows. It was common ground that service of a Claim Form in Scotland constitutes service outside of the jurisdiction and therefore engages CPR r 7.5(2). Mr Kennedy was therefore required to serve the Claim Form on the NTS by 24 August 2017, within six months of the date of issue. On 23 August 2017, Mr Kennedy's solicitors sent the Claim Form to the NTS in Scotland by first class post, which was the "relevant step" for the purposes of CPR r 6.14. Accordingly, although the Claim Form was in fact received by the NTS on 24 August 2017, by operation of rule 6.14 service of the Claim Form took place on 25 August 2017, outside the six-month time limit set down in CPR r 7.5(2).

109. We were first referred to two decisions of the Court of Appeal. The first was *Godwin v Swindon Borough Council* [2002] 1 WLR 997 (Pill, May *UJ* and Rimer J). The second was *Anderton v Clwyd County Council (No. 2)* [2002] 1 WLR 3174 (Lord Phillips MR, Mummery and Hale IJJ). Mr Glen submitted that those decisions showed that the deeming provisions in the CPR fixed the date on which service of a document *is* taken to have occurred for the purpose of assessing compliance with any deadline for achieving that service. Although the Court of Appeal was dealing with an older provision, Mr Glen submitted that rule 6.14 in its current form *is* materially identical to the earlier provision, and the rationale for those two decisions therefore still applies under the current procedural regime.
110. Mr Glen also took us to dictum of Andrew Baker J in *Brightside v RSM UK Audit* [2017] 1 WLR 1943 at para 18, which says that where service is in Scotland or Northern Ireland, that date of service will be the date fixed by CPR r 6.14.
111. Mr Callus' essential submission was that rule 6.14 did not apply, as it was not concerned with the validity of a claim form under CPR r 7.5(2). Rather the position was governed by a rebuttable presumption that service by first-class post in Scotland will be effected on the next business day, *as* set out in section 7 of the Interpretation Act 1978. In this case, the NTS accepted that the Claim Form had in fact been received on 24 August 2017. As such, the presumption in section 7 was rebutted and service had taken place on 24 August 2017, within the six month deadline set down in CPR r 7.5(2).
112. In support of his position, Mr Callus advanced three arguments. The second and third arguments were put in the alternative and arose from the Respondent's Notice on the cross appeal. Mr Callus' primary position *was* that the judge was right to follow Master McCloud's analysis in *Paxton Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB) that rule 6.14 did not affect the temporal validity of a claim form, and that Andrew Baker J's *obiter* analysis in *Brightside* should be disapproved.
113. We were also taken to three cases considered in *Paxton Jones v Chichester Harbour Conservancy*. These were *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2013] EWHC 3261 (QB); *T&L Sugars Ltd v Tate & Lyle Industries Ltd* [2014] EWHC 1066 (Comm); and *DB UK Bank Ltd v Sinclair Solutions Ltd* [2015] EWHC 4219 (Ch).
114. Mr Callus' second argument was that notwithstanding service on the NTS fell within *the* terms "within the United Kingdom" in the first part of CPR r 6.14, that provision has no application to claim forms served outside the jurisdiction under CPR r 7.5(2). He submitted that where service is completed by the claimant taking a "relevant step", as in CPR r 7.5(1), then a deemed date of service was useful and necessary. However, for service outside of England and Wales under rule 7.5(2), the date of service is when the material actually arrived with the defendant. There *is* no need for a deeming provision in those circumstances.
115. Mr Callus' third argument was that adopting a purposive construction, the words "within the United Kingdom" should be read-down to "within England and Wales". This was because Mr Glen's construction led to an absurd outcome. This was that the deemed service provision would only affect claim forms served in Scotland and Northern Ireland (within rule 6.14) but not claims served in England and Wales (under rule 7.5(1)) or outside of the United Kingdom (such service is not within CPR r 6.14). Mr Callus also pointed out that rule 6.14 does not apply to service on a company under

CPR r 6.3(2)(b) or on a limited partnership under 6.3(3)(b). This, he submitted further underlined the absurdity of the interpretation of the rules for which the NTS was contending.

