



Neutral Citation Number: [2026] EWCA Civ 1224

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 October 2026

Before :

LADY JUSTICE KING
LORD JUSTICE ARNOLD
and
LORD JUSTICE MILES

Between :

(1) AVIATOR LLC
(2) AVIATOR STUDIO LIMITED
(3) AVIATOR STUDIO HOLDING LIMITED
- and -
SPRIBE OÜ

Claimants/
Appellants

Defendant/
Respondent

Thomas Raphael KC, Sam O’Leary and Edward Cronan (instructed by **Allen Overy**
Shearman Sterling LLP) for the **Appellants**
Benet Brandreth KC, Andrew Scott KC and Christopher Hall (instructed by **Bird & Bird**
LLP) for the **Respondent**

Hearing date : 22 September 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 2 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

1. The issue on this appeal is what law applies to a plea of *res judicata*, or more specifically issue estoppel, based on a foreign judgment in a case concerning claims for copyright infringement allegedly committed in numerous territories. The Claimants and the Fifth Party (collectively “Aviator”) contend that English law applies as the *lex fori* (the law of the forum). The Defendant (“Spribe”) contends that the law applicable to each claim for copyright infringement, the *lex loci protectionis* (the law of the country in respect of which protection is claimed), applies by virtue of European Parliament and Regulation 864/2007/EC of 11 July 2007 on the law applicable to non-contractual obligations (“the Rome II Regulation”). Subject to minor amendments made by regulation 11 of the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/234), the Rome II Regulation is assimilated law.
2. Michael Tappin KC sitting as a Deputy High Court Judge (now Tappin J) held that Spribe was correct for the reasons given in his judgment dated 22 May 2026 [2026] EWHC 1216 (Ch). Aviator appeal with permission granted by the judge. On the appeal this Court has had the benefit of a wider range of arguments, and citation of authorities, than the judge did. As a result, I have come to the opposite conclusion to the judge for the reasons explained below.

Background

3. The First Claimant and the Fifth Party are companies incorporated in Georgia, and the Sixth Party is a citizen of Georgia. The Second and Third Claimants are companies incorporated in Malta. Spribe is a company incorporated in Estonia.
4. This case concerns “crash games”. A crash game is an online gambling game where players place bets on the outcome of a rapidly increasing multiplier. The goal is to cash out before the multiplier “crashes” down, which can happen at any random moment. The longer the player waits, the higher the potential reward; but if the player waits too long and the game “crashes”, the player will lose their bet.
5. In January 2019 a company associated with Aviator launched a crash game in Georgia under the logo reproduced below (“the Aviator Image”).



6. The software for the game was created by Spribe. The Aviator Image was created, Aviator allege, pursuant to a commission from another company associated with Aviator.

7. In June 2019, a third-party design agency, Bambuk Design Studio, produced the artworks reproduced below.

The “Spribe Aviator Image”	The “Spribe Aeroplane Device”
	

8. From December 2019, Spribe authorised distribution of its own crash game (“the Spribe Crash Game”) outside Georgia, including in the United Kingdom from February 2020, using the Spribe Aviator Image, the Spribe Aeroplane Device and the sign reproduced below.



The claims

9. Aviator assert subsistence and ownership of copyright in the Aviator Image, and also in the image of the aeroplane contained within it (“the Aeroplane Device”). Spribe does not admit subsistence and denies ownership of copyright by Aviator.
10. Aviator contend that the Spribe Aviator Image and the Spribe Aeroplane Device were copied from the Aviator Image and/or the Aeroplane Device. Spribe contends that they were independently designed.
11. Aviator contend that operation of the Spribe Crash Game in the UK amounts to infringement of the UK copyright in the Aviator Image and the Aeroplane Device. That is denied by Spribe.
12. Aviator also pursue claims for infringement or threatened infringement of the copyrights in the Aviator Image and the Aeroplane Device in Gibraltar (to which the UK Copyright, Designs and Patents Act 1988 has been extended) and in all countries other than Georgia which are party to the Berne Convention for the Protection of

Literary and Artistic Works. Spribe has accepted the English courts' jurisdiction over these claims.

