Neutral Citation Number: [2008] EWCA Civ 152

Case No: B1/2007/0207

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon Mr Justice Mackay

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03 March 2008

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE DYSON
and
LORD JUSTICE JACOB

- -

Between :

JON OLAFSSON	**Claimant/ Respondent**
- and -	
HANNES HOLMSTEINN GISSURARSON	**Defendant/ Appellant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr Hugh Mercer (instructed by **Olswang Solicitors**) for the **Claimant**
Mr Jasbir Dhillon (instructed by **Eversheds LLP**) for the **Defendant**

Hearing dates: 22 and 23 October 2007

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Judgment
As Approved by the Court

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Sir Anthony Clarke MR:

Introduction

1. This is an appeal brought with the permission of Moore-Bick LJ from an order made by Mackay J ('the judge') on 20 December 2006 in which he made an order under CPR 6.9 that service of the claim form be dispensed with. In order to understand the issues in this appeal it is necessary for me to refer briefly to the nature of the case, the procedural history of the action and the earlier decision made by the judge on 8 December 2006.

The nature of the case

2. I can take the relevant facts from [3] and [4] of the judgment of 8 December. The respondent, whom I will call 'the claimant', is an Icelandic businessman. The appellant, whom I will call 'the defendant', is a professor of political science at the University of Iceland and domiciled in Iceland. The basis of the claimant's claim is the alleged publication on the defendant's website in England of defamatory material relating to the claimant. Solicitors for the claimant wrote to the defendant on 8 June 2004 setting out the claimant's complaints in some detail and on 3 July 2004 the defendant disconnected the home page on his website. On 5 July the claimant's solicitors sent an email to the defendant warning him that proceedings would be issued.

The procedural history

3. The claim form in this action was issued on 4 August 2004. The claimant's solicitors took immediate steps to have the claim form served on the defendant in Iceland. As explained in more detail below, on the same date they made an appropriate request to the court by signing and submitting Form PF 7. Less than a month later, on 2 September 2004, on the instructions of the International Matters Unit of the Foreign and Commonwealth Office ('the 'FCO'), Mr Simon Minshull, who was Deputy Head of Mission at the British Embassy in Iceland and HM Consul, went to an address in Reykjavik in order to serve the process on the defendant, who is a well known figure in Iceland and was known to him.

4. He identified the defendant and gave him the claim form and all the other relevant documents including the response pack. The defendant, who reads and understands English, opened the envelope and read the contents. He retained the documents but did not sign any written receipt for them. He was not asked to do so. None of this is in dispute. To put it at its lowest, the defendant knew what the documents were. It is, however, common ground that on these facts the documents were not served on the defendant in accordance with Icelandic law.

5. There are various methods of service under Icelandic law as follows. Process is duly served on a person if it is served (a) by a public process server or a notary public or (b) by a registered letter delivered by a postman or (c) subject to certain conditions, by publication in the Official Gazette or (d) by delivery to the person and that person

signing a declaration on the summons confirming acceptance of the documents. Icelandic law also provides that, if the person concerned attends court on the initial hearing of the case, it is irrelevant whether the summons was otherwise served in accordance with one of the above methods.

6. The problem here for the claimant is that he did not avail himself of methods (a), (b) or (c) and he could not rely upon any signature on the summons or claim form because the defendant was not asked to and did not sign a declaration on the documents confirming receipt of them. He could not rely upon events at the initial hearing because there has not been such a hearing in Iceland. It is in these circumstances that it is common ground that the defendant was not duly served with the English proceedings in Iceland under Icelandic law, even though he received and retained the documents on 2 September 2004 and he both knew and understood what they contained.

7. The defendant took advice in Iceland and was told that it was likely that the case would be dismissed by the English courts because he was domiciled in Iceland and, in any case, that there would be no difficulty in seeking a retrial if judgment should be entered against him. In these circumstances he did not acknowledge service of the claim form.

8. For their part, the claimant and his solicitors thought that the documents had been duly served in Iceland and on 23 December 2004, on being satisfied that they had indeed been served, Master Whittaker gave judgment in default in favour of the claimant and against the defendant for damages for libel together with aggravated damages and costs, with damages to be assessed. Thereafter, the claimant's solicitors kept the defendant informed of the progress of the proceedings but he chose to play no part in them. On 13 July 2005 His Honour Judge Previté QC assessed damages at £55,000 with £10,000 by way of aggravated damages. He also awarded costs and granted a permanent injunction.

9. On 12 January 2006 the defendant applied to set aside the judgment. The matter came before the Senior Master, Master Turner, who, after a one and a half day hearing, on 23 May 2006 dismissed the application to set aside the judgment under CPR 13.2 and exercised his discretion under CPR 3.10 and/or 6.9 "to correct any error in respect of service".

10. The defendant appealed to the judge with the permission of Master Turner and on 8 December 2006 the judge allowed the appeal. He held that CPR 3.10 could not be used in a case where there had been no service under the relevant rules for service, which here were the rules in Iceland. As to CPR 6.9, the judge noted that the claimant had not sought to rely upon it before him. After the judge had handed down his judgment on 8 December, the question arose what orders he should make. It was not in dispute that, in the light of his judgment, the orders and judgments of 23 December 2004 and 13 July 2005 must be aside and the claimant has not sought to appeal against the order made to that effect. The defendant submitted, however, that, in addition to those orders being set aside, the claim should be dismissed. In response, the claimant sought an order under CPR 6.9 dispensing with service of the claim form, alternatively an order under CPR 7.6(3) extending the time for service of the claim form to a date which would permit 're-service' to take place.

The judgment and order of 20 December 2006

11. In a reasoned judgment handed down on 20 December 2006 the judge held that the court had jurisdiction to make an order dispensing with service of the claim form under CPR 6.9, that it should only do so in an exceptional case but that this was an exceptional case. In the exercise of that discretion he concluded that he should make the order sought under CPR 6.9. He added that in these circumstances it was not necessary for him to reach a conclusion on the application under CPR 7.6(3). He therefore made no order "either way" under that rule.

The appeal

12. The central issue in the appeal is whether the judge was wrong to make an order under CPR 6.9 dispensing with service. Mr Dhillon submits that he was. In doing so, Mr Dhillon draws attention to these facts, which are not in dispute. The time for service of the claim form expired in February 2005. The limitation period governing the claimant's claim in this action is one year, so that it expired in August 2005. Mr Dhillon submits that the judge had no power to make the order he did, alternatively that it was not appropriate in the exercise of his discretion (as he puts it) to implead a foreign defendant by dispensing with service of the claim form, with the effect (again as he puts it) of retrospectively validating the claim. In response Mr Mercer submits that, in order to succeed, Mr Dhillon must persuade this court that the judge erred in principle or made an order he could not make. He submits that the judge did neither and that he was entitled to make the order he did.

13. The argument was divided into two parts. In the first the focus was on the position on the footing that this was an entirely English case and in the second it was on the footing that this is an international case. I shall therefore consider the appeal under the heading first of the national perspective and then of the international perspective.

The national perspective

14. CPR 6.9 provides that the court may dispense with service of a document and that an application for such an order may be made without notice. It is common ground that "the document" includes a claim form. CPR 7.6 gives the court power to extend the period within which the claim form must be served. Rule 7.6(3) provides for the case where the application is made after the time for serving the claim form has expired, whether the time was specified under CPR 7.5 or under an order made under rule 7.6. By rule 7.6(3), the court only has jurisdiction to extend time in such a case if: (a) the court has been unable to serve the claim form; or (b) the claimant has taken all reasonable steps to serve the claim form but has been unable to do so; and (c) in either case, the claimant has acted promptly in making the application.

