Appeal No. ______________

IN THE COURT OF APPEAL (CIVIL DIVISION)

Claim No. IL-2024-000151

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

BETWEEN:

(1) AVIATOR LLC
(a company incorporated in Georgia under no. 404612610)

(2) AVIATOR STUDIO LIMITED (formerly AVIGROUP LIMITED)
(a company incorporated in Malta)

(3) AVIATOR STUDIO HOLDING LIMITED
(a company incorporated in Malta)

Claimants/Appellants

- and -

SPRIBE OÜ
(a company incorporated in Estonia)

Defendant/Respondent

- and -

(5) AVIATOR LLC
(a company incorporated in Georgia under no. 404552177)

(6) MR TEIMURAZ UGULAVA

Fifth and Sixth Parties

(together with the Claimants, the "**Aviator Parties**")

APPELLANTS' SKELETON ARGUMENT
(replacement copy with bundle references)

10th June 2026

PHILIP ROBERTS KC
SAM O'LEARY
EDWARD CRONAN

Instructed by Allen Overy Shearman Sterling LLP

A. INTRODUCTION

1. This appeal concerns a single point of law: whether the res judicata effect of a prior judgment (in this case, a judgment of a foreign court) is governed by English law as the law of the forum, even where the claim in which the res judicata is pleaded is governed by foreign law.

2. On the Application of the Appellants ([CORE/1]), the point was considered as a preliminary issue at a case management hearing in this action. The Judge decided that the Rome II Regulation (EC) No. 864/2007 ("**Rome II**"), now assimilated English law, required the English Court to decide claims governed by a foreign law without reference to the preclusive effect that English law would give to a prior judgment and instead to apply any rules of res judicata that might exist as part of the foreign law applicable to the claim.[1] The Judge granted permission to appeal across the full breadth of the Appellants' Grounds of Appeal.[2]

3. The Judge treated the domestic characterisation of issue estoppel as a substantive right as though that were sufficient to make it part of the law applicable to the underlying non-contractual obligation under Rome II. That conflated the substantive immunity arising from a prior judgment with the substantive rights which form the subject matter of the claim.

4. Properly analysed, issue estoppel is part of the law of the forum governing the effect of prior adjudications in proceedings before it. Where the prior judgment is foreign, that includes the forum's rules on recognition and effect. Rome II is concerned with the law applicable to the non-contractual obligation itself; it does not allocate the law governing whether an issue already conclusively determined may be re-opened in the English Court.

5. Even if Rome II is engaged at the level of the underlying claim, the same result follows. Issue estoppel is not part of the substantive law of that claim. Although it may affect the way in which the court determines the claim before it, its effect is to close off further evidence and argument on an issue already finally decided. That concerns the conduct of the later proceedings and the effect of the prior judgment in those proceedings; it does not make issue estoppel part of the substantive law governing the underlying non-contractual obligation.

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[1] Order of Michael Tappin KC (sitting as a Deputy Judge of the High Court) dated 22 May 2026 (the "**Order**"), paragraphs 2 and 4 ([CORE/3/49-50]).
[2] Paragraph 5 of the Order ([CORE/3/50]).

6. Alternatively, if issue estoppel would otherwise fall within Rome II, English rules of finality are preserved under Article 16 (or, if necessary, Article 26) as overriding mandatory provisions of the forum.

B. THE PROCEDURAL CONTEXT

7. The Appellants allege that the Respondent has used copied artwork and branding in its "Aviator" gambling "crash game". The proceedings include claims and counterclaims in respect of infringement of copyright and other intellectual property rights. The Appellants' copyright infringement claims are brought in respect of infringements in over 180 jurisdictions.

8. Under Article 8 of the Rome II Regulation, the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right is the law of the country for which protection is claimed. Accordingly, in these proceedings the claims are governed by the laws of many different jurisdictions. The Appellants rely on the widespread international convergence of copyright laws (in particular under the Berne Convention for the Protection of Literary and Artistic Works, first adopted in Berne in 1886). The parties agree that the English Court has jurisdiction to try all the claims.

9. The Appellants' position is that a number of the issues that arise in their claims have already been the subject of proceedings in Georgia between the First Claimant and the Defendant. In those proceedings, the Appellants contend, the Georgian Courts determined in the First Claimant's favour issues of copyright subsistence, ownership and copying in relation to certain works, and that those determinations were upheld through the Georgian appellate process, culminating in a decision by the Supreme Court of Georgia (together, the "**Georgian Judgments**").

10. In these proceedings, the Appellants rely on those Georgian Judgments as estopping the Respondent per *rem judicatam* from disputing certain matters arising on the various claims and counterclaims: see PoC §58 ([CORE/7/96-98]); Reply §§42.2.2 ([CORE/9/181]) and 45 ([CORE/9/182-184]), together with Annex 2 ([CORE/9/217-223]). The Respondent denies that those judgments have any such preclusive effect in these proceedings and pleads, among other things, that no res judicata arises from the Georgian proceedings: see Defence and Counterclaim §§43I ([CORE/8/122-125]) and 46 ([CORE/8/126-133]).

11. The issue is of fundamental significance to the future conduct of the proceedings. If the Appellants are right, the existence and effect of any res judicata founded on the Georgian Judgments falls to be determined once and for all by reference to English law as the law of the forum. If, however, the Judge was right, the English Court will be required to address the laws of issue preclusion of very many foreign jurisdictions in order to decide whether, and to what extent, the Georgian Judgments preclude re-litigation of corresponding issues across the claims. In some cases, it may be that the facts have to be tried again for the purposes of determining some of the claims, while others are determined in accordance with the issue estoppels. The point therefore has consequences not merely for the legal analysis of res judicata, but for the scope, cost, complexity and manageability of the action as a whole. That is why the Judge himself recognised in [7] of the Judgment that this "*pure point of law*" had "*major consequences for the conduct and shape of the case*." ([CORE/4/57])

C. THE NATURE AND EFFECT OF THE RULES OF *RES JUDICATA*

12. In English law, res judicata is sometimes used as an umbrella term, but in its strict sense it refers to cause of action estoppel and issue estoppel: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 per Lord Sumption JSC at [20]-[22].

13. Cause of action estoppel bars re-litigation of the same cause of action once its existence or non-existence has been finally determined by a court of competent jurisdiction; issue estoppel bars re-litigation of an issue necessarily decided in earlier proceedings, even in later proceedings on a different cause of action: *Zodiac* per Lord Sumption JSC at [20], developing the analysis of Lord Keith of Kinkel in *Arnold v National Westminster Bank plc* [1991] 2 AC 93.

