



Neutral Citation Number: [2021] EWCA Civ 28

Case No: A2/2020/0367

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**MEDIA AND COMMUNICATIONS LIST**  
**MR JUSTICE JAY**  
**[2020] EWHC 51 (QB)**

Royal Courts of Justice,  
Strand, London, WC2A 2LL

Date: 15/01/2021

Before :

**LORD JUSTICE MOYLAN**  
**LORD JUSTICE SINGH**  
and  
**LORD JUSTICE POPPLEWELL**

Between :

**CRAIG WRIGHT**  
  
- and -  
**MAGNUS GRANATH**

**Claimant/  
Appellant**

**Defendant/  
Respondent**

-----  
-----  
**Adam Wolanski QC, Greg Callus and Lily Walker-Parr** (instructed by **ONTIER LLP**) for  
the **Claimant/Appellant**

**Hugh Tomlinson QC and Darryl Hutcheon** (instructed by **Atkins Thomson Ltd**) for the  
**Defendant/Respondent**

Hearing date : 15 October 2020  
-----

**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30 a.m. on 15 January 2021.

## Lord Justice Popplewell :

### Introduction

1. This appeal raises two questions about the application to a defamation claim of article 27 of the Lugano Convention (Convention on jurisdiction and recognition of judgments in civil and commercial matters 21.12.2007 (OJ 2007 L339 p1)). The Judge applied article 27 to decline jurisdiction on the grounds that the cause of action in these proceedings was the same as that in proceedings brought in Norway for negative declaratory relief, of which the Norwegian Court was first seised. The issues on this appeal are (1) whether article 27 applies to these defamation claims; and (2) if so, whether the causes of action in the two sets of proceedings are the same.

### Chronology

2. The claim arises in relation to a controversy as to who was the developer of the cryptocurrency Bitcoin. On 31 October 2008 an academic paper was published online under the name Satoshi Nakamoto describing the manner in which the electronic cash system operated. Thereafter Satoshi Nakamoto came to be regarded as the pseudonym for the person or persons who developed Bitcoin. The claimant, Dr Craig Wright, is a computer scientist with a particular interest in cryptocurrencies. He has lived in England since December 2015. His connections with England are more fully explored in the judgment of this Court in *Wright v Ver* [2020] EWCA Civ 672. As recorded in paragraphs 23 and 27 of that judgment, he claims on his website to be the creator of Bitcoin under the pseudonym Satoshi Nakamoto, and claims to have been the author of the 2008 academic paper.
3. The defendant, Mr Magnus Granath, is a citizen of Norway resident in Oslo. He has tweeted on various technology issues, including cryptocurrencies, and has an interest in Bitcoin and its development. He believes that Dr Wright's claim to be Satoshi Nakamoto is false.
4. On 17 March 2019 Mr Granath posted a tweet from his Twitter account @Hodlonaut. The account is said to have had approximately 8,000 followers, of whom about 560 were in the United Kingdom. The tweet said:

“The forensics to CSW’s first attempt to fraudulently ‘prove’ he is Satoshi. Enabled by @gavinandresen. Never forget. #CraigWrightIsAFraud.”
5. On 29 March 2019 Dr Wright's solicitors sent a letter of claim to the @Hodlonaut account on Twitter. It set out the terms of nine tweets on that account posted between 13 and 18 March 2019, but made a complaint of libel only in relation to the one sent on 17 March quoted above. It set out the defamatory meaning alleged, namely that “[Dr Wright] had fraudulently claimed to be Satoshi Nakamoto, that is to say the person or one of the people who developed Bitcoin.” It went on to assert that the meaning was false in these terms:

“Our client has not fraudulently claimed to be Satoshi Nakamoto. He *is* Satoshi Nakamoto. He produced the [2008 academic paper] in 2008, sent the first bitcoin to Hal Finney in January 2009, and played an integral part in the development of bitcoin. He has explained his role in detail on previous occasions.”

6. At that stage Mr Granath’s identity as author of the tweets was unknown to Dr Wright or his advisers. The letter of claim sought a number of remedies including that the author identify himself, remove the tweets from his Twitter feed, undertake not to repeat the allegation of dishonesty, apologise, and assent to the making of a statement in open court. It threatened a claim for damages unless all these steps were taken. It required a response by 5 April 2019, and stated that, in the absence of a satisfactory response, Dr Wright would locate the author and commence libel proceedings against him in this jurisdiction.
7. Following receipt of the letter of claim, Mr Granath deleted the @Hodlonaut twitter account.
8. By 15 May 2019 Dr Wright’s advisers thought they had identified Mr Granath as the owner of the @Hodlonaut account, and sent a further letter via Facebook and LinkedIn seeking confirmation. The letter was served by hand on Mr Granath on 20 May 2019.
9. Meanwhile on the previous day, 19 May 2019, Mr Granath issued proceedings in the Oslo District Court seeking in effect a declaration of non-liability (“the Norwegian Claim”). I shall return to the scope of the Norwegian Claim. The Norwegian Claim was served on Dr Wright by the Court on 3 June 2019 and a copy sent with a letter dated 4 June 2019 from Mr Granath’s Norwegian lawyers to Dr Wright’s legal advisers.
10. On 26 June 2019 Dr Wright issued the Claim Form in the present action. It sought damages for libel in relation to the 17 March tweet, and an injunction restraining any further publication of the libel. The Claim Form and Particulars of Claim were served on Mr Granath in Norway on 6 August 2019. I shall return to the scope of the claim identified in the Particulars of Claim (“the English Claim”). Mr Granath filed an acknowledgment of service and issued a Part 11 application asking the court to decline jurisdiction pursuant to article 27 of the Lugano Convention on the grounds that the Oslo District Court was first seised and that the Norwegian Claim and English Claim involved the same cause of action. The application relied only on article 27. There was no alternative application for a stay under article 28.
11. It is common ground that the Norwegian court was first seised. On 19 August 2019 Dr Wright filed and served a Notice of Defence in the Norwegian proceedings. He asked the Oslo District Court (1) to dismiss the proceedings for want of jurisdiction; alternatively (2) that the case be referred to the Oslo Conciliation Board; or in the further alternative (3) that the case be stayed pursuant to article 28 of the Lugano Convention because there was a related action in England against another individual (referring to other proceedings involving Dr Wright but not Mr Granath). On 6 December 2019 the Oslo District Court dismissed Dr Wright’s applications on all three bases. Jurisdiction was accepted on the basis that the relief sought was “global”

in the sense that it was not limited to any harm or loss suffered in Norway, and that article 5(3) of the Lugano Convention was applicable because the “harmful event” occurred in Norway, that being where Mr Granath lived and published the tweets. Dr Wright’s appeal on this issue to the Borgarting Court of Appeal was dismissed, as was a subsequent appeal to the Norwegian Supreme Court. Jurisdiction for the Norwegian Claim is therefore established, with the consequence that if the Judge was correct, article 27(2) requires jurisdiction to be declined in favour of the Oslo District Court and the English Claim to be dismissed.

### **The Norwegian Claim and the English Claim**

12. The English Claim, as set out in the Particulars of Claim, involves the following elements:
  - (1) publication of the 17 March tweet on the internet by Mr Granath (paragraph 3);
  - (2) the allegation that it would be understood to refer to Dr Wright (paragraph 4);
  - (3) the alleged defamatory meaning, in the same terms as set out in the letter before action of 29 March 2019, namely that “[Dr Wright] had fraudulently claimed to be Satoshi Nakamoto, that is to say the person or one of the people who developed the cryptocurrency bitcoin” (paragraph 5);
  - (4) an allegation that the publication caused serious harm to Dr Wright’s reputation in this jurisdiction (paragraph 6);
  - (5) allegations of damage by injury to feelings (paragraph 7) supported by allegations designed to support a claim for aggravated damages (paragraph 8), including reference to three of the other tweets referred to in the 29 March letter which were alleged to have been published to mock and abuse Dr Wright; and an allegation that Mr Granath was motivated by malice as a supporter of a derivative of bitcoin (the Bitcoin Core protocol) which is a rival to that promoted by Dr Wright (Bitcoin SV);
  - (6) relief in the form of:
    - (a) a claim for damages, including aggravated damages;
    - (b) an injunction to restrain further publication; and
    - (c) an order under s.12 Defamation Act 2013 that Mr Granath publish a summary of the judgment in the proceedings.
13. The Norwegian Claim is contained in what is translated as an “Opening Writ” which is a little more discursive than the Particulars of Claim in the English Claim but of roughly similar length. It has four headings. The first is “INTRODUCTION”, the second “FACTS OF THE CASE”, the third “BASIS OF CLAIM”, and the fourth “STATEMENT OF CLAIM”.
14. In the INTRODUCTION section it states that “Mr Magnus Granath hereby files suit against Mr Craig Wright claiming a declaratory judgement that Granath is not liable

to pay damages to Wright. Wright has claimed that Granath has made libellous remarks about Wright on Twitter, and that Wright has a claim for damages against Granath. Granath disputes the claims and asks for an exculpatory judgement in his favour.”

15. In the section headed FACTS OF THE CASE, the document states that at some point in 2015 Craig Wright claimed to be the person behind the pseudonym Satoshi Nakamoto as the person or persons behind the cryptocurrency Bitcoin, and goes on to say that such claim is incorrect. It refers to a summary of tweets in Schedule 6, which substantially overlaps with the nine tweets referred to in Dr Wright’s solicitors’ letter of 29 March which was exhibited. The section ends with “Granath is now taking action in order to decide the claims that Wright believes he has against Granath.”
16. The BASIS OF CLAIM section opens with an averment that Norwegian law applies. It identifies the three ingredients required under section 3-6a of the Damage Compensation Act (Damages Act) as being that the allegations (in the tweet) must be libellous, made negligently, and be unlawful. What follows addresses each. As to the first it states “Granath believes he can substantiate that Wright is not Satoshi Nakamoto and that Granath’s allegations are therefore correct. Therefore they are not libellous.” As to the second it states “Neither has Granath acted negligently in relation to the statements.” As to the third it states “In any case Granath had honourable reasons to put forward the allegations” and goes on to refer to the statements being within the wide framework of the protection of freedom of expression as a key human right under the Norwegian Constitution and under article 10 of the European Convention on Human Rights, and so not unlawful. It goes on to say, in the alternative, that even if the statements are libellous, Dr Wright has not suffered any loss because his reputation was damaged long before the tweets. The section concludes: “Accordingly we ask the court to find in favour of Granath regarding the claims by Wright. We will also ask for a declaratory judgement that Granath’s statements on Twitter about Wright are lawful.”
17. The section headed STATEMENT OF CLAIM seems to correspond to what we would call the prayer for relief. The substance reads: “1. The court finds in favour of Magnus Granath in regard to the claim for damages raised by Craig Wright. 2. Magnus Granath’s statements indicating that Craig Wright is not Satoshi Nakamoto are not unlawful. 3. Magnus Granath is awarded legal costs.”

### **Jurisdiction in defamations claims**

18. As is well known, the basic jurisdictional rule reflected in article 2 of the Lugano Convention, as in the Recast Brussels Regulation (Parliament and Council Regulation (EU) 1215/2012 (OJ 2012 L351 p1)) and its predecessors, the Brussels Convention (Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (OJ 1978 L304 p36)) and the Judgments Regulation (Council Regulation (EC) 44/2001 (OJ 2001 L12 p1)), is that a person must be sued in the place of his domicile save where the Convention provides for other options, such as the special jurisdiction in relation to matters of contract, tort and other causes of action provided for in article 5. Defamation claims fall within article 5(3), which governs matters relating to tort, delict or quasi delict, and provides that a person may be sued in the courts of the place “where the harmful event occurs or may occur”.

From the earliest jurisprudence of the European Court of Justice, now the Court of Justice of the European Union (to both of which I will refer for the sake of simplicity as the CJEU), it was established that this conferred on the claimant a choice of two venues. As summarised by Lord Hodge JSC in *AMT Futures Ltd v Marzillier mbH* [2018] AC 439 at [15]:

“The CJEU has ruled on the correct approach to article 5(3). It has interpreted the phrase “the place where the harmful event occurred” (a) to give the claimant the option of commencing proceedings in the courts of the place where the event occurred which gave rise to the damage or in the courts of the place where the damage occurred (if the event and damage were in different member states): *Handelskwekerij GJ Bier BV v Mines de Potasse d’Alsace SA* (Case C-21/76) [1978] QB 708, para 24; (b) as “the place where the event giving rise to the damage, and entailing tortious ... liability, directly produced its harmful effect upon the person who is the immediate victim of the event” and thus not the place where an indirect victim, such as the parent company of the immediate victim, suffered financial loss as a result: *Dumez France and Tracoba Sarl v Hessische Landesbank (Helaba)* (above), para 20; and (c) consistently with (b) above, where a victim suffered harm in one member state and consequential financial loss in another, as referring to the place where the initial damage occurred: *Marinari v Lloyd’s Bank Plc* (Case C-364/93) [1996] QB 217, paras 14 and 15. The focus in (b) and (c) is thus on where the direct and immediate damage occurred.”

19. Thus in the case of tort claims in general the claimant will have a choice of up to three jurisdictions in which to bring the claim, namely the place of the defendant’s domicile, the place where the harmful event occurred, and the place where the damage was directly suffered.
20. The CJEU has dealt with the application of these principles to claims for alleged infringement of personality rights on the internet, including defamation, in three leading cases.
21. The first is *Shevill and others v Presse Alliance S.A.* (Case C-68/93) [1995] 2 AC 18, which involved a claim for libel in a newspaper article published in France but distributed also in England and Wales. The claimant, who was based in England at the time of suit, commenced an action for libel in England which by amendment was confined to the damage caused only by the publication and distribution in England. There were rival submissions as to how to determine both limbs of the article 5(3) test, namely place of harmful event and place of direct damage. These were resolved by the court holding that the place where the harmful event occurred was to be interpreted as the place where the publisher of the newspaper is established, since that is the place where the harmful event originates and from which the libel is initiated: paragraphs 24-25. However the claimant must also have the option to sue in the place where the direct damage is suffered, as established in *Bier*, because the place of the harmful event would generally be the same as the defendant’s domicile and article 5(3) would not be a derogation from article 2 if there were not this alternative. The

place where the damage occurs in the case of an international libel through the press is where the publication is distributed because the victim is known in that place and the damage is to the honour, reputation and good will of a person there. Accordingly the second limb of article 5(3) jurisdiction applies to confer a choice to sue in each state in which the claimant claims to have suffered injury to his reputation for the damage suffered in that state (paragraphs 28-31).

22. This decision did not alter the threefold choice of forum accorded to a claimant in tort cases generally, namely place of (1) domicile (2) harmful event and (3) direct damage. However it created a distinction in the type of claims brought in defamation proceedings. The first two options provided a choice of forum in which to bring the whole of an entire claim (to use the language of paragraph 32), as is normally the position with the application of article 5(3) to other claims in tort or delict. This has come to be known as a global claim. The third option provides a choice to bring a series of claims in different jurisdictions at the same time with each confined to the damage suffered within each jurisdiction. These have come to be known as mosaic claims.
23. There are two aspects of this decision worth emphasising. First, the option to bring mosaic claims is of a different quality from the options of where to bring a global claim. The forum chosen for a global claim will determine where the entire claim is to be determined: it is a single forum choice. By contrast the mosaic claim option inherently permits multiple parallel proceedings in which the proceedings will be identical or similar (depending on the governing law applied under local rules of private international law) save for the local damage alleged. It is a multi-forum choice which contemplates and permits the bringing of parallel proceedings. The Court recognised that this carried with it all the disadvantages of parallel litigation, but said at paragraph 32: “Although there are disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant’s domicile or the place where the publisher of the publication is established.” The disadvantages of parallel litigation may be very considerable: they involve the duplication of costs and court resources, and the risk of irreconcilable or inconsistent decisions, which it is the very purpose of the *lis pendens* regime to mitigate or avoid. The Court was, however, less concerned about this effect of mosaic claims because the claimant had the option of bringing a global claim instead. The Court said nothing expressly about the ability of a defendant to mitigate or avoid these disadvantages. However, as I shall endeavour to show, he can mitigate or avoid them as a result of the choice conferred on him to have the claim determined as a global claim in a single jurisdiction by bringing a claim for negative declaratory relief.
24. Secondly, the case illustrates that an important consequence of the claimant having jurisdiction options is what might pejoratively, but wrongly, be called “forum shopping”. In defamation cases the courts of different states will apply their own conflicts rule to determine applicable law: defamation is outside the harmonising scope of the Rome II Regulation (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations). Often this will result in application of the *lex fori* which may well differ from that which would be applied in a different available forum. In *Shevill*, Advocate General Darmon stated that there are striking differences between the national laws in contracting states in respect of defamation;

and gave by way of example the requirement of intention to cause harm in French law, by contrast with strict liability in English law (paragraph 11). He went on to point out that therefore choice of forum was “not a neutral matter” (paragraph 12), recognising that the choice of forum carried with it the potential for significant differences in the parties’ substantive rights, because available jurisdictions might apply their own differing national laws. This is inherent in the scheme of the Convention and the options it confers, conferring on a claimant the ability to choose from amongst the available options the forum which will apply the system of law most favourable to him. However, as I have observed, it would be wrong to treat this as forum shopping in a pejorative sense. As Saville LJ said in *Boss Group v Boss France SA* [1997] 1 WLR 351 at p. 358H:

“In any event, the charge of forum shopping can only be made good by assuming that a party which takes advantage of the Convention exceptions to the general rule of domicile is somehow doing something illegitimate; but that assumption cannot be sustained if in truth one of the exceptions is applicable.”

