Neutral Citation Number: [2019] EWCA Civ 1932

Case No: A2/2018/1282

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HON MR JUSTICE NICOL
HQ17M01583

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEAN
and
LORD JUSTICE BAKER

- -

Between :

(1) EUROECO FUELS (POLAND) LTD **(2) ALPHACO LTD** **(3) EDWARD ALLEN TIMPANY** **(4) ROBERT DAVID HARPER**	**Appellants (Claimants)**
- and -	
(1) SZCZECIN AND SWINOUJSCIE SEAPORTS AUTHORITY SA **(2) ALEKSANDER MILEWSKI** **(3) DARIUSZ SLABOSZEWSKI**	**Respondents (Defendants)**

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Adrienne Page QC and Greg Callus (instructed by **Mishcon de Reya LLP**) for the **Appellants**
William McCormick QC (instructed by **B P Collins LLP**) for the **Respondents**

Hearing date: 16 October 2019

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Approved Judgment

Lord Justice Bean :

1. The Claimants appeal from a decision of Nicol J declining jurisdiction to hear and determine their claims for libel and malicious falsehood. The origins of the claims are words spoken by the Second Defendant in March 2017 at a press conference in Poland and a press release said to have been issued by the Defendants, also in Poland, to the press and other media. The reach of some of those Polish media included England and Wales. The Claimants rely on what are said to be republications of the words and the press release which took place in England and Wales by means of internet articles being read here and Polish broadcasts available here, again on the internet ("the Republications").

2. The Claim Form was issued on 9 May 2017 and was served on the Defendants in Poland. By an application issued on 24 July 2017 under CPR Part 11 they disputed the Court's jurisdiction.

The Parties

3. The First Claimant ("EEF") is a Polish company. It is the leaseholder of a site in the Baltic port of Szczecin in Poland. It operates an industrial scale alternative petrochemical production plant ("the EEF Plant") which recycles used tyres into carbon and oil products. Before the English action began, the First Defendant had taken proceedings in Poland against EEF alleging that the EEF Plant was causing a nuisance because of the odours it emitted.

4. The Second Claimant ("Alphaco") is an English company holding 87.5% of the shares in EEF. It is said to operate the EEF Plant, along with EEF itself.

5. Mr Timpany and Mr Harper, the Third and Fourth Claimants, are the CEOs or equivalent officers in the two Claimant companies. They are said to be publicly associated (especially in the UK) with the day to day operation of the EEF Plant and to have invested time and money in its establishment and operation and the development of the "clean" alternative energy which it deploys.

6. The First Defendant company is the landlord of the EEF Plant site and the administrator of the ports of Szczecin and Swinoujscie. The Second Defendant, Mr Milewski, is the First Defendant's Director of Port Infrastructure and Maintenance. The Third Defendant, Mr Slaboszewski, is the company's President. The First Defendant is said to be vicariously responsible for the other two.

The English claims

7. The Claimants rely exclusively on Republications within England and Wales of the words spoken by Mr Milewski in Poland and the Press Release issued in Poland. These were all in Polish but the judge had agreed translations before him. The essence of the pleaded complaint is that the Defendants were saying that the EEF Plant was emitting excessive levels of benzene and that in some cases the legal limit were being exceeded by several hundred per cent.

8. These remarks are said to have been picked up by the Polish media, television, radio, and internet news distributors. Nine particular Republications are pleaded whose reach

is said to have included England and Wales. The Defendants are said to be liable for the Republications because Mr Milewski knew and intended from what he said to reporters that his words, or words to the same effect, would be republished. Mr Milewski reported to Mr Slaboszewski and had his authority to say what he did. It is alleged that the Defendants foresaw, or should reasonably have foreseen, that the Republications would include an audience in England where the owners, investors and potential investors in the EEF Plant or their agents and advisors were mainly situated.

9. Although the Claimants were not all named in the Republications, it is pleaded that they would all have been identified with the EEF Plant or EEF which the Republications did mention.

10. The Particulars of Claim plead that Mr Milewski's words, the press release and the Republications (all referred to in omnibus fashion) had the following meanings:

> "(1) That the Claimants and each of them are guilty of conducting or of involvement in the management of an industrial operation at the EEF Plant which is in gross violation of the pollution standards imposed by Poland's environmental laws for the protection of the health and safety of the public by emitting toxic benzene at levels that are several hundred per cent above legally permitted (i.e. safe) levels.
>
> (2) That in pursuit of their own business and commercial interests, the Third and Fourth Claimants are content to see put at grave risk of serious physical harm their own employees at the EEF Plant as well as the public who live and work in the vicinity of the EEF Plant by a gross and criminal disregard for Poland's environmental laws, put in place for the protection of the public's health and safety."

11. The Claimants also plead that the Court should infer that all or most of those who read the Republications would know that human exposure to benzene above certain levels is associated with acute health disorders.

12. The Defamation Act 2013 s. 1 now provides:

> "(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss."

13. The First and Second Claimants are bodies that trade for profit. Accordingly, so far as they are concerned, each Republication will only be actionable in libel if it caused or was likely to cause that Claimant serious financial loss. None of the four Claimants can succeed in libel in respect of any Republication unless that Republication caused or was likely to cause serious harm to the reputation of the Claimant in question.

14. The Claimants say that this jurisdiction is a major source of investment for them and that potential investors are likely to conduct a due diligence search of online materials which would, in turn, be likely to lead them to the Republications.

15. For the claims in malicious falsehood, the Claimants must plead and prove that the words were false. Mr Milewski's words and the press release are said to have been false for a number of reasons which include in summary the following:

    i) the tests on which the Defendants apparently relied were conducted by a non-accredited laboratory;

    ii) those tests, such as they were, did not show that the EEF Plant had ever emitted benzene at levels above the legally permitted levels or that they were hundreds of times in excess of those levels;

    iii) those tests were not proper tests for annual levels but took snapshots which were inadequate for annual levels properly to be extrapolated;

    iv) those tests did not establish any risk of benzene poisoning or other adverse effects on those who worked in or lived nearby the EEF Plant.

    v) those tests did not distinguish between the contribution of the EEF Plant to such benzene levels as were emitted as opposed to a nearby road and rail freight line;

    vi) those tests were not more detailed than benzene emission tests by a Provincial Inspectorate of Environmental protection (known as WIOS);

    vii) the EEF Plant was fully compliant with the law on emissions standards for industrial facilities.

