APPEAL NO. CA-2026-001508

IN THE COURT OF APPEAL (CIVIL DIVISION)

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

Decision of Michael Tappin KC (sitting as a Deputy Judge of the High Court)
[2026] EWHC 1216 (Ch)

B E T W E E N :

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

(2) AVIATOR STUDIO LIMITED (formerly AVIGROUP LIMITED)
(a company incorporated in Malta with no. C110098)

(3) AVIATOR STUDIO HOLDINGS LIMITED
(a company incorporated in Malta with no. C111500)

Appellants (Claimants below)

and

(4) SPRIBE OÜ
(a company incorporated in Estonia)

Respondent (Defendant below)

and

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

(6) MR TEIMURAZ UGULAVA

Fifth and Sixth Parties

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT

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3 August 2026

BENET BRANDRETH KC
ANDREW SCOTT KC
CHRISTOPHER HALL

Instructed by Bird & Bird LLP

Introduction

1. This appeal is about whether the English law doctrine of issue estoppel applies to claims for infringement of foreign copyrights. Specifically, it asks whether the doctrine applies when an English Court is considering on such claims core liability issues as to whether the underlying foreign intellectual property rights exist and have been infringed.

2. The Judge concluded that the English law doctrine has no application to such claims, because Rome II requires the English Court to apply the relevant foreign law that governs such claims under the Regulation. The Respondent respectfully submits that the Judge was correct. In short: (i) Art 8(1) of Rome II requires the English Courts to apply to non-contractual obligations arising from allegations of infringement of copyright the law(s) of the place(s) for which protection is claimed (the *lex loci protectionis)*; (ii) the liability issues said by the Appellants to be the subject of estoppels fall squarely within Art 15, pursuant to which the English Court is bound to apply the *lex loci protectionis* to all such issues; and so (iii) the availability and extent of any principle whereby prior judgments (in this case, the Georgian Judgments) preclude a party from contesting those liability issues depends on whether that law provides for it. It is irrelevant whether the *lex fori* (here English law) so provides, because it does not apply to such issues under Rome II.

3. Pursuant to Art 1(3), Rome II does not apply to 'evidence and procedure'. Thus, if the *lex loci protectionis* contained rules on issue estoppel that fell within the autonomous concept of 'evidence and procedure' under Art 1(3), Rome II would disapply them and it would be open to the English Court to apply its own law on 'evidence and procedure' to that extent. But that possibility does not arise here, because the question under appeal is posed on the premise that the *lex loci protectionis* <u>does not have</u> a rule equivalent to the English law doctrine of issue estoppel. There is accordingly no rule of foreign law to engage Art 1(3), and no scope for the application of the English doctrine of issue estoppel

even if it were a matter of 'evidence and procedure' (which it in any case is not, being a doctrine of substantive law as the Judge also correctly held).

4. Thus, Rome II requires the English Court to apply the provisions of the *lex loci protectionis* under which the Appellants are required to prove each substantive element of their claim for copyright infringement on the balance of probabilities on the evidence. Even if such a requirement might otherwise be categorised as 'evidence and procedure' for the purpose of Art 1(3), that provision is expressly subject to Art 22 which requires application of rules on the burden of proof under the *lex loci protectionis* in any case.

5. What remains is to consider, by reference to Articles 16 and 26, whether the requirement under the *lex loci protectionis* to prove copyright infringement on the evidence to the requisite standard is so contrary to English public policy that the situation is a suitably exceptional one in which the otherwise-applicable law under Rome II should cede to the *lex fori*. The Judge refused to accept that it was, and he was again correct to do so.

6. The Appellants take a very different approach from the Judge and the Respondents. They begin with a platonic ideal of 'issue estoppel', proceed to offer an analysis of how that ideal is characterised under English law, and then look to Rome II to ask within which of its provisions (if any) this abstract form would fall. In so doing they start in the wrong place, for the question is not so abstract but is specific to the issues of foreign law on which the estoppel is said to bite. Those issues being matters of liability under foreign copyright law, it is respectfully clear beyond peradventure that they fall within Art 15 and so fall to be determined by the relevant foreign law under Art 8(1).

7. The Appellants' philosophical approach may explain their shifting stance: they jumped from labelling issue estoppel as a "rule of evidence" in their skeleton below, to characterising it as a "mode of decision making" in oral submissions. Now in one part of their appeal it is said to be an undefined aspect of procedure, but in another an

overriding mandatory provision of English law. In contrast, the Judge's approach, and the Respondent's argument, being anchored in the specific issues in dispute, finds a straightforward answer in the provisions of Rome II.

Procedural context

8. In addition to the Judge's overview at [1] {CORE/4/54}, it is important to draw out three matters of context that are perhaps not apparent from the judgment. In what follows, we refer sometimes to the Appellants collectively as 'Aviator', and to the Respondent as 'Spribe'.