25. In *eDate Advertising GmbH v X* (Cases C-509/09 and C-161/10) [2012] QB 654, the CJEU was concerned with two cases of personality rights claims where the publications complained of had been made on the internet. The particular problems thrown up by this different form of information medium led the court to fashion a further special rule for the application of article 5(3) in such cases: the claimant additionally should have the option of suing in the jurisdiction in which he has his centre of interests (paragraphs 48-50). The Court made clear that this was for a global damages claim and was in addition to the other options conferred by article 5(3) (paragraphs 51-52).
26. In *Bolagsupplysningen OU and another v Svensk Handel AB* (Case C-194/16) [2018] QB 963, the CJEU gave further guidance in relation to the application of these principles in the case of alleged invasion of personality rights on the internet. That decision makes clear that they apply whether the claimant is a natural or legal person (paragraph 38), and apply when there is material damage as well as damage to reputation or feelings (paragraph 36). It also establishes that where non-pecuniary relief of a kind which is single and indivisible is sought, in that case amendment of a website and removal of material from it, it may only be sought in one of the jurisdictions in which a global claim may be brought; it cannot be included in a mosaic claim: see paragraphs 45 to 49. Mr Wolanski QC submitted that this would apply equally to a claim for an injunction restraining Mr Granath from repeating the libel, as it clearly would if the injunction were not confined to local repetition in England. The significance of this aspect of the decision lies in the categorisation of the English Claim in this case. Mr Wolanski submitted that it was a global claim, not a mosaic claim limited to damages suffered within this jurisdiction. That followed both from the inclusion of a claim for an injunction, as well as the prayer for damages without limit. Although paragraph 6 pleaded damage to Dr Wright’s reputation in this jurisdiction, that was to fulfil the requirements of s.1 of the Defamation Act 2013 to establish serious harm, and did not restrict the claim for damages to those suffered in this jurisdiction. The English Claim is therefore a global claim, not a mosaic claim.



It is jurisdictionally justified as brought here on the grounds that England is the centre of Dr Wright's interests.

### **Negative declaratory relief**

27. There was a time when the courts in this jurisdiction took a restrictive approach to the circumstances in which someone facing a claim could properly instigate proceedings seeking a declaration of non-liability by way of negative declaratory relief ("NDR"), but that is no longer so: see *Messier Dowty Ltd v Sabena SA* [2000] 1 WLR 2040. As Rix LJ put it in *Andrea Merzario Ltd v International Spedition Leitner GmbH* [2001] 1 Lloyd's Rep 490 at paragraph 57: "Although at one stage English courts may have viewed claims for negative declarations with suspicion or even hostility, the modern approach is more open minded."
28. The European approach has been to treat NDR claims as a legitimate procedural course available to defendants facing a potential claim. In *Owners of cargo lately laden on board the Ship TATRY v Owners of the Ship MACIEJ RATAJ* (Case C-406/92) [1999] QB 515, the CJEU was concerned with claims arising out of the alleged contamination by diesel oil and other hydrocarbons of a bulk cargo of soya bean oil carried by the TATRY to Rotterdam and Hamburg. The shipowners made a pre-emptive strike by commencing proceedings in the Rotterdam District Court against the cargo owners, including those due to take delivery in Hamburg, for a declaration of non-liability. One of the questions in issue was whether that involved the same cause of action under article 21 of the Brussels Convention (materially identical to article 27 of the Lugano Convention) as a subsequent cargo claim brought by the Hamburg cargo interests for damages in England. I shall return to the decision when considering article 27 below, but for present purposes it is relevant to note that the Court expressed no disapproval of this course. Moreover Advocate General Tesauro addressed and rejected an argument that NDR actions are "a cloak for forum shopping" (paragraphs 21-22) and went as far as to say that "the bringing of proceedings to obtain a negative finding is generally allowed under the various national procedural laws and is entirely legitimate in every respect."
29. Practitioners are familiar with the use of NDR proceedings to seek to benefit from the perceived advantages of a first seised jurisdiction. The "Italian Torpedo" was the name given to parties facing a strong claim who brought NDR actions in Italy for tactical advantage based on the lengthy delays which might occur there. That is, in the words of AG Tesauro, entirely legitimate. If it produces a result which some find unpalatable, that is not the result of the availability of NDR, or the propriety of invoking it as such, but of the simple "tie-break rule" (*Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502, 514) of first seisin in article 27 which gives priority to the objective of certainty; and of the assumption which underlies the Convention that there is no distinction to be drawn in the quality of justice available in each member state notwithstanding differences in national courts, laws and procedures.
30. However that may be, the legitimacy of seeking NDR is not confined to cases involving contractual rights or trading relations between the parties. In *Folien Fischer AG v Ritrama SpA* (Case C-133/11) [2013] QB 523, the CJEU addressed the question whether article 5(3) applied to an NDR claim by Folien Fischer that its distribution policy, and refusal to grant patent licences, was not contrary to

competition law, as Ritrama had alleged. In concluding that article 5(3) applied, notwithstanding the differences in the form of the actions and the role of the parties, the Court said at paragraph 52 that provided the relevant elements of the liability in dispute fulfilled the article 5(3) test in either of its two meanings (i.e. place of harmful event or place of direct damage), each of those two states could assume jurisdiction for an NDR claim. In other words, where article 5(3) confers a choice of options, it confers them on the defendant by way of a choice of fora in which to bring an NDR claim just as much as on a claimant. A charge of “forum shopping” in the pejorative sense is just as misguided when applied to these choices which are made by someone facing a claim as it is when applied to the same choices available to the person advancing the claim. They are the choices which the Convention confers.

31. I would regard the legitimacy of actions for NDR in defamation claims as reinforced by what the CJEU said in *Shevill* at paragraph 32 about the disadvantages of parallel litigation inherent in mosaic claims. In observing that the claimant always had the option to bring his entire claim before the courts of the defendant’s domicile or of the place where the publisher of the defamatory publication is established, the court is in my view to be treated as saying that the considerable disadvantages involved in parallel litigation can be avoided by the bringing of a global claim, which is something open to the claimant. The same logic would permit a defendant to avoid these serious disadvantages by seeking to have the entire claim dealt with in a forum which had global jurisdiction by bringing a claim for NDR. Indeed, whether or not that is inherent in the observation in that case, it is consistent with the main purposes of the *lis pendens* provisions in the Convention, which are to avoid parallel proceedings and avoid the risk of conflicting judgments.

### Article 27

32. Section 9 of Title II of the Convention, headed “*Lis pendens – related actions*”, contains articles 27 and 28 which are in these terms:

“

#### *Article 27*

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different States bound by this Convention, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

#### *Article 28*

1 Where related actions are pending in the courts of different states bound by this Convention, any court other than the court first seised may stay its proceedings.

....

3 For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

.....”

33. There is no material distinction to be drawn for the purposes of the present case between articles 27 and 28 of the Lugano Convention, and the equivalent provisions in the Brussels Convention (articles 21 and 22), the Judgments Regulation (articles 27 and 28) and the Recast Brussels Regulation (articles 29 and 30). The CJEU has held that the principles developed in its case law in respect of articles 21 and 22 of the Brussels Convention are equally applicable to articles 27 and 28 of the Judgments Regulation (see *Folien Fischer v Ritrama* at [32]-[33]) and the same must be true of the applicability to articles 27 and 28 of the Lugano Convention of all its decisions on the equivalent provisions of the Brussels Convention, Judgments Regulation and Recast Brussels Regulation.
34. The leading English authority on article 27 and its equivalents is *Starlight Shipping v Allianz Marine & Aviation Versicherungs (“The Alexandros T”)* [2013] UKSC 70, [2014] All ER 590, in which Lord Clarke summarised the effect of the applicable CJEU jurisprudence in terms with which all the other members of the Supreme Court agreed. At paragraphs 23-24 he recorded that the *lis pendens* provisions were the mechanism designed to achieve the purpose reflected in Recital (15) to the Judgments Regulation that “In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States...”; and at paragraph 27 he referred to paragraph 8 of the CJEU decision in *Gubisch Maschinenfabrik KG v Palumbo* (Case C-144/86) [1982] ECR 4861, as establishing that the purpose of article 27 is to prevent the courts of two member states from giving inconsistent judgments and to preclude, so far as possible, the non-recognition of a judgment on the grounds that it is irreconcilable with a judgment given by a court in another member state.
35. At paragraph 28 Lord Clarke summarised the principles applicable to the question whether proceedings involve the same cause of action within the meaning of article 27, in the following terms:
- “
- i) The phrase “same cause of action” in article 27 has an independent and autonomous meaning as a matter of European law; it is therefore not to be interpreted according to the criteria of national law: see *Gubisch* at para 11.

ii) In order for proceedings to involve the same cause of action they must have “le même objet et la même cause”. This expression derives from the French version of the text. It is not reflected expressly in the English or German texts but the CJEU has held that it applies generally: see *Gubisch* at para 14, *The Tatry* at para 38 and *Underwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2009] Lloyd's Rep IR 365, per Beatson J at para 24.

iii) Identity of ‘cause’ means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action: see *The Tatry* at para 39. As Cooke J correctly stated in *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd's Rep 665 at para 42,

“The expression ‘legal rule’ or ‘rule of law’ appears to mean the juridical basis upon which arguments as to the facts will take place so that, in investigating ‘cause’ the court looks to the basic facts (whether in dispute or not) and the basic claimed rights and obligations of the parties to see if there is coincidence between them in the actions in different countries, making due allowance for the specific form that proceedings may take in one national court with different classifications of rights and obligations from those in a different national court.”

iv) Identity of ‘objet’ means that the proceedings in each jurisdiction must have the same end in view: see *The Tatry* at para 41, *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* (Case C-111/01) [2003] ECR I-4207 at para 25, *Primacom* at para 42 and *Sinco* at para 24.

v) The assessment of identity of cause and identity of object is to be made by reference only to the claims in each action and not to the defences to those claims: see *Gantner* at paras 24-32, where the CJEU said this in relation to article 21 of the Brussels Convention:

“... in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account should be taken

only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.”

See also to similar effect *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] 1 Lloyd's Rep 434, per Lawrence Collins LJ at para 93 and *Research in Motion UK Ltd v Visto Corporation* [2008] 2 All ER (Comm) 560, per Mummery LJ at para 36.

vi) It follows that article 27 is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings. I would accept the submission on behalf of the CMI that this is an important point of distinction between articles 27 and 28. Under article 28 it is actions rather than claims that are compared in order to determine whether they are related.

vii) After discussing *Gubisch*, *The Taty*, *Sarrio*, *The Happy Fellow* [1998] 1 Lloyd's Rep 13 and *Haji-Ioannou v Frangos* [1999] 2 Lloyd's Rep 337, Rix J summarised the position clearly and, in my opinion, accurately in *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 Lloyd's Rep 692 at 697:

“It would appear from these five cases, of which the first two were in the European Court of Justice, and the latter three in the domestic Courts of England, that, broadly speaking, the triple requirement of same parties, same cause and same objet entails that it is only in relatively straightforward situations that art 21 bites, and, it may be said, is intended to bite. After all, art 22 is available, with its more flexible discretionary power to stay, in the case of ‘related proceedings’ which need not involve the triple requirement of art 21. There is no need, therefore, as it seems to me, to strain to fit a case into art 21. The European Court, when speaking in *Gubisch* (at para 8) of the purpose, in the interests of the proper administration of justice within the European Community, of preventing parallel proceedings in different jurisdictions and of avoiding ‘in so far as it is possible and from the outset’ the possibility of irreconcilable decisions, was addressing arts 21 and 22 together, rather than art 21 by itself.

Thus a prime example of a case within art 21 is of course where party A brings the same claim against party B in two jurisdictions. Such a case raises no problem. More commonly, perhaps, the same dispute is raised in two jurisdictions when party A sues party B to assert liability in one jurisdiction, and party B sues party A in another jurisdiction to deny liability, or vice versa. In such situations, the respective claims of parties A

and B naturally differ, but the issue between them is essentially the same. The two claims are essentially mirror images of one another. *Gubisch* and *The [Tatry]* are good examples of this occurrence.

On the other hand, *Sarrio v KIA* is a case where the same claimant was suing the same defendant on different bases giving rise to different issues and different financial consequences, and where liability on one claim did not involve liability (or non-liability) on the other. *Haji-Ioannou v Frangos* illustrates the situation where even though the cause is the same, and even though there is some overlap in the claims and issues, nevertheless different claims, there the proprietary claim to trace, may raise sufficiently different issues of sufficient importance in the overall litigation for it to be concluded that the objet differs. The authority of *The Happy Fellow* at first instance may be somewhat shaken by the reservations expressed by Lord Justice Saville on appeal, but it too may be said to illustrate the process of analysing the claims and issues in the respective proceedings to identify whether they are the same. Where, for instance, there is no dispute over a shipowner's right to limit should he be found liable (a separate question, which need not even be resolved at the time when a limitation action is commenced or a decree given), I do not for myself see why it should be held that the liability action and the limitation action involve the same cause of action for the purposes of art 21.”

”

36. Lord Clarke continued at paragraph 30:

“The essential question is whether the claims in England and Greece are mirror images of one another, and thus legally irreconcilable, as in *Gubisch* and *The Tatry*, in which case article 27 applies, or whether they are not incompatible, as in *Gantner*, in which case it does not.”

### **The arguments**

37. The two grounds advanced were labelled as ground 1, being whether article 27 was fulfilled in this case and ground 2, being whether, if so, article 27 was applicable to defamation claims in this case. It might be thought the two grounds fall to be addressed in the reverse order as a matter of logic. However, the grounds were labelled in this way and argued in this order before the Judge and in the written and oral argument before us. This was, perhaps, because Mr Wolanski candidly recognised that the argument in what was described as ground 2 was a bold one. I also find it convenient to address them in the order labelled by the parties.

### **Ground 1**

*Rival submissions*

38. Although both parties took the guidance in *The Alexandros T* as their starting point, they differed in their interpretation of the principles and their application to the circumstances of the present case.
39. Mr Wolanski's argument on behalf of Dr Wright can be summarised as follows:
  - (1) In order to establish identity of cause of action within article 27 it is necessary that there be complete overlap in the issues in each set of proceedings; and/or there must be irreconcilability as a necessary consequence of the two claims proceeding, in the sense of cause of action estoppel.
  - (2) The following differences between the two claims prevent those requirements being met:
    - (a) The meaning of the words in the tweet are in issue in the English Claim but not in the Norwegian Claim.
    - (b) Dr Wright's dishonesty is an issue in the English Claim but not the Norwegian Claim. The Particulars of Claim contain an allegation that the tweet accuses Dr Wright of dishonesty (by innuendo); whereas the Norwegian Claim does not raise such an issue but merely seeks NDR in relation to whether statements that Dr Wright is Satoshi Nakamoto are "incorrect". The Norwegian Court could find that Dr Wright was not Satoshi Nakamoto, but that his claim to be so was honestly made, if, for example he believed he was entitled to claim to be the principal creator of Bitcoin but the court held that someone else had a better claim to be the principal creator and so was properly to be described as Satoshi Nakamoto.
    - (c) The truth of the meaning is in issue in the Norwegian Claim but would only arise by way of a defence in the English Claim and so falls to be ignored by reason of the principle established by *Gantner*.
    - (d) The Norwegian Claim requires proof of negligence under Norwegian law as an ingredient of liability, whereas the English tort of defamation is one of presumed malice which does not require a claimant to prove any mental element.
    - (e) The Norwegian Claim concerns allegations made in a number of tweets, not only the 17 March tweet relied on as libellous in the English Claim.
  - (3) The claims do not have the same *objet*. In particular, the Norwegian Claim is for a declaration that Mr Granath is not liable to pay damages and is therefore concerned with insulation against financial liability; by contrast, the English Claim is concerned with vindication of Dr Wright's reputation rather than pecuniary relief. Damages are not the primary relief sought; the primary relief sought in the English Claim is non-pecuniary, namely the injunction and s. 12 statement. Neither is available in Norway.