15. The correct approach to an application to dispense with service of a claim form under CPR 6.9 has been considered in a number of cases decided under the CPR. At the time of the hearing of the appeal they included: *Godwin v Swindon Borough Council* [2001]

EWCA Civ 1478, [2002] I WLR 997, *Anderton v Clwyd County Council (No 2)* [2002] EWCA Civ 933, [2002] 1 WLR 3174, *Wilkey v BBC* [2002] EWCA Civ 1561, [2003] 1 WLR 1, *Cranfield v Bridgegrove Ltd* [2003] EWCA Civ 656, [2003] 1 WLR 2441, *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 1 WLR 3206, *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945, *Kuenyehia v Inrernational Hospitals Group Limited* [2006] EWCA Civ 21 and *Phillips v Nussberger* [2006] EWCA Civ 654, [2006] 1 WLR 2598.

16. After the hearing of the appeal we learned that the House of Lords was soon to hand down its judgments in an appeal in *Phillips v Nussberger*. We decided to await the House of Lords' decision and reasoning before finalising our judgments in this appeal. We invited and have received submission from both counsel as to the effect of that decision on the issues we have to decide. In the House of Lords the case is called *Phillips v Symes (No 3)* [2008] UKHL 1, although in [2008] 1 WLR 180, while given that name in the text, it is reported as *Phillips v Nussberger*. To avoid confusion we will call the case *Nussberger*, both in this court and in the House of Lords and will return to it below.

17. Apart from *Nussberger*, perhaps the most important of those cases, at any rate in a domestic context, is *Anderton v Clwyd* because it considered a number of different classes of case and gave valuable guidance for the future. The court comprised Lord Phillips MR and Mummery and Hale LJJ. The judgment of the court was given by Mummery LJ. It is helpful to consider some specific aspects of the court's approach. They include the following:

i) To leave an attempt to serve the claim form until the end of the period for service is fraught with peril for the claimant and his solicitors: *Anderton* at [2].

ii) Subject to iii) and viii) below, the court will not make an order dispensing with service where such a dispensation would constitute a retrospective extension of time for service specifically forbidden by rule 7.6(3): *Godwin* as explained in *Anderton* at [19].

iii) There is power in rule 6.9 to dispense with service retrospectively as well as prospectively but it is only exercisable retrospectively in exceptional circumstances: *Anderton* at [50].

iv) There is a sensible and relevant distinction between two classes of case which was not analysed or recognised in *Godwin*: *Anderton* at [56].

v) The first is where the claimant has not even attempted to serve the defendant by one of the methods permitted by CPR 6.2 and the claimant still needs to serve the claim form *and to bring it to the attention of the defendant* (my emphasis). Such a case is clearly caught by *Godwin* and an order dispensing with service should not be made: *Anderton* at [57].

vi) The second is that set out in *Anderton* at [58] which is discussed at [17] and [18] below.

vii) In the exercise of the discretion to dispense with service it may also be legitimate to take into account other relevant circumstances, such as the explanation for late service, whether any criticism could be made of the claimant or his advisers in the conduct of the proceedings and any possible prejudice to the defendant on dispensing with service of the claim form: *Anderton* at [59]. As I see it, whether it is legitimate to take such circumstances into account will depend upon the facts of the particular case. As will be seen, these seem to me to be significant features of the instant case.

viii) It is important, however, to add that *Anderton* was a deemed service case and the court made it clear at [2] that, now that both *Godwin* and *Anderton* have made the meaning of the deemed service provisions clear, "there will be very few (if any) accepted failures to observe the rules for service of the claim form".

18. At [58] of *Anderton* Mummery LJ said this:

> "Second, an application by a claimant, who has already made an ineffective attempt in time to serve a claim form by one of the methods allowed by rule 6.2, for an order dispensing with service of the claim form. The ground of the application is that the defendant does not dispute that he or his legal adviser has in fact received, and had his attention drawn to, the claim form, by a permitted method of service within the period of four months, or an extension thereof. In the circumstances of the second case the claimant does not need to serve the claim form on the defendant in order to bring it to his attention, but he has failed to comply with the rules of service of the claim form. His case is not that he needs to obtain permission to serve the defendant out of time in accordance with the rules, but rather that he should be excused altogether from the need to prove service of the claim form in accordance with the rules. The basis of his application to dispense with service is that there is no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact. The defendant accepts that he has received the claim form before the end of the period for service of the claim form. Apart from losing the opportunity of taking advantage of the point that service was not in time in accordance with the rules, the defendant will not usually suffer prejudice as a result of the court dispensing with the formality of service of a document, which has already come into his hands before the end of the period for service. The claimant, on the other hand, will be prejudiced by the refusal of an order dispensing with service because he cannot obtain an extension of time for service under rule 7.6(3)."

19. The court applied that approach in one of the cases before it, namely *Dorgan v Home*

Office, where (as appears at [84]), the reason for the delay in service of the claim form was that the solicitors erroneously believed that they had to serve the particulars of claim and the medical report, as well as the claim form, within four months of issue of the claim form. The claim form was received by fax within three minutes of the deadline for service by fax and came to the attention of the defendant's solicitors shortly thereafter. The period for service did not expire until the following day. Within minutes the solicitors faxed the claimant's solicitors asking for some pages of the medical report which had not arrived to be faxed through, which was done. The application was made promptly. Mummery LJ observed that an order dispensing with service would not prejudice the defendant other than depriving it of a time point on the rules "which may be removed by the exercise of the discretion under rule 6.9". The defendant had been notified of the claim and been supplied with details of it in correspondence. Mummery LJ added:

> "On the other hand, the claimant will be prejudiced by a refusal to dispense with service, in that his claim will be statute barred and he will be deprived of a trial on the merits of the claim."

The court thus treated that case as an example of the kind of exceptional case in which it was appropriate for an order dispensing service to be made.

20. I do not read any of the other cases to which we were referred, most of which I mentioned earlier, as varying the underlying principles identified in *Anderton*. That is to my mind so, although I recognise that in *Wilkey v BBC*, Simon Brown LJ (with whom Buxton and Carnwath LJJ agreed) distinguished between pre-*Anderton* and post-*Anderton* cases and at [18] emphasised the principle at [16 viii)] above that in post-*Anderton* deemed service cases the dispensing power should ordinarily *not* be exercised in the claimant's favour. The instant case is not of course a deemed service case.

21. Further clarification was provided by this court (comprising Ward, Waller and Dyson LJJ) in *Cranfield*, where Dyson LJ gave the judgment of the court. He discussed the scope of rule 6.9 at [31-32]. In doing so, he emphasised the exceptional nature of the power to dispense with service of the claim form, adding the hope that what was said on the facts of each of the cases before the court would provide guidance for the future, at least in similar circumstances, but he also noted that it was not appropriate to attempt to provide an exhaustive guide to the circumstances in which it is appropriate to dispense with service of a claim form retrospectively under rule 6.9. He ultimately concluded that the power to dispense with service retrospectively should be limited to truly exceptional cases.

22. The case of *Hashtroodi* is of little assistance in the instant case because it was a case in which it was held that the only reason for the failure to serve the claim form in time was the incompetence of the claimant's solicitors. The case of *Collier* is also of little importance in the context of the instant case. It was again a case in which Dyson LJ gave the judgment of the court, which also comprised Waller and Neuberger LJJ. It is sufficient to note that at [131] Dyson LJ stressed that the critical inquiry which the court must undertake is the reason why the claimant did not serve the claim form within the specified period.