9. **First**: The question on appeal arises not out of the nature of the Georgian judgment which gives rise to the alleged estoppel, but out of Aviator's choice of the English court as the forum in which to deploy that judgment to claims of foreign copyright infringement. The First Claimant's claim in Georgia was for a declaration of invalidity against Spribe's Georgian registered trade mark, which declaration was granted because (Aviator alleges) the Georgian trade mark infringed the First Claimant's Georgian copyright. Aviator then sued the Respondent in England for infringement of UK copyright, in respect of which claim Aviator relies on the English law doctrine of issue estoppel to preclude Spribe from defending issues which Aviator says were decided in Georgia. So far, none of this directly engages this appeal.

10. It is the next step that is critical: Aviator also sues in England for infringement of overseas copyright in all remaining ~180 countries of the Berne Convention, and in that context relies on the aforesaid English law estoppels to preclude Spribe from contesting the infringement allegations in all those countries by virtue of the Georgian trade mark decision. Those countries include many jurisdictions, such as the Czech Republic and France, which Aviator accept do not have a doctrine of issue estoppel (see §11 {CORE/2/22}); for simplicity we refer to these as the "**Civil Code countries**". Aviator

would be unable to rely on any estoppel had it brought its claim for infringement of Civil Code countries' copyright in the courts of those countries.

11. Accordingly, the first point of context, is that Aviator seeks to remove from Spribe the protections that the Civil Code countries would offer to a defendant faced by infringement allegations made in respect of copyrights that only exist under and to the extent that the laws of those countries provide. That is not the consequence of the Georgian source of the judgment; it is the consequence of Aviator's decision to choose England as the forum in which to seek to apply that Georgian judgment to foreign copyright infringement claims and in a way that seeks to give that judgment an effect which it does not have under the foreign laws that govern those claims. In short, the Appellant anticipates – on its argument – obtaining an advantage in its position on liability in all other countries where it alleges infringement simply as a result of bringing proceedings in England rather than, say, France.

12. **Second**: The issues which Aviator says Spribe is estopped from contesting are essential elements of the causes of action for foreign copyright infringement. The relevant pleading is at §58 of the Amended Particulars of Claim {CORE/7/96}. In summary:

    (a) §§58.1 to 58.7 allege Spribe is estopped from contesting the subsistence and ownership of the copyright in the works relied on;

    (b) §§58.8 to 58.10 and 58.13 allege Spribe is estopped from contesting the allegation that it copied the works; and

    (c) §§58.11 to 58.12 allege Spribe is estopped from contesting that what they are alleged to have copied was a substantial part of the works.

13. **Third**: Spribe's argument is not founded upon a general proposition that issue estoppel is a 'substantive rule of law'. That proposition addressed the way *Aviator* previously put

its case. It initially said issue estoppel was to be characterised as a rule of evidence falling within Art 1(3) of Rome II.[1] In fact, as Spribe pointed out, and the Judge accepted, the cases make clear that issue estoppel is *not* a rule of evidence: see e.g. [10], [12] and [13] {CORE/4/57}. Spribe's case, on the other hand, was (and remains) that regardless of the nature of the English law doctrine, the key point is that the particular issue estoppels said to arise here go directly to the substantive elements of the causes of action upon which Aviator relies and so to the very questions that are reserved by Rome II to the *lex loci protectionis*.

The Respondent's case on appeal

The scheme of Rome II

14. Recitals 6 and 16 of Rome II identify its purpose as follows (with our emphasis):

> (6) The proper functioning of the internal market creates a need, **in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments**, for the conflict-of-law rules in the Member States **to designate the same national law irrespective of the country of the court in which an action is brought**.

> (16) Uniform rules should **enhance the foreseeability of court decisions** and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. …

15. These recitals indicate that the purpose of Rome II is to promote legal certainty and the free movement of judgments. Harmonised choice of law rules achieve this by removing an incentive that would otherwise exist for a litigant to forum shop. The same concern underlies Recital 13, which provides that:

> (13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

[1] See e.g. paragraphs [47]-[48] of Aviator's skeleton argument before the judge

16. We also emphasise recitals (11) and (12):

> (11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.
>
> (12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

17. Thus a "non-contractual obligation" in Rome II is not narrowly confined to the specific provisions creating the cause of action. To the contrary, Recital 11 calls for an autonomous interpretation, which Recital 12 makes clear is intended to encompass questions of capacity to incur liability in tort. That enables legal certainty as to the law applicable, thereby reducing the value of competition between jurisdictions. As the authors of *Dicey, Morris and Collins* (16th edition) explain (at 34-011):

> The principal objectives of the Rome II Regulation were to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments. The Regulation's recitals emphasise the desire to create "uniform rules". These considerations favour an approach to interpretation which seeks to attribute autonomous meanings to terms which are likely to have different meanings in the laws of the various Member States. Recitals to the Regulation support this conclusion: thus, because the concept of "non-contractual obligation" varies from one Member State to another, it "should be understood as an autonomous concept;" similarly, "*culpa in contrahendo*" is, for the purposes of the Regulation, "an autonomous concept and should not necessarily be interpreted within the meaning of national law". The European Court and English courts have consistently supported this approach.

