

Libel Tourism in England: Now the Welcome is even Warmer

The protection afforded by the forum (non) conveniens doctrine to publishers who find themselves sued in England and Wales over “international” libels has dwindled in recent years. Now a decision of the European Court of Justice has removed the doctrine altogether from a category of cases to which it had been thought to apply. More than ever, publishers must be prepared to fight claims on their merits.

“International libels”

A libel claim in the English courts can be “international” in three respects. First, it might be brought by a claimant who is based abroad. Secondly, it might be brought against a publisher who is based abroad. Thirdly, it might be brought in respect of a publication which has occurred abroad. Sometimes more than one of these elements will be present. In *King v Lewis*,¹ for example, Don King, the Florida-based boxing promoter, brought a claim against New York-based defendants in respect of accusations on a US website, which he claimed had been accessed (and hence “published” for libel purposes) in England.

Forum (non) conveniens and libel

The forum (non) conveniens doctrine protects defendants against claimants who wish to drag them inappropriately before the English courts when the case ought properly to be tried elsewhere, having regard to “the interests of all the parties and the ends of justice”. Where no permission is required from the English court to serve the claim form, a defendant may have the action stayed if he can show that there is some other available jurisdiction which is clearly more appropriate (forum non conveniens), although the claimant may rebut a prima facie case for a stay by showing that it would nevertheless be unjust to deprive him of the right to trial in England. Conversely, a claimant who needs permission to serve a claim form outside the jurisdiction must satisfy the court that England and Wales is clearly the more appropriate forum for the dispute (forum conveniens).² Where a “real and substantial” tort has occurred within England and Wales an initial presumption arises that the claim should be heard here.³ In a libel case, the presumption will often arise from the mere fact that the words complained of have been published here. Thereafter it is for the defendant to show, for example, that the claimant has no real connection to this jurisdiction, or that key witnesses are located in another country.

The diminishing usefulness of forum (non) conveniens for defendants

One reason for the increased exposure of defendants to international libel claims in England is that the world has moved on while, by and large, the law has not. On the one hand, many of the businessmen, sports stars, entertainers and celebrities who are today’s typical libel claimants now pursue international careers and enjoy global reputations. They can easily show that they are known here and have “connecting factors” such as a home, business interests or family members in England and Wales, sufficient to satisfy the forum test. On the other hand, there has been an explosion in international publishing. Many foreign titles are marketed here, foreign TV channels are available on satellite and cable services and, above all, the advent of the internet means that, unless sophisticated precautions are taken, any material placed on a website is capable of being accessed and read (and hence “published”) in this jurisdiction.

In *Berezovsky v Michaels*,⁴ the defendants embarked on an ambitious attempt to persuade the House of Lords to recast the forum test in cases involving international publications. The case was brought by two internationally known Russian businessmen against the publishers of *Forbes* magazine, an American business title which sold some 786,000 copies in North America, as opposed to fewer than 2,000 in England and Wales. The defendants conceded in the House of Lords that the claimants technically had a cause of action against them in this jurisdiction but argued that, when it came to the forum test, the court should proceed as if all the publications of the magazine worldwide constituted a single cause of action and then ask where the appropriate forum for that action was (i.e. probably the United States). The submission was roundly rejected as being contrary to well-established principles of libel law, lacking any underpinning in considerations of justice, and impractical.⁵ Neither were the majority impressed by the argument that the claimants' reputations in England were merely an aspect of their international reputations rather than something connecting them specifically to this jurisdiction.⁶ Accordingly, the claim was allowed to proceed.⁷

The *Berezovsky* decision left one ray of hope for defendants: Lord Steyn expressly declined to consider the position of the internet publications of the *Forbes* article,⁸ so it remained possible that the forum test would be applied differently in a pure internet case. That possibility was snuffed out by the Court of Appeal in *King*.⁹ Not only did they reject the defendants' submission that the court should take into account, in an internet case, whether the publisher had targeted his publications towards this jurisdiction, they appear to have considered that the practical impossibility of determining where a web page is read should count against, rather than in favour of, an online publisher who finds himself sued here:

"a global publisher should not be too fastidious as to the part of the globe where he is made a libel defendant . . . in an Internet case the court's discretion will tend to be more open-textured than otherwise; for that is the means by which the court may give effect to the publisher's choice of a global medium."¹⁰ The vulnerability of a publisher to an action in England and Wales, thanks to a combination of the current law on the definition of "publication", responsibility for publication, and forum (non) conveniens, is strikingly illustrated by the case of *Richardson v Schwarzenegger*.¹¹ In 2003 Mr Schwarzenegger was standing in elections for governor of California. The second defendant, Mr Walsh, was Mr Schwarzenegger's principal spokesman and the third, Sheryl Main, was one of his publicists. Mr Walsh and Ms Main were quoted in the *LA Times*, allegedly speaking on behalf of Mr Schwarzenegger, and their words were alleged to be defamatory of the claimant, an English journalist who had claimed she was sexually assaulted by Mr Schwarzenegger in London in 1995. The *LA Times* article had been published in hard copy in this jurisdiction and was available here on the internet. The words had also been picked up by the English media and repeated on search engine homepages. Notably, it was not the publishers of any of these newspapers or websites who were sued, but Mr Schwarzenegger and members of his team, who were speaking in the context of a state election campaign and may well have paid little thought to where their comments might end up when they responded to the *LA Times* journalists. Nevertheless, the claimant was given permission to serve proceedings on all three defendants and, rejecting an application by the second defendant to have the claim against him stayed, Eady J. held that he was arguably responsible for the publications which took place here, and that England and Wales was the appropriate forum for the action.

Only one recent case has bucked the trend. In *Jameel v Dow Jones & Co Inc*,¹² the defendants did not seek to set aside the decision permitting the claimant to serve the proceedings out of the jurisdiction, but, had they done so (at least armed with the evidence they later acquired) they would have succeeded, the Court of Appeal held. The facts were unusual. A Saudi businessman sued the publishers of the *Wall Street Journal On-line* over an article on its website, but the claimant was only identified as the subject of the defamatory allegation to readers who clicked on a link to a further web page, where he was named. It transpired that, within this jurisdiction, there were only five such

readers beside the claimant himself: one was the claimant's solicitor, two more were close business associates, and the remaining two had no knowledge of the claimant or any recollection of seeing his name on the list. The Court of Appeal picked up on a somewhat overlooked aspect of earlier case law, namely that, in order to satisfy the forum test, there must be a publication in this jurisdiction which is "significant" or which amounts to a "substantial" tort. That test was not satisfied by the five publications actually identified. In the event, the court stayed the claim as an abuse of process.

The Brussels Convention and Shevill v Presse Alliance SA

In a large class of cases, forum non conveniens arguments are no longer available, even if they could have assisted a defendant. The Brussels Convention (since supplemented by the Lugano Convention and now largely replaced by the Judgments Regulation¹³) introduced a complete code for the distribution of civil actions between Contracting States, and when a case is allocated to the United Kingdom under the Convention there is no discretion to stay the action on the grounds that the courts of some other state are more suitable.¹⁴ The Convention's effect on libel claims was determined in *Shevill v Presse Alliance*,¹⁵ a case in which claimants (an English individual, an English company and two foreign companies) brought an action in England against the French publishers of *France Soir* in respect of the very small number of copies sold in this jurisdiction. In a Convention case, the European Court of Justice decided, a claimant may either sue the defendant in his home state in respect of all the publications,¹⁶ wherever they occurred, or, under Art.5(3) of the Convention, in another Contracting State where the words were published and the claimant's reputation damaged (that being the "place where the harmful event occurred"), but in the latter case the claim must be limited to the damage occurring in the chosen state. The claim in respect of the English publications was therefore permitted to proceed in England. It is worth noting that, had the forum doctrine applied, some or all of the claimants might have faced real difficulties resisting an application for a stay.