116. As for *Godwin* and *Anderton*, Mr Callus submitted that these decisions pre-dated the CPR amendments and concerned the old rule 6.7 as it applied to claim forms *within* the jurisdiction. As such, those decisions have nothing to say about claim forms served *outside* of the jurisdiction.
117. Mr Callus took us through the legislative history relating to rules 7.5(2) and 6.14. The two key points which emerged were that:
- i) The first draft of rule 7.5(2) set out in Consultation Paper 14/07 included the possibility that the claim form must be "deemed to be received" within six months. In contrast, the rule ultimately enacted required the claim form to be "served" within *six* months. This reflected a specific legislative choice by the *Rules* Committee in enacting the Civil Procedure (Amendment) Rules 2008 (SI 2008/2178) ("the 2008 Rules") to prefer the actual date of service rather than the deemed date of service, thereby materially reversing the effect of *Godwin* and *Anderton*; and
 - ii) The words "within the United Kingdom" in rule 6.14 were introduced by the Civil Procedure (Amendment) Rules 2011 (SI 2011/88) ("the 2011 Rules") to ensure the UK's compliance with its EU obligations. The change was therefore EU-facing and only intended to disapply rule 6.14 where the defendant was BEA-domiciled outside the UK as opposed to a UK-domiciled defendant in Scotland or Northern Ireland.

Discussion - case law

118. In *Godwin* and in *Anderton* this Court decided that the deemed date of service of a claim form provided by the CPR is a fixed date. It is not merely a presumption, rebuttable by proof by a claimant that the claim form was actually received on some earlier date. Those decisions concerned the old deemed date of service provisions set out in CPR r 6.7, which included different deemed dates for different methods of service .
119. We were taken to what May LJ said at para 46 of *Godwin* as follows:

"46. In my judgment, although dictionaries may give various meanings for the word "deem" in other circumstances, the provision in rule 6.7(1) that "A document ... shall be deemed *to* be served on the day shown in the following table" and the heading to the second column in the table "Deemed day of service" clearly mean that, for each of the five methods of service, the day to be derived from the second column is to be treated as the day on which the document is served. It is a fiction in the sense that you do not look to the day on which the document actually arrived, be it earlier or later than the date to be derived from the table. Thus in the present case, the claim form and other documents were posted a day late and the fact that they arrived earlier than the deemed day of service is no

more help to the claimant than it would be help to the defendant if they had arrived later. As I say, I consider this to be the clear meaning of the

words used which do not admit of the qualification necessary for the claimant's submission to succeed. This interpretation does not offend the overriding objective in cases where limitation is at issue for the reasons which I gave in *Vinos v Marks & Spencer plc*. The use of the "deemed" in para (1) and "treated" in para (2) is odd but not, in my view, of any significance one way or the other. More significant is the fact, which Mr Regan accepted, that the interpretation of rule 6.7(1) has to apply, not only to service by first class post, but also to the other methods of service in the table. Granted that the purpose of service is to bring the document to the attention of the person to be served, these are all methods of service other than personal service which are not bound to put the document literally into the hands of the person to be served on any particular day. All these methods of service will not achieve this unless the person to be served is there to receive the document or takes steps to do so by, for example, going to the document exchange or checking the e-mail: see para 3.3 of the Part 6 Practice Direction. Uncertainties in the postal system and considerations of this kind make it sensible that there should be a date of service which is certain and not subject to challenge on grounds of uncertain and potentially contentious fact. It seems to me that parties serving documents by these means are in a better position if the deemed date for service is certain than if it is open to challenge on factual grounds. This particularly applies to claimants wanting to serve a claim form at the very end of the period available to do so. The deemed day of service is finite and they will not be caught by a limitation defence where the last day for service is a Friday, if they post the claim form by first class post on the preceding Wednesday whenever it in fact arrives. Since, in my view, the deemed day of service to be derived from the table to rule 6.7(1) is not rebuttable by evidence, and since, for the reasons which I shall give, the limitation consequences for a claim form which is served late are not amenable to the exercise of the court's discretion, a claimant who makes the kind of mistake made in the present case and in other cases to which I have referred is in no different position from a claimant who issues the claim form by mistake a day or two after the expiry of the limitation period."

