Neutral Citation Number: [2021] EWHC 2256 (Admin)

Case No: CO/810/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Birmingham District Registry

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 6 August 2021

Before :

HIS HONOUR JUDGE SIMON
sitting as a Judge of the High Court

- -

Between :

THE QUEEN **on the application of** **AYMAN EID KALDAS GIRGIS**	**Claimant**
- and -	
JOINT COMMITTEE ON INTERCOLLEGIATE EXAMINATIONS	**Defendant**

- -

- -

MR C COYLE (instructed through **DIRECT ACCESS**) for the **Claimant**
MR T TABORI (instructed by **DAC Beachcroft LLP**) for the **Defendant**

Hearing dates: 30 June 2021

- -

JUDGMENT

His Honour Judge Simon:

Introduction

1. On 27 February 2020, the Claimant, Dr Ayman Eid Kaldas Girgis lodged a claim for judicial review. The brief details of the claim will be set out below. On 6 May 2020 the Defendant to the claim, the Joint Committee on Intercollegiate Examinations (JCIE), filed an Acknowledgment of Service (AoS). For ease, I have adopted the nomenclature of Defendant or JCIE for the Defendant, depending on the context.

2. The AoS indicated that the claim is resisted in full. In Section D of the AoS, the Defendant highlighted a challenge to the jurisdiction of the Administrative Court of England & Wales to entertain the claim on the basis that any proceedings of this nature sought to be instituted by the Claimant must be before the Court of Session in Scotland, in short, because the Defendant is 'domiciled' there.

3. On 11 August 2020 His Honour Judge Klein, sitting as a High Court Judge, gave detailed directions for the progress of the proceedings, identifying a number of preliminary applications and issues that would need to be resolved prior to consideration of the permission application itself.

4. Those preliminary applications and issues came before me at an oral hearing on 30 June 2021, which was held with the attendance of counsel and others via remote means. I had the benefit in advance of detailed and helpful skeleton arguments, a hearing bundle and a full bundle of authorities.

5. At the conclusion of the hearing, I reserved judgment and this is what now follows below.

Executive summary:

Applications

6. The following applications required determination following the oral hearing:

6.1 The Claimant's applications for amendment of section 8 of the claim form to include an application for an extension of time of one day, relief from sanctions and the extension of time for filing as sought;

6.2 The Defendant's application for an extension of time for filing its Acknowledgment of Service ('AoS') and relief from sanctions;

6.3 Subject to being satisfied that a legitimate challenge to the Court's jurisdiction was engaged:

6.3.1 The Defendant's application for a stay and a declaration that the court lacks jurisdiction to try the claim by virtue of the application of the Civil Jurisdiction and Justice Act 1982 (the CJJA) and/or the Union with Scotland Act 1706; or

6.3.2 In the alternative, that the court should exercise its discretion to stay this claim based upon the principles of *forum non conveniens*.

Conclusions

7. For the reasons that follow, my conclusions on the above applications are:

7.1 To grant the Claimant permission to amend, an extension of time to file the claim form;

7.2 To grant the Defendant an extension of time for filing the AoS and relief from sanctions;

7.3 To accept that there is an extant challenge to the jurisdiction of this Court, but to refuse the Defendant's application for a declaration and/or stay of proceedings and to permit the Claim to proceed to the permission stage.

The parties

8. The Claimant is a medical doctor. He is a Specialist in Urology employed at University Hospitals Birmingham NHS Foundation Trust.

9. The Defendant is an unincorporated association. It is authorised by the Postgraduate Board of the General Medical Council (GMC) under the Medical Act 1983, as amended, to be responsible for the supervision of standards, policies, Regulations and professional conduct of the Specialty Fellowship Examinations, acting as the parent body of ten specialty Surgical Boards and for the four surgical Royal Colleges of Edinburgh, Glasgow, England and Ireland. Any 'in-training' doctor, in England, Scotland, Wales, Northern Ireland or the Republic of Ireland, practising in one of these surgical specialties, of the requisite skills and experience must pass the examinations set by the Defendant in order to be eligible for entry onto the Specialist Register of the General Medical Council or its equivalent maintained by the Medical Council of Ireland. For 'out-of-training' doctors utilising the Certificate of Eligibility for Specialist Registration (CESR) route, whilst not mandatory, the absence of a pass in the Specialist Fellowship Exam administered by the Defendant, makes it significantly more difficult to prove the required standards of clinical competence to the GMC. The Claimant's specialty, Urology, is one for which the Defendant is responsible.

10. It is uncontroversial that in practical terms, the administration and governance of the Defendant is hosted within the Royal College of Surgeons of Edinburgh (RCSE), although it is not suggested that overall it has any greater affiliation to that College than to the other three Colleges on behalf of which it operates.

The Claim

11. The Claimant sought to progress his career to the level of consultant by undertaking the necessary specialty examinations hosted by the Defendant. Part 1 of the Urology Specialty examination is an online multiple-choice question paper, based on the Single Best Answer model. The Claimant successfully completed this at his first attempt.

12. Thereafter, on dates set out in the chronology below, the Claimant made four attempts at Part 2 of the Urology Specialty examination, this being the maximum number of attempts permitted. The examination consists of an oral and practical examination, based on clinical relevant scenario-based oral examinations with an emphasis on higher order thinking. The second and third of these attempts were undertaken at venues in Wales and England respectively. The Claimant did not reach the pass mark on these previous attempts.

13. On the fourth attempt undertaken in Edinburgh in November 2019, the Claimant failed again to reach the designated pass mark, though by a small margin. He thereafter sought to appeal using the Defendant's internal appeal process. While the appeal was pending, the Claimant received the examiners' marking sheets from his fourth attempt and he submitted additional points of appeal arising directly therefrom. The Claimant's appeal was premised on various allegations

of failures in the conduct of the examination, which he sought to distinguish from simple concerns about academic judgment.