40. Mr Tomlinson QC on behalf of Mr Granath argued as follows, in summary:
- (1) What was necessary to fulfil the requirement of same *cause* was identity at a high level of abstraction: it was sufficient in this case that both claims raise the question whether Mr Granath defamed Dr Wright and damaged his reputation by publishing the tweet. The rule of law involved in both is protection of personalities from false statements.
  - (2) It is also sufficient if there is a single common issue which is an essential ingredient of the cause of action in each claim, because that gives rise to a risk of irreconcilable judgments which it is the purpose of article 27 to prevent. Any such risk engages article 27.
  - (3) In any event, there is complete overlap between the issues in the two sets of proceedings.
  - (4) The claims have the same *objet*, namely whether Mr Granath is liable for the 17 March tweet.

#### *Overlap*

41. It is convenient first to address the dispute about the degree of overlap between the two claims.
42. I would reject Mr Wolanski's argument that the Norwegian Claim does not require a determination of the meaning of the 17 March tweet. The claim seeks to establish that the tweet is true. I do not see how the Norwegian Court could consider or decide that question without answering the logically prior question of what it means. Mr Wolanski relied in the course of argument on the fact that the Norwegian Claim said nothing about whether meaning was in issue. However care must be taken about the use of the word "issue" which is prevalent in the jurisprudence in this area. What matters is the element or elements of the claim, whether or not in dispute. If the Norwegian court will have to determine meaning as an element of the claim, it is irrelevant whether there is any dispute about its meaning, and therefore an "issue" in that sense.
43. I would also reject Mr Wolanski's argument that the Norwegian Claim does not raise a question of Dr Wright's dishonesty. The very terms of the tweet accuse Dr Wright of being a fraud in claiming to be Satoshi Nakamoto: "CSW's first attempt to fraudulently prove he is Satoshi" and "#CraigWhiteIsAFraud". That is necessarily a charge of dishonesty which the Norwegian Court will have to address in determining Mr Granath's claim that the tweet is true.
44. I am also unable to accept that the truth of the tweet cannot be treated as a question which arises in the English proceedings on the grounds that it will be for Mr Granath to raise it by way of defence. This argument has a wholly artificial air; it is clear that the defence of truth will be advanced in the English Claim if it proceeds, because the truth of the tweet has been averred as the central element of the Norwegian Claim. That does not fall foul of the rationale put forward in *Gantner* at paragraphs 27 to 31 for ignoring defences, which is that the identity question must be capable of being answered at the moment of seisin in the second set of proceedings. I would accept Mr



Tomlinson's argument that if the first set of proceedings would amount in substance to a defence to the second set, that is sufficient to allow its defensive content to be taken into account in assessing the scope of the second seised proceedings for article 27 purposes. Some support for this approach is to be found in *Gubisch*. There the claim first brought was by the German seller of a machine tool who commenced suit in a German Landgericht (regional court). It was an action for the price against the Italian buyer. Subsequently the purchaser commenced proceedings in Italy for a declaration that the order he had placed was inoperative because he had revoked it; or alternatively for rescission of the contract on the grounds of lack of consent or discharge as a result of failure to comply with the mandatory time limit for delivery. The CJEU held that the claims involved the same cause of action because the question whether the contract was binding lay at the heart of the two actions. It went on at paragraph 16 to say: "If it is the action for rescission or discharge of the contract that is brought subsequently, it may even be regarded as simply a defence against the first action, brought in the form of independent proceedings before a court in another Contracting State." In other words, the Court was saying that if one action can be regarded as in substance a defence to the other, its defensive content helps determine whether the two claims involve the same cause of action. So in the present case, the claim in Norway that the tweet was true would have been regarded as a defence to the English Claim and as such its defensive content falls to be considered in the English proceedings, which are second seised, when comparing the two to determine whether they involve the same cause of action.

45. Were it otherwise, the purpose of article 27 would be undermined: article 27 would not be engaged notwithstanding there would be the required identity in the second seised proceedings and that that could be established with certainty because the relevant issue had already been raised in the first seised claim.
46. This approach also accords with the requirement to give article 27 an autonomous meaning and application. Some national systems may require a claimant to plead a lack of truth as part of a claim while others leave it to be raised by way of defence. Those are aspects of the national laws and procedures whose differences ought not to affect the autonomous application of article 27. As my Lord, Singh LJ, put it in the course of argument, article 27 looks to an overall assessment of the position in substance, not to the niceties of different procedural requirements of national systems of law.
47. I am also unpersuaded by Mr Wolanski's argument that there is significance in the fact that the Norwegian Claim refers to a number of tweets, not only the 17 March tweet relied on as libellous in the English proceedings. The terms of the Norwegian Claim make clear in a number of places that what is sought is a declaration of non-liability for the claims advanced by Dr Wright, and specifically the claim advanced in the letter before action of 29 March. That letter confines the libel claim to the 17 March tweet.
48. I would accept, however, that there are two differences between the English and Norwegian Claims whose significance requires examination. The first is that the Norwegian Claim identifies negligence as a necessary ingredient of liability under Norwegian law, and asserts the absence of negligence on Mr Granath's part. This gives rise to the possibility that Mr Granath could succeed in Norway on a basis that would not be inconsistent with liability to Dr Wright in England under English law: if

the Norwegian Court were to hold that the tweet was untrue because Dr Wright is Satoshi Nakamoto, and there was no defence of lawfulness by way of public interest or freedom of expression, but that Mr Granath was entitled to his declaration on the grounds that although the tweet was wrong it was not negligently so, Dr Wright would have established all the ingredients of an English law defamation claim. However the consequence of the Court now declining jurisdiction under article 27 would be to preclude him from pursuing that English law claim or obtaining the relief it would provide.

49. The second difference between the claims is that were Mr Granath to fail in full in Norway, the relief available there to Dr Wright by way of counterclaim would not be co-extensive with that available in a successful English law claim. It would not include a s.12 statement; and it might not include an injunction. I say “might not” because it was in dispute as to whether that was so. Dr Wright sought to adduce expert evidence of Norwegian law before the Judge below, but permission was refused on the grounds that it came too late, with the result that there was no relevant evidence of Norwegian law or practice before the Court. Mr Tomlinson asserted that an injunction must be available in Norway as an effective remedy guaranteed by the EU Charter, but later confirmed that Norway was not a signatory to the Charter and not bound by it. He submitted in the alternative that such relief would be available as part of Dr Wright’s article 8 rights under the European Convention on Human Rights, but that is not self-evident to me and the point was not explored in argument. I shall assume for the purposes of my analysis that an injunction is not available in Norway because for the reasons explained below I do not regard any such unavailability as precluding the application of article 27.

*The law on same ‘cause’*

50. An analysis of the authorities suggests that the submissions of each party are too extreme.
51. In *Gubisch*, it will be recalled that the claim first brought was an action for the price by the seller in Germany and the second seised claim was by the purchaser in Italy for a declaration that the order he had placed was inoperative because he had revoked it; or alternatively for rescission of the contract or discharge as a result of failure to comply with the time limit for delivery. The Italian first instance court rejected the argument that the cases involved the same cause of action within the meaning of article 21 of the Brussels Convention. On appeal, the Court of Cassation referred the question to the CJEU. The rival arguments were recorded in paragraph 2 of the Opinion of Advocate General Mancini. That which prevailed in the Italian first instance court, and was supported by the Italian government, was that article 21 must be interpreted literally and the two causes of action were not the same; any risk of inconsistent judgments could be met by the application of the discretionary jurisdiction to stay under article 22. The contrary argument, supported by the European Commission and other interveners, was that article 21 “operates not only in the case of proceedings involving exactly the same subject matter and cause of action but also in the case of actions which, whilst differing in scope, are based on the same legal circumstance.” AG Mancini favoured the former argument, and opined at page 4 that the cases did not involve the same *cause* or *objet*: “Both cases are indeed concerned with the question whether a contract exists and whether it is operative. In the case pending before the [German Court] however, that question is secondary, or to

be more precise preliminary to consideration of the substance of the action to enforce payment of the price.”

52. The CJEU, however rejected the Advocate General’s opinion, and favoured the approach of the Commission in holding that the necessary identity of both *cause* and *objet* was fulfilled. In relation to *cause* the Court said at paragraph 15:

“In the procedural situation which has given rise to the question submitted for a preliminary ruling the same parties are engaged in two legal proceedings in different Contracting States which are based on the same “cause of action”, that is to say the same contractual relationship.”

53. The Court went on to say that the problem was whether two actions have the same *objet* when the first seeks to enforce the contract and the latter seeks its rescission or discharge. In holding that the claims involved the necessary identity of *objet*, it described the critical factor, at paragraph 16, as being that “the question whether the contract is binding therefore lies at the heart of the two actions”. At paragraph 17 it stated: “that concept [i.e of the identity of *objet* required by article 21] cannot be restricted so as to mean two claims which are entirely identical”.

54. The conclusion that there was the necessary identity in both respects was contained in paragraph 19 in these terms, which reflects what the Court had identified in paragraph 13 as the “salient features” of the two claims which gave rise to the question before it:

“The answer to the question submitted by the national court must therefore be that the concept of *lis pendens* pursuant to Article 21 of the [Brussels Convention] covers a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State.”

55. The case suggests, therefore, two things of relevance to this appeal. The first is that when considering *objet*, the search is not for complete identity, but for identity on a question “which lies at the heart of” the two actions. Same does not mean same. The two claims need not be “entirely identical”.

56. Secondly, it is equally true that there can be the necessary identity of *cause* without complete identity of legal issues in the two sets of proceedings. Here too same does not mean same. The decision is necessarily to that effect also in relation to *cause*, because as the Advocate General pointed out, in the claim for the price in the first seised German proceedings, there would need to be established not only the validity and subsistence of the contract, which was in issue in the second seised Italian proceedings, but also an entitlement to the price which was not. The validity of the contract which was in issue in the Italian proceedings was a necessary, but not sufficient, basis for the claim in the German proceedings; the latter additionally raised the issue of what the seller was entitled to under the contract if valid and subsisting. In that case the identity which was held to be sufficient was that in both sets of proceedings the cause of action “was based on the same contractual relationship”. The conclusion expressed in general terms in paragraph 19, covering both *cause* and

*objet*, suggests that the necessary identity of *cause* would not necessarily be defeated by the inclusion of additional issues in the enforcement claim over and above those which were involved in resisting the allegations of rescission or discharge; and it was not so defeated despite the lack of complete identity of legal issues in that case.

57. In such a situation the two claims would not necessarily lead to inconsistent results. They would not have done so on the facts of *Gubisch*, because entitlements under the contract, if valid, were not part of the legal issues raised by the claimant in Italy, but were a necessary part of the claim in Germany. It is not clear from the report whether the buyer would have accepted a liability to pay the price if he failed in his allegations that the contract was inoperative, rescinded or discharged, but that is not relevant: as the authorities make clear (see e.g. *Primacom* at paragraph 42 and the *Easygroup* case discussed below), what matters when determining whether there is identity of *cause* is whether there is sufficient identity of the issues which the claim raises, whether or not such issues are disputed by the defendant.
58. In *The Tatry* the CJEU said at paragraph 39 that the same *cause* meant that the proceedings in each jurisdiction must have the same facts and rule of law relied on as the basis of the action. The actions satisfied the test in that case because they were for damage caused in the same circumstances to a cargo carried in bulk, and were brought on the basis of shipping contracts “in identical terms”: paragraph 40. The case itself does not therefore address the situation in which there is not complete identity of legal basis: the claims there were based on contracts in identical terms and governed by a single governing law which would fall to be applied in either jurisdiction.
59. However the Court addressed as a separate question whether the necessary identity was precluded by the fact that one set of proceedings were *in personam* and the other *in rem*. At paragraphs 46 to 48 it held that they involved the same *cause* and *objet* notwithstanding that the second seised proceedings in England were proceedings *in rem* which involved the arrest of a sister ship and the posting of security. This relief by way of security is only available in actions *in rem*. This aspect of the decision illustrates that actions may have the same *objet* notwithstanding that different forms of relief are available and are sought.
60. *The Tatry* is also of assistance in explaining what is meant by irreconcilable judgments in the context of the *lis pendens* provisions of the Brussels Convention. In *Hoffmann v Krieg* (Case 145/86) [1988] ECR 648 the CJEU had established that in the context of the enforcement provisions (article 27(3) of the Convention), irreconcilable judgments were those where the decisions had mutually exclusive legal consequences. At paragraphs 49 to 57 of *The Tatry* the Court explained that the word irreconcilable in article 22 of the Brussels Convention had a different and broader meaning than it did when used in the enforcement provisions. It covered the risk of conflicting or contradictory decisions even if their legal consequences were not mutually exclusive and they could be separately enforced. This was because the objective of article 22 was to improve coordination of judicial functions within the Community and avoid conflicting and contradictory decisions (paragraph 55). Applying *The Tatry*, the House of Lords held in *Sarrio SA v Kuwait Investment Authority* [1991] 1 AC 32 that the concept of conflicting decisions was to be interpreted broadly, and could extend to conflict on issues which were not primary or even essential issues as individual ingredients of the cause of action. Although those paragraphs in *The Tatry*, and the decision in *Sarrio*, were addressed to article 22, the

same rationale applies to article 21 and its equivalents so far as avoiding “irreconcilable” judgments is concerned, although of course article 21 imposes the more stringent requirements of the identities in parties, *cause* and *objet* which are absent from article 22. It is true that articles 21 and 22 are also aimed at avoiding the possibility of judgments which would result in non-recognition, and are irreconcilable in that sense, but that is not their only objective, as is apparent from paragraph 8 of *Gubisch*, in which the CJEU identified the purposes of articles 21 and 22 of the Brussels Convention together as “intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the Courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, insofar as possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which the recognition is sought” (my emphasis). The same formulation is adopted in *Erich Gasser GmbH v MISAT Srl* (Case C-116/02) [2005] QB 1, at paragraph 41. I would therefore respectfully disagree with the suggestion in paragraph 129 of Lord Neuberger’s minority judgment in *The Alexandros T* that the fundamental purpose of Article 27 is to ensure enforceability of judgments if he thereby intended to convey that such is its sole or essential purpose. That is certainly one of its purposes, but it is not the only one.

61. Accordingly when Lord Clarke says at paragraph 30 of *The Alexandros T* that the question in that case is whether the claims are “mirror images of one another and thus legally irreconcilable”, I do not understand him to be defining the identity which is required by article 27 as involving irreconcilability in the sense used in the enforcement provisions, that is to say mutually exclusive legal consequences, still less cause of action estoppel which is in any event an inappropriate domestic concept; rather he was using the metaphor of a mirror image as capturing the necessary identity, which could have as its effect a risk of irreconcilable judgments in the sense interpreted in *Gubisch* and *The Tatry* of conflicting or contradictory decisions.
62. *The Tatry* was considered and applied in this Court in *Haji-Ioannou & others v Frangos & others* [1999] CLC 1075. In that case Mr Haji-Ioannou, a wealthy shipowner, had personally, and through his companies, transferred large sums of money to his son-in law, Mr Frangos, who was to invest it in ships and to manage the money and/or ships on his behalf. After the marriage to his daughter had ended, Mr Haji-Ioannou terminated the agreement and alleged that the money used to purchase the ships was repayable. The first seised proceedings were a civil claim by Mr Haji-Ioannou added to criminal proceedings in Greece against Mr Frangos for embezzlement of approximately \$49 million. The civil claim was for the equivalent of about £33 as “moral damages” for the tort of embezzlement. The second seised proceedings were brought in England by Mr Haji-Ioannou and his companies alleging that the money and shares in the shipowning companies were to remain their property. They claimed to be able to trace the money into the ships and claimed a declaration that they were entitled to ownership of them. The causes of action in the English claim, set out at pp. 1078-9 of the report, were for breach of an express trust created by the agreement, breaches of fiduciary duty created by the agreement and breach of a duty to account. The invocation by Mr Frangos of article 21 of the Brussels Convention failed on the grounds that the civil claim in the Greek criminal

proceedings did not have the same *objet* as the English proceedings. However the Court determined, obiter, that they did have the same *cause*.

