

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2018

Before :

SIR DAVID EADY
(sitting as a Judge of the High Court)

Between :

	Howard Kennedy	<u>Claimant</u>
	- and -	
	The National Trust for Scotland	<u>Defendant</u>

Greg Callus (instructed by **Penningtons Manches**) for the **Claimant**
David Glen (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing date: 21 November 2017

Judgment Approved by the court
for handing down
(subject to editorial corrections)

SIR DAVID EADY :

INTRODUCTION

1. The Claimant, who is domiciled in Scotland, seeks damages and other remedies in this jurisdiction against the National Trust for Scotland in respect of a number of allegations published in both jurisdictions as well as in Italy, France and Brazil. He relies not only on defamation but also on negligence and on alleged breaches of the Data Protection Act 1998. The dispute arises over the Claimant's attendance at Craigievar Castle in Aberdeenshire on 23 February 2012, when he took a series of photographs of a naked model for commercial purposes. He claims that he did so pursuant to an oral contract, entered into with a representative of the Defendant, which expressly authorised that

activity.

2. Some years later, in or about February 2016, this episode came to the attention of the daughter of Lord Sempill who had gifted the castle to the Defendant (more than 50 years ago) and she protested that it had been used for the purpose of taking nude photographs. Her remarks caught the attention of a journalist called Alastair Robertson. He made enquiries and was given a statement by or on behalf of the Defendant on 24 February 2016 which was reported in the *Scottish Mail on Sunday* of 28 February. Thereafter, the Defendant also issued a press release which denied that the taking of the photographs had been authorised. This was sent to a number of media outlets including a reporter on the *Metro* newspaper.

THE HISTORY OF THE CLAIM

3. Letters were exchanged between the parties on 26 February and 1 March 2016 and the Claimant instructed solicitors who sent a letter of claim dated 17 May of that year, which complained *inter alia* of the extensive republication of the Defendant's allegations in local and national newspapers. It was said that the Claimant's business appeared to have suffered considerable damage and particularly in respect of a falling demand for the training courses he provided.
4. The Defendant also instructed solicitors, Bannatyne Kirkwood France & Co of Glasgow, 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. Time passed and nothing further was heard from the Claimant's solicitors until a letter of 6 January 2017, enclosing draft particulars of claim, by which time the 12 month limitation period which applies to libel claims in this jurisdiction was drawing to a close. In the meantime, it was claimed, they had been able to monitor the impact of the publications upon the Claimant's business and upon his reputation. Attention was drawn to the substantial readership in England and the extent of his business interests south of the border. Reference was also made to the decision of Tugendhat J in *Lennon v Scottish Daily Record & Sunday Mail Ltd* [2004] EMLR 16, to which I shall need to return in due course.
5. On 24 January, the Defendant's then solicitors pressed further their argument that Scotland would be the appropriate forum. Again, there followed a period of silence from the Claimant. Meanwhile, however, the claim form was issued, as the Defendant later discovered, on 24 February (just as the primary limitation period was about to expire). There have been frequent warnings about the need to "progress the proceedings speedily and within time limits" and especially to those who choose to commence proceedings at the end of the relevant limitation period: see e.g. *Vinos v Marks & Spencer Ltd* [2001] CP Rep 12, at [20], *per* May LJ. The Claimant's solicitors should therefore have been well aware of the need for a sense of urgency. Yet still matters dragged on until a letter arrived dated 26 May. This enclosed a further draft of the particulars of claim, raising the foreign publications, and stating that the final version together with the claim form would be served by 23 June. This aspiration was not achieved.
6. Eventually, the Defendant's then solicitors indicated, on 18 August of last year, that they

were not instructed to accept service. Thereafter, the Claimant’s advisers decided to attempt service on the Defendant, at its registered office in Edinburgh, by first class post on 23 August. (Permission was not required: CPR r 6.32.) The documents arrived on the following day, but the Defendant contends that this was not effective service. At midnight on 24 August, the six months validity of the claim form would have expired and the Defendant submits that this was fatal because, by reason of CPR r 6.14, service would be deemed to have occurred on 25 August (i.e. two days after the documents were committed to the first class post). This brings me to the first of the issues so ably argued before me.

WAS SERVICE OF THE CLAIM FORM INVALID?

7. Each of the parties seeks a declaration as to the validity (or otherwise) of the attempted service of the claim form. The Defendant’s application is dated 29 September and the Claimant’s followed shortly after on 11 October. The arguments turned on the inter-relationship between CPR r 7.5 and CPR r 6.14. This has been considered by other judges on a number of occasions and differing views have been expressed. My attention was drawn specifically to *Paxton Jones v Chichester Harbour Conservancy* [2017] EWHC 2270 (QB), *Brightside v RSM UK Audit* [2017] 1 WLR 1943; *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2013] EWHC 3261 (QB); *T&L Sugars Ltd v Tate & Lyle Industries* [2014] EWHC 1066 (Comm) and *Heron Bros Ltd v Central Bedfordshire Council* [2015] PTSR 1146. In *Paxton Jones*, at [31], there was said to be an “unfortunate tension” between the two rules. It may be, therefore, that greater clarity in the drafting would be of assistance to litigants and practitioners.