16. A further requirement for the tort of malicious falsehood is that the words must have been published maliciously. The Claimants allege that Mr Milewski and Mr Slaboszewski authorised and published the words and the press release for the dominant and improper motive of causing damage to EEF to the point where it has to be closed, allowing its site to be let by the First Defendant to other businesses which were more appealing to the Defendants. The Claimants allege either that the Defendants knew, before the words were spoken or the press release was published, that they were false and misleading or that they lacked an honest belief in their truth or were indifferent to their truth or falsity. It is said that at least two third party potential investors in the EEF Plant have decided against pursuing their interest and that the future of the Claimants' investment has been put in serious jeopardy.

Regulation (EU) No. 1215/2012 of the European Parliament and of the Council

17. This Regulation, known as "the Recast Brussels Regulation" (the "RBR") applies in legal proceedings instituted after 10 January 2015 (see Article 66). It replaced the Brussels Convention of 1968 which had been given the force of law in the UK by the Civil Jurisdiction and Judgments Act 1982, as supplemented and amended from time to time. As an EU regulation, it still takes precedence over any conflicting domestic legislation. It was not suggested before us that the possible imminent exit of the UK from the EU should have any bearing on the outcome of this appeal.

18. One of the purposes of the Brussels Convention and of the RBR was to provide for a "clear and predictable" set of rules for determining which Member State should have jurisdiction to decide contested litigation. At this stage I note paragraphs (15), (16) and (21) of the preamble to the RBR:

> "(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> (16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.
>
> (21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously."

19. Article 4 of the RBR sets out the basic rule:

> "1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

20. Each of the three Defendants in this case is domiciled in Poland. Accordingly, (unless some other provision of the RBR permits) it is in Poland that they can be sued in accordance with Article 4.

21. Article 7(2) of the RBR provides:

> 'A person domiciled in a Member State may be sued in another Member State….
>
> (2) in matters relating to tort, delict or quasi-delict, in te courts for the place where the harmful event occurred or may occur."

22. In *Shevill v Presse Alliance SA* [1995] 2 AC 18 the Defendant was the publisher of the French daily newspaper *France Soir* and was domiciled in France. The First Plaintiff was domiciled in North Yorkshire. She claimed that an article in one issue of *France Soir* defamed her. She brought her claim in the English courts. Initially her claim concerned both English and foreign publications, but by an amendment she confined her action to publications which had taken place in England and Wales. While about 237,000 copies of the paper were sold in France, she said that some 230 were sold in England and Wales (including only 5 in Yorkshire). As a matter of English law, each separate "publication", in the sense of each occasion that the defamatory words were made known to a reader, gave rise to a separate cause of action. She alleged that those publications in England and Wales were sufficient to mean that (as regards them) the "harmful event" had occurred in the jurisdiction of the English courts and her action here should therefore be allowed to continue. At the time the Brussels Convention was still in force, but its Article 5(3) was in the same terms as Article 7(2) of the RBR. The Defendant's application disputing the jurisdiction of the English court was dismissed by the High Court and an appeal to the Court of Appeal was unsuccessful.

23. When the case reached the House of Lords, the House, by order of 1 March 1993, referred a number of questions to the European Court of Justice (ECJ):

> "(1) In a case of libel by a newspaper article, do the words "the place where the harmful event occurred" in article 5(3) of the Convention mean: (a) the place where the newspaper was printed and put into circulation; or (b) the place or places where the newspaper was read by particular individuals; or (c) the place or places where the plaintiff has a significant reputation?
>
> (2) If and so far as the answer to the first question is (b), is "the harmful event" dependent on there being a reader or readers who knew (or knew of) the plaintiff and understood those words to refer to him?
>
> (3) If and in so far as harm is suffered in more than one country (because copies of the newspaper were distributed in at least one Member State other than the Member State where it was printed and put into circulation), does a separate harmful event or harmful events take place in each Member State where the newspaper was distributed, in respect of which such Member State has separate jurisdiction under article 5(3), and if so, how harmful must the event be, or what proportion of the total harm must it represent?
>
> (4) Does the phrase "harmful event" include an event actionable under national law without proof of damage, where there is no evidence of actual damage or harm?
>
> (5) In deciding under article 5(3) whether (or where) a "harmful event" has occurred is the local court expected to answer the question otherwise than by reference to its own rules and, if so, by reference to which other rules or substantive law, procedure or evidence?

> (6) If, in a defamation case, the local court concludes that there has been an actionable publication (or communication) of material, as a result of which at least some damage to reputation would be presumed, is it relevant to the acceptance of jurisdiction that other Member States might come to a different conclusion in respect of similar material published within their respective jurisdictions?
>
> (7) In deciding whether it has jurisdiction under article 5(3) of the Convention, what standard of proof should a court require of the plaintiff that the conditions of article 5(3) are satisfied: (a) generally; and (b) in relation to matters which (if the court takes jurisdiction) will not be re-examined at the trial of the action?"

24. The case was originally listed to be heard by the Sixth Chamber of the ECJ. In his opinion dated 14 July 1994 Advocate General Darmon dealt with Question (6) as follows:

> "97. In asking the sixth question, the House of Lords seeks to know whether its decision to accept jurisdiction must be subject to the absence of any risk that the courts of another contracting state, which also have jurisdiction, may arrive at a different solution.
>
> 98. As I have already stated, the jurisdiction of the courts of a Contracting State in which damage arises is limited to that part of the damage which occurred within their judicial district; consequently, where two courts are called upon, following the occurrence of the same causal event, to hear a claim for compensation for the damage, they do not have concurrent jurisdiction.
>
> 99. Article 22 [the equivalent of Article 30 of the RBR], relating to cases where jurisdiction is declined on the grounds of connexity, stipulates jurisdiction of that type as a condition of its application, and is consequently inapplicable. Moreover Mrs Gaudemet-Tallon states in that regard [in *Les conventions de Bruxelles et de Lugano*, p. 143, para. 197]:
>
> > "If it is accepted that the courts of the place where damage occurs do not have jurisdiction in respect of any other damage arising from the same causal event but occurring in another Contracting State, Article 22 does not fall to be applied."…
>
> 100. Does there not exist, however, the risk that irreconcilable decisions may be given, within the meaning of Article 27(3) of the Convention [dealing with recognition of judgments], where certain courts are prepared to uphold the compensation claim whilst others, by contrast, find against the victim?