14. The appeal was rejected by the Defendant as being outside the terms of any legitimate appeal, as it was considered to amount to nothing more than a challenge to the academic judgment of the examiners involved in the fourth examination. Such decisions are not susceptible to the internal appeal process. A request for a further opportunity to undertake the examination was similarly rejected. As a result of this decision, the Claimant had exhausted all permitted attempts to gain the qualification in his specialty that would allow him to be entered on the GMC's Specialist Register.

15. The Claimant then issued these proceedings.

Brief chronology

May 2018 Nov 2018 May 2019	Claimant attempts Intercollegiate Speciality Fellowship Examination in Urology, provided by Defendant, but does not pass.
14-15 Nov 2019	Claimant attempts Intercollegiate Speciality Fellowship Examination in Urology for fourth and final permitted occasion.
26 Nov 2019	Notification to Claimant by Defendant that the Panel of Examiners in Urology had reported to the Intercollegiate Speciality Board that Claimant had failed to reach the pass mark.
4 Dec 2019	Claimant initiates Defendant's appeal process.
16 Dec 2019	Claimant informed that his appeal will be determined within 30 days.
17 Dec 2019	Claimant supplied with examiners' mark sheets.
20 Dec 2019	Claimant files further submissions for appeal based on mark sheets.

10 Feb 2020	Claimant notified by Defendant that his appeal is rejected as it falls outside the scope of appeal process (given it relates to academic judgment, not examination regulations or related standards). Defendant declines to allow Claimant a fifth attempt at the examination.
14 Feb 2020	Pre-Action Protocol letter sent to Defendant.
17 Feb 2020	Defendant‘s response to Pre-Action Protocol letter.
20 Feb 2020	Defendant notifies Claimant that it considered the matter closed.
27 Feb 2020	Claim issued.
6 May 2020	Acknowledgment of Service and Summary Grounds filed. Defendant makes ancillary applications including raising the question of jurisdiction.
10 May 2020	Claimant files a Reply.
12 June 2020	Defendant files a response to Claimant’s Reply. Court informed by Defendant about Claimant’s Employment Tribunal claim.
26 June 2020	Claimant files a Further Reply.
11 August 2020	HHJ Klein gives directions for the hearing of (i) application for extension of time for filing the claim form, (ii) application for an extension of time for filing the AOS and relief from sanction for late filing of the same, and (iii) application for a declaration that the court does not have jurisdiction to try the claim by virtue of CJJA 1982.
18 August 2020	Defendant files an application to vary HHJ Klein’s direction in relation to an application pursuant to CPR 11 (paragraph 10 of the order).
8 Sept 2020	Claimant files an application for relief from sanctions and for permission to amend the claim form; and a witness statement in response to Defendant’s submissions on jurisdiction.

8 March 2021	HHJ Klein varies his earlier directions by deleting paragraph 10 requiring a CPR 11 compliant application by Defendant, on the basis that the time for compliance had long passed.
30 June 2021	Hearing of preliminary applications, including jurisdiction.

Applications for extension of time and relief from sanctions

16. The applications for extension of time were uncontroversial. The Claimant filed one day beyond the primary limitation, but had acted with due expedition and I determined that it was in the interests of justice to permit the amendment to seek relief for late filing and to grant that relief.

17. Although the Defendant's delay in filing its AoS was a more substantial one in terms of time, it has provided evidence in support of its application and explaining how the failure occurred. The Claimant does not oppose the grant of relief and I conclude, for the reasons set out in the Defendant's evidence on the point, that I should grant the application for an extension of time and relief from sanctions.

The Jurisdiction issue

Question 1 – Is there a valid challenge to jurisdiction before the Court?

18. In his written directions, His Honour Judge Klein ordered that the Defendant's applications be considered first at the hearing of the preliminary issues. Paragraph 10 of the order directed an application in accordance with CPR Part 11 within 14 days. The Defendant applied to vary the order by removing

Paragraph 10. In response to the application to vary his order, His Honour Judge Klein maintained the necessity of compliance, but noting that the time for compliance had passed, the order was varied by deletion of the paragraph. The Learned Judge left to the oral hearing the question of whether or not a valid challenge had in fact been made to the jurisdiction of this Court.

19. The CPR provides for Judicial Review proceedings in Part 54, making clear that such proceedings are a modified Part 8 procedure:

> *PART 54 - JUDICIAL REVIEW AND STATUTORY REVIEW*
> *I JUDICIAL REVIEW*
> *Scope and interpretation*
> ***54.1***
> *(1) This Section of this Part contains rules about judicial review.*
> *(2) In this Section –*
> *…*
> *(e) 'the judicial review procedure' means the Part 8 procedure as modified by this Section;*

20. CPR 54.8 provides for the lodging of an acknowledgment of service by the Defendant:

> *Acknowledgment of service*
> ***54.8***
> *(1) Any person served with the claim form who wishes to take part in the judicial review must file an acknowledgment of service in the relevant practice form in accordance with the following provisions of this rule.*

21. CPR Part 11 makes provision for circumstances in which a defendant seeks to dispute the jurisdiction of the Court to try a claim:

> *PART 11 - DISPUTING THE COURT'S JURISDICTION*
> *Procedure for disputing the court's jurisdiction*
> ***11***

(1) A defendant who wishes to –

(a) dispute the court's jurisdiction to try the claim; or

(b) argue that the court should not exercise its jurisdiction

may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.

(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.

(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction.

(4) An application under this rule must –

(a) be made within 14 days after filing an acknowledgment of service; and

(b) be supported by evidence.

(5) If the defendant –

(a) files an acknowledgment of service; and

(b) does not make such an application within the period specified in paragraph (4),

he is to be treated as having accepted that the court has jurisdiction to try the claim.