120. *Godwin* was applied in *Anderton*. At para 3 of *Anderton*, Mummery U, giving the judgment of the Court, summarised the Court of Appeal's conclusions on the issue of interpretation:

"3. Later in this judgment we explain our conclusions on the contested points of interpretation, and we state the facts and outcomes of the individual cases under appeal. In summary the legal position is that: (a) service of a claim form, which has been sent by first class post or fax before the end of the period for service, may, as a result of "deemed service" under rule 6.7, occur after the end of that period; (b) the fact that the claim form has actually been received by, and come to the attention of, the defendant or his solicitor through the post, by fax or by means other than personal service within the period of four months allowed by rule 7.5(2) is legally irrelevant to ascertaining the day of service, as

deemed by rule 6.7; (c) if an application for an extension of time is issued

by the claimant after the end of the period of service, *the* court will rarely have power under rule 7.6(3) to grant an extension of time and only in the most exceptional circumstances will *it* be proper to exercise its discretion under rule 6.9 to dispense with service ... "

121. At para 36, Mummery LJ explained why the deeming provision in rule 6.7 had *this* effect in relation to the validity of service of a claim form (emphasis added):

"36. Despite the eloquence of the arguments we are not persuaded that the decision of this court in Godwin's case is incompatible with article 6. We are therefore bound to follow it. *The aim of rule 6.7 is to achieve procedural certainty in the interests of both the claimant and of the defendant. Certainty in the time of service of a claim form is an important requirement for the efficient performance of the case management functions of the court.* It is legitimate to promote that aim by setting a deadline of four months from issue for the service of the claim form by one of the permitted methods and by using the legal technique of deemed service to bolster the certainty. The rules employ a carefully and clearly defined concept of the "service" of a document, which focuses on the stated consequences of the sending of the document by the claimant, rather than on evidence of the time of its actual receipt by the defendant. *The objective is to minimise the unnecessary uncertainties, expense and delays in satellite litigation involving factual disputes and statutory discretions on purely procedural points* "

122. *Godwin* and *Anderton* were considered by Andrew Baker J in *Brightside*. That case concerned CPR r 7.7. This provides by sub rule (1) that: "Where a claim form has been issued against a defendant, but has not yet been served on him, the defendant may serve a notice on the claimant requiring him to serve the claim form or discontinue the claim within a period specified in the notice." If the claimant fails to comply, the court may, by rule 7.7(3), dismiss the claim or make some other order. The defendants in *Brightside* gave notice under CPR r 7.7 requiring the claimants to serve the claim form by 10 June 2016. On 10 June 2016, the claimants hand-delivered the claim form to the defendants. The claimants submitted that by leaving the claim form at the relevant place for the purposes of rule 7.5, within time under the notice, service had taken place in time, notwithstanding the deemed date of service provisions in rule 6.14.
123. Andrew Baker J concluded that service of the Claim Form took place later than 10 June 2016 by virtue of rule 6.14. At para 20 Andrew Baker J expressed the view that "CPR r 6.14 fixes the date on which service of a claim form occurs, for all, not only for some, CPR purposes". At para 18 he said *obiter* (emphasis added):