> 101. I do not think so, in so far as the condition of irreconcilability identified by the court in its judgment in *Hoffmann v Krieg* (Case 145/86) [1988] E.C.R. 645 is not met. In that judgment, the court held [at p. 668, para. 22] that
>
> > "In order to ascertain whether the two judgments are irreconcilable within the meaning of Article 27(3), it should be examined whether they entail legal consequences that are mutually exclusive."
>
> 102. The Court found in that judgment that a decision ordering a husband to pay maintenance to his wife was irreconcilable with a decision given in another Contracting State pronouncing the divorce. The present case does not fall within that hypothesis, and even though the decisions given might be regarded as contradictory, they would not be irreconcilable.
>
> 103. The recognition of its jurisdiction by the court of the place where the damage arises cannot be compromised on the ground of a risk of conflict between the decision to be given by it and that of a court in another Contracting State which has jurisdiction to order compensation for the damage occurring within its judicial district."

25. In the light of the importance of the questions raised in the case, the Sixth Chamber referred the case back to the full court. Another Opinion was delivered on 10 January 1995, this time by Advocate General Léger. He said that he "concurred in effect" with the position adopted by his predecessor. On the question of the risk of irreconcilable judgments his view was categorical [emphasis added]:

> 14. …[T]he courts of the place where the damage arose (that is to say, the place of distribution) cannot be excluded as a potential forum. They must constitute a possible choice for the purposes of ensuring the "… particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile" [judgment in *Dumez France v Hessische Landesbank (Helaba)* (Case C-220/88) [1990] E.C.R. I-49, 79-80, para. 17] on which the special jurisdiction attributed by article 5(3) of the Convention is founded.
>
> 15. For example, the victim of defamation arising from the publication in Contracting State A of a newspaper which is also distributed in Contracting State B, where that person is particularly well known, must be able, at his option, to sue in the courts of State A, if he considers that the damage suffered by him extends to the whole of the Community, or in those of State B, if he considers that the damage is limited to the territory of that latter State.
>
> 16. For that reason, it is suggested that the plaintiff should be able, at his option, to sue not only in the courts of the defendant's

> domicile and those of the place in which the causal event occurred but also in the courts of the place in which the damage arose [see Advocate-General Darmon's opinion, paragraph 58].
>
> 17. That solution obviates any risk of forum-shopping: each court before which proceedings are brought in places where distribution has occurred can award compensation for separate damage. Moreover, the courts of the place where the article was printed, having jurisdiction in respect of the whole of the damage, will generally apply, as regards damage arising in other Contracting States, the substantive laws of those states.
>
> 18. Such a solution accords with the principle that the rules of special jurisdiction must be interpreted restrictively.
>
> 19. It confers competence on the courts which are best qualified to assess the damage arising in their locality: the "particularly close connecting factor" between the court seised and the dispute is undeniable.
>
> 20. It is true that one major objection may be raised against such a solution: it gives rise to a potential multiplicity of competent forums, whereas the concentration of proceedings is "… one of the primary objectives of the Convention." [Bourel, *Collected Courses of the Hague Academy of International Law*, vol. 214, p. 357, para. 118].
>
> 21. The tendency of the Convention is to avoid the proliferation of forums, because such proliferation increases the risk of the irreconcilability of judgments, which constitutes a ground for non-recognition (Article 27(3) and (5) of the Convention) or for refusing an application for enforcement in Contracting States other than that in which such judgments have been given.
>
> 22. No such risk exists in the present case.
>
> 23. *It is true that the judgments of courts seised in different contracting states may conflict with one another, since they are governed by different substantive laws. They will not be irreconcilable, because they will each relate to compensation for a distinct head of damage* (that arising in the territory of the contracting state concerned).
>
> 24. I would add that, in any event, the plaintiff will always have the option of suing in respect of the whole of his claim before the courts of the defendant's domicile and those of the place in which the causal event occurred."

26. The Grand Chamber of the Court of Justice ruled that:

> "33. …on a proper construction of the phrase "the place where the harmful event occurred" in Article 5(3) of the Convention… 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 harm caused in the State of the court seised."

27. The Grand Chamber did not answer the House of Lords' Question (6) specifically, and said nothing about what is meant by a risk of irreconcilable judgments. In paragraph [32] of its judgment it simply observed that "although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or the place where the publisher of the defamatory publication is established".

28. In a subsequent decision, *eDate Advertising Gmbh v X, Martinez v MGN* [2012] EMLR 12 the Grand Chamber allowed a claimant, who claimed to have been defamed in a newspaper published in several different Member States, a further alternative. It held that in the courts of the Member State in which the claimant's "centre of interests" is situated a claim may be brought for all the damage caused.

29. The result of this case law of the ECJ and CJEU is that, where it is alleged that a claimant has been defamed in a newspaper or internet publication distributed in more than one Member State by a defendant domiciled in a Member State, the claimant has three choices:

> i) to sue for all of the loss in the courts of the defendant's domicile;
>
> ii) to sue for all of the loss in the courts of the Member State which is the claimant's centre of interests; or
>
> iii) to sue in the courts of the Member State where (according to the national law of that Member State) the harmful event occurred, but in those circumstances the claimant is limited to the harm which occurred in that Member State. This last alternative is sometimes referred to as the "mosaic alternative" because, to recover for all of the loss suffered, claims must be brought in more than one state. It is this third alternative which the present Claimants have chosen to pursue.

30. It was common ground before Nicol J that, although he was dealing with the Defendants' application, it was for the Claimants to show that the Court had jurisdiction under Article 7(2). In particular, it was for the Claimants to satisfy the judge that they had a good arguable case (including, in relation to the defamation claim, a good arguable case that the personal Claimants had suffered serious harm and the corporate Claimants had suffered serious financial harm). Nicol J found that the Claimants had discharged that burden and that conclusion is not challenged on this appeal.

The Defendants' application

31. At the heart of the argument of Mr McCormick for the Defendants is Article 30 of the RBR. This provides:

> "(1) Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
>
> (2) Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> (3) For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

32. The original application notice said that the Court either lacked jurisdiction or should not exercise it because:

> "1. The First, Second and Third Defendants are domiciled out of the jurisdiction in Poland;
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> 2. The First Claimant is also domiciled out of the jurisdiction in Poland;
>
> 3. The statements that are the subject of the claim were spoken in Poland and disseminated to Polish regional television and Polish websites;
>
> 4. The statements that are the subject of the claim specifically relate to Polish public health and would be of particular interest to Polish citizens;
>
> 5. The centre of gravity of the dispute is in Poland; and
>
> 6. England and Wales is not the proper place in which to bring the claim."