22. Although CPR 11(4) makes mandatory a separate written application supported by evidence, and CPR 11(5) establishes an automatic result for failure to comply, the notes accompanying CPR 11 in the White Book state:

*"Rule 54.1(2)(e) states that "the judicial review procedure" means the Pt 8 procedure as modified by provisions in Section I of Pt 54. The appropriate Form for acknowledgment of service for claims proceeding under the Pt 8 procedure is Form N210, Section C of which invites the defendant to say that he or she intends "to dispute the court's jurisdiction". It has been observed that Pt 11 may apply to the taking of jurisdictional points in judicial review proceedings (**Shah v Immigration Appeal Tribunal** [2004] EWCA Civ 1665, CA, at [9] per Sedley LJ). The Form for acknowledgment of service in judicial review claims is N462 and that does not expressly invite a defendant to state that the court's jurisdiction is contested. The usual, and in practice safest, course of action, is for a defendant who wishes*

to raise any jurisdictional issue to raise that issue in the acknowledgment of service and to invite the court to refuse permission to apply for judicial review for that reason."

23. On the absence of a written application pursuant to CPR Part 11, the short submission on behalf of the Claimant was that the Defendant had failed to comply with the Order of His Honour Judge Klein and should therefore be deemed to be subject to the jurisdiction of this Court. The wording of CPR 11(4) is in mandatory form and CPR 11(5) sets out the consequence of a lack of compliance. Although acknowledging the right of the Court to raise and determine *forum non conveniens* questions of its own volition (quoting ***Cook v Virgin Media Ltd*** [2015] EWCA Civ 1287), Mr Coyle argued that it is inappropriate to rely on this to circumvent the Defendant's obligations under CPR Part 11, having raised the issue in the AoS.

24. The Defendant contended that it had complied with the recommended practice as set out in the notes to CPR Part 11 in the White Book, by including the challenge to jurisdiction in the AoS and had not ignored the Order of 11 August 2020 but had applied to vary it. In any event, the Court retained the power to raise and deal with a question of jurisdiction of its own motion.

25. Self-evidently, if the Court were to take the view that the Defendant was bound by the full extent of CPR Part 11 then its culpable failure to make an application in accordance with the Order of 11 August 2020 would be determinative of the jurisdiction issue. The reference in the notes to the White Book is to the following paragraph in ***Shah v Immigration Appeal Tribunal*** [2004] EWCA Civ 1665, per Sedley LJ:

"9. But a challenge to the jurisdiction of the English and Welsh courts based, as the Majead decision is based, on considerations of principle and comity rather than on exclusionary law may, in my judgment, fail if it is not made in good time. I do not, with respect, accept Miss Anderson's submission, for the Home Secretary, that Part 11 of the CPR has no bearing on the taking of jurisdictional points in public law proceedings. The amendments to Part 54 introduced by Order in 2000 extended the use of acknowledgements of service — using the same name as in Part 10 — to judicial review proceedings. Rule 54.8(5) even goes to the trouble of disapplying one element of Part 10 to which, it is to be inferred, it would otherwise apply. By rule 54.8(4)(a)(i) the acknowledgement must set out a summary of the defendant's grounds for contesting the claim. I am entirely unable to discern in these provisions a special rule that public authorities are not expected today to be as prompt and as explicit as every other defendant in setting out their case. On the contrary, Parts 10, 11 and 54 of the Civil Procedure Rules seem to me to create a consistent requirement from which public law defendants (or for that matter interested parties) are not exempt."

26. In the case of ***Shah*** the point on jurisdiction arose for the first time in the Court of Appeal and the observations of Sedley LJ above in respect of CPR Part 11 are therefore obiter, leading one might venture to the phraseology used in the White Book notes. Sedley LJ's opinion is persuasive and may well represent the correct position, but the parties in the proceedings before me, perhaps understandably, did not argue this point in full, focussing on the substantive, rather than the procedural, challenge. No other authorities were put before me that may have a bearing on the strict application of CPR Part 11(4) and (5).

27. In all the circumstances, I have concluded that clarity as to whether CPR Part 11 applies in full to Judicial Review is not something that can properly be adjudicated in these proceedings. The Defendant in this case has raised the issue of jurisdiction in the AoS, as advised in the White Book notes, and, although

there is no formal application, the Defendant has filed evidence in support of its argument. Though not compliant with His Honour Judge Klein's direction, the Defendant did apply to discharge the relevant paragraph, rather than simply leave the point in abeyance.

28. In my judgment, the jurisdiction issue in these proceedings requires to be resolved on the substantive arguments based on the CJJA and/or *forum non conveniens* and not on a technical, procedural point.

The substantive jurisdiction issue

The parties' respective positions on jurisdiction – in brief

29. I set out below the parties' broad contentions on the substantive issue of jurisdiction. The more particularised arguments and references to case law are contained within the individual analysis sections that follow.

30. The Defendant's primary position was, based on the decision in ***Cook***, that the CJJA applies and, with or without the additional support of the Union with Scotland Act 1706, unequivocally allocates Scotland as the sole jurisdiction within which to bring these proceedings. This, submitted Mr Tabori, is irrespective of the nature of the proceedings; that is whether they ought to be classed as civil and commercial matters or as administrative matters (the distinction drawn by *Regulation (EU) No. 1215/2012*).

31. Even if, contrary to the primary submission, the classification of these proceedings were to be relevant, the Defendant's case is that they are not administrative in nature but plainly civil and commercial. The Claimant paid a fee for a service offered by the Defendant, a non-governmental organisation

based in Scotland, the service was performed in Scotland and the Claimant now seeks to complain about the quality of that service. The circumstances, argued Mr Tabori, did not have any of the elements of an administrative decision, such as to take it outside the CJJA.

32. Were the Court to conclude that there was concurrent jurisdiction, *forum non conveniens* principles applied which would again favour Scotland as the appropriate jurisdiction.

