Trinity Term
[2020] UKSC 30
On appeal from: [2018] EWCA Civ 1120

JUDGMENT

Villiers (Appellant) *v* Villiers (Respondent)

before

Lady Hale
Lord Kerr
Lord Wilson
Lady Black
Lord Sales

JUDGMENT GIVEN ON

1 July 2020

Heard on 9 and 10 December 2019

Appellant
Michael Horton
Alexander Laing

(Instructed by Dawson Cornwell)

Respondent
Timothy Scott QC
Alexis Campbell QC
Gayatri Sarathy
(Instructed by Penningtons Manches Cooper LLP (Oxford))

Intervener
(Secretary of State for Justice)
Sir James Eadie QC
Deepak Nagpal
Jason Pobjoy
(Instructed by The Government Legal Department)

LORD SALES: (with whom Lord Kerr agrees)

1. This case concerns the jurisdiction of a court in England to make a maintenance order in favour of a party to a marriage (here, the wife) pursuant to section 27 of the Matrimonial Causes Act 1973 (as amended - "section 27") in circumstances in which for most of the marriage the parties lived in Scotland and where the relevant divorce proceedings (those issued by the husband) were conducted in Scotland. After marriage in England in 1994, the parties lived together in Scotland between 1995 and 2012, when they separated. The wife returned to England in 2012 and has lived in England since then. On 13 January 2015 she issued her application under section 27 in England for an order requiring the husband to make maintenance payments. Under section 27, an order can be made for periodic payments or payment of a lump sum directed to satisfying an obligation in the nature of provision of maintenance.

2. The wife issued a divorce petition in England in July 2013, which included a prayer for financial orders. The husband issued a writ for divorce in Scotland in October 2014. The writ sought relief only in the form of an order to dissolve the marriage and included no prayer for orders in relation to financial matters. The effect of the relevant statutory provision (paragraph 8 of Schedule 1 to the Domicile and Matrimonial Proceedings Act 1973) was that the application for divorce had to be assigned to the court in Scotland, since the parties had last lived together there. The wife accepted this and on 13 January 2015 she consented to an order dismissing her petition in England, which order was made on 16 January 2015. The husband's writ for divorce could then proceed in Scotland.

3. Relief in the form of an order for maintenance under section 27 is not tied to the grant of a decree of divorce and such an order can be sought in separate proceedings. Therefore, subject to questions of jurisdiction, the wife was free to issue her application under section 27 in England, as she did on the same day on which she consented to the dismissal of her petition for divorce. By her application, she seeks an order for payment of periodical payments and a lump sum. She has also applied for interim periodical payments under section 27(5). Issuing proceedings for maintenance in England was both more convenient for her, since she lives in England, and offered the prospect of more generous maintenance provision than would be available to her if she sought orders in Scotland.

4. The husband applied for an order to stay or dismiss the wife's application under section 27 on the basis that the court in England either did not have or should not exercise jurisdiction to hear the application, alternatively on the basis that her

application should be rejected on the merits. These matters were considered at a hearing before Parker J in the High Court. She rejected the husband's challenge to the jurisdiction of the English court and made an order for, among other things, interim periodical payments of maintenance by the husband: [2016] EWHC 668 (Fam); [2017] 1 FLR 1083.

5. The husband appealed to the Court of Appeal. The Court of Appeal (King, David Richards and Moylan LJJ) dismissed the appeal: [2018] EWCA Civ 1120; [2019] Fam 138. King LJ gave the sole substantive judgment, with which the other members of the court agreed. The husband now appeals to this court, with permission granted by this court, in relation to the jurisdictional issues. These are concerned with the interpretation and effect of Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484) ("Schedule 6" and "the 2011 Regulations", respectively) and the interpretation and effect of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("the Maintenance Regulation"). The 2011 Regulations were promulgated by the Secretary of State for Justice pursuant to section 2(2) of the European Communities Act 1972 ("the ECA 1972"), and on the appeal to this court the husband has been given permission to raise a new point as to whether Schedule 6 to those Regulations, or any part of it, is ultra vires the Secretary of State's powers under section 2(2).

6. The final determination of the wife's application for financial orders under section 27 was adjourned pending the appeal to the Court of Appeal and then adjourned again pending the appeal to this court. The order by Parker J for payment of interim periodical payments has not been stayed, but the husband has failed to comply with it.

7. Four issues arise on the appeal, as follows (in the order in which they were presented by Mr Horton, counsel for the appellant):

> (1) On the proper interpretation of section 27(2), does an English court have jurisdiction to make any order for maintenance in a case with no international dimension at all?
>
> (2) If the answer to (1) is "yes", does the English court have a discretion which has survived the promulgation of Schedule 6, to stay maintenance proceedings before it on the general ground of forum non conveniens (and if so, should it exercise that discretion so as to give priority to the Scottish courts to deal with financial issues between the parties)?

(3) If the answer to (2) is "no", was the purported removal by Schedule 6 of a general discretion to stay proceedings on the ground of forum non conveniens ultra vires the Secretary of State's powers in section 2(2) of the ECA 1972? and

(4) If the answer to (3) is "no", with the result that the jurisdictional position is governed by the express terms of the Maintenance Regulation, as adopted into domestic law by Schedule 6, is the husband's divorce proceeding in Scotland a "related action" for the purposes of article 13 of the Maintenance Regulation (as so adopted) and, pursuant to that provision, should the English court decline jurisdiction in respect of the wife's claim for a maintenance order under section 27?

Legislative background

8. The national legislation governing jurisdiction in cross-border cases is primarily contained in the Civil Jurisdiction and Judgments Act 1982 ("the CJJA 1982"). That Act gave effect in domestic law to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 ("the Brussels Convention"). The Brussels Convention was amended on the association of Denmark, Ireland and the United Kingdom in 1978. It was replaced as the principal instrument governing jurisdiction in cross-border cases between member states of the European Union by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels Regulation" or, as it is sometimes called, "the Judgments Regulation"), which in large part replicated the provisions of the Brussels Convention. The CJJA 1982 was amended to refer to and give effect in domestic law to the Brussels Regulation. The Brussels Regulation has been replaced by Regulation (EU) No 1215/2012 ("the Brussels Recast Regulation").

9. The Brussels Convention did not apply to issues of the status of natural persons, including marriage, nor to rights in property arising out of a matrimonial relationship (article 1(1)), but it did apply in respect of claims for maintenance. The Convention set out a general principle that a person should be sued in his state of domicile (article 2), but this was subject to certain special rules of jurisdiction. One such rule was that in matters relating to maintenance, the person owing an obligation to pay maintenance (the maintenance debtor) could be sued by the person to whom that obligation was owed (the maintenance creditor) in the courts for the place where the maintenance creditor was domiciled or habitually resident (article 5(2)). This was specifically designed to make it easier for a maintenance creditor to enforce his or her rights, by giving them the right to choose where to sue the maintenance debtor.

10. The rationale for this was explained by Mr Jenard in his report on the Brussels Convention (OJ 1979 C59, pp 24-25, excluding footnotes):

> "The Convention is in a sense an extension of the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations in respect of children, since it ensures the recognition and enforcement of judgments granting maintenance to creditors other than children, and also of the New York Convention of 20 June 1956 on the recovery abroad of maintenance. The Committee decided that jurisdiction should be conferred on the forum of the creditor, for the same reasons as the draftsmen of the Hague Convention. For one thing, a convention which did not recognize the forum of the maintenance creditor would be of only limited value, since the creditor would be obliged to bring the claim before the court having jurisdiction over the defendant.
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> If the Convention did not confer jurisdiction on the forum of the maintenance creditor, it would apply only in those situations where the defendant against whom an order had been made subsequently changed residence, or where the defendant possessed property in a country other than that in which the order was made.
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> Moreover the court for the place of domicile of the maintenance creditor is in the best position to know whether the creditor is in need and to determine the extent of such need.
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> However, in order to align the Convention with the Hague Convention, article 5(2) also confers jurisdiction on the courts for the place of habitual residence of the maintenance creditor. This alternative is justified in relation to maintenance obligations since it enables in particular a wife deserted by her husband to sue him for payment of maintenance in the courts for the place where she herself is habitually resident, rather than the place of her legal domicile."

11. Article 5(2) of the Brussels Convention was amended in 1978 so as to expand this special rule of jurisdiction, so that in matters relating to maintenance the maintenance debtor could be sued "in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to

proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties". The object of this provision remained the protection of the maintenance creditor, who was regarded as the weaker party: see the judgments of the European Court of Justice ("the ECJ") in *Farrell v Long* (Case C-295/95) EU:C:1997:168, [1997] QB 842, para 19, and *Freistaat Bayern v Blijdenstein* (Case C-433/01) EU:C:2004:21, [2004] All ER (EC) 591, paras 29 and 30.

12. The Brussels Convention set out rules governing cases of *lis pendens* and related actions at articles 21 and 22, respectively, in terms closely similar to what later became articles 27 and 28 of the Brussels Regulation, articles 12 and 13 of the Maintenance Regulation and articles 29 and 30 of the Brussels Recast Regulation. The effect of articles 12 and 13 of the Maintenance Regulation is discussed below.

13. Section 16(1) of the CJJA 1982 stated that the provisions in Schedule 4 to the Act (which contained a modified version of Title II of the Brussels Convention) should have effect for determining, in each part of the United Kingdom, whether the courts of that part had jurisdiction in proceedings where the subject matter of the proceedings was within the scope of the Brussels Convention as determined by article 1 (therefore, maintenance proceedings were covered) and the defendant was domiciled in the United Kingdom. As Lord Wilson explains, the Brussels Convention had nothing to say about determination of jurisdiction of courts in different parts of a single state and the CJJA 1982 did not adopt articles 21 and 22 of the Brussels Convention as part of the scheme for allocation of jurisdiction as between different jurisdictions in the United Kingdom (ie in an intra-state case with a cross-jurisdiction dimension). The position in such cases remained governed by ordinary domestic discretionary rules, according to the principles relating to the forum non conveniens doctrine. Section 49 of the CJJA 1982 provided:

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

14. The Brussels Regulation followed the structure of the Brussels Convention. Like the Convention, the Regulation did not apply to issues of status of natural persons, nor to rights in property arising out of a matrimonial relationship (article 1.2(a)). Like the Convention, the Regulation included provisions governing jurisdiction in respect of claims for maintenance payments. Article 2 repeated the general rule that a defendant should be sued in the courts of his domicile. Article 5(2) of the Brussels Convention (as amended) was repeated. The object remained,

as before, that the maintenance creditor, who is regarded as the weaker party, should have options regarding where to sue, so that he or she could proceed in the place most convenient or advantageous for him or her.

15. As with the Brussels Convention before it, the Brussels Regulation did not harmonise the law of maintenance. The substantive law to be applied was therefore a matter for the national law of the forum in which the maintenance claim was brought. This meant that by giving the maintenance creditor a choice regarding the forum in which to bring their claim, the maintenance creditor was also afforded a choice regarding the substantive law to be applied.

16. The CJJA 1982 was amended so as to refer to the Brussels Regulation in relevant provisions. As explained below, the domestic doctrine of forum non conveniens is excluded by the Brussels Regulation, as it was by the Brussels Convention before it. However, as the Brussels Regulation was (unlike the Convention) directly applicable in the United Kingdom as a matter of EU law, it was not necessary for section 49 of the CJJA 1982 to be amended to refer to it in order for the Regulation to have effect to govern the allocation of jurisdiction in inter-state cases. As regards the effect of the Brussels Regulation, it is not the CJJA 1982 which prevents a court in the United Kingdom from staying proceedings before it on the ground of forum non conveniens, but the directly applicable Regulation itself. The final clause of section 49 now refers to inconsistency with the Brussels Convention (as this still has application in a small number of cases), "or, as the case may be, the Lugano Convention or the 2005 Hague Convention". The reason for these references is that, since these instruments only have the status of treaties, they do not have direct effect in domestic law and so have to be given effect by a legislative provision in order to achieve the intended result that they, too, should exclude the operation of the forum non conveniens doctrine.

17. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition of and enforcement of judgments in matrimonial matters and matters of parental responsibility ("the Matrimonial Regulation", or the Brussels II Revised Regulation as it is often called) excluded maintenance obligations from its scope. In due course, maintenance obligations were covered by their own jurisdictional regime as set out in the Maintenance Regulation. Accordingly, EU legislation has continued the original scheme of the Brussels Convention, by treating maintenance obligations and questions of marital status, including divorce, as separate matters for the purposes of jurisdiction.

18. Recital (9) to the Maintenance Regulation states that a maintenance creditor should be able to obtain easily, in a member state, a decision which will automatically be enforceable in another member state. Recital (11) makes it clear that the Maintenance Regulation covers all maintenance obligations arising from,

among other things, marriage. Recitals (21) and (25) make it clear that the Maintenance Regulation is not concerned with questions affecting the existence of family relationships, such as marriage. Recitals (15) and (45) (in material part) are as follows:

> "(15) In order to preserve the interests of maintenance creditors and to promote the proper administration of justice within the European Union, the rules on jurisdiction as they result from [the Brussels Regulation] should be adapted. The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a member state may exercise subsidiary jurisdiction.
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> …
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> (45) Since the objectives of this Regulation, namely the introduction of a series of measures to ensure the effective recovery of maintenance claims in cross-border situations and thus to facilitate the free movement of persons within the European Union, cannot be sufficiently achieved by the member states and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures …"

19. Article 3 of the Maintenance Regulation provides:

> "In matters relating to maintenance obligations in member states, jurisdiction shall lie with:
>
> (a) the court for the place where the defendant is habitually resident, or
>
> (b) the court for the place where the creditor is habitually resident, or
>
> (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the

status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or

(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties."

20. Articles 12 and 13 of the Maintenance Regulation provide as follows:

"*Article 12*

Lis pendens

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, 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.

2. 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 13

Related actions

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

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.
>
> 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."

21. As is made clear by recital (15), the Maintenance Regulation is intended to preserve and enhance the rights of maintenance creditors as they had been set out previously in the Brussels Convention and the Brussels Regulation. Therefore, article 3 of the Maintenance Regulation is concerned with defining the set of jurisdictions where the maintenance creditor has the right to bring her claim. This is in line with the fundamental object of the Maintenance Regulation to protect the interests of the maintenance creditor as the weaker party and is also indicated by the text of the article itself. The contrast between sub-paragraphs (a) and (b) is between the place of habitual residence of "the creditor" (a term defined in article 2(10) to mean "any individual to whom maintenance is owed or is alleged to be owed") and the place of habitual residence of "the defendant" (which is not a defined term; in context, it means the person against whom a claim is asserted that he owes maintenance). This language reflects the fact that the jurisdiction provisions in relation to maintenance claims have been removed from the Brussels Regulation (where the special rule of jurisdiction set out in article 5(2) was in addition to the general right under article 2 to sue a defendant in the state of his domicile) and placed in a separate Regulation dedicated to maintenance claims. The text of article 3 does not use the word "debtor", which is a term defined in article 2(11) of the Maintenance Regulation to mean "any individual who owes or who is alleged to owe maintenance". Thus article 3 does not create a right for a maintenance debtor to pick a jurisdiction from those set out in that provision and commence proceedings seeking declaratory relief regarding the extent of any maintenance obligation he might have.

22. Although, as an EU Regulation, the Maintenance Regulation is directly applicable in domestic law as regards inter-state cases, it required some degree of implementation in national law as at the date it came into effect in 2011 in relation to matters such as the designation of relevant central authorities and relevant courts for particular applications. Such implementation and other associated legal changes were effected by the 2011 Regulations. First, jurisdiction in relation to maintenance claims was removed from the CJJA 1982 by the amendments to that Act effected by regulation 6 of and Schedule 4 to the 2011 Regulations. Therefore, section 49 of the CJJA 1982 has no application in relation to maintenance claims. Secondly, regulation 3 of the 2011 Regulations gives effect to Schedule 1 to the 2011 Regulations which contains provisions relating to the enforcement of maintenance

decisions pursuant to the Maintenance Regulation to the extent that national law is required to specify certain matters for the purposes of the Maintenance Regulation. Thirdly, regulation 8 of and Schedule 6 to the 2011 Regulations provide the relevant rules for the allocation of jurisdiction for intra-state cases within the United Kingdom in relation to maintenance.

23. Schedule 6 to the 2011 Regulations includes the following provisions, so far as material:

> "1. The provisions of this Schedule have effect for determining, as between the parts of the United Kingdom, whether the courts of a particular part of the United Kingdom, or any particular court in that part, have or has jurisdiction in proceedings where the subject-matter of the proceedings is within the scope of the Maintenance Regulation as determined by article 1 of that Regulation.
>
> 2. In this Schedule, a reference to an article by number alone is a reference to the article so numbered in the Maintenance Regulation.
>
> 3. The provisions of Chapter II of the Maintenance Regulation apply to the determination of jurisdiction in the circumstances mentioned in paragraph 1, subject to the modifications specified in the following provisions of this Schedule.
>
> 4. Article 3 applies as if -
>
> (a) the references in article 3(a) and (b) to the court for the place where the defendant or the creditor is habitually resident were references to the court for the part of the United Kingdom in which the defendant, or the creditor, as the case may be, is habitually resident;
>
> (b) the references to a person's nationality were references to a person's domicile.
>
> …

> 12. Article 12 applies as if after 'different member states' there were inserted 'or different parts of the United Kingdom'.
>
> 13. Article 13 applies as if after 'different member states' there were inserted 'or different parts of the United Kingdom'.
>
> …"

24. As part of the suite of legislative amendments made by the 2011 Regulations to give effect to the Maintenance Regulation to govern allocation of jurisdiction relating to maintenance between member states and in parallel with the promulgation of the jurisdiction code in Schedule 6 governing allocation of jurisdiction relating to maintenance between jurisdictions within the United Kingdom, section 27 was amended (by paragraph 6 of Schedule 7 to the 2011 Regulations) by the insertion of a new subsection (2). This provides:

> "The court may not entertain an application under this section unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to [the 2011 Regulations]."

Analysis

25. Although Lord Wilson says that the resolution of the question of jurisdiction in this case is absurdly complicated, in my respectful opinion it is not. Schedule 6 was intended to introduce for intra-state cases the same clear and certain jurisdictional rules which have been adopted for inter-state cases in the Maintenance Regulation, and it has achieved that result. This means that on proper analysis the resolution of the question of jurisdiction is straightforward, as it is intended to be.