33. The amended application notice relied on the original application but said, in addition, the relief sought should be granted because, *inter alia*:

> "…3. In respect of all four Claimants, the present proceedings were issued at a time when the Courts in Poland were seised with proceedings that are "related" for the purposes of the Recast Brussels Regulation, Art 30 and jurisdiction should be declined or stayed on the following non-inclusive grounds:
>
> a. there is a substantial risk of irreconcilable judgements;

> b. Poland is the more appropriate place for the issues concerning the nature and extent of the emissions from the plant to be adjudicated upon;
>
> c. to the extent that any of the Claimants has suffered in his/its reputation because of the words complained of, the greatest damage will have been suffered in Poland;
>
> d. to the extent that the Claimants wish investors to be reassured that the words (in the meanings complained of) were false, an adjudication in Poland is evidently more useful than an adjudication in England and Wales;
>
> e. the Courts of Poland could (if asked) hear an action for libel and malicious falsehood on the part of the Claimants with the extant proceedings."

Article 30 of the Recast Brussels Regulation

34. In the circumstances set out in Article 30 the Court has two discretions: it may decline jurisdiction in accordance with Article 30(2); or it may grant a stay in accordance with Article 30(1). There is no dispute that it is for the Defendants to show that the actions are "related" within the meaning of Article 30 and also to show why one or other of the discretions should be exercised.

35. Nicol J held that the English and Polish proceedings are "related" for the purposes of Article 30. He said:

> "80. …I recognise that the Polish proceedings do not involve all of the parties to the English proceedings, but that is not essential (contrast Article 29, which only applies if there are proceedings in different Member States for the same cause of action and between the same parties, but, when applicable, requires proceedings in subsequent Member States to be stayed). I recognise also that the First Defendant could succeed in the Polish proceedings by showing that, irrespective of any output of benzene, the EEF Plant emitted noxious odours. The issue of the truth of the allegations in the Republications *is* likely to be an issue in the English proceedings. Since the Claimants have relied on malicious falsehood as well as libel they will have the burden of positively showing that the Republications were false in the absence of an express admission to that effect (which there is not). In the libel claims the First and Third Defendants have said they will defend them as true…
>
> 81. Ms Page argues that, even in relation to benzene emissions, there is a distinction between what is in issue in the Polish proceedings and what would (potentially) be in issue in the English proceedings in terms of the scale and persistence of the alleged pollution. Further, I bear in mind that the English proceedings are not yet at a stage where the Defendants are

> obliged to state with precision the meaning which they will defend as true. Even when they do so, the issue at trial for the purpose of the libel proceedings will be whether, in such meaning or meanings as the Court determines the words of the Republications bear, they are substantially true (Defamation Act 2013 s.2). Notwithstanding the points put forward by Ms Page, applying the common sense approach which Lord Saville mandated [in *The Sarrio*, see below] there is, it seems to me, a risk of irreconcilable judgments between the Polish court and, if they continue, the present English proceedings…
>
> 84. I, therefore, take the word 'together' in Article 30(3) to mean together in the same Member State. Whether the claims are tried together in the same action or the same court or whether some other procedure is adopted to prevent or minimise the risk of irreconcilable judgments would then be a matter for the law of civil procedure of that Member State.
>
> 85. If, as I have held, there is a risk of irreconcilable judgments, it would seem that there is still a judgment to be made as to whether that risk makes it expedient for them to be heard together. While I recognise that such a judgment is necessary, it seems to me that it will involve very similar issues as to whether the discretionary decisions allowed by Article 30(1) and Article 30(2) should be taken."

36. Turning to Article 30(2), the judge said:

> "86. The power to decline jurisdiction in Article 30(2) has two further conditions. The first is not problematic. In the courts first seised the action must be 'pending at first instance'. The Polish claim by the First Defendant is still in the trial court and this condition is therefore satisfied.
>
> 87. The second condition in Article 30(2) is that 'the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.'
>
> 88. 'Actions' is in the plural. However, no question has been raised as to the Polish court's jurisdiction over the current Polish proceedings. The Polish lawyers for both sides are agreed that Polish courts would also have jurisdiction over the claims for libel and malicious falsehood which have presently been brought in England, if such claims were to be brought in Poland. Furthermore, the Polish lawyers are also agreed that in principle such actions, if brought in Poland, could be consolidated with the existing Polish proceedings by virtue of Article 219 of the Polish Code of Civil Procedure. Thirdly, they are also agreed that, while such consolidation is in theory possible, in practical terms consolidation is very unlikely because of the different nature of the two sets of proceedings.

> 89. In my judgment, the power to decline jurisdiction in Article 30(2) arises if the law of Poland, in this case, 'permits consolidation'. The likelihood or otherwise of that occurring is, at most, a relevant consideration as to whether the discretion which would then arise should be exercised. Since it is agreed that Polish civil procedure would 'permit consolidation' the second condition for the discretion in Article 30(2) is also fulfilled."

37. The judge then referred at [92] to the guidance given by the Supreme Court in *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG, The Alexandros T* [2014] 1 All ER 590 at where Lord Clarke said:

> "92. …In *Owens Bank Ltd v Bracco* (Case C-129/92) [1994] QB 509, paras 74-79, Advocate-General Lenz identified a number of factors which he thought relevant to the exercise of discretion. They can I think briefly be summarised in this way. The circumstances of each case are of particular importance but the aim of article 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion Advocate General Lenz said, at para 79, that it goes without saying that in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question."
>
> …..
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> "94. Ms Page submitted, without contradiction from Mr McCormick, that once jurisdiction is established under the Recast Brussels Regulation, the Court does not have a general discretion to decline to hear the case or to stay the proceedings on grounds of *forum non conveniens* – see *Owusu v Jackson* [2005] QB 801… While I accept that proposition, I also agree with Mr McCormick that some of the factors which in another context might feature in an argument as to which *forum* was *conveniens* may also be material as to whether to exercise a discretion which arises under Article 30.
>
> 95. I shall take first the three factors summarised by Lord Clarke.
>
> i) *The extent of relatedness and the risk of mutually irreconcilable decisions*
>
> As I have already accepted, the Polish proceedings will not necessarily lead to a judgment which bears on an issue in the

English action. That is because the Polish proceedings might turn on odours from a cause other than the emission of benzene. It is also because, as Ms Page argued, such meaning as the Claimants must prove in England to establish the falsity of the Republications or which the Defendants (or such of them as rely on truth) must show to make good a defence of truth may not precisely match whatever findings the Polish court does make in relation to benzene or whatever reasoning it includes in its decision. To that degree, the extent of the risk of irreconcilable judgments is perhaps less than it may be in other cases where Article 30 is in issue. But the weight to be given to that consideration is muted because (a) the English proceedings are at a very early stage; (b) even with the assistance of the Polish lawyers from both sides, it is difficult to tell precisely how the Polish court will frame its reasoning and judgment.