18. The aims are reflected in the Rome II provisions of Art 1, Chapter II (of which the relevant article in the case of copyright infringement is Art 8), and Art 15:

Chapter 1: SCOPE - Article 1: Scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

Chapter II: TORTS / DELICTS - Article 8: Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

Chapter V: Common Rules - 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;

…

19. Thus one begins by asking, *per* Art 1 and by reference to the provisions of Chapter II and Art 15, whether the situation involves a conflict of laws in non-contractual obligations in a civil or commercial matter, and if so, what is the applicable law governing that situation.

20. See to that effect the decision of the CJEU in *Florin Lazar v Allianz Spa* (C-350/14). That case concerned compensation for a road traffic accident (see [2]), and at [23] the court began by ascertaining the law applicable to the tort, by reference to Article 4(1) in Chapter II, explaining in terms in [28] that this is the necessary first step.

21. In that regard, the scope of what falls within the Regulation is broad. As *Dicey* explains:[2]

[2] In passages not modified in the Supplement

> 34-52 … In the Explanatory Memorandum accompanying its original proposal, the Commission expressed an intention to confer a "very wide function" on the designated law, in line with the general concern for certainty in the law. …
>
> 34-53 … As noted, Art.1(3) of the Regulation excludes from its scope matters of "evidence and procedure". In order not to prejudice the scheme of the Regulation, and having regard to the legislative intention to give Art.15 a "very wide function" expressed in non-exhaustive terms, the concepts of "evidence" and "procedure" should be interpreted narrowly with particular regard to the issues which Art.15 expressly requires to be determined by the law applicable under the Regulation. Article 15 should be given a correspondingly broad interpretation, with the consequence that the common law authorities which address the borderline between matters of substance and procedure can no longer be considered as a reliable guide as to the issues governed by the law applicable under the Regulation.

22. The 2nd supplement to the 16th edition of *Dicey* adds an additional citation to 34-053: the decision of Steyn J in *Andrew Fernando Bravo v Amerisur Resources Limited* [2023] EWHC 122 (KB): see [106] and the cases to which Steyn J refers in [105].

23. The Appellants fall into error by asking whether 'issue estoppel' falls into the exception in Art 1(3), *before* considering the relevant foreign law under Article 15. That has matters the wrong way round. Steyn J considered precisely this point in *Bravo*, recording the rival submissions at [76] (that the starting point is Art 1(3), not Art 15) and at [85] (that the focus is on Art 15), before determining at [102]-[106] that the correct approach is to begin with Art 15.

24. Thus it is only once it has been established that foreign law applies that one then turns to consider Art 1(3). That provides an exception in respect of *"evidence and procedure"*. If there is an aspect of the otherwise applicable law under Rome II (the *lex loci protectionis*) which, properly characterised under the autonomous interpretation of the Regulation, is a rule of 'evidence and procedure', then: (i) insofar as it concerns 'formal validity' (Article 21) or 'burden of proof' (Article 22), then that rule shall

continue to apply; otherwise (ii) Rome II does not require its application, with the consequence that that rule is disapplied from the Regulation's scheme, and Member States are left to this extent to apply their own choice of law rules and the law(s) they identify.

25. It follows that Article 1(3) must be viewed through the lens of the *foreign law*. A clear illustration of this is provided by the Court of Appeal's decision in *Nicholls v Mapfre España Cia de Seguros y Reaseguros SA* [2025] 1 WLR 660. There the claimants had suffered injuries arising out of accidents in Spain [1]. The claim for damages was brought in England, and the applicable law under Rome II was the Spanish Insurance Contract Act 50/1980 [2]. The question arose as to whether interest was payable at the higher Spanish law rate, or the lower English law rate (see [6]). Dingemans LJ (with whom Stuart Smith and Coulson LJJ agreed) discussed Rome II from [21], considered *Lazar* at [29] and the *obiter* decision in *Actavis* at [30], and at [33]-[34] said (with our emphasis):

> 33. In my judgment the court's task is to give Rome II an independent and uniform interpretation, having regard to the wording, the context in which it occurs, and the objectives pursued by the rules of which it is part. **The objectives of Rome II were to ensure a uniformity of approach to determining the applicable substantive law.**

He then explained that "evidence and procedure" should be given neither a 'very wide interpretation' nor a 'strict or narrow interpretation', and continued:

> They are words which are to be given an autonomous meaning under Rome II and interpreted in their context and **in the light of the objectives of Rome II**.
>
> 34. **In order to carry out the task of determining whether the interest payable under article 20(4) of Act 50/1980 is a matter of procedure, it is necessary to undertake a consideration of Act 50/1980. That is not to discover whether the provision is considered to be substantive law or a matter of procedure under either Spanish law or the laws of England and Wales**, because what is a matter of procedure for the purposes of article 1(3) of Rome II is an autonomous concept under Rome II. **The purpose of undertaking a consideration of Act 50/1980 is to determine whether the**

issue of interest under that provision is so "intertwined" with the assessment of damages, which is a matter of substantive law under Rome II, that interest payable under Act 50/1980 should be considered a matter of substantive law and not a matter of procedure.