(1) Does an English court have jurisdiction under section 27(2) to make any order for maintenance in a case with no international dimension at all?

26. The submission of Mr Horton for the appellant on this issue is that section 27(2) can only apply if a case falls to be governed both by the Maintenance Regulation *and* by Schedule 6, so that it only applies in inter-state cases. On this issue I agree with Lord Wilson that Mr Horton's submission must be rejected. Section 27(2) is intended to cover two classes of case: (i) inter-state proceedings, in relation to which jurisdiction is governed by the Maintenance Regulation, and (ii) intra-state proceedings, in relation to which jurisdiction is governed by Schedule 6. In this context, it might perhaps be said that the use of the word "and" is infelicitous;

but the meaning is abundantly clear. There is no scope for the Maintenance Regulation and Schedule 6 both to apply, because they deal with different types of case. Therefore, Mr Horton's proposed construction of section 27(2) would deprive it of any practical effect. Rather, the drafter has used the formula referring to "the Maintenance Regulation and Schedule 6" to indicate that the jurisdiction of an English court to make an order under section 27 is to be determined by application of the Maintenance Regulation and Schedule 6 taken together, in the sense that together they cover the whole possible field of inter-state cases and intra-state cases. This interpretation is also borne out by the elaborate provisions in Schedule 6 which provide for the provisions of the Maintenance Regulation to apply with appropriate modifications to give them equivalent effect in intra-state cases. The intended effect of those provisions, as modified, would be defeated in a significant class of maintenance proceedings if section 27(2) were given the construction for which Mr Horton contends. There is no rational basis for thinking that they were to be deprived of effect in this way.

(2) Does the English court have a discretion which has survived the promulgation of Schedule 6, to stay maintenance proceedings before it on the general ground of forum non conveniens?

27. In my judgment, the answer to this question is clearly "no". The Court of Appeal was right so to hold.

28. The jurisdictional scheme of the Maintenance Regulation is modelled on the similar schemes in the Brussels Convention and the Brussels Regulation (and is in line with the scheme of what is now the Brussels Recast Regulation). The basic scheme of all these jurisdiction-governing instruments is to provide clear guidance where proceedings may or must be brought. The Grand Chamber of the ECJ authoritatively ruled in *Owusu v Jackson* (Case C-281/02) [2005] QB 801, a case concerning the interpretation of the Brussels Convention, that the scheme of this form of EU legislation is inconsistent with courts in a Member State retaining any discretionary power to stay proceedings on the grounds of forum non conveniens. The case concerned an accident which occurred in Jamaica, but involving a defendant who was domiciled in England. As the ECJ pointed out, a national court cannot retain a power to refuse to accept jurisdiction on forum non conveniens grounds, since to do so would allow it to defeat the mandatory provision in article 2 of the Brussels Convention which required that a defendant be sued in the courts of his state of domicile. The relevant part of the judgment is at paras 37-46, as follows:

> "37. It must be observed, first, that article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the

Convention: see, as regards the compulsory system of jurisdiction set up by the Convention, *Erich Gasser GmbH v MISAT Srl* (Case C-116/02) [2005] 1 QB 1, 35, para 72, and *Turner v Grovit* (Case C-159/02) [2005] 1 AC 101, 113, para 24. It is common ground that no exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Convention, although the question was discussed when the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom was drawn up, as is apparent from the report on that Convention by Professor Schlosser, OJ 1979 C59, p 71, at pp 97-98, paras 77 and 78.

38. Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention (see, inter alia, *GIE Groupe Concorde v Master of the vessel Suhadiwarno Panjan* (Case C-440/97) [1999] ECR I-6307, 6350, para 23, and *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* (Case C-256/00) [2003] 1 WLR 1113, 1130, para 24), would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the forum non conveniens doctrine.

39. According to its Preamble, the Brussels Convention is intended to strengthen in the Community the legal protection of persons established therein, by laying down common rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the various national courts before which proceedings in a particular case may be brought: *Besix*, para 25.

40. The court has thus held that the principle of legal certainty requires, in particular, that the jurisdictional rules which derogate from the general rule laid down in article 2 should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued: the *GIE Groupe Concorde* case [1999] ECR I-6307, 6350-6351, para 24, and the *Besix* case [2003] 1 WLR 1113, 1130, para 26.

41. Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the

predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.

42. The legal protection of persons established in the Community would also be undermined. First, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he could be sued. Second, where a plea is raised on the basis that a foreign court is a more appropriate forum to try the action, it is for the claimant to establish that he will not be able to obtain justice before that foreign court or, if the court seised decides to allow the plea, that the foreign court has in fact no jurisdiction to try the action or that the claimant does not, in practice, have access to effective justice before that court, irrespective of the cost entailed by the bringing of a fresh action before a court of another state and the prolongation of the procedural time limits.

43. Moreover, allowing forum non conveniens in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of contracting states, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.

44. The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, inter alia as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.

45. In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when forum

> non conveniens is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in article 2 of the Brussels Convention, for the reasons set out above.
>
> 46. In the light of all the foregoing considerations, the answer to the first question must be that the Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state is in issue or the proceedings have no connecting factors to any other contracting state."

29. In this respect there is no material difference between the Brussels Convention, as interpreted in *Owusu*, and the Maintenance Regulation. Article 3 of the Maintenance Regulation establishes a mandatory rule regarding jurisdiction ("… jurisdiction shall lie with …") of the same force as that in article 2 of the Brussels Convention. Like the Brussels Convention, the Maintenance Regulation is intended to lay down clear and predictable common rules of jurisdiction and the principle of legal certainty applies with equal force. In the context of the Maintenance Regulation, the objective of protection of the rights of the maintenance creditor has special force, as appears from the derivation of the Regulation from the special rule of jurisdiction in the Brussels Convention (as explained in the Jenard report), via the Brussels Regulation and as explained in recitals (9), (15) and (45) to the Maintenance Regulation. The object of the mandatory rule of jurisdiction in article 3 of the Maintenance Regulation is to afford special protection for a maintenance creditor by giving him or her the right to choose the jurisdiction most beneficial for them out of the range of options specified in that article.

30. This has been confirmed by the caselaw of the Court of Justice of the European Union ("the CJEU") on the Maintenance Regulation, most recently in *R v P* (Case C-468/18) ECLI:EU:C:2019:666; [2020] 4 WLR 8. That case concerned a wife and husband who were both Romanian nationals, who lived in the United Kingdom and had a child there before separating. The husband returned to Romania; the wife and child remained in the United Kingdom. The wife issued proceedings in Romania seeking the dissolution of the marriage, an order that the child should reside with her and that she should have sole parental responsibility and an order that the husband pay maintenance for the child. The husband contested the jurisdiction of the Romanian court. The court held that it had jurisdiction under the Matrimonial Regulation to hear the divorce petition, but that by virtue of that Regulation it had no jurisdiction in relation to the issues of residence and parental responsibility, as the child was habitually resident in the United Kingdom and it was

the courts there which had jurisdiction in relation to those matters. The court was unsure whether it had jurisdiction under article 3 of the Maintenance Regulation in respect of the claim for maintenance, on the basis that the husband was habitually resident in Romania, or whether jurisdiction for such a claim lay with the courts of the United Kingdom; accordingly, it referred that question to the CJEU.

31. The CJEU ruled that article 3 of the Maintenance Regulation established a right for the maintenance creditor to choose the jurisdiction in which to sue the maintenance debtor, out of the range of options set out in that article, so that the Romanian court had jurisdiction in respect of the maintenance claim brought by the wife. At paras 28-31 of its judgment, the CJEU said:

> "28. By its three questions, which must be examined together, the referring court asks, in essence, whether article 3(a) and (d) and article 5 of [the Maintenance Regulation] must be interpreted as meaning that where there are three joined claims before a court of a member state concerning, respectively, the divorce of the parents of a minor child, parental responsibility in respect of that child and the maintenance obligation with regard to that child, the court ruling on the divorce, which has declared that it has no jurisdiction to rule on the claim concerning parental responsibility, nevertheless has jurisdiction to rule on the claim concerning the maintenance obligation with regard to that child since it is also the court for the place where the defendant is habitually resident and the court before which the defendant has entered an appearance, or if solely the court with jurisdiction to hear the claim concerning parental responsibility in respect of the child may rule on the claim concerning the maintenance obligation with regard to that child.
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> 29. It is apparent from the wording of article 3 of [the Maintenance Regulation], entitled 'General provisions', that that article lays down general criteria for attributing jurisdiction for the purposes of the courts of the member states ruling on maintenance obligations. Those criteria are alternative, as is attested to by the use of the co-ordinating conjunction 'or' after each of them: see *A v B* [(Case C-184/14) EU:C:2015:479], para 34).
>
> 30. In this connection, since the objective of [the Maintenance Regulation], as is apparent from recital (15) thereof, consists in preserving the interest of the maintenance

> creditor, who is regarded as the weaker party in an action relating to maintenance obligations, article 3 of that regulation offers that party, when he acts as the applicant, the possibility of bringing his claim under bases of jurisdiction other than that provided for in article 3(a) of that regulation: see *Freistaat Bayern v Blijdenstein* (Case C-433/01) EU:C:2004:21; [2004] ECR I-981; [2004] All ER (EC) 591, para 29 and *Sanders v Verhaegen* (Joined Cases C-400/13 and C-408/13) EU:C:2014:2461; [2015] 2 FLR 1229, paras 27-28).
>
> 31. The maintenance creditor can thus bring his application either before the court for the place where the defendant is habitually resident, in accordance with point (a) of article 3, or before the court for the place where the creditor is habitually resident, in accordance with point (b) of that article, or further, in accordance with points (c) and (d) of that article, if the maintenance application is ancillary to a main action, relating to the status of a person, such as a divorce petition (under point (c)), or to an action concerning parental responsibility (under point (d)), before the court with jurisdiction to entertain either the former or the latter proceedings respectively."

32. The CJEU held that the fact that the Romanian court had declared that it had no jurisdiction to rule on an action in relation to the exercise of parental responsibility for a child made no difference to the availability of jurisdiction under the Maintenance Regulation, which set out mandatory rules of jurisdiction for maintenance claims. This was so even though the courts in the United Kingdom might be better placed to assess the claim for maintenance for the child. The maintenance creditor had a right to choose the jurisdiction for her claim from the list of options in article 3. The CJEU said this at paras 41-51:

> "41. That finding is supported by the scheme and the objectives of [the Maintenance Regulation].
>
> 42. So far as the scheme of [the Maintenance Regulation] is concerned, that regulation sets out, in Chapter II thereof, entitled 'Jurisdiction', all of the applicable rules to designate the court having jurisdiction with respect to maintenance obligations. Recital (15) of that regulation stipulates in that regard that there should no longer be any referral to the rules on jurisdiction in national law, since the rules resulting from that regulation must be considered to be exhaustive.

43. Thus, if a court seised of an application concerning maintenance obligations with regard to a child does not have jurisdiction to entertain proceedings in relation to an action concerning the parental responsibility for that child, it is first of all necessary to ascertain whether that court has jurisdiction to entertain proceedings on another basis under that regulation: orders of 16 January 2018, *PM v AH* (Case C-604/17) EU:C:2018:10, para 33, and of 10 April 2018, *CV v DU* (Case C-85/18PPU) EU:C:2018:220; [2018] IL Pr 21, para 55.

44. It must also be noted that [the Maintenance Regulation] does not provide for the option, for a court with jurisdiction under one of the provisions of that regulation before which an application has legitimately been brought, to decline jurisdiction with regard to that application in favour of a court which, in its view, would be better placed to hear the case, as article 15 of Regulation No 2201/2003 permits in the matter of parental responsibility.

45. Such an interpretation also corresponds to the objective of [the Maintenance Regulation] recalled in para 30 above. As Advocate General Szpunar observed in his opinion EU:C:2019:649, points 59 and 61, that regulation provides for alternative and non-hierarchised criteria for jurisdiction which give priority to the applicant's choice.

46. The importance of that choice given the aim of protecting the maintenance creditor reflects the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, approved on behalf of the European Community by Council Decision 2009/941/EC of 30 November 2009 (OJ 2009 L331, p 17), the Court having observed that that protocol has close links with [the Maintenance Regulation]: *KP v LO* (Case C-83/17) EU:C:2018:408, para 49. The court has thus ruled that that protocol enables the maintenance creditor, de facto, to choose the law applicable to his application concerning maintenance obligations by providing that the law of the forum, rather than the law of the State of the habitual residence of the creditor, may be applied as a matter of priority when the creditor introduces his application before the competent authority of the State where the debtor has his habitual residence: see *Mölk v Mölk* (Case C-214/17) EU:C:2018:744; [2019] IL Pr 2, paras 31 and 32.

47. An interpretation of Regulation No 4/2009 according to which only the court with jurisdiction in respect of parental responsibility has jurisdiction to rule on an application concerning maintenance obligations is liable to limit that option for the maintenance creditor applicant to choose not only the court with jurisdiction, but also, as a result, the law applicable to his application.

48. In a situation such as that at issue in the main proceedings, the initial choice of the parent representing the minor maintenance-creditor child to regroup all his heads of claim before the same court is rendered inadmissible by the plea raised by the defendant alleging lack of jurisdiction of that court and a decision of that court declaring that it has no jurisdiction, under article 12 of Regulation No 2201/2003, in respect of the head of claim in relation to parental responsibility.

49. In the light of the risk of having to bring his applications concerning maintenance obligations and concerning parental responsibility before two separate courts, that parent may wish, in the child's best interests, to withdraw his initial application concerning maintenance obligations brought before the court ruling on the divorce petition so that the court with jurisdiction in matters of parental responsibility also has jurisdiction to rule on that application concerning maintenance obligations.

50. Nevertheless, that parent may also wish, in the child's best interests, to retain his initial application concerning maintenance obligations with respect to the child before the court ruling on the divorce petition, where that court is also the court of the place in which the defendant has his habitual residence.

51. Many reasons, like those mentioned by Advocate General Szpunar in his opinion EU:C:2019:649, points 65 to 71, may be behind such a choice by the maintenance creditor, in particular the possibility of ensuring that the law of the forum is applied, that being Romanian law in the present case, the ability to express himself in his native language, the possibility of lower costs in the proceedings, the knowledge by the court seised of the defendant's ability to pay and exemption from the requirement to seek leave to enforce decisions."

33. The importance of the object of the Maintenance Regulation of protecting the interests of the maintenance creditor was also emphasised by the CJEU in its judgment in *Sanders v Verhaegan; Huber v Huber* (Joined Cases C-400/13 and C-408/13) EU:C:2014: 2461; [2015] 2 FLR 1229. The issue in that case was whether Germany's system of providing centralised courts with jurisdiction for cases involving maintenance claims against debtors resident outside the country was compatible with article 3(b) of the Maintenance Regulation. The centralised courts were at a greater distance from where the maintenance creditors in these cases lived than their local courts. Article 3(b) sets out a right for the maintenance creditor to sue in "the court for the *place* where she is habitually resident", not the courts of the member state where she is habitually resident. The CJEU held that article 3(b) would be incompatible with the German system, unless it could be shown that it sufficiently protected the interests of maintenance creditors while assisting in the effective recovery of their claims - a matter which the referring courts were required to verify. At paras 23-25 of the judgment the CJEU said:

> "23. A preliminary point to note is that, as the Advocate General has observed at point 33 of his opinion, insofar as the provisions of the Maintenance Regulation relating to the rules on jurisdiction replaced those in [the Brussels Regulation], the court's case law concerning the provisions on jurisdiction in matters relating to maintenance obligations in the [Brussels Convention] and in [the Brussels Regulation], which follows on from the Brussels Convention, remains relevant for the purposes of analysing the corresponding provisions of the Maintenance Regulation.
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> 24. It should also be recalled that it is settled case law that the provisions relating to the rules on jurisdiction must be interpreted independently, by reference, first, to the objectives and scheme of the regulation under consideration and, secondly, to the general principles which stem from the corpus of the national legal systems (see, by analogy, judgments in *CartierParfums-Lunettes SAS and Axa Corporate Solutions Assurances SA v Ziegler France SA and Others* (Case C-1/13) EU:C:2014:109, [2014] 1 LPR 25, at para 32 and the case law cited, and *flyLAL-Lithuanian Airlines AS, in Liquidation v Starptantiska lidosta Riga VAS and Another Company* (Case C-302/13) EU:C:2014:2319, [2014] All ER (D) 324 (Oct), at para 24 and the case law cited).
>
> 25. Against that background, article 3(b) of the Maintenance Regulation must be interpreted in the light of its aims, wording and the scheme of which it forms part."

At paras 26-27 the CJEU referred to recitals (9), (15) and (45) to the Maintenance Regulation. At paras 28-30 and 32 the CJEU continued as follows:

> "28. As regards the rules on jurisdiction in cross-border disputes concerning maintenance obligations, the court has stated, in the context of article 5(2) of the Brussels Convention, that the derogation relating to the rules on jurisdiction in matters relating to maintenance obligations is intended to offer special protection to the maintenance creditor, who is regarded as the weaker party in such proceedings (see, to that effect, judgments in *Farrell v Long* (Case C-295/95) EU:C:1997:168, [1997] All ER (EC) 449, at para 19, and *Freistaat Bayern v Blijdenstein* (Case C-433/01) EU:C:2004:21, [2004] All ER (EC) 591, at paras 29 and 30). The rules on jurisdiction provided for in the Maintenance Regulation, like the rule set out in article 5(2) of the Brussels Convention, are intended to ensure proximity between the creditor and the competent court, as indeed the Advocate General has observed at point 49 of his Opinion.
>
> 29. It should also be pointed out that the objective of the proper administration of justice must be seen not only from the point of view of optimising the organisation of courts, but also, as the Advocate General has observed at point 69 of his Opinion, from that of the interests of the litigant, whether claimant or defendant, who must be able to benefit, inter alia, from easier access to justice and predictable rules on jurisdiction.
>
> 30. Article 3(b) of the Maintenance Regulation specifies the criterion for identifying the court which has jurisdiction to rule on cross-border disputes concerning maintenance obligations, namely, 'the place where the creditor is habitually resident'. That provision, which determines both international and territorial jurisdiction, seeks to unify the rules of conflict of jurisdiction (see, to that effect, judgment in *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05) EU:C:2007:262, [2007] ECR 1-3699, [2010] 1 WLR 1909, at para 30).
>
> …

> 32. In this connection, it should be stated that, although the rules of conflict of jurisdiction have been harmonised by the determination of common connecting factors, the identification of the competent court remains a matter for the member states (see, to that effect, judgments in *Mulox IBC v Geels* (Case C-125/92) EU:C:1993:306, [1993] ECR 1-4075, at para 25, and *GIE Groupe Concorde and Others v Master of the Vessel Suhadiwarno Panjan and Others* (Case C-440/97) EU:C:1999:456, [2000] All ER (EC) 865, at para 31), provided that the national legislation does not undermine the objectives of the Maintenance Regulation or render it ineffective (see, inter alia, to that effect, judgment in *Zuid-Chemie BV v Phillipo's Mineralenfabriek NV/SA* (Case C-189/08) EU:C:2009:475, [2010] 2 All ER (Comm) 265, at para 30, and, by analogy, judgment in *Health Service Executive v SC and AC* (Case C-92/12PPU) EU:C:2012:255, [2012] 2 FLR 1040, at para 79)."