ii) *The stage reached in each set of proceedings*

The English proceedings are at a very early stage. There are Particulars of Claim, but no Defence. As already explained, the Particulars of Claim which have already been served are likely to need amendment. The Polish proceedings are well advanced, as Ms. Paczuscka-Tokarska says in her statement of 8th February 2018.

iii) *The proximity of the courts to the subject matter of the case*

On balance and for the reasons given by Mr McCormick, in my view the Polish courts have greater proximity to the subject matter of the case. I understand Ms Page's submissions as to the relevance of English investors and suppliers, but in the end the English proceedings concern the performance of a Polish industrial plant in Poland and the application of Polish environmental regulations. Although the English courts are well used to dealing with translations and interpreters, it is also of some relevance that the Republications relied upon by the Claimants were all in Polish. All of the Defendants and the 1st Claimant are domiciled in Poland. The other Claimants are not, but they rely for their claims on their association with the 1st Claimant and the EEF Plant.

iv) *Other matters*

a) I recognise that, if the Claimants are prevented from suing in the UK, there is likely to be some delay before proceedings for the same relief can be brought to the equivalent stage in Poland. While that is a factor, it does not outweigh the other considerations which I have taken into account.

b) Although *Shevill* gives a claimant a choice as to how to proceed, the mosaic alternative has real disadvantages.

> Necessarily, any relief (assuming the Claimants to be successful) would be confined to harm suffered in England and Wales. The internet publications (in the colloquial sense) had a much wider reach. By contrast, if the claims were to be pursued in Poland (which is where all three Defendants are domiciled) the Court would not be so limited and could provide compensation for loss wherever it was suffered. Correspondingly, injunctive relief would not need to be limited to repeat publications in England and Wales.
>
> c) I accept the evidence of both sides' Polish lawyers that consolidation of putative claims for libel and malicious falsehood with the present Polish proceedings in nuisance is unlikely. But, as I have already commented, the risk of irreconcilable judgments is very much reduced and can be more satisfactorily addressed if the two claims proceed in the same jurisdiction. Conversely, the risk of such judgments is very much more difficult to manage if the proceedings are carried on in separate Member States…

98. The conclusion that I come to is this; the necessary conditions for declining jurisdiction under Article 30(2) are fulfilled and the discretion to do so should be exercised.

99. I have considered whether, instead of declining to exercise jurisdiction under Article 30(2), I should alternatively stay the proceedings pursuant to Article 30(1). (I accept that I am not obliged to decline jurisdiction or to stay the proceedings. I could do neither – see *Alexandros T* (above at [97]) but I am not inclined to take that course in view of all the circumstances of the case).

100. The conditions for staying the proceedings in Article 30(1) are not as onerous in that this discretionary power is not dependent on the requirement that 'the court first seised has jurisdiction over the action in question and its law permits the consolidated thereof.' It is still necessary that the actions be related, but I have held that they are. The related actions must still be pending, but they plainly are.

101. It may be said that staying the proceedings would be a less drastic alternative to declining jurisdiction. It would have the advantage of postponing a decision as to whether to allow the English proceedings to continue until more was known about:

> i) the nature of the Polish court's judgment and reasoning in the present proceedings for nuisance and whether it says anything about benzene emissions and, if so, what.

> ii) whether the Claimants begin proceedings in Poland and, if so, whether they were consolidated with the present proceedings by the First Defendant for nuisance.
>
> 102. I have, though, decided against that course. Ms Page positively argued against it. She said that the Claimants were concerned to obtain speedy vindication of their reputations. In her submission, a stay would be as good as denying them that opportunity in the English courts and, in practice be no different from declining jurisdiction. As to the second matter, she submitted that the evidence from the Polish lawyers was that consolidation was highly unlikely (as indeed I have accepted) and there was therefore no point in staying the English proceedings to see if that occurred.
>
> 103. In view of the Claimants' position, I have decided that staying the proceedings under Article 30(1) is not a course which I should adopt rather than declining jurisdiction under Article 30(2)."

38. The judge's overall conclusion was that the Defendants had shown that the necessary conditions were fulfilled for the Court either to decline jurisdiction pursuant to Article 30(2) or to stay the English proceedings pursuant to Article 30(1), and that there was good reason why the Court should take one or other of those courses. He said that, had the Claimants been minded to advocate a stay rather than the Court declining jurisdiction (as the lesser of two unwelcome alternatives), he would have taken that course, but that was not their position. He therefore declined jurisdiction to hear the Claimants' claims for libel and malicious falsehood.

Grounds of Appeal

39. The Claimants sought permission to appeal on nine grounds. Asplin LJ granted permission on grounds 1-4 and 8, refused permission on grounds 5-7, and adjourned to the full court the question of whether to grant permission on ground 9.

40. The grounds which were before us were thus as follows.

> "(Ground 1) Having rightly held that the Court had jurisdiction to hear and determine this claim for libel, the Judge erred in deciding that the Court should nevertheless decline jurisdiction pursuant to Article 30(2) of Regulation (EU No. 1215/2012 of the European Parliament and of the Council) ("the Brussels Recast Regulation"), and in so doing erred in the respects set out below.
>
> (Ground 2) The Judge erred in law in holding at [80] that these proceedings and separate proceedings in Poland (brought by the First Defendant against the First Claimant for alleged nuisance) were 'related' for the purposes of Article 30(3), and in making this wrong finding made the following errors:

Having held that it was "very unlikely" that a defamation claim by the Claimants (should they now commence one in Poland) would be consolidated with the nuisance claim in Poland, the Court was wrong to hold that the condition of expediency in Article 30(3) was satisfied.

The Court was wrong to find that there was a risk of irreconcilable judgments.

Further, or in the alternative, in the absence of any finding that any such risk was a substantial risk or of any real weight or significance, the Court was wrong to find that such risk was a sufficient risk to satisfy the test of close connectedness and expediency under Article 30(3).

(Ground 3) The Court erred in holding at [84] that the word "together" in Article 30(3) means together in the same Member State.

(Ground 4) The Court erred in concluding at [95(iv)(c)] that the risk of irreconcilable judgments is very much reduced and can be more satisfactorily addressed if the two claims proceed in the same jurisdiction.