"18. Thus, the result in the *Godwin* and *Anderton* cases, that CPR 7.5 had not been complied with because the date of service achieved by the claimant (as deemed, i.e. fixed, by the CPR) was not within four months from the issue of the claim form, was reversed by the 2008 amendment to CPR 7.5, *but only for claim forms served within the jurisdiction and not by changing the meaning or nature of a deemed date of service under the CPR..* As the CPR now stand: for a claim form served within the jurisdiction, CPR 7.5(1) requires that the step there specified, for the

method of service used by the claimant, as a result of the taking of which service will be effected two business days later (see CPR 6.14), must be taken within four months of the claim form being issued; *for a claim form served outside the jurisdiction, CPR 7.5(2) requires that the claim form be served, i.e. (see Godwin and Anderton) that the date of service be, within six months of issue. (If service is in Scotland or Northern Ireland, that date of service will be the date fixed by CPR 6.14; if it is overseas, so far as I can see - this was not explored in argument - there are no 'deemed date' rules in the CPR, so that when service occurs, if disputed, will fall to be determined on the facts of each case.)*"

124. A different analysis of the effect of the rules is to be found in para 31 of *T&L Sugars Ltd*. There Flaux J said (emphasis added):

"In my judgment these two rules, CPR 7.5 and 6.14, taken together draw a clear distinction between the date when service is actually effected, which is when the relevant step under 7.5 has been completed and the date two business days later when service is deemed to take place under CPR 6.14. If one asks oneself why that distinction *is* there, it is not as Mr Nicholls QC suggests because service does not actually occur until the deemed day, but because, whereas CPR 7.5 is looking at when actual service takes place, so that a Claimant who takes the requisite step, depending upon which method of service he employs, can be sure that he has served within the four months of validity of the claim form (thereby avoiding, if relevant, any limitation issues). *CPR 6.14 is looking at when service will be deemed to have taken place for the purpose of other steps in the proceedings thereafter, beginning with the filing of an acknowledgement of service.* In my judgment, that construction of the rules is supported not only by the reasoning of Green J. in the *Ageas 1* case at 63-80, with which on this point I entirely agree, but by the wording of the rules themselves and by the various commentaries on the CPR, not only Blackstone's Civil Practice on which Mr Mill relied but, on a proper analysis, the notes to the White Book."

125. *Paxton Jones* was a case, which concerned service within the jurisdiction under rule 7.5(1). The "relevant step" was the posting of the documents on 17 January 2017. The documents arrived on 18 January 2017. As the final date for service was 17 January 2017, a question arose as to whether the claim form was properly served within its period of validity. The defendant argued that by reason of rule 6.14, the latest day for the relevant step was 13 January 2017 (two business days prior to 17 January 2017).
126. In summary, the Master rejected the defendant's argument for three reasons: (1) in so far as Andrew Baker J in *Brightside* was purporting to lay down a general rule that an otherwise valid claim form could be invalid due to the operation of rule 6.14 that conclusion was *obiter* and incorrect; (2) the 2008 Rules had reversed the effect of *Godwin* by removing the snare of the deemed date of service provisions and it would be contrary to the purpose of those Rules to re-introduce a "dead" period at the end of the validity of the claim form; and (3) the only function of rule 6.14 was to ensure that it is clear to the parties what date is to be used for the purpose of calculating dates for subsequent steps in the litigation. See in particular paras [29], [37] and [38].