34. For intra-state maintenance claims within the United Kingdom, Schedule 6 to the 2011 Regulations applies the provisions of the Maintenance Regulation with relevant modifications (to take account of the fact that the Schedule is concerned to set out the jurisdiction of courts in different parts of the United Kingdom rather than courts in different member states): see, in particular, paragraphs 1, 3 and 4 of Schedule 6, set out above. The scheme of the Maintenance Regulation is replicated in domestic law for the purposes of intra-state cases. The mandatory rule regarding jurisdiction in article 3 of the Maintenance Regulation is repeated in the intra-state context, adapted only so far as necessary to take account of that context: paragraph 4 of Schedule 6. The effect of this transposition of the Maintenance Regulation into domestic law is that, for the same reasons as have been explained by the ECJ in *Owusu* and by the CJEU in *R v P*, a maintenance creditor has the right to choose from the menu of options in article 3 (as adapted by paragraph 4 of Schedule 6) the jurisdiction in which to bring her maintenance claim and the doctrine of forum non conveniens is excluded. In saying this, I should also make it clear that I agree with what Lady Black says at para 73 of her judgment about case management powers.

35. Mr Horton submitted that section 49 of the CJJA 1982 preserves the jurisdiction of the English Court to stay proceedings on forum non conveniens grounds. I cannot accept this submission. As explained above, Schedule 6 is part of a legislative regime which has been established outside and separate from the CJJA 1982. Therefore section 49 has no application. Put another way, it is not anything in the CJJA 1982 which purports to prevent the English court in this case from staying the proceedings before it on forum non conveniens grounds; it is the separate legislative regime in Schedule 6, as promulgated by the 2011 Regulations, which does that. The position in relation to section 49 is basically the same as for the

operation of the Brussels Regulation (see para 16 above) and other current EU Regulations governing jurisdiction, such as the Brussels Recast Regulation and the Maintenance Regulation itself: where a legal instrument separate from the CJJA 1982 governs jurisdiction and excludes the operation of the forum non conveniens doctrine, section 49 has nothing to say about that.

36. In my view, it is clear that Schedule 6 is intended to be a comprehensive code to govern questions of jurisdiction in relation to maintenance claims with a cross-jurisdictional dimension within the United Kingdom, just as the Maintenance Regulation provides such a code in relation to such claims with an inter-state cross-jurisdictional dimension. As with the statutory code at issue in *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; [2011] 2 AC 15, there is no basis for "reading down" or modifying the plain terms of Schedule 6 by reference to fundamental human rights or the principle of legality: see para 31 per Sir John Dyson JSC. There is no scope whatever for the operation of a forum non conveniens discretion in the context of the legislative scheme in Schedule 6.

(3) Was the purported removal by Schedule 6 of a general discretion to stay proceedings on the ground of forum non conveniens ultra vires the Secretary of State's powers in section 2(2) of the ECA 1972?

37. Section 2(1) and (2) of the ECA 1972 provide in relevant part as follows:

> "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the [EU] Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly …
>
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision -
>
> > (a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights

> enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; …"

38. In my view, the answer to the question posed above is "no". The Secretary of State submits that the making of the 2011 Regulations, including in particular Schedule 6 thereto, was authorised by section 2(2)(b) of the ECA 1972. This submission is clearly correct for the reasons given by Lord Wilson at paras 141-145. Section 2(2)(b) confers a wide power to make subordinate legislation for the purpose of dealing with matters (i) arising out of or (ii) related to the obligations of the United Kingdom under the Maintenance Regulation, or for dealing with matters (iii) arising out of the operation of section 2(1) of the ECA 1972 (relevant here, because the Maintenance Regulation creates rights and obligations under the EU Treaties which are recognised and available in law in the United Kingdom without further enactment) or (iv) related to such operation. In my view, the promulgation of Schedule 6 was authorised under each of limbs (i) to (iv) of section 2(2)(b). The purpose and effect of Schedule 6 is to ensure that there is one coherent, certain and predictable set of rules which apply to all maintenance claims with a cross-jurisdictional dimension, whether the crossing of jurisdictions occurs on an inter-state basis or on an intra-state basis. To have one set of rules which applies in both types of case makes obvious sense in a world where people are highly mobile, and liable to move between jurisdictions internationally and within the United Kingdom. It enables everyone to know clearly where they stand and what their rights are, without having to worry about (and obtain expensive legal advice regarding) possible differences in the position which might apply if the applicable intra-state jurisdictional rules are different from the applicable inter-state rules. Further, by reason of the different grounds of jurisdiction allowed for in article 3 of the Maintenance Regulation it is readily possible to envisage a case where, say, maintenance proceedings are commenced in each of Spain, England and Scotland. Schedule 6 ensures that there is a single set of clear and coherent rules which the domestic courts can apply in order to resolve the jurisdictional issues which would arise in such a situation.

(4) Is the husband's divorce proceeding in Scotland a "related action" for the purposes of article 13 of the Maintenance Regulation (as applied by Schedule 6)

and, pursuant to that provision, should the English court decline jurisdiction in respect of the wife's maintenance claim under section 27?

39. As stated by the CJEU in its judgment in the *Sanders/Huber* case at paras 23-25 (see para 33 above), the proper interpretation of the Maintenance Regulation requires consideration of its specific objects and adjustment of the more general rules applicable under the Brussels Convention in the light of those objects.

40. In my judgment, the husband's divorce proceeding in Scotland is not a "related action" within article 13 of the Maintenance Regulation. Therefore, neither article 13(1) nor article 13(2) has any application in this case to permit the English court to decline jurisdiction in relation to the wife's maintenance claim based on section 27.

41. As regards the claim under section 27, the wife is the maintenance creditor. As explained above, the Maintenance Regulation and Schedule 6 give her the right to choose in which jurisdiction, within those listed in article 3 (as adapted by paragraph 4 of Schedule 6), she wishes to bring her maintenance claim. She has an unfettered choice in that regard, and is entitled to choose to bring her claim in an English court on grounds of its convenience for her or because she believes that the law it will apply is more advantageous for her. It is a fundamental object of the Maintenance Regulation to confer that right on a maintenance creditor, and the scheme of that Regulation is replicated for intra-state cases by Schedule 6. Articles 12 and 13 of the Maintenance Regulation (including as they are replicated for intra-state cases by Schedule 6) have to be interpreted in the light of this object.

42. Article 3 of the Maintenance Regulation is concerned with defining the set of jurisdictions in which the maintenance creditor has the right to bring her claim. This is in line with the fundamental object of the Maintenance Regulation to protect the interests of the maintenance creditor as the weaker party and is also indicated by the text of the article itself, read in the light of the legislative history: see para 21 above.

43. Article 12 is directed to dealing with the position which could arise if a maintenance creditor brought maintenance proceedings in more than one court. The phrase "the same cause of action" in article 12(1) has to be read in the light of the objects of the Maintenance Regulation referred to in the case law cited above. Since article 3 allows a choice of jurisdiction and the substantive law to be applied in relation to a maintenance claim differs as between member states, I consider that the phrase refers to the nature of the claims being brought, ie as claims for maintenance of a specific person, rather than to the precise cause of action in law.

44. It is possible that, by cross-maintenance claims, each of a husband and wife might seek to claim that the other owes maintenance. Then, each of them would be the maintenance creditor in respect of his or her claim and would be entitled to exercise the choice of jurisdiction allowed for by article 3. In the context of the Maintenance Regulation, a core object of article 13 is to deal with this situation.

45. In article 13, read in the context of the Maintenance Regulation, I consider that the word "actions" refers primarily to maintenance claims of the kind to which the special regime in the Regulation applies. If the position were otherwise, and the word "actions" meant legal proceedings of any kind whatever, that would undermine the fundamental object of the Maintenance Regulation that a maintenance creditor has the right to choose in which jurisdiction to claim maintenance. On such a reading, there would be a substantial risk that this object of the Maintenance Regulation would be undermined by the commencement of proceedings by the maintenance debtor according to the jurisdictional provisions of instruments other than the Maintenance Regulation, laid down in pursuance of entirely different jurisdictional policies than that reflected in the Maintenance Regulation. By contrast, by reading "actions" as referring primarily to maintenance claims, such claims will be brought in exercise of the rights conferred by the Maintenance Regulation and hence in accordance with its objects and policy. Since it is the case that the Maintenance Regulation may have the effect of authorising more than one person to bring a maintenance claim, it needs to make provision for how a potential jurisdictional clash arising *within* the objects of the Regulation should be resolved. Any extension of the concept of "related action" beyond this in the context of the Maintenance Regulation has to be tested against the objects and policy of that Regulation, and accordingly will be narrowly confined to cases in which the risk of conflicting judgments is very clearly made out (an example would be if an obligation to provide maintenance were conditional on a marriage relationship actually continuing, and a court in another member state had been asked to dissolve the marriage, thereby bringing the relationship on which the obligation depends to an end: cf *Hoffman v Krieg* (Case C-145/86) EU:C:1988:61, [1988] ECR 645, a decision on article 27(3) of the Brussels Convention, which was concerned with irreconcilable judgments). The risk should be direct, real and present, not a speculative possibility.

46. By contrast with the situations in para 44 above, there is no relevant connection in the present case between the wife's maintenance claim under section 27 and proceedings concerned with determining marriage status, which is the subject of the Scottish proceedings brought by the husband. That these are distinct subject matters is underlined by their separation for jurisdictional purposes under the successive EU jurisdictional regimes. Article 3(c) of the Maintenance Regulation does not establish that proceedings concerning the marital status of a person must be regarded as related proceedings for the purposes of article 13. It merely adds a jurisdictional option which the maintenance creditor is entitled to choose, if she

wants to. To give it wider significance than that would undermine the fundamental object of the Maintenance Regulation to protect the interests of the maintenance creditor by giving her the choice of where to litigate her claim for maintenance, since it would enable the opposing spouse, who is the maintenance debtor, to choose where to sue in relation to the question of marital status and then to argue, by reference to article 13, that the maintenance creditor's maintenance claim must be brought in the same place.

47. In my opinion, interpreting article 13 of the Maintenance Regulation in light of the objects of that Regulation is an entirely conventional approach to interpretation of an EU legislative instrument. Contrary to the view of Lord Wilson, I do not regard this as being in any way at odds with the interpretation given to article 22 of the Brussels Convention by the House of Lords in a different context in *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32. As Lord Saville of Newdigate said in that case ([1999] 1 AC 32, 41F), the interpretation had to be arrived at "bearing in mind the objective of the article", and the objective of article 13 of the Maintenance Regulation has to be assessed in light of the fundamental object of the Regulation itself.

48. I should mention that in *Moore v Moore* [2007] EWCA Civ 361; [2007] 2 FLR 339, it seems (albeit it is not entirely clear) that the Court of Appeal may have assumed - but without deciding and with no critical examination of the issue - that a maintenance debtor might be able to bring a claim in a jurisdiction of *his* choice which included an adjustment of family property rights to take account of the maintenance requirements of his wife and that this might be a related action for the purposes of what is now article 13 of the Maintenance Regulation (previously article 28 of the Brussels Regulation). If they really meant to say this, I respectfully doubt that it is correct. It would mean that the maintenance debtor rather than the maintenance creditor could in practice choose the jurisdiction for the maintenance claim, which would have been directly contrary to the fundamental object of article 5(2) of the Brussels Regulation (and the fundamental object of what is now the Maintenance Regulation: see para 21 above). Whatever might have been the view of the Court of Appeal in relation to this point, it does not assist the husband in this appeal. His proceeding in Scotland does not involve any claim for distribution of family property, let alone distribution of family property with allowance to take account of the wife's maintenance needs.

49. In other respects, the decision in *Moore v Moore* supports the wife's case on this appeal that the husband's divorce proceeding in Scotland is not a "related action" for the purposes of article 13. So far as relevant for present purposes, the case concerned an English husband and wife who had relocated to Spain. Their relationship broke down and the wife returned to England. The husband filed a petition for divorce in Spain. On 24 April 2006 he made an application in Spain in the context of the divorce procedure for a judgment regarding financial aspects

arising from the divorce. In conjunction with this, he made a financial offer to the wife to divide up the family's capital assets in a way which he maintained would allow her to meet her reasonable needs and maintain her standard of living. On 24 May 2006, the wife commenced a maintenance claim in England. The husband objected to the jurisdiction of the English court, arguing that it should stay its proceedings in accordance with articles 27 or 28 of the Brussels Regulation (now articles 12 and 13 of the Maintenance Regulation). The wife, on the other hand, argued that her claim was the only claim relating to maintenance and therefore that articles 27 and 28 were not engaged and the English court had no power to stay her claim. At first instance, McFarlane J decided that the husband's application was not a claim for maintenance: its essential object was to seek a division of the family's capital assets and it was not a claim by the wife for maintenance; so article 5(2) of the Brussels Regulation was not engaged by the Spanish proceedings (see [2007] EWCA Civ 361; [2007] 2 FLR 339, paras 30-31). The Court of Appeal held that the essential object of the husband's application was to achieve sharing of the family property on his terms rather than an order based on financial needs, and consequently that it was not a matter relating to maintenance for the purposes of article 5(2), and therefore there would be no basis for the application of articles 27 or 28 of the Brussels Regulation (paras 94-95).

50. According to the Court of Appeal in *Moore v Moore*, the husband's petition for divorce and his application for financial relief in the divorce proceedings was not a "related action" in respect of the wife's claim for maintenance. I consider that this conclusion was correct. It reflects the different nature of the claims and the different jurisdictional regimes which govern issues of marital status and division of family property, on the one hand, and issues of maintenance on the other. *A fortiori* in the present case, where the only application the husband has made in the Scottish court is for a decree of divorce, the Scottish proceedings do not constitute a "related action" in respect of the wife's claim for maintenance in the English court.

51. In the present case, as in *Moore v Moore*, there has only ever been one maintenance claim, ie claim in a matter "relating to maintenance obligations" (in the language used in article 3 of the Maintenance Regulation). It is the section 27 claim brought by the wife in the English court in reliance on article 3(b) (as adapted by paragraph 4 of Schedule 6), on the grounds that she is habitually resident in England. Article 3 (as so adapted) provides that jurisdiction shall lie with that court. The English court is the court first seised of the maintenance claim, so if there were any question of the Scottish court considering a maintenance claim by the wife it would be obliged to refuse jurisdiction under article 12 of the Maintenance Regulation (as adapted by paragraph 12 of Schedule 6). As explained in *R v P*, if the wife wished to proceed with her maintenance claim in Scotland rather than in England, it would be open to her to withdraw her claim in England and issue a claim in Scotland.

52. Even if, contrary to my view above, a maintenance debtor might in principle be able to bring a claim of his own which in some sense comprehends a maintenance claim by the maintenance creditor against him and then argue that, as regards a maintenance claim brought by the maintenance creditor herself, either his claim involved the same cause of action between the same parties for the purposes of article 12 or was a related action for the purposes of article 13 of the Maintenance Regulation, that would not assist the husband on this appeal. The interpretation of the definition of "related action" in article 13(3) has to reflect the policy and objects of the Regulation. The definition in article 13(3) must be strictly applied, since if the husband sought to maintain such an argument he would be seeking to rely on article 13 to derogate from the fundamental object of the Maintenance Regulation (as replicated in Schedule 6 for intra-state cases) to provide a right for the wife, as maintenance creditor, to choose where to bring her maintenance claim; and he would be seeking to do so by reference to an action brought by himself which relates to marital status or the division of matrimonial property rather than maintenance. The special jurisdictional regime for maintenance claims is not lightly to be regarded as supplanted by the operation of a distinct jurisdictional regime designed for different types of case.

53. Still more clearly, on application of this approach to article 13(3), the divorce proceeding brought by the husband in the present case is not related to the wife's maintenance claim, within the meaning of article 13(3). The subject matters of the two sets of proceedings are not connected at all. The husband seeks a divorce, to end the marital status. The wife claims maintenance. It is only her claim which falls within the scope of the Maintenance Regulation. Similarly, as regards the possibility suggested by *Hoffman v Krieg* that in some circumstances a proceeding to dissolve a marriage might be regarded as related for the purposes of article 13, that does not assist the husband in this case. The wife's claim is not predicated on the result of the proceeding in Scotland, so there is no requirement that the two proceedings be heard and determined together to avoid the risk of irreconcilable judgments. An award of maintenance to the wife is in no way incapable of being reconciled with an order for divorce issued by the Scottish court.

54. With respect to Lord Wilson, I consider that the decision of Moor J in *N v N (Stay of Maintenance Proceedings)* [2012] EWHC 4282 (Fam); [2014] 1 FLR 1399 was wrong and that the Court of Appeal in the present case was right to overrule it. In *N v N* the husband issued divorce proceedings in Sweden. The wife, who was habitually resident in England, then brought a maintenance claim in England under section 27. She could have brought a maintenance claim in the course of the divorce proceedings in Sweden, but preferred to claim in England. Moor J held that the divorce proceedings and the maintenance claim were related actions for the purposes of article 13 of the Maintenance Regulation, on the basis of very summary and flawed reasoning (para 25):

> "The application here arises out of the marriage. There would be no jurisdiction to make an order if the parties were not married. The proceedings in Sweden relate to the dissolution of that very same marriage. They are undoubtedly related. Indeed, if article 13 of the Maintenance Regulation only applied to applications in each jurisdiction for maintenance, there would be no need for the article at all. The position would be covered by article 12. The two applications would be the same cause of action and would be automatically stayed without the need for the discretion given by article 13."