13. Spribe has registered UK trade marks comprising the Spribe Aviator Image and the Spribe Aeroplane Device. Aviator contend that those trade marks are invalid because their use would amount to copyright infringement, and because they were applied for in bad faith.

Counterclaims

14. Spribe counterclaims for trade mark infringement and passing off in respect of Aviator's prospective launch of their own Aviator-branded crash game in the UK ("the Aviator Crash Game"). The passing off claim relies on alleged goodwill in the Aviator name, the Spribe Aviator Image and the Spribe Aeroplane Device, and also the gameplay mechanics of the Spribe Crash Game. Spribe alleges that the Sixth Party is jointly liable with Aviator. On the basis of these counterclaims Spribe obtained an interim injunction restraining Aviator from launching their game in the UK pending trial.
15. By way of defence to the claim in passing off Aviator rely on the doctrine of *ex turpi causa*, alleging that Spribe is not entitled to rely on such goodwill as it has established in the UK, on the basis that the underlying trade was conducted (i) in infringement of copyright, and (ii) without the appropriate licence from the UK Gambling Commission.
16. Spribe also has a counterclaim for copyright infringement in respect of certain in-game graphics in the Aviator Crash Game and certain text on Aviator's website.

Aviator's plea of issue estoppel

17. The First Claimant and Spribe were parties to related proceedings in Georgia, in which Aviator successfully challenged the validity of a Georgian trade mark registered by Spribe on the grounds that its use would infringe Aviator's copyrights in the Aviator Image and the Aeroplane Device. Those proceedings culminated in an unsuccessful appeal by Spribe to the Supreme Court of Georgia, which handed down a ruling on 20 May 2025 and a decision on 26 March 2026. Aviator say that issue estoppels arise from the Georgian proceedings which preclude the re-litigation of some or all of the pleaded issues as to subsistence and ownership of copyright in the Aviator Image and the Aeroplane Device and as to copying of a substantial part thereof. Spribe disputes this.

The law applicable to Aviator's claims for copyright infringement countries other than the UK

18. It is common ground that, by virtue of Article 8(1) of the Rome II Regulation (set out below), the law applicable to each of Aviator's claims for copyright infringement in respect of countries outside the UK is the law of the country in question. As Aviator put it in their skeleton argument:

"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."

19. Aviator nevertheless rely upon the presumption that foreign law is the same as English law. Although Spribe previously denied that there was any proper basis for presuming that all of the relevant foreign copyright laws are the same as UK copyright law, it has recently agreed to the presumption being applied. (Absent that agreement, it would have been necessary for the court at some point to consider a number of authorities on the point which do not appear to have been drawn to the court's attention in *Hasbro Consumer Products Licensing Ltd v Công Ty TNHH Đầu Tư Công Nghệ Và Dịch Vụ Sconnect Việt Nam* [2026] EWHC 1546 (Ch).)

Issue estoppel in English law

20. There is little, if any, dispute between the parties as to the doctrine of issue estoppel (known in some other systems of law as issue preclusion or collateral estoppel) in English law.
21. In English law, *res judicata* in its strict sense refers to two doctrines, cause of action estoppel and issue estoppel, collectively referred as estoppel *per rem judicatam*. 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. Cause of action estoppel is absolute, whereas issue estoppel is subject to an exception for special circumstances where it would cause injustice. See *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [20]-[25] (Lord Sumption).
22. As Lord Sumption put it in *Virgin v Zodiac* at [25], “*res judicata* is a rule of substantive law”. This may be contrasted with the abuse of process doctrine which originated in *Henderson v Henderson* (1843) 3 Hare 100, which is “a concept which informs the exercise of the court's procedural powers”.
23. Thus issue estoppel recognises and protects a private law right which a party can enforce by pleading the issue estoppel in the subsequent proceedings. This is a species of enforcement of the rights given by the prior judgment (or arbitral award): see *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041 at [15] (Lord Hobhouse).
24. The court prevents re-litigation of the issue by treating the previous decision as conclusive of the issue. That means that the estopped party is prevented from adducing evidence to contradict the previous court's decision, because such evidence is irrelevant: see *Hulley Enterprises Ltd v Russian Federation* [2025] EWCA Civ 108, [2026] KB 1 at [55]-[56] (Males LJ).
25. The rules of *res judicata* apply to foreign judgments: *Virgin v Zodiac* at [17]. In order for an issue estoppel to arise from a foreign judgment, three requirements must be satisfied. 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 (or their privies). Third, the issue decided by the foreign court must be the same as the issue in the domestic proceedings: see *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21,