33. For the Claimant, Mr Coyle submitted that the nature of the proceedings was clearly relevant to the question of whether the CJJA applied and the Court should conclude that these proceedings were indeed administrative. He sought to draw a strong analogy between the examinations provided through the Defendant and the case of ***The Queen (on the application of London Borough of Lewisham & Ors) v Assessment and Qualifications Alliance & Ors*** [2013] EWHC 211 (Admin), which involved GCSE examination bodies, in order to establish the administrative nature of the proceedings.

34. On the issue of *forum non conveniens*, Mr Coyle argued that this was a case involving concurrent jurisdiction and there was no stronger argument for the case to proceed before the Court of Session than before this Court. In addition, given the passage of time, there was no guarantee that the Claimant would receive the necessary permission at the Court of Session to bring the proceedings out of time and designating Scotland as the *forum conveniens* could have the effect of denying all redress to the Claimant.

Question 2: Does the CJJA apply irrespective of the nature of the proceedings?

35. In oral submissions, adopting a stance one stage earlier than that presaged in his skeleton, Mr Tabori suggested that ***Cook*** provided a simple and complete answer to this application and that the clear route to determining jurisdiction is that the CJJA applies irrespective of the classification that might be attached to the proceedings. Once the CJJA is in play then the scheme in Schedule 4 thereof allocates jurisdiction very plainly to the Court of Session. Mr Tabori's submission was focussed on paragraphs 25 and 26 of ***Cook*** in which Lord Dyson MR distinguished purely domestic cases for which the Regulation has no relevance and those with an inter-state element in which it does.

36. Mr Coyle submitted that the drafting of s16 of the CJJA makes clear that it is tied to the subject matter of the proceedings and the distinction cannot be ignored.

Question 1 - Analysis

37. For present purposes, the relevant sections of the CJJA are as follows:

> ***Civil Jurisdiction and Judgments Act 1982***
> *Part I*
> *Implementation of the Conventions*
> *Main implementing provisions*
> *1 Interpretation of references to the Conventions and Contracting States.*
> *(1)In this Act—*
> *…*
> *"the Regulation" means Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) as amended from time to time and as applied by virtue of the Agreement made on 19 October 2005 between the European Community*

and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

…

Part II

Jurisdiction, and Recognition and Enforcement of Judgments, within United Kingdom

16 Allocation within U.K. of jurisdiction in certain civil proceedings.

(1)The provisions set out in Schedule 4 (which contains a modified version of Chapter II of the Regulation) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—

(a)the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings); and

(b)the defendant or defender is domiciled in the United Kingdom or ...

38. Paragraph 1 of Schedule 4 to the CJJA provides:

Schedule 4

1 Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.

39. Section 49 of the CJJA specifically retains the Court's forum non conveniens jurisdiction:

49. Saving for powers to stay, sist, strike out or dismiss proceedings.

Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 2005 Hague Convention.

40. The wording of section 16 of the CJJA was amended by the Civil Jurisdiction and Judgments Order 2001, which provided in Schedule 2 Part 2:

> ***3.*** *In section 16 (allocation within UK of jurisdiction in certain civil proceedings)—*
> *(a)in subsection (1)—*
> *(i) for "Title II of the 1968 Convention" substitute "Chapter II of the Regulation";*
> *(ii) for paragraph (a) substitute—*
> *"(a)the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation has effect in relation to the proceedings); and"; and*
> *(iii)…*

41. As set out in the interpretation section of the CJJA above, reference to the 'Regulation' is to *EU Regulation 1215 of 2012*, which provides as far as is necessary for these proceedings (an extract of the preamble and Article 1):

> *REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL*
> *of 12 December 2012*
> *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*
> *…*
> *On 21 April 2009, the Commission adopted a report on the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The report concluded that, in general, the operation of that Regulation is satisfactory, but that it is desirable to improve the application of certain of its provisions, to further facilitate the free circulation of judgments and to further enhance access to justice. Since a number of amendments are to be made to that Regulation it should, in the interests of clarity, be recast.*
> *…*
> *CHAPTER I*

SCOPE AND DEFINITIONS

Article 1

1.This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, 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).

42. In ***Cook***, Lord Dyson MR said:

"25. The legal position has been well summarised in Civil Jurisdiction and Judgments by Professor Adrian Briggs (2015) 6th ed, para 2.28 which is headed "International Scope". The whole section is relevant. But it is sufficient to refer to the last paragraph: "The result is that if a matter is demonstrably wholly internal to the United Kingdom, so that the only jurisdictional question which may arise is as to the part of or a place within the United Kingdom which has jurisdiction, it is not one in which the Regulation is designed to have any role. The point may be illustrated this way. Suppose a defamatory statement is made by a person domiciled in the United Kingdom about another such person, and is published in newspapers in England and Scotland. If the question is whether the claimant may or must sue in England or Scotland, or whether the courts of England and Scotland may stay proceedings on grounds of forum non conveniens in favour of the other jurisdiction, the Regulation has no role in answering the question, for the matter before the court is wholly internal to a single member state. But as soon as the claim is broadened to include complaint of publication by a person outside the United Kingdom, whether the defendant or another, it appears that the Regulation would then apply to all aspects of the jurisdiction of the court."

26. For all these reasons, I accept the submissions of Ms Wyles and Mr Sweeting that the Regulation does not apply to these proceedings which were issued in England against companies domiciled in the UK arising from accidents that took place in a different part of the UK, namely Scotland. These proceedings are "purely" domestic."

43. I am unable to accept Mr Tabori's submission that the CJJA applies regardless of the nature of proceedings, for two reasons. First, the issue of the classification of proceedings was not a point that arose directly in ***Cook*** or its adjunct ***McNeil v Tesco plc***, both cases being so evidently civil in nature.