14. In English law, res judicata is often described as a rule of substantive law: *Zodiac* per Lord Sumption JSC at [25]. This may be contrasted with the abuse of process doctrine in *Henderson v Henderson* (1843) 3 Hare 100 which is a concept that informs the court's procedural powers: *Zodiac* per Lord Sumption JSC at [25].

15. What this means is that, unlike the abuse of process doctrine, res judicata is not *merely* a principle that the court applies in exercising its inherent powers. Rather, res judicata substantively protects the rights between the particular parties arising from a prior decision between them. Where an issue has been decided in prior litigation between the same parties,

issue estoppel recognises the parties' substantive immunity from vexation arising from the re-litigation of the same issue in subsequent proceedings. A party is entitled to enforce that immunity (sometimes described more broadly as a substantive right) by pleading the issue estoppel in the subsequent proceedings: *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 (PC) at [15] per Lord Hobhouse.

16. The court prevents the re-litigation of the issue by treating the previous decision as conclusive on the issue: see e.g. *Hulley Enterprises Ltd v Russian Federation* [2026] KB 1 at [55]. That in turn means that the estopped party is shut out from adducing evidence to contradict the previous court's decision (such evidence being irrelevant to how the court will determine the issue).

17. It follows from the nature of issue estoppel as an immunity from re-litigation that the *occasion* for its exercise will be subsequent proceedings in which one party is attempting to enforce some obligation against another.

18. Crucially, however, the fact that res judicata is a rule of substantive law in domestic taxonomy does not make it part of the substantive law of the underlying claim. The fact that the *occasion* for a party to assert its substantive immunity is a claim concerning a contract or a tort, etc. does not mean that issue estoppel is part of the law of contract or tort, etc. As observed above, the issue estoppel arises from the policy of English Courts to prevent the re-litigation of previously decided issues rather than from any peculiar feature of contract or tort law. The fact that the policy is being given effect to in the context of a contract claim or a tort claim does not change the *independent* nature of the substantive immunity.

19. That distinction between domestic substantive character and inclusion within the law applicable to the underlying claim is central to this appeal.

D. RES JUDICATA ARISING FROM A FOREIGN JUDGMENT

20. The rules of res judicata apply to foreign judgments: *Zodiac* per Lord Sumption JSC at [17].[3]

[3] As Lord Sumption JSC explained, at common law, all of the rules of res judicata applied to foreign judgments with the exception of the doctrine of merger. However, since 1982, s.34 of the Civil Jurisdiction and Judgments Act 1982 has applied a corresponding rule by statute.

21. In that context, issue estoppel is a consequence of the recognition by the English Courts of a foreign judgment, which is itself a matter for the *lex fori*, applying a test that is mirrored in the test for issue estoppel. As explained by the Privy Council in *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21; [2023] Bus LR 1305:

> *"36. In Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853 the House of Lords held that issue estoppel can be based on a foreign judgment. To give rise to such an issue estoppel, three requirements must be satisfied: see DSV Silo-und Verwaltungsgesellschaft mbH v Owners of The Sennar (The Sennar) (No 2) [1985] 1 WLR 490, 499 (Lord Brandon of Oakbrook); Good Challenger Navegante SA v Metalexportimport SA [2004] 1 Lloyd_s Rep 67, para 50. First, the judgment must be entitled to recognition in accordance with* ***the domestic rules*** *on the recognition of foreign judgments***.** *At common law, these rules require the judgment to be (a) given by a court of a foreign country with jurisdiction to give it and (b) final and conclusive on the merits***.** *Second, the parties in the two actions must be the same. Third, the issue decided by the foreign court must be the same as the issue in the domestic proceedings.*" (emphasis added)

22. It follows that, where a foreign judgment is relied on as founding res judicata in English proceedings, both the recognition of that judgment and the effect given to it by way of preclusion are governed, in the first instance, by English law as the law of the forum.

E. THE AUTHORITIES RECOGNISE THAT ISSUE ESTOPPEL IS GOVERNED BY THE *LEX FORI*

23. Under English private international law, the fact that a claim is governed by foreign law does not mean that every question arising in the proceedings is governed by that same law. English law has long distinguished between the law governing the substantive claim on the one hand and rules of evidence and procedure on the other: *Harding v Wealands* [2006] UKHL 32; [2007] 2 AC 1 at [24]-[30] per Lord Hoffmann. The line is not drawn in precisely the same way as under Rome II but it is nevertheless a fundamental aspect of English choice of law rules. English law also treats certain questions, including questions that are not purely evidential or procedural, as matters for the forum because they concern the effect to be given in its proceedings to prior adjudications, rather than the substantive law governing the underlying claim: see, e.g., *Gol Linhas* at [36].

24. Issue estoppel has consistently been treated in that way. It is not part of the law governing the underlying cause of action. Nor is it merely a rule of evidence. Rather, it is a doctrine by

which the forum gives effect to the finality of an earlier adjudication in later proceedings before it. That is why English law has consistently treated the existence, scope and effect of issue estoppel as matters for the forum.

25. That classification is unsurprising. Issue estoppel does not define the subject matter of the underlying copyright right, the elements of infringement, the persons liable, or the remedies available for breach. It arises only because there has already been a prior adjudication between the parties, and it operates independently by determining whether a particular issue remains open in the later proceedings. Its source is not the underlying non-contractual obligation, but the policy of the forum in giving effect to the finality of the prior judgment.

26. The leading authority is *Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)* [1967] 1 AC 853. In that case, the House of Lords considered the effect of the decision of a West German Court on a cause of action governed by East German law before an English Court. Lord Reid observed that the law applicable to the issue estoppel effects of the West German decision was the *lex fori* (at 919C). The other members of the House did not repeat that formulation, but they proceeded on the same general footing that the English Court was applying its own doctrine of issue estoppel to determine the effect, in English proceedings, of the prior West German judgment.