23. The same constitution handed down its judgment on the same day in *Kuenyehia*, although this time the judgment was given by Neuberger LJ. He analysed the cases to which I have referred at [13-18]. He noted at [14] that this is an area in which "simplicity, clarity and certainty are particularly desirable". He summarised the effect of the cases at [26]:

> "In our view, the effect of the reasoning of this court, at least in "post-*Anderton*" cases, in the decisions to which we have referred, is as follows. First, it requires an exceptional case before the court will exercise its power to dispense with service under r 6.9, where the time for service of a claim form in r 7.5(2) has expired before service was effected in accordance with CPR Part 6. Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt in time to serve by one of the methods permitted by r 6.2, or has served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of a claim form."

It is true that in *Kuenyehia* this court allowed a defendant's appeal but I do not think that the facts of that case are sufficiently close to the facts of this to provide any useful guide. It was a case of faxed service, whereas this was a form of personal service, and the question for the judge here was, as in each case, whether it was a truly exceptional case. As to *Nussberger*, I will return to it below in the context of the international perspective.

24. With these considerations in mind I turn to the facts. This is to my mind a truly exceptional case. The claimant was entitled to serve the proceedings out of the jurisdiction in Iceland under CPR 6.19(1) because Iceland is a party to the Lugano Convention. His solicitors took appropriate steps to have the claim form served in Iceland. On 4 August 2004 they made a request of the High Court on the prescribed form, namely Form PF 7, which is entitled "Request for Service of Document Abroad (rules 6.26(2)(a) and 6.27(2)(a))", as follows:

> "We hereby request that the claim form be sent through the proper channel to Iceland for service on [the defendant] at [the defendant's address] and that it may be served as follows:
>
> (i) through the judicial authority of Iceland; and/or
>
> ii) through the government of Iceland (where the government is willing to effect service)."

The document concluded with an undertaking to pay "all the expenses incurred by the foreign judicial authority".

25. This was a request under CPR 6.26 not under CPR 6.27. The request was made under rule 6.26(2)(a), that is for service of the claim "by the method in paragraph (1) that has been chosen". As can be seen from the request, the method chosen was that the claim form be served through the judicial authority in Iceland and/or through the government of Iceland. The request was thus made under rule 6.26(1)(a) and/or (d). It was not made under paragraph (b), which is for service through a British Consular authority, or under paragraph (c), which is for service through an authority designated under the Hague Convention. Iceland is not a party to the Hague Convention.

26. CPR 6.26(4)(b) provides that in such a case the Senior Master will send the relevant documents to the FCO "with a request that it arranges for the claim form to be served by the method indicated in the request [filed by the claimant] or, where that request indicated alternative methods, by the most convenient method". Neither party procured a copy of that request from the Senior Master and we do not have a copy of it. However, although we do not know what form the request to the International Legal Matters Unit at the FCO took, we do have a letter dated 14 August from the FCO to Mr Simon Minshull, the Consul in Reykjavik, sending him the relevant documents for service, including both the claim form and appropriate translations. The letter, which the claimant and his solicitors did not see until much later, stated that according to FCO records there was no local objection to process being served personally by a member of the Consular staff and asked the Consul to arrange for service to be effected by that method as soon as possible. That was correct so far as it went but, unfortunately (as stated earlier), such service would only be good under Icelandic law if the defendant signed a declaration confirming receipt of the relevant documents. In the event the purported service on 2 September 2004 by the Consul was not good service under Icelandic law because no such declaration was made.

27. On the next day, 3 September 2004, the Consul signed a certificate stamped by the British Embassy in Reykjavik stating that the relevant documents were served upon the defendant "by delivery thereof to [him] in person" at his address on 2 September. By rule 6.26(5) that certificate is evidence of the facts stated in it. It was that certificate which no doubt persuaded Master Whittaker that the claim form had been properly served in accordance with Icelandic law and that it was appropriate to give judgment on 23 December 2004. Unfortunately no one noticed that the method for service adopted by the FCO was not one of the methods requested by the claimant's solicitors in Form PF 7 quoted above and it did not occur to anyone that the method adopted was not good service under Icelandic law.

28. In these circumstances, it was in my opinion understandable for the claimant and his solicitors to think that the claim form had indeed been served in accordance with Icelandic law, even though it had not. That is so even though I would accept Mr Dhillon's submission based on the decision of Treacy J in *Chare v Fairclough* [2003] EWHC 180 (QB) that service through the Senior Master and the FCO is service by the claimant and not service by the court. Nevertherless, in practice I feel sure that claimants' solicitors both rely upon the Foreign Process Department of the High Court and upon the FCO to procure the effecting of service in a case of this kind and rely upon any certificate issued by the FCO. By CPR 6.24(1)(a), where a claim form is to be served out of the jurisdiction, it may be served by any method permitted by the law of the country in which it is to be served. In my opinion, in the particular circumstances of this case, the claimant and his solicitors could reasonably have thought that the claim

form was served in accordance with the law of Iceland. I would reject Mr Dhillon's submission that the judge was insufficiently critical of the claimant and his solicitors in failing to ensure that the service in Iceland complied with Icelandic law. The judge was, if anything, more critical than I would be. I should, however, add that the position may not be the same in the future. The experience of this case should lead claimant's solicitors in the future to ensure that the service is in fact valid by the relevant law.

29. The judge summarised the submissions on both sides at [13-18] and directed himself by reference to the cases to which I referred earlier. I would reject Mr Dhillon's submission that the judge did not have regard to all the cases because he did not refer to *Wilkey* or *Kuenyehia* in his judgment. He expressly referred to the passage in *Nussberger* in which Neuberger LJ summarised the effect of the cases, including both those cases. The judge had well in mind the narrow class of case in which it would be appropriate to grant relief under CPR 6.9 when it would not be appropriate to grant an extension of time for service under CPR 7.6(3). He correctly held that this is a case of the kind identified by Mummery LJ in *Anderton* as the second class of case, albeit in a different factual context. Thus it is a case in which the claimant made an ineffective attempt in time to serve a claim form by a method allowed by the rules. Personal service is permitted by Icelandic law, so that the method was allowed by the rules in Iceland but it was ineffective under Icelandic law for want of a declaration signed by the defendant. Although the judge does not spell it out quite like that, he must I think have approached it in that way. In my opinion, he was correct to do so.

30. The judge's reasoning is clearly stated at [19] of his judgment:

> "My conclusion on this rule [ie 6.9] is that I do have a jurisdiction to entertain the claim under it. The principles on which I should exercise the discretion I have, it being in my judgment an exceptional and very unusual case, are to be found in the decisions in *Anderton* and *Cranfield*. I am persuaded that I should exercise my discretion in the claimant's favour. The failure to achieve valid service was for want of the merest technicalities, in circumstances where the fact of service is accepted. The only defect was as to evidence of service, and the best evidence is now available in that the defendant accepts and has always accepted that he did indeed receive all the relevant documents in appropriate form at the appropriate time. The limitation point is a sword with two edges. While the effect of this order will be to deprive the defendant of an accrued defence, the failure to make it would be to deprive the claimant of having his case considered on its merits. No serious argument has been addressed to me to support the notion that that the passage of time has made this case more difficult for either party or the court. The defendant has said he intends to justify his remarks. It seems to me that the sooner the merits of this claim are considered and the interlocutory wrangling ends the better the overriding objectives of our civil courts are more likely to be achieved. I therefore exercise my discretion in favour of the claimant and order that service of this claim be dispensed with and that the matter should proceed."