63. At p. 1091 Lord Bingham LCJ, giving the judgment of the court, identified that the Greek claim was for “moral damages” which was a type of compensation provided by Greek law in relation to certain torts which were directed against the ‘person’ or the ‘name’ of a plaintiff and not against his property. He then recorded that “Mr Papadimitriou [Mr Haji-Ioannou’s expert in Greek law] says that in Mr Frangos’ case moral damages may have the same (historical) basis as the embezzlement but they do not have the same legal basis since the claims for indemnity and restoration *in natura* and those relating to proprietary rights arise out of ‘contract’. In response, Mr Scorinis [Mr Frangos’ expert in Greek law] says that the tort claim for moral damages is founded on precisely the same facts and legal basis as the claim for restitution.”
64. Having referred to the CJEU authorities on article 21, including in particular paragraph 39 of *The Tatry* explaining that *cause* comprises the rule of law relied on as the basis of the action, Lord Bingham expressed the court’s conclusion on this point in these terms:
- “It appears to us that in the language of the European Court of Justice, the same facts and rule of law form the basis of each proceedings. Although in England the plaintiffs are asserting that the same underlying agreement gave rise to different legal consequences from which different legal obligations and therefore different legal remedies flowed, the *cause* would appear to be the same in both countries”.
65. That was therefore a case in which the legal basis of a tortious claim for moral damages for embezzlement was treated as the same as one for a declaration of property rights in the subject matter of the alleged embezzlement, because they arose from the same underlying agreement. However, a granular analysis would inevitably have identified differences in the legal ingredients of the causes of action in the two cases. It is inconceivable that the legal ingredients of a code based tort of embezzlement under Greek law would coincide with the legal ingredients of the equity based proprietary claims advanced in the English proceedings. One was a claim of a personal nature, the other proprietary. This was expressly recognised in Lord Bingham’s conclusion that the plaintiffs were asserting in England that the underlying agreement “gave rise to *different legal consequences from which different legal obligations* and therefore different legal remedies flowed” (my emphasis).
66. This decision is therefore further authority, albeit obiter, for the proposition that there is no requirement for complete overlap between the legal ingredients of the claims in the two sets of proceedings. Moylan LJ expresses disagreement that the remarks of Lord Bingham bear this interpretation; or if they do, that they bear the weight I seek to place on them. He gives two reasons. The first is that the judgment provides limited assistance by way of explanation as to why the cause was considered to be the same in both countries, and one explanation might be that the court was persuaded by the expert evidence that the tort claim and the restitution claim had the same legal basis, which was, in turn, the same legal basis as the proceedings in England. This was not, however, the explanation given by Lord Bingham: the issue of identity under article 21 was not one to be determined by Greek law or any domestic law, but by the

autonomous European law concept which he identified from paragraph 39 of *The Tatry*. His conclusions explain that this was fulfilled by the identity of both claims *arising out of the same underlying agreement*, notwithstanding, as he expressly recognised, that the legal obligations which were relied on as flowing from that agreement were different in each of the two claims. The unifying feature was said to be the underlying agreement notwithstanding the different legal obligations which formed the basis for the two claims. Secondly, Moylan LJ suggests that the focus on the fact that the proceedings were based on the same underlying agreement resonates with the decision in *Gubisch*. I would respectfully agree, but this serves to emphasise that exact identity between the legal issues which arise domestically in the two sets of proceedings is not required, it being absent both in this case and in *Gubisch* for the reasons I have endeavoured to explain.

67. I have already quoted paragraph 28(iii) of Lord Clarke’s speech in *The Alexandros T*, as to what was meant in paragraph 39 of the CJEU judgment in *The Tatry* by “the rule of law relied on as the basis of the action”, in which he approved as correct the passage in Cooke J’s judgment in *Primacom* at paragraph 42 requiring “coincidence” between “the basic claimed rights and obligations of the parties” in the two actions “making due allowance for the specific form that proceedings may take in one national court with different classifications of rights and obligations from those in a different national court.” I note that the reference to *basic* claimed rights and obligations suggests that these are a subset of a larger set comprising *all* the claimed rights and obligations, and that some selection or characterisation of those which are the basic aspects of the claim in that respect is required.
68. Cooke J’s formulation does not answer the question as to the level of abstraction at which the basic claimed rights and obligations must be identical, nor how much latitude is permitted by the “due allowance” for different national classifications of rights and obligations. However further assistance in that regard is to be found in the actual decision in *Primacom* and other passages in his judgment.
69. In *Primacom* there was no complete identity of legal issues. There were two sets of proceedings first brought in Germany by German borrowers under a term loan facility. There were three subsequent sets of proceedings commenced in England by the lending banks, which the borrowers argued involved the same cause of action and required the English Court to decline jurisdiction. In an action in Mainz, the borrowers sought a declaration that the lending banks were not entitled to interest under the facility, either at all, or alternatively in respect of a certain period of time, on the basis of a particular German statutory provision providing protection to those in financial crisis. In Frankfurt they sought declarations in relation to pledge agreements executed on the same date as the loan facility: they claimed there were no pledges constituted by those agreements, alternatively that they were not enforceable until the end of the loan agreement or the end of the borrowers’ financial crisis. In England the lenders’ first action was for an injunction to prevent the borrowers selling an asset which by the terms of the loan facility could only be sold with the consent of the lenders. The second action sought declarations as to the validity and enforceability of the clause in the loan agreement providing for payment of interest. The third action sought disclosure of a report on the lenders’ financial position by PwC which another provision of the loan agreement required to be disclosed to the lenders.

70. Cooke J held that the declaratory proceedings involved the same cause of action as the Mainz and Frankfurt proceedings within the meaning of article 27 of the Judgments Regulation, and the English court would therefore decline jurisdiction. The injunction and PwC report proceedings did not fall within article 27 or article 28 and were permitted to continue in England.
71. Having concluded that the Mainz proceedings and the English declaratory proceedings had the same *objet* because they raised the same essential issue as to the enforceability of the interest provisions in the loan agreement, and their effect on the other provisions in relation to default and repayment of capital, Cooke J addressed the question of whether they involved the same *cause* at paragraphs 44 to 47. He recognised that the German courts would apply their own domestic law as a matter of its rules of private international law, and that the English court would conversely apply its own law as applicable under English conflicts rules. There was therefore a clear disparity in legal issues: the Mainz court would apply the German public order statute which protects debtors in financial crisis, whereas the English court would not. Nevertheless this difference of national approach to enforceability did not prevent the proceedings from involving the same cause of action for the purposes of article 27 (paragraph 45). At paragraphs 46 to 47 he said:
- “46. If I had applied the test set out in Briggs and Rees, Civil Jurisdiction and Judgments at paragraph 2.189, I would have come to a different conclusion, because it is there suggested that another way of determining this point is to ask whether a decision in one set of proceedings would be a conclusive answer to the questions raised in the other. A decision in the English Court would not answer the question which the German Courts have to consider as a matter of public policy. Equally, a decision by the German Courts will assume the validity of the SSFA under English law which, in the absence of any argument advanced to the contrary, is the conclusion which the English Court seems bound to reach.
47. It appears to me however that this is too narrow an approach, since otherwise it would be possible to argue that Article 27 did not apply to proceedings where a national court’s decision, based on the application of its domestic law (which it found to be applicable under its rules of private international law) did not answer the question determinable by a different national court under its own law (which it regarded as applicable under its own rules of private international law). The way the claim is framed and the arguments in support of it may fall to be taken into account, but ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way (see *The Happy Fellow* [1998] 1 Lloyd’s Reports 12 at pp17-18 and, by way of example, *The Sennar no 2* [1985] 1 Lloyd’s Reports 521).”
72. Those passages were not referred to in Lord Clarke’s summary in *The Alexandros T*, which confined the endorsement of Cooke J’s judgment to what he had said at paragraph 42. I would not for my part agree that that the question must be seen



broadly in terms of the judgment sought and not in terms of the issues raised on the way. Expressed in that way it treats identity of *objet* as sufficient, and is not in that respect supported by the authorities cited (and the qualified and provisional view of Saville LJ in *Blue Nile Shipping Co Ltd v Iguana Shipping and Finance Inc (The Happy Fellow)* [1998] 1 Lloyd's Rep 13 at 17-18 relied on by Cooke J has subsequently been rejected by the CJEU in *Maersk Olie & Gas A/S v De Haan & De Beer* (case C-39/02 [2005] 1 Lloyd's Rep 210). Nevertheless there is force in the argument that these are the workings out of what Cooke J had said at paragraph 42, and had the Supreme Court considered that they led to the wrong conclusion in that case, it would have said in terms that the case was wrongly decided rather than citing the main exposition of the principle of law in play as correct. It is a decision whose ratio involved treating proceedings applying different issues of national law as nevertheless involving the same cause of action for the purposes of article 27; and has the implicit approval of the Supreme Court in that respect.

73. In *Easygroup Ltd v Easy Rent a Car Ltd and another* [2019] 1 WLR 4630 Easygroup had brought proceedings in Cyprus claiming trade mark infringement and passing off by Easy Rent a Car. They were settled on a basis which Easy Rent a Car contended permitted it to carry on using the marks. For the purposes of the subsequent dispute about the application of article 29 of the Recast Brussels Regulation, the first seised proceedings were brought in Cyprus some 11 years later by Easy Rent a Car seeking declarations that they were entitled to use the marks and that Easygroup were estopped from asserting any rights in the marks; injunctions to prevent Easygroup from interfering with their business, and against Easygroup using the marks; and an order for specific performance of the settlement agreement or damages for its breach. The second seised proceedings were brought in England by Easygroup seeking relief preventing use by Easy Rent a Car of the marks as allegedly constituting the infringement of UK registered patents and passing off. The particulars of claim made no reference to the settlement agreement, unsurprisingly, but Easy Rent a Car made clear that the settlement agreement would form the central plank of their defence.
74. The judge at first instance held that the proceedings did not have the same cause of action because the Cypriot proceedings were based in contract, relying on the settlement agreement, whereas the English proceedings were brought in tort. David Richards LJ, with whose judgment King and Lewison LLJ agreed, rejected this as a sufficient distinction, saying at paragraph 32:
- “32. In my judgment, it is necessary to analyse the elements in the two claims in order to decide whether they involve the same “cause”. It is not sufficient simply to rely on the different domestic law causes of action (contract and tort) on which the claims are based; see proposition (i) above derived from *The Alexandros T* [2014] Bus LR 873 [that the phrase has an independent and autonomous meaning as a matter of European law and is not to be interpreted according to criteria of national law].”
75. At paragraph 38 he identified as “the essential element” in the Cypriot proceedings that Easygroup was alleged to have consented to the use of the marks by Easy Rent a Car and to the latter carrying on business in a way which would otherwise amount to passing off. At paragraph 40 he said:

“40. If the claims in the English and Cypriot proceedings are examined, without regard to any possible defences, it is apparent that the claimant’s consent to the defendant’s use of the marks, or lack of such consent, is an essential element of both claims. While the Cypriot proceedings are more extensive in the relief sought than the English proceedings, so that there is not a complete overlap between the proceedings, the essential question is whether the “cause” in the English proceedings is mirrored in the Cypriot proceedings. It is, in my judgment, as regards the issue of consent.”

76. However that was not “the end of the matter” because counsel for Easy Rent a Car had undertaken not to challenge the validity of the trade marks in the Cypriot proceedings; and had there given “indications” that the argument would be concerned solely with the alleged agreement. The result was that the Cypriot proceedings would be concerned only with the issue of whether consent was conferred by the alleged agreement; whereas no such undertaking was given in relation to the English proceedings. The Court was therefore faced with a situation in which the second seised proceedings raised wider issues than those which arose in the first seised proceedings, such that the issue in the first seised proceedings (i.e. consent) might never be decided in the second seised proceedings: there were a number of factual issues which Easygroup would have to establish in England before the question of consent arose. At paragraph 42 David Richards LJ said:

“The effect of this undertaking and the indications, if carried through, will be to limit the scope of the Cypriot proceedings, but not the English proceedings, to the single issue of consent. On this basis, the range of issues raised by the claims in the two sets of proceedings will not be the same. The question then is whether they none the less raise the same “cause” for the purposes of article 29.”

77. At paragraph 46 he described the situation as best characterised as one in which the claimant in the English proceedings seeks to establish liability for infringement and passing off, and all the elements of those “causes” are potentially in issue, while the claimants in the Cypriot proceedings seek to establish that they have no liability for infringement or passing off, but only one element of those “causes” is in issue. His conclusion was that this did not preclude the causes of action being the same. He said at paragraph 48 that the resolution of that issue was to be found in what Cooke J had said at paragraph 42 of *Primacom*, approved by the Supreme Court in *The Alexandros T*, in which he added his own emphasis to the words “whether in dispute or not”. His conclusion was expressed in these terms at paragraph 49:

“49. While the scope of the dispute in the Cypriot proceedings may be narrower than in the English proceedings, that which is not disputed in the Cypriot proceedings is in effect assumed in the claimant’s favour, narrowing the case to the single issue of consent. Fundamentally, the “cause” and, as is common ground, the “objet” of the two sets of proceedings are the same.”

78. At paragraphs 50-51 he went on to give an alternative reason for holding that article 29 applied even if he were wrong in his reasoning leading to paragraph 49. This was that the scope of the Cypriot claim should be looked at without reference to the undertaking not to challenge the validity of the trade marks because any challenge to the validity of the trademarks would only come into the English proceedings by way of defence or counterclaim and so fell to be ignored; and that any other narrowing of the issues in Cyprus depended on the “indication” to confine the issue in Cyprus to one of consent, which was to be ignored because it was not something which would have any binding force in Cyprus. Accordingly, judging the *cause* in Cyprus by reference to the claim, it “was and remained in a form that potentially put in issue all the elements of the claimant’s claim in the English proceedings.”
79. I would emphasise four aspects of this decision. First, as David Richards LJ said at paragraph 32, it is necessary to analyse the elements in the two claims in order to decide whether they involve the same *cause*. This suggests that it is necessary to examine the constituent elements of each claim with care, rather than at the high level of abstraction suggested by Mr Tomlinson’s argument. It reflects what Cooke J said at paragraph 42 of *Primacom*, that the basic rights and obligations must be examined to see whether the rule of law is the same.
80. Secondly, David Richards LJ referred to there being a risk of irreconcilable judgments in paragraph 44 in terms which make clear that he was using that expression to connote a risk of a conflicting decision in *The Tatry* sense which I have identified, not irreconcilability as defined for the enforcement provisions of the Convention; and in paragraph 47 he referred to it in terms as a “potential for conflicting decisions.” At that stage of the analysis he was treating the English proceedings as raising a wider set of issues than those in Cyprus on the hypothesis that the undertaking and indications would confine the issue in Cyprus to one of consent. This supports the analysis that this was the sense in which Lord Clarke was using “irreconcilable” in paragraph 30 of *The Alexandros T*.
81. Thirdly, at paragraph 47 David Richards LJ observed that the potential for conflicting decisions was a relevant but not decisive factor. Irreconcilability is not part of the test, although it is a helpful tool in evaluating whether the test is met. This too supports the analysis that Lord Clarke was not at paragraph 30 of *The Alexandros T* seeking to incorporate irreconcilability as an ingredient of the test of identity in article 27.
82. Fourthly, paragraphs 38 and 40 introduce the concept of the, or an, “essential element” of the two claims as a consideration in determining whether they have the same cause. It is not clear to me that this concept formed an important part of the reasoning for either of the two bases for the decision. Paragraph 40 would suggest that it may have done: there David Richards LJ identified the issue of consent as an essential element of both claims, and said that the *cause* was mirrored in the two sets of proceedings as regards the issue of consent notwithstanding that there was not complete overlap. On the other hand, paragraphs 46 and 51 suggest that the legal issues in both claims were considered to be identical apart from the effect of the undertaking and indications given in the Cypriot proceedings which would narrow their scope to the issue of consent. Each of the two grounds for the court’s decision comprised reasons why the undertaking and indications should be ignored for the purposes of comparing the *cause* in each action.

