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Where in the world?- Service Out of the Jurisdiction

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The Basics

Permission Required or not?

CPR 6.33- No permission required where the court has the power to determine the claim under:

- Civil Jurisdiction Act 1982
- Lugano Convention;
- Judgments Regulation ;
- 'Other legislation'.

CPR 6.34- Serve with a notice of grounds for service out and beware, *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm), claimants must take particular care to ensure that they have a reasonable basis for their belief that the English court can determine their claim, the facts have to be put forward in a transparent basis. If there is a failure to serve these grounds, the claim form will only be served once the grounds are filed or if the court gives permission.

Permission Required

- CPR 6.37:

(1) An application for permission under rule 6.36 must set out –

(a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;

(b) that the claimant believes that the claim has a reasonable prospect of success; and

(c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.

(2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.

(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

PD6B 3.1- Tort Gateway

(9) A claim is made in tort where –

(a) damage was sustained, or will be sustained, within the jurisdiction; or

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.

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Brownlie v Four Seasons [2017] UKSC 80

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- On 3 January 2010, Sir Ian Brownlie QC was killed in a road traffic accident in which his wife, Lady Brownlie, was injured.
- They had been on holiday in Egypt along with other members of their family and were staying at the Four Seasons Hotel in Cairo.
- Lady Brownlie issued claims for (1) her own injuries (in contract and tort), (2) damages under the **Fatal Accidents Act 1976**, and (3) damages on behalf of her husband's estate under the **Law Reform (Miscellaneous Provisions) Act 1934**.

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- Lady Brownlie had to establish:

(1) that the case fell within at least one of the jurisdictional gateways in CPR 6BPD, para 3.1;

(2) that she had a reasonable prospect of success, and

(3) that England and Wales was the proper place in which to bring the claim.

Obiter disagreement between Lord Sumption (with whom Lord Hughes agreed) and Lady Hale (with whom Lords Wilson and Clarke agreed)as to whether in personal injury cases arising from accidents abroad consequential loss in England would satisfy the 'tort gateway'

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- Was 'damage' sustained in the jurisdiction? The majority view:

(1) There is a consistent line of first instance decisions permitting claims in tort to be brought in England and Wales if damage is suffered here a result of personal injuries inflicted abroad.

(2) There is no reason to think that the authors of paragraph 3.1(9) were contemplating anything but the ordinary and natural meaning of the word *"damage"*.

(3) Damage can be suffered by the same person in more than one place and the distinction between direct and indirect damage is not easy to draw in all cases.

(4) Robust *forum conveniens* discretion

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- Was 'damage' sustained in the jurisdiction? The minority view:

(1) There is an important distinction between the damage done to an interest which the law protects, which in the context of an action for personal injury is bodily integrity, and subsequent expenditure which is merely evidence of its amount.

(2) The wording of the Practice Direction could have provided that *"damage"* should extend to the financial or physical consequences of the damage, but it did not.

Brownlie v Four Seasons [2019] EWHC 2533 (QB)

- Various applications issued by the Claimant.
- Nicol J applied the majority view of the Supreme Court's approach to 'damage' in the context of the tort gateway.
- Held that the tort claims satisfied the test under CPR 6BPD 3.1(9)(a), which required that "damage was sustained, or will be sustained, within the jurisdiction".

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Brownlie v Four Seasons [2019] EWHC 2533 (QB)

- *"I recognise that all of the views of the Judges in Brownlie were obiter since all of the Justices of the Supreme Court accepted that the Claimant did not have a good arguable case that Holdings was responsible for the losses in contract or in tort. With such an illustrious range of opinions, it would seem somewhat superfluous for me to add to them. For what it is worth, I respectfully agree with the majority in the Supreme Court whose views I would anyway be inclined to prefer to those of the minority (and the decision of the Court of Appeal)."*

- Permission to appeal granted.

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PD6B 3.1- Contract Gateway

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(6) A claim is made in respect of a contract where the contract –

(a) was made within the jurisdiction;

(b) was made by or through an agent trading or residing within the jurisdiction;

(c) is governed by English law; or

(d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.

(7) A claim is made in respect of a breach of contract committed within the jurisdiction.

(8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).

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- Lord Sumption accepted that this 'gateway' required an offer and acceptance analysis in accordance with the rules laid down in *Entores v Miles Far East* [1955] 2 QB 327 (CA).

> *The argument on the point turned on the question who uttered the words which marked the point at which the contract was concluded and where the counterparty was physically located when he or she heard them. This is the test which has for many years been applied where the contract was made by instantaneous exchanges, eg by telephone [16]*

Brownlie v Four Seasons [2017] UKSC 80

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- In *Brownlie* the Claimant had no realistic prospect of establishing that she had contracted with Four Seasons because the hotel had been owned by an unrelated company.
- Application of those rules to determine whether or not the English Courts had jurisdiction over a dispute was "*not at all satisfactory*" and were "*particularly arbitrary when the mode of communication used is instantaneous*" (at [16]).
- Lord Sumption called on the Rules Committee to "*re-examine*" the drafting of PD6B, para. 3.1(6)(a). Similarly, Lady Hale suggested that the Committee consider "*adopting a broader formulation of the* rule" in PD 6B, para. 3.1(6)(a) [34].

Principles

- Serious issue to be tried on the merits of the claim
- Good arguable case that the claim falls into one of the gateways
- Ultimately, though: is this a proper case for service out?
- The court will not give permission unless satisfied that E&W is the proper place in which to bring the claim..

Is E&W the proper place?

The Spiliada [1987] AC 460

- Does the action have a real and substantial connection with the jurisdiction?
- Convenience, location of witnesses, governing law, residence of the parties, etc.
- Procedural advantages offered by English law, are not a matter for consideration.

Pandya v Intersalonika General Insurance Co SA [2020] EWHC 273 (QB)

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- C was a UK national who was hit by a motorcycle as she was crossing a road in Kos. D was a Greek-registered insurance company which provided insurance to the motorcyclist.
- Greek law imposed a five-year limitation period. D's case was that since C's claim had been issued but not served within this five-year period, it was out of time. C said that it was sufficient that the claim had been issued within the five-year period and that the English Civil Procedure Rules then applied to govern the question of service.
- The foreign law experts agreed that, under Greek law, the relevant period of limitation was five years and that interruption of limitation under Greek law required both the filing and service of the claim within that time period.
- C's case was that service was procedure that fell within art.1(3) of Rome II, governed by English law and therefore not time barred.

Pandya- Cont

- Professor Andrew Dickinson's monograph "The Rome II Regulation as cited in *Wall v Mutuelle De Poitiers Assurances* [2014] 1 WLR 4263, 4269G–H:

> *"the Regulation makes clear that 'rules relating to the commencement, interruption and suspension of a period of prescription or limitation' fall within the ambit of Article 15(h). Accordingly, for example, if the limitation regime of the country whose law applies to a particular non-contractual obligation under the Regulation specifies that an event prior to or following the commencement of legal proceedings is relevant for limitation purposes (for example, formal notification of a claim, commencement of a mediation procedure, or service of the claim document), the Member State court seised of proceedings must endeavour to give effect to that rule, having regard to its own corresponding procedures where appropriate."*

Pandya- Cont

- Tipples J agreed with D:
  - "service of the claim cannot be severed, carved out, or downgraded to a matter of mere procedure which falls to be dealt with under the English Civil Procedure Rules."
  - Held that C's interpretation would have given rise to a different limitation period in England and Wales than in Greece, contrary to the clear intention of Rome II to promote predictability of outcomes.
  - No support on authority for C's argument.
  - Claim barred under Greek