26. Dingemans LJ applied that to the facts in [56]-[58]. Note also the short dicta of Stuart Smith LJ at [79], explaining that it was wrong to view the question *"through an overly-Anglo/Welsh prism"*. Contrary to Aviator's position on this case, the Court of Appeal did not begin with an abstract concept of 'interest' under English law and seek to characterise it as a matter of 'evidence and procedure' to which Art 1(3) applies.

Application of Rome II to this case

27. The effect of Rome II in this case is both clear and mandatory. The non-contractual obligations the subject of Aviator's claim arise out of allegations of infringement of copyright, and the specific issues in respect of which an estoppel is said to arise – subsistence, ownership and infringement – are governed by the law of the country of protection: that includes the laws of the Civil Code countries. Under those laws, there is no law of issue estoppel. There is, accordingly, no relevant law on which Art 1(3) can bite such that it might be disapplied were it a matter of 'evidence and procedure'.

28. The consequence is that, for each Civil Code country claim, Aviator bears the burden of proving each element of the tort of copyright infringement on the evidence. That is the ineluctable result of Art 8(1) and 15. To the extent that this *consequence* falls to be further analysed under Rome II from the perspective of Art 1(3) (and the Respondent's position is that it does not: see paragraph 27 above), then it is plainly a matter of 'burden of proof' under Art 22 to which the exception in Art 1(3) does not apply in any event.

The Appellants' argument

29. The central planks of the Appellants' case are:

(a) issue estoppel viewed through the lens of English law is a matter of procedure; and

(b) the law of issue estoppel is not "part of the law governing the underlying non-contractual obligation".

30. As for (a), for the reasons set out above, the focus for Art 1(3) is not on the characterisation of the abstract concept of 'issue estoppel' under English law, but rather upon the *lex loci protectionis*. That is so having regard to the language of the relevant provisions of Rome II (Arts 1(1), 8(1), and 15) and the authorities considering the correct approach to Art 1(3): see paragraphs 23 and 25 above. It is also necessary to achieve the purpose of Rome II (*"to designate the same national law irrespective of the country of the court in which an action is brought"* – Recital 6; *"to ensure a uniformity of approach to determining the applicable substantive law"* - Nicholls). The Appellants' approach would frustrate that purpose. It would alter the scope of the applicable law under Rome II – the *lex loci protectionis* - by reference to the question of which forum the dispute was brought in: disputes brought in countries recognising issue estoppel under their (non-applicable) local law would remove from the scope of applicable law under Rome II issues that countries not having a doctrine of issue estoppel would continue to include as part of the *lex loci protectionis*. That is the opposite of the purpose of Rome II.

31. As for (b), the argument proceeds from a false premise: Rome II is not confined either as a whole, or by specific reference to Art 15, to the "law governing the underlying non-contractual obligation", see §24 {CORE/2/24}.

32. Art 8 says that the law applicable to the infringement of intellectual property rights is the law of the country of protection. Art 8 is not, in terms, confined only to the "law governing the underlying non-contractual obligation".

33. Similarly and consistently, Art 15 expressly extends beyond the law of, say, copyright, to encompass broader questions of liability that arise in relation to the non-contractual

obligation in dispute. This is the point that the Judge correctly makes at [28] {CORE/4/64} and that we endorse. Art 15 sets out a list of matters to be governed by the law of the country of protection that is wide in scope: it is not just the "basis and extent of liability" but (emphasis added) "**any** limitation of liability and **any** division of liability". Even those matters are non-exhaustive: they are those which "in particular" shall be governed by the applicable law under Rome II. They are the very minimum. That is consistent with the intention behind Rome II, reflected in the Explanatory Memorandum cited in *Dicey* (see paragraph 21 above) and quoted at [22] {CORE/4/62}, to confer a "very wide function" on the designated law.

34. Art 22 also applies the law of the country of protection to "rules which raise presumptions of law or determine the burden of proof". Again, it is clear that the whole scheme of Rome II is to treat the foreign infringement issue, if it is being tried in another jurisdiction, as one that is being dealt with by reference to the law of the country of protection. This is explicit for intellectual property rights in Recital 26 that provides:

> (26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright…

35. Necessarily, we say, under Rome II, the law governing the non-contractual obligation also governs whether elements of that obligation may be treated as established or precluded.