8. In so far as relevant, it is currently provided in CPR r 7.5 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.

<i>Method of service</i>	<i>Step required</i>
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.”

9. 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.”

10. It is clear from CPR r 6.3(2) 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).
11. There is a dispute between the parties on a fundamental matter of interpretation. The Claimant contends that r 7.5(1) is applicable: all he has to show is that “the step required” was taken within the six month period of the claim form’s validity. He says that r 7.5(2) only applies to service “out of the jurisdiction” and that accordingly he does not need to prove that it was actually served. Mr Glen, however, submits that service in Scotland is “outside the jurisdiction” and, therefore, that actual service must be shown to have taken place within the six months: see *Brightside v RSM UK Audit*, cited above, at [16]-[18]. Andrew Baker J clearly proceeded on the basis that service in Scotland or Northern Ireland would be “outside the jurisdiction”. I shall do the same.
12. It is now necessary to consider how these provisions relate to CPR r 6.14, which provides:

“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).”
13. It is not in dispute that the documents were posted on 23 August or that they arrived at the Defendant’s registered office on 24 August. As at the moment of delivery, were they served or not? Mr Callus argues that they were, and that service had thus been effected, as a matter of fact, on 24 August. At that moment, the claim form had not lost its validity. (Had it been *actually* served on 25 August, it would of course have been too late.) At some point, CPR r 6.14 requires that service shall be deemed to have occurred on the second business day after completion of the relevant step (i.e. on 25 August). But that provision applies to “a claim form served”. (It does not include the words ‘*or purportedly served*’.) In my judgment, as at 24 August (up to midnight), the claim form fits that description. It was “a claim form served”. By reason, however, of CPR r 6.14, that (valid) service is deemed to have taken place on 25 August. That is not true, as a matter of fact, but as a matter of law the parties are to proceed *as if* that service had taken place on 25 August.
14. The word “served” appears twice in the sentence quoted above. When one comes to interpret “a claim form served” at the beginning of r 6.14, it cannot be referring to service on the deemed date. It is a reference to service *whenever* it actually occurred. The rule can give rise to a fiction, if it is clearly expressed, but it cannot rewrite history altogether and does not purport to do so. Indeed, the opening words recognise that service may in fact have occurred on a different (including an earlier) date. (See also the

discussion along similar lines in *T&L Sugars*, cited above, at [34]-[37].)

15. It follows that I would not agree with Andrew Baker J when he says, in *Brightside* at [26], that it is “incorrect and unhelpful” to speak about when service “actually occurs”. The rule requires that we deem the service which “actually occurs” to have occurred on a different date. We have to take cognisance of it to that extent at least, and to understand the significance of the distinction. I note that in *T&L Sugars*, at [39], Flaux J (as he then was) clearly explained the relationship between actual and deemed service.
16. Mr Glen argues, on the other hand, that CPR r 6.14 requires additionally that the claim form be treated as if it was invalid at the time of service or purported service. I do not think that can be read into the words. The “claim form served” does not change its character simply because the date on which it was in fact served is deemed to be different. The rule gives rise to a legal fiction for reasons of public policy; namely, to achieve certainty and predictability for the parties. It does not necessarily also have the effect of creating a separate legal fiction (i.e. that the claim form was invalid when served). The fiction is expressly concerned with the date of service – not the validity of the claim form. The rule says nothing about its validity at the time of actual service – whether as to its length or its expiry.
17. The Defendant’s interpretation (and that of Andrew Baker J) would entail a claimant’s lawyers having to take the relevant “step” at least one day earlier because, even though they know the claim form will still be valid when it is served (in this case on 24 August), it will have to be treated by them *as if* its validity was going to expire one day earlier. That is because of what Master McCloud referred to in *Paxton Jones*, at [32], as being the “dead period” for a day or two at the end of the claim form’s validity.
18. If service of this claim form was to have been in England, it could have been posted under r 7.5(1) up to and including the evening of 24 August. If it was to be served in Scotland, however, the required step (i.e. posting) would have to take place, at the latest, on 22 August. Otherwise, *whenever it arrived*, service would be deemed to take place after expiry.
19. That complication seems to me to go beyond the words and the intent of CPR r 6.14. In order to comply with the deeming provision, all one has to do is to *pretend* that the date of service was 25 August. There is no need to strive to construct a whole counter-factual history to go with the fiction expressly stipulated. If one attempts to do so, the exercise becomes uncertain and confusing, as the supposed “dead period” illustrates.
20. The Defendant’s argument is not supported by the express words of the rule and must, therefore, depend on necessary implication. Merely because the rule requires the court and the parties to proceed on the fictitious basis that the date of service was 25 August, it does not follow, as a matter of logic, that service took place after expiry. It is in the nature of fiction that it does not have to reflect reality. In the real world, if service took place on 25 August it would necessarily be the case that the claim form had expired. If the date of service is transposed to 25 August on the basis of a fiction, however, that is

not so.