27. The Judge sought to distinguish *Carl Zeiss* on the basis that the precise choice between *lex fori* and *lex causae* was not argued in that form, [18] of the Judgment ([CORE/4/60]). But that does not deprive Lord Reid's statement of force. The point was not assumed; it formed part of the legal basis on which the House proceeded. A considered decision of a superior court is not robbed of authority merely because the point was not the subject of developed argument, provided that the court decided it rather than merely assuming it: *R (Kadhim) v Brent LBC Housing Benefit Review Board* [2001] QB 955 at [38]. Lord Reid's statement that issue estoppel is a matter for the *lex fori* was plainly a considered step in his reasoning, not an incidental assumption.

28. Nor is it a sufficient answer to say, as the Judge did, that at the time of *Carl Zeiss* issue estoppel was viewed as a rule of evidence, and that may have informed the decision to apply the *lex fori.* While Lord Guest described issue estoppel as a rule of evidence (at 933F), no similar reasoning appeared in Lord Reid's judgment. Thus, there was no basis for the Judge

to suggest that Lord Reid was proceeding on the basis that issue estoppel was understood to be a rule of evidence.

29. The House of Lords also applied the *lex fori* to issue estoppel in The Sennar (No 2) [1985] 1 WLR 490. In that case, a Dutch Court had decided that the Sudanese Courts had exclusive jurisdiction over a claim brought in respect of a bill of lading governed by Sudanese law. When the matter was brought before the English Courts, the House of Lords applied the English law of issue estoppel to conclude that the Dutch Court's decision on jurisdiction meant that the English Courts were required to decide the issue the same way (at 500).

30. Although the claim had been brought in tort, Lord Diplock noted there was no English law tort claim available to the claimants (at 495). Accordingly, the only claims available to the claimants were a claim in contract (governed by Sudanese law) or a claim in tort (governed by German law). Nonetheless, both Lord Diplock (at 493) and Lord Brandon (at 499) (with whom the other judges agreed) applied English law to the question of issue estoppel (rather than Sudanese or German law).

31. A post-Rome II restatement of the same approach appears in *PJSC National Bank Trust v Mints* [2022] 1 WLR 3099. Foxton J said at [23] that issue estoppel depends on a rule of law of the "receiving" tribunal as to the legal effect of the original determination; that while foreign law may be relevant to whether the prior judgment meets the English law requirement of finality, the doctrine of estoppel is "*part of the law of the forum*", not a legal attribute of the foreign judgment; and that when a foreign judgment or award is relied on in English proceedings, it is English law which determines, for example, the scope of the estoppel and whether the "special circumstances" exception applies.

32. That was a case in which the court was considering the effect of a previous arbitral award, in later English Court proceedings where the *lex causae* was Russian law (at [2](x)). However, in deciding that the arbitral award did not have a preclusive effect against the defendants, Foxton J applied the English law principles of issue estoppel (at [23](ii)).

33. The Judge distinguished *Mints* on the basis that in that case the issue of whether Rome II applied was not (it would seem) argued ([20] of the Judgment) ([CORE/4/61]). However, again, *Mints* is a case in which the application of the *lex fori* to issue estoppel was a necessary part of Foxton J's considered reasoning (he concluded that the arbitral award did not have

preclusive effects by applying the law of the forum). The fact that he did not consider Rome II does not render the judgment *per incuriam* - it may simply reflect the fact that Foxton J (rightly) considered Rome II to be irrelevant to the question of the law applicable to issue estoppel.

34. These cases show that issue estoppel has consistently been treated as a doctrine of the forum governing the effect of prior adjudications in later English proceedings. Just as importantly, the courts have consistently proceeded on the footing that it is not part of the substantive law governing the underlying claim, even where that claim is itself governed by foreign law.

F. WHETHER ISSUE ESTOPPEL IS A SUBSTANTIVE RIGHT IS NOT DETERMINATIVE

35. The Judge erred in treating the domestic characterisation of issue estoppel as a "substantive right" as sufficient to bring it within the law applicable to the underlying non-contractual obligation under Rome II (Judgment [26]-[29]) ([CORE/4/64-65]). That is not sufficient. The question is not whether issue estoppel is substantive in English law; rather the question is whether it forms part of the law governing the non-contractual obligation sued on.

36. The Judgment sets out the key parts of Rome II at [21] followed by *Dicey, Morris and Collins on the Conflict of Laws'* commentary on the interaction between Article 1(3) and Article 15 ([CORE/4/61-63]). Those two aspects of Rome II are key for present purposes, and they read as follows (emphasis added):

> *Article 1*
> *Scope*
> *1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. …*
> *3. **This Regulation shall not apply to evidence and procedure**, without prejudice to Articles 21 and 22.*
> *Article 15*
> *Scope of the law applicable*
> ***The law applicable to non-contractual obligations under this Regulation shall govern** in particular:*
> > *(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;*
> > *(b) the grounds for exemption from liability, any limitation of liability and any division of liability;*
> > *…*
> > *(h) the manner in which an obligation may be extinguished and rules of prescription and limitation…*

Rome II is not concerned with all matters of substance

37. The application of Rome II does not simply depend on whether a matter is "substantive". Rome II is concerned with the substantive connection between a particular matter and the non-contractual obligation that forms the subject matter of a claim. Accordingly, the relevant question is not whether issue estoppel is part of "substantive law". Rather, it is whether issue estoppel can sensibly be said to form part of the law applicable to non-contractual obligations.

38. Article 1(3) of Rome II excludes from its ambit matters of "evidence and procedure". However, it does not follow from the fact that Article 1(3) of Rome II excludes "evidence and procedure" that any matter of substance whatsoever will fall within the ambit of Rome II.

39. Indeed, Rome II does not use the term "*substance*" to describe matters said to be determined by the law applicable to non-contractual obligations at all. Instead, it focuses on the connection between a particular matter and the substance of the non-contractual obligation being asserted (as is apparent from Article 15, which is discussed further below). While issue estoppel is a substantive doctrine, it is conceptually separate from the non-contractual obligation that forms the substance of a claim.

Issue estoppel is a matter for the forum

40. For the reasons set out above, the process of recognising a foreign judgment and giving effect to its finality through an issue estoppel is a matter for the forum - such matters concern the effect the English Court will give to a foreign judgment within the *English* legal system.

41. It is irrelevant to the analysis that the *occasion* for pleading the estoppel is a claim asserting a non-contractual obligation governed by foreign law. As explained in section C above, the nature of issue estoppel as a substantive immunity means that it will always be asserted in the context of proceedings that a party brings to assert a particular obligation. However, as a matter of substance, the issue estoppel is entirely separate from the subject matter of the claim that happens to be before the court (e.g. the exclusive right to use a particular copyright

work in a particular jurisdiction).[4] The estoppel arises from the policy of the forum to give effect to the finality of the previous judgment.