55. In so far as this reasoning does not simply rest on assertion, in my opinion it is wrong. Article 13 clearly does have a role in circumstances which Moor J had overlooked: see paras 43-44 above. On the basis that the divorce proceeding in Sweden and the maintenance claim in England were, in his view, related actions, Moor J held that the wife's maintenance claim in England should not proceed. His decision was, in my view, directly contrary to the intended effect of the Maintenance Regulation, which was to give the wife (as maintenance creditor) the right to choose the jurisdiction in which to bring her maintenance claim which was most convenient and advantageous for her. She was entitled to claim maintenance under section 27 whether or not the court in Sweden dissolved the marriage for the future, so it was not a case where there was a direct risk of irreconcilable judgments such as would justify application of article 13 by way of qualification of or departure from the fundamental object and policy of the Maintenance Regulation.

56. I find the reasons Moor J gave for his decision in para 28 revealing, as underlining the error which he made in his approach to the interpretation of the Maintenance Regulation. He took himself to be following the spirit of the jurisdictional rules in the Matrimonial Regulation (para 28(a)-(c) and (g)); but the jurisdictional regime in that Regulation is very different from the jurisdictional regime in the Maintenance Regulation, which was the relevant regime to be applied. Absent a clearly established risk of directly irreconcilable judgments (of the kind illustrated by *Hoffman v Krieg*), jurisdiction established under the Matrimonial Regulation in respect of a divorce procedure brought by a maintenance debtor should not be allowed to undermine the right of a maintenance creditor under the Maintenance Regulation to choose the jurisdiction for her maintenance claim. The judge relied on the fact that the husband's finances were based in Sweden (para 28(d)); but that ignores the importance under the Maintenance Regulation of the position of the wife (the maintenance creditor) and the identification of her needs in the place of her habitual residence, as explained in the Jenard report (para 10 above). The judge said, "[t]here is no prejudice to the wife as she can make her application in Sweden … I am quite satisfied that the only reason she has not done so to date is tactical" (para 28(e)). However, there was prejudice to the wife, because by his ruling the judge deprived her of her rights under the Maintenance Regulation and

her ability to rely upon section 27 as a matter of substantive law. He clearly thought that the wife had engaged in illegitimate forum shopping; but the Maintenance Regulation laid down a right for her to choose the forum in which to sue. She was entitled to do so by reference to tactical reasons. In the context of the Maintenance Regulation, there was nothing illegitimate in her deciding to bring her maintenance claim in England. At para 28(f) the judge said that it was "undoubtedly expedient to hear and determine the issues between these parties together in the same jurisdiction"; but the EU jurisdictional regimes expressly contemplate that different claims arising out of the marriage of the parties might well have to be determined in different jurisdictions. The judge also speculated in para 28(f) that the husband might be able to apply for a maintenance order against himself in Sweden; but it would be contrary to the Maintenance Regulation to allow him, as the maintenance debtor, by such a stratagem to determine the jurisdiction in which his wife's maintenance claim should be heard.

Conclusion

57. For the reasons given above, I would dismiss this appeal.

LADY BLACK:

58. I am grateful to Lord Sales and to Lord Wilson for their thorough description of the legal provisions with which we are concerned, and of the history of those provisions. I need not go over this material again and can proceed directly to deal with the issues that require determination. For the most part, in what follows, I will refer to the various legal instruments using the same shorthand as Lord Sales.

59. Lord Sales identifies four issues as arising in the appeal, which he lists at para 7, whereas Lord Wilson identifies five. The additional issue is whether the Maintenance Regulation (Council Regulation (EC) No 4/2009) ("the Maintenance Regulation") itself regulates the allocation of jurisdiction to hear maintenance applications as between the various parts of the UK. Lord Wilson deals with this as his first issue, and I take it first below. The remaining four issues are:

> i) Can an application for financial provision be made under section 27 of the MCA in a purely domestic case, or, given the terms of section 27(2) as amended, is section 27 now only concerned with cases where another jurisdiction outside the UK is also involved? (Lord Sales' Issue (1); Lord Wilson's Second Point)

ii) Can a UK court stay maintenance proceedings which are before it, in favour of proceedings in another part of the UK, on the basis that it is a less appropriate forum than the court in the other part of the UK? (Lord Sales' Issue (2); Lord Wilson's Fifth Point)

iii) If Schedule 6 to the 2011 Regulations (Civil Jurisdiction and Judgments (Maintenance) Regulations 2011) should be construed as preventing a stay of maintenance proceedings in one part of the UK in favour of proceedings in another part of it on a forum non conveniens basis, was it within the powers of the Secretary of State under section 2(2) of the 1972 Act to make regulations to that effect? (the third issue/point for both Lord Sales and Lord Wilson)

iv) Are the Scottish proceedings and the English proceedings in this case "related actions" within article 13 of Schedule 6 to the 2011 Regulations, and if so, should the English court stay/dismiss its proceedings on that basis? (the fourth issue/point for both Lord Sales and Lord Wilson)

Does the Maintenance Regulation determine intra-UK jurisdiction?

60. At paras 128-134 of his judgment, Lord Wilson rejects the Secretary of State's argument that the Maintenance Regulation itself determines questions of jurisdiction as between the various parts of the UK. I infer that Lord Sales is of the same view (see his para 22 where he refers to the implementation of the Maintenance Regulation by the 2011 Regulations). I too would reject this argument, for the reasons Lord Wilson gives.

Is section 27 confined to cases with an international element?

61. Turning to Lord Sales' Issue 1 (Lord Wilson's Point 2), both Lord Sales (para 26) and Lord Wilson (paras 135-140) would reject the husband's argument that section 27 relief is no longer available in purely domestic cases. I share their view that the argument is wrong. Lord Sales considers that the use of the word "and", in the section 27(2) provision that the "court may not entertain an application under this section unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6", might be said to be infelicitous. For the reasons given by Lord Wilson, I do not think that it is in fact inappropriate. Even though there is no need to have recourse to the Maintenance Regulation where there is no competing jurisdiction outside the UK, both parties naturally having gravitated to the courts of the member state entrusted with jurisdiction by Chapter II of the Maintenance Regulation, the Maintenance Regulation is still the foundation for the jurisdiction of

the UK courts. In such circumstances, a court might be said to have jurisdiction by virtue of *both* the Maintenance Regulation *and* Schedule 6, even in a purely domestic case. In the alternative, should it be wrong to view things this way, I would agree with Lord Sales' interpretation of section 27(2), namely that the drafter referred to "the Maintenance Regulation and Schedule 6" in order to encompass the whole field of inter-state and intra-state cases. Either way, the condition in section 27(2) can be satisfied in a purely domestic case.

Forum non conveniens discretion?

62. I now turn to Lord Sales' Issue 2 (Lord Wilson's Point 5), namely the question of whether there is a discretion to stay on the forum non conveniens basis. Lord Sales deals with the issue at paras 27 to 36. He concludes that there is no scope for the operation of a forum non conveniens discretion in the context of the legislative scheme in Schedule 6. I share Lord Sales' view, and I will attempt to explain, as shortly as I can, why that is. Lord Wilson reaches the same conclusion, but does so, as he explains in para 173, on a contingent basis, dependent on the reach of article 13. Although my conclusion is not contingent, I have still found myself much assisted by Lord Wilson's discussion of the arguments for and against the continuing availability of a discretion, as also by Lord Sales' analysis of the position.

63. My starting point is that ever since the Brussels Convention, it has been clear that there is no room for a forum non conveniens discretion in cases which are not purely domestic. That appears from *Owusu v Jackson* (Case C-281/02) [2005] QB 801, from which Lord Sales quotes extensively at para 28. It can be seen from the passages quoted that the decision to reject the doctrine was influenced significantly by the view that it would undermine the uniformity, and predictability, of the rules of jurisdiction, and thus legal certainty. The position was unchanged when the Brussels Convention was replaced with the Brussels Regulation (Council Regulation (EC) No 44/2001). And when the Maintenance Regulation came in, dealing separately with maintenance for the first time, the same approach applied, see *R v P* (Case C-468/18) [2020] 4 WLR 8, with which Lord Sales deals at paras 30 - 32. In this context, emphasis was placed on the objective of the Maintenance Regulation, which the CJEU said "consists in preserving the interest of the maintenance creditor, who is regarded as the weaker party in an action relating to maintenance obligations" (para 30 of the CJEU judgment), and on the importance of the right that the maintenance creditor has to choose from the range of courts featured in article 3. The Maintenance Regulation must be considered "exhaustive", said the CJEU (para 42 ibid), and it does not permit a court which has jurisdiction under one of the provisions of the Maintenance Regulation to decline jurisdiction on the basis that another court would be better placed to hear the case (para 44 ibid).

64. Schedule 6 to the 2011 Regulations, in seeking to regulate allocation of jurisdiction within the UK, kept the Maintenance Regulation centre stage. It will be recalled that Schedule 6 provides:

> "3. The provisions of Chapter II of the Maintenance Regulation apply to the determination of jurisdiction in the circumstances mentioned in paragraph 1, subject to the modifications specified in the following provisions of this Schedule."

65. The "circumstances mentioned in paragraph 1" are that there is (i) a jurisdiction clash between parts of the UK, and (ii) "the subject-matter of the proceedings is within the scope of the Maintenance Regulation". The "modifications specified" were, of course, set out in the rest of Schedule 6, many of them concerned with replacing references to "member state" with references to "part of the United Kingdom", although there *were* changes of other types too. As to these other changes, it is relevant for present purposes to note particularly that they included the disapplication of article 9 (which sets out when a court is deemed seised). In contrast, articles 12 and 13 (lis pendens and related actions) were not disapplied.

66. Having chosen to regulate the domestic allocation of jurisdiction by adopting (to a large extent) a model which, operating in its natural habitat, did not permit recourse to the forum non conveniens doctrine, did the drafters of the provisions nonetheless intend to leave the doctrine in place? As Lord Wilson observes at para 168, until the advent of the 2011 Regulations, UK courts *could* have recourse to the doctrine in maintenance proceedings when determining jurisdiction issues between the courts of different parts of the UK. But the pre-2011 law was significantly different. First, the version of the European regulation that was applied by Schedule 4 of the CJJA 1982 did not include the articles dealing with lis pendens and related actions. Secondly, the effect of section 49 of the CJJA 1982 (the saving for powers to stay, sist, strike out or dismiss proceedings) was clear. It provided that "[n]othing in this Act" was to prevent a court in the UK staying proceedings. Schedule 4 regulated allocation of jurisdiction around the UK, and Schedule 4 was plainly something "in this Act". It followed that nothing in Schedule 4 could prevent a stay on the basis of forum non conveniens, as indeed the Court of Appeal held in the *Cook* and *McNeil* cases (see Lord Wilson para 130).

67. If I put to one side for a moment the question of whether section 49 has a continuing role to play in relation to maintenance jurisdiction, it seems to me that Schedule 6 to the 2011 Regulations imports into domestic law a scheme which excludes stays on the basis of forum non conveniens. The principal jurisdiction provisions closely follow those of the Maintenance Regulation which firmly shut out the doctrine. And it can safely be assumed that those who drafted the 2011

Regulations shared, with the creators of the Maintenance Regulation, the objective of protecting the interests of the maintenance creditor, which objective was served by him or her having the choice of the available jurisdictions, a choice which could not be overridden by the selected court declining to entertain the proceedings. Furthermore, there is the inclusion in Schedule 6 (for the first time) of the lis pendens and related actions articles (articles 12 and 13).

68. I cannot persuade myself that articles 12 and 13 and a forum non conveniens discretion can sensibly co-exist. The first point to make is that the discretion to stay on forum non conveniens grounds is not confined within the conditions set out in articles 12 and 13, as Lord Wilson points out at para 166. If it continues to be available, it would be quite sufficient to enable the court to take action in the circumstances regulated by the articles. The articles are not therefore required as facilitative provisions.

69. It might be suggested, however, that rather than intending to provide the court with *power* to stay proceedings or to decline jurisdiction, the purpose of the articles was to *confine* the court's discretion, in certain cases, by stipulating the conditions for its exercise. I do not find that a convincing explanation for the inclusion of the articles, however.

70. My view can be tested by reference to article 13 (related actions). By article 13(1), any court other than the court first seised *may* stay its proceedings. It does not have to do so; it is given a discretion, with no restriction on how it is to be exercised. So far, therefore, the article adds nothing to the forum non conveniens discretion. But, it may be said, article 13(1) does limit the discretion to "any court other than the court first seised", whereas there is no such limitation with forum non conveniens which would permit even the court first seised to stay its proceedings if the circumstances justified it. True, but what purpose is served by article 13 limiting stays to courts other than the court first seised, if it can be circumvented by the first seised court, exercising a forum non conveniens discretion instead of acting under article 13?

71. Subject always to section 49, to which I will come shortly, it seems to me that what was intended was that the Schedule 6 scheme would follow the Maintenance Regulation model, relying exclusively on articles 12 and 13 to deal with cases where concurrent proceedings existed, ousting reliance on the forum non conveniens doctrine, and thus aligning the intra-UK position in this respect with the inter-state position, and protecting the interests of the maintenance creditor. Alignment was indeed what the Explanatory Memorandum to the 2011 Regulations said, at para 7.3, was intended:

> "Schedule 6, however, embodies a policy decision to align the rules of jurisdiction between the different parts of the UK on the provisions of the Maintenance Regulation …"

However, I reach my view without placing weight on the Memorandum, particularly given that, as Lord Wilson says at para 171, para 7.3 goes on to make the erroneous observation that when the Brussels Regulation (No 44/2001) came in, the law for domestic maintenance cases between UK jurisdictions was aligned with the requirements of the EU legislation. This was inaccurate because the articles of the Brussels Regulation (No 44/2001) which dealt with lis pendens and related actions were not adopted, and forum non conveniens intervention remained possible in domestic cases until the 2011 Regulations.

72. The final question then, is whether section 49 operates to preserve the forum non conveniens discretion, as Mr Horton submits that it does. Like Lord Sales, and for the reasons he sets out in para 35, I cannot accept this submission. It follows that, in my view, as Lord Sales says at para 36, there is no scope for the operation of a forum non conveniens discretion in the context of the legislative scheme in Schedule 6.

73. I should make plain that in ruling out the exercise of a forum non conveniens discretion in this context, I do not intend to suggest that normal case management powers are unavailable to the court. A stay/dismissal on the ground of forum non conveniens is the practical incarnation of a decision that another forum is the appropriate forum. It is a specialised order and must be distinguished from, for example, an order adjourning a case for a period in order that the court should be better able to decide it. To take an example unrelated to this case, if one court were to be determining issues between spouses as to residence of their children, the court determining the parties' financial issues might wish to await the first court's determination on residence, because it would potentially affect the needs and resources of the spouses. The same might apply if one court were determining maintenance and another determining property issues.

Was the removal of the forum non conveniens discretion ultra vires?

74. The third issue/point logically falls next for determination ie whether the removal of the forum non conveniens discretion was ultra vires the Secretary of State's powers in section 2(2) of the ECA 1972. Both Lord Wilson and Lord Sales would hold that it was not. I agree with them for the reasons that they give.

Were the proceedings related actions within article 13?

75. That leaves the question of whether the proceedings in this case fall within article 13 on the basis that they are related actions, and if so whether there should be a stay. For convenience, I will again set out article 13, in the amended form applicable to intra-UK cases:

> "1. Where related actions are pending in the courts of different member states or different parts of the United Kingdom, any court other than the court first seised may stay its proceedings.
>
> 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.
>
> 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."

76. Lord Wilson and Lord Sales differ on the application of article 13 to the present case. Lord Wilson would hold that there are related actions pending in England and Scotland, so that the English court, not being the court first seised, has power under article 13 to stay, and indeed to decline to entertain, the wife's application under section 27. Lord Sales considers article 13 inapplicable, and, given his conclusion that there is no power to stay proceedings on a forum non conveniens basis, this means that the English court proceedings would continue.

77. Lord Wilson reasons that, in contrast to article 12, article 13 applies to proceedings which do not involve the same cause of action. Although he considers that article 13(3) was probably intended to provide an exclusive definition of which actions are deemed to be related, he considers that too literal an interpretation of it would exclude situations to which article 13(2) appears to extend. He considers that the definition of related actions in article 13(3) must be driving at the situation where it is expedient to hear and determine together the issues raised in the two actions, and possible to do so because the actions can be consolidated in the court first seised and heard together there. So, he concludes, in light of the pending Scottish proceedings, the English court has power to stay/decline jurisdiction and the

husband's application to this end should be remitted to a judge of the Family Division to determine whether it should be exercised.

78. Lord Sales' reasoning revolves around the wife's status as maintenance creditor. It has, in essence, the following steps:

i) it was a fundamental object of the Maintenance Regulation to give the maintenance creditor the right to choose the jurisdiction in which to bring her claim;

ii) Schedule 6 to the 2011 Regulations replicates the Maintenance Regulation scheme;

iii) therefore Schedule 6 has to be interpreted in the light of the objective of giving the maintenance creditor the right to choose her jurisdiction;

iv) interpreting article 13 in that light, it should be narrowly confined so that "actions" refers primarily to maintenance claims of the kind to which the Maintenance Regulation regime applies;

v) any extension of the concept of "related action" beyond this needs to be confined to cases in which the risk of conflicting judgments is very clearly made out;

vi) it is not made out here because there is no relevant connection between the wife's section 27 maintenance claim in England and the proceedings concerning marital status in Scotland;

vii) if it were otherwise, the protection of the maintenance creditor would be undermined.