31. In *Kuenyehia* Neuberger LJ, giving the judgment of the court, said at [24], in the context of the exercise of a discretion under rule 6.9, that the issue on an appeal must be whether the exercise of discretion by the judge was within the parameters laid down by this court and, if it was, unless the judge failed to take a relevant factor into account or took an irrelevant factor into account, this court should not interfere with the conclusion reached by the judge.

32. In my judgment, at any rate viewed from a national perspective, the defendant has not shown that the judge erred in principle or that the exercise of his discretion was outside the parameters laid down by the authorities. He was entitled to hold that this was an exceptional or, I would say, truly exceptional case. Although the context is somewhat different, to my mind the considerations in [58] of the judgment in *Anderton* (quoted above) resonate here. Thus, to adopt Mummery LJ's language, the claimant does not need to serve the claim form in order to bring it to the defendant's attention, there is no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact and the defendant accepts that he received the claim form before the end of the permitted period of service. As Mummery LJ put it, apart from losing the opportunity of taking advantage of the point that service was not in accordance with the rules, the defendant will not usually suffer prejudice as a result of the court dispensing with the formality of service of a document which has already come into his hands before the end of the period for service. On the other hand, as Mummery LJ put it at [58] and [84], in the absence of an order dispensing with service, the claimant's claim will be time-barred and he will be deprived of a trial on the merits of the claim. In my judgment, on the particular facts of this case, where the claim form was issued in time and delivered to the defendant within the period for service by a method of service which the claimant and his solicitors could reasonably have thought was a reasonable method of service, and where the defendant knew precisely what the claim was from the claim form, it would be unjust and contrary to the principle of the overriding objective that cases should be determined justly to refuse the relief. That is in my opinion so even though there was some delay before the claimant relied upon CPR 6.9.

33. For these reasons, if the matter were considered from a national perspective I would hold that there is no basis upon which this court could properly interfere with the judge's conclusion and, in any event, that he was correct to reach the conclusion he did. It follows that on the basis of national law considerations I would dismiss the appeal. I turn to the international perspective.

The international perspective

34. It seems likely to me that this part of the argument was much more fully developed before us than it was before the judge. Mr Dhillon submits that, whatever the solution would be if this were an entirely domestic case, rule 6.9 should not be used to assist the claimant here, where the claimant has failed to serve the defendant in Iceland in accordance with Icelandic law.

35. Iceland is a party to the Lugano Convention, which is in the same terms as what was the Brussels Convention. Unlike the Brussels Convention, the Lugano Convention has not

been superseded by the Jurisdiction and Judgment Regulation No 44/2001 of 22 December 2000 ('the Judgment Regulation') or, yet, the new Lugano Convention which was signed on 30 October 2007 and is expected shortly to be ratified. It is I think of some importance to note that the English court has jurisdiction over the claim in this case by reason of article 5(3) of the Lugano Convention and the decision of the Court of Justice ('the ECJ') in *Shevill v Presse Alliance* [1995] ECR I-415 at I-462, paragraph 30, which give the court of each state in which a libel is published jurisdiction to determine the claim in respect of that publication. The claimant had the right to proceed against the defendant in England in respect of the publication of the alleged libel on the defendant's website in England.

36. I would accept Mr Mercer's submission that the jurisdiction is conferred on the English court by the Lugano Convention and not by service of the process. As to service, as stated above, the claimant did not need the permission of the court to serve the defendant in Iceland but was entitled to do so under CPR 6.19(1). The problem was that, although the claimant was entitled, under CPR 6.24(1)(a), to serve the claim form by any method permitted by Icelandic law, he did not succeed in doing so for the reasons given above. Mr Dhillon submits that in these circumstances it would be wrong in principle or inappropriate on the facts to use CPR 6.9 to dispense with service.

37. In the course of his oral argument in the appeal Mr Dhillon relied upon the decision and approach of this court in *Nussberger*, where it was held that in a case where the question was which of two courts was the court first seised for the purpose of article 21 of the Lugano Convention, rule 6.9 either could not or should not be used in order retrospectively to validate earlier invalid service and thus to affect the identity of the court first seised. It was held that an English court did not become the court first seised until the defendant had been served with the claim form, that the order of the English court dispensing with service of a document under CPR 6.9 would not be effective to make the English court the court first seised within article 21 if the court of a Lugano Convention State (there Switzerland) was already seised of relevant proceedings and, in any event, should not be made for that purpose.

38. The reasoning of this court gave some support for Mr Dhillon's submissions. However, as stated above, an appeal from it has recently been decided by the House of Lords, which allowed the claimants' appeal. The principal speech was given by Lord Brown of Eaton-under-Heywood, with whom the other members of the appellate committee agreed, although Baroness Hale and Lord Mance expressed views as to when the English court is first seised for the purposes of the Lugano Convention, which is an issue which does not arise here.

39. The facts were briefly these. On 16 December 2004 the claimants issued proceedings in England for certain relief against a number of defendants. On 3 February 2005 two of the defendants ('the Swiss defendants') issued proceedings against the claimants in Switzerland for negative declaratory relief in respect of exactly the same facts as those the subject of the English proceedings. The question for decision in the House of Lords was whether, in the light of the Swiss proceedings, the English court must decline jurisdiction and impose a stay under article 21 of the Lugano Convention. Under Swiss law proceedings are regarded as 'definitively pending', which it was agreed was the relevant test, when they are issued. Under English law, however, as "hitherto

understood" (per Lord Brown at [11]), proceedings are only definitively pending on service of the proceedings.

40. At [12] Lord Brown posed the first question as being whether there had been, before 3 February 2005 (when the Swiss proceedings were issued) "service of the English proceedings upon [the Swiss defendants] such as to make the High Court "the court first seised". It does not appear to me that this court had addressed the case in quite that way, although implicit, if not explicit, in its approach was that the answer was no. Lord Brown formulated what was I think the same question in this way at [28(v)]. Was "the service effected" on the Swiss defendants on 19 January 2005 sufficient to satisfy the *Dresser* rule so as to confer first seisin upon the English court? The reference to *Dresser* was a reference to the decision of this court in *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502.

41. The events of 19 January 2005 were shortly these. At the end of a hearing in Zurich to review an attachment order made on 20 December 2004 the judge deputed to effect service under the Hague Convention on the first Swiss defendant, Mrs Nussberger, in the presence of the claimants' solicitor handed her a package of documents for which she signed a receipt. By then, unknown to anyone else, the judge or his clerk had inspected the documents and had removed from the package the English language claim form because it had been erroneously stamped by staff in the High Court "Not for service out of the jurisdiction". The judge or his clerk had then resealed the package without it. On 24 January Mrs Nussberger and her lawyers learned that the claim form (although not its German translation) had been removed from the package and on 3 February issued the Swiss defendants' own proceedings in Switzerland. The Swiss defendants' lawyers only informed the claimants of the absence of the claim form in English on 9 February 2005. In a Hague Convention certificate dated 11 March 2005 a Swiss official recorded that all the documents had been served upon Mrs Nussberger except the claim form because of the stamp. In March 2005 the claimants also learned that no documents had been served on the second Swiss defendant, Galerie Nefer AG, a company of which Mrs Nussberger was the sole proprietor and the sole officer.