36. This analysis anchors our response to the Appellants' argument. If the claim involves a non-contractual obligation then Rome II is engaged. It then becomes a question of analysing where the issues said to be estopped fall within that scheme, to which there is only one sustainable answer. The Appellants fail to engage with the question why those particular issues do *not* fall within the ambit of Art 15. They evade this question by

treating issue estoppel in the abstract and by confining, incorrectly, the scope of Rome II's application, and specifically Art 15, to the law of the underlying cause of action.

The Article 16 and 26 exceptions

37. It remains to ask whether either of the exceptions in Articles 16 or 26 apply. We have set out our position in summary above, and address the detail in Section I below.

Procedural consequences

38. Finally, the Appellants raise in §11 {CORE/2/22} the prospect that if the Judge was right, then the English Court will determine some of Aviator's copyright infringement claims on the evidence, and some on the estoppels. That conflict ought not however to arise, for if the breadth of Aviator's claim requires the court to hear evidence on the liability issues, that would frustrate the inherent purpose of the estoppel and so provide a 'special circumstance' under which any issue estoppel should not operate: see *Transworld Payment Solutions UK Limited v First Curaçao International Bank N.V.* [2025] EWHC 2480 (Ch) at [741].

C. The nature and effect of the rules of Res Judicata

39. We now address the substantive sections of the Appellants' skeleton.

40. The Appellants engage at §§12 to 19 {CORE/2/22} in an identification of the nature of *res judicata* under English law with which we do not fundamentally disagree. It is a substantive right that may be asserted by a party on the occasion of subsequent litigation. We do not suggest that issue estoppel, for example, is an element of any cause of action of copyright infringement. However, that does not mean that where issue estoppel is raised in the context of such a claim it is not serving to govern issues in relation to that claim. To the contrary, its whole purpose is to do so. Accordingly, the distinction that the

Appellant says at §19 {CORE/2/23} is "central to this appeal" fails to engage with the reasoning in the Judgment. It fails to explain why Art 15 does not bite.

41. The recent decision of the Supreme Court in *Skatteforvaltningen (The Danish Customs and Tax Administration) (Appellant) v MCML Ltd* [2026] 3 WLR 219 serves to emphasise the nature of issue estoppel as one that falls within the ambit of Art 15 precisely because it serves to govern the basis of liability and the grounds for exemption from liability. Indeed, that is its purpose. At §§38 {CORE/2/28} and 46 {CORE/2/29} (with emphasis added):

> 38. **Issue estoppel may have the effect of restricting or denying a litigant's access to court to vindicate what is otherwise a good claim or of preventing a litigant from raising what is otherwise a good defence to a claim against them. When it applies, it involves a serious interference with the ordinary entitlement of litigants to present their claims and to defend themselves according to a proper understanding of their legal rights. That is a powerful effect.** Conscious of this, and of the availability of and ground covered by the doctrine of abuse of process as a flexible mechanism to accommodate the private and public interests involved in the conduct of successive rounds of litigation, the courts have been astute to ensure that issue estoppel is kept within the narrow limits which are appropriate for a doctrine having such an effect.
>
> …
>
> 46.The critical point made by Dixon J is that an issue estoppel has a very narrow focus, **being concerned with the facts that are fundamental or ultimate** (in the sense that they necessarily had to be established to make good the cause of action being alleged or a defence put forward) and the legal quality of those particular facts….

D. Res Judicata arising from a foreign judgment.

42. At §§20 to 21 {CORE/2/23} the Appellants make two points. The first is that issue estoppel may apply to foreign judgments. That is uncontroversial. The second is that for foreign judgments issue estoppel "is a consequence of the recognition by the English Courts of a foreign judgment". They cite *Gol Linhas* in this context. If all that is meant is

that no issue estoppel will be available unless that foreign judgment is recognised by the English Courts, we do not disagree. If, however, the suggestion is that issue estoppel is given effect *because* that is what it means to recognise a foreign judgment then we say that goes too far and is not supported by the cited passage. Neither the first nor second point, however, has any bearing on the appeal. As we indicate above, it is not the source of the judgment but its deployment to displace the *lex loci protectionis* that creates the debate.

E. The authorities recognise that issue estoppel is governed by the lex fori

43. The short answer to most of this section of the Appellants' skeleton is that provided by *Dicey* in the passage at 34-053 cited in paragraph 21 above: common law authorities are no longer a reliable guide as to the issues raised by Rome II. One does not look to how issue estoppel is treated as a matter of English law, but instead to the *lex loci protectionis*.

44. In any event, it is not controversial that private international law has reserved to the *lex fori* some matters even when dealing with claims governed by foreign law: e.g. evidence and procedure. However, at §23 {CORE/2/24} the Appellants say that *"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"*.