[2023] Bus LR 1305 at [36] (Lord Hamblen and Lord Leggatt). The first of these requirements will involve consideration of the relevant foreign law, but that does not detract from the proposition that the requirements are rules of English law.

26. As Lord Sumption explained in *Virgin v Zodiac*, the doctrines of cause action estoppel and issue estoppel form part of the principles of *res judicata* understood in a broader sense, which also include *Henderson v Henderson* abuse of process and merger. Although at common law merger did not apply to foreign judgments, it has been extended to foreign judgments by section 34 of the Civil Jurisdiction and Judgments Act 1982.

Issue estoppel in other legal systems

27. Spribe asserts that the doctrine of issue estoppel is unknown to some systems of law. Aviator do not accept this proposition, but it is common ground that the applicable principles in other legal systems may well differ materially from those applied by English law.

English private international law with respect to issue estoppels alleged to arise from foreign judgments

28. Spribe does not dispute that, prior to the Rome II Regulation, English private international law considered that the law applicable to the effect of a foreign judgment, and in particular the question whether it gave rise to an issue estoppel, was the *lex fori*: see *Castrique v Imrie* (1869–70) LR 4 HL 414 at 427 (Blackburn J), *Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)* [1967] 1 AC 853 at 919C (Lord Reid), *The Sennar (No 2)* [1985] 1 WLR 490 at 493G-494A (Lord Diplock) and 499A-C (Lord Brandon), *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 457D-E (Parker LJ delivering the judgment of this Court), *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm), [2022] 1 WLR 3099 at [23] (Foxton J, as he then was) and *Hulley v Russia* at [56], [65] and [71].
29. The issue on this appeal is whether the Rome II Regulation requires a different rule to be applied.

The relevant provisions of the Rome II Regulation

30. The Rome II Regulation includes the following recitals:
- “(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.
- (7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5)

(Brussels I) and the instruments dealing with the law applicable to contractual obligations.

- (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.
- (13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.
- (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. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.”

31. The operative provisions include the following:

“*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*).

...

- 3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

...

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.

...

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

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;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

Article 16

Overriding mandatory provisions

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 22

Burden of proof

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

...

Article 26

Public policy of the forum

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.”

Outline of the parties’ arguments

32. Spribe contends that: (i) Article 8(1) of the Rome II Regulation requires the English courts to apply to non-contractual obligations arising from infringements of copyright the law (or laws) of the country (or countries) for which (i.e. in respect of which) protection is claimed; (ii) the issues on liability which are said by Aviator to be the subject of issue estoppels fall squarely within Article 15 of the Rome II Regulation; and (iii) the availability and extent of any principle where a prior judgment precludes a party from contesting those liability issues depends on whether and to what extent that law (or those laws) provide for it.
33. Aviator contend that, properly characterised, the effect of a prior foreign judgment on claims being pursued in this jurisdiction is a matter that falls outside the Rome II Regulation altogether. In the alternative, Aviator argue that it is excluded by Article 1(3). In the further alternative, Aviator rely upon Articles 16 and/or 26 as leading to the application of English law to the exclusion of the law that would otherwise be applicable by virtue of Article 8(1).