79. I have found the interpretation of article 13 extremely difficult. The natural response of a family lawyer might be to say that *obviously* one court should resolve all the financial issues that arise upon the ending of a marriage. Indeed, an initial response might be to go further and say that one court should resolve all the issues, of whatever sort, arising upon the ending of a marriage. Further thought would remind the family lawyer that that sort of consolidation is by no means universal, however. Two examples will demonstrate the point. First, jurisdiction in relation to parental responsibility issues is often dictated by the habitual residence of the child

(see domestic law and the Brussels II Revised Regulation (Council Regulation (EC) No 2201/2003)). Secondly, financial relief can be available in the courts of England and Wales, following the granting of an overseas divorce, under the Matrimonial and Family Proceedings Act 1984, including in situations where there has already been an order elsewhere for a payment, or transfer of property, to be made in favour of the applicant or a child of the family. Nevertheless, the idea of two courts within the United Kingdom both making orders which will regulate the finances of the parties to a marriage following divorce is not very palatable. And yet that is what the position might be if, as the Court of Appeal decided in a very clearly reasoned judgment, article 13 does not permit the court to intervene.

80. The husband's argument is that the Court of Appeal erred in its construction of article 13 for one of two alternative reasons. First, there was no need to construe the 2011 Regulations strictly in accordance with EU law, and the Court of Appeal should have construed the domestic incarnation of article 13 so as to allow for a stay in the present circumstances. But secondly, if it was right to construe the 2011 Regulations in accordance with EU law, it was wrong to proceed upon the basis that, as it is put in the husband's written case, "actions could only be related if they both had 'maintenance' as their cause of action". The Court of Appeal was wrong, in the husband's submission, to be guided towards this view by *Moore v Moore* [2007] 2 FLR 339 (see para 48 of Lord Sales' judgment and para 157 of Lord Wilson's judgment). Amongst other things, the judgments in *Moore* did not consider the lis pendens and related actions articles separately. If both actions had to have maintenance as their cause of action, article 13 would have a very limited scope indeed. On the contrary, in the husband's submission, proceedings for divorce and proceedings for maintenance, arising out of the same marriage, can be sufficiently closely connected to be related. If his appeal is not allowed, the husband says, the law will serve to encourage forum shopping, by maintenance creditors within the UK, in favour of England and Wales.

81. The wife argues that the Court of Appeal's analysis is unimpeachable. She submits that *Moore v Moore* is a complete answer to the husband's case, and there is an even stronger argument against the application of article 13 in the present case than there was in the *Moore* case, because in *Moore* there were ancillary financial proceedings in Spain, whereas in the present case there are merely divorce proceedings with no financial aspects in Scotland. As for the husband's proposal that there should be a more permissive interpretation of article 13 for domestic proceedings, the wife's submission is that there is no warrant for that, given the importation of articles 12 and 13 from the Maintenance Regulation into domestic law. And in any event, no matter how broad the interpretation, article 13 could not encompass the two sets of proceedings in this case.

82. I have already explained that in my view, the 2011 Regulations were intended to follow the scheme of the Maintenance Regulation, and that those who

drafted the 2011 Regulations shared the objective of protecting the maintenance creditor by conferring on him or her a choice from whatever jurisdictions were available on the facts of a particular case. The provisions of article 13 must, I think, be interpreted in light of that choice and the protection it is intended to confer. If article 13 is interpreted as widely as the husband submits it should be, the protection of the maintenance creditor would be diluted. The facts of the present case demonstrate that the maintenance creditor's habitual residence will not necessarily be in the part of the United Kingdom which has jurisdiction over the divorce suit. If the wife has to pursue her maintenance claim in Scotland, alongside the divorce there, she will have been deprived of the possibility of litigating in her place of habitual residence.

83. I can see the attraction of Lord Wilson's approach of looking to see whether it is expedient to hear and determine the issues raised in the two actions together. However, even giving heed to the helpful observations of Lord Saville of Newdigate in *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32, 41, to the effect that a broad common sense approach should be taken to whether actions are related (see Lord Wilson's judgment at para 155), I cannot reconcile Lord Wilson's rather wide interpretation with the wording of article 13 or the objective of the Maintenance Regulation or of the 2011 Regulations.

84. In explaining why I say this, and what my interpretation of article 13 would be, I would start by noting that article 12 and article 13 must be dealing with different situations, otherwise there would be no point in having both of them. If the two sets of proceedings in question were maintenance claims by the wife against the husband, one could expect the situation to fall within article 12 (same cause of action, same parties), so article 13 must be intended to extend further than that. In contrast to article 12, it does not require that the proceedings involve the same cause of action between the same parties. It is focused instead on "related actions". The ambit of this category is to be ascertained from article 13(3), which, like Lord Wilson, I think is intended to be a complete definition. Related actions are, accordingly, actions which 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". Articles 13(1) and 13(2) concern only "related actions" which come within this definition, article 13(1) referring to the situation "[w]here related actions are pending …" and article 13(2) referring back to this in its opening words "[w]here these actions are pending …".

85. It is plain from article 13(3) that the actions have to be closely connected. But that is insufficient to define a related action for the purposes of the article. Actions could be said to be closely connected if they were both brought by the same litigant, but if one action was against a retailer in respect of a defective domestic appliance and the other was a petition for divorce, no one would suggest that they

were related actions for article 13 purposes. The reference to avoiding the risk of irreconcilable judgments is vital, therefore, in fixing the boundaries of the category.

86. We are asked to draw from *Moore v Moore* the principle that to be related, both actions must relate to maintenance. It will be recalled that in *Moore*, they did not, because, whether or not the wife's application in England, under Part III of the Matrimonial and Family Proceedings Act 1984, involved maintenance, the husband's application in Spain did not, being concerned with a division of matrimonial property. The Court of Appeal in the present case relied on *Moore* as providing the answer (see paras 89 to 92 of King LJ's judgment), concluding that separate applications, one concerning status alone (Scotland) and the other for maintenance (England), could not be related, "when in the *Moore* case the Court of Appeal held that a general application for financial relief and a discrete application for maintenance were not".

87. The husband argues that no reliance should be placed on *Moore v Moore* because the Court of Appeal in that case did not, in fact, address the issues that arise in relation to article 13, not having given any specific attention to its precursor, article 28 of the Brussels Regulation (No 44/2001). For my part, I do not consider that there is much to be gained from arguing over the detail of *Moore v Moore*, although it is important to have regard to the fact that the court there, on stronger facts than those of the present case, found no basis to stay the English proceedings. The decision is also useful in pointing up the firm distinction made in what is there called "the Brussels regime" (for present purposes, the Brussels Convention of 1968, the Brussels Regulation, Brussels II (Council Regulation (EC) 1347/2000), and in due course Brussels II Revised, and the Maintenance Regulation) between maintenance on the one hand, and rights in property arising out of a matrimonial relationship on the other. As Lord Sales says at paras 17 and 46 of his judgment, maintenance obligations and questions of marital status are also treated as separate matters for jurisdiction purposes.

88. Similarly, I would not linger too much over the case of *N v N (Stay of Maintenance Proceedings)* [2014] 1 FLR 1399 (see para 54 of Lord Sales' judgment and para 156 of Lord Wilson's judgment), which is relied upon by the husband, who commends the analysis of Moor J, but which the Court of Appeal in the present case concluded was wrongly decided (para 87 of King LJ's judgment). In my view, what is important is to go back to the wording of article 13 and to interpret it in the light of the objectives of the regulatory scheme which the 2011 Regulations have adopted to cater for intra-UK cases.

89. So what sort of proceedings are likely to be closely connected in a way which would give rise to a risk of irreconcilable judgments within the meaning of article 13(3)? I do not intend to offer a definitive answer to this question - all that is

required is to determine whether the two sets of proceedings in this case were related actions, and further mapping out of the territory of article 13 ought to wait until it is required to cater for other facts. But examples of the sorts of situations that *might* fall within article 13(3) can still be helpful in ascertaining its meaning. Two such useful examples can be found in the husband's written case. They are: (1) where a spouse is being pursued for maintenance by his or her first and second spouse at the same time, and (2) where there are child maintenance proceedings in one court, and spousal maintenance proceedings in another (assuming of course that these are considered to be two separate causes of action). Lord Sales suggests the situation where there are cross-applications for maintenance, by the wife against the husband in one part of the UK and by the husband against the wife in another (see para 44 of his judgment). He gives a further example at para 45, inspired by the case of *Hoffman v Krieg* (Case 145/86) [1988] ECR 645. Another possibility might be where one spouse (say, the wife) applies for maintenance from the other spouse in one part of the UK and, in another part, the husband applies for an order against himself (see *Dart v Dart* [1996] 2 FLR 286, 292). Again, this would depend on whether or not the two actions were, in fact, classed as "proceedings involving the same cause of action" and therefore within article 12 rather than article 13. It is also worth noting that, in this last example, there would need to be consideration of the point made by Lord Sales, at para 46 of his judgment, about the potential problems of a maintenance debtor choosing the jurisdiction for a maintenance claim. But, in all of these examples, it is possible to foresee that, depending on the precise facts, there could be a risk of the two courts giving irreconcilable judgments. Furthermore, looking particularly at article 13(2), as Lord Wilson does, it is possible to contemplate that, in any of these examples, the first instance court first seised might have jurisdiction over both actions, and be permitted to consolidate them.

90. The present case is, in my view, materially different from these examples. As I see it, the Court of Appeal was right to decide that here, where one action deals with status and the other with maintenance, there can be no risk of irreconcilable judgments. It was not deflected from its conclusion by the fact that an application *could* be made for financial relief in the Scottish proceedings. What mattered, it considered (and I agree) was that the Scottish Court was not actually seised of the question of maintenance. Moreover, as Lord Sales says at para 53, even the *Hoffman v Krieg* inspired possibility that in some circumstances a proceeding to dissolve a marriage might be regarded as related for article 13 purposes does not assist the husband here. A judgment in the wife's maintenance claim would not be irreconcilable with a divorce decree in Scotland, as provision made under section 27 can survive divorce (see section 28 MCA).

91. Concentrating therefore on the wording of article 13, and reminding myself of the special objective of protecting the maintenance creditor, and of the roots that the article has in the European tradition of a firm separation of maintenance and property issues, I agree with the Court of Appeal, and with Lord Sales, that the

English and the Scottish proceedings are not related actions. The frustration that a UK family lawyer might feel, when contemplating the potential fragmentation of the proceedings required to resolve the financial affairs of the husband and wife upon the ending of their marriage, is understandable. It is, however, in my view, a consequence of the system that has been adopted by the 2011 Regulations, promoting maintenance as a separate claim, and prioritising the needs of the maintenance creditor.

92. I should add that I am grateful to Lord Wilson for his searching postscript, which has caused me to revisit my own view of the issues in the case, and to subject it to further careful scrutiny. In the end, however, this process has not caused me to alter my analysis, even though I entirely understand how frustrating the result might be for those who become involved, in whatever capacity, in litigation within the United Kingdom concerning family finance.

LORD WILSON: (dissenting) (with whom Lady Hale agrees)

Issue

93. A husband, habitually resident in Scotland, lodges a writ for divorce in Scotland. His wife, now habitually resident in England, is constrained by the law to concede that the divorce should proceed in Scotland; so she consents to the dismissal of the petition for divorce which she has issued in England. She wishes to make financial claims against the husband. But, instead of then making them within the Scottish proceedings for divorce, she issues an application in England in which she alleges that he has failed to provide reasonable maintenance for her and so should be ordered to make periodical payments to her and to pay her a lump sum. The issue is whether the English court has power to stay the application made to it by the wife and thereby in effect to require her to make her financial claims against him within the Scottish proceedings for divorce. It is common ground, and a subject of current political debate, that financial awards to a spouse following both separation and divorce are more generous in England and Wales than in Scotland. This fact explains the genesis of the issue but plays no part in its resolution.

94. One would expect resolution of the issue to be straightforward. In fact it proves to be absurdly complicated.

Facts

95. The husband is aged 57 and the wife is aged 61. They married in England in 1994. From 1995 until their separation in 2012 they lived in Dumbarton, which lies

north west of Glasgow. There was a child of the marriage, now adult. Upon separation, the wife came to live south of the border, now in London, and she has become habitually resident in England. The habitual residence of the husband continues to be in Scotland.

96. In 2013 the wife issued a petition for divorce in England. In 2014 the husband lodged a writ for divorce in Scotland. Since they had last resided together in Scotland and had by then been habitually resident there for at least a year, the English court was obliged to stay the wife's petition: section 5(6) of, and paragraph 8(1) of Schedule 1 to, the Domicile and Matrimonial Proceedings Act 1973 ("the DMPA"). In January 2015, after it had been stayed, her petition was by consent dismissed. But thereupon the wife issued an application in England under section 27 of the Matrimonial Causes Act 1973 ("the MCA"). Such applications are rare.

97. The ground of the wife's application under section 27 of the MCA was that the husband had failed to provide reasonable maintenance for her. Upon that ground she sought orders that he should make periodical payments to her under subsection (6)(a) and should pay her a lump sum under subsection (6)(c). Under section 27 a court in England (and of course Wales) has no power analogous to its power when granting a divorce to order a transfer of, or other adjustment of, property in favour of an applicant or to make a pension sharing order. An applicant under section 27 has to be a party to a subsisting marriage. The marriage between these parties subsists even now because no decree of divorce has yet been granted to the husband pursuant to his writ in Scotland. An order for periodical payments under subsection (6)(a) cannot extend beyond the joint lives of the parties: section 28(1)(a). It can extend beyond the parties' later divorce. In that event, however, it would also end on the payee's remarriage: section 28(2). By contrast the inevitable future grant of a decree of divorce in Scotland will not enable the wife to apply in England for financial relief following overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act"): for, by section 27 of it, Scotland is not an overseas country.

98. The husband, acting in person, defended the wife's application under section 27 of the MCA, which was determined by Parker J on 8 July 2016, [2016] EWHC 668 (Fam), [2017] 1 FLR 1083. The husband's first contention was that the wife had not been habitually resident in England on the date of issue of her application, with the result that the court would have lacked jurisdiction to entertain it. Parker J rejected the husband's first contention, about which nothing further need be said. His second contention was that, even if the court had jurisdiction to entertain it, it should stay the wife's application in the light of the writ for divorce in Scotland, the lodging of which had preceded it. The arguments presented to Parker J in this regard bore little relation to those which have since developed. At all events Parker J refused to stay the application and proceeded to make an interim order for the husband to make periodical payments to the wife. She also made an order for

payments by the husband in respect of the cost of legal services to be obtained by the wife; and whether the judge had jurisdiction to do so is irrelevant to this appeal.

99. The husband, still acting in person, applied to the Court of Appeal for permission to appeal against the orders made by Parker J. His application was refused on paper. Then, however, the Bar Pro Bono Unit assigned to him the services of Mr Horton and Mr Laing. At an oral renewal of the application, they secured permission for him to appeal to the Court of Appeal. They have continued to represent him, free of charge, in his substantive appeals to the Court of Appeal and now before this court. The amount of work which they have done for him is phenomenal; and its high quality will become evident as this judgment proceeds.

100. By a judgment delivered by King LJ on 17 May 2018, with which David Richards and Moylan LJJ agreed, the Court of Appeal dismissed the husband's appeal: [2018] EWCA Civ 1120, [2019] Fam 138. Its dismissal of the two, alternative, grounds for a stay of the wife's application, pressed upon it on behalf of the husband, is better explained when, later in this judgment, those grounds are examined. Its reasons for dismissal of the husband's subsidiary objections to the orders for interim periodical payments and for payments in respect of the cost of legal services are irrelevant to this further appeal.

Rival Jurisdictions in Respect of Maintenance

101. For reasons which will become clear, analysis of the law in relation to the stay or dismissal of a claim for maintenance in England in favour of the jurisdiction of Scotland or Northern Ireland must be accompanied by an analysis of EU law in relation to such an issue as between member states. The two analyses must go hand in hand; and they must be both historical and chronological in order for them to illumine the evolution of these laws up to the present day.

History

102. The history begins with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 ("the 1968 Convention"). The fourth paragraph of its preamble made clear that it governed international jurisdiction, in other words as between one contracting state and another. It did not purport to provide for the allocation of jurisdiction between such different legal parts of a contracting state as might exist. Indeed in due course the European Court of Justice ("the ECJ") expressly recognised that it did not thus provide: *Kleinwort Benson Ltd v Glasgow City Council* (Case C-346/93) [1996] QB 57. The civil matters within the scope of the convention included claims

for spousal maintenance. The basic jurisdictional provision, set out in article 2, was that a person domiciled in a contracting state should be sued there. But article 5(2) made special provision in matters relating to maintenance; for the "maintenance creditor", in other words the applicant for maintenance, could instead sue in the place where she or he was domiciled or habitually resident. As the Advocate General of the ECJ explained in *Farrell v Long* (Case C-295/95) [1997] QB 842, paras 69 to 71, there were two main reasons for the grant of this option: first, the applicant for maintenance was likely to be the more impecunious of the parties and might be unable to afford to go abroad to sue in the state of the respondent's domicil; and, second, the court of the place of the applicant's domicil or habitual residence was better placed to assess her or his needs. By articles 21 and 22, under the heading "Lis pendens - related actions", the convention provided for the determination of issues of rivalry between contracting states in relation to the exercise of the jurisdiction for which it provided; but, since the substance of these articles was later replicated in a second, and even more relevantly a third, community instrument, there is no need further to consider them at this stage.

103. Schedule 1 to the DMPA governed - and continues to govern - the staying of matrimonial proceedings in England in favour of the jurisdictions of Scotland and Northern Ireland. Indeed, as noticed in para 96 above, it operated so as to require a stay of this wife's English petition for divorce. But, by paragraph 2 of Schedule 1, matrimonial proceedings are so defined as not to include an application for maintenance made outside proceedings for divorce or for relief analogous to divorce.