21. Unlike the present case, *Paxton Jones* was an instance of service within the jurisdiction, under CPR r 7.5(1). There, the relevant “step” was taken when the documents were posted on 17 January 2017, but they were received on 18 January (i.e. after the time permitted for service, which had been extended to 17 January by order of Master Fontaine). On the facts in the present case, involving service *outside* the jurisdiction, it is not merely a question of posting on 23 August, as being the “step required”. It was accepted at the hearing before me that the claim form arrived in Edinburgh on 24 August – *before* the relevant expiry time.
22. Although the facts are different in those respects, my understanding of the rules would, I think, be consistent with the careful analysis of Master McCloud in the *Paxton Jones* case. She expressed the view, at [38], that “...the deeming provisions operate as a means to ensure that it is clear to the parties what date is to be used for the purpose of calculating such things as the date for service of acknowledgement of service or defence”. The Master readily admits, at [31], that there is nothing express in the rules to say that the deemed service provisions are “disapplied” for the purpose of calculating the period of validity. The wording is simply silent on the question. That is why she felt she had to propose her “purposive interpretation of the rules” (at [33]). It is almost certainly the case that r 6.14 was silent on the subject of validity because the draftsman was not concerned with that topic, which is adequately covered elsewhere – for example, in r 7.5(2) which allows six months in a case like the present (without the complication of a “dead period”).
23. The Master, in her review of recent law and practice, referred to the decision of Flaux J in *T&L Sugars*, cited above, at [31], where he said “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 the acknowledgement of service”. He also endorsed the commentary in the then current edition of **Blackstone’s Civil Practice**, at 15.1, to the effect that deemed dates of service “are now primarily of use in computing the time for taking the next steps in the litigation”. In this respect, their views on the limited function of the deeming provision seem to me consistent and compelling. CPR r 6.14 applies to service in the United Kingdom and must obviously be given the same interpretation whether it is being addressed in the context of England & Wales or, as here, that of Scotland.
24. Mr Glen points, however, to the reasoning of Andrew Baker J in *Brightside* (cited above), at [18], who observed:

“...for a claim form served outside the jurisdiction, CPR r7.5(2) requires that the claim form be served. i.e. (see *Godwin’s* case and *Anderton’s* case) 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 r 6.14 ...)”
25. The two cases to which the Judge was referring were *Godwin v Swindon Borough Council* [2002] 1 WLR 997 and *Anderton v Chwyd County Council (No 2)* [2002] 1

WLR 3174, both decisions of the Court of Appeal in the context of an earlier corresponding provision. They were to the effect that, because of the deeming provision then applying, service of the claim form had not been effected within the relevant time limit (four months). There was also the consequence that service was deemed not to have taken place within the limitation period. These outcomes were tackled by an amendment to the rules in 2008 – but only with regard to claim forms served within the jurisdiction (i.e. within England & Wales). The Judge took the view, therefore, that the Court of Appeal reasoning would still be valid vis a vis service of such a document in Scotland or Northern Ireland. Accordingly, in such a case, service will not be achieved merely by taking “the relevant step” (e.g. first class postage). It will be necessary also that service take place within the period of validity and that, moreover, (he said) would have to be determined by reference to the deemed date as defined in CPR r 6.14.

26. Mr Callus submits, however, that the deeming provision should not impact on the validity of the document – but only on the date of service. That is difficult to reconcile with the conclusion of the Court of Appeal in the Godwin case, in so far as it held that the deeming provision was effective to take the date of service outside the limitation period. Nevertheless, one has to do one’s best to construe the language of the relevant provisions, and their relationship to one another, in their current context and according to logic.
27. In trying to extricate themselves from these uncertain waters, both counsel sought guidance from commentary in the **White Book**, but that carries relatively little weight, especially in the case of apparent inconsistencies. As I have already illustrated, however, these conflicting currents have recently been navigated with considerable success by Master McCloud in her reserved judgment in Paxton Jones. In her view, all that the claimant had to show was that the relevant “step required” under CPR r 7.5(1) (e.g., as here, committing the document to the first class postal service) had been taken within the period of validity. It was not necessary to show that service was actually effected in this jurisdiction. That does not apply, of course, in the case of Scotland or Northern Ireland, but the facts in this case happen to be that not only was the document posted, but it also arrived (on 24 August) before the expiry of its validity. The question I must consider, therefore, is whether the deeming provision gave rise, despite that, to the fiction that its validity had expired before service (or possibly that it was lost at some point thereafter).
28. The headnote in the Brightside case purports to summarise the finding as being to the effect that CPR r 6.14 fixes the date on which service of a claim form occurs “for all CPR purposes”. Indeed, the Judge himself, at [20], expressed it in these terms, namely that “...CPR r 6.14 fixes the date on which service of a claim form occurs, for all, not only for some, CPR purposes”. Master McCloud was clearly troubled by this at [28]. She did not find it easy to reconcile these words with what the Judge had said at [24(ii)]; namely, that CPR r 7.5(1) “...defines what must be done within four months by a claimant who serves within the jurisdiction for the resulting service of the claim form to be valid”.
29. The Master thought that the view the Judge expressed at [20] was *obiter* in so far as it went beyond the issue of CPR r 7.7, which was the topic with which he was primarily concerned. In any event, she took the view, at [29], that in this respect the Judge’s

conclusion was “incorrect” and that, accordingly, she was not obliged to follow it, whether as a matter of precedent or convention: see *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch), at [26]-[51]. Turning to the present case, it seems clear that Andrew Baker J’s parenthetical observations about Scotland and Northern Ireland, at [18], were indeed *obiter* – whereas I have to address those circumstances head on. In coming to a different conclusion, therefore, I do not believe that I need to presume that he was either “incorrect” or “clearly wrong”.