Characterisation

34. Issues in the conflict of laws frequently involve the problem of characterisation, that is to say, determining which juridical concept or category is appropriate to the case at hand. Although English courts apply English conflict of laws principles when engaged in characterisation, they endeavour to avoid a parochial approach. As Mance LJ put it

in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 at [26], a “broad internationalist spirit” is required. It is elementary that one must avoid arguing in a circle by allowing a particular law to govern the process of characterisation before the process of characterisation has led to the selection of the appropriate legal system. More subtly, it is necessary to avoid framing the characterisation question in a way which pre-empts the answer, such as by reference to the particular relief claimed: see *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72.

35. Where an issue arises concerning the applicability of an European Union Regulation, the question is primarily one of interpretation of the relevant Regulation applying a uniform autonomous meaning: see *Dicey, Morris and Collins on The Conflict of Laws* (16th ed) para 2-042. As the recent decision of Court of Justice of the European Union in Case C-176/25 *IU v BT* [EU:C:2026:785] demonstrates, however, it may still be necessary as a first step to characterise the issue in question. The question in that case was whether the law applicable to an issue as to the validity of an assignment of copyright relied upon by the claimant in an infringement claim was the law specified by the Rome II Regulation (the *lex loci protectionis*, which was German law) or that specified by European Parliament and Council Regulation 593/2008/EC of 17 June 2008 on the law applicable to contractual obligations (“the Rome I Regulation”) (the *lex contractus*, the law governing the contract, which was Polish law). As Advocate General Emiliou explained in his opinion [EU:C:2026:349] at [35]:

“Where infringement proceedings are brought before a court of a Member State by an alleged beneficiary of a copyright licence or assignment (such as BT) against a third party (such as IU), there is not *one, single conflict-of-law rule*, which designates a given substantive law, to be followed with respect to *all the issues* that may be raised in such proceedings. On the contrary, *different conflict-of-law rules*, associated with various *categories* known in private law, and designating (potentially) distinct substantive laws, may be relevant depending on the nature of *the specific issue(s) concerned* ... Therefore, to determine the rules that are relevant with respect to the formal validity of a contractual licence or assignment of copyright and, ultimately, the applicable law, it is crucial to properly *characterise* that issue, that is, to determine in which category it adequately fits”

36. In its judgment the CJEU adopted the Advocate General’s reasoning and his conclusion that the applicable law was that specified by the Rome I Regulation since the issue was a contractual one.
37. Spribe characterises the issue on this appeal as one concerning liability for copyright infringement, and more specifically the issues raised by a claim for copyright infringement. Aviator characterise the issue as one concerning the effect of a previous (foreign) judgment. I am in no doubt that Aviator is correct about this. Issue estoppel is not a doctrine peculiar to copyright law, or indeed intellectual property law more generally. Nor are cause of action estoppel, *Henderson v Henderson* abuse of process and merger. On the contrary, these doctrines are general ones which apply regardless of the nature of the underlying claim. As Lord Sumption explained in *Virgin v Zodiac*

at [25], they were “distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation”. It is desirable, if not essential, for the same law to be applied to all such doctrines, regardless of how individual legal systems may categorise and label them. In broad terms, these doctrines may be categorised as being concerned with the preclusive effect, if any, of a prior judgment on the current proceedings before the court. They fall within the realm of adjectival law (rules which regulate how legal proceedings are conducted and how substantive law is enforced), not within the realm of substantive law (rules which regulate the substantive rights and obligations of the parties).

38. This characterisation of the issue is consistent with how EU law treats such issues. The case law of the CJEU shows that it treats “the principle of *res judicata*” as part of “domestic rules of procedure”: see Case C-234/04 *Kapferer v Schlank & Schick GmbH* [2006] ECR I-2606 at [20]-[22], Case C-2/08 *Amministrazione dell’Economia e delle Finanze v Fallimento Olimpiclub Srl* [2009] ECR I-7520 at [22]-[24], Case C-40/08 *Asturcom Telecommunications SL v Nogueira* [2009] ECR I-9602 at [36]-[38] and Joined Cases C-370/17 and C-371/18 *Caisse de retraite du personnel navigant professionnel de l’aéronautique civile (CRPNPAC) v Vueling Airlines SA* [EU:C:2020:260] at [88]-[91].