104. On 1 January 1973 the UK became a member of what later came to be called the European Union; and it ratified the 1968 Convention. On 1 January 1987 most of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") came into force. By section 2(1), it gave the force of law in all three legal parts of the UK to the 1968 Convention, in other words so as to regulate jurisdiction as between any of those parts on the one hand and another contracting state on the other. But, by section 16, entitled "Allocation within UK of jurisdiction in certain civil proceedings", it also extended provisions in the 1968 Convention, albeit in a modified form, so as to regulate jurisdiction to entertain civil proceedings within the scope of the convention as between one part of the UK and another part of it. Paragraph 1 of Schedule 4, to which section 16 gave effect, imported, albeit with modification, the basic provision that a person domiciled in one part of the UK should be sued in the courts of that part. But, again with modification, it also imported the special provision in the convention under which an applicant for maintenance could instead sue in the place where she or he was domiciled or habitually resident. In that way the indulgence given to the applicant for maintenance in the convention was carried into the domestic law of the UK. But the provisions in articles 21 and 22 of the convention entitled "*Lis Pendens* - related actions" were not imported into Schedule 4. So, unless other provision were to be made in the 1982 Act, there would be nothing to

determine issues of jurisdictional rivalry between the three parts of the UK in relation to civil proceedings within the scope of the convention.

105. In England the High Court has an inherent power to stay proceedings before it. The power, being inherent at common law, has not been conferred by statute. But its existence has long been recognised in statute: see section 24(5) of the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66), and now section 49(3) of the Senior Courts Act 1981. The power has also been extended to the county court: see section 76 of the County Courts Act 1984.

106. It was this inherent power to stay proceedings which was specifically recognised in the 1982 Act as applicable to proceedings brought in England pursuant to Schedule 4. For section 49 provides:

> "Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention …"

Inasmuch as the 1968 Convention did not extend to the subject-matter of Schedule 4, namely the allocation of jurisdiction as between the three parts of the UK, a stay of proceedings brought pursuant to the schedule would not be inconsistent with the 1968 Convention. In their General Note to Schedule 4 in *Current Law Statutes Annotated 1982*, its authors explain the omission from the schedule of articles 21 and 22 of the convention. They refer to section 49 and assert that it enables the courts of the different parts of the UK, in relation to jurisdiction as between themselves, to "adopt a more sophisticated approach of assuming or yielding jurisdiction according to the court which is considered most suitable for disposing of the case than is provided for in the [articles], which [adopt] the rule that the court first seised shall have jurisdiction".

107. The English stay and the Scottish sist to which section 49 of the 1982 Act referred, and still refers, were "on the ground of *forum non conveniens* or otherwise". It is possible that, in referring to "*forum non conveniens*", the drafter of the 1982 Act regarded it as the ground only of a Scottish sist; and that the word "otherwise" was intended to cover the ground of an English stay. For it was only in 1986, four years after the Act's passage into law, that the principle of *forum non conveniens* was squarely adopted as part of English law: *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460. In Chapter 3 of "*Forum (Non) Conveniens in England*" (2019), Ardavan Arzandeh charts the slow movement of the principle across the border. In summary

(a) the principle had been established in Scotland by 1873: *Macadam v Macadam* (1873) 11 M 860;

(b) the ground for a stay of proceedings in England was narrower, namely whether they were vexatious and oppressive: *McHenry v Lewis* (1882) 22 Ch D 397;

(c) the narrowness of the English ground, which persisted for 90 years, betrayed a degree of arrogance that proceedings in England were intrinsically better than proceedings elsewhere, exemplified by comments by Lord Denning MR in the Court of Appeal in *The Atlantic Star* [1973] QB 364, 381-382;

(d) on further appeal in that case, [1974] AC 436, the House of Lords, while not expressly adopting the Scottish principle, moved closer to it by enlarging the considerations relevant to a stay; and

(e) in the *Spiliada* case, cited above, the House of Lords, in squarely adopting the Scottish principle as part of English common law, defined the basis of it to be to permit a stay "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice": Lord Goff of Chieveley, at p 476.

108. It is surely better to use English language when attempting to explain English law. In the *Spiliada* case Lord Goff observed at pp 474-475 that "appropriate" was a better translation of the Latin word "*conveniens*" than "convenient". The Latin word "*forum*", however, has also become an English word. So, in what follows, I will refer to the principle as being that of the less appropriate forum.

109. The history continues with Council Regulation (EC) No 44/2001, 22 December 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("the Judgments Regulation" or "the Brussels Regulation"). The regulation came into force on 1 March 2002 (article 76) and it superseded the 1968 Convention (article 68). It covered much of the ground which the 1968 Convention had covered; and, like that convention, it contained nothing to indicate any purported regulation of jurisdiction as between the different legal parts of a member state. Its main purpose, explained in its sixth recital, was to make provisions which, unlike those in the convention, would be "binding and directly applicable". Since it was a regulation, such was its effect. Like the convention, it

applied to jurisdiction in matters relating to maintenance; and, by article 5(2), it continued the specific provision for an applicant for maintenance to have the option to proceed in the courts for the place where she or he was domiciled or habitually resident rather than in the courts of the member state in which the respondent was domiciled. By articles 27 and 28, in the section entitled "*Lis pendens* - related actions", the regulation repeated articles 21 and 22 of the convention subject only to some verbal re-arrangement.

110. Albeit out of chronological order, it is appropriate to note here that, with effect from 10 January 2015, the Judgments Regulation was recast by Regulation (EU) No 1215/2012, 12 December 2012, ("the Recast Judgments Regulation"). It will be necessary to refer to one article of this in para 152 below.

111. The supersession of the 1968 Convention by the Judgments Regulation required substantial amendment to the 1982 Act. This was achieved by the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929). But, as in the case of their predecessors in the convention, there was no attempt to import the rules in articles 27 and 28 of the Judgments Regulation into the substituted rules in Schedule 4 for the allocation of jurisdiction within the UK. Issues of jurisdictional rivalry within the UK remained solely governed by section 49 of the 1982 Act, which was not amended.

112. Next in time came Council Regulation (EC) No 2201/2003, dated 27 November 2003 ("the Brussels II Revised Regulation" or "the Matrimonial Regulation"), which, in expanding the rules of an earlier regulation, applied to the allocation of jurisdiction as between member states not only in matters of divorce or analogous to divorce but also in most matters relating to children. By paragraph 3(e) of article 1, however, matters of maintenance were excluded from the regulation. As was explained in its eleventh recital, they were to continue to be covered by the Judgments Regulation.

113. Now at last we reach the two pieces of legislation which lie at the heart of the appeal. The first is Council Regulation (EC) No 4/2009, 18 December 2008, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in matters relating to Maintenance Obligations ("the Maintenance Regulation"). The second is the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484) ("the 2011 Regulations"), made by the Secretary of State for Justice pursuant to section 2(2) of the European Communities Act 1972 ("the 1972 Act") and extending to all parts of the UK. Both pieces of legislation came into force on 18 June 2011.

114. The effect of the Maintenance Regulation was to remove from the Judgments Regulation the EU's rules in respect both of the rights of its members to determine maintenance applications and of their reciprocal obligations to recognise and enforce maintenance orders: article 68(1). It is a bespoke regulation which addresses only maintenance obligations; and in relation to them it widened, and no doubt improved, the rules in the Judgments Regulation.

115. In its first recital to the Maintenance Regulation the EU Council referred to its intention to adopt measures relating to judicial cooperation in civil matters "having cross-border implications". In its fourth recital it recorded an invitation made to it in 1999 to establish common procedural rules to simplify and accelerate the settlement of "cross-border disputes" concerning maintenance applications. In its ninth and tenth recitals it stated as follows:

> "(9) A maintenance creditor should be able to obtain easily, in a member state, a decision which will be automatically enforceable in another member state without further formalities.
>
> (10) In order to achieve this goal, it is advisable to create a Community instrument in matters relating to maintenance obligations bringing together provisions on jurisdiction, conflict of laws, recognition and enforceability, enforcement, legal aid and cooperation between Central Authorities."

Article 3 of the regulation, in Chapter II entitled "Jurisdiction", defines the general jurisdiction of a member state to determine a maintenance application in terms different from those of the Judgments Regulation. But, as before, the applicant for maintenance is given an initial choice. For jurisdiction is conferred on the court for the place where (a) the respondent or (b) the applicant is habitually resident; or, if the maintenance application is ancillary to divorce proceedings, it is conferred, (c), on the court which has jurisdiction to hear them. The significance of this third basis of jurisdiction will already be apparent: it is that the regulation expressly recognises that a claim for maintenance can appropriately be made in the divorce court. A fourth basis, (d), is irrelevant. It will be seen that in the present case the Scottish court would have jurisdiction on the first and third bases and that the English court has jurisdiction on the second basis.

116. The Maintenance Regulation did not change the rules which required or permitted the court of a member state to stay proceedings in respect of which jurisdiction had been conferred on it in favour of the court of another member state. For articles 27 and 28 of the Judgments Regulation were repeated, word for word,

in articles 12 and 13 of the Maintenance Regulation. Article 12, entitled "Lis pendens", provides:

> "1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, 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.
>
> 2. 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 13, entitled "Related actions", is of central importance to the resolution of this appeal. It is better set out in para 147 below, where it must begin to receive close attention.

117. Articles 12 and 13 of the Maintenance Regulation both refer to the seisin of the court, as had articles 27 and 28 of the Judgments Regulation and indeed articles 21 and 22 of the 1968 Convention. The 15th recital of the Judgments Regulation had declared that there should be a clear "mechanism for … obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending [and for] the purposes of this Regulation that time should be defined autonomously". The autonomous concept of seisin had therefore been defined in article 30 of the Judgments Regulation; and the definition was repeated, in effect word for word, in article 9 of the Maintenance Regulation in order to enable articles 12 and 13 to be similarly interpreted throughout the member states. It is unnecessary to set it out.

118. The principal purpose of the 2011 Regulations was to facilitate the application of the Maintenance Regulation within the UK. Since the latter was to come into force on 18 June 2011, it was necessary for the 2011 Regulations also to come into force on that date. Unfortunately the Ministry of Justice left it late to make the regulations, which, under paragraph 2(2) of Schedule 2 to the 1972 Act, were subject to the negative resolution procedure. They were both made and laid before Parliament on 13 June 2011 and so came into force only four clear days later. In addition to the Explanatory Note appended to the regulations, an Explanatory Memorandum was also laid before Parliament for the attention of its Joint Committee on Statutory Instruments. In the memorandum the Ministry expressed regret for the breach of the convention which requires instruments subject to the negative resolution procedure to be laid before Parliament at least 21 days before

they come into force. It is unclear whether the committee had any opportunity during those four days to consider the regulations.

119. Annexed to the Explanatory Memorandum was a Transposition Note, in which, at para 5, the Ministry of Justice stated:

> "These regulations do not go beyond what is necessary to facilitate the application of the Maintenance Regulation in the United Kingdom, with one minor exception."

This "minor exception" was the product of a decision that, just as the EU was removing its rules in respect of maintenance issues from the Judgments Regulation and was placing them into a regulation of their own, so too the UK should remove its rules for the allocation of maintenance proceedings within the different parts of the UK from the 1982 Act and should place them separately, namely within Schedule 6 to these regulations. Their removal from the 1982 Act was effected by paragraph 11 of Schedule 4 to the regulations. But the rules were not just to be placed separately: they were to be changed, at least to some extent. In its Explanatory Memorandum the Ministry stated, at para 3.3:

> "The Department's view was that the policy decision to align the jurisdiction scheme for intra-UK cases on the jurisdictional rules of the EU Maintenance Regulation was the right approach as this replicated what was done in 2002 when the [Judgments Regulation] was implemented …"

Unfortunately, as will be explained in para 171 below, it was not correct to say that the provisions of the 1982 Act had been "aligned with" the Judgments Regulation in 2002. In para 7.3 of the memorandum the Ministry proceeded to explain that the rules in Schedule 6 would determine "which court [within the different parts of the UK] will have power to deal with" applications within the scope of the Maintenance Regulation.

120. How much consultation had the Ministry conducted in relation to the proposed content of Schedule 6 to the 2011 Regulations? The answer is given in para 8.1 of the Explanatory Memorandum: there had been a "limited specialist technical consultation" which had extended to the entire contents of the proposed regulations and which had lasted for only three weeks. The absence of any proper consultation in relation to Schedule 6 and of any sensible opportunity for parliamentary scrutiny of it may help to explain why it is in part an unsatisfactory piece of legislation.

121. Paragraph 1 of Schedule 6 to the 2011 Regulations, to which regulation 8 gave effect, provides:

> "The provisions of this Schedule have effect for determining, as between the parts of the United Kingdom, whether the courts of a particular part of the United Kingdom … have … jurisdiction in proceedings where the subject-matter of the proceedings is within the scope of the Maintenance Regulation as determined by article 1 of that Regulation."

Although the reference is to whether the courts "have" jurisdiction, it seems clear that the provisions of the schedule are also intended to govern, at least to some extent, whether they should exercise such jurisdiction as they have.

122. Paragraph 3 of Schedule 6 provides:

> "The provisions of Chapter II of the Maintenance Regulation apply to the determination of jurisdiction in the circumstances mentioned in paragraph 1, subject to the modifications specified in the following provisions of this Schedule."

123. Paragraph 12 and, being of central importance to the resolution of this appeal, paragraph 13 of Schedule 6 provide:

> "12. Article 12 applies as if after 'different member states' there were inserted 'or different parts of the United Kingdom'.
>
> 13. Article 13 applies as if after 'different member states' there were inserted 'or different parts of the United Kingdom'."

124. The reader of para 117 above will recall that articles 12 and 13 of the Maintenance Regulation fall to be construed by reference to the autonomous concept of seisin, which is defined in its article 9. Paragraphs 12 and 13 of Schedule 6 to the 2011 Regulations make no change to the reference to seisin in articles 12 and 13 of the regulation. Why then does paragraph 10 of the Schedule provide that "article 9 does not apply"? Sir James Eadie, on behalf of the Secretary of State, confesses to having no clear answer; and he concedes that the absence of a definition of seisin for the purposes of construing articles 12 and 13, as modified for the purposes of Schedule 6, is unsatisfactory. UK courts, so it seems, are expected to seek to interpret the concept by provisions of their own laws.

125. It is important to realise that it was only part of the Maintenance Regulation which was imported, as modified, into Schedule 6 to the 2011 Regulations. The importation relates only to the rules in Chapter II of the Maintenance Regulation entitled "Jurisdiction". There was no attempt to import the rule entitled "Applicable Law" in Chapter III of the regulation nor the rules entitled "Recognition, Enforceability and Enforcement of Decisions" in Chapter IV of it. Under Chapter III the applicable law falls to be determined by reference to the Hague Protocol dated 23 November 2007, the effect of which, for those states which have ratified it (not including the UK), is that, subject to exceptions, maintenance obligations are governed by the law of the state of habitual residence of the applicant for maintenance. Within the UK, however, the court of such part as has jurisdiction under Schedule 6 will determine the application for maintenance by reference to its own law. Equally, the recognition and enforcement in one part of the UK of a maintenance order made in another part of it (including an order made in England under section 27 of the MCA) are governed by the provisions for registration and enforcement in sections 16 to 18 of the Maintenance Orders Act 1950.

126. A footnote to this section requires the reader, however briefly, to step back from Schedule 6 to the 2011 Regulations and into the text of the regulations themselves. Regulation 10 obliged the Secretary of State to review the operation of the regulations in England and Wales and to publish his conclusions in a report. He was obliged to do so by 18 June 2016. Now, almost four years later, no such report has been published. Sir James has no instructions with which to explain the reason for this breach of the law - indeed of the Secretary of State's own law. The breach is irrelevant to the disposal of this appeal. But it does not follow that we should overlook it. We should direct the Secretary of State within 28 days to submit proposals for his belated compliance with Regulation 10.

Five Points

127. Does, then, the English court have power in one way or another to stay the wife's application? Five points are raised. In my view the first three and the fifth should be rejected; but the fourth should be upheld.

First Point

128. The first point arises out of the third. By the latter, the husband asserts that within Schedule 6 to the 2011 Regulations the Secretary of State included a provision which he had no power to include. It is this third point, not raised in the Court of Appeal, which has precipitated the intervention of the Secretary of State in this further appeal.

129. By his intervention the Secretary of State introduces a startling point which logic requires the court to consider first. It is at least arguable, so he contends, that the Maintenance Regulation has effect (and, being a regulation, has direct effect) in allocating jurisdiction to hear maintenance applications not only between member states but also between the different legal parts of a member state such as the UK. The argument would mean, of course, that in creating Schedule 6 to the 2011 Regulations in order that, as modified, the Maintenance Regulation should apply to the allocation of jurisdiction within the UK (see paras 121 and 122 above), the Secretary of State made legislation of wholesale redundancy; and that, in stating in the Explanatory Memorandum that he had made a policy decision to align the provisions of the Maintenance Regulation with those for the allocation of jurisdiction within the UK (see para 119 above), he substantially, albeit no doubt unintentionally, misspoke.

130. It is clear that the provisions of the 1968 Convention had not extended to the allocation of jurisdiction between one part of a contracting state and another: see para 102 above. It is equally clear that the Judgments Regulation had not so extended: *Cook v Virgin Media Ltd* and *McNeil v Tesco plc* [2015] EWCA Civ 1287, [2016] 1 WLR 1672, paras 18 to 26. How, then, and indeed why, might that substantial extension have been introduced when maintenance applications were removed from the Judgments Regulation and placed within an instrument bespoke to themselves, namely the Maintenance Regulation? In answer the Secretary of State raises two arguments.

131. The first argument is to refer to two EU regulations to which, as it happens, the UK is not subject and which address not the jurisdiction of member states to determine actions for the enforcement of contractual and non-contractual obligations respectively but the law which they are required to apply when they do so: Regulation (EC) No 593/2008, 17 June 2008 ("Rome I") and Regulation (EC) No 864/2007, 11 July 2007 ("Rome II"). Article 22(2) of the former and article 25(2) of the latter provide that member states which comprise different legal parts are not obliged to apply the regulations to conflicts solely between the laws of those parts. The absence of analogous provision in the Maintenance Regulation is said to be significant. Might it, however, have been at least marginally more significant if there had been analogous provision in the Judgments Regulation which had been omitted from the Maintenance Regulation?

132. The second, and main, argument depends largely upon the fact that in article 3, in which it makes general provision for the allocation of jurisdiction, the Maintenance Regulation partly overrides the legal arrangements within a member state by referring to the courts "for the place" where each party is habitually resident rather than generally to the courts "of a member state": see para 115 above.