(Ground 8) Having dismissed the option of neither staying the action nor declining jurisdiction, the Court erred in deciding to decline jurisdiction in preference to a stay, and in exercising its discretion thus made the following errors:

The Court failed to take account of: (1) the fact that *Shevill* and the cases of the CJEU that follow *Shevill* give *the complainant* the option to do what these Claimants have elected to do, by bringing a defamation claim in this jurisdiction (even if also bringing parallel actions in other jurisdictions); and (2) the prohibition in *Owusu* of the court declining jurisdiction on the ground that the courts of another jurisdiction would be a more appropriate forum for the trial of the action.

The Court applied considerations that were pure '*forum conveniens*' considerations: the reach of the internet publications; the domicile of the Defendants; the availability of compensation for loss wherever suffered; and injunctive relief not limited to repetition in England and Wales, and thus in effect wrongly applied a *forum conveniens* test to the issues in this case.

The Court wrongly approached the exercise of its discretion as if it were the default option to decline jurisdiction (see [99] and [103]), that to say, as if there is a presumption in favour

> of declining jurisdiction, unless there is some good reason to depart from that course and direct a stay.
>
> In (wrongly) deciding to decline jurisdiction, the Court failed to take any or any sufficient account of the fact that the Claimants, who, on their case (which was accepted by the Court as being a good arguable case), had all suffered in this jurisdiction serious harm to their reputations (as well as, in the case of the corporate claimants, serious financial loss) had chosen to sue in England and Wales in preference to suing in Poland, as they were entitled to under Article 7(2) of the Brussels Recast Regulation, and that the opportunity of suing in Poland on the harm to their reputations in England was not an equal or sufficient alternative (nor was it so claimed by the Defendant). The impact of the Court's decision to decline jurisdiction (as opposed to staying the claim) was to shut out the Claimants from ever exercising its right to seek relief in this jurisdiction in respect of defamatory publications published, in the light of the fact that the limitation period for defamation was about to expire at the time of the hearing (and had already expired by the time of judgment).
>
> (Ground 9) The Court was wrong to opt to decline jurisdiction on the ground that counsel for the Claimants "positively argued against" a stay. The Court further erred in failing to correct the position upon clarification by the Claimants', prior to judgment, that they oppose both the imposing of a stay and the declining of jurisdiction, but, if they had been pressed by the Court to choose between the two, would have been constrained to opt for a stay, subject to the Claimants' right to seek permission to appeal any such order."

Discussion

41. It is clear from the wording of Article 30, and was confirmed by Lord Clarke in *The Alexandros T* (dealing with an identically worded regulation) at [97], that there are two separate discretions which may be exercised: to stay or not to stay, and to decline or not to decline jurisdiction. Each depends on the two actions being "related" as defined by Article 30(3). Mr McCormick faintly argued that the use of the words "deemed to be related" in the subparagraph leaves room for a type of related action which does not fall within Article 30(3); but he did not pursue this, and we were not shown any authority which suggests that Article 30(3) is anything other than a definition of what is meant by "related actions". It follows that, unless the two actions fall within the definition, they are not related and the two discretions simply do not arise.

42. The other point to be made on the structure of the Article is that for the discretion to stay the proceedings under Article 30(1) to arise, the actions must be related; for the court to have the discretion to take the more drastic step of declining jurisdiction altogether under Article 30(2), it must be satisfied not only that the actions are related, but also that the law of the court first seised permits the two actions to be "consolidated".

43. Finally, it is common ground that if the two actions are not related there is no discretion to stay one of them on general *forum non conveniens* grounds: see the judgment of the ECJ in *Owusu v Jackson* [2005] QB 801.

44. I turn to the wording of Article 30(3). "Closely connected" is a phrase which looks forward to the rest of the sentence and does not require separate analysis.

45. "Expedient" is a word whose meaning has been the subject of discussion in decisions of the Commercial Court in this jurisdiction as to whether it means "desirable" or "possible". In *JSC Commercial Bank Privatbank v Kolomoisky and Others* [2019] EWCA Civ 1708, a decision handed down the day before the hearing in the present case, this court held at [191] that "expedient" is more akin to "desirable" than to "practicable" or "possible". The court approved the approach of Rix J in *Centro Internationale Handels Bank AG v Morgan Grenfell Trade Finance Ltd* [1997] CLC 870 that the question is not whether the actions *can* be brought together but rather whether they *should* be brought together.

Could the two actions be heard and determined together in Poland?

46. The next and critical question is what is meant by the phrase "hear and determine them together". As already noted, the judge, after referring to paragraph (21) of the preamble to the RBR, which speaks of the need to ensure that irreconcilable judgments will not be given in different Member States, held at [84] that the word together means "together in the same Member State". He added that:

> "84. …Whether the claims are tried together in the same action or the same court or whether some other procedure is adopted to prevent or minimise the risk of irreconcilable judgments would then be a matter for the law of civil procedure of that Member State".

47. I cannot agree with the judge that "together" in Article 30(3) only means "in the same Member State". If that was what the drafters of the Regulation intended it would have been easy for them to use that phrase rather than the word "together". That conclusion seems to me to follow obviously from the wording of the Article, but it is supported by a glancing reference in the judgment of this court given by Mummery LJ in *Research in Motion UK Ltd v Visto Corporation* [2008] 2 All ER Comm 560, which dealt with the identically worded Article 28 of Council Regulation (EC) 44-2001. He said, at [37] to [38], that the application of the Article:

> "37. …requires an assessment of the degree of connection, and then a value judgment as to the expediency of hearing the two actions together (assuming they could be so heard) in order to avoid the risk of inconsistent judgments.
>
> 38. …It does not seem to us that Article 28(3) requires one to find that <u>any</u> possibility [of inconsistent judgments], no matter how small the point, requires the conclusion that the actions are related. One still has to consider expediency. We consider that the area of potential conflict is not sufficiently great to lead to

> the conclusion that expediency would require *one trial* even if it were theoretically possible." [emphasis added]

48. Ms Page was right to remind us that the question is whether it is expedient that the two actions be "*heard and determined*" (not just "heard") together. This must in my judgment mean at least that, even if the two actions cannot be consolidated (which would bring Article 30(2) into play), they will be tried by the same judge or panel of judges in the same court and that judgment will be given in both actions at the same time. It would no doubt be a question for the civil procedural law of the relevant Member State how the evidence was handled. But I do not think that it can be said that two actions are "heard and determined together" if one takes place before Judge A, who gives a decision in (say) March, and the other takes place later before Judge B, who gives judgment in October.