    The Appellants cite *Gol Linhas* at [36] as an example. That citation is inapposite. In that paragraph, all the Privy Council does is recite the elements required for a foreign judgment to generate an issue estoppel. It does not touch on the proposition quoted.

45. This leads into the straw-man proposition found at §24 {CORE/2/24}, and developed through §25 {CORE/2/25}, namely that issue estoppel, as an abstract concept, is not part of the law governing the underlying claim, so the issues said to be estopped do not fall within Art 15. We have addressed these points above.

46. Reliance is placed in §26 {CORE/2/25} on the decision in *Carl Zeiss*. That decision concerns whether the English court should recognise an issue estoppel as arising from a foreign judgment. It does not touch on the question in this case, and the Judge so held [18]{CORE/4/60}. The Judge also makes the points that Rome II was not extant at the time of *Carl Zeiss* (a point the Appellants do not address) and that the perception at the time may have been that issue estoppel was a rule of evidence, which is no longer the case. To this latter point, at §28 {CORE/2/25}, the Appellants say that the statement to that effect is found in the judgment of Lord Guest, not Lord Reid. But it does not follow that this was not a common perception; indeed were it not, there would have been no need for subsequent cases to clarify the position.

47. Of greater significance to this appeal are the observations of Lord Reid (at p917C-E) and Lord Upjohn (at p947C-E) urging the need for caution before settling the limits of issue estoppel. That sentiment, emphasised by reference to those passages, is repeated by the Supreme Court in *Skatteforvaltningen* at [49].

48. The Sennar, cited at §29 {CORE/2/26}, also pre-dates Rome II. It again sheds no light on this appeal.

49. The *PJSC Mints* case post-dates Rome II but did not raise any question concerning non-contractual obligations and involved no discussion of the Regulation. The issue was whether a foreign decision (in this case a foreign arbitration award) could found an issue estoppel in English proceedings as against privies to the decision. The context was an application for permission to amend to plead the estoppel. Permission was refused. *Mints* does not therefore engage the issue that arises under this appeal; a point made by the Judge at [20] {CORE/4/61}. What is said about *Mints* at §32 {CORE/2/26} is that Foxton J was concerned with a case being heard in the English courts but applying Russian law as the *lex causae*.The implication is that, had the claimant been permitted to plead an estoppel, and successfully proven it at trial, Foxton J would (or ought to) have simply

applied the effect of that estoppel to the substantive Russian law; the Appellants then speculate at §33 {CORE/2/26} as to what Foxton J's attitude might have been to Rome II. None of this assists this Court.

F. Whether issue estoppel is a substantive right is not determinative

50. The Appellants' skeleton at §35 {CORE/2/27} is revealing of the conceptual error in their appeal. They now say, rather than ask whether the English law of issue estoppel is a "substantive right", instead the correct question is whether it "forms part of the law governing the non-contractual obligation sued on." Neither question leads to a determinative answer, because their focus is on English law rather than on the law of the country of protection.

51. The Judgment picks up on the substantive nature of issue estoppel because it was relevant to the way the argument was put by the Appellants as to why issue estoppel fell within Art 1(3). But the Judgment does not treat the substantive nature of issue estoppel as determinative. Rather the Judgment concludes, correctly, in [31] {CORE/4/65}, that the question concerns the application of the law of the country for which protection is claimed. For this reason, the criticisms made at §§49 to 55 {CORE/2/30} are misplaced. They seek to criticise the Judge for something he did not do.

52. The Judge's conclusion follows from function. Where the issue said to be precluded is an ingredient of liability, Rome II requires the *lex loci protectionis* to apply to it. A rule which determines that e.g. copying may not be disputed is an integral part of the law governing the basis and extent of liability for copyright infringement within Article 15(a), and may also bear upon the grounds on which liability is excluded or the way in which the obligation may no longer be pursued. The Judge so held in clear terms at [29] {CORE/4/65}. The Respondent adopts that reasoning. It is artificial to sever the rule by which the court decides whether an element of liability is open to contest from the law which governs liability itself. The fact that the rule is triggered by a prior adjudication

does not deprive it of its operative role in the determination of the later claim.

53. As to the point about privilege in §§56 to 60 {CORE/2/32}, Rome II provides the answer. Consider a claim to which Rome II applies such that the relevant law is the *lex loci protectionis*. Any rule of that law requiring documents to be disclosed for (or withheld from) use in litigation, would surely fall within Art 1(3) and so be disapplied. It would be no different from the French rules on expert evidence that were held to fall within Art 1(3) by this Court in *Wall v Mutuelle De Poitiers Assurance* [2014] 1 WLR 4263. There being no harmonised choice of law rule that applies in such cases under Rome II, it would fall to the English Court to apply its own rules to determine the applicable law(s).