83. However that may be, the concept may be of some assistance in assessing whether in any particular case the degree of divergence in overlap of issues in two sets of proceedings prevents identity of *cause*. Lord Clarke uses the language of “mirroring” in his judgment in *The Alexandros T*, but as is well known, metaphors are sometimes no substitute for further analysis. It is, in my view, an apt and useful metaphor for the inverted reflection which captures the identity between a positive allegation and a negative allegation. It cannot, however, be taken to mean that the two claims must be an exact reflection of each other in the sense that there is complete overlap of all legal issues. That would be contrary to the decision of the CJEU in *Gubisch*, the decision of the Court of Appeal in *Haji-Ioannou* and contrary to the decision of Cooke J in *Primacom* which received the implicit approval of the Supreme Court in *The Alexandros T*. Lord Clarke’s use of the metaphor must be interpreted in that context.
84. What degree of divergence is therefore permissible? The references by David Richards LJ to the “essential element” of the claims at paragraphs 38 and 40 (in the second of which he also uses the mirror metaphor) reflects the language used by Andrew Smith J in *Evalis SA v SIAT* [2003] 2 Lloyd’s Rep 377 at paragraph 89 and *Ferrexpo AG v Gilson Investments Ltd* [2012] EWHC 721 (Comm) at paragraph 173, the former referred to by Beatson J in *Underwriting Members of Lloyd’s Syndicate 980 v Sinco SA* [2009] Lloyd’s Rep IR 365 at paragraph 50, of asking what is “the central or essential issue” in the two sets of proceedings. The word “essential” is here used to connote a common issue or issues which capture the essence of the two claims, rather than merely that there is commonality in relation to one single issue which has to be established in each, and so is an essential ingredient in that sense. As Lord Clarke observed at paragraph 28(iv) in *The Alexandros T*, article 27 is not engaged merely by virtue of the fact that common issues will arise in both sets of proceedings. The search is for the common issue or issues which capture the essential nature of the cause of action in the sense of its main or central focus. Put another way, the search is for commonality in *the* essential elements, not *an* essential element. I regard this as the sense in which it was used by David Richards LJ in paragraph 40 when addressing the question whether the cause in the English proceedings was mirrored in the Cypriot proceedings.
85. In *Evalis* Andrew Smith J said at paragraph 89:
- “However, I do accept the insurer’s submission, that if the proper approach is to look at the English proceedings as a whole, to ask what is the central or essential issue and to consider whether that is the same as that in the Italian proceedings, the issue in both proceedings is the insurer’s liability in respect of the cargo damage.”
86. *Evalis* was referred to in *The Alexandros T* with a degree of criticism. In that case Lord Clarke quoted extensively from Longmore LJ’s judgment, in which the latter had treated as irrelevant additional causes of action which did not mirror each other on the grounds that the “key assertions” in the two sets of proceedings were the same. Lord Clarke then said:

“[52] I respectfully disagree with that approach. It focuses on the nature of the settlement agreements as a defence to the Greek action in tort, which the authorities in the CJEU show is irrelevant. Given the fact that defences are irrelevant, the analysis cannot involve a broad comparison between what each party ultimately hopes to achieve. The analysis simply involves a comparison between the claims in order to see whether they have the same cause and the same object. In so far as Andrew Smith J treated the question as a broader one in *Eviolis SA v SIAT* [2003] 2 CLC 802 I respectfully disagree with him, although, as Beatson J observed in *Sinco* at para 50, *Eviolis* was distinguishable on the facts because the insured had brought a substantive claim in the English proceedings in addition to their claim in the Italian proceedings, which rendered the former a mirror image of the latter. This case can be distinguished on the same basis, at least in the case of the CMI's claims.”

87. I read this provisional criticism of the Andrew Smith J's approach in *Eviolis* as directed to paragraphs 126 to 130 of his judgment, in which he decided that article 27 fell to be applied by characterising the proceedings as a whole, rejecting the submission that it was appropriate to look at the different causes of action separately. Lord Clarke had made clear at paragraph 29 of his judgment that the correct approach where there is more than one cause of action is to analyse each separately. To this extent it was also a criticism of paragraph 89 which contained Andrew Smith J's characterisation of the proceedings as a whole. However I do not read it as a criticism of the use of the concept of “the central or essential issue” if applied to each cause of action separately.
88. I would treat what David Richards LJ said in *Easygroup* as an indication that whilst the search is not for identity in the essential element of the two claims under consideration at a high level of abstraction, nevertheless it may be useful to consider what are the issues which constitute the essential element of the claims or their central focus. This affords a clue to what level of divergence will or will not prevent the necessary identity of *cause*. Where a divergent issue is not one of those issues which comprise the essential element of the claim, in the sense of being part of its essence or main focus, the fact that such issue arises in only one set of proceedings may not prevent the necessary identity of *cause* being established. Conversely an issue which arises in only one of the sets of proceedings and which is one of the issues which goes to make up the essence of the claim in those proceedings is likely to prevent the necessary identity of *cause* being established. This is consistent with the CJEU's characterisation of the “salient features” of the two claims in paragraph 13 of *Gubisch*, which ignored the additional issue in the seller's claim for the price, and with Cooke J's reference to “*basic* claimed rights and obligations” in paragraph 42 of *Primacom*, approved in *The Alexandros T*.
89. The last case I should mention, in which claims were found to have the same *cause* without complete overlap of issues, is the decision of Butcher J in *The Federal Republic of Nigeria v Royal Dutch Shell Plc and others* [2020] EWHC 1315 (Comm). In that case the first seised proceedings were brought by the Federal Republic of Nigeria (“FRN”) in Italy against Shell and three other defendants. The

second seised proceedings were brought by FRN against these and other defendants in England. Both raised allegations of bribery and corruption of officials in relation to transactions relating to an oil exploration licence for a Nigerian block and relied on the same facts. The English causes of action pleaded were (i) fraud and/or bribery (ii) dishonest assistance giving rise to a constructive trust; and (iii) unlawful means conspiracy. The causes of action in Italy differed in five material respects which are set out in paragraph 53 of the judgment. Some involved additional requirements in the Italian proceedings, such as proof of intent; others involved additional requirements in the English proceedings, such as proving that the relevant ministers were fiduciaries and proof of acts undertaken pursuant to a common design for the conspiracy claim. Butcher J held that these did not prevent the claims involving the same cause of action, applying *Haji-Ioannou*, *The Alexandros T*, *Primacom* and *Easygroup*.

90. Drawing the strands together, I would suggest that the following principles emerge by way of expansion on those set out in *The Alexandros T*:
- (1) *The Alexandros T* makes clear (paragraph 28(iii)) that identity of *cause* requires that the claims be based on the same facts and the same rule of law (*The Tatry* para 39); that each cause of action must be addressed separately and without reference to any defences (paragraph 29); and that rule of law here means the basic claimed rights and obligations, making due allowance for the different national forms with different national classifications of rights and obligations (*Primacom* paragraph 42).
  - (2) This requires a careful analysis of the constituent elements of the two claims (*Easygroup* paragraph 32 and *Primacom* paragraph 42).
  - (3) This concept is not restricted to two claims in which all the legal issues are entirely identical. Claims may have the same *cause* even if there are additional issues which will or may arise in the claim in either the first seised or the second seised proceedings: *Gubisch*, *Haji-Ioannou*, *Primacom*, *Nigeria v Shell*.
  - (4) Where there is not complete overlap, a useful guide to whether the *cause* is the same in the claim in each set of proceedings may be to ask whether there is identity in the issue or issues which make up the essential element of the claim, that is to say which are part of its essence or main focus. If so, each claim may properly be characterised as the mirror of the other, to adopt the language used in *The Alexandros T*.
  - (5) The fact that each court may apply its own national laws, involving differing legal bases for establishing or resisting liability, is not of itself sufficient to prevent the relevant identity arising. Such was the case in *Primacom* and is the “due allowance” which must be made as referred to in paragraph 42 of Cooke J’s judgment in that case and its approval by the Supreme Court in *The Alexandros T*, which in turn reflects the requirement to give article 27 an autonomous European interpretation.
  - (6) Irreconcilability is not part of the test. Although the purpose behind article 27 includes avoiding irreconcilable judgments in the sense used in the enforcement provisions of article 34, namely where the decisions have mutually exclusive

legal consequences, that is not its sole purpose. The purpose includes avoiding the risk of conflicting or contradictory decisions even if their legal consequences are not mutually exclusive and they could be separately enforced, i.e. irreconcilability in the wider sense explained in paragraphs 49 to 57 of *The Tatry* and in *Sarrio*.

- (7) The availability of additional relief in one or other of the jurisdictions is not sufficient to prevent the claims having the same *objet*. They may have the necessary identity if they have as their objective the establishment or non-establishment of liability for the actions complained of, even if each jurisdiction accords different forms of relief as a consequence of such liability: *The Tatry*, *Haji-Ioannou*, *Easygroup*.
91. Mr Tomlinson's submissions therefore appear to me flawed in a number of ways. The very high level of abstraction at which he seeks to characterise the legal basis for the claims, i.e. liability for defamation, focusses solely on the end the actions have in view, i.e. the *objet*, leaving no scope for the additional requirement of identity of *cause*. Moreover he misconstrues the references in *Easygroup* to an "essential" ingredient of the claim as meaning that overlap of a single issue is sufficient. Further it does not follow that because the purpose of Article 27 is to avoid the risk of irreconcilable judgments, any circumstances which give rise to the risk engage it. A similar fallacy in reasoning was exposed by Lord Hodge in *AMT Futures v Marzillier* at paragraph 29 when he said: "To invoke a special ground of jurisdiction a claimant must bring himself within that ground: *Folien Fischer AG v Ritrama SpA* (CaseC-133/11) [2013] QB 523 paragraphs 39-40. A claimant cannot establish jurisdiction under the Judgments Regulation by merely invoking the justification or rationale of the ground." Moreover, Article 28 caters for the situation where there is some overlap which is insufficient to meet the requirements of article 27. Article 27 is only intended to bite in relatively straightforward situations and there is no need to strain to fit a case within it (per Rix J in *Glencore*).
92. On the other hand Mr Wolanski's submissions seek to restrict the scope of article 27 too narrowly. There is no need for complete overlap of issues and to insist on complete identity is to interpret the concept too narrowly: *Gubisch*, *Haji-Ioannou*, *Primacom*, and *Nigeria v Shell*. To insist on identity between the necessary ingredients undermines the need to give article 27 an autonomous interpretation. Similarly there need not be complete overlap in the forms of relief available or claimed. Nor is it necessary to establish that there will inevitably be irreconcilability of judgments in the sense of cause of action estoppel. Mr Wolanski relied on what was said by Dillon LJ in *Berkeley Administration Inc v McClelland* [1995] I.L.Pr. 201 at paragraphs 26 to 28, but those passages do not support the proposition advanced. As I have endeavoured to explain, Lord Clarke's reference to irreconcilability in paragraph 30 of *The Alexandros T* is not an indication that article 27 is only fulfilled if the claims would have mutually exclusive legal consequences.

*Article 27 applied to the facts of this case*

93. The legal and factual issues which arise in the claims in this case are identical save for the ingredient of negligence in Norway and the (partly assumed) differences in relief available. The former is relevant to the question whether they involve the same *cause*. The latter to whether they have the same *objet*.

*Same cause*

94. I would conclude that the additional negligence issue does not prevent the claims having the same *cause*. The basic issues which lie at the heart of the two claims, and characterise their essential nature, are identical: the essential legal and factual issue in each is whether Mr Granath is tortiously liable if his tweet caused substantial damage to Dr Wright's reputation because it was not true in accusing him of being fraudulent in his claim to be Satoshi Nakamoto. They are claims to determine whether there is liability for publishing the tweet in question involving identical issues of meaning, truth and damage to reputation. The additional ingredient of negligence in Norway, which does not exist in England, is no more than the difference between national classification of defamation rights for which due allowance must be made. It is analogous to the difference which Cooke J treated as insufficient to prevent identity in *Primacom* for the reasons he articulated at paragraph 47. It does not go to the essence of either claim.
95. Nor do I see this as in any sense contrary to the scheme of allocation of jurisdiction under the Convention, or unfair. It is true that it enables Mr Granath to have the global claim dealt with under Norwegian law which in this respect is more favourable to him. But that is not unfair and does not amount to forum shopping in the pejorative sense. It is a "right" conferred on him by way of choice of jurisdiction under the Convention, as the Norwegian Courts in their jurisdictional judgments in this case have held, just as the Convention confers on Dr Wright a "right" to bring a global claim in England where the law is more advantageous to him and less favourable to Mr Granath. Neither of these "rights" is absolute. They are qualified by the other provisions of the Convention and in particular (subject to the second ground of appeal) the *lis pendens* provisions of Article 27 and 28 which accord priority to whoever commences proceedings first.

*Same objet*

96. The end which the proceedings have in view is in each case to determine whether Mr Granath is liable for the tweet. The distinction Mr Wolanski seeks to draw between financial liability and vindication of rights is an artificial one. Dr Wright seeks damages in the English Claim. A section 12 statement is a form of relief peculiar to English defamation law, but no doubt a favourable outcome to Dr Wright in Norway could be used by him to make the judgment widely known in a similar way. In any event it is the kind of difference in the forms of national rights and remedies which an autonomous reading of Article 27 should ignore.
97. The same is true of the (assumed) absence of any ability to secure an injunction from the Norwegian Court. If an injunction is unavailable by way of counterclaim in Norway, such is the result of the differences in remedies under national laws which must be ignored. Were it otherwise, article 27 would not prevent Dr Wright from bringing a global claim in both England and Norway. In fact, in practical terms an injunction is likely to be available from the English Court should Dr Wright be successful in Norway and need one. A subsequent request for confirmation that Mr Granath will not repeat the libel will be met either by such confirmation, in which case an injunction is unnecessary, or by a refusal, in which case a *quia timet* injunction would no doubt be available with the benefit of issue estoppels arising from the Norwegian Court findings.



### *The Judgment*

98. For these reasons I would uphold the Judge's conclusions that, subject to Ground 2, article 27 requires the claim to be dismissed. I have not referred to his reasoning, which was subjected to detailed criticism by Mr Wolanski. Since I have reached the same conclusion for reasons which are expressed rather differently, I do not think any useful purpose would be served by lengthening this judgment with a dissection of the Judge's reasoning.

### **Ground 2**

99. Mr Wolanski submitted that this case raises the issue which divided Bean and Baker LJ on the one hand, and Lewison LJ on the other, in their obiter remarks in *EuroEco v SSSA* [2019] 4 WLR 156 as to whether article 27 could apply to preclude multiple mosaic claims brought simultaneously by a defamation claimant in different jurisdictions at the same time. It is inherent in the very nature of the mosaic claim option which *Shevill* determined was available to defamation claimants under article 5(3) that the choice so conferred is a multiple forum choice. That multiple forum choice therefore arguably involves a tension with articles 27 and 28 which restrict such choice. However that is not an issue which arises in this case because both the English and Norwegian Claims are global claims. There is no such tension in relation to global claims. Article 5(3) confers options for global claims in defamation which are single forum choices for the resolution of the entire dispute between the parties. In that respect defamation claims are no different from any other claims in tort or delict for which article 5(3) provides a range of jurisdictional options (place of domicile; place where harmful event occurs; and place where damage is directly suffered). There is no authority which suggests that article 27 is inapplicable to such claims, and no sound reason for restricting its applicability. On the contrary, the avoidance of parallel proceedings and risk of irreconcilable judgments which article 27 is designed to avoid dictates that it should apply. The logic of Mr Wolanski's argument is that if the laws of Norway and England were the same, it would be open to Dr Wright to bring identical global claims against Mr Granath in both jurisdictions and have two bites of the cherry without being subject to the *lis pendens* restraints of articles 27 and 28. Such an obviously unintended and undesirable consequence exposes the fallacy in the argument.
100. Mr Wolanski submitted that the mechanism, or juridical basis, for preventing the application of article 27 was that articulated by the Supreme Court in *Vedanta Resources plc v Lungowe* [2019] 2 WLR 1051 per Lord Briggs at paragraphs 25 to 41: that where *lis pendens* is misused by a party with the sole purpose of circumventing the claimant's choice of jurisdictional options, that will be the invocation of one EU law to subvert another and thus an abuse of EU law. He did not contend that all NDR claims in courts first seised will be abusive, but rather that insofar as they deprive claimants of their right to elect where they sue and the remedies which will fall to be available to them if they win, they may well be so.
101. What Lord Briggs said in that case was directed to an argument about abusive behaviour in suing an anchor defendant for the sole purposes of establishing jurisdiction against other defendants. It is of no relevance to the current argument, which proceeds from a false premise in arguing that the use of a claim for NDR is abusive if it restricts the choice of forum available to a claimant under article 5(3).