42. Contrary to the Judge's remarks at [16] ([CORE/4/59]), the Appellants' position as set out above does not mean that "choice of law rules" fall out of the picture if issue estoppel is determined in accordance with English law. It is of course the position that the English Court will have to determine the law applicable to each substantive claim and that the English Courts will apply e.g. German law to a German copyright claim. This will dictate the elements of the cause of action and additional matters connected to the cause of action such as those matters set out in Article 15 of Rome II. If (ex hypothesi) German law gives rise to an issue which is the same as an issue that is *res judicata*, the Court will decide that issue accordingly.

43. However, it is then for the English Court to determine whether the elements of the cause of action are fulfilled. In carrying out that process, the English Court is responsible for the management of the litigation, and for determining whether the allegation is established. The consequences of an issue estoppel may be felt in this latter process of litigation management and decision making.

Erroneous focus on "substantive effects"

44. The Judge at [27] emphasised the "substantive effects" of issue estoppel on the non-contractual obligation as explaining why issue estoppel falls within the ambit of Rome II ([CORE/4/64]). However, that reasoning assumes that, because the operation of an issue estoppel might affect the *final outcome* of the court's determination of a claim, the issue estoppel affects the *substance* of the claim's subject matter. There are two problems with such reasoning.

45. First, the argument is inconsistent with the English rules of private law. In applying English law principles of res judicata, the English Court in no sense changes the substance of German copyright law or affects the claimant's *entitlement* to relief under that law.

46. Secondly, even if one accepts that issue estoppel could affect the outcome of a case as a matter of reality, that does not lead to the conclusion that issue estoppel falls within the ambit

[4] Both rights may be in the hands of one party, as in this case, but equally the case may be that the defendant to the action wishes to assert the issue estoppel to prevent re-litigation of issues in the English Court by the claimant.

of Rome II. There are various manifestly procedural provisions that might similarly affect the outcome of a case but are not part of the law of the underlying obligation. For example, CPR r. 16.5(5) requires the court to treat as admitted any allegation on which a defendant fails to either deny or put the claimant to proof. Thus, CPR r. 16.5(5) might have a similar effect to an issue estoppel in the sense that if a court considered the allegation itself (rather than taking it as admitted), it might have arrived at a different conclusion. However, the fact that CPR r. 16.5(5) might affect the outcome of a case or the determination of an issue in this way, does not mean that the rule forms part of the law of the non-contractual obligation.

47. The Judge at [27] noted that rules which affect a court's decision-making process may still be characterised as part of the law of the non-contractual obligation under Article 15 of Rome II ([CORE/4/64]). The Judge gave the example of rules about how the court assesses damages, which relate to the court's decision-making process but fall within Article 15 of Rome II.

48. However, the Judge's analogy to rules about the assessment of damages is inapposite. The reason why the *lex causae* applies to rules relating to damages is that the obligation to pay damages is a secondary obligation generated by the breach of the primary non-contractual obligation. The source of the obligation to pay damages is the non-contractual obligation, such that the law of damages is inextricably linked to the law of the underlying non-contractual obligation. The same cannot be said of issue estoppel: the source of the substantive immunity is not the non-contractual obligation but rather the policy of the forum in giving effect to the finality of the prior judgment.

Erroneous reliance on authorities stating issue estoppel is substantive

49. The Judge relied on various authorities that describe issue estoppel as substantive in nature (at [11] – [13]) ([CORE/4/58-59]), including *Hulley* and *Zodiac.* However, while those authorities recognise the substantive nature of issue estoppel, they are not authorities that suggest that issue estoppel forms part of the law applicable to the obligation that is being asserted in the claim. Accordingly, they do not support the conclusion that issue estoppel is captured by Article 8 or Article 15 of Rome II.

50. In *Hulley*, the question before the Court of Appeal was whether the court could apply the doctrine of issue estoppel to the determination of Russia's state immunity under the State

Immunity Act 1978 (the "**SIA**"). The Dutch Supreme Court had previously decided that state immunity did not apply, and at first instance, the English Court held that the Dutch Court's decision gave rise to an issue estoppel on the question of state immunity. On appeal, Russia argued that issue estoppel could not apply for two reasons: (i) the SIA required the court to make a decision on state immunity, and the court therefore could not rely on issue estoppel as procedurally barring the consideration of state immunity, and (ii) issue estoppel was a public policy that was subsidiary to the public policy of state immunity.

51. Males LJ rejected Russia's argument, characterising issue estoppel as an "*enforceable substantive right*" within English law (at [34]). However, that characterisation of issue estoppel as "*substantive*" should be understood in light of Russia's submissions before the Court of Appeal. Males LJ was characterising issue estoppel as "*substantive*" in order to reject the submission that issue estoppel was merely a procedural bar or public policy consideration, concluding that there was "*no question of making a choice between competing public policies*" (at [67]).

52. Turning to *Zodiac*, in that case, Lord Sumption explained that res judicata is "*juridically very* different" from abuse of process. His Lordship drew that distinction on the basis that res judicata is a "*rule of substantive law*" while abuse of process is a concept "*that informs the court's procedural powers*" (at [25]). However, his Lordship was not suggesting that res judicata is substantive in the sense that it forms part of the law of the underlying obligation being asserted in a case.

53. Read in context, Lord Sumption was explaining why, in some cases, the court focuses on the doctrine of "abuse of process" instead of res judicata, despite both doctrines being directed towards the common objective of preventing abuse. His Lordship was specifically discussing *Johnson v Gore-Wood & Co* [2002] 2 AC 1 and explaining that, in that case, the parties could not rely on res judicata as they were not the same parties to the previous decision. As res judicata is a "substantive" immunity or right that one party has against another, the party cannot assert the res judicata against a third party. However, as against the third party, the court can still apply the abuse of process doctrine as it is part of the court's inherent procedural powers.

54. Nothing in that reasoning suggests that res judicata forms part of the law of the underlying obligation. Indeed, Lord Sumption's comment in the final sentence of [25] notes that res

judicata is a doctrine aimed at preventing the abuse of the court's process. Accordingly, contrary to the Judge's reliance on _Zodiac_, if anything, the case supports the view that res judicata is a matter for the law of the forum. It would be odd if, in applying a doctrine designed to prevent the abuse of the *English Court's* process, the English Court applied a foreign state's law.