49. In *Kolomoisky* at [209] to [210] this court drew a distinction between two Ukrainian courts: a district court with defamation jurisdiction and the country's commercial court. Mr Kolomoisky, the first defendant in a fraud claim of very high value brought in the Business and Property Courts of England and Wales, sought a stay on the grounds that a defamation claim was proceeding in the Ukrainian district court and that the two actions were related. This court noted the expert evidence that the district court before which the defamation claims were proceeding did not have jurisdiction to hear the claimant Bank's fraud claim which would have to be brought before the Ukrainian commercial court. The court held that "absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay".

50. In the present case the judge noted at paragraph 91(iv) of his judgment:

> "91(iv). The Defendants' Polish lawyers accept that it is very unlikely that there would be consolidation of the present proceedings for nuisance with any claims which the Claimants were to bring for libel and/or malicious falsehood. Unless those expectations are wrong, there will, in any case, be two sets of proceedings even if they are continuing in the same jurisdiction."

51. It seems equally unlikely that the two actions could be tried in the same court before the same judge. The Claimants' expert stated that a libel claim in Poland must be brought in the civil division of the general court, whereas the emissions lawsuit had to be brought in the commercial division. She stated that she had never in her professional experience seen such proceedings joined and she believed that it would be very rare for such joinder to occur. The Defendants' expert agreed.

52. If the judge's decision to decline jurisdiction is upheld or even if the English claim for libel and malicious falsehood is stayed the Claimants could, of course, start similar proceedings in Poland. But on the material before us there appears to be no real possibility of such a claim and the existing claim for nuisance brought by the Defendants being "heard and determined together".

53. In these circumstances I consider that the judge had no discretion to decline jurisdiction nor to order a stay under Article 30 of the RBR, and that the appeal must be allowed.

However, since the issue of the risk of irreconcilable judgments was argued before us at some length I will give my views on it.

54. In *Owners of Cargo lately laden on board the ship Tatry v Owners of the ship Maciej Rataj* [1999] QB 515 ("*The Tatry*") the ECJ (as it then was) considered what was then Article 22(3) of the 1968 Brussels Convention as amended, which was in identical terms to Article 30(3) of the RBR. The Court held at [51] that the purpose of the provision was "to avoid the risk of conflicting judgments and thus to facilitate the proper administration of justice in the Community". It noted that the expression "related actions" did not have the same meaning in all Member States and that it followed that:

> "51. …the concept of related actions… must be given an independent interpretation.
>
> 52. In order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive."

55. The leading case in a commercial context in this jurisdiction is *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32. Lord Saville of Newdigate, giving the only substantive speech in the House of Lords, noted that in the *The Tatry* the ECJ had rejected the argument that the phrase "irreconcilable judgments" should be interpreted so as to confine it to cases where the decisions would have mutually exclusive legal consequences. However, having cited the passage I have just quoted about the need for a broad interpretation, he continued:

> "This reasoning does not suggest that the phrase "irreconcilable judgments" in article 22 should be given a limited meaning. Indeed, to limit the application of article 22 to cases where there is a potential conflict between so-called "primary" issues, so far from giving the article a broad interpretation, comes dangerously close to the argument rejected in [*The Tatry*]. If there are only to be irreconcilable judgments where one or more of "the facts which are necessary to establish a cause of action" are potentially in conflict, then at least in cases where the parties are the same, the article will be likely to be confined to situations where there is a risk that the legal consequences will be legally exclusive.
>
> In the second place, it seems to me that the words of the article itself militate against the suggested limitation. The actions, to be related, must be "so closely connected that it is expedient to hear and determine them together" to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances, from cases where the matters before the courts are virtually identical (though not falling within the provisions of article 21) to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question. These words

are required if "irreconcilable judgments" extends beyond "primary" or "essential" issues, so as to exclude actions which, though theoretically capable of giving rise to conflict, are not sufficiently closely connected to make it expedient for them to be heard and determined together. The words would hardly be necessary at all if the article was to be confined as suggested. Indeed, in that event, it seems to me that quite different words would have been used.

In the third place, it seems to me that to adopt the suggested limitation would in truth be to give the phrase "related actions" a special "English" meaning, which would be contrary to what the court decided in [*The Tatry*], where it was pointed out (at paragraph 52) that since that phrase did not have the same meaning in all the member states, it was necessary to give it an independent interpretation. Evans L.J. defined "primary" issues as those necessary to establish a "cause of action," and, it would seem, distinguished what he described as "secondary" or "non-essential" issues by reference to the principles of issue estoppel to be found in our common law. However, those who framed article 22 can hardly be suggested to have had in mind our English concepts of "cause of action" or "issue estoppel" when using the phrase "irreconcilable judgments" any more than courts in other Community countries faced with interpreting or applying article 22.

In the fourth place, I take the view that to attempt to analyse actions so as to distinguish between different kinds of issues would be likely to add to the complexity of applications under article 22 and thus to the expense and delay in dealing with them. Instead of simply considering whether the actions were so closely connected that it was expedient that they should be heard and determined together to avoid the risk of conflicting decisions, the parties and the court would have to embark upon a sophisticated and difficult exercise of legal analysis, made more complicated by the fact that the court would be dealing not with actual judgments, but with what judgments yet to be given would be likely to contain. It must be borne in mind that article 22 is concerned not with the substantive rights and obligations of the parties, but with the ancillary and procedural question as to where in the Community those rights and obligations should be heard and determined. There is nothing in the Convention that suggests that it is in the interests of the Community that litigation on this question should be made more expensive and time-consuming than is necessary. If, for example, the difficulties encountered by our courts in trying to apply our sophisticated law of issue estoppel are anything to go by, and such concepts are used for the purpose of article 22 applications, this would in my view be calculated to make such applications a peculiarly complicated kind of what the Lord Chief Justice has described

> as "satellite litigation," for what in my view would be no good reason…
>
> For these reasons, I am of the view that there should be a broad common-sense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter."

56. If these observations were applicable in the present case (and if there were a real possibility of the two actions being heard and determined together) they would strongly support the Defendants' application. However, Ms Page submits that the decisions in commercial cases are irrelevant in the present context. She relies on the decision of the ECJ in *Shevill*, discussed above, establishing the right of a defamation claimant to invoke the mosaic principle.

57. Many defamatory statements are, no doubt, published or republished in all or most of the Member States to which the RBR regime applies. It appears that under the mosaic principle the claimant in such a case has the right to bring separate claims in each of the 27 Member States, provided that each such claim is confined to seeking a remedy in respect of the damage caused to the claimant in that Member State. Ms Page submits that each of these is an entirely separate claim. The actions cannot be said to be related because, although there is the possibility of conflicting judgments, there is no possibility of irreconcilable judgments: see the Opinions of Advocates General Darmon and Léger in *Shevill* in the passages already cited.