Does the Rome II Regulation apply to the effect of prior foreign judgments?

39. Aviator rely upon four strands of argument as supporting the conclusion that the Rome II Regulation does not apply to the effect of prior foreign judgments: (i) the nature of the issue; (ii) the scheme of the EU private international law instruments; (iii) the proper interpretation of the Rome II Regulation; and (iv) the consequences of the differing approaches.

The nature of the issue

40. As explained in paragraphs 37 and 38 above, the issue is properly characterised as being as to the effect of a prior foreign judgment on the claim before the court. As Aviator point out, this is an issue that falls within the general area of recognition and enforcement of foreign judgments. This is inherently a field governed by the law of the receiving state, the *lex fori*, because that law must decide how to treat the foreign judgment. Certainly, this is how it is treated by English conflicts rules: see *Martin v Nadel* [1906] KB 26 at 29 (Vaughan Williams LJ), *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 WLR 260 at [16] (Lord Bingham of Cornhill) and [44] (Lord Hoffmann), *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458 at [151] (Rix LJ giving the judgment of this Court), *Gol Linhas* at [36] and *London Steam-Ship Owners’ Mutual Insurance Association Ltd v Kingdom of Spain* [2024] EWCA Civ 1536, [2025] 1 WLR 3011 at [161] (Sir Geoffrey Vos MR) and [244]-[245] (Andrews and Falk LJJ).
41. Aviator do not dispute that the law of the receiving state could be, and to some extent is, harmonised by EU law. As explained below, however, it is not harmonised by the Rome II Regulation.

The scheme of the EU private international law instruments

42. The starting point here is that, to state the obvious, the Rome II Regulation does not apply to all types of issue that arise in civil and commercial litigation. First, it only applies to some kinds of non-contractual obligation. Other kinds of non-contractual obligation (such as those concerning companies, defamation and violations of privacy) are excluded from the scope of the Regulation by Article 1(2). Secondly, as indicated above, contractual obligations are governed by the Rome I Regulation. Thirdly, some legal issues that arise in civil and commercial litigation do not concern either contractual or non-contractual obligations.
43. As Aviator point out, in EU law, recognition and enforcement of judgments are governed by European Parliament and Council Regulation 1215/2012/EU of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels I Regulation”). Due to Brexit, the Brussels I Regulation is no longer part of UK law, but that is irrelevant to the place of the Rome II Regulation in the European scheme. It remains the case that questions of recognition and enforcement of foreign judgments fall outside the scope of the Rome II Regulation because they are addressed, to the extent that they are harmonised at all, by the Brussels I Regulation. Furthermore, the Rome II Regulation must be interpreted consistently with the Brussels I Regulation: see recital 7 of the former.
44. The Brussels I Regulation requires recognition and enforcement of judgments from other EU member states subject to prescribed defences. It exhaustively harmonises the possible grounds for refusal of recognition, but refers the rest to the law of the receiving state. Thus recognition can be refused on public policy grounds, but the content of public policy is for the law of the receiving state subject to the minimum conditions of the Regulation. Furthermore, once recognised, the judgment is incorporated into the legal order of the receiving state and the latter’s procedural rules govern the matters not addressed by the Regulation, including the procedure for enforcement. See recitals 26 and 30 and Articles 36 (recognition), 39, 41 (enforcement) and 45 (refusal of recognition) of the Regulation.
45. As the CJEU has explained, the fundamental principle underlying these provisions is that “a foreign judgment which has been recognized ... must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment is given”: see Case 145/86 *Hoffmann v Krieg* [1988] ECR 645 at [11], Case C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* [EU:C:2012:719] at [34] and Case C-567/21 *BNP Paribas SA v TR* [EU:C:2023:452] at [47]. Thus the Brussels I Regulation provides for a minimum level of *res judicata* effect for prior judgments of courts in other Member States, although as noted in paragraph 38 above such doctrines are otherwise a matter for the procedural rules of the receiving State (see also Case C-379/17 *Società Immobiliare Al Bosco Srl* [EU:C:2018:806] at [26] and [32]-[36]).
46. Bearing in mind that the UK is now a “third State”, it is also worth noting that the CJEU held in Case C-568/20 *J v H Ltd* [EU:C:2022:264] as follows:
- “34. Because of the limitation of the scope of Regulation No 1215/2012 to questions of jurisdiction and the recognition and enforcement of judgments delivered by the courts of the