30. Mr Glen suggests that the Master’s judgment has been misinterpreted by the Claimant’s advisers. It should be confined, he says, to the interaction between CPR r 6.14 and r 7.5(1). It identified a distinct rule for determining the date by which a claimant must act if a claim form is to be validly served *within this jurisdiction*. That is a “special case” and he argues that she was not concerned directly with CPR r 7.5(2), which is the subject matter of the present dispute. That is right, although it does not mean that her analysis of the deeming provision is of no relevance at all.
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.
32. I would therefore grant the Claimant the declaratory relief he seeks in respect of the validity of service.

THE CLAIMANT’S APPLICATION FOR RETROSPECTIVE RELIEF

33. In case his argument on service failed, the Claimant’s advisers made an application to guard against the consequences. They would have sought to put matters right in retrospect. I accept Mr Glen’s submission that the need for litigants and their advisers to serve a claim form within its period of validity is not a matter of mere technicality: it will not do simply to say “We only missed it by a matter of hours”.
34. It is *possible*, as both sides agree, for a court in effect to breathe fresh life into a claim form, even though it has lost its validity, by granting the necessary extension(s) retrospectively, but the rules will be narrowly construed even in the case of a prospective application: see e.g. *Hoddinott v Persimmon Homes* [2008] 1 WLR 806, at [14], *per* Dyson LJ.
35. The court is permitted to extend time retrospectively only if certain criteria are fulfilled

in accordance with CPR r 7.6(3). Those criteria appear to be based, as a matter of policy, on a “no fault” regime (my phraseology). Such an order may *only* be made if (a) *the court* has failed to serve the claim form, (b) the claimant has taken *all reasonable steps* to comply with CPR r 7.5 but has been *unable* to do so, and (c) the claimant has acted promptly in making the application (my emphases).

36. I cannot see that any of these hurdles has been overcome by or on behalf of this Claimant. Matters were left to the very last moment. His solicitor had looked up the law and concluded, rightly or wrongly, that she could comply with the time limits if she committed the document to the first class postal service on 23 August. She was taking a gamble in doing so, for whatever reason, and certainly cannot claim to have taken “all reasonable steps”. The application was not made promptly either, since it is dated 11 October.
37. It is necessary to have regard to the warning of Dyson LJ, in *Hashtroodi v Hancock* [2004] 1 WLR 3206, to the effect that a solicitor who leaves the issue of a claim form almost until the expiry of the limitation period (as here), and then leaves service of the claim form until the expiry of the period of service is imminent (as again happened here), is courting disaster. (See also the *Vinos* case, cited above at [5].)
38. A number of excuses were put forward, none of which carries conviction against the background of the disciplined regime of the CPR. They included such matters as the difficulties of engaging specialist lawyers with appropriate funding arrangements; the possibility of without prejudice negotiations; the last minute confirmation that the Defendant’s solicitors would not accept service; the need to obtain translations of some of the articles complained of; and the supposed absence of prejudice caused to the Defendant’s case by the delays. These matters would not justify the court in taking the unusual step of granting an extension retrospectively.
39. Other points were raised which were also unconvincing. Reliance was placed, for example, on CPR r 3.9 (relief from sanctions) and r 3.10 (rectification of errors of procedure). Yet neither of these provisions seems to me to be apt for the present circumstances. As I have said, a claimant who consciously chooses to leave such important matters to the very last minute takes a gamble and cannot expect the assistance of the court in going back to square one. I would not see any reason to help him or his solicitors to avoid the disciplines of the CPR over these long delays. He certainly cannot blame circumstances beyond his control – nor can it be said to be the Defendant’s fault that he found himself in this predicament. I would refuse relief under any of these provisions had I come to the opposite conclusion on the validity of service. Nor is it right to suggest that such an indulgence would be neutral so far as the Defendant is concerned. If I were to grant any such relief, the Defendant would be bound into time consuming and expensive litigation and would also have been deprived *ex hypothesi* of a good limitation defence so far as the claim in defamation is concerned.

THE ALTERNATIVE ARGUMENT BASED ON THE COMPANIES ACT

40. If the Defendant’s submissions about the deeming provision had been upheld, then Mr Callus would have wished to advance the argument that, in any event, service had been

effected under s.1139(1) of the Companies Act 2006 – to which the provisions of CPR r 6.14 would have no application. This contention was mainly developed after the hearing by way of written submissions. There were naturally complaints from the Defendant about lateness and the additional expense of putting in late evidence and submissions.