55. It follows that neither _Hulley_ nor _Zodiac_ supports the view that issue estoppel is 'substantive' in the sense that it ought to lie with the *lex causae* for choice of law purposes, either under Rome II or at all. The court in each case was characterising issue estoppel as substantive for a purpose completely unconnected to choice of law principles.

Parallels with privilege

56. Finally, the court's approach to applying the *lex fori* to legal professional privilege shows that the characterisation of a right as substantive does not lead to the application of the *lex causae* as governing the availability of that right.

57. The courts have recognised on numerous occasions that legal professional privilege is not merely a rule of evidence or procedure but is rather a "*substantive right founded on an important public policy*": _R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax_ [2003] 1 AC 563 at 612 at [31]. However, despite its status as "substantive", there is "*well-settled*" authority supporting the treatment of privilege as part of the *lex fori*: _RBS Rights Issue Litigation_ [2016] EWHC 3161 (Ch) at [132].

58. In _RBS_, Hildyard J considered and rejected an argument that the application of the *lex fori* to legal professional privilege was obsolete because the privilege is now conceptualised as a "*fundamental human right, rather than an aspect of evidence"* (at [131]). In rejecting that argument, his Lordship explained that the question of whether privilege was a rule of evidence or a "substantial right" was unhelpful in determining the application of choice of law rules (at [174](1)). The court went on to explain that the application of the lex fori was justified because, *inter alia,* the law of privilege "*requires a balance to be struck as a matter of public policy in the forum in which it arises*" (at [174](2)).

59. To a similar effect in _Suppipat v Willkie Farr & Gallagher (UK) LLP_ [2022] EWHC 381 (Comm), HHJ Pelling QC rejected the application of Rome II to questions of legal professional privilege. In that case, the claimant had sought to argue that the question of

whether a document is confidential for the purposes of legal advice privilege should be governed by Rome II, as confidentiality is a non-contractual obligation (at [37]). The court rejected that argument, noting that it required applying Rome II "*without regard to the context in which the issue arises"* (at [41]). The issue before the court was whether documents were subject to privilege, which is a doctrine "*founded on public policy"* and therefore part of the *lex fori* (at [41] – [42]). Accordingly, it was considered unnecessary "*to consider Rome II at all. In each case where a privilege issue arises it should be necessary to refer only to the lex fori to resolve those issues*" (at [42]).[5]

60. It is submitted that the parallels between the law of professional privilege and the law of issue estoppel are instructive. Both doctrines involve a party being granted a substantive immunity (from inspection in the case of privilege and from re-litigation in the case of issue estoppel). In both cases, the substantive immunity has procedural consequences in terms of the evidence that a court will consider. However, in both cases, the substantive immunity is independent from the obligation that forms the subject matter of the claim in which the immunity is being asserted. The immunity arises from the "*public policy of the forum*" and is therefore a matter for the *lex fori.*

G. SCOPE OF ROME II AND QUESTIONS OF CHARACTERISATION

61. Even if the law of res judicata falls to be considered through the lens of Rome II, the Judge erred in concluding that issue estoppel forms part of the *lex causae* applicable to the underlying non-contractual claim. The Judge reasoned that because issue estoppel is a substantive doctrine in English law, it therefore falls within Articles 8 and 15 of Rome II. That heuristic fails to grapple with the real question: whether, for the autonomous purposes of Rome II, issue estoppel forms part of the law applicable to the non-contractual obligation sued on.

62. That question must be answered by giving Articles 1(3), 8 and 15 an autonomous meaning. In Actavis v Eli Lilly [2015] EWCA Civ 555, Floyd LJ explained that Article 1(3) concerns the "*vertical scope*" of Rome II, that domestic classifications are not determinative, and that the inquiry is whether the rule in question is so connected with the matters governed by the applicable law as to require treatment as part of the *lex causae*. That approach has now been

[5] His Lordship noted that even if Rome II was engaged, legal professional privilege was an issue of public policy to which Article 26 of Rome II applied (at [43]). Article 26 is considered further below.

approved and applied by the Court of Appeal in *Nicholls v Mapfre* [2024] EWCA Civ 718 at [34], where the court held that the relevant rules must be examined to determine whether they are so "intertwined" with matters undoubtedly governed by the applicable law as to require treatment as substantive rather than procedural.

63. Properly construed, Article 15 confirms the same point. Article 15 does not refer generally to all "substantive" matters. It identifies matters which are intrinsic or closely connected to the non-contractual obligation itself, including the basis and extent of liability, grounds of exemption, persons who may be liable, and the manner in which the obligation may be extinguished.

64. The Commission proposal[6] for Rome II gives examples of the kinds of liability factors in Article 15 (then Article 11) as follows:

> "*(a) "The conditions and extent of liability, including the determination of persons who are liable for acts performed by them"; the expression "conditions ... of liability" refers to intrinsic factors of liability. The following questions are particularly concerned: nature of liability (strict or fault-based); the definition of fault, including the question whether an omission can constitute a fault; the causal link between the event giving rise to the damage and the damage; the persons potentially liable; etc. "Extent of liability" refers to the limitations laid down by law on liability, including the maximum extent of that liability and the contribution to be made by each of the persons liable for the damage which is to be compensated for. The expression also includes division of liability between joint perpetrators.*
>
> *b) "The grounds for exemption from liability, any limitation of liability and any division of liability": these are extrinsic factors of liability. The grounds for release from liability include force majeure; necessity; third-party fault and fault by the victim. The concept also includes the inadmissibility of actions between spouses and the exclusion of the perpetrator's liability in relation to certain categories of persons.*"

65. As the Commission proposal explained, these are factors intimately connected with the constituent elements of liability and the redress available under the applicable law. Issue estoppel is of a different nature. It does not define the copyright right, the elements of infringement, the persons liable, or the remedies for breach. It regulates the effect to be given to a prior adjudication in later proceedings.