Member States, and in the absence of other provisions of EU law governing those questions for judgments delivered by the courts of third States, those Member States remain, in principle, free to lay down the conditions and procedures enabling national courts to hear disputes brought before them. It follows that certain types of proceedings and court judgments in one Member State do not necessarily have an equivalent in the other Member States.

35. As regards, in particular, the effects which judgments delivered by courts of third States may have in the Member States, the absence of harmonisation at EU level means that the courts of a Member State may, in accordance with the applicable national law, legitimately adopt enforceable decisions on the basis of those judgments, even though taking those judgments into consideration in other Member States is still subject to the requirement for exequatur.”
47. In other words, the Brussels I Regulation does not apply to such judgments, and therefore national procedural rules apply.

The proper interpretation of the Rome II Regulation

48. It is common ground that, save where it refers to national law, the Rome II Regulation must be given a uniform autonomous interpretation. This involves interpreting the Regulation in accordance with its wording, purpose and context.
49. Spribe emphasises the purposes of the Regulation identified in recitals 6, 13 and 16: in short, to achieve predictability, certainty and uniformity as to the applicable law with respect to issues covered by the Regulation. As Aviator point out, these purposes do not extend to issues which fall outside the scope of the Regulation.
50. There is no dispute that, in general and subject to their allegations of issue estoppel, Aviator bear the burden of proving each element of their copyright infringement claims. (As Article 22(1) makes clear, Aviator may be able to rely upon presumptions (such as the presumptions as to authorship and ownership provided by section 104 of the Copyright, Designs and Patents Act 1988) to the extent that the applicable law so provides, but on the appeal neither side suggested that Article 22(1) was relevant to the present issue.) This burden of proof is only relevant, however, if and to extent that the issue in question is properly characterised as one concerning a non-contractual obligation.
51. Quite a lot of judicial ink has been spilled on the relationship between Article 15 (scope of the applicable law) on the one hand and Article 1(3) (exclusion of evidence and procedure) on the other hand. This question must now be regarded as settled (subject to any future decision of the Supreme Court) by the decision of this Court in *Nicholls v Mapfre España Cia de Seguros y Reaseguros SA* [2024] EWCA Civ 718, [2025] 1 WLR 660 applying the approach adopted obiter in *Actavis UK Ltd v Eli Lilly and Co* [2015] EWCA Civ 555, [2025] Bus LR 1068. As Dingemans LJ held in *Nicholls v Mapfre* at [33], with the agreement of Coulson and Stuart-Smith LJ, the words “evidence and procedure” in Article 1(3) should not be given either a “very wide” or a “strict or

narrow” interpretation. It follows from his reasoning that Article 15 is not to be broadly or narrowly interpreted either. The correct approach is to interpret both Article 1(3) and Article 15 in accordance with their wording, purpose and context. Accordingly, a line of earlier first instance decisions which proceeded on the footing that Article 15 was to be broadly, and Article 1(3) narrowly, interpreted should no longer be regarded as good law.