58. In an explanatory report on the equivalent provisions in the 2007 Lugano Convention by Professor Fausto Pocar of Milan University, published in the Official Journal of the European Union (2009-C319-01), the author wrote:

> "59. …It is true that the solutions offered by the Court of Justice oblige plaintiffs who suffer damage in several States to bring multiple proceedings, and given the different laws that are applicable this may lead to contradictory rulings regarding the same causal act. Conferring jurisdiction over the entire damage on the court in each place where part of the damage occurred, on the other hand, would increase the scope for forum shopping and favour the plaintiff excessively."

59. I accept the submission of Mr McCormick that the judgment of the Grand Chamber of the ECJ in *Shevill* is an authority about the right of a claimant to issue claims in each jurisdiction pursuant to RBR Article 7(2), not about whether the "related actions" provisions of Article 30 can then be applied to such claims. The proposition for which Ms Page contends seems rather extreme. Suppose that someone is found stabbed to death and the defendant publishes an article, which is circulated throughout Europe, alleging that the deceased was murdered by the claimant. If Ms Page is right, the claimant, assuming he can afford it, has an absolute right to bring 27 separate libel claims against the defendant and (subject to any local case management decisions) to push each of them along towards a trial and judgment in whichever order he, the claimant, chooses. No stay can be granted, still less jurisdiction declined, under Article 30; and if in the first trial it is found that the claimant did in fact murder the deceased

then, no matter: he can try again in another Member State because there is no risk of "irreconcilable" judgments, only of "conflicting" ones. This does not seem to me to accord with common sense. It also enables a claimant with deep pockets to oppress a defendant by suing him in 27 jurisdictions.

60. In the present case the coincidence of issues between the nuisance claim in Poland and the defamation claim which was before Nicol J is not as great as in the stark example of the murder case which I have just given. In the nuisance claim it is alleged that the EEF Plant operated by the Claimants is emitting substances which cause a nuisance by smell. There is a dispute as to whether benzene emissions may be part of the problem. In the defamation claim the allegations complained of are, in summary, that the Claimants are responsible for benzene emissions which substantially exceed the legal limit. (I would not accept Ms Page's argument that it is too early in the defamation claim to say what the issues will be. At one point in her submissions she appeared to suggest that a stay should not be considered until a defence has been served to the libel claim. Since in present defamation practice that may not occur until after a judge has ruled on meaning, it would go against the obviously desirable aim that if a stay is to be granted it should occur before excessive time and money has been spent on the English proceedings.)

61. If I am right in thinking that the decision of the ECJ in *Shevill* tells us nothing about Article 30, and that the matter is to be approached on the broad interpretation set out in *The Tatry* or the broad common sense basis recommended by Lord Saville in *Sarrio*, I would hold that the central issue in both actions will be whether the Claimants are causing or permitting harmful pollution to the atmosphere around the EEF Plant; and that to allow the libel claim to proceed to trial in England would create a risk of "irreconcilable judgments". However, my views on that issue cannot prevail against my conclusion that there is effectively no prospect of the two actions being "heard and determined together".

62. In those circumstances it is unnecessary to consider the grounds of appeal (8 and 9) which raise the issue of whether the judge should have stayed the action in preference to declining jurisdiction altogether.

63. I would therefore allow the appeal and set aside the decision of the judge. This does not mean, in my view, that in making case management or listing decisions in this jurisdiction a judge of the Media and Communications List will have to be blind to the progress of the nuisance claim in Poland. Although the point was not argued before us, it seems to me at least arguable that any finding by the Polish court that the Claimants *were* causing serious damage to the environment around the EEF Plant, while not establishing any issue estoppel in the English defamation claim, might affect the damages recoverable in that claim if it were to be successful, or even the question of whether the allegedly defamatory statements have caused serious harm or serious financial harm to the Claimants. But these are matters for another day.

Lord Justice Baker:

64. I agree that there is no real possibility of a claim by the Claimants for defamation and malicious falsehood being "heard and determined together" in Poland with the existing claim for nuisance brought by the Defendants, and that Nicol J therefore had no

discretion either to decline jurisdiction or to order a stay under Article 30 of the Recast Brussels Regulation, For that reason, I would allow this appeal.

65. Like Bean LJ, I find it an unattractive proposition that a claimant has an absolute right to pursue to trial 27 separate claims for defamation against the same defendant in respect of the same statement without any prospect of a court declining jurisdiction or staying the proceedings under Article 30. I have, however, read in draft the judgment to be given by Lewison LJ and, for the reasons he gives, I consider it unnecessary on this appeal to express a concluded view on the question of irreconcilable judgments. I prefer to await another case when the court has an opportunity for a more detailed analysis of the case law on this issue.

Lord Justice Lewison:

66. I agree that the appeal should be allowed for the reasons given by Bean LJ in paragraphs [46] to [53] of his judgment.

67. So far as the question of irreconcilable judgments is concerned, I wish to reserve my opinion for a case in which it matters. I simply make the following observations. Judgment in *The Tatry* was given on 6 December 1994. *Shevill* was argued before the Grand Chamber on 10 January 1995; and judgment was delivered on 7 March 1995. Of the 11 judges who sat in *Shevill*, 6 had also sat in *The Tatry*. Neither Advocate-General Léger nor the court referred to *The Tatry*, which had been decided in the previous month. In *Shevill* both Advocates-General drew a distinction between "conflicting judgments" on the one hand, and "irreconcilable judgments" on the other. That does not appear to be the case in *The Tatry*, in which the court referred only to "conflicting judgments". The court in *Shevill* did not cast doubt on the Advocates-General's distinction; and its answer to question 6 might be thought to recognise implicitly that the existence of another possible jurisdiction did not deprive the claimant of his right to sue. How *Shevill* and *The Tatry* are to be reconciled is not, in my judgment, a straightforward question. On one view, *Shevill* (and after it *eDate*) give a claimant the *substantive* right to sue in each member state where the libel has been published, with the consequence that that right is not to be taken away by procedural means. On another view, the mere fact that there is a right to *begin* proceedings in a particular member state does not entail the consequence that the claimant is entitled to prosecute those proceedings all the way to trial. There is something to be said for each point of view. So I would prefer not to decide between them in a case in which it makes no difference to the outcome of the appeal.