Owusu v Jackson

It was therefore uncontroversial that the forum doctrine could not apply when the various candidates for the appropriate court were located in different Contracting States. What was not clear until very recently was what happens when a defendant is sued in the Contracting State in which he is domiciled, but there is an alternative forum in a state which has not signed up to the Convention.¹⁷ On one view, the Convention only governed relations between Contracting States, so that it was still open to an English court to apply the forum doctrine and stay a claim on the grounds that there was some non-Contracting State which was the more appropriate forum for the action. On another view, whenever an international claim was brought against a defendant domiciled here, it was brought by virtue of the Convention. If that view was correct, then the primary rule under the Convention would apply (i.e. that the defendant should be sued in his home court), to the exclusion of the forum doctrine. At first the English courts inclined to the former view¹⁸ but the House of Lords expressed doubt about it in *Lubbe v Cape Plc*.¹⁹

The ECJ has now ruled on the point, following a preliminary reference from the English Court of Appeal in a personal injury case.²⁰ The claimant, Mr Owusu, was a British national, domiciled in the United Kingdom. He had been injured while on holiday in a rented villa in Jamaica. He sued the villa's owner, Mr Jackson, who was also domiciled in the United Kingdom, in the English High Court, together with a number of Jamaican companies. Since the claim would turn on a detailed investigation of the facts of the accident and the prevailing conditions and safety standards on a Jamaican beach, this would appear to have been a good candidate for a stay on grounds of forum non conveniens if the court retained its discretion to grant one. The ECJ, however, was unmoved by the practical difficulties which would arise from the application of the inflexible Convention rules in

cases such as this. In a somewhat laconic judgment,²¹ the court ruled that, while there had to be some “international element” before the Convention was engaged, there was nothing in the Convention which required that the international dimension must consist in the involvement of two or more Contracting States and indeed there were other parts of the Convention which were likely to apply to international legal relationships involving only a single Contracting State.²² The court acknowledged that the objective of the Convention was to ensure the smooth working of the internal market, but rejected the submission of Mr Jackson and the UK Government that it was therefore inapplicable to cases which were only “international” by virtue of the involvement of a non-Contracting State. It was unnecessary, the ECJ held, for there to be a “real and sufficient link” with that objective in every case. The court held therefore that Art.2 of the Convention is indeed of mandatory effect in all international claims against a defendant domiciled in a Contracting State. It went on to rule that, this being the case, it would be inconsistent with the principle of legal certainty underlying the Convention if the English court could nonetheless retain the power to decline jurisdiction on grounds of *forum non conveniens* rather than solely on the grounds expressly specified as exceptions to Art.2 in the Convention itself.²³

Predictably the ECJ, which is reluctant to be drawn into hypothetical pronouncements, refused to go on and answer the English court’s further questions as to whether there might be certain circumstances in which the *forum doctrine* could be applied without coming into conflict with the Convention. It is hard to imagine, however, what such circumstances might be.²⁴ Equally, although the ECJ confined itself to the Convention, it is hard to imagine that a different result would be reached under the Judgments Regulation, which is similarly worded and pursues the same aims.

The ECJ’s decision is potentially of great significance for international libel actions. Take, for example, the facts of *Orara v The Observer*.²⁵ The claimant was a prominent Kenyan lawyer who sued the London-based *Observer* over an article concerning events in Kenya. Notwithstanding the fact that there had been a substantial publication in England, compared with a very limited circulation of the newspaper in Kenya, the claim was stayed because it was “all about Kenyan politics and Kenyan personalities”. Today, the court would be obliged to let the claim proceed. Similarly, UK-based broadcasters who take care to ensure that defamatory programmes are broadcast only outside this jurisdiction (previously making it extremely unlikely that an action could be brought here) must now face up to the fact that they are nevertheless vulnerable to an English libel claim.

What is left of *forum (non) conveniens*?