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6 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52003PC0427

66. It is true that Article 1(3) excludes matters of "evidence and procedure", but it does not follow that every matter which is not purely procedural must therefore fall within the *lex causae*. As explained in Dicey, Morris and Collins on the Conflict of Laws (Second Cumulative Supplement to the Sixteenth Edition, 2024), at [34-036]:

> "*In order to promote a uniform approach in determining the applicable substantive law, the court in Nicholls v Mapfre Espana Compania de Seguros y Reaseguros SA, above, expressed the view (at [33]) that the words "evidence" and "procedure" should be given an autonomous meaning and should be interpreted in a manner that was neither "very wide" nor "strict or narrow". This exercise in characterisation demanded that the potentially applicable rules of law be examined in order to determine whether their application would be so "intertwined" with matters that are undoubtedly governed by the law applicable to a non-contractual obligation under the Regulation as to require that they be treated as matters of substantive law, and not of procedure (at [34] and also at [59]–[60], applying this test to the question of the payment of interest under provisions concerning direct actions against insurers).*"

67. In other words, *Dicey* now expressly denounces a narrow interpretation and proposes that the article requires an autonomous meaning, one that is neither 'very wide' nor 'narrow'. The reason for this development is, as explained above, that the legislative history of Article 1(3) does not support the suggestion that Article 1(3) be given a narrow meaning.[7]

68. Construed properly, Article 1(3) and Article 15 are to work in tandem, accounting for the fact that the causes of action to which Rome II applies are described within the individual member states in widely varying language, precluding an exact description of the constituent elements of the various diverse causes of action addressed by the legislation.[8]

69. On that approach, issue estoppel is not intertwined with the law of copyright or any other non-contractual obligation in suit. It is not a doctrine peculiar to copyright. No international copyright convention purports to harmonise it. No copyright statute carries with it a rule of issue preclusion as part of the right itself. On the contrary, the English authorities show that issue estoppel operates across claims governed by many different systems of substantive law precisely because it is distinct from the content of those claims. The same conclusion follows

[7] The court at [30] suggested a concession was made in this regard by counsel for the Appellants ([CORE/4/65]), but counsel's comments were narrowly drawn. Counsel agreed that "the prevailing trend" is to give a very broad interpretation to the scope of Article 4 through to Article 15 and a narrow one to the concept of evidence and procedure but maintained that this did not tell the court "anything useful" in this application (T2/178 lines 17-22) ([SUPP/4/41]).

[8] Competition law, personal injury, environmental damage etc.

here: the fact that the underlying claim is one for copyright infringement under foreign law does not make issue estoppel part of that foreign law.

70. This is consistent with the CJEU case law at the time of the adoption of Rome II,[9] discussed in the following section below, which indicated that the law of res judicata was a matter for the courts of each member state.

71. The Judge's reliance on the "substantive effects" of issue estoppel in the context of Rome II was therefore misplaced. As noted above, the fact that a doctrine may affect the outcome of litigation does not make it part of the substantive law of the underlying claim. The effect of issue estoppel is that, in the later proceedings, a particular issue is no longer open to evidence and argument because it has already been conclusively determined. As Diplock LJ explained in *Mills v Cooper* [1967] 2 QB 459, and as Lord Hobhouse and Males LJ later confirmed in *AEGIS* and *Hulley* respectively, the doctrine operates by treating the prior decision as conclusive and thereby excluding contradictory evidence as irrelevant. That concerns what remains open in the later proceedings; it does not alter the content of the underlying copyright right or the legal ingredients of the cause of action.

72. The Judge relied on a passage in *Dicey, Morris and Collins on the Conflict of Laws* that indicated that the Rome II exception for rules of evidence and procedure was to be given a narrow meaning, at [23] of the Judgment ([CORE/4/63]). The passage quoted by the Judge, [34-036], states that the 'exception' for evidence and procedure "*should be interpreted narrowly as covering only matters, such as the constitution and powers of courts and the mode of trial, that are an integral and indispensable feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the lex causae.*"

73. In relying on this passage, the Judge fell into error. The paragraph of *Dicey* relied on by the Judge was cited in *KMG International NV v Chen* [2019] EWHC 2389 (Comm). However, the law has moved on (*Nicholls*) and so has *Dicey* (per the statement from the Second Supplement to the 16th edition referred to above). Following the guidance in *Actavis* at [131], approved and followed by the Court of Appeal in *Nicholls* at [34], cited by *Dicey* at [34-

[9] The picture has not changed since. See the consistency with which the principle is restated in Asturcom at [35–38]; Vueling at [91]; Amministrazione dell'Economia e delle Finanze v Fallimento Olimpiclub Srl (C-2/08) [2009] E.C.R. I-7501 at [22]-[24].

036], the Judge ought to have asked whether the law of copyright was so "intertwined" with the law of issue estoppel that the two ought to be dealt with together. It is submitted that this is the correct approach to Rome II, and it is not the approach taken in the Judgment.

74. The law of issue estoppel is not "intertwined" with the law of copyright any more than with the law governing any other cause of action. These two areas of law are not regulated by the same statutes or treaties. They are distinct and where they coincide, without any particular correlation, they operate independently.

75. Indeed, the fact that domestic rules of issue estoppel can operate in frictionless tandem with the application of foreign law is evident from the case law discussed above: the House of Lords in *Carl Zeiss* had no difficulty with the idea that the English law of issue estoppel could and should be applied prior to determining under East German law whether the Council of Gera had authority to act.

76. Properly characterised, the role of issue estoppel in the determination of the subsequent claim is that the effect of the issue estoppel is to limit what remains open to evidence and argument: *Mills v Cooper* per Diplock LJ at 468-469; *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* at [15]; and *Hulley* at [33]. That is best characterised as a procedural consequence of the rule: it concerns what the court will entertain by way of re-litigation, not the existence or content of the parties' substantive rights and obligations arising from the alleged infringement (or other wrong).[10] If the consequences of an issue estoppel are to be characterised for the purposes of Rome II at all, they ought to be regarded as falling within the "evidence and procedure" exclusion in Article 1(3) of Rome II.

77. In *Lucasfilm v Ainsworth* [2011] UKSC 39 the court found that under section 411 of the US Copyright Act registration of copyright was a pre-requisite to proceedings in the United States. However, the Supreme Court declined to impose that requirement in the context of the English Court's determination, on the basis it was "*purely procedural*", [108]. If section 411 of the US Copyright Act is insufficiently intertwined with the remainder of the US

[10] There is an analogous distinction drawn in *Actavis* at [135] between rules which are conditions of admissibility of actions, "*concerned with whether the court should hear a dispute about substance*", rather than rules "*concerned directly with the substance itself*".

Copyright Act to qualify as a part of the substantive copyright law of the United States, the same proposition applies *a fortiori* to the US doctrine of collateral estoppel.