There is no such abuse. As I have endeavoured to explain, NDR claims are entirely legitimate, in the words of AG Tesouro, and in any tort claim in which article 5(3) confers a choice of jurisdiction on the claimant for a global claim, the choice is equally conferred on a defendant by way of an NDR claim; in each case the option is circumscribed by the simple and automatic mechanism (per *Gantner* paragraph 30) in article 27 of who starts first. That is not an abuse of the regime established by the Convention, but rather its implementation.

102. Mr Tomlinson suggested that in the case of mosaic claims there would be no tension with article 27 because they would each be claims for different damage and so would not fulfil the same *objet* requirement of article 27, relying by analogy on *Merck KGAA v Merck & Co Inc and others* (Case C-231/16) [2018] E.T.M.R 5. I would prefer to express no view on this argument or the applicability of article 27 more generally to mosaic claims, which is better left for a case in which it arises for decision.
103. I would therefore reject the second ground of appeal, in agreement with the conclusion of the Judge on this issue.

### **Conclusion**

104. For my part, I would dismiss the appeal.

### **Lord Justice Singh :**

105. I am grateful to Popplewell LJ for his summary of the facts and the issues. I agree with him that Ground 2 (issue 1 in his judgment) should be rejected. I would, however, allow the appeal on Ground 1 (issue 2 in his judgment) for the reasons given by Moylan LJ.

### **Lord Justice Moylan :**

106. As I endeavour to explain below, I have come to a different conclusion on this appeal to that reached by Popplewell LJ in respect of Ground 1 (issue (2) in his judgment), namely whether the proceedings in Norway and those in England have the same cause of action for the purposes of article 27 of the Lugano Convention. In my view, they do not have the same cause of action because, whilst they might have the same object (namely determination of liability for the tweet and for damages/NDR), they do not have the same cause. I agree with Popplewell LJ in respect of Ground 2 (issue (1) in his judgment).
107. I gratefully adopt the summary of the facts of this case and of the parties' submissions as set out in Popplewell LJ's judgment.
108. The key question raised by this appeal is what is meant by the expression "the same cause of action" for the purposes of the *lis pendens* provisions under article 27 of the Lugano Convention. This has been extensively analysed in Popplewell LJ's judgment and I do not need to retrace all of the ground which he has covered.

109. I propose, first, to make some general observations about the structure of the Lugano Convention.
110. The 1988 and 2007 Lugano Conventions are based on and mirror the provisions of the 1968 Brussels Convention and the Brussels I Regulation. They are intended to be operated consistently and, accordingly, Article 1 of Protocol 2 to the 2007 Convention requires courts to “pay due account to the principles laid down by any relevant decision” of the CJEU concerning any “similar provision(s)” in the 1968 Brussels Convention and the Brussels I Regulation.
111. Neither the Lugano Convention nor Brussels I seeks to harmonise domestic causes of action as between Contracting/Member States. Their purpose is not to deprive a party of a cause of action available in one State even when the facts giving rise to that cause of action may also found a cause of action in another State. The purposes, as expressed in recital 2 of Brussels 1, are:

“Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.”

It can be seen that the purposes, while significant, are limited to unifying conflict of jurisdiction rules and simplifying the process required for the recognition and enforcement of judgments. The objective, as it is described in recital 6, is the “free movement of judgments”.

112. Recital 15 adds an additional consideration:

“In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously”

113. The provisions of articles 27 and 28 of the Lugano Convention (as with comparable provisions in Brussels 1 and other Regulations) draw a clear and important distinction between “proceedings involving the same cause of action and between the same parties”, in the former, and “related actions”, in the latter. The former is narrow and mandates that the court “*shall* decline jurisdiction” (my emphasis). The latter is broad and, by paragraph (1), gives the court a discretion to grant a stay. Article 28 also provides:

“2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of

one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.”

114. The distinction between these articles was addressed succinctly in the 2007 *Explanatory Report* on the Lugano Convention by Professor Fausto Pocar. The paragraphs dealing with the former, [118]-[119], are very largely taken up with addressing the issue of when a court is seised and the adoption of an autonomous rule. There is only a brief reference to the question which arises in the present case:

“[118] The fact that alternative forums are available for disputes governed by the Convention makes it possible that the *same case* may be brought before the courts in different States bound by the Convention, with the danger that the decisions that are taken may be incompatible with one another. To ensure proper operation of the system of justice within a common judicial area, that risk should be minimised by avoiding, whenever possible, parallel proceedings going ahead at the same time in different States.” (my emphasis)

In respect of article 28(1), it is said:

“[122] Provided that the tests of Article 28(3) are satisfied, therefore, a court seised subsequently is entitled – but not obliged – to stay the proceedings and await the decision of the court first seised before deciding the case before it ...”

115. It is also relevant to note the different structures in articles 27 and 28. Article 27 has a simple test. All the court has to determine is whether the proceedings involve “the same cause of action and [are] between the same parties”. There is no need to consider, as there is under article 28, whether the actions are “so closely related that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments”. I would suggest that the risk of irreconcilable judgments is not referred to in article 27 because that *risk*, if article 27 applies, is self-evident.
116. This connects with the critical distinction as to the effect of jurisdiction being declined under article 27 and the effect of a stay under article 28(1). As the *Explanatory Report* makes clear, in the latter situation the court remains seised of the proceedings and *can* later proceed to determine them. The effect of the former is not expressly dealt with in the Lugano Convention. However, as a matter of domestic law, if a court has decided that the causes of action are the *same*, it would seem inevitable, as referred to by Popplewell LJ at paragraph 48, that cause of action estoppel would apply because, as expressed by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [26]:

“Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims.”

117. There is, therefore, no reason to apply article 27 broadly to avoid the risk of irreconcilable judgments because article 28 is itself a broad, or at least a broader, provision. Further, there is good reason to confine article 27 to its terms because of the potential effect of its application, to which I have just referred.
118. In my view, the above analysis and the structure of the provisions support the conclusion that the test in article 27 is intended to be a closely defined one which does not require any extensive enquiry but simply the determination of whether proceedings have the same cause of action and the same object. In this context, I repeat what Rix J said in *Glencore International*, at p.697, which was quoted with approval by Lord Clarke in *The Alexandros T* (as referred to by Popplewell LJ at paragraph 35 above):

“It would appear from these five cases, of which the first two were in the European Court of Justice, and the latter three in the domestic courts of England, that, broadly speaking, the triple requirement of same parties, same cause and same objet entails that it is only in relatively straightforward situations that art. 21 bites, and, it may be said, is intended to bite. After all, art. 22 is available, with its more flexible discretionary power to stay, in the case of ‘related proceedings’ which need not involve the triple requirement of art. 21. There is no need, therefore, as it seems to me, to strain to fit a case into art. 21. The European Court, when speaking in *Gubisch* (para. 8) of the purpose, in the interests of the proper administration of justice within the European Community, of preventing parallel proceedings in different jurisdictions and of avoiding ‘in so far as it is possible and from the outset’ the possibility of irreconcilable decisions, was addressing art. 21 and 22 together, rather than art. 21 by itself.”

I emphasise the phrases “only in relatively straightforward situations” and “no need ... to strain to fit a case into art. 21”.

119. Finally, it is important to note that *no* application has been made in the present case under article 28 for the proceedings to be stayed.
120. With those general observations, I now turn to consider some of the authorities starting with those from the CJEU.
121. The first is *Gubisch*. I do not repeat the facts of that case which have been set out by Popplewell LJ, at paragraph 51. That case decided that, what is now, article 27 requires the proceedings to involve the same subject matter *and* the same cause of action, wording which appeared in most language versions but which did (and does) not appear in the German version (or the English version). The CJEU also addressed the overarching purpose of the Section in the 1968 Brussels Convention dealing with *lis pendens*/related actions:

“[8] According to its preamble, which incorporates in part the terms of Article 220, the Convention seeks in particular to facilitate the recognition and enforcement of judgments of

courts or tribunals and to strengthen in the Community the legal protection of persons therein established. Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.”

These observations are directed towards the purposes of articles 21 *and* 22. It is also relevant to note, in this context, what the court said about the inter-relationship between article 21 and article 27(3), which stipulated that a judgment “shall not be recognised” if it was “irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought”:

“[13] It is therefore in the light of the aforesaid objectives and with a view to ensuring consistency as between Articles 21 and 27(3) that the question whether a procedural situation of the kind at issue in this case is covered by Article 21 must be dealt with ...”.

122. The CJEU decided without difficulty, at [15], that the respective proceedings were “based on the same ‘cause of action’, that is to say the same contractual relationship”.
123. The CJEU found the more difficult question – the “problem which arises”, at [15], – was whether the actions had the same subject matter as one sought enforcement of the contract and the other sought rescission. It was in *this* context that the court said that the subject-matter of the actions did *not* have to be “entirely identical”, at [17].
124. I quote an extensive passage from *Gubisch* so what was said can be seen in context:

“[8] According to its preamble, which incorporates in part the terms of Article 220, the Convention seeks in particular to facilitate the recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition

of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.

[9] Moreover, in its judgment in *Case 42/76, De Wolf v. Cox* [1976] E.C.R. 1759, [1977] 2 C.M.L.R. 43, the Court acknowledged the importance of those objectives of the Convention even outside the narrow field of *lis pendens*, holding that it would be incompatible with the meaning of Article 26 et seq. on the recognition of judgments to accept the admissibility of an application concerning the same subject-matter and brought between the same parties as an application upon which judgment has already been delivered by a court in another Contracting State.

[10] Furthermore, the concept of *lis pendens* is not the same in all the legal systems of the Contracting States and, as the Court has already held in *Case 129/83, Zelger v. Salinitri* [1984] E.C.R. 2397, [1985] 3 C.M.L.R. 366, a common concept of *lis pendens* cannot be arrived at by a combination of the various relevant provisions of national law.

[11] Having regard to the aforesaid objectives of the Convention and to the fact that Article 21, instead of referring to the term *lis pendens* as used in the different national legal systems of the Contracting States, lays down a number of substantive conditions as components of a definition, it must be concluded that the terms used in Article 21 in order to determine whether a situation of *lis pendens* arises must be regarded as independent.

[12] That result does not conflict with *Zelger v. Salinitri*, referred to earlier, in which the Court pointed out that the question of the moment at which a court is to be considered seised of a case for the purposes of Article 21 of the Convention must be appraised and resolved, in the case of each court, according to the rules of its own national law. That reasoning was based on the absence of any indication in that Article of the nature of the relevant procedural formalities, since the Convention does not have the aim of unifying those formalities, which are closely connected with the procedural systems of the different member-States. Accordingly, it cannot prejudice the interpretation of the substantive scope of the conditions of *lis pendens* laid down in Article 21.

[13] It is therefore in the light of the aforesaid objectives and with a view to ensuring consistency as between Articles 21 and 27(3) that the question whether a procedural situation of the kind at issue in this case is covered by Article 21 must be dealt with. The salient features of that situation are that one of the parties has brought an action before a court of first instance for

the enforcement of an obligation stipulated in an international contract of sale; an action is subsequently brought against him by the other party in another Contracting State for the rescission or discharge of the same contract.

[14] It must be observed first of all that according to its wording Article 21 applies where two actions are between the same parties and involve the same cause of action and the same subject-matter; it does not lay down any further conditions. Even though the German version of Article 21 does not expressly distinguish between the terms 'subject-matter' and 'cause of action', it must be construed in the same manner as the other language versions, all of which make that distinction.

[15] In the procedural situation which has given rise to the question submitted for a preliminary ruling the same parties are engaged in two legal proceedings in different Contracting States which are based on the same 'cause of action', that is to say the same contractual relationship. The problem which arises, therefore, is whether those two actions have the same 'subject-matter' when the first seeks to enforce the contract and the second seeks its rescission or discharge.

[16] In particular, in a case such as this, involving the international sale of tangible moveable property, it is apparent that the action to enforce the contract is aimed at giving effect to it, and that the action for its rescission or discharge is aimed precisely at depriving it of any effect. The question whether the contract is binding therefore lies at the heart of the two actions. If it is the action for rescission or discharge of the contract that is brought subsequently, it may even be regarded as simply a defence against the first action, brought in the form of independent proceedings before a court in another Contracting State.

[17] In those procedural circumstances it must be held that the two actions have the same subject-matter, for that concept cannot be restricted so as to mean two claims which are entirely identical.

[18] If, in circumstances such as those of this case, the questions at issue concerning a single international sales contract were not decided solely by the court before which the action to enforce the contract is pending and which was seised first, there would be a danger for the party seeking enforcement that under Article 27(3) a judgment given in his favour might not be recognised, even though any defence put forward by the defendant alleging that the contract was not binding had not been accepted. There can be no doubt that a judgment given in a Contracting State requiring performance of the contract would not be recognised in the State in which recognition was



sought if a court in that State had given a judgment rescinding or discharging the contract. Such a result, restricting the effects of each judgment to the territory of the State concerned, would run counter to the objectives of the Convention, which is intended to strengthen legal protection throughout the territory of the Community and to facilitate recognition in each Contracting State of judgments given in any other Contracting State.”

I would highlight the following sentence from [16]: “The question whether the contract is binding therefore lies at the heart of the two actions”; and the whole of [17]. As can be seen from the above, both of these were directed to the question of whether the proceedings had the same subject-matter and not to whether they had the same cause of action. The observation that the claims did not have to be “entirely identical”, for the actions to have the same subject-matter, is explained at [18]. It is an observation which, in my view, is built on the fact that both proceedings involved the same cause of action.

125. The next case is *The Tatry*. The case involved proceedings in the Netherlands and proceedings in England between shipowners and the various owners of cargo concerning the alleged contamination of a cargo of soya bean oil. The action brought by the shipowners against some of the cargo owners in Rotterdam was “for a declaration that they were not liable for the alleged contamination”: Advocate General’s Opinion at [2]. The action brought by some of the cargo owners in England against the shipowners sought damages for the “allegedly contaminated state” of the oil when discharged: Opinion at [3]. The former was an action in personam, the latter an action in rem.

126. The Advocate General considered that the proceedings had the same cause of action:

“[16] ... It should first be observed that in the main proceedings bills of lading in identical terms govern the contractual relationships between the various cargo owners and the shipowners and that the conditions of carriage, including the material circumstances thereof, the goods in question being soya bean oil in bulk, are the same in the various cases. It thus seems reasonable to conclude that the most important aspect of the legal situation to which the present preliminary question relates is the fact that the proceedings pending before the Arrondissementsrechtbank, Rotterdam, and the Admiralty Court, London, have the same "cause of action," that is to say the same contractual relationship, and - at least partially, to the extent to be indicated shortly - *the same "subject matter," in that in both cases the central issue* is whether the shipowners are liable for the contamination of the soya bean oil through leakage of various hydrocarbons. In fact, both actions, the one in which it is sought to establish the liability of the shipowners and the one in which it is sought to establish non-liability, *are nothing more than two sides of the same coin*, as has been rightly pointed out by the Commission in the course of the present proceedings.” (my emphasis)

It is relevant to note that the Advocate General used the expression, “the central issue”, in the context of whether the proceedings had the same subject matter and not whether they had the same cause of action. Further, in describing the nature of the “actions”, and it seems to me the cause of action in both proceedings, I would also note that he referred to them as being “nothing more than two sides of the same coin”.

127. The Advocate General also considered that the fact that one action was in personam and the other in rem did not take them outside the scope of article 21:

“[19] However, for the purposes of resolving the present problem, namely, identification of the circumstances in which it can be said that two actions have the same cause of action under the Brussels Convention, no importance should in my view be attached to the distinction drawn by English law between actions in rem, by means of which the plaintiff seeks to satisfy his claim by proceeding against specific assets, and actions in personam intended to produce binding effects as between individuals. The application of article 21 cannot be made conditional on the individual features of national procedural laws and differing forms of action: reference to the domestic laws of contracting states, when rendered necessary by the incompleteness of the rules contained in the Brussels Convention, must be conducive to the applicability of the provisions of the Convention and may not in any circumstances lead to results which conflict with its aims and rationale: see in that connection the judgment in *Gubisch Maschinenfabrik* [1987] E.C.R. 4861, 4873-4874, paras. 68, and the earlier judgment in *Industrie Tessili Italiana Como v. Dunlop A.G.* (Case 12/76) [1976] E.C.R. 1473. The purpose of article 21 is - as already indicated - to avoid the duplication of proceedings involving the same cause of action before courts in different contracting states and the concomitant risk of judgments which are irreconcilable with each other and therefore, by virtue of article 27(3), cannot be recognised. It seems to me, in that connection, that the possibility of conflicting judgments clearly exists in the present case, since the central issue in the proceedings pending in the United Kingdom and the Netherlands is the liability of the shipowners for contamination of the cargo. No importance must therefore be attached to the fact that the proceedings in question may possibly be of a different nature under the civil procedural law of one or other of the states concerned: *what is important is whether or not the substantive issues which the court is called on to examine are the same.*” (my emphasis)

The Advocate General drew a distinction between “procedural laws and differing forms of action” on the one hand and “the substantive issues which the court is called on to examine” on the other. Differences in procedural laws and differences in forms of action did not take proceedings outside the scope of article 21. However, in order for proceedings to be within article 21 the substantive, which must include substantive

legal, issues in both sets of proceedings must be “the same”. These observations would appear to be directed to the question of whether the proceedings involved the same cause of action. Accordingly, their effect is that the former (procedural laws and forms of action) did not have to be the same for the causes of action to be the same in both proceedings but the latter (including substantive legal issues) did.