It follows that the *forum (non) conveniens* doctrine survives in only two situations. First, it is available where the defendant is domiciled in some non-Contracting State.²⁶ Secondly, it can be invoked when the alternative forum is another UK court (i.e. in Scotland or Northern Ireland), because the Convention has no bearing on the allocation of claims within the United Kingdom.²⁷

Practical steps for defendants

Given that, in so many cases, *forum* arguments will either not be available at all, or, if available, of doubtful effectiveness, how should a defendant respond to an international libel claim? The following points are worth bearing in mind.

First, if a defendant suspects that publication in this jurisdiction has in fact been very limited and can have caused the claimant no real damage, then, in light of *Jameel*, it is worth trying to obtain clear evidence of the extent of publication at an early stage, in the hope that it will be possible to show that there has been no “substantial tort” committed in this country. But if the evidence emerges later, an application for a stay on grounds of abuse of process can still be brought, even if jurisdiction was not challenged at the outset.

Secondly, it is worth remembering that, when a claimant is required to obtain permission to serve his claim form abroad then, as well as satisfying the forum test, he must satisfy the court that his claim has a realistic prospect of success.²⁸ Although, as in a summary judgment application, the court will not look closely at disputed factual matters, there will be cases where a defendant would do better to concentrate his efforts on challenging the claimant's prospects of success on the merits rather than disputing the connecting factors of the claim with this jurisdiction.

Thirdly, when the claim is in respect of a publication which has occurred abroad, the claimant will have to satisfy the "double actionability rule"²⁹ or show that his case falls into an exception to it, even where the court's jurisdiction cannot be challenged on grounds of forum non conveniens.³⁰ Sometimes it may be better to bring a preliminary challenge on that basis instead of or as well as a forum challenge. On the other hand, such applications can be expensive and time-consuming: in *Komarek v Ramco Energy Plc*³¹ a preliminary issue on double actionability took up several days of court time, with specialist counsel and live evidence from two experts on Czech law.

Fourthly, if none of the preceding suggestions are applicable, a defendant needs to consider carefully, before embarking on a forum challenge, whether it might not be more cost-effective in the long run simply to accept that the court has jurisdiction to hear the claim and to devote his resources to fighting it on the merits. Similarly, if a forum challenge has failed at first instance, a defendant should think very carefully before appealing: appellate courts frequently stress that these are matters within the discretion of the first instance judge and deprecate appeals based only on points of factual distinction between the case in hand and other applications which have succeeded or failed.³²

Finally, even if a claimant wins at trial against a foreign defendant, then all may not be lost. Claimants may find that their enthusiasm for English justice is not shared by the courts to which they must turn in order to enforce their judgments. US courts in particular have declined to enforce awards on the basis that English libel law is anathema to the First Amendment.³³

1. [2005] E.M.L.R. 4.

2. See *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, at 476–482 per Lord Goff, and *Dicey & Morris on the Conflict of Laws* (13th ed., 2000), Ch.12.

3. See *Berezovsky v Michaels* [2000] 1 W.L.R. 1004 at 1012–1014 per Lord Steyn.

4. *ibid.*

5. See *ibid.*, per Lord Steyn at 1012–1013.

6. A point which had carried weight with Popplewell J., who had set aside permission to serve out. See *ibid.*, per Lord Hoffmann at 1022–1024.

7. Lords Hoffmann and Hope dissented on the ground that the Court of Appeal should not have interfered with Popplewell J.'s exercise of his discretion.

8. See *ibid.*, at 1015.

9. In fact this came as no surprise, in light of *Gutnick v Dow Jones* [2002] H.C.A. 56, a decision of the High Court of Australia, where the law on publication is the same as England and the approach to forum (non) conveniens is similar.

10. n.1 above, at [31].

11. [2004] EWHC 2422.

12. [2005] E.M.L.R. 16.

13. Council Regulation 44/2001 replaces the Brussels Convention in respect of all Member States of the EU except Denmark, to which the Brussels Convention still applies. The Lugano Convention applies to non-EU states belonging to the European Free Trade Area. The rules under discussion here are in similar terms in all three instruments. Since *Owusu v Jackson* was decided under the Brussels Convention, Convention terminology is used in this article for the sake of convenience, although the majority of cases in the future are likely to fall within the Judgments Regulation.