78. The foreign law of copyright is not inseparable from the foreign law of issue estoppel; it is quite capable of independent travel. In argument below the Respondent protested that unless the foreign law of issue estoppel was imported as a fellow traveller alongside the foreign law of copyright, the English Court might reach a different conclusion than the foreign court would have done. That is indeed a hypothetical possibility, but that is true whenever the English Court applies foreign law. It is neither the aim nor the function of the English Court to replicate as closely as possible the methodology and reasoning of a foreign court so as to ensure an identical conclusion: *Wall v Mutuelle de Poitiers Assurances* [2014] 1 WLR 4263 at [15], [42] and [47]-[48].

79. Taking a simpler example than the present case, of res judicata arising on a prior English judgment on copyright infringement, the effect of the Judgment is that the English Court would need to hear the same claim again – the same witnesses and the same evidence – to deal with a further alleged infringement by an English company in a European jurisdiction which had no domestic doctrine of issue estoppel. The English Court would be forced to entertain re-litigation of all issues in the case including e.g. whether the defendant copied the claimant's work, with all the consequent duplication of court resources, contrary to its own public policy.

H. ROME II AS COMMUNITY LAW

80. Rome II as originally enacted was an instrument of Community law.[11] Its origins are set out in the Court of Appeal's judgment in *Actavis v Eli Lilly* [2015] EWCA Civ 555.

81. The legislative materials[12] show that Rome II was framed on the footing that matters outside the law applicable to the non-contractual obligation remained for the *lex fori*. The original proposal explained that no separate exclusion for evidence and procedure was required because Article 11 (now Article 15) already made clear that, subject to the specified matters, such rules were for the *lex fori*:

[11] Since incorporated into UK law by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52003PC0427

> "*The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 that, subject to the exceptions mentioned, these rules are matters for the lex fori. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation.*"

82. A later report on the Commission Proposal, referenced in *Actavis*, records the intention to include Article 1(3), as it now is, in the following terms:

> "*This amendment takes account of the universal principle of 'lex fori' within private international law that the law applicable to procedural questions, including questions of evidence, is not the law governing the substantive legal relationship ('lex causae'), but, rather, the procedural law of the forum.*"

83. Those materials are important in light of the state of Community law at the time Rome II was adopted. Shortly before its adoption, the CJEU confirmed in *Kapferer v Schlank & Schick GmbH* (C-234/04) [2006] 2 C.M.L.R. 19 at [20]-[22] that Community law did not require a national court to disapply domestic rules conferring finality on a decision. At the time *Kapferer* was decided, the Rome *Convention* (80/934/EEC) was already in force as regards contractual obligations. This fundamental community instrument governed community choice of law on contractual matters between its signature and the entry into force of the Rome I Regulation in 2008. The Rome Convention specifies in Article 1(h) that the specified rules shall not apply to evidence and procedure and contains a list of inclusive matters in Article 10, titled "*Scope of the applicable law*". The Rome Convention was the template for Rome II.

84. Against that background it is inherently unlikely that Rome II, enacted little more than a year after *Kapferer*, was intended by implication alone to oblige national courts to disapply their domestic rules of res judicata in the determination of claims governed by foreign law. Had such a departure from the pre-existing position been intended, it would be expected to find clear expression in the text, recitals or legislative history of Rome II.

85. That inference is reinforced by the structure and objectives of Rome II. Rome II sought to harmonise conflict rules for non-contractual obligations in order to improve predictability, certainty and the free movement of judgments: recital 6. Nothing in those objectives required the harmonisation or displacement of national rules of res judicata.

86. The same conclusion is supported by the principles of conferral and subsidiarity. Rome II was intended to harmonise conflict rules for non-contractual obligations only to the extent necessary to achieve its stated objectives: Rome II recital 38; Article 5 Treaty on European Union. An interpretation under which Rome II silently displaced national rules of res judicata would involve a significant intrusion into the procedural autonomy of Member States in an area which the CJEU had repeatedly treated as belonging to the national legal order. Clear language would be required before such an intention could be attributed to the legislature.

87. The same understanding appears in later CJEU authority. In subsequent cases such as <u>*Asturcom Telecomunicaciones SL v Rodriguez Noguiera*</u> (Case C-40/08) [2009] ECR I-9579 and <u>*Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v Vueling Airlines SA*</u> (C-370/17) and (C-37/18)*,* the CJEU continued to treat res judicata as a matter for the national legal order, subject to the ordinary principles of equivalence and effectiveness, rather than as a field harmonised by EU private international law.

88. Read together, the travaux and the CJEU authorities point in the same direction. At the time Rome II was enacted, EU law proceeded on the basis that res judicata was a matter for the national legal order, while Rome II itself was framed to harmonise only the law applicable to the non-contractual obligation. In those circumstances, the natural reading of Rome II is that it leaves the forum's law on finality and preclusion untouched.

89. That does not by itself answer every question of characterisation under Articles 1(3), 8 and 15. It does, however, provide powerful confirmation that the Judge's interpretation was wrong. Rome II should not be construed as requiring *sub silentio* an English Court to disregard its own law of res judicata when determining whether issues already conclusively determined may be reopened in proceedings before it.

I. ISSUE ESTOPPEL IS A MANDATORY OVERRIDING PROVISION OF ENGLISH LAW

90. The Appellants' primary position is that the law of the non-contractual obligation does not apply to issue estoppel under Rome II. However, even if Article 15 of Rome II does govern the law of issue estoppel, the court should continue to apply English rules of issue estoppel

pursuant to Article 16 (or, if necessary, Article 26) on the footing that issue estoppel forms an integral part of the public policy within the English forum.

Article 16

91. Article 16 provides that nothing in Rome II prevents the forum from applying its own overriding mandatory provisions. These are rules which the forum treats as crucial to the protection of its public interests and which therefore apply regardless of the law otherwise applicable to the non-contractual obligation: *KMG International* at [50](7).

92. Examples of laws that have been held to be (or capable of being) overriding mandatory provisions, include the following:

    92.1. A public policy of not awarding damages other than on a compensatory basis (e.g. exemplary or punitive damages of an excessive nature): see recital 32 to Rome II.

    92.2. Belgian rules protecting commercial agents in connection with the implementation of the Commercial Agents Directive: *Unamar v Navigation Maritime Bulgare* (C-184/12).

