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A key new case on jurisdiction where an accident happens abroad during a holiday booked from the UK: *Brownlie v Four Seasons Holdings Incorporated* [2015] EWCA Civ 665

By Lucy McCormick

In a wide-ranging decision earlier this month, the Court of Appeal has clarified a number of key questions on jurisdiction where an accident happens abroad during a holiday booked from UK. Most significantly, Arden LJ (giving the leading judgment) held that direct damage in the jurisdiction is required to come within the tort jurisdictional gateway in the CPR, effectively overruling earlier first instance decisions that indirect or consequential damage was sufficient. While this would prevent many overseas accidents from being litigated in the UK, Arden LJ did carve out an exception for Fatal Accident Act claims, which she considered involved 'direct damage' in the UK. She also took the opportunity to provide her own 'gloss' on the so-called 'Canada Trust gloss'. Peppered throughout the judgment are some blistering but instructive observations on defective witness statements.

BACKGROUND

1. Sir Ian Brownlie and his wife were involved in a car accident while on an excursion in Egypt. Lady Brownlie was injured, and her husband was killed. This excursion had been organised by the concierge of the Four Seasons Hotel Cairo, having been booked by Lady Brownlie from England by telephone shortly before she left.

2. Lady Brownlie brought proceedings in the UK to recover damages in contract and in tort. The tort claims were threefold:

   2.1. For her own injuries;

   2.2. For her loss as a dependant of her husband under the Fatal Accidents Act 1976 ("FAA 1976");

   2.3. (In her capacity as executrix of her husband's estate) for the loss and damage suffered by her husband, under the Law Reform (Miscellaneous Provisions) Act 1934.

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3. The Four Seasons chain of hotels is run by a Canadian corporation, Four Seasons Holdings Incorporated ("FSHI"). Lady Brownlie initially obtained the court's permission pursuant to the Civil Procedure Rules to serve these proceedings in Canada, on a without notice application. However, FSHI then applied to set that permission aside. They would be entitled to have permission set aside unless Lady Brownlie was able to show a "*a good arguable case*":

   3.1. As to her claims in contract, that the contract in question was (i) made in England or (ii) governed by English Law;

   3.2. As to her claims in tort, that "*damage was sustained within the jurisdiction*".

4. FSHI was initially successful before Master Cook in having the permission set aside. However, that decision was reversed on appeal by Tugendhat J. The matter then reached the Court of Appeal.

THE COURT OF APPEAL'S DECISION

5. Arden LJ, giving the leading judgment, concluded **[93]** that:

   5.1. As to Lady Brownlie's claims in contract, on the facts it was found that there was a good arguable case that the the contract had been concluded in England, and therefore the gateway was satisfied and the court had jurisdiction.

   5.2. In relation to her claims for her own personal injury and for her husband's loss and damage under LR(MP)A 1934, "*Lady Brownlie cannot show that "damage" was sustained within the jurisdiction since the motor accident occurred in Egypt. The damage suffered in this jurisdiction was consequential loss only, which in my judgment is insufficient (when considered by reference to Rome II) to found jurisdiction."*

   5.3. However, in relation to Lady Brownlie's claim for her loss as a dependant of her husband under the FAA 1976, "*the damage occurred in this jurisdiction and so the claim is properly brought within this jurisdiction and there is a good arguable case that English law applies*."

SIGNIFICANCE

The 'Canada Trust gloss' elucidated

6. As set out above, the court has jurisdiction if a "*good arguable case*" is shown that the case falls within one of the jurisdictional gateways set out in the CPR. To

establish whether a "*good arguable case*" is made out, the court has to apply what has become known as the 'Canada Trust gloss'. This is drawn from the following passage in the judgment of Waller LJ in Canada Trust Co v Stolzenberg (No.2 [1998] 1 All ER 318:

> *"It is also right to remember that the 'good arguable case' test, although obviously applicable to the ex parte stage, becomes of most significance at the* inter partes *stage where two arguments are being weighed in the interlocutory context which, as I have stressed, must not become a 'trial'. 'Good arguable case' reflects in that context that one side has a* much better argument *on the material available. It is the concept which the phrase reflects on which it is important to concentrate, ie of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.*"

7. Lady Arden felt that "*the Canada Trust gloss requires explication. It is not easy to apply where there is a disputed issue of fact*" **[19]**. Giving her own 'gloss on the gloss', she concluded that:

> " *…when looking for "*the much better argument*" the court is concerned with the question of relative plausibility. But there is also an absolute standard to be met. The words used by Waller LJ, namely a "much better argument", mean more than that, on the material available, the case is arguable. There must be some substance to it: since we are deciding a question of jurisdiction, the evidence must achieve an acceptable level of quality and adequacy. However, the standard to be attained is not that of succeeding on a balance of probabilities because there is no trial: see per Flaux J in* Erste Group Bank AG v JSC (VMZ Red October) [2013] EWHC 2926 (Comm)."

Damage must be 'direct damage' to satisfy the gateway

8. Perhaps the most significant point arising from the judgment is Arden LJ's decision on what "*damage*" must be sustained within the jurisdiction to satisfy the relevant gateway under CPR Practice Direction 6B, para 3.1(9)(a). Does it have to be direct damage, or is any damage, including consequential damage, sufficient? There had been some tension on this point between English first instance decisions and the Brussels regime **[71-86]**. In light of Arden LJ's judgment, it is now clear that indirect or consequential loss is not sufficient to satisfy the jurisdictional gateway. The first instance line of authority beginning with Booth v Phillips [2004] 1 WLR 3292 (QB) was therefore doubted and, effectively, overruled. The gateway should be interpreted consistently with Rome II, and that in turn should be interpreted in line with the Brussels Convention. This decision is not only relevant to personal injury cases, but potentially to economic tort claims such as conspiracy as well.

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A Fatal Accidents Act claim does involve 'direct damage' in England

9. While Arden LJ's decision prevented most of Lady Brownlie's tort claims from being brought in England, she distinguished the FAA 1976 claim, holding that this did involve a direct loss in the jurisdiction. Arden LJ did so with some trepidation, noting that there were several points which "*militate against drawing any distinction between the FAA76 claim and Lady Brownlie's other claims*" **[86].** However, on balance she considered it appropriate to treat it separately for a number of reasons, not least because "*the fact Lady Brownlie was involved in the accident is not an ingredient in this separate cause of action: she would have had the FAA76 claim even if she had not been in Egypt at the time of the accident*".

The court may, in the absence of proof as to foreign law, presume it is the same as English law

10. Further, on the issue of whether the court could in the absence of proof as to Egyptian law, apply the presumption that Egyptian law was the same as English Law, Arden LJ found that the mandatory nature of Article 4 (1) of Rome II did not exclude this presumption.

Observations on defective witness statements

11. Finally, perhaps the point of the widest relevance is Arden LJ's comments on FSHI's defective witness statements. She noted that Tugendhat J below had recorded that FSHI's *"witness statements failed to comply with the CPR, in particular because they did not state the maker's source of information and the maker of the statement could not speak of his own knowledge*" **[35]**, and she effectively agreed that these statements "*relied upon unattributed hearsay*"**[58]**. More specifically, she commented that FSHI's *"evidence is only expressed in the present tense. The court cannot be expected to read it as if speaking to some unspecified date in the past when it plainly says nothing of the sort*"**[57]**. Arden LJ was clearly bemused that no attempt to explain or remedy these "*obvious defects*" had been made. Ultimately, the vague and slapdash nature of the statements counted against FSHI when the court was forming a view as to whether the Canada Trust gloss had been met.

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