44. Secondly, and of greater import, the plain language of s16 of the CJJA. It seems to me, to borrow Lord Dyson's phraseology, that the insuperable stumbling block for Mr Tabori's submission is the explicit drafting of s16, which envisages purely domestic proceedings to which the Regulation itself does not apply, save that the applicability of s16 is predicated on the subject matter being such as would come within the wording of Article 1. This importing into section 16 of concepts and/or definitions in Article 1 is in no way inconsistent with the disapplication of the Regulation as described in ***Cook***.

45. My conclusion on Question 2, therefore, is that the CJJA does not apply to these proceedings without active consideration of the nature of the proceedings by reference to Article 1 of the Regulation.

Question 3 – Are these proceedings civil or commercial in nature?

46. On this point the Claimant and Defendant understandably adopted polar opposite positions.

47. Mr Tabori relied on a number of decisions of the European Court of Justice to support his contention that the nature of the instant proceedings could not be classified as administrative. In **Case C-292/05 *Lechouritou and Others v Dimosio* [Judgment of 15 February 2007]**, the ECJ, in considering the meaning of 'civil and commercial matters' spoke of "*the exclusion of certain legal actions … by reason either of the legal relationships between the parties to the action or of the subject-matter*". The ECJ noted that certain actions between a public authority and a person governed by private law may come within the scope of the [Brussels] convention, but that the position is otherwise where the public authority is acting in exercise of its public powers. It went on

to refer to the exercise of public powers as the exercise of powers outside the scope of the ordinary legal rules applicable to relationships between private individuals (paragraph 34).

48. Mr Tabori drew on three specific decisions of the ECJ: **Case C-172/91 *Sonntag v Weidmann* [Judgment of 21 April 1993]**, involving the actions of an individual teacher leading a state-school trip, which were found not to be an exercise of public powers, despite his employment and the insurance arrangements covering the trip; and **Case 66/85 *Lawrie-Blum v Baden-Württemberg* [Judgment of 3 July 1986]**, which determined that the general role of a teacher, even when it encompasses awarding marks to pupils or participating in decisions as to class allocation, is not an exercise of public powers. In **Case C-641/18 *LG and others v Rina Spa, Ente Registro Italiano Navale***, the ECJ concluded (paragraphs 37 – 44) that the issuing of a statutory certificate by the defendant (on behalf of a flag state) to establish whether the Claimant's vessel met the requirements laid down by the applicable legislation could not be treated as an administrative act carried out *iure imperii*.

49. Arguing that the subject of matter of this claim is within the Regulation and in reliance on ***Lechouritou***, Mr Tabori submitted in particular that:

    49.1 The legal relationship between the parties was based on the Claimant's payment for a service.

    49.2 It was not to be compared with the Claimant's relationship with his professional body.

    49.3 It was a one-off service, procured by payment of fee.

    49.4 The Defendant is not a public authority. Notwithstanding that the Defendant is hosted by a charity incorporated by Royal Charter, the

Defendant is a non-governmental body providing services for reward under private law contracts.

49.5 The fact that the claim has been issued in the Administrative Court is not determinative;

49.6 The Defendant's professional examination decisions are not on the scale of the accreditation organisations in ***R (LB Lewisham) v AQA, Edexcel, and Ofqual*** **[2013] EWHC 211 (Admin)**, which responsible for the determination of GCSE grades, taken by students across the country, which was described in the case as "*a matter of very significant public importance potentially affecting the life chances of those who are candidates for the examination"*.

49.7 To the extent that the Defendant's nature and the decision under challenge could be considered a hybrid of public and private, this would still not render the claim an 'administrative matter'.

50. For the Claimant, Mr Coyle acknowledged in his skeleton a number of principles also derived from ***LG v Rina Spa***, namely, that the mere fact that certain powers are delegated by an act of a public authority does not imply that those powers are exercised *iure imperii* (paragraph 39); and the fact of acting on behalf of the State does not always imply the exercise of public powers (paragraph 40). However, he emphasised the ECJ's observation that even acts performed *iure gestionis* may not be caught by Article 1 of the Regulation, where the public authority is acting in the exercise of its public powers (paragraph 33); and further that the public nature of the framework under which the Defendant operates, précised at paragraph 9 above. [His para 21]

51. Mr Coyle reiterated his reliance on the comparison to be made between the responsibility of the Defendant in these proceedings and those involved in the ***Lewisham*** case, although that was dealing with the more widely applicable GCSE examinations. The Defendants in that case sought to argue that they were

private entities exercising contractual powers and thus not amenable to Judicial Review. However, the Administrative Court (Elias LJ & Sharp J, as she then was) concluded otherwise on the basis that the decisions under challenge "*plainly have a 'public element, flavour or character' to them*". The Court noted that the determination of GCSE grades for examinations taken across the country was "*a matter of very significant public importance potentially affecting the life chances of those who are candidates for the examination*". The Court concluded that the case involved "*a classic case of contracting out a public function*".

52. Mr Coyle's comparison to these proceedings relied on the way in which the JCIE: is authorised under the statutory powers of the GMC; exercises functions of a public law nature, being the supervision of standards, policies, Regulations and the conduct of professional examinations; and regulates the ability of medical professionals throughout the United Kingdom to gain admission to the Specialist Register maintained by the GMC and thus progress in their medical careers.

Question 3 - Analysis

53. I begin by observing that the Defendant as an entity possesses some unusual features. It is described by Mr Tabori as a non-governmental body providing services for reward under private law contracts, not a public authority and without any distinct legal status of its own, whether as a charity or the like. It is hosted, in terms of administration, by the RCSE but it exercises functions at all times on behalf of the four surgical Royal Colleges, including the Royal College of Surgeons in Ireland (authorised no doubt through the Irish Medical

Council) and across ten separate surgical specialties. Its examinations, at least at the relevant time for these proceedings, were arranged to take place in person not only in Scotland, but also at venues in England, Wales and Ireland.