54. *Suppipat v Wilkie Farr & Gallagher* provides an example of the converse position where Rome II does not apply. The underlying action between Mr Suppipat and the Siam Commercial Bank concerned a conspiracy to defraud [12], but the *application* before the court was to prevent the use in that action of certain documents which had been disclosed overseas. The *claim* before the court was thus founded in privilege [41], to which Rome II did not apply at all [42]. *Suppipat* does not address the effect of Art 1(3), and is of no assistance here. Similarly, *RBS* was not a case to which Rome II applied and the judgment in that case did not consider the Regulation at all.

55. Aviator does not here make a 'claim' to issue estoppel; its claims are for copyright infringement, so Rome II applies. It does not assist the Appellants to point to an example of a different substantive right that was embodied in a claim to which Rome II did not apply. This is why the attempted analogy with the law of privilege fails.

G. Scope of Rome II and questions of Characterisation

56. In §61 {CORE/2/33} the Appellants contend that, if issue estoppel must be characterised at all for Rome II purposes, the correct question to ask is whether it forms part of the law

applicable to the non-contractual obligation sued on. Again, that fails to appreciate the relevant law under Rome II is the *lex loci protectionis*, and the relevant question is whether there is basis for excluding a provision of *that foreign law*.

57. If, however, it were right simply to ask whether issue estoppel falls within Art 1(3), the Appellants suggest that question is answered by reference to the effect of an estoppel, which they say is to render a particular issue no longer open to evidence and argument §§71-79 {CORE/2/36}, especially §76 {CORE/2/37}.

58. The Judge rejected that submission, correctly, because the exclusion for evidence and procedure under Art 1(3) must be read in the context of the *"very wide function"* assigned to the applicable law by Rome II [22]-[23] {CORE/4/62}; [30] {CORE/4/65}. He further held that issue estoppel comes nowhere near being an integral and indispensable feature of the forum's legal framework such that it could not satisfactorily be replaced by corresponding rules of the *lex causae* [30] {CORE/4/65}. That decision is correct: a rule of preclusive effect is not merely a rule about the mode of trial or the presentation of evidence. It is a rule that dictates the legal consequence of a prior adjudication for the determination of the later issue. In that respect, it is closer to an irrebuttable legal consequence affecting liability than to a procedural mechanism of the forum.

59. The Judge noted at [26] to [29] {CORE/4/64} that the removal of an issue from consideration has consequences as to the evidence that remains relevant, but that this does not alter the nature of the issue estoppel as being (to use the words of Dingemans LJ) "intertwined" with the substantive question of liability. Indeed, as it is put at §76 {CORE/2/37}, what the cases recognise is that there may be "procedural consequences" to the rule but that does not mean that the rule itself is a rule of evidence or procedure.

60. In this regard, the Judge rightly drew support from Article 22, which expressly brings within the applicable law rules that raise presumptions of law or determine the burden of proof. Although issue estoppel is not to be equated mechanically with a presumption, the

Judge was entitled to regard the analogy as reinforcing the conclusion that Rome II does not reserve all rules affecting proof or findings to the forum [30] {CORE/4/65}.

H. Rome II as community law

61. At §81 {CORE/2/38} it is asserted that Rome II recognised that everything outside the law applicable to the non-contractual obligation remained for the *lex fori*. That assertion is not supported by the discussion that follows in the Appellants' Skeleton. To the contrary, that discussion shows that Rome II did not, in final form, intend to leave everything not covered by Art 15 to be treated as falling within Art 1(3). The leap from this analysis to, at §84 {CORE/2/39}, the proposition that *res judicata* was to be dealt with under Rome II as a matter of domestic law of the forum is completely unexplained. Again, it does not assist to show that *res judicata* is a creature of the local law. The question is, *which* local law, the *lex fori* or the *lex loci protectionis*? That question must be answered, at least for issue estoppel, by looking at the issue said to be estopped.

I. Rome II Exceptions

62. Arts 16 and 26 concern the disapplication of the otherwise applicable law under Rome II. Art 16 does so in respect of mandatory provisions of the *lex fori* that apply irrespective of the law otherwise applicable to the non-contractual obligation. Art 26 does so where the *lex loci protectionis* is "manifestly incompatible with the public policy (*ordre public*) of the forum. These Articles address exceptional situations. They are a necessary safeguard given the universal application of Rome II throughout the world: see Article 3. But, given that the nature and effect of these exceptions contradict the purpose of the Regulation, they must be applied with caution.