128. The court, at [38], repeated as decided in *Gubisch* that article 21 requires both the same cause of action and the same object. These concepts were explained as follows:

“[39] For the purposes of article 21 of the Convention, the "cause of action" comprises the facts and the rule of law relied on as the basis of the action.

[40] Consequently, an action for a declaration of non-liability, such as that brought in the main proceedings in this case by the shipowners, and another action, such as that brought subsequently by the cargo owners on the basis of shipping contracts which are separate but in identical terms, concerning the same cargo transported in bulk and damaged in the same circumstances, have the same cause of action.

[41] The "object of the action" for the purposes of article 21 means the end the action has in view.

[42] The question accordingly arises whether two actions have the same object when the first seeks a declaration that the plaintiff is not liable for damage as claimed by the defendants, while the second, commenced subsequently by those defendants, seeks on the contrary to have the plaintiff in the first action held liable for causing loss and ordered to pay damages.

[43] As to liability, the second action has the same object as the first, since the issue of liability is central to both actions. The fact that the plaintiff's pleadings are couched in negative terms in the first action whereas in the second action they are couched in positive terms by the defendant, who has become plaintiff, does not make the object of the dispute different.

[44] As to damages, the pleas in the second action are the natural consequence of those relating to the finding of liability and thus do not alter the principal object of the action. Furthermore, the fact that a party seeks a declaration that he is not liable for loss implies that he disputes any obligation to pay damages.

[45] In those circumstances, the answer to the fifth question is that, on a proper construction of article 21 of the Convention, an action seeking to have the defendant held liable for causing loss and ordered to pay damages has the same cause of action and the same object as earlier proceedings brought by that

defendant seeking a declaration that he is not liable for that loss.”

In my view, there is a clear difference between what is said in respect of cause of action, at [39] and [40], and what is said about object, at [41] to [44].

129. A cause of action “comprises the facts and the rule of law relied on as the basis of the action”, at [39]. The important phrase for the purposes of the present appeal is that which appears at [40], namely the court’s assessment that the actions were “separate but in *identical* terms” (my emphasis).
130. In contrast, the question of whether the proceedings had the same object was focused on whether “the issue of liability [was] central to both actions” (there was also consideration of the “pleas”). The identification of the “central” issue, for the purposes of deciding whether the proceedings had the same object, reflects the same approach taken in *Gubisch*, at [16], where the court referred to the “question ... at the heart of the two actions”. Adopting what the Advocate General had said, the differences in the form of the pleadings (one positive and one negative) and the differences in the remedy sought (damages and a non-liability declaration) did “not make the object of the dispute different”, at [43], nor “alter the principal object of the action”, at [44].
131. The court also decided that the fact that one action was in personam and the other was in rem did not mean that they did not have the same cause of action or the same object or the same parties. This was explained as follows:

“[47] In article 21 of the Convention, the terms "same cause of action" and "between the same parties" have an independent meaning: see *Gubisch Maschinenfabrik K.G. v. Palumbo* (Case 144/86) [1987] E.C.R. 4861, 4874, para. 11. They must therefore be interpreted independently of the specific features of the law in force in each contracting state. It follows that the distinction drawn by the law of a contracting state between an action in personam and an action in rem is not material for the interpretation of article 21.

[48] Consequently, the answer to the second question is that a subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a contracting state, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another contracting state by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other contracting state.”

132. As referred to by Popplewell LJ, at paragraph 90, the court in *The Tatry* also considered the meaning of irreconcilable judgments. This was for the purposes of article 22(3) (article 28(3) in the Lugano Convention), namely for the purposes of deciding when actions would be “deemed to be related” and not for the purposes of article 21 (article 27). In this context, the court explained, at [57], that the term “irreconcilable” as used in article 22(3) “has a different meaning from the same term used by article 27(3) of the Convention” (article 34(3) of the Lugano Convention; the non-recognition provision). However, I depart from Popplewell LJ in that, I do not consider that what was said there provides any assistance on the question of when proceedings have the same cause of action. The court was specifically addressing only article 22(3) and expressly said, at [50], that the question as to the scope of article 22(3) “arises only if the conditions for the application of article 21 of the Convention are not satisfied”. The question of when proceedings have the same cause of action is a different question to that of whether actions are deemed to be related so as to bring them within article 22 (or article 28). As a result, “irreconcilability in the wider sense”, to adopt Popplewell LJ’s expression from paragraph 90, as applied in *The Tatry* is relevant only to the scope of article 28 of the Lugano Convention (article 22 of the Brussels Convention) and not, respectively, article 27 (article 21).
133. The next case is *Gantner*. An Austrian company, called Gantner, manufactured carrier pigeon clocks which it supplied to a Dutch company called Basch, for resale. A dispute arose over non-payment of invoices and Gantner terminated their commercial relationship.
134. Basch brought an action against Gantner in the Netherlands claiming damages on the basis that Gantner had given insufficient notice of termination. In calculating the amount claimed, Basch set off sums which it accepted were due to Gantner, by way of a declaration of intent as provided for in Dutch and Austrian legislation. Gantner brought separate proceedings in Austria for the recovery of the sums it alleged were due from Basch for clocks which it had supplied.
135. The judgment of the court only addressed, at [24], the question of “whether Art.21 of the Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different Contracting States have the same subject-matter, account must be taken not only of the claims of the respective applicants but also of the grounds of defence raised by a defendant”. The answer was that only the claims should be taken into account.
136. However, it is of some relevance to note what Advocate General Léger said:
- “[37] To begin with, I think it must be made clear, leaving aside the question of set-off for the moment, that the two actions in the Netherlands and Austria are not identical for the purpose of Art.21.
- [38] The existence of a *lis pendens* situation in Community law requires, pursuant to Art.21 of the Convention, identity between the two actions in three respects: the parties, the cause and the object. If one of those requirements is not fulfilled, there is no *lis pendens*.

[39] In the present case, it seems obvious to me that the two actions do not have the same cause. The cause of action, within the meaning of Art.21, has been defined by the Court as comprising “the facts and the rule of law relied on as the basis of the action” [*The Tatry*, at [39]]. Neither the facts nor the rule of law relied on in the two actions are identical.”

The important word is “identical”, as used at [39].

137. I refer very briefly to the case of *Gasser* in order to address the observation made by the court, at [41], that article 21 “must be interpreted broadly” in order to achieve the aims of preventing parallel proceedings and conflicting decisions. This observation was in the context of a question from the national court as to whether article 21 could be derogated from when the court second seised had exclusive jurisdiction under an agreement, at [28]. The answer was no. Article 21 “must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts of contracting states”, at [41]. These words were not being applied to the question of whether proceedings did or did not involve the same cause of action but to whether there were circumstances in which the article might not be applicable even though the *lis pendens* provisions otherwise applied.
138. I now turn to the English authorities.
139. The first is that referred to by Popplewell LJ, from paragraph 62, namely *Haji-Ioannou v Frangos*. I recognise, of course, the weight to be given even to obiter comments made by a court comprising Lord Bingham LCJ and Brooke and Chadwick LJJ. However, I am not sure they have the effect ascribed to them by Popplewell LJ, or if they do, that they bear the weight he puts on them.
140. The case concerned proceedings in Greece, which comprised linked criminal proceedings (embezzlement) and civil proceedings, and civil proceedings in England. The underlying issue was the basis on which monies had been provided to Mr Frangos when married to Mr Haji-Ioannou’s daughter. The criminal proceedings in Greece were based on an allegation by Mr Haji-Ioannou and his companies (“the plaintiffs”) that Mr Frangos had embezzled funds contrary to an “informal, verbal agreement” under which funds had been entrusted to the “management” of Mr Frangos, at p.1080. A number of remedies were available in respect of this claim including restitution. The civil proceedings in Greece involved a claim by each of the plaintiffs for “moral damages” of Dr 15,000 (about £33) against Mr Frangos, a claim which was described in the judgment, at p.1091, as “a type of compensation under Greek law in relation to certain torts”. In the proceedings in England the plaintiffs alleged that there was “an agreement or understanding” under which funds transferred to Mr Frangos would be held and managed on behalf of the plaintiffs, at p.1078, and claimed that they were entitled to trace the assets acquired with those funds.
141. As set out in Neuberger J’s judgment at first instance, [1998] CLC 61, it was argued on behalf of Mr Frangos that article 21 applied, at p.70:
- “ ... the defendant contends that the plaintiffs have chosen to bring ‘proceedings’, albeit very limited in extent, for damages arising out of the same alleged arrangement and breach of that

arrangement, as the plaintiffs seek to rely on in the present proceedings, and that this falls within the ambit of art. 21.”

Neuberger J considered that there was “some force in the argument that [the Greek proceedings] can be said to ‘involv[e] the same cause of action’ as the instant [English] proceedings” by reference to the decision in *Gubisch* which was relied on by Mr Frangos. However, for a number of reasons he decided that article 21 did not apply; these included that the Greek proceedings were criminal and that the plaintiffs had only advanced a civil claim “in the criminal proceedings in order to give them locus standi to pursue their complaint”, at p.71.

142. The Court of Appeal decided that article 21 did not apply but for a different reason, namely that the Greek and the English proceedings did not have the same object. The headnote explains the article 21 decision as follows:

“3. The Brussels Convention applied to a civil claim for compensation appended to criminal proceedings, and proceedings involved the same cause of action for the purposes of art. 21 if they had the same facts and rule of law as their basis and had the same end in view. The proceedings were based on the same alleged agreement, were between the same parties and were definitively pending in Greece but art. 21 did not apply because the object of the proceedings was not the same. In Greece the civil claim was for the recovery of money whereas the English claim was to trace the money into the assets acquired and to a beneficial interest in those assets on the basis of allegations of a breach of fiduciary duty. The proceedings should not be stayed pursuant to art. 21.”

As can be seen, this focuses on the fact that the proceedings were based on “the same alleged agreement”, as had been argued by the defendant.

143. The judgment, at p.1091, records the expert evidence given about the legal basis of the proceedings in Greece:

“Mr Papadimitriou says that in Mr Frangos' case moral damages may have the same factual (historical) basis as the embezzlement but they do not have the same legal basis, since the claims for indemnity and restoration *in natura* and those relating to proprietary rights arise out of ‘contract’. In response, Mr Scorinis says that the tort claim for moral damages is founded upon precisely the same facts and legal basis as the claim for restitution.”

After dealing with a number of decisions of the CJEU, including *The Tatry*, their effect was summarised, at pp.1092/1093. This summary of the principles included:

“ (4) Actions have the same cause if they have the same facts and rule of law as their basis.”

144. The judgment addressed the issue of whether the proceedings involved the same cause of action briefly, as follows, at p.1093:

“The jurisprudence of the European Court of Justice has established that a civil claim of the type the plaintiffs have made in Greece is one to which the convention applies, and it is a matter of choice for the plaintiffs to decide how much to claim in these proceedings. They said that Mr Frangos had embezzled the liquidated sum of US\$49m, and if they only choose to claim a fraction of that sum under the rubric of ‘moral damages’, that is a matter for them. We assume that it would always be open to them to increase their claim before the trial, if the matter is allowed to proceed to trial. It appears to us that, in the language of the European Court of Justice, the same facts and rule of law form the basis of each proceedings. Although in England the plaintiffs are asserting that the same underlying agreement gave rise to different legal consequences from which different obligations and, therefore, different legal remedies flowed, the cause would appear to be the same in both countries.”

My reasons for being cautious about the effect of these observations and the weight which can be placed on them, in particular for the purposes of understanding the meaning of cause of action in article 21 (and 27), are as follows.

145. First, in stating the conclusion that the cause of action is “the same in both countries”, the judgment provides limited assistance as to why this was so. One possible explanation is that the court was persuaded by the expert evidence to the effect that the claim for restitution and the tort claim had the same legal basis which was, in turn, the same legal basis as the proceedings in England. This was the argument advanced by the defendant, as referred to above, and would be supported by the simple statement that “the same facts and rule of law form the basis of each proceedings”. Secondly, the clear focus is on the fact that the proceedings were based on “the same underlying agreement” which would resonate with the decision in *Gubisch*. The plaintiffs had chosen to limit their claim in Greece, which was advanced “under the rubric of ‘moral damages’ (my emphasis), but this did not affect the basis of the respective claims. Accordingly, I do not agree with Popplewell LJ that this decision provides authority for the proposition that the respective causes of action involved “legal ingredients ... [which] were ... far from identical” especially when, to repeat, the court determined that “the rule of law” which formed the basis of both proceedings was the same.
146. The next decision I propose to address is *The Alexandros T*.
147. I first note, in passing, that in the Court of Appeal, [2013] 1 CLC 123 at [36], Longmore LJ adopted the words “mirror image” from Rix J’s judgment in *Glencore*, leading to his conclusion, at [41]: “It is, I think, clear from these authorities that if a cause of action in one member state is a mirror image of a cause of action in another member state, the cause of action will be regarded as the same”. These words were in turn adopted by Lord Clarke, at [30].



148. Lord Clarke referred with approval, at [28], to what had been said by Cooke J in *Primacom*, at [42], and to what Rix J had said in *Glencore*, as referred to above. I repeat two elements from Lord Clarke’s judgment, at [28]:

“(iii) Identity of 'cause' means that the proceedings in each jurisdiction must have the same facts and rules of law relied upon as the basis for the action ... (followed by Cooke J’s analysis from *JP Morgan Europe Ltd*)”; and ...

“(vi) It follows that art 27 is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings. I would accept the submission on behalf of the CMI that this is an important point of distinction between arts 27 and 28. Under art 28 it is actions rather than claims that are compared in order to determine whether they are related.”

149. His conclusion was as follows:

“[30] The essential question is whether the claims in England and Greece are mirror images of one another, and thus legally irreconcilable, as in *Gubisch* and *The Tetry*, in which case Article 27 applies, or whether they are not incompatible, as in *Gantner*, in which case it does not.”

In my view, these words can be taken to mean what they say because I consider them to be clear. Lord Clarke specifically stated both, at [28(iii)], that the “facts and rules of law relied upon as the basis for the action” must be the “same” and, at [28(vi)], that article 27 is “not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings”. The claims must be “mirror images”, at [30].

150. The need for the claims to be mirror images is emphasised by Lord Clarke’s use of the word “mirrored”, at [31], to explain why the CJEU distinguished *Gantner* and *The Tetry* from the *Maersk* case, and his repetition of “mirror image”, at [49], when summarising his conclusion that the proceedings in that case did not involve the same cause of action. Lord Clarke again used the expression “mirror image”, at [52], after disapproving the “broad” approach adopted by the Court of Appeal in that case and the “broader” approach taken by Andrew Smith J in *Evalis SA v SIAT* [2003] 2 CLC 802. Lord Clarke quoted extensively from Longmore LJ’s judgment and then said:

“[52] I respectfully disagree with that approach. It focuses on the nature of the settlement agreements as a defence to the Greek action in tort, which the authorities in the CJEU show is irrelevant. Given the fact that defences are irrelevant, the analysis cannot involve a broad comparison between what each party ultimately hopes to achieve. The analysis simply involves a comparison between the claims in order to see whether they have the same cause and the same object. In so far as Andrew Smith J treated the question as a broader one in *Evalis SA v SIAT* [2003] 2 CLC 802 I respectfully disagree with him, although, as Beatson J observed in *Sinco* at para 50, *Evalis* was distinguishable on the facts because the insured had brought a

substantive claim in the English proceedings in addition to their claim in the Italian proceedings, which rendered the former a mirror image of the latter. This case can be distinguished on the same basis, at least in the case of the CMI's claims.”