52. In both *Actavis v Lilly* and *Nicholls v Mapfre* the Court found it helpful to consider whether the disputed issue (conditions for the admissibility for a negative declaration in *Actavis v Lilly*, a rule requiring enhanced rates of interest to be payable by insurers where claims were not settled within specified time frames in *Nicholls v Mapfre*) was “so intertwined with matters of substance as to require [it] to be dealt with under the *lex causae* [the law applying to the substantive claim]” (in the words of Floyd LJ in *Actavis v Lilly* at [137]). As counsel for Aviator pointed out, this is a judicial gloss upon the wording of the legislation. In the present case it is not necessary to descend to that level of analysis.
53. As counsel for Spribe made clear, Spribe does not contend that the effect of a prior judgment is a matter that falls within any of paragraphs (a) to (h) of Article 15. Spribe’s case is that Article 15(a) confirms that the law specified by the Regulation governs the basis and extent of liability. Spribe argues that it follows that it is necessary to look to that law to determine what issues on liability arise, and that the question whether a prior (foreign) judgment determines one or more of those issues is thus a matter for that law.
54. As Aviator submit, this argument confuses the nature of a rule with its effect. A rule is not part of the law governing a non-contractual obligation merely because its operation may affect whether liability is established. Many rules can affect the determination of a dispute without forming part of the substantive law: for example, rules as to pleading, admissions, evidence and contractual bars. The correct approach is to characterise the issue and then ask whether that issue is governed by the relevant substantive law. In the present case the issue is, as discussed above, properly characterised as one as to the effect of a prior (foreign) judgment. That is not governed by the law of non-contractual obligations because it is not concerned with the parties’ substantive rights and obligations, but with the process of adjudication upon those rights and obligations. It is not the purpose of the Regulation to ensure identical outcomes in different courts: see *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263 at [15] (Longmore LJ) and [42] (Jackson LJ).
55. This interpretation of the Regulation is supported by the *travaux préparatoires*. The European Commission’s proposal for the Regulation commented on Article 15 (then Article 11) as follows:

“Article 11 defines the scope of the law determined under Articles 3 to 10 of the proposed Regulation. It lists the questions to be settled by that law. The approach taken in the Member States is not entirely uniform: while certain questions, such as the conditions for liability, are generally governed by the applicable law, others, such as limitation periods, the burden of proof, the measure of damages etc., may fall to be treated by the *lex fori*. Like Article 10 of the Rome Convention, Article 11

accordingly lists the questions to be settled by the law that is actually designated.

In line with the general concern for certainty in the law, Article 11 confers a very wide function on the law designated. It broadly takes over Article 10 of the Rome Convention, with a few changes of detail:

- 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.”

56. This confirms that Article 15 concerns issues of substantive law, not adjectival law. To similar effect is the Report of the Committee of Legal Affairs of the European Parliament explaining the rationale for the Parliament’s amendment to introduce what is now Article 1(3):

“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.”

57. Aviator’s primary case is that the effect of prior foreign judgments does not fall within the scope of the Rome II Regulation at all. In the alternative, Aviator argue that this is a matter of procedure falling within Article 1(3) on the basis that, although *res judicata* in the strict sense is according to English law a rule of substantive law, when viewed from the perspective of European private international law it falls into the category of “rules of procedure” as explained in paragraph 39 above. In my judgment the better view is that, for the reasons explained above, this is not an issue which falls within the

scope of the Rome II Regulation at all. But if I am wrong about that, then I consider that it clearly falls within Article 1(3) rather than within Article 15.

The consequences of the differing approaches

58. As Aviator point out, on Spribe's case, different laws would apply to a plea of issue estoppel depending on whether the claim was governed by the Rome II Regulation or not. Furthermore, Spribe's approach would potentially lead to different laws applying to issue estoppel with respect to different causes of action, e.g. contract and tort, involving the same single issue. Spribe's approach would also have the odd result that, if the prior judgment was an English judgment, the question whether it gave rise to an issue estoppel would be governed not by English law, but by the law specified by the Rome II Regulation. By contrast, on Aviator's approach, the same law applies to any question of issue estoppel regardless of the nature of the underlying claim and of the origin of the prior judgment. This makes sense, and there is nothing about claims involving intellectual property rights that requires a different approach. (Not that the Rome II Regulation provides any basis for distinguishing between intellectual property claims and other non-contractual obligations covered by the Regulation anyway.) These considerations support the conclusion that this issue is not a matter governed by the Rome II Regulation.

Articles 16 and 26

59. It follows that it is not necessary to consider Aviator's alternative case based on Articles 16 and 26.

Conclusion

60. For the reasons given above I would allow the appeal.

Lord Justice Miles:

61. I agree.

Lady Justice King:

62. I also agree.