41. The argument was put in three alternative ways. First, it was said that the Defendant is a company which can be served under s.1139(1) of the Companies Act. Secondly, it was canvassed that it might be a company which had applied to be “registered but not formed” pursuant to s.1(2)(a) and s.1040(b), to which SI 2009/2437 applies. Thirdly, it might be an “unregistered company” under s.1(2)(b) and s.1043, to which SI 2009/2436 applies.
42. These hypotheses were addressed in a witness statement from the Trust’s Secretary, Mr Stephen Small, as a result of which I am able to deal with them quite shortly. In each case, it largely turns on a question of fact.
43. The Defendant was created by the National Trust for Scotland Order Confirmation Act 1935. It is not a company formed and registered under the 2006 Act; nor is it a company for the purposes of the 1985 Act. The suggestion was put forward by Mr Callus on a somewhat speculative basis that, nonetheless, the Defendant may be a company to which s.1(2) applies, by reason of the provisions of Chapter 1, Part 33 of the 2006 Act. The evidence, however, establishes that it has not made an application to register under that Act or any of its predecessors. It does not therefore qualify under those provisions.
44. Reliance was also placed upon the possibility that the Defendant is an unregistered company which could be served by reason of Chapter 2, Part 33 of the 2006 Act (combined with the Unregistered Companies Regulations 2009 (SI 2009/2436)). These provisions do not, however, apply in the case of certain categories of unregistered companies. In particular, in the light of s.1043(1)(b), they do not apply to bodies *not* formed for the purpose of carrying on a business that has for its object the acquisition of gain by the body of its individual members. It is thus clear from the evidence that the Defendant is outside the scope of this statutory framework. It is a charity which does not make acquisitions for gain.
45. In my judgment, therefore, if service had been deemed to have occurred after the validity of the claim form expired, the Claimant would not be rescued by any of the statutory provisions put forward.

FORUM NON CONVENIENS

46. The Defendant advanced a further alternative argument, if the court should find that valid service had been effected, namely that jurisdiction should be declined on the basis that Scotland would be the more appropriate forum (and where there is, at present, a three year limitation period for libel). The Claimant resists this, not only because he suggests that the discretion would be exercised in favour of this jurisdiction, and a stay refused, but also because of his contention that issues of *forum conveniens* are

altogether precluded by reason of the fact that this is not “a purely domestic case”.

47. It is provided by s.49 of the Civil Jurisdiction and Judgments Act 1982 that:

“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 ground 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 or the 2005 Hague Convention.”
48. On the other hand, because the Claimant complains of re-publication of the defamatory words in France and Italy, he now suggests that this is not “a purely domestic case”. Accordingly, he argues, jurisdictional matters are governed by the Brussels Recast Regulation 2012/1215, which will take precedence over the 1982 Act. Where that regulation applies, Mr Callus submits that it follows from *Owusu v Jackson* (C-281/2002) [2005] QB 801 and *Maletic v lastminute.com GmbH* (C-478-12) [2014] QB 424 that the English court is deprived of any discretion to stay on grounds of *non conveniens*.
49. It will be necessary, therefore, to decide whether there is indeed an “international element” such as to take this case out of the category of “purely domestic”. If so, and if the Recast Regulation does apply, would its operation override the rules of national law contained in Schedule 4 of the 1982 Act (including the doctrine of *forum non conveniens*)?
50. The rule of general jurisdiction derived from Article 4(1) provides that, subject to specific exceptions, a person domiciled in a member state shall be sued in the courts of that member state. The exceptions are contained in sections 2 to 7 of chapter II (none of which would appear to be directly relevant here). There are, for example, the rules of special jurisdiction in section 2 at Article 7. It is provided in Article 7(2) that in matters relating to tort, delict or quasi-delict, a person domiciled in a member state may be sued in the courts for “the place where the harmful event occurred or may occur”.
51. It is thus apparent that the purpose of the regulation, and of the rule of general jurisdiction in particular, is to regularise issues of jurisdiction as between different states: *Cook v Virgin Media Ltd* [2016] 1 WLR 1672, at [18]-[26]. No such question arises here, because the only potential competition is between the courts of Scotland and England & Wales (i.e. internal to the United Kingdom).
52. By contrast, in *Owusu v Jackson*, the court was concerned with the possibility of jurisdiction being assumed in Jamaica, which would have been inconsistent with the rule of general jurisdiction. So too, in *Maletic*, where the special jurisdictional rule concerning consumer contracts, contained in Article 16(1), was effective and the Austrian court was to determine two claims – one of which was brought against a co-defendant domiciled in Germany. In both cases, therefore, there was clearly an international element.