42. Under CPR 7.5 the claim form should have been included with the documents served on the defendants. Lord Brown said at [29] that it was clear that, but for the error made in removing the claim form from the package, it would have been served, that the particulars of claim were in fact served in both English and German at the same time and that the Swiss defendants suffered no prejudice from the omission of the claim form in English. In this regard the position seems to me to be not dissimilar from that in the instant case: see [32] above.

43. Lord Brown summarised the facts in somewhat more detail than I have done at [13-29] and then posed two questions at [30]. They were first, whether there was power in the court by virtue of CPR 3.10 and 6.9 to determine that the "service of documents actually effected on 19 February constituted sufficient service for the court then to be seised of the proceedings as definitively pending before it under the *Dresser* rule" and, secondly, if so whether the court ought in its discretion to exercise the power.

44. At [31] Lord Brown said that it was at least arguable that, even without resort to rule

6.9, the court could simply order under rule 3.10(b) that the Swiss defendants were to be regarded as properly served, certainly for the purposes of seisin. The "error of procedure" was the omission of the English language claim form from the package served and thus a failure to comply with a rule, namely rule 7.5. Lord Brown said that under rule 3.10(a) that error "does not invalidate any step taken in the proceedings unless the court so orders", the relevant step being service of the proceedings out of the jurisdiction.

45. At [32-33] Lord Brown further analysed rule 3.10 by reference to the decision of this court under RSC Order 2 rule 1, which was the forerunner of rule 3.10, in *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)* [1990] 2 Lloyd's Rep 215. In that case several defendants were served with copies of the writ addressed to a different defendant and one defendant was served only with a form of acknowledgment of service. The majority concluded that in all the cases service had plainly been attempted and, that under Order 2 rule 1, service was to be regarded as valid. At [33] Lord Brown said this:

> "… The question in the *The Goldean Mariner*, just as the question here, is whether the "attempt to serve the writ" was or was not "ineffective". It was held there to have been, not ineffective, but effective. That was not a "retrospective validation". Why should service not similarly be declared to have been effective here? The question is purely one for our domestic law, just as the question of when an English court is seised of proceedings is purely one for domestic law (and, indeed, the question of precisely what documents have to be served to achieve effective service out of the jurisdiction under the Hague Convention is purely one for domestic law)."

46. I think that Lord Brown must there have been saying that the service or purported service could be declared to be valid under CPR 3.10, just as the service had been declared to be valid under RSC Order 2 rule 1 in *The Goldean Mariner*. However, notwithstanding Lord Brown's enthusiasm for CPR 3.10, Mr Mercer has not formally sought to revive his case based on rule 3.10 in the instant case. So I say nothing further about it on the facts here.

47. As I read his speech, Lord Brown ultimately concluded that it was appropriate to make an order dispensing with service under CPR 6.9. He said at [35]:

> "As I have said, therefore, it may not be necessary to invoke r.6.9 at all in order to declare the service of documents effected on 19 January 2005 to have been valid and effective. But assume, as both courts below clearly thought, that it is necessary for the court actually to dispense with service of the claim form under r.6.9 before the service in fact effected can be declared valid. Is that within the court's power? The court below concluded not, on the basis that an order under r.6.9 would by its very nature involve the retrospective validation of what *ex hypothesi* would otherwise fall to be regarded as ineffective service. And this essentially is the argument by which the

respondents now seek to uphold the Court of Appeal's judgment.

48. Lord Brown rejected that view at [35] in these terms:

> "There are, however, as it seems to me, two complete answers to this argument. The first is this. In making the order pursuant to rule 6.9, Peter Smith J was not thereby declaring valid and effective service which had previously been ineffective; rather he was holding the previous service to have been valid and declaring that it was unnecessary to have served the English language claim form to make it so. It was in this sense that he was dispensing with service. There was no more question here, therefore, than in the *The Goldean Mariner* of "retrospective validation".

In so far as Lord Brown was relying upon CPR 6.9, I do not think that he can have been saying that the service on 19 January 2005 was effective service in the full sense, because, if that were so, it is difficult to see why it was necessary for the court to make an order dispensing with service under rule 6.9. In these circumstances, it seems to me that he must have meant that the service, while defective because of the absence of the English claim form, was effective for the purposes of the Lugano Convention, at any rate for the purposes of seisin, and perhaps more widely.

49. I return to Lord Brown's [35]:

> The second answer is that even if a dispensing order under r.6.9 was properly to be regarded as retrospectively validating what would otherwise have been ineffective service, in my judgment it would have been within the court's power to make such an order. True, its effect would then be to alter the jurisdictional precedence under an international Convention. But if, as is uncontested, your Lordships could now overrule *Dresser* (just as the Court of Appeal in *Dresser* itself departed from the ruling at first instance that English courts are seised of proceedings at the date of issue), the question of seisin being purely one for the national court, so too can an English court, applying its own procedural rules to dispense with service of a particular document, make an order which is effective retrospectively to validate what would otherwise have been an invalid form of service. I do not believe that this conclusion involves any exception to the *Dresser* rule: the rule surely is that the English court is seised of proceedings at the date of effective service, whatever that date may eventually be declared to have been. If, however, it does constitute an exception, so be it: to this limited extent I would if necessary qualify the decision in *The Sargasso* [[1994] 3 All ER 180]."

50. Lord Brown then considered whether the court should exercise its power under rule 6.9. He first said in [36] that, if the question were asked in a purely domestic context, it was

"surely beyond argument" that it would do so, notwithstanding the fact the exercise of the power would defeat a prospective Limitation Act defence. As I see it (and as indicated above), it is my view that the same is true here.

51. At [37] Lord Brown considered whether it was appropriate to make an order which had the effect of altering the priority of the seisin of proceedings under an international Convention. He said this:

> "On any view the power is one to be exercised sparingly and only in the most exceptional circumstances. It is difficult to suppose, for example, that it could ever properly be exercised if there had been no process of service whatever. Consider in this regard article 27(2) of the Lugano Convention:
>
> > "A judgment shall not be recognised...(2) where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence."
>
> There can be no question here but that the respondents were served with "an equivalent document": they had not only the German translation of the omitted claim form but the detailed particulars of claim (in both English and German) as well."

Much the same can to my mind be said here. The defendant was served with all the relevant documents, the only defect in the service being that the defendant was not asked to make an appropriate declaration confirming acceptance of the documents. Although, as appears below, it is not necessary finally to resolve this question now, it seems to me that the defendant was as much "duly served with the document which instituted the proceedings or an equivalent document" as Mrs Nussberger had been in *Nussberger*. As at present advised, I would not accept Mr Dhillon's submission to the contrary.

52. At [38] Lord Brown said that the circumstances of that case were indeed exceptional and that the call on the exercise of the court's discretion was compelling. For the reasons I have already given, the same is in my opinion true on the facts of the instant case.

53. In my judgment the decision and reasoning of the House of Lords in *Nussberger* provide strong support for the claimant's case here. The effect of rule 6.9, which it is appropriate to use here, was either (as Lord Brown put it in the first part of [35] and as Lord Mance may have had in mind at [41]), to hold that the previous service was valid, or, as Lord Brown put it in the second part of [35], retrospectively to validate what would otherwise have been an invalid form of service.