54. In my judgment an important feature of the Defendant is that it is the sole provider of Fellowship examinations for the aforementioned colleges and specialties. Such examinations are a significant element, whether mandatory or voluntary, of a portfolio of evidence to gain entry to the GMC's Specialist Register for a broad range of medical professionals. The Defendant's authority in this regard arises through Part 4A of the Medical Act 1983, which was introduced into the Act by paragraph 10 of The General and Specialist Medical Practice (Education, Training and Qualifications) Order 2010. This Statutory Instrument abolished the separate Postgraduate Medical Education and Training Board, which had previously been responsible for postgraduate medical training and vested powers in the GMC. The territorial extent of the Order was clearly, as with the Medical Act, throughout the UK. Annexe A contains relevant extracts from the Medical Act 1983 to which I have had regard.

55. It is not without relevance that, in fact by contrast with the defendants in ***Lewisham***, there exists no true commercial choice for a suitably experienced and skilled doctor seeking advancement in their career to the rank of consultant in any of the ten surgical specialties under the Defendant's dominion (the CESR route for an out-of-training doctor being acknowledged by the Defendant as significantly more difficult to use successfully). The Defendant's two-stage examinations regime is the only GMC-recognised test of applied knowledge relevant to the curriculum. Beyond the public confidence in standards, the

Defendant's maintenance of proper standards is, fundamentally, a manifestation of public protection, statutorily derived from the Medical Act 1983. As the extracts from the Medical Act set out at Annexe A demonstrate, public protection is an overarching theme of the post-graduate education regime.

56. The instant proceedings are not concerned with what might be described as standard continuing professional development or even medical revalidation, both of which are potentially remediable in the event of a gap in knowledge or skills or a failure to satisfy the appropriate standard in one or more required elements or topics. These proceedings relate to the binary outcome of superior professional examinations within a regime of defined and finite opportunities for suitably qualified medical professionals to reach the upper echelons of the profession. The bar for success must necessarily be set at a level that satisfies, as a minimum, the GMC's public protection obligation, devolved to the Defendant in relation to the specialties concerned. There is no suggestion by the Defendant of quotas or limiting the number of passes based on criteria other than competence, objectively assessed and moderated in a context that is consistent and predictable.

57. The Defendant's equating of itself with either the teacher in training in ***Lawrie-Blum*** or the trip-leading teacher in ***Sonntag*** is inapposite and does not assist me in characterising the nature of the proceedings. The decision in ***Lechouritou*** posits overall more relevant principles, against which to measure the specifics in this case, and I am more persuaded by the way in which the Claimant argues his case as aligned with the concepts set out in the ECJ's judgment.

58. Furthermore, though the numerical extent of those undertaking the Defendant's examinations is in no way comparable to those in the ***Lewisham*** case, in my judgment there are similarities that can properly be drawn. The Defendant's role is an examining body that contracts for the provision of a service that leads to a nationally-recognised qualification. One must also not lose sight of the fact (as mentioned above) that, in contrast with the examination bodies in ***Lewisham***, the Defendant exercises exclusive domain over such examinations for the ten specialties, there being no commercial choice or competition – as there is in terms of GCSE boards.

59. It is an accepted and natural part of a medical professional's career, in the vast majority of cases, that they will seek to progress to consultant status, or more accurately to achieve a Certificate of Completion of Training that would permit their inclusion on the GMC's Specialist Register. Any such 'in-training' professional within the four countries of the United Kingdom (and the Republic of Ireland), specialising in one of the ten surgical specialties for which the Defendant is responsible, must successfully pass its examinations. Professionals who are 'out-of-training', such as the Claimant, will face significant difficulties in proving equivalence without success in the examinations.

60. This framework, it seems to me, weakens paragraphs 1 to 4 of Mr Tabori's submissions at paragraph 49 above. The existence of a fee paid by a user of the Defendant's services is unsurprising, but does not in these circumstances evidence a simple private law or commercial contract. Moreover, the situation can, in my judgment, legitimately be regarded as characterising an extension of

the relationship between professional and relevant regulatory body. There is no alternative route for 'in-training' professionals to achieve entry on the GMC's Specialty Register than through the offices of the Defendant in the Claimant's surgical specialty. For 'out-of-training' professionals, though there is an alternative CESR route in theory, the absence of success in the Defendant's examinations presents significant challenges in proving equivalent competence.

61. A further relevant consideration in assessing the categorisation of the proceedings is the principle of public protection that guides the Defendant's processes. The Defendant may describe itself as simply providing a service for a fee but that is not determinative of its nature.

62. It seems to me also that the relationship among Claimant, Defendant and GMC in these proceedings goes sufficiently further in scope and subject matter than the circumstances in ***LG v Rina Spa***.

63. Having carefully considered all the arguments presented, the legislative context and the available case law, I have reached the conclusion that the answer to Question 3 is that the instant proceedings are administrative in nature and therefore outside the scope of the Regulation. By extension the proceedings do not come within section 16 of the CJJA and I am not required to consider any provisions of that Act.

The Union with Scotland Act 1706 & Forum non conveniens

Question 4 – Does the Union with Scotland Act 1706 or forum non conveniens designate Scotland for these proceedings?

64. The parties had turned their minds to the alternative jurisdictional question of *forum non conveniens* if the proceedings were not to be allocated to Scotland by the CJJA (or additionally in accordance with s49). For the Defendant, Mr Tabori set out a number of factors that he argued made Scotland the appropriate forum. These included that:

64.1 The Claimant sat the examination in Edinburgh;

64.2 His examination was marked in Edinburgh;

64.3 The subsequent request for an appeal was processed in Edinburgh;

64.4 The Defendant's staff are located in Edinburgh;

64.5 The Defendant's witness works and resides in Scotland;

64.6 Whilst the Defendant is responsible to the four surgical Royal Colleges of Great Britain and Ireland, its administration is based with the Royal College of Surgeons in Edinburgh.