53. In the present case, one Defendant has been sued in the United Kingdom, where it is to be treated as domiciled, and the fact that remedies are sought against it in respect of re-publications in other jurisdictions does not entail any issue of competing courts. It is thus not easy to see why the regulation should be engaged. The competing claims would appear to be matters for internal determination by the courts of the United Kingdom.
54. Mr Callus, however, points to a passage in Briggs on **Civil Jurisdiction and Judgments** (6th edn), at 2.28, cited in *Virgin Media* at [25]. There, a hypothetical illustration is discussed of a defamation case which raises an issue concerning a complaint of publication “by a person outside the United Kingdom, whether the defendant or another”. He relies on this scenario as giving rise to an international element sufficient to engage the regulation. Yet it is necessary to tease out the various possibilities embraced within that hypothesis.
55. One might be faced, for example, with a defendant domiciled outside the jurisdiction, sued in respect of a publication within it. In such a case, the courts of England & Wales might accept jurisdiction consistently with Article 7(2): see e.g. the discussion in *Lennon v Daily Record* [2014] EWHC 359 (QB) and Briggs, *op cit*, at 2.210.
56. It all depends on the facts. Another possibility would be that the ‘defendant’ (referred to in the passage from Briggs) is domiciled in the United Kingdom, but is sued alongside a co-defendant domiciled elsewhere. Here again, it is likely that (as with *Maletic*) the special jurisdiction provisions of Article 7(2) would determine the matter in favour of the courts of the jurisdiction where publication occurred (and the ‘harm’ was done).
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*.

THE COURT’S APPROACH TO JURISDICTION WITHIN THE UNITED KINGDOM

58. The allocation of jurisdiction internally as between the various constituent “nations” or parts of the United Kingdom is largely determined by statutory provisions which reflect the macro approach of the European Union towards international issues of jurisdiction. The matter is governed by s.16 and Schedule 4 of the 1982 Act (as amended to take account of changes in the Brussels Recast Regulation). The structure and wording of Schedule 4 correspond closely to those of the current regulation.
59. Rule 1 provides that (subject to the other rules) persons domiciled in a part of the United Kingdom shall be sued in the courts of that part. Under Rule 2, such persons may only be sued in another part by virtue of Rules 3 to 13. In the present context, what matters is Rule 3(c), which acknowledges a special jurisdiction, “in matters relating to tort, delict or quasi-delict”, such that a person domiciled in one part may be sued in the courts for the place where the harmful act occurred (or may occur). These provisions are subject to those of s.49 (set out above) and the doctrine of *forum non conveniens*.

60. The rules within this jurisdiction are modelled on those applying in Europe and Mr Glen made reference to the observations of Lord Goff in *Kleinwort Benson v Glasgow City Council* [1999] 1 AC 153, 183. He there confirmed that in cases arising under Schedule 4 to the 1982 Act relevant decisions of the European Court should be fully taken into account.
61. It would thus be appropriate to have in mind in the instant case the principles expounded by the CJEU in *Shevill v Presse Alliance* [1995] 2 AC 18. Where a libel is published in several jurisdictions, a litigant is given the choice of suing where the defendant is domiciled, where he can recover all relevant remedies, or suing in each of the countries where harm is said to have been incurred. Thus, in the present case, such a policy would require that the Claimant choose between Scotland (where the Defendant is domiciled or conducts its affairs) and the courts of Italy, France, Brazil and England (where the other offending publications are said to have occurred and where at least some harm is alleged to have been incurred). In fact, of course, he has chosen to sue only in England – yet, unlike Mr Lennon, not confining his claim to the harm incurred in that jurisdiction.
62. Against this background, it will be appreciated that the next issues I have to resolve are closely linked. That is to say, (1) should the action be stayed under s.49 and (2) should the claims for global damages be struck out?

SHOULD THE COURT STAY THESE PROCEEDINGS UNDER S.49 OF THE 1982 ACT?

63. There can be no doubt that “substantial justice” could be achieved in the courts of Scotland: see e.g. *Connelly v RTZ Corp plc* [1998] AC 854. The question is whether that jurisdiction is clearly more appropriate for resolving the issues in the interests of all the parties and the ends of justice. That is initially for the Defendant to establish. Can it be shown that there are “connecting factors” which point to the conclusion that it is with Scotland that the action has the most real and substantial connection? In such circumstances, a stay would ordinarily be granted unless the claimant can demonstrate that there are *nonetheless* circumstances such that justice requires that a stay should be refused. These are the principles identified in the speech of Lord Goff in *The Spiliada* [1987] AC 460. See again also *Lennon*, at [19]-[20].
64. Mr Glen points to a number of “connecting factors” which he says indicate Scotland to be the natural and clearly more appropriate forum. Such factors are recognised to include, for example, the convenience of the parties and witnesses, the expense of the litigation, the applicable law, and the place(s) where the parties respectively reside or carry on their business.
65. In the light of the policy that a citizen of the EU is, subject to specified exceptions, entitled to assume that he will be sued in his state of domicile, this is surely a connecting factor which should be put in the forefront of the court’s consideration. Mr Glen argues that both parties are domiciled in Scotland and that the primary focus of their businesses is also there. He also submits that the courts in England have only a limited jurisdiction, in the sense that they would only be able to address such damage as is alleged to have occurred in England & Wales, under the special jurisdiction contemplated by Rule 3 of Schedule 4, whereas the Scottish courts would be able to adjudicate upon the whole of

the damages claim – including in respect of damage (if any) accrued in other jurisdictions: see *Shevill*, cited above. (That is a point to be addressed also in the next section of this judgment.) At all events, if the Claimant chooses to sue on matters going wider than harm done in England & Wales, it is difficult to see why he should be permitted to do so outside the jurisdiction of the Defendant’s domicile.