54. Mr Mercer submits that, in the light of *Nussberger*, subject of course to the circumstances of a particular case, there is no reason why the general principles

identified in the domestic law cases referred to above should not be applied to the exercise of the court's discretion to dispense with service under CPR 6.9, whether the purported service is invalid in England or elsewhere. I would accept that submission. In my opinion, now that the House of Lords has held that rule 6.9 can in principle be applied in a seisin case, there is no rational basis for holding that it cannot be applied in a non-seisin case

55. In these circumstances I see no reason in principle why English procedural law (or indeed the law of another contracting state if the facts were reversed) should not have a discretionary power to dispense with service in an appropriate case, especially since the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case: see eg *Barclays Bank Ltd v Hahn* [1989] 2 All ER 398 per Lord Brightman at 402H and the definition of "service" in the Glossary to the CPR, which describes it as "steps required to bring documents used in court proceedings to a person's attention." Thus, as in *Anderton* and as here, there may be cases in which formal service is not necessary to achieve that aim.

56. In the light of the reasoning in the House of Lords in *Nussberger* I would accept Mr Mercer's submission that in an English action it is only the English court that is concerned with the sufficiency of the service of English process abroad. Before the decision of the House of Lords in *Nussberger* the only doubt had been as to whether rule 6.9 could be used in order to affect the date of seisin. See for example *Molins Plc v GD SpA* [2000] 1 WLR 1741, where it had been suggested that earlier service by fax, which did not itself amount to service, could amount to service on the basis that any irregularity would be cured if the claimant entered an appearance or, if no appearance was entered, it could be validated retrospectively by directions of the judge. As to that, Aldous LJ said at [38]:

> "I have no doubt that service is a requirement of Italian law before proceedings become definitively pending before an Italian court. I accept that irregular service can under Italian law be validated either by appearance or an order of the judge and that such validation would be retrospective; but until such validation has been achieved the Italian court cannot be seised, as during the interim period the proceedings could not be definitively pending before the Italian court."

The last part of that passage is no longer correct in the light of *Nussberger*, whereas the first part remains sound. Thus there is no reason why a court of a member state should not have a provision which is capable of validating irregular service retrospectively.

57. At the hearing of the appeal Mr Mercer relied upon a section of Neuberger LJ's judgment in *Nussberger* at [107-112] in which he considered *obiter* the question whether invoking CPR 6.9 would be contrary to the Hague Convention and concluded that it would not. It is not now necessary to consider that part of Neuberger LJ's judgment because the House of Lords has now applied rule 6.9 in *Nussberger*, to which the Hague Convention applied. Moreover it did so as part of the *ratio decidendi*.

58. This is not a Hague Convention case because Iceland and the United Kingdom are not both parties either to the Hague Convention or to any other bilateral convention or treaty on service. Moreover, it is common ground that the Service Regulation (Council Regulation (EC) No 1348/2000) does not apply to Iceland. However, Mr Dhillon relies upon article IV of the First Protocol to the Lugano Convention, to which I will return below.

59. In the course of the hearing of the appeal Mr Dhillon placed some reliance on other non-domestic cases. In *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570, [2002] 1 WLR 907, the first instance decision permitted service under CPR 6.8 on a foreign defendant's English solicitors to enable the claimant to say that the defendant had thereby been served, and the English court was the court first seised under the Brussels Convention, before the German court was seised of proceedings which the defendant was proposing to bring in Germany. In this court, Henry LJ, giving the judgment of the court, said at [47] that the use of CPR 6.8

> "as a means of turning the flank of [the Hague and Brussels] Conventions when … they do not permit service by a direct and speedy method such as post, is to subvert the Conventions which govern the service rule as between claimants in England and defendants in Germany."

Lord Brown said at [39] that the facts of *Nussberger* could hardly be further from those in *Knauf,* which involved a naked attempt to use CPR 6.8 to subvert the Brussels Convention.

60. The position was somewhat different in *Shiblaq v Sadikoglu* [2004] EWHC 1890 (Comm), [2004] 2 All ER (Comm) 596, where, as Neuberger LJ noted at [86] of *Nussberger* in this court, Colman J referred at [56] to "the strong disapproval of the deployment of [CPR 6.8] to subvert the rules of the Hague Convention so as to engage the rules of the [Judgment Regulation] as to jurisdictional precedence" and suggested that the principle applied equally to CPR 6.9. Colman J said at [57] that CPR 6.9 should not be used prospectively or retrospectively "for the purpose of … avoiding a defect in service which is inconsistent with a service convention binding as between this country and the country of service." Neuberger LJ added that in the same paragraph Colman J said:

> "Where it is sought to apply rule 6.9 retrospectively, if the effect of dispensing with service is to place the defendant in the same position as he would have been if service had not been by an impermissible method but by a method provided for by such service convention, no order should be made."

I do not think that that statement can stand in the light of the House of Lords' speeches in *Nussberger*, at any rate in the context of the Lugano Convention. However, it was made in the context of a case which was not a Jurisdiction Regulation or Lugano Convention case but a case where permission was required to serve the proceedings out of the jurisdiction. The same is true of the decision of Langley J in *Cherney v Deripaska* [2007] EWHC 965 (Comm).

61. As I see it, especially in the light of *Nussberger* in the House of Lords, where the circumstances are such that justice requires an order dispensing with service in a Lugano Convention case like this, for the purpose of ensuring that an otherwise potential domestic time bar would not defeat the claim, there is no reason in principle why the court should not make the order sought in a truly exceptional case. There will be no prejudice to the defendant because, as here, it is almost certain that he will have received the court documents in time, have understood them and decided to take no part in the proceedings for tactical reasons. Here, as explained in detail above, the documents were served upon the defendant personally in the sense of being delivered to him and he read and understood them. The only defect in the service was that he did not sign a declaration to that effect or, put another way, that he did not sign a receipt. In *Nussberger* Neuberger LJ concluded that, subject to the article 21 point (on which this court was of course held to be wrong), on the very unusual facts of that case, to grant relief under CPR 6.9 would not have involved "turning the flank of" or "subverting" the provisions of the Hague Convention". In my opinion the same is true here.

62. Mr Dhillon submits that *Nussberger* in the House of Lords supports the distinction between the position here, where, as in *Knauf*, there was a naked attempt to subvert the relevant Convention and the position in *Nussberger*, where the problem lay not with the method of service of the claim form, which was in accordance with Swiss law and the Hague Convention, but with a failure to include a particular document. Mr Dhillon further relies upon the statement by Lord Brown at [37] that it is difficult to suppose that the discretion could ever be exercised "if there had been no process of service whatsoever".

63. I would not accept those submissions but prefer the submissions of Mr Mercer. In *Knauf*, as Henry LJ said at [58], the method of service was being by-passed in order to establish jurisdiction, whereas here the method of service was not being by-passed for that purpose, if indeed it can fairly be said to have been or to be being by-passed at all. In *Nussberger* the defect in service was a missing document, whereas here the defect was the failure to ask for and obtain the defendant's signature, which the defendant could scarcely have refused if it had been sought, since he knew the contents of the documents, which were complete. If he had refused and insisted on a fully compliant method of service under Icelandic law, there can be no doubt that such service would have been effected. To insist on a different method of service of the very same documents would have been of no advantage to the defendant, since he had all the necessary documents, which is after all the purpose of service: see eg *Barclays Bank v Hahn*.