133. In its article 5, however, the Judgments Regulation had also allocated jurisdiction to the courts for a "place" within a state rather than to the courts of the state itself. In *Color Drack GmbH v Lexx International Vertriebs GmbH* (Case C-386/05) [2010] 1 WLR 1909, the ECJ addressed the provision in article 5(1)(b) of the Judgments Regulation which permitted a claimant under a contract for the sale of goods to sue in "the place … where … the goods were delivered". It explained in para 23 that the court of that place was presumed to have a close link to the contract and in para 30 that, by referring to the "place", the provision determined local as well as international jurisdiction, in other words "without reference to the domestic rules of the member states". In *Sanders v Verhaegen; Huber v Huber* (Joined Cases C-400/13 and C-408/13), [2015] 2 FLR 1229, the renamed Court of Justice of the European Union ("the CJEU") applied the analysis in the *Color Drack* case to the allocation of jurisdiction in article 3(b) of the Maintenance Regulation to "the court for the place where the creditor is habitually resident". It observed in para 28 that the objective behind the allocation was to ensure proximity between the applicant for maintenance, regarded as the weaker party, and the competent court; and in para 37 that to that extent article 3 restricted the freedom of a member state to determine its competent court.

134. By their references to "place", the drafters of the Judgments Regulation and of the Maintenance Regulation reflected a need, in the interests of effective access to justice, to allocate jurisdiction not just to the courts of a state but to the courts for places within a state. The references apply to all member states irrespective of whether they comprise more than one legal part. With respect to the Secretary of State, the references to "place" in the Maintenance Regulation cannot in my view be construed as a different invasion of member state autonomy. For they do not invade the right of a state which comprises more than one part to resolve for itself an issue as to which of its parts should exercise jurisdiction to determine a maintenance application assigned by the regulation to each of those parts as "places". I confess that the Secretary of State's second argument deserves greater respect than I had originally afforded to it. But, when one stands back, it fails to stand up. In its first recital to the Maintenance Regulation the EU Council referred to the objective, linked to the free movement of people, of judicial cooperation in civil matters having "cross-border" implications and in its ninth recital it identified the objective that orders for maintenance made in one member state should automatically be enforceable in "another member state": see para 115 above. Indeed articles 12 and 13 of the regulation are crucial. In the light of the four different, yet equally valid, bases of jurisdiction identified in article 3, it was essential that, when more than one of them was invoked, the regulations should determine which of them should prevail. Such is the function of articles 12 and 13. Yet each is expressly limited to proceedings brought "in different member states". The conclusion has to be that, in conferring jurisdiction on the different parts of the UK as "places", the Maintenance Regulation, like the Judgments Regulation, did not identify which of them should prevail in the event of rivalry; and that, irrespective of whether it

entirely succeeded in filling that gap, Schedule 6 to the 2011 Regulations is not redundant.

Second Point

135. The second point, raised by the husband but not in the courts below, arises out of the substitution of a fresh subsection (2) of section 27 of the MCA, which was effected by regulation 9 of, and paragraph 6(2) of Schedule 7 to, the 2011 Regulations. The subsection addresses the jurisdiction of a court in England to entertain an application for financial provision under subsection (1). Prior to 18 June 2011 subsection (2) provided that the jurisdiction could be founded upon the domicil or (broadly speaking) the residence of one or other of the parties in England. But the fresh subsection provides:

> "The court may not entertain an application under this section unless it has jurisdiction to do so by virtue of the Maintenance Regulation and Schedule 6 to the [2011 Regulations]."

136. By reference to the fresh subsection, Mr Horton submits that the English court no longer has jurisdiction to entertain an application for financial provision under section 27 in what he calls a "purely domestic case", by which he means a case in which all parties live in the UK. The submission is astonishing because, if valid, it would deprive the section of almost all its effect. Mr Horton's premise is that "the court will not have jurisdiction under the Maintenance Regulation unless there is a cross-border issue"; and therefore that, although Schedule 6 applies within the UK, a purely domestic case cannot fall within the Maintenance Regulation as well as within Schedule 6, as required by the word "and" in the fresh subsection.

137. Mr Scott QC on behalf of the wife helpfully explains why this argument needs careful unpacking.

138. It is correct that in its recitals the Maintenance Regulation makes clear that its objective is to address cross-border issues so as to ensure the effective recovery throughout the EU of maintenance duly awarded in one of its member states. But it in no way follows that a member state is unconstrained by the regulation when a cross-border issue is not, or not yet, visible to it in relation to a maintenance application. An effective system for the orderly determination of maintenance applications and for the effective recovery of sums thereby awarded requires rules which determine the jurisdiction of the courts of member states in relation to all maintenance applications made to them. Thus the opening words of article 3 of the regulation are unqualified: "In matters relating to maintenance obligations in

member states, jurisdiction shall lie with …"; and the article then proceeds to identify the four bases of jurisdiction.

139. The fresh subsection (2) of section 27 is therefore correct to recognise that any application under the section for financial provision has to comply with the jurisdictional requirements of the Maintenance Regulation. Indeed, were there to be a rival application for maintenance in a court of another member state which also complied with those requirements, it would again be the provisions of that regulation, namely in articles 12 and 13, which the English court, as well as the other court, would apply with a view to ending the rivalry. But the fresh subsection is also correct to require compliance with Schedule 6 to the 2011 Regulations: for, were there to be a rival application for maintenance in a court in Scotland or Northern Ireland which also complied with those requirements, it would be the provisions of that schedule, supplemented, according to Mr Horton, by the less appropriate forum principle (this being the fifth point below), which, like the rival court, the English court would apply with a view to ending the rivalry.

140. There is nothing wrong with the fresh subsection of section 27. It does not yield absurd results. The premise of Mr Horton's submission is incorrect. The subsection does not exclude what he calls a purely domestic case.

Third Point

141. Logically this point follows the fifth point below; but it is convenient to address it now. The husband's argument, not raised in the courts below, is that, if, which he denies, the purported effect of Schedule 6 to the 2011 Regulations is to disapply the less appropriate forum principle from potential deployment in staying maintenance proceedings in one part of the UK in favour of proceedings in another part of it, it is an effect which it was beyond the powers of the Secretary of State, in making those regulations, to achieve.

142. The construction of section 2(2) of the 1972 Act, pursuant to which the Secretary of State made the regulations, also requires consideration of section 2(1) of it. Section 2(1) provides:

> "All such rights … obligations and restrictions from time to time created … under the [EU] Treaties … as in accordance with the Treaties are without further enactment to be given legal effect … in the United Kingdom shall be recognised and available in law …"

It is by virtue of this subsection that the Maintenance Regulation is recognised as law in the UK. Had it been a directive rather than a regulation, it would, by contrast, have imposed an obligation which the UK was required to implement by specific legislation. Section 2(2) enables the making of regulations which make provision:

> "(a) for the purpose of implementing any EU obligation of the United Kingdom …; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation … or the operation from time to time of subsection (1) above;"

The "operation" of subsection (1) was such as to recognise the Maintenance Regulation as UK law. It is therefore my view that, in the application of subsection (2)(b) to the present case, the matters to which it refers must arise out of, or be related to, the "operation … of subsection (1)" rather than out of, or to, "any such obligation" as might have fallen to be implemented under subsection (2)(a). The question then becomes whether the 2011 Regulations were made for the purpose of dealing with matters arising out of, or related to, the operation of subsection (1) in recognising the Maintenance Regulation as UK law. Insofar as they facilitated the way in which that regulation was to be applied in the UK, the 2011 Regulations undoubtedly dealt with matters "arising out of" the operation in this respect of subsection (1). But, by regulation 8 and Schedule 6, and as the Secretary of State has always acknowledged, they went further than that. So the narrower question is whether any purported disapplication in Schedule 6 of the less appropriate forum principle was for the purpose of dealing with matters "related to" the operation of subsection (1) in recognising the Maintenance Regulation as UK law.

143. The court has been referred to a number of authorities on the width of the phrase "related to" in section 2(2)(b) of the 1972 Act. There seems to be a tendency for one judge to offer an explanation of its extent and for the next judge to discard the explanation as an unwarranted gloss. Perhaps it is better to allow the phrase to speak for itself; but never to forget that the required relationship is to the particular terms of the EU instrument which either already has been, or is being, given the force of law in the UK.

144. The most helpful commentaries upon the meaning of the phrase seem to be those of Waller LJ in *Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening)* [2005] EWCA Civ 1191, [2006] Ch 337, para 39, and of Lord Mance in *United States of America v Nolan* [2015] UKSC 63, [2016] AC 463, para 61. But there is no need to lengthen this judgment by reciting those paragraphs. For it is already clear that the husband's argument faces insuperable obstacles. The first

stems from his making of a realistic, indeed an inevitable, concession. It is that in principle the provisions in Schedule 6 for the purpose of resolving jurisdictional issues between the different parts of the UK were "related to" the arrival of the Maintenance Regulation into UK law by operation of section 2(1) of the 1972 Act. The Judgments Regulation had, by its reference to "place", held out the prospect that different parts of the UK would have equal jurisdiction to hear maintenance applications. But its provisions for the resolution of jurisdictional rivalry between member states in relation to maintenance applications had not extended to such rivalry as might arise between different parts of a member state. In section 49 of the 1982 Act the UK had therefore identified the law which would resolve such rivalry. The effect of the Maintenance Regulation was to remove maintenance applications from the scope of the Judgments Regulation; and so it required at least some adjustment to UK law in that regard. The decision was to make the adjustment in Schedule 6.

145. But, once the concession is made that the Secretary of State had power under section 2(2)(b) of the 1972 Act to resolve issues of jurisdictional rivalry between different parts of the UK in relation to maintenance applications, how can it be said that his suggested inclusion in Schedule 6 of one particular provision in that regard was beyond his power? His power to provide for the resolution of issues of rivalry must have included power to disapply the less appropriate forum principle and to assign the resolution of such issues entirely to other provisions. The real question, which is the fifth point, is whether that power was exercised.

146. So this third point falls to be rejected at an early stage; and there is no need to wrestle with the problems which would have confronted it at a later stage. These are problems arising out of the fact that in Schedule 6 there is on any view no express disapplication of the less appropriate forum principle. The disapplication perceived by the Court of Appeal was, so that court held, implied in Schedule 6. The husband's argument was therefore that any implied provision to that effect was beyond the Secretary of State's powers. But, if the result of discerning an implied provision in regulations were to be that it would be beyond the powers of their maker, that would be a strong argument for not discerning it. Would it indeed be a contradiction in terms to speak of a provision implied in a set of rules being beyond the rule-maker's powers? And - another knotty question - would the court have to proceed to identify the express provisions in the regulations from which the impugned provision was implied and to rule them to be beyond their maker's powers in giving rise to the implication?

Fourth Point

147. The husband contends that paragraph 13 of Schedule 6 to the 2011 Regulations applies to the present case. Subject to making an insertion into it,

paragraph 13, set out in para 123 above, applies article 13 of the Maintenance Regulation to the resolution of jurisdictional rivalry between the courts of England and Scotland in a case such as the present. Subject to the insertion, which will be set out in square brackets, article 13, entitled "Related actions", provides as follows:

> "1. Where related actions are pending in the courts of different member states [or different parts of the United Kingdom], any court other than the court first seised may stay its proceedings.
>
> 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.
>
> 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."

Since Schedule 6 does not relate to rivalry between the courts of different member states, it is not obvious why the words inserted into article 13 were presented as an alternative to the words "different member states" rather than as a substitution for them. But nothing turns on it.

148. The husband contends

> (a) that his proceedings for divorce in Scotland and the wife's application for maintenance in England are related actions within the meaning of article 13 of the Maintenance Regulation;
>
> (b) that, as is agreed, the Scottish court must be taken to be the court first seised;
>
> (c) that within the divorce proceedings the Scottish court has jurisdiction to hear any application for maintenance which the wife might there bring so long as she were to do so prior to the grant of a decree; and

(d) that accordingly the English court has power under article 13 of the Maintenance Regulation, as applied by paragraph 13 of Schedule 6 to the 2011 Regulations, to stay and indeed to dismiss the wife's application for maintenance.

149. Article 13 of the Maintenance Regulation must be construed in its context, adjacent to article 12, set out in para 116 above. The articles have the same shape. In each of them paragraph 1 provides for a court to stay proceedings, in other words to make a temporary order. In each of them paragraph 2 provides for the court in specified additional circumstances to proceed to decline jurisdiction, in other words to proceed to make a permanent order. What, then, is the difference between them? Article 12, which addresses a "Lis pendens", governs "proceedings involving the same cause of action" and imposes a duty on a court other than that first seised to stay its proceedings and in the specified additional circumstances to proceed to decline jurisdiction. But article 13, which addresses "Related actions", confers only a power on a court other than that first seised to stay its proceedings and in the specified additional circumstances to proceed to decline jurisdiction. It follows that article 13 applies to proceedings which do not involve the same cause of action.

150. Article 13(3) of the Maintenance Regulation defines the circumstances in which actions are "deemed" to be related. It is probably intended to provide an exclusive definition of such circumstances. These are that the actions "are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments". But actions in different member states, as also in different parts of a member state, cannot be heard and determined together. Paragraph (3) must mean that it is expedient to hear and determine together the *issues raised* in the two actions.

151. Article 13(2) of the Maintenance Regulation is in principle significant. For, in specifying the additional circumstances in which the court has power to proceed to decline jurisdiction, the paragraph necessarily identifies circumstances which can exist in related actions. But what are those circumstances? In *Owens Bank Ltd v Bracco* (Case C-129/92) [1994] QB 509, the Advocate General Lenz of the ECJ observed at para 66 that the provision in the 1968 Convention in terms identical to those in article 13(2) was "not wholly easy to comprehend".

152. Article 13(2) requires that the related actions should both be "pending at first instance". Why? We have the benefit of an interesting insight in relation to this question. Article 13(2) is in identical terms to the provision in the Judgments Regulation which had preceded it, namely article 28(2). But in 2012 the Judgments Regulation was recast; and, when article 28(2) was recast as article 30(2), an opportunity was taken to make a small but significant amendment to it. The words "[w]here these actions are pending at first instance" were recast as "[w]here the

action in the court first seised is pending at first instance". Although in the present case the English action, having been to date the subject only of interim orders, happens to remain pending at first instance, as indeed does the Scottish action, the drafters of the Recast Judgments Regulation clearly regarded it as important for the purposes of this provision only that the action in the court first seised should remain pending at first instance. Why? The answer is surely that, once the action has been determined at first instance, the opportunity to add to its subject-matter will have been lost. This construction is confirmed by the further requirement of article 13(2), namely that "the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof". It seems clear that article 13(2) demands an affirmative answer to the following question: would the court first seised have jurisdiction also to determine the cause of action raised before the other court and if so would its procedural rules permit that cause of action to be consolidated with the cause of action already raised before it and thus permit both to be determined in the same proceedings?

153. To this Mr Scott QC has only one answer. But it deserves respect. Have regard, he says, to the definition of related actions in article 13(3): actions are related only if there is a risk of "irreconcilable" judgments resulting from separate proceedings. He argues that there would be no risk of irreconcilable judgments if the maintenance proceedings in England and the divorce proceedings in Scotland were each to continue.

154. The difficulty is that the reference to "irreconcilable" judgments in article 13(3) does not fit with the clear meaning of article 13(2) in identifying circumstances which can exist in related actions. No doubt that is what the Advocate General in the *Owens Bank* case had in mind when making the comment quoted in para 151 above. What, then, is to be done?

155. In *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32 the two actions brought by the claimant against the defendant each stemmed indirectly from the claimant's sale of part of its business to a third party. But the causes of action were entirely distinct. In its action in Spain the claimant alleged that the defendant was obliged to purchase from it shares which it had been required to receive as part consideration for the sale. In its action in England, by contrast, it claimed damages for negligent misrepresentations on the part of the defendant which had induced it to enter into the sale. The House of Lords held that the English court should decline jurisdiction on the basis that the action before it and the action in Spain were related for the purpose of article 22 of the 1968 Convention. "[T]he debate", said Lord Saville of Newdigate at p 38H when making the only substantive speech, "has concentrated on whether there is a risk of irreconcilable judgments resulting from the two sets of proceedings". The appellate committee reversed the decision of the Court of Appeal, which had held that judgments were irreconcilable only if issues of fact or law essential to the respective decisions were common to both. This, so

Lord Saville observed at p 40, gave too limited a meaning to the word "irreconcilable". The matters in the two courts, he added, did not need to be virtually identical for the actions to be related; it sufficed that the connection between them was close enough to make it expedient for them to be determined together in order to avoid the risk in question. He summarised the basis of the decision of the House at p 41,

> "[T]here should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter."

156. Also of relevance to the present issue is the decision of Moor J in *N v N (Stay of Maintenance Proceedings)* [2012] EWHC 4282 (Fam), [2014] 1 FLR 1399. The facts bear a striking resemblance to those of the present case. The Swedish husband and the Dutch wife had lived in Sweden. Upon separation she came to live in England. The husband issued divorce proceedings in Sweden. Later the wife issued divorce proceedings in England but they were stayed pursuant to the Brussels II Revised Regulation. The wife thereupon issued an application for financial provision in England under section 27 of the MCA. The husband asked Moor J to decline jurisdiction to entertain her application pursuant to article 13(2) of the Maintenance Regulation. Moor J considered the article in context. In para 18 he recited article 12. In para 19 he observed that, since the wife had chosen not to apply for maintenance in the Swedish divorce proceedings, it could not be said that there were "proceedings involving the same cause of action" in both states, with the result that article 12 was not engaged. In para 20, however, he proceeded to recite article 13. He then considered the wife's submission that, because of the absence of an application for maintenance in Sweden, the actions in the two states were not "related". Although not spelt out in terms, her submission must have been that there was no risk of "irreconcilable" judgments. But Moor J held in para 25:

> "[I]f article 13 of the Maintenance Regulation only applied to applications in each jurisdiction for maintenance, there would be no need for the article at all. The position would be covered by article 12. The two applications would be the same cause of action and would be automatically stayed without the need for the discretion given by article 13."

Having at para 28 given seven reasons for exercising the discretion conferred by article 13, the judge then, at para 29, considered whether to stay the wife's application under para (1) or to decline jurisdiction under para (2). He elected to decline jurisdiction.