151. In summary, therefore, Lord Clarke stated succinctly that the “essential question”, in determining whether proceedings involve the same cause of action, is whether the claims are “mirror images ... and *thus* legally irreconcilable” (my emphasis). This does not require any further analysis save that domestic procedural differences or differences of form do not prevent claims being the mirror image of each other.
152. I should also add that I do not consider that Cooke J’s decision on the facts in *Primacom* can justify departing from what I regard to be the clear guidance given in *Gubisch*, *The Tatry* and *The Alexandros T*. I acknowledge that the Supreme Court did not indicate that they did not agree with his determination in that case but nor did they indicate that they did. Further, as set out by Popplewell LJ at paragraph 72, the actual basis of Cooke J’s decision, namely that “ultimately, the question must be seen broadly in terms of the judgment sought and not in terms of the issues raised on the way”, is not supported by the authorities.
153. The last case to which I propose to refer is *Easygroup*. The facts of that case have been set out by Popplewell LJ including that the judge at first instance had decided that the causes of action were not the same because, at [25], the “English action is based on tort on the law of trade marks and passing off; the defendants’ Cypriot action is based on contract”.
154. The defendants argued that this conclusion was wrong because, at [30]:

“... the Cypriot action does concern the same cause because it directly concerns whether they are infringing the claimant's rights. The proceedings are analogous to mirror claims of the sort discussed above. If the defendants succeed in the Cypriot proceedings, it will result in a decision that the claimant is not entitled to rely upon any rights they may otherwise have in relation to the defendants’ business activities.”
155. In his judgment, David Richards LJ summarised the effect of *The Alexandros T*. This included, at [23(viii)]: “If the claims in the two sets of proceedings are essentially *mirror* images, article 29 will apply” (my emphasis); article 29 being the *lis pendens* provisions under the relevant Regulation (1215/2012).
156. David Richards LJ did not consider it was sufficient to consider the labels applied by domestic law but that, at [32], it was “necessary to analyse the elements in the two claims in order to decide whether they involve the same “cause”. It is not sufficient simply to rely on the different domestic law causes of action (contract and tort)”. He proceeded to undertake that exercise.
157. The “rules of law” relied on in the Cypriot proceedings are not entirely clear but I would first note that David Richards LJ’s “further basis”, at [50], for concluding that article 29 applied was that, at [51]: “If we are to judge the “cause” by reference to the claim in the Cypriot proceedings, as we are required to do, that claim was and

remained in a form that potentially put in issue *all the elements* of the claimant's claim in the English proceedings” (my emphasis). In other words, I take it, that the rules of law involved in the respective proceedings were the same. To explain this conclusion, I quote the whole of [50] and [51]:

“[50] Even if I were wrong on that, there is a further basis on which I would hold that article 29 applies to these proceedings. The authorities make clear that it is the claims as formulated by the claimants in the two sets of proceedings that determine whether they have the same “cause” and “objet”. The defendants’ claim in the Cypriot proceedings, as set out in their writ, is drafted in very wide terms. It is not limited to the issue of consent but is wide enough to encompass a challenge to all or any of the facts and matters on which the claimant relies in the English proceedings. The apparent narrowing of the scope of the Cypriot proceedings results from an undertaking given to the English court not to challenge the validity of the claimant's trade marks and indications given by counsel that the only issue would be consent.

[51] The undertaking is not important in this context for the reason given above, that a challenge to the validity of the marks would be by way of defence or counterclaim. In all other respects, the narrowing of the issues depends entirely on counsel's indications. It seems unlikely that those “indications” would have any binding force in Cyprus, and we certainly have no evidence that they would bind the defendants. Before the Cypriot proceedings were struck out, there had been no amendment to the writ nor had particulars of claim narrowing the case to the issue of consent been served. If we are to judge the “cause” by reference to the claim in the Cypriot proceedings, as we are required to do, that claim was and remained in a form that potentially put in issue all the elements of the claimant's claim in the English proceedings.”

158. I acknowledge that David Richards LJ also decided, at [40], that “the “cause” in the English proceedings was mirrored in the Cypriot proceedings ... as regards the issue of consent” which was “an essential element of both claims”. This was, however, not “the end of the matter”, at [41], because all the issues in the English proceedings were potentially in dispute whereas, because of the effect of an undertaking given by the defendants in the Cypriot proceedings, they would be limited there “to the single issue of consent”, at [41]. After further analysis he concluded as follows, at [49]:

“[49] While the scope of the dispute in the Cypriot proceedings may be narrower than in the English proceedings, that which is not disputed in the Cypriot proceedings is in effect assumed in the claimant's favour, narrowing the case to the single issue of consent. Fundamentally, the “cause” and, as is common ground, the “objet” of the two sets of proceedings are the same.”

159. In my view, it is important to note that, although David Richards LJ decided, at [40], that “the issue of consent” was “an essential element of both claims”, he did not consider that this was sufficient to mean that the *cause* in the English proceedings was mirrored in the Cypriot proceedings. David Richards LJ’s answer to whether the causes were mirrored depended on his *further* analysis of the issues in both proceedings. This led to his conclusion, at [49], that while the “scope of the dispute” in Cyprus might be narrower this was only because “that which is not disputed in the Cypriot proceedings is in effect assumed in the claimant’s favour, narrowing the case to the single issue of consent”. In other words, as I read the judgment, as he explained further, at [50]-[51], both sets of proceedings engaged the same legal rules. I repeat, “the claim in the Cypriot proceedings ... potentially put in issue *all the elements* of the claimant’s claim in the English proceedings” (my emphasis). The fact that, because of the undertaking, some of those elements might not be disputed in the Cypriot proceedings was a procedural difference which did not prevent the rules of law engaged in both sets of proceedings from being the same.
160. In conclusion, I consider that the effect of the leading authorities, namely *Gubisch*, *The Tatry* and *The Alexandros T*, is reasonably clear.
161. Proceedings will have the same cause of action if they are in “identical terms”: *The Tatry* at [40]. This expression was also used by the Advocate General in that case, at [16], who additionally used the expression “two sides of the same coin”, at [16], and said that “what was important is whether or not the substantive issues ... are the same”, at [19]. The word “identical” was also used by the Advocate General in *Gantner*, at [39], in respect of “the facts and the rule of law relied on in the two actions”. In *The Alexandros T*, Lord Clarke made clear that the proceedings must engage “the same ... rules of law”, at [28(iii)]; that claims must be “mirror images ... and thus legally irreconcilable”, at [30]; and that article 27 is *not* engaged “merely by virtue of the fact that common issues might arise”, at [28(vi)].
162. In contrast, whether proceedings have the same object is a broader analysis and depends on whether “the question ... at the heart of the two actions” is the same: *Gubisch* at [16]. It is in *this* context that claims do not have to be “entirely identical”: *Gubisch* at [17]. In *The Tatry*, this was expressed as depending on whether “the end the action has in view” is the same, at [41]; and whether the same issue is “central to both actions”, at [41]. In that case, the “issue of liability is central to both actions” with the result that the object was the same. The Advocate General in that case had also identified the question of whether proceedings had the same object as depending on whether “the central issue” was the same. I would add, for completeness, that the different remedies sought, namely damages and a non-liability declaration, did “not make the object of the dispute different”, at [43].
163. For the purposes of addressing below the case as advanced by Mr Tomlinson, I would just pause to emphasise why I see a clear distinction between the approach to the question of whether proceedings have the same cause to that of whether they have the same object. This distinction derives from the authorities above which, in my view, clearly and expressly differentiate between these two elements. It is, therefore, important to apply what is said about each only to the relevant element. For example, the passages I now repeat are confined to the issue of whether the proceedings have the same object and are not applied to whether they have the same cause. From *Gubisch* at [16] and [17]: “the question (which) ... lies at the heart of the two

actions”; “that concept (the same subject-matter) cannot be restricted so as to mean two claims (which) are entirely identical”; from *The Tatry* at [41] and [43]: “The ‘object of the action’ for the purposes of article 21 means the end the action has in view”; “As to liability, the second action has the same object as the first, since the issue of liability is central to both actions”; and see also *The Alexandros T* at [28(iv)].

164. If the test for the cause adopted the same or a similar approach to that for the object, in my view this would be clear from the above authorities. In fact, as set out above, the contrast is notable. That is why, as set out below, I do not accept Mr Tomlinson’s submissions on this issue. It is also why, with all due respect, I disagree with Popplewell LJ’s analysis, at [84] that “the search is for the common issue or issues which capture the essential nature of the cause of action in the sense of its main or central focus” and, at [90(iv)], where he refers to the “issue or issues which make up the essential element of the claim”. In my view, his proposed approach resonates with the approach set out in the passages I have just quoted, which address the question of whether the proceedings have the same object or subject matter and not that of whether they have the same cause, and would have the effect of removing any real substance from the specific requirement that the proceedings have the same cause as well as the same object.
165. This distinction was captured by Rix J in *Glencore*, at pp.107/108, in terms which I propose to quote in full:

“In *Gubisch* the dispute in question was as to the validity of a sale contract. *Gubisch* sued Mr Palumbo in Germany for payment of the price under it. Subsequently, Mr Palumbo sued *Gubisch* in Italy for a declaration that no contract had been entered into at all, on the ground that his order had been revoked before acceptance. The European Court of Justice held that art. 21 applied. The cause was the same because both proceedings involved ‘the same contractual relationship’ (para. 15); and the objet was the same because, although one action was aimed at giving effect to the contract and the other action at depriving it of any effect, nevertheless (para. 16):

‘The question whether the contract is binding therefore lies at the heart of the two actions.’

In other words, the objet may be the same although the claims may not be identical (para. 17). It would seem therefore that it is for the court to identify the objet of the two actions by identifying objectively the essential issue raised between the parties to them.

*The Maciej Rataj* arose out of the alleged contamination of a cargo of soya beans during a voyage. The first action was brought by the shipowners in Holland, naming all of the cargo owners except Phibro, and claiming a declaration of non-liability for the alleged contamination. The second and third actions were brought in England by Phibro and some but not all of the other cargo owners, against the shipowners, claiming in

respect of damaged cargo. The fourth action was brought by the shipowners, again in Rotterdam, and again for a declaration of non-liability, but this time against Phibro. I have already mentioned that the European Court of Justice held that art. 21 operated to the extent that the same parties were involved, even if other parties were also involved. That was the ‘first question’. The ‘fifth question’ raised the issue whether the cause and objet were the same in the Dutch and the English proceedings. The European Court of Justice held that they were. The declaration for non-liability and the claim for damages in respect of the same cargo both involved the same cause. The objet was also the same (para. 43):

‘since the issue of liability is central to both actions. The fact that the plaintiff’s pleadings are couched in negative terms in the first action whereas in the second action they are couched in positive terms by the defendant, who has become plaintiff, does not make the object of the dispute different.’

Here again, therefore, the court objectively identified the central or essential issue and found in it the objet of the actions.”

166. I now turn to deal with this appeal.
167. It follows from the above that I do not agree with Popplewell LJ’s conclusion, at paragraph 94, that the respective claims have the same cause of action because they “are claims to determine whether there is liability for publishing the tweet in question”. That this might be the question “at the heart of the two actions”, to quote *Gubisch*, at [16], establishes, at most, that they have the same object, not that they have the same cause. It also follows, that I do not accept Mr Tomlinson’s submission that proceedings have the same cause of action if they “raise a common “*question*” or “*element*” which is “*essential*” or which “*lies at the heart*” of both proceedings”. As I have sought to demonstrate above, I do not consider that this approach is supported, as he submitted, by the “authorities from *Gubisch* through to *Easygroup*”. In particular in my view, these submissions conflict with Lord Clarke’s observations in *The Alexandros T* including, at [28(vi)], that “article 27 is not engaged merely by virtue of the fact that common issues might arise in both sets of proceedings” and, at [30], that the “essential question is whether the claims in England and Greece are mirror images of one another, and thus legally irreconcilable”. Simply stated, the claims in the present case are not “mirror images of one another, and *thus* legally irreconcilable” (my emphasis).
168. I agree with Mr Wolanski’s submission that the judge was wrong when he said, at [71], that “it is the potential for irreconcilable judgments which is key”. Whilst this might be a policy consideration behind the formulation of articles 27 and 28, the potential for irreconcilable judgments does not answer the question of whether the proceedings involve the same cause of action. Although I agree with Popplewell LJ when he says, at paragraph 81, that irreconcilability may be a helpful tool in evaluating whether the article 27 test is met, the *potential* for conflicting decisions will not determine whether the causes of action are the same.

169. In this respect, I would quote what Mance J said at first instance in *Sarrjo SA v Kuwait Investment Authority* [1996] CLC 211, at p.218, when deciding that the proceedings in that case did not involve the same cause of action (in respect of the identical provisions in the 1968 Brussels Convention): “Article 21 has its own specific criteria, and, even between the same parties, art. 22 may be the only article potentially applicable where there is a risk of irreconcilable judgments”. This part of his decision was upheld by the Court of Appeal and not further appealed to the House of Lords which dealt only with the question of whether the actions were related.
170. I also agree with Mr Wolanski’s submission that the judge was wrong when he decided, at [77]-[78], that the correct approach is to determine “whether there is a significant or substantial degree of commonality or overlap between the two sets of claims” and when he said that all “that is necessary ... is that there is a substantial and important area of common dispute”. The judge adopted this approach because, again, he considered that an “important relevant factor albeit not decisive is the clear potential for conflicting decisions”. With respect to the judge it is the answer to the question of whether the causes of action are the same which will determine whether conflicting judgments will be irreconcilable. Further, in my view as set out above, his approach is that applied to the question of whether the proceedings have the same object and not to whether they have the same cause.

171. The Norwegian writ asserts, under the heading “Basis of Claim”, that:

“In order that Wright shall have a claim for damages resulting from Granath’s allegations on Twitter, the allegations must be made negligently, and they must be libellous and unlawful.”

The writ further contends that the allegations “are correct” and therefore not libellous and that “Granath has [not] acted negligently in relation to the statements”. The issue of whether they are “unlawful” is then addressed as follows. It is first asserted that: “In any case, Granath had honourable reasons to put forward the allegations”. Then, after reference is made to freedom of expression (under the Norwegian Constitution and the European Convention on Human Rights) it is further asserted that “Granath’s statements are within the wide framework of freedom of expression that these rules establish”; and that, therefore, “the statements are not unlawful”. It also asserts that Dr Wright has suffered no loss.

172. The Particulars of Claim sets out the alleged defamatory words; that they would have been understood as referring to Dr Wright; that they meant that Dr Wright “had fraudulently claimed to be Satoshi Nakamoto”; and that he had been caused serious harm. Damages and an injunction are claimed.
173. Do the causes of action in the respective proceedings mirror each other such that they are legally irreconcilable? In my view, the answer is that they do not. The Norwegian claim, based on the Damages Compensation Act 1969 section 3-6a, clearly includes one legal element which does not feature in the English proceedings, namely whether the allegations were or were not made negligently. This does not form part of or feature in the English proceedings. I also have a question as to the issue raised in the Norwegian proceedings of whether the allegations were “unlawful”. It would seem to me arguable that this is also a distinguishing feature but, as this was not argued by Mr Wolanski, I do not deal with it further.

174. I appreciate that defences are not relevant but when one party is contending that the other is liable for a tweet and the other is contending that they are not liable for the same (and other tweets), it is necessary to consider the constituent legal elements of the causes of action in both sets of proceedings. This is the required approach even when, as in the Norwegian claim in this case, some aspects of that claim might have formed defences if Dr Wright had brought a claim there against Mr Granath.
175. I do not consider that this outcome conflicts with the purposes of article 27. For example, it is clear that a legal dispute arising from, say, one accident might give rise to two different causes of action in different states. One cause of action might be based on strict liability and the other on negligence. There is clearly a risk of differing judgments but the causes of action are not mirror images nor would they necessarily lead to irreconcilable judgments if, for example, negligence was not proved. Accordingly, if the prospective defendant brought proceedings for a declaration that they were not liable because they were not negligent, this would be the mirror image of a claim based on negligence but not one based on strict liability. Similarly, in the present case, the legal principles involved in the Norwegian proceedings do not mirror the legal principles involved in the English proceedings. Put another way, the juridical basis of the proceedings is not the same.
176. Accordingly, I would allow this appeal on the basis that article 27 does not apply because, for the reasons set out above, the proceedings in Norway and the proceedings in England do not involve the same cause of action.