64. I should add that these views are expressed solely in the context of a Judgment Regulation or Lugano Convention case where the English court has jurisdiction based on the articles in one or other of them. Here it is article 5(3) of the Lugano Convention. The position may well be different in a non-Convention or non-Judgment Regulation case, where permission is required to serve the proceedings out of the jurisdiction. The court has traditionally regarded the exercise of its jurisdiction in such a case as the exercise of an exorbitant jurisdiction: see eg *The Hagen* [1908] P 189. The same is not as I see it true of a claim under the Jurisdiction Regulation or the Lugano Convention because their essential scheme is that, if the relevant criteria are satisfied, the claimant is entitled to proceed in the relevant jurisdiction. Thus, while I appreciate that service

(or an order dispensing with service) is essential in every case, the approach in the two classes of case is different. When Lawrence Collins J said at [216] in *Bas Capital Funding Corporation v Medfinco Ltd* [2004] 1 Lloyd's Rep 652 (a case which involved service in a country which was not party to a service Convention) that proper service is particularly important in international cases and that he would hesitate before ordering service by an alternative method, or dispensing with service, he was referring to a truly international case - one outside the scope of the Jurisdiction Regulation or the Lugano Convention.

65. In my opinion, the correct approach to adopt in a case of this kind is that adopted by the House of Lords in *Nussberger*. The approach would apply if, like *Nussberger*, this were a Hague Convention case: per Lord Brown at [33] in the House of Lords and per Neuberger LJ in this court at [108]-[111] in a passage which was not criticised in the House of Lords.

66. The approach would also apply, in my opinion, in this case even if the Lugano Convention provided for a specific and exclusive method of service. Whether the Convention so provides depends upon the true construction of article IV of the First Protocol to the Lugano Convention. I turn to consider that question, which was much debated in argument, although, as appears below, it is not in my opinion necessary to resolve it in order to determine this appeal.

Article IV of the First Protocol to the Lugano Convention

67. The only provision of the Lugano Convention upon which Mr Dhillon relies or could rely is article IV of the First Protocol to the Lugano Convention, which is in the same terms as the Protocol to the Brussels Convention. The Protocol is described as a protocol on "certain questions of protection, procedure and enforcement" and article IV provides as follows:

> "Judicial and extrajudicial documents drawn up in one Contracting State which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States.
>
> Unless the State in which service is to take place objects by declaration to the Swiss Federal Council, such documents may also be sent by the appropriate public officers of the State in which the document has been drawn up directly to the appropriate public officers of the State in which the addressee is to be found. In this case the officer of the State of origin shall send a copy of the document to the officer of the State applied to who is competent to forward it to the addressee. The document shall be forwarded in the manner specified by the law of the State applied to. The forwarding shall be recorded by a certificate sent directly to the officer of the State of origin."

68. Mr Mercer submits that the first paragraph of article IV has no application here because there are no "conventions and agreements concluded between the Contracting States", since the United Kingdom and Iceland are not both parties either to the Hague Convention or to any other relevant bilateral treaty or convention. As to the second paragraph, he submits that it only has application where there is a relevant convention or agreement within the meaning of the first paragraph and that, in any event, whether dependent upon the first paragraph or not, the provision is permissive and not obligatory. As appears below, that is how I would construe the article on the basis of the language used when viewed in its context.

69. However, Mr Dhillon submits that it follows from the fact that there is no separate agreement dealing with service of process as between Iceland and the United Kingdom that the second paragraph of article IV constitutes the sole "procedure laid down in" a "convention" or "agreement" "concluded between" the United Kingdom and Iceland. Therefore, he submits, any English process "shall be transmitted" in accordance with the procedure in the second paragraph. I am bound to say that that is not to my mind the natural construction of the article.

70. However, Mr Dhillon relies upon *Molins* at [40] and the decision of the ECJ in *Scania Finance France SA v Rockinger (Case C-522/03)* [2005] All ER (D) 146 (Oct). As to *Molins*, it is important to note that both the United Kingdom and Italy were parties both to a bilateral civil procedure convention and to the Hague Convention. Aldous LJ said at [40]:

> "Once it is established, as it is, that service is required for proceedings to be definitively pending under Italian law, then the decision as to whether service took place depends upon whether service was effected as required by article IV of the Protocol to the Brussels Convention. In so far as Italian law differs it is irrelevant. The purpose of the Convention is to achieve a legal systemisation which will give the greatest legal certainty. It is designed to ensure recognition and enforcement within the European Union of judgments given in courts of contracting states. The Convention overrides national law, but does not exclude national law where the Convention is silent on service. It provides in article IV of the Protocol for the way in which service is to be effected, namely "in accordance with the procedures laid down in the conventions and agreements concluded between the contracting states". Thus, when service is a requirement, service must be carried out in accordance with that article *and the Conventions to which I have already referred*. That is emphasised by article 27(2), which excludes from recognition judgments not duly served, ie obtained by default without proper service. Further, under both English and Continental legal systems service out of the jurisdiction is regarded as an interference with sovereignty (*Ferrarini SpA Magnol Shipping Co Inc* [1988] I Lloyd's Rep 238, 241) and therefore it would be odd if service, giving seisin, could be effected except under conditions set out in international conventions or in accordance with the national rules of the

contracting states where service is to be effected."

71. I have emphasised the words in italics because they show that this court construed the reference "the conventions and agreements concluded between the Contracting States" in article IV as a reference to the Hague Convention and the bilateral treaty between the United Kingdom and Italy and not the Brussels Convention itself. Also it seems to me to be plain that the court did not exclude local methods of service where the Convention is silent. As [37-38] make clear (and as discussed above), defects in service can in principle be cured by the courts of the forum. In these circumstances I am not persuaded that [40] of *Molins* assists the construction of article IV advanced by Mr Dhillon.

72. In *Scania* the claimant sought to enforce a judgment of a French court which had been obtained in default of appearance in Germany. The defendant objected that he had not been properly served with the proceedings. Both France and Germany were parties to the Hague Convention. The German court referred to the ECJ the question whether article 27(2) of the Brussels Convention and the first paragraph of Article IV of the Protocol were to be interpreted as meaning that judicial documents might be served on a defendant in another contracting state only in accordance with the conventions concluded between the contracting states. However, at [14] the ECJ restated the question thus:

> "[14] By its first question the national court asks essentially whether Article 27(2) of the Brussels Convention and the first paragraph of Article IV of the Protocol must be interpreted as meaning that, where a relevant international convention is applicable between the State in which the judgment was given and the State in which enforcement is sought, the question whether the document instituting the proceedings has been duly served on a defendant who has failed to enter an appearance must be determined solely in the light of the provisions of that convention, or whether it may also be determined by reference to the national rules in force in the State in which the judgment was given if the application of those rules has not been excluded by the convention."

73. It is to be noted that the ECJ was only considering the position "where a relevant international convention is applicable between the State in which the judgment was given and the State in which enforcement is sought". That is not surprising because the Hague Convention was in force as between France and Germany. The ECJ was not however considering the different question; what the position would be if there were no such convention or no such convention other than the Lugano Convention.

74. The ECJ observed at [17] that article 27(2) provides that a judgment delivered in another Contracting State is not to be recognised where it was given in default of appearance, if the defendant was not 'duly served' with the document which instituted the proceedings in 'sufficient time'. At [18] and [19] the ECJ underlined the point made at [56] above and emphasised that the process must be 'duly served' within the meaning of the convention between the states, which was of course the Hague Convention. The

ECJ then at [21-30] considered and rejected the submission that it was open to the claimant to serve by using any of the methods of service provided for by the national laws of the states concerned on the basis that none of those laws was excluded by the Convention.