63. Their exceptional nature is made clear in Recital (32):

> (32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. …

64. See also *Dicey* at [34-083].

65. **As to Art 16**, the test for whether a provision falls within the exception was identified in *KMG International NV v Chen* [2020] Bus LR 133 at [50(7)]. Namely, is it:

> "a provision the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation to the extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation"

66. The authors of *Dicey* state in respect of Article 16:

> …the category of "overriding mandatory provisions" is to be strictly interpreted, requiring not only that the provision of law in question be one which applies to a claim based on a non-contractual obligation regardless of its governing law, but also that it appears, on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which the provision was adopted, that it serves an interest judged to be essential by the State concerned. [34-084]

67. Art 16 was recently considered by the CJEU in Case C-86/23 - *HUK-COBURG-Allgemeine Versicherung AG*. The Court emphasised the restrictive interpretation to be given to the exception at [29] to [32], and stated as follows (emphasis added):

> 31 In addition, the objective pursued by the Rome II Regulation consists, inter alia, as is apparent from its recitals 6, 14 and 16, in **ensuring certainty as to the law applicable irrespective of the country in which the action is brought**, improving the **foreseeability** of court decisions and ensuring a reasonable balance between the interests of the person claimed to be liable and those of the person who has sustained damage [citation omitted]. Accordingly, **a broad interpretation of Article 16 of the Rome II Regulation would run counter to that objective.**
>
> 32 Second, it is apparent from the wording of Article 16 that the derogation that it lays down applies where the provisions of the law of the forum 'are mandatory'.

68. It continued that Art 16 is intended to engage with laws that, "are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable" [38], which laws should be "absolutely necessary in order to protect the essential interest concerned in the particular case" [42]. In that context, laws directed at individuals' interests would only fall within Art 16 if the court's analysis "shows clearly that the protection of the individual interests of a category of persons, at which those national provisions are aimed, corresponds to an essential public interest whose safeguarding those provisions ensure" [46].

69. **<u>As to Art 26</u>**, the Deputy Judge said in [56] of *<u>KMG</u>* (with our emphasis):

> 56 … The test under this article differs from that under article 16. Under article 16 the focus is on the mandatory nature of the English rule. Under this article, **the focus is on the effect of applying the rule of foreign law**, and whether the application of that law would be contrary to English public policy in the sense identified in the cases set out above.

70. In reaching that conclusion he approved the following passage (at [54(2)]) to the effect that recourse to public policy is envisaged:

> "only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order."

71. To which can be added the following proposition in *<u>Dicey</u>*:

> A difference (even a significant difference) between the applicable foreign law and English law will clearly not be sufficient in and of itself to invoke the public policy exception. [34-086]

72. Thus Article 16 looks to mandatory provisions in the law of the forum, whereas Article

26 looks to the effect of the law of the country of protection. See Dicey at [34-087]-[34-088] for illustrations as to how these two provisions may operate in practice.

The exceptions on the facts of this appeal

73. **Art 16**: Issue estoppel is not a mandatory provision of English law. It is a substantive right which a party can choose to assert or not. The Appellants do not grapple with this point. §98 {CORE/2/42} appears to treat the argument as one of pleading. It is not. The point is that issue estoppel is a right that the party benefiting from it has the option to assert. A right exercisable by an individual at their discretion cannot be characterised as one that engages with the fundamental public interest such that it should displace the default position of applying the law of the place of protection.

74. And even if, as here, a party chooses to advance a plea of issue estoppel, the doctrine provides for special circumstances in which justice demands that effect is not given to it: see e.g. Lord Keith in *Arnold v Natwest* at 108E – 109B, contrasting issue estoppel with the absolute nature of cause of action estoppel. See also the Supreme Court in *Skatteforvaltningen* at [49]. A rule that must be asserted by a party in order for it to apply, and that will not apply if it does injustice, cannot be characterised as mandatory in the sense that its application is crucial to safeguarding public interests.

75. As to the argument concerning policy considerations at §§93 to 94, {CORE/2/41} the Appellants would need to show that issue estoppel under English law is of such a nature that its application must prevail over the underlying principle that the law of the country of protection is to be applied. The Appellants cannot show that: see paragraphs 73-74 above.

76. At §92 {CORE/2/41} the Appellants give examples of matters that have been held to be mandatory. But none is analogous to issue estoppel or undermines the points about it made above.

77. **<u>Art 26</u>**: The test requires a focus on the *effect* of applying the Civil Code country law. Here, the effect is that Aviator must prove each element of its claims of copyright infringement on the evidence. That effect does not *infringe* a fundamental principle of English law. To the contrary, it is how English law ordinarily functions.

78. And indeed, the application of the English doctrine of issue estoppel may, in special circumstances as discussed above, lead in any event to the estoppel not operating. Thus the effect of applying the Civil Code country law coincides precisely with at least one possible outcome of the application of the doctrine of issue estoppel. Such an outcome is the antithesis of a *'manifest breach of a rule of law regarded as essential*'.

79. As for *The Kingdom of Spain v The London Steam-Ship Owners' Mutual Insurance Association Limited* [2024] EWCA Civ 1536, the judgment makes clear at [160] that the issue was whether it would constitute a manifest breach of *English law* to fail to recognise a binding arbitration award *in England*. That decision does not assist with the question of whether applying e.g. Czech law to a claim for infringement of Czech copyright infringes a fundamental principle of English law.

3 August 2026