14. See *Arkwright Mutual Insurance Co v Bryanston Insurance Co* [1990] 3 W.L.R. 705.

15. [1995] 2 A.C. 18.

16. The basic rule, in Art.2 of the Convention, is that a defendant should be sued in the court of the Contracting State in which he is domiciled.

17. If the defendant is not domiciled in a Contracting State at all, the position is unproblematic: by Art.4, the traditional English rules on jurisdiction are preserved in such cases.

18. In *Re Harrods (Buenos Aires)* [1992] Ch. 72, where the competing jurisdictions were England and Argentina).

19. [2000] 1 W.L.R. 1545 per Lord Bingham at 1562.

20. *Owusu v Jackson* Case C–281/02 (Judgment of Grand Chamber, March 1, 2005).

21. There was some more detailed and slightly more persuasive reasoning in the Opinion of Advocate General Leger (December 14, 2004). In particular, at [159]–[175] he argued that limiting the application of Art.2 to intra-Community cases would be inconsistent with the Convention's aims of achieving legal certainty and strengthening the legal protection of people, especially defendants, established in the Community: there would be difficult, unpredictable disputes about whether a case was really an intra-Community one, and a defendant domiciled in a Contracting State (say, Germany) would not be able to rely with certainty on the fact that he would be sued there unless one of the express exceptions set out in the Convention itself applied: he could find himself sued in, say, England by a claimant from a non-Contracting State simply because he travelled to the United Kingdom, making himself amenable to service there and hence (under English law) *prima facie* a proper defendant for English proceedings. By contrast the ECJ only relied on this reasoning at the second stage (i.e. when, having already decided that Art.2 is *prima facie* applicable to all international claims, it turned to consider whether the forum doctrine was incompatible with the Convention thus construed). The only reasons it gave for reaching that first conclusion were negative: essentially, there is nothing in the Convention expressly limiting its application to intra-Community cases.

22. e.g. Arts 16 and 17. See judgment, n.20 above, at [28].

23. e.g. under ss.5, 6, or 8 of the Convention, dealing with exclusive jurisdiction in certain cases, agreements between the parties as to jurisdiction, and cases where the courts of another Contracting State are already seised of the action.

24. The ECJ has already ruled, in *UGIC v Group Josi* [2000] E.C.R. I–5925 (a dispute involving a Canadian claimant and Belgian defendant) that “as a general rule” the domicile of the claimant is a matter of indifference in a case under the Convention, so it would presumably have made no difference had Mr *Owusu* been a Jamaican resident.

25. April 10, 1992, Drake J., unreported.

26. In this situation the Convention is engaged, because there is an international element (see *Owusu*, n. 20 above, at [25]–[26]) but Art.4 operates to preserve the English discretionary approach to jurisdiction.

27. Likewise the Judgments Regulation: see *Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EWHC 359 (QB) at [4]–[17].

28. See CPR 6.21 and e.g. *BAS Capital Funding Corp v Medfinco Ltd* [2004] Lloyd’s Rep. 652 at [153].

29. i.e. he must show that the claim is civilly actionable both in England and Wales and the jurisdiction in which publication occurred.

30. Despite suggestions to the contrary, it appears that the double actionability rule has not been abrogated by the Brussels Convention (see e.g. *Gatley on Libel and Slander* (10th ed., 2004), para.24.26, fn.67). However under the proposed EU Regulation on the Law Applicable to Non-Contractual Obligations (“Rome II”) the rule would be affected, and there is an argument that it has also been abrogated in certain internet cases by the Electronic Commerce (EC Directive) Regulations 2002: see Law Commission “Defamation and the Internet—A preliminary Investigation” (December 2002), at paras 4.37–4.49).

31. [2002] EWHC 2501.

32. See e.g. *King*, n.1 above, at [35]–[36].

33. See e.g. *Telnikoff v Matusevich* 347 Md 561, 702 A. 2d 230 (Md 1997) (Supreme Court of Maryland), noted in *Gatley*, n.30 above, at para.24.34.

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