64.7 Scotland is the forum with which the action has the most real and substantial connection.

64.8 Popplewell J's decision in ***ex parte Greenpeace*** and Article XIX of the **Union with Scotland Act 1706** further clarify the appropriateness of the Court of Session.

65. In response, Mr Coyle argued that the present proceedings are readily distinguishable from what was under consideration by the court in ***ex parte Greenpeace***. He suggested that a more appropriate comparator would be the facts under consideration by the House of Lords in ***Tehrani v Secretary of State for the Home Department*** **[2007] 1 AC 521**. The issue in that case was whether the Court of Session had supervisory jurisdiction in respect of a decision of the Immigration Appeal Tribunal (IAT), sitting in London, and where the adjudicator under the Immigration & Asylum Act 1999 had sat in Durham, albeit in respect of an individual residing in Scotland.

66. Lord Nicholls concluded, at paragraph 24 of ***Tehrani***, that as the legislation had nationwide application, and the adjudicators and IAT had jurisdiction throughout the United Kingdom:

"…the superior courts of the constituent parts of the United Kingdom have jurisdiction to review decisions of the adjudicators and IAT wherever made. Once it is recognised that adjudicators and the IAT are properly to be characterised as United Kingdom tribunals, there can be no occasion for attempting to confine the supervisory jurisdiction of the courts of England or Scotland by rigid rules or, even less, by rules whose bounds are vague. In respect of decisions of these tribunals the Court of Session and High Court have concurrent jurisdiction".

The case was then determined on the principles of *forum non conveniens*.

Question 4 - Analysis

67. I accept the Claimant's submissions that ***ex parte Greenpeace*** can be distinguished. In that case, any connection with England and Wales could only be described as extremely tenuous and remote. It was a quintessentially Scottish case in respect of every reasonably relevant factor within the proceedings.

68. The same is not true in this case. The instant proceedings have a number of factors that lessen the connection with Scotland and broaden the jurisdiction to one that is more readily comparable to, albeit not the same as, that in ***Tehrani***.

69. With this in mind, I am satisfied that the Union with Scotland Act 1706 does not act to deprive this Court of jurisdiction in the instant claim.

70. On the issue of *forum non conveniens* more specifically, Annexe B contains extracts from the speech of Lord Goff of Chieveley in ***Spiliada Maritime***

Corporation v Cansulex Ltd **[1987] A. C. 460** to which this Court has had particular regard.

71. The parties are in agreement that the principles enunciated in ***Spiliada*** continue to provide the framework for the determination of *forum non conveniens* issues. These can be summarised in this way:

"First, in general the legal burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay, although the evidential burden will rest on a party who seeks to establish the existence of matters which will assist him in persuading the court to exercise its discretion in his favour."
"Secondly, if the court is satisfied by the defendant that there is another available forum which is clearly a more appropriate forum for the trial of the action, the burden will shift to the claimant to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England."
"Thirdly, the burden on the defendant is not just to show that England is not the natural or appropriate forum, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum; accordingly, where (as in some commercial disputes) there is no particular forum which can be described as the natural forum, there will be no reason to grant a stay."
"Fourthly, the court will look to see what factors there are which point in the direction of another forum as being the ''natural forum'', i.e. that with which the action has the most real and substantial connection. These will include factors affecting convenience or expense (such as availability of witnesses) and such other factors as the law governing the transaction and the places where the parties reside or carry on business, and also whether the claim is part of a larger overall dispute which would be damaged by being fragmented."
"Fifthly, if the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, the court will ordinarily refuse a stay."
"Sixthly, if, however, the court concludes that there is some other available forum which prima facie is clearly more appropriate, it will ordinarily grant a

stay unless there are circumstances by reason of which justice requires that a stay should not be granted. In that enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions."

"Seventhly, a stay will not be refused simply because the claimant will thereby be deprived of ''a legitimate personal or juridical advantage'', provided that the court is satisfied that substantial justice will be done in the available appropriate forum."

72. Mr Tabori emphasised the venue for the taking and marking of the examination; however I find these aspects of limited weight. As a *viva* examination, the physical 'sitting' and marking will always be contemporaneous in time and place (save where online). It is no more than calendrical happenstance that the Claimant's final attempt occurred in Edinburgh, given that the examinations are also arranged in England and Wales, the Claimant having undertaken them in these locations on earlier occasions. Those non-Scotland based examinations are not irrelevant, when considering the background to the proceedings as a whole, given that they counted towards the finite number of permitted attempts. I am unpersuaded by Mr Tabori's argument that the venue of the attempt under challenge (Edinburgh) strengthens the *forum non conveniens* submission. When seen in the context of the attempts as a whole (which feature as more than mere background in the Claim) and their organisation generally outside of Scotland, I see no additional support being derived from this quarter.

73. Whilst acknowledging that the appeal was processed in Edinburgh, and the significance of this being where the Defendant's administration is based – its seat, so to speak – the effect of its decision resonates upon the Claimant, who at

all relevant times has lived and worked in England, and by extension although to a lesser extent upon his employing Trust.

74. I accept that the Defendant's witness works and resides in Scotland, but I remind myself that these are Judicial Review proceedings in which the giving of evidence is rare during oral hearings. As the hearing of these preliminary matters demonstrated, if there is one positive legacy of the pandemic in the legal world it may be the greater use of technology for conducting proceedings, where that is conducive to an effective hearing.

75. As to Mr Tabori's overarching submission that it is Scotland with which the action has the most real and substantial connection, I find myself again unpersuaded. Granted there is an obvious and real connection with Scotland from the Defendant's perspective, but there is a not insubstantial connection with England and the United Kingdom, not just because of the Claimant's circumstances, but because the very nature of the 'services' provided by the Defendant has, and is intended to have, force and application in all four countries of the United Kingdom.