75. As I read the reasoning of the ECJ, its decision to reject the submission was based on the assumption that this was a case to which the Hague Convention applied. On that basis paragraph one of article IV applies because under the Hague Convention the relevant documents had to be served on the defendant in accordance with article 15 of it. Paragraph one is mandatory because it provides that the documents "shall be served". As [22] of the judgment of the ECJ made clear, the words "may also" in paragraph two show that the two methods of service, namely that provided by paragraph one of article IV and article 15 of the Hague Convention on the one hand and paragraph two of article IV on the other, are exhaustive. That conclusion seems to me to be sustained by the language of article IV.

76. The ECJ placed some reliance on article 20 of the Brussels Convention, which was in the same terms as article 20 of the Lugano Convention. It provides:

> "Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.
>
> The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.
>
> The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention."

77. Article 20 is of some interest in the present context. Paragraph one does not apply because, for the reasons already given, the English court has jurisdiction over the alleged libel published in England. No one has suggested that the English Court was bound to stay this action under the Convention. This is presumably because the defendant cannot satisfy the provisions of paragraph two and because paragraph three does not apply. He cannot satisfy paragraph two because it focuses, not on particular rules of service, but on the broader concept that a stay is required only so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end. The claimant is able to satisfy both those requirements.

78. As to paragraph three, as already stated, it is accepted that Iceland is not a party to the Hague Convention and it is not suggested that the defendant can rely upon its provisions, including article 15. The relationship between paragraphs two and three of article 20 is shown by [23-24] of the judgment of the ECJ in *Scania*. They show that in a case where the relevant states are parties to the Hague and the Lugano Conventions, the provisions of paragraphs one and two of article IV are exhaustive. On the other hand, they contain no suggestion that that is so where they are not parties to the Hague or some similar convention or bilateral treaty. Thus the ECJ's conclusion is stated at [30] as follows:

> "It follows from all of the foregoing considerations that the answer to the first question must be that Article 27(2) of the Brussels Convention and the first paragraph of Article IV of the Protocol must be interpreted as meaning that, where a relevant international convention is applicable between the State in which the judgment is given and the State in which recognition is sought, the question whether the document instituting the proceedings was duly served must be determined in the light of the provisions of that convention, without prejudice to the use of direct transmission between public officers where the State in which recognition is sought has not officially objected, in accordance with the second paragraph of Article IV of the Protocol."

79. In the case where, as here, there is no such relevant convention, paragraph one of article IV can have no application. Nor, as I see it, can paragraph two. The expression "may also" shows that paragraph two depends upon paragraph one, so that it can have no effect in the absence of paragraph one. Any other conclusion would be very odd.

80. The logic of the defendant's position is that, absent a specific convention or bilateral treaty, as here, the only permissible method of service is that provided by paragraph two. This does not seem to me to be a sensible construction of the second paragraph for these reasons:

    i) the paragraph is expressed in permissive and not mandatory terms, as shown by the use of 'may' by contrast with 'shall' in paragraph 1;

    ii) it is open to a state to object to the use of the method permitted by paragraph two, in which event there would be no permissible method of service under the Convention in a case, as here, where paragraph one does not apply; and

    iii) the submission gives no meaning to the word 'also'.

81. If that view is correct, as I believe it to be, there remain only two possibilities. The first is that in the absence of a relevant convention or bilateral agreement, each state which has jurisdiction under the Convention is left to make its own rules, subject of course to paragraph two of article 20, and that the second paragraph has no effect. The second is

that each state is left to make its own rules but that paragraph 2 operates as an additional method of service which the claimant can use if he wishes.

82. In both cases the state which has jurisdiction over the claim is permitted to make its own rules for service in another state party to the Convention. As I read the Convention, subject to paragraph 2 of article 20, there is nothing in it to prevent the state which has jurisdiction from making its own rules as to how the defendant in a different Convention state is to be served with its process. Thus I see nothing to lead to the conclusion that the methods of service provided by CPR 6.24, including any method permitted by the law of the country in which it is to be served, are contrary to the Convention.

83. It is not necessary to resolve the question whether paragraph two of article IV has any effect. My primary view is that it does not because it seems to me that the use of the words 'may also' support the proposition that it was intended to be an additional discretionary method of service in a case in which paragraph one applies, but not otherwise. Thus it was intended that it should be an additional method to those permitted by the Hague Convention or other relevant convention or bilateral agreement. However, if, contrary to that view, paragraph 2 of article IV has any effect in a case like this, it seems to me to be limited to permitting a method of service which is additional to those permitted by the national law of the state with jurisdiction. I should perhaps add that such a method would no doubt be compatible with CPR 6.24(1)(a) because paragraph 2 provides that the relevant document shall be forwarded by the public officer "in the manner specified by the law of the state applied to". This is the view expressed at paragraph 4.040 of the second edition of *Layton and Mercer* on *European Civil Practice*.

84. The key point here is, however, that, whatever the role of paragraph 2 of article IV, the relevant national law is the law of England as the state which has jurisdiction over the claim for libel. That law includes not only CPR 6.24 but also CPR 6.9. There is, in my opinion, nothing in the Convention, including article IV of the First Protocol, to invalidate rule 6.9, which gives the court power to dispense with service. Moreover, I would accept Mr Mercer's submission that, on the facts here, to dispense with service of the claim form does not subvert or turn the flank of the only relevant Convention, which is the Lugano Convention. On the contrary, such a dispensation seems to me to be consistent with paragraph 2 of article 20 of it.

85. In all these circumstances, I would hold that article IV either has no application to these facts or, if it does, that it is not mandatory and is not therefore relevant to the determination of this appeal. If, contrary to that view, the claimant was bound to serve the proceedings in accordance with the second paragraph of article IV, that fact does not invalidate rule 6.9 for the reasons given above. It follows that my consideration of the international perspective has not persuaded me that the judge was wrong to exercise his discretion as he did.

86. I would only add this by way of postscript. There has been some discussion on the question whether, in the events that have happened there has been 'service' within the meaning of article 27(2) of the Lugano Convention. Mr Mercer submits that there has.

He relies upon *Klomps v Michel* [1981] ECR 1595 and submits that, in the light of article 20, the concept of 'service' in article 27(2) is wider than the concept of service which would satisfy national law. Mr Dhillon submits the contrary. Both parties rely upon *Lancray SA v Peters und Sickert KG* [1990] ECR I-2725. Mr Dhillon further submits that that it is not open to the court now to hold that there has been service of the claim form within the meaning of CPR 6.24 because the court has declared that there has not, to which it may be said that the questions in the future might be different, including the questions whether the concept of 'service' in article 27(2) is different from the concept of service in CPR 6.24, what is the role of the court in which judgment is given in the curing of defects in service and what is the role of the court in a jurisdiction in which any judgment is sought to be enforced.

87. It is not necessary finally to determine any of these questions for the purposes of determining this appeal. It is not clear what part the defendant will play in these proceedings in the future. He has at some stages indicated that he would wish to defend the case by pleas of justification and reliance upon *Reynolds* qualified privilege. It is thus not clear what, if any, judgment may be obtained against him. In particular it is not clear whether any such judgment would be a judgment 'in default of appearance' or not and it is not clear whether or how any such judgment might be enforceable. The whole dispute may even be settled. I would only add that it seems to me, for the reasons given earlier, that the defendant was "duly served" with the document which instituted the proceedings within the meaning or article 27(2) of the Convention.

CONCLUSION

88. Whatever the answers to those questions, for the reasons I have given, I have reached the conclusion that the judge was entitled to exercise his discretion under CPR 6.9 to dispense with service of the claim form. It follows that I would dismiss the appeal.

Lord Justice Dyson

89. I agree.

Lord Justice Jacob

90. I also agree.