Discussion - conclusions

127. We should begin by disclosing, as Sir Rupert Jackson did to the parties, that he was a member of the Rule Committee in 2008, but not in 2011. The Committee deals with a vast volume of business. Sir Rupert has no recollection of their discussions about CPR Part 6 in 2008, beyond the bare fact that the service rules underwent major revision during that period. Even if he did have any more detailed recollection however, he notes this would not be relevant to the present appeal.
128. Under the 2008 Rules (and before the introduction of the 2011 Rules) CPR r 6.14 related only to proceedings served in England and Wales. Rule 6.14 did not affect the validity of the claim form or the effectiveness of its service. That was governed by rule 7.5(1). At that time, CPR r 6.14 was, and could only be, a deeming provision for the purpose of determining when parties should take subsequent steps.
129. The material amendments effected by the 2011 *Rules* were made to ensure the United Kingdom was compliant with its EU obligations under Regulation 1393/2007 (the "Service Regulation") further to Directive 77/249/EEC on the free movement of legal services within the European Union; and Directive 2008/52/EC (the "Mediation Directive").
130. Thus, the Explanatory Note to the 2011 Rules, says about CPR Part 6 that:
- "These Rules amend the Civil Procedure Rules 1998 in that they -
- amend Part 6 of the CPR (with consequential amendments in rules 10.5 and 16.5):
 - (a) to allow for the address of a European Lawyer in an EEA state, or, for a litigant in person, the litigant's normal residence or place of business in the United Kingdom or failing that any EEA state, to be provided as an address for service, and
 - (b) to update references to Civil Procedure Conventions or Treaties which make provision for service of documents; ... "
131. This purpose is reflected in the specific amendments made to CPR Part 6. For example, under para 4(c) of the 2011 Rules, the heading of Section II of CPR Part 6 (which includes rule 6.14) was changed to read: "Service of the Claim Form in the Jurisdiction *or in Specified Circumstances within the EEA*" (emphasis added). Similarly, under para 4(k) of the 2011 Rules, the heading of Section III of CPR Part 6 was changed to read: "Service of Documents other than the Claim Form in the United Kingdom *or in Specified Circumstances within the EEA*" (emphasis added). As Mr Callus submitted, the changes to CPR Part 6 introduced by the 2011 Rules were essentially "EU-facing".
132. In our view, it would be a very odd thing for the Rule Committee to have intended rule 6.14 to have (in effect) two different meanings, as set out above. Furthermore, it would bear no relationship to the general package of reforms which the Rule Committee was making in 2011. If that really was the Committee's intention, they would have expressed it in clear words. But they have not used clear words, or indeed any words,

to achieve that bizarre result. Instead, by inserting the four extra words, into rule 6.14

("within the United Kingdom": see para 117 above) what the Rule Committee has produced does not make sense.

133. Line 1 of rule 6.14 includes four new words which extend the application of that provision from proceedings served in England and Wales to proceedings served in England, Wales, Scotland and Northern Ireland. Line 3 of rule 6.14 links the whole provision to a table which applies only to proceedings served in England and Wales.

134. A deeming provision does not state absolute truth. It states that which is assumed to be true for limited purposes. In *Inland Revenue Commissioners v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637 at 646, Nourse J reviewed the leading authorities on deeming provisions and summarised their effect as follows:

"When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the fiction is to be resorted to. It will *not* always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result, then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."

135. The Court of Appeal approved Nourse J's summary of the law in *Anderton* at para 26.

136. In the present case, the only way to make sense of an otherwise obscure provision is to construe rule 6.14 as (1) extending the scope of that provision so that it applies to proceedings served in Scotland and Northern Ireland - *in* this respect we do not consider it possible to read-down the words "within United Kingdom" to mean "within England and Wales" but (2) continuing to have the same substantive effect they did before the 2011 Rules (namely to state a deeming provision which deems the date of service for the limited purpose of determining when parties should take subsequent steps).

137 In our view, the judge below was correct to follow the reasoning of Flaux J in *T&L Sugars Ltd* and Master McCloud in *Paxton Jones*. As Mr Callus submitted, in enacting the 2008 Rules, there was a specific legislative choice to prefer the date of actual service rather than deemed service. *Godwin and Andenon* have no application to rule 7.5(2).

138. In conclusion, we consider that the claim form was validly served when delivered to the NTS on 24 August 2017. In the light of this conclusion, there is no need to consider whether the judge should have found that Mr Kennedy would have been entitled to retrospective validation of the claim form. That issue does not arise.

139. For the reasons given above, both the appeal and cross appeal are dismissed.