76. In contrast with ***ex parte Greenpeace***, the instant proceedings are not "properly described as a Scottish case", simply because that is where the Defendant is hosted and/or because of the venue for the final events in a series that are not Scotland-based in their entirety. The Defendant operates on behalf of professional bodies outside of, as well as inside, Scotland and the qualification gained, irrespective of the venue of its sitting, permits inclusion on a professional register established by UK-wide legislation and which takes effect across the United Kingdom.

77. Mr Coyle made the further point that the Claimant is formally acting in person, with the assistance of legal representation on a direct access, but only piecemeal, basis. There should be no assumption that he will be represented in future hearings or other aspects of the proceedings.

78. For the reasons set out above, and applying the full extent of the ***Spiliada*** considerations, my conclusions on the *forum non conveniens* argument are that, whilst the Court of Session is another available forum, it is not clearly and distinctly more appropriate in the particular circumstances of this case. As a result, I would refuse the jurisdiction argument and the application for a stay of proceedings.

79. For completeness, I would add that, even if I had concluded that the Court of Session could be characterised as more appropriate, there are aspects of this case that would persuade me not to grant a stay. In particular, it is far from certain, at this distance from the decision(s) complained of that the Court of Session would exercise its discretion under s27A of the Court of Session Act 1988 to extend the time for initiating proceedings under its supervisory jurisdiction beyond the three months in s27A(1)(a). The first significant tranche of delay arose from the failure of the Defendant to act with the required expedition. That has been remedied within these preliminary proceedings, but thereafter much time has passed with limited progress. The exact reasons for this have not been investigated within the hearing before me, but it must be recognised that the extension of time needed under s27A(1)(b) is substantial and though the Court of Session would undoubtedly give proper consideration to such application, the outcome is by no means predictable. This being so, I consider the words of

Lord Goff at the end of the extract in Annexe B to be particularly pertinent to these proceedings.

Conclusion

80. For the reasons set out above, I reject the Defendant's challenge to the jurisdiction of this Court to hear the Claimant's application for permission to apply for Judicial Review.

Case management

81. Having considered brief responses from the parties in respect of the progress of the proceedings, the application for permission will now proceed to consideration on the papers in the normal way.

Annexe A

Medical Act 1983

1 The General Medical Council.

(1)There shall continue to be a body corporate known as the General Medical Council (in this Act referred to as "the General Council") having the functions assigned to them by this Act.

(1A)The over-arching objective of the General Council in exercising their functions is the protection of the public.

(1B)The pursuit by the General Council of their over-arching objective involves the pursuit of the following objectives—

(a)to protect, promote and maintain the health, safety and well-being of the public,

(b)to promote and maintain public confidence in the medical profession, and

(c)to promote and maintain proper professional standards and conduct for members of that profession.

…

34D The Specialist Register

(1)The General Council shall keep a register of specialist medical practitioners (known as "the Specialist Register").

(2)The Specialist Register shall, subject to subsections (4) and (5), contain the names of—

(a)registered medical practitioners who hold a CCT in a recognised specialty;

…

(9)The Specialist Register shall indicate—

(a)the specialty in respect of which a person's name is included in that register; and

34H Postgraduate medical education and training: general functions

(1)The General Council shall—

(a)establish standards of, and requirements relating to, postgraduate medical education and training, including those necessary for the award of a CCT in general practice and in each recognised specialty;

(b)secure the maintenance of the standards and requirements established under paragraph (a); and

(c)develop and promote postgraduate medical education and training in the United Kingdom.

34I Postgraduate medical education and training: approvals

(1)In order to secure the maintenance of the standards and requirements established under section 34H(1)(a), the General Council may approve—

(a)courses or programmes of postgraduate medical education and training (or part of such a course or programme) which the General Council are satisfied meet, or would meet, the standards and requirements established under section 34H(1)(a);

34L Award and withdrawal of a Certificate of Completion of Training

(1)Subject to subsection (3), the Registrar shall award a certificate of completion of training (CCT) to any person who applies to the General Council for that purpose if—

(a)that person is a registered medical practitioner;

(b)the Registrar is satisfied that that person has been appointed to, and has satisfactorily completed, a course of training leading to the award of a CCT; and

(b) [*sic*] that course of training has been approved by the General Council under section 34I(1)(a).

ANNEXE B

Spiliada Maritime Corporation v Cansulex Ltd [1987] AC 460

Extracts from the speech of Lord Goff of Chieveley (*Section 5 onwards*)

> It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:
> *"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."*
>
> I feel bound to say that I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as *forum non conveniens* and sometimes as *forum conveniens*) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it.
>
> But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience." Such a suggestion was emphatically rejected by Lord Kinnear in Sim v. Robinow, 19 R. 665 , 668, and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the Société du Gaz case, 1926 S.C.(H.L.) 13 , 18, 19, and 22 respectively. Lord Dunedin, with reference to the expressions *forum non competens* and *forum non conveniens*, said, at p. 18:
> *"In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for conveniens.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'"*
>
> In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(a) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Société du Gaz case, 1926 S.C.(H.L.) 13 , 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(c) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. …

…

It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum – in The Atlantic Star [1974] A.C. 436 (Belgium); in MacShannon's case [1978] A.C. 795 (Scotland); in Trendtex [1982] A.C. 679 (Switzerland); and in the The Abidin Daver [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum

for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum.

(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795 , 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Société du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Daver [1984] A.C. 398 , 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Crédit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

…

(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. Again, take the example of cases concerned with time bars. Let me consider how the principle of *forum non conveniens* should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate

for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there.

But, in my opinion, this is a case where practical justice should be done. and practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country.