66. The Defendant’s solicitor also deals in evidence with the events underlying this dispute which, he says, all took place in Scotland. In particular, reliance is placed by the Claimant on the content of an oral contract governing the terms on which he was allowed to enter the castle and to take the relevant photographs. The contract would have been reached in Scotland and the likely witnesses (such as the Claimant himself and the photo-librarian, Mr Sinclair) reside in Scotland. Likewise, the witnesses who were present on the day of the photo-shoot are based in that jurisdiction, with the possible exception of the model (although there was no specific evidence on the matter).
67. There is no defence as yet, but it is suggested that there are likely to be defences of truth and qualified privilege. This may involve evidence from members of the Defendant’s staff, such as those who investigated matters when Ms Sempill’s complaints were raised and those who prepared the press statement to which the Claimant has taken objection.
68. So too, it is said, the issues of negligence will also largely turn on evidence relating to what took place in Scotland – matters which will overlap considerably with those arising in the context of truth and qualified privilege.
69. So far as data protection is concerned, Mr Glen submits that the processing took place in Scotland and that the evidence will again overlap considerably with that to be called on the other causes of action. There will probably be evidence also as to the technical and organisational measures put in place by the Defendant with respect to the seventh data principle (again, obviously, in Scotland).
70. At this stage, it is too early to predict which issues of fact will need to be resolved by calling witnesses at trial, and thus too early to be able to form a view as to the exact cost and inconvenience occasioned by conducting a hearing in London as compared to one in Edinburgh. One can only form an impression. It is also however, right to bear in mind, that video link facilities are available at the High Court in London: my experience of taking evidence by this means has been entirely satisfactory.
71. It is submitted by Mr Callus, in any event, that the factual issues are likely to be of less significance at trial than legal argument as to the inter-relationship between the laws relating to the three causes of action across the relevant jurisdictions. If Mr Glen is right, however, and claims in respect of foreign publications should not be determined other than in the courts of the Defendant’s domicile, that point falls away. I believe that is correct as a matter of law and, therefore, one of Mr Callus’ primary arguments in favour of retaining the case in England is significantly undermined. In any event, it was by no means clear to me that those legal issues would have been *more* appropriately addressed in England. They could be determined in either jurisdiction.

72. The Claimant places reliance on the proposition that there would have been substantially more readers of the offending words in England than in Scotland, although Mr Glen suggests that a more significant issue may be where lies the main focus of the Claimant's reputation. Where was the greatest harm done? Evidence would have to be carefully considered as to where, and in what proportions, his business was carried out. It seems reasonably clear from the pleaded case that the majority of publishees were based in England because the English mass media outlets would have had a greater reach. There were also the mass media publications in France, Italy and Brazil. Numerically, therefore, it may well be that there were more readers outside Scotland, but that nonetheless would fall within the general jurisdiction of the Scottish courts (under Rule 1 of Schedule 4).
73. Mr Callus points out that in Lennon, even though over 95% of the publication of the *Daily Record* was in Scotland, a stay was nevertheless refused. The circumstances were different, however, not least because the claim was only in respect of publications in England.
74. As for special damages, the Claimant has pleaded that in the year to March 2016 a significant proportion of his income was derived from England – and correspondingly much of the fall-off in business. That may well involve expert evidence, which can be dealt with by the courts of either jurisdiction. (We cannot tell as yet whether the relevant witness(es) will be based in Scotland or in England.)
75. One of the factors to be taken into account is that of any personal or juridical advantage for the claimant which may be available in one jurisdiction or the other: see the remarks of Lord Goff in The Spiliada at 482-483. Mr Callus points to certain remedies that are available in England but not in Scotland, such as those under ss.12 and 13 of the Defamation Act 2013. Under s.12 it would be possible to order the publication of a summary of the judgment, which would assist in the process of vindication: see e.g. Shakil-Ur-Rahman v ARY Network [2016] EWHC 3110 (QB), [2017] 4 WLR 22. The remedy under s.13(1) enables the court to order “take down” of material from a website, whereas that under s.13(2) provides for persons other than authors, editors and publishers to cease the distribution or display of offending material.
76. Another comparison made is between the cost likely to be incurred in Scottish litigation and that in England – having regard, in particular, to the possibility of jury trial (thought likely to be more prolonged, expensive and uncertain of outcome). This is most unlikely to occur nowadays in an English trial, but the position is less clear in Scotland. Because the Claimant has indicated that he expects the damages not to exceed £50,000, it seems that a trial in Scotland would take place in the Sheriff Court: s.39 of the Courts Reform (Scotland) Act 2014. Mr Glen had assumed that jury trials are not permitted in the Sheriff Court, but by the time of the hearing it was common ground that jury trial is available in that jurisdiction, but only in personal injury cases – unless and until a ministerial order is made to extend this mode of trial to defamation claims. (Mr Callus draws attention to s.63 of the same statute.) It seems that the only possibility of a jury trial would be if there were “exceptional circumstances”, such that the case was transferred to the Court of Session under s.97(2) of the Courts Reform (Scotland) Act 2014. The likelihood of such a direction being made in the present case remains

somewhat obscure on the evidence as it stands (although I would doubt it in a case involving data protection and negligence).