157. In the present case the Court of Appeal held in para 87 that Moor J had wrongly decided the *N* case; in para 86 that, had the earlier decision of the Court of Appeal in *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FLR 339, been cited to him, he would probably have decided that the wife's English application had to proceed; and in para 89 that the effect of the decision in the *Moore* case was that the husband's reliance on article 13 in the present case was misplaced. Although this court would not be bound by it in any event, the decision in the *Moore* case clearly requires examination.

158. In the *Moore* case the judgment of the court was delivered by Thorpe LJ. The facts were that the parties were British; that they had gone to live in Spain; that the wife had resumed habitual residence in England; that the husband's petition for divorce in Spain had preceded the wife's petition for divorce in England, with the result that the latter had been stayed; that an order for divorce had been pronounced in Spain; that the husband had then applied in Spain for what the Court of Appeal no doubt correctly understood to be an order defining the parties' respective property rights; that, despite an initial reversal, his application in Spain probably remained pending; that later, in England, the wife had sought leave to apply for financial relief following overseas divorce under Part III of the 1984 Act; that the wife had secured leave; that the issue before the Court of Appeal was whether a judge had rightly refused the husband's application to set the leave aside; and that part of the husband's case was that the judge should have stayed the wife's application under what were then articles 27 and 28 of the Judgments Regulation.

159. It is not disrespectful to the Court of Appeal to say that in places its judgment in the *Moore* case is not entirely easy to follow. One of the complications was that, while at that time the Judgments Regulation governed applications for "maintenance" (article 5(2)), "rights in property arising out of a matrimonial relationship" have never been within its scope (article 1(2)(a)). It seems, however, to have been agreed that, at least in part, the wife's application under Part III was indeed for "maintenance"; and that, since she had resumed habitual residence in England, the English court had jurisdiction under article 5(2) to entertain an application on her part for "maintenance". So, in this part of the husband's case, the only questions were surely whether, in the light of his application in Spain, the wife's application either should be stayed under article 27(1) or could be stayed under article 28(1). Instead the court seems to have concentrated on whether the Spanish court itself had jurisdiction under article 5(2) to entertain the husband's application. Its overall conclusion on this part of the husband's case was as follows:

> "95. Consequently we are satisfied that [the husband's] application was not a matter relating to maintenance for the purpose of article 5.2, and therefore that there would be no basis for the application of articles 27 or 28 of [the Judgments Regulation] even if those proceedings were still pending."

160. Thus, in the light of its reasoning, the Court of Appeal in the *Moore* case never recognised a need to address either article 27 or article 28 of the Judgments Regulation. Had it addressed article 27, it would, in the light of its analysis of the husband's application, undoubtedly have held that the two sets of proceedings did not involve the same cause of action and thus that there was no requirement for the wife's application to be stayed. But how would it have addressed article 28? There can be no answer to this question. In four places the court referred compendiously to articles 27 and 28. It set out article 27. It did not set out article 28. Nor did it refer to the terms or effect of article 28. Nor did it even note that article 28 provided a ground for stay distinct from, and additional to, the ground in article 27.

161. With respect, I cannot agree with the Court of Appeal in the present case that in its judgment in the *Moore* case that court based any part of its decision upon what was then article 28 of the Judgments Regulation and is now article 13 of the Maintenance Regulation; cannot agree that the answer to the husband's reliance on article 13 in the present case is therefore to be found in that judgment; and cannot agree that the decision of Moor J in the *N* case to decline jurisdiction under article 13(2) was therefore wrong. On the contrary, in my view his decision was right.

162. On any view article 13 of the Maintenance Regulation is poorly drafted; and, when in domestic law its effect was extended by the 2011 Regulations, the opportunity was not taken to clarify it for the purposes at any rate of the extension. Called upon to construe it, the court is presented with a conundrum. Should it give effect to the clear meaning of article 13(2) at the expense of attributing a normal meaning to the reference in article 13(3) of the phrase "irreconcilable judgments"? Or should it attribute a normal meaning to the phrase and deprive article 13(2) of effect? In my view we should follow the decision of our predecessors in the *Sarrio* case and adopt a broad, common sense, approach to resolution of the conundrum. Our more important function is to give effect to article 13(2). That is the dog. The reference to "irreconcilable judgments" is no more than the tail.

163. In the light of the pendency of the Scottish proceedings the English court therefore has power under paragraph 13 of Schedule 6 to the 2011 Regulations to stay, and indeed to decline jurisdiction to entertain, the wife's application under section 27. The husband's appeal should in my view be allowed and, in the absence of Parker J who has retired, his application should be remitted to another judge of the Family Division for determination whether the power should be exercised.

Fifth Point

164. The husband contends that the common law principle of the less appropriate forum remains available for application by a UK court when determining an issue

of jurisdictional rivalry between it and another UK court in relation to an application for maintenance.

165. In the light of my conclusion above in relation to the fourth point, this fifth point may not need to be decided. For there is no reason to consider that in the present case the discretion under article 13(2) of the Maintenance Regulation, as applied by the 2011 Regulations, would be exercised differently from any discretion which might arise under the common law principle. Nevertheless the court has received extensive submissions on the fifth point. I offer a review of the most significant of them in the paragraphs which follow.

166. Were it to apply to jurisdictional rivalry between UK courts in relation to maintenance, the common law principle would extend to some situations beyond those covered by articles 12 and 13 of the Maintenance Regulation, as applied by the 2011 Regulations. In particular it could precipitate a stay both of proceedings in the court first seised and also of proceedings even in the absence of any proceedings yet issued in the court considered to be the more appropriate forum.

167. Even when the law of a member state, such as the UK, adheres to the less appropriate forum principle, it cannot apply it to its determinations under the Maintenance Regulation. For articles 12 and 13 represent an exclusive code for the resolution of jurisdictional rivalry between the courts of different member states in relation to maintenance. The decision of the Grand Chamber of the ECJ in *Owusu v Jackson* (Case C-281/02) [2005] QB 801, made this clear even in relation to the expanded situation in that case, in which the potential choice of forum was between that of a member state (the UK) and that of a non-member state (Jamaica) which might have been more appropriate. Nothing turns on the fact that the decision was made by reference to the terms of the 1968 Convention which was then operative, rather than those of the Judgments Regulation or now of the Maintenance Regulation. The ECJ held in para 41 that the objective of legal certainty which formed the basis of the convention might be undermined by the less appropriate forum principle; in para 43 that in any event there were only a few contracting states which recognised the principle; and in para 46 that it could not be applied so as to displace jurisdiction conferred by the convention. Indeed recently, in *R v P* (Case C-468/18) ECLI:EU:C:2019:666, [2020] 4 WLR 8 the CJEU confirmed in para 44 that, if conferred with jurisdiction under the Maintenance Regulation, a member state could not decline to exercise it by reference to any principle of the less appropriate forum. To decline to do so would, observed the court in para 45, undermine the priority given by the regulation to the choice of forum made by the applicant for maintenance.

168. By contrast, however, it is clear that, at any rate until 18 June 2011, when the 2011 Regulations came into force, UK courts did have power to apply the less

appropriate forum principle when determining issues of jurisdictional rivalry between the courts of the different parts of the UK in relation to maintenance applications. Schedule 4 to the 1982 Act had in a modified form applied within those different parts the provisions of the 1968 Convention for the allocation of jurisdiction to hear civil proceedings. But Schedule 4 had not replicated the articles in the convention entitled "Lis pendens - related actions"; and section 49 of the 1982 Act had expressly provided that the power of UK courts to stay proceedings by reference to the less appropriate forum principle was unaffected by the Act, including therefore by Schedule 4. When in 2002 the Judgments Regulation superseded the 1968 Convention, there was no change in this respect. For, similarly, the articles in the Judgments Regulation entitled "*Lis pendens* - related actions" were not replicated in the substituted version of Schedule 4; and section 49 continued in force. Indeed, while maintenance applications were removed from the scope of the 1982 Act on 18 June 2011 and were therefore no longer governed by section 49, it has continued to govern the resolution of issues of jurisdictional rivalry between UK courts in relation to other civil proceedings. In the *Cook* and *McNeil* cases, cited in para 130 above, the claimants, who lived in Scotland, each brought actions in England for damages for personal injuries sustained in Scotland against companies based in England. The Court of Appeal held that the district judge had been entitled to stay their actions on the ground that Scotland was the more appropriate forum. Lord Dyson, Master of the Rolls, observed in para 30 that the rules in Schedule 4 were not a mirror of those in the Judgments Regulation and in para 33 that section 49 of the 1982 Act provided a complete answer to the claimants' contentions.

169. The wife does not dispute that, in determining an issue of jurisdictional rivalry with a court in another part of the UK in relation to *all* proceedings other than for maintenance, a UK court has power to stay proceedings before it by reference to the less appropriate forum principle. So the question becomes: have the 2011 Regulations rendered the power no longer available in relation to maintenance proceedings? The fact that there is no inclusion of the power in the regulations does not answer the question. The power does not need to be conferred: it already exists in the common law of all parts of the UK. As the wording of section 49 of the 1982 Act recognises in confirming that the Act does not "prevent" exercise of the power, the question is not whether the 2011 Regulations include the power but whether they exclude it; and, more particularly, whether, in the absence of any express exclusion of it, they exclude it by necessary implication.

170. In *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15, the issue concerned the Secretary of State's right to recover overpayments of social security benefits. He claimed that he had a right to recover them at common law and that statutory provisions for recovery had not displaced it. This court held that no such right of recovery existed at common law but that if, alternatively, it had existed, the statutory provisions had displaced it

by necessary implication. Sir John Dyson JSC, as he was during the first months of his service in this court, said in para 34:

> "The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended [to] coexist with it."

171. A question whether something *could have been* intended is often illumined by inquiry into what *was* intended. But not in this case. Neither in the consultation paper which preceded the making of the 2011 Regulations nor in the Explanatory Memorandum which accompanied them when laid before Parliament was there reference to the power to stay by reference to the less appropriate forum principle which had hitherto existed in relation to jurisdictional rivalry within the UK. In that regard the amended provisions of the 1982 Act had not aligned the jurisdictional rules for the allocation of maintenance applications within the UK with those in the Judgments Regulation; and the memorandum was wrong to state otherwise. It is impossible to avoid the conclusion that, in their hasty production of the 2011 Regulations, its drafters overlooked the applicability up to that point of the common law power to stay.

172. A substantial change made in Schedule 6 to the 2011 Regulations was to import into the rules for allocation of jurisdiction in relation to maintenance applications within the UK the two articles in the Maintenance Regulation entitled "Lis pendens" and "Related actions". So the question becomes more focussed: is the common law power to stay incompatible with their importation? Under the Maintenance Regulation the two articles represent an exhaustive code for the determination of issues of jurisdictional rivalry between member states. Should they therefore be regarded as an exhaustive code under the 2011 Regulations? Would it be a necessary consequence of their importation that a UK court which regards itself as the less appropriate forum should be disabled from staying a maintenance application in favour of another UK court otherwise than in accordance with their terms?

173. On balance, in answer to Sir John Dyson's question, I am reluctantly driven to the conclusion that the less appropriate forum principle is incompatible with, and so cannot be deemed to have been intended to co-exist with, articles 12 and 13 which, once imported, have covered much, albeit not all, of the same ground. I stress, however, that I regard my conclusion as correct only if article 13 requires to be construed with reasonable width as suggested above. Were I, by contrast, to have felt obliged to give it so narrow a construction as not to extend to most of the more likely cases of jurisdictional rivalry within the UK, it would have been clear to me that the articles were not incompatible with the common law principle and that their importation had not excluded it.

Postscript

174. I drafted almost all of the above before the judgments of Lord Sales and Lady Black became available to me. In the light of their judgments, and of Lord Kerr's agreement with that of Lord Sales, my judgment becomes a dissenting judgment and is rightly placed last. In this postscript I raise six questions which reflect my concerns about the court's decision today in relation to article 13. My respect for each of my three colleagues applies to all that follows. The framing of my concerns as no more than questions reflects my respect for them; and there will be no need to reiterate it.

175. First question: was it optimum for Lord Sales and Lady Black to consider whether the less appropriate forum principle continues to apply prior to considering whether article 13 applies to the present case? In paras 67 and 68 of her judgment Lady Black concludes that the importation of articles 12 and 13 into Schedule 6 to the 2011 Regulations cannot co-exist with the survival of the common law principle. But that conclusion depends on the meaning of the articles. I reach that same conclusion but only in the light of my understanding of the meaning of them, in particular of article 13. If, however, as the majority later proceeds to hold, the articles require the narrowest possible construction, the strength of Lady Black's conclusion falls away.

176. Second question: how credible are the examples given by the majority of the circumstances in which, on its construction, article 13 applies? In para 44 above Lord Sales states that "a core object" of the article is to address a situation in which "by cross-maintenance claims, each of a husband and wife might seek to claim that the other owes maintenance". In para 89 above, Lady Black joins Lord Sales in presenting this situation as exemplifying the reach of the article. Her background, like mine, is in family law, and, in the light of her experience, she clearly considers that the situation which he identifies is realistic. In my experience, by contrast, it is entirely unrealistic. I cannot recall having encountered a situation in which each spouse claims maintenance from the other; but, even if a cross-claim is conceivable, probably as an ill-considered tactic, what is for me inconceivable is that it would be made in a different jurisdiction. Not even in the *Moore* case was the husband claiming maintenance from the wife. Some lawyers, although clearly not all, would regard it as preposterous that article 13 should be construed by reference to that perception of its core object. In para 89 above Lady Black mines a few other examples, all very rare, of situations which might fall within the majority's construction of the article, although, she adds, some of them might instead fall within her construction of article 12. Even if one adds her examples to the situation identified by Lord Sales, the second question remains: how credible is their analysis of the circumstances in which article 13 applies?

177. Third question: was it correct for the majority's analysis of article 13 to be dominated by an understanding that, at every stage, priority must be given to the choice of jurisdiction made by the maintenance creditor (for convenience, "the wife")? In 16 paragraphs of his judgment Lord Sales refers, as does Lady Black in seven paragraphs of her judgment, to the objective behind the successive European instruments of giving priority to the choice made by the wife. In para 67 of her judgment Lady Black summarises their conclusion that the objective "could not be overridden by the selected court declining to entertain the proceedings". It is clear that, since 1968, the objective to which they refer has been reflected in the wider choice of jurisdiction given to the wife for the *issue* of her claim. But should it follow - and is there authority to suggest - that, when a rival action is already pending in another state, resolution of the rivalry pursuant to what are now articles 12 and 13 is in effect foreclosed by reference to that objective? Might it have been forgotten that article 13 confers only a power and that, if for whatever reason the wife's choice deserves continuing priority at that stage, the power to stay or dismiss her action will not be exercised? Indeed is not the law relating to the resolution of rivalry between the three UK jurisdictions clearer still? When in 1987 the provisions of the 1968 Convention, including the wider provisions for the issue of maintenance claims, were extended so as to operate within those jurisdictions, Parliament confirmed that the resolution of rivalry between them was to be governed by an objective not of giving priority to the wife's choice but of identifying the less appropriate forum pursuant to the common law principle. When in 2011 its resolution came instead to be governed by articles 12 and 13, was not the legislative intention that the articles would broadly cover the ground which the common law principle had governed? Why would the legislator have intended to emasculate the jurisdiction to stay by reference to a different objective, namely of giving continuing priority to the wife's choice? Can any such intention be collected from anything then said or done?

178. Fourth question: did the majority afford sufficient significance to article 3(c) of the Maintenance Regulation brought within the UK by paragraph 4 of Schedule 6 to the 2011 Regulations? As part of the priority given to the wife's choice of jurisdiction for the issue of her claim, article 3(c) confers jurisdiction upon

> "the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings …"

The article thus expressly contemplates that a maintenance claim can be ancillary to divorce proceedings and that, if so, it is appropriate for it to be determined in the divorce court. So the fourth question becomes refined: if a claim for maintenance can be ancillary to divorce proceedings and appropriately issued in that court for the purpose of article 3(c), how can it be other than related to divorce proceedings for

the purpose of article 13? Is it convincing for Lord Sales to respond in para 46 above that to reason from article 3(c) to article 13 would be to defeat the priority given to the wife, particularly in circumstances in which article 3(c) itself reflects that priority?

179. Fifth question: did the majority sufficiently address the significance of the decision of the House of Lords in the *Sarrio* case, analysed by me at para 155 above? In para 83 above Lady Black notes only that Lord Saville there observed that an inquiry into whether actions are related should be approached with broad common sense. But, for present purposes, the real significance of the case lies in the application of broad common sense on the part of the House of Lords to the inquiry before it. For its unanimous decision was that the claimant's English action for damages in tort was related to its Spanish action for payment due under a contract within the meaning of what is now article 13 and should be dismissed under what is now paragraph 2 of it. So the question, also prompted by the treatment given by Lord Sales to the decision in para 47 above, is whether further recourse to the mantra of giving priority to the wife justifies the attribution to the word "related" of a meaning in the context of maintenance claims entirely different from its meaning in the context of other civil claims.

180. Sixth and final question: did the majority check its construction of article 13 in the light of its adverse consequences? When lawyers conclude that the construction of an instrument is clear, they will not shrink from their conclusion by reference to its adverse consequences. If, however, their provisional conclusion has adverse consequences, they will check it before making it their concluded view. There will be two adverse consequences of today's decision, one expressly noticed only by Lord Sales, and the other only by Lady Black. The first will be the untrammelled licence given to a wife to go forum-shopping, in other words to put her husband at an initial disadvantage unrelated to the merits of her case. Having observed that in the *N* case the judge considered that the wife had engaged in illegitimate forum-shopping, Lord Sales comments in para 56 above that she had been entitled to choose the forum for her claim by reference to tactical reasons and that, under the Maintenance Regulation, there had been nothing illegitimate in her doing so. The second will be the inability of a court in one part of the UK to decline to determine a wife's maintenance claim even when a court in another part alone has power to determine a claim by one spouse or the other for transfer of property or for some other adjustment (such as would, for example, disentangle them from joint ownership of property) or for a pension sharing order. As Lady Black says in para 79 above, the prospect is "not very palatable". So the final question can be refined: did the adverse consequences of today's decision oblige the majority to undertake a rigorous examination of its provisional conclusion about the meaning of article 13 and, if so and in the light of all the questions posed above, can its provisional conclusion have received rigorous examination?