    92.3. A Portuguese rule fixing a special limitation period for claims arising out of road accidents (notwithstanding the specific inclusion of limitation periods within Article 15(h) of Rome II which would have pointed to Spanish law of limitation): *Agostinho da Silva Martins v Dekra Claims Services Portugal* (C-149/18).

93. It is well established that the English law rules concerned with issue estoppel, res judicata and abuse of process are fundamentally grounded in overlapping principles of public policy:[13] (1) the public interest in the finality of litigation (*interest reipublicae ut sit finis litium*);[14] and (2) the right of a party not to be vexed twice in the same cause (*nemo debet bis vexari pro una et eadem causa*; and related policies such as the rule against double jeopardy in criminal proceedings).[15]

[13] As to the difference between the two, see *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, per Lord Hoffmann observed, at 701.
[14] *The Ampthill Peerage* [1977] AC 547 per Lord Wilberforce at 569.
[15] *Johnson v Gore Wood & Co Ltd* [2002] 2 AC 1 at 31 per Lord Bingham of Cornhill and at 58-59 per Lord Millett.

94. The principle of finality has been held to be of "*fundamental public importance*": *AIC Ltd v FAAN* [2021] 1 WLR 1520 at [50] per Coulson LJ; cited with approval by the Supreme Court at [2022] 1 WLR 3223 at [31]. As Lord Sumption noted in *Zodiac*, the principle goes towards preventing the abuse of the court's process (at [25]).

95. In *The Kingdom of Spain and the London Steam-Ship Owners' Mutual Insurance Association Limited* [2024] EWCA Civ 1536, the court was asked to recognise a Spanish judgment under the Brussels I Regulation. The Court of Appeal held that recognition of the Spanish judgment should be refused under Article 34(1) of the Brussels I Regulation because it conflicted with the res judicata created by the prior award. Sir Geoffrey Vos MR said that failure to give effect to that res judicata would be "*manifestly contrary to English public policy*" (and see the reasons given from paragraph [161] of the judgment, which, although directed to arbitration, are equally applicable to a prior judgment of a competent court). The decision shows, in a closely analogous context, that English law treats the finality and preclusive effect of prior determinations as a matter of fundamental English public policy.

96. The English Courts' interest in ensuring that judicial resources are not expended on the abusive re-litigation of issues, thereby subjecting parties to repeated vexation, is fundamental to the proper administration of justice. It is an interest that ensures England has properly functioning courts that cannot be readily abused, which is integral to the proper functioning of the English legal system. It follows that issue estoppel, which is a feature of the principle of finality, is an overriding mandatory provision for the purposes of Article 16.

97. The Judge did not seem to take issue with the importance of issue estoppel as a matter of English public policy. Instead, at [35] the Judge reasoned that because issue estoppel must be pleaded by a party and is subject to certain exceptions, it cannot be a "*mandatory*" provision in English law ([CORE/4/66-67]). That reasoning is problematic for two reasons.

98. First, the fact that issue estoppel must be pleaded does not affect its status as an overriding mandatory provision. Rather, it reflects the fact that issue estoppel is a substantive immunity that one party can assert against another.

99. Secondly, the fact that there might be exceptions to the operation of a provision does not mean the operation is not an overriding mandatory provision. The Judge accepted at [34] that the question of whether a provision can be derogated from is not determinative of

whether it is an overriding mandatory provision ([CORE/4/66]). However, despite this, the Judge erroneously treated the "special circumstances" exception to issue estoppel recognised in *Arnold v National Westminster Bank plc* as conclusive.

100. In any event, the fact that the exceptions to issue estoppel are narrow confirms the mandatory nature of the rule rather than undermining it. The Judge's approach confuses mechanistic with mandatory. A rule may be mandatory without being absolute. The doctrine of issue estoppel forms part of a principled but flexible system of finality rules. A court has no general discretion to ignore a properly established estoppel, even though the law recognises narrow limits to its operation.

101. Moreover, the recognised exceptions to issue estoppel uphold rather than undermine the policy against abusive re-litigation - they cover scenarios in which re-litigation is no longer regarded as abusive. Thus, where genuinely new material has become available that could not with reasonable diligence have been adduced earlier, the rationale of vexatious re-litigation falls away. That does not weaken the mandatory character of the rule; it marks the boundary of its proper application.

Article 26

102. Alternatively, Article 26 of Rome II provides that "*The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.*" Accordingly, Article 26 permits the court, in an appropriate case, to refuse to apply foreign law insofar as its application would be manifestly incompatible with the forum's public policy of finality.

103. A useful example of the application of this rule, albeit obiter, is in the *Suppipat* case discussed above in the context of legal professional privilege, where HHJ Pelling QC noted that even if Rome II was engaged, legal professional privilege was an issue of public policy to which Article 26 of Rome II applied (at [43]).

104. In *The Kingdom of Spain* case, the court treated the operation of res judicata as falling within a similar exception found in Article 34(1) of the Brussels Regulation. Article 34(1) provides that "*the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed*". The Court of Appeal held that it would be manifestly contrary to English public policy to recognise a

Spanish judgment which conflicted with the res judicata created by a prior London arbitration award and the English judgments enforcing it.

105. Although that case concerned Article 34(1) of the Brussels regime rather than Article 26 of Rome II, the reasoning is closely analogous. Both provisions are expressions of the forum's *ordre public* exception. *The Kingdom of Spain* therefore supports the proposition that, where the application of otherwise applicable foreign law would require the English Court to disregard the preclusive effect which English law gives to a prior determination, Article 26 may be engaged. The same public policy of finality is in play. If English public policy is sufficiently strong to justify refusing recognition to a foreign judgment that cuts across res judicata, it is likewise capable, in an appropriate case, of justifying refusal to apply foreign law which would require the English Court to permit re-litigation of an issue already conclusively determined.

106. The Appellants accept that Article 26 sets a high threshold, and that not every difference between English rules of issue estoppel and the corresponding foreign law would suffice. But where the result of applying the foreign law would be that the English Court must disregard the final and preclusive effect of a prior judgment which English law recognises as conclusive, that would strike at a principle of fundamental importance in the forum's legal order. In such a case, Article 26 provides a further basis on which the court may refuse to apply the foreign law and instead give effect to the English rules of finality.

107. It follows that even if (which is not the Appellants' primary position in this appeal) issue estoppel were to fall within the scope of Rome II, it ought in any event to benefit from the exceptions provided by Articles 16 and 26.