77. A further area of discussion was that of funding. Points have been made as to the relative merits of CFA contracts (not available in Scotland) and speculative fee arrangements (only available in Scotland). Each no doubt has some advantages by way of improving access to justice, but we should not be distracted by attempts at detailed comparisons, which could only be speculative at this stage. It was accepted between the parties, in general terms, that in England CFA uplifts/success fees and ATE premiums are recoverable, whereas in Scotland, by contrast, speculative fee agreement success fees and ATE premiums are not.
78. There may be differences in the courts' approach to the quantification of damages and, in particular, the quantification of general damages for defamation. The approach of Scots law was described in *Lennon*, at [22], as "less remunerative" and "invariably modest". That was a factor which carried very little weight when raised before Tugendhat J.
79. More generally, there are obviously differences in procedure and substantive law between the jurisdictions, some of which may favour one side and some another. But it is always important to remember the fundamental test of "substantial justice". If one is confident that this can be achieved, as has been conceded in relation to Scotland, then the court should guard against giving any of these supposed advantages disproportionate significance: see e.g. *The Spiliada*, at p483, *per* Lord Goff. Indeed, it is hardly consistent with comity to trumpet the virtues of one's own system, in relation to (say) the facilities of the new Media & Communications Court, or the availability of specialist practitioners in London, as some of the Claimant's submissions appeared to be suggesting I should. It is true that smaller jurisdictions will have had less chances to develop the law in relation, for example, to libel and data protection than has been the case in London, but the highly respected judicial system in Scotland has its own methods of dealing with such matters based on long experience. (It so happens that the Scottish Law Commission has just published a very substantial report making 49 proposals, including for statutory measures, by way of reforming the Scots law of defamation. One of the suggestions is that the limitation period be reduced to twelve months.)
80. Those courts are more than capable of providing substantial justice in this dispute.
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.
85. In view of these significant connecting factors, I will grant a stay.

GLOBAL DAMAGES

86. If the claim were to go ahead in this jurisdiction, the Defendant submits that the claim for damages would need to be substantially restricted. Mr Glen argues that the Claimant should be limited to recovering in respect of England & Wales. The claims relating to Scotland, Italy, France and Brazil should be struck out. This is based on the reasoning in the CJEU decision in *Shevill v Presse Alliance* [1995] 2 AC 18, which is authority for the proposition that global damages would be recoverable only in the courts of the contracting state (the expression now used is “member state”) where the defendant is domiciled.
87. The ratio of that decision would appear to be that the victim of a libel by a newspaper article, distributed in several contracting states, may bring an action for damages against the publisher either in the contracting state in which the publisher is domiciled or established (the general jurisdiction), where the courts would 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 (the special jurisdiction). The relevant contracting state here, of course, is the United Kingdom.
88. Mr Callus argues that this Defendant is now asking the court to develop a novel sub-national model of *Shevill*, such that only courts of the sub-national place where the publisher is domiciled would have jurisdiction to award global damages – and all other courts within the United Kingdom would be restricted to awarding damages for harm occurring within their relevant regions.
89. I am not sure why this is thought to be odd. I have already pointed out that there is room for the application of *forum non conveniens* within at least this member state and, moreover, that Parliament has approved rules in parallel to those under the recast regulation – including those under Schedule 4. Also, it is appropriate to take guidance in this context, where necessary, from CJEU decisions, especially having regard to the

requirements of s.16(3) of the 1982 Act.

90. Mr Callus submits that “beyond the legal and public policy difficulties”, this “novel” approach would actually be contrary to recent CJEU decisions.
91. He cites e.g. *eDate Advertising GmbH v X* [2012] QB 654, which concerned content placed on a website. It was held that in such circumstances a claim may be brought, in respect of all the damage caused, before the courts of the member state in which the publisher is established – or before the courts of the member state in which the centre of his interests is based. That was an attempt to update the established principles to the era of the internet and is consistent with the earlier CJEU decision at [1995] 2 AC 18.
92. There is also the case of *Bolagsupplysningen BV v Svensk Handel AB* (Case C-194/16), which decided that claims for the rectification and removal of online material which infringes personality rights may only be entertained in the courts of the member state of the publisher’s domicile or that which is at the centre of his interests.
93. I do not see that these decisions, albeit introducing the concept of “centre of his interests”, do anything to contradict the application of the *Shevill* principles when construing Parliament’s intention in the 1982 Act, as expressed in Rules 1 to 3 of Schedule 4. *Shevill* presents a perfectly defensible framework for bringing consistency to international jurisdiction issues in the context of publication cases. Why should it not be applied when corresponding issues arise as between internal parts of the United Kingdom?
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.

CONCLUSION

95. I have found that the claim form was validly served in Scotland, but I propose to grant a stay of these proceedings on grounds of *forum non conveniens*.
96. Finally, I express my thanks to counsel for their industry, and for their clarity of presentation, in relation to these issues, some of which seemed (to me at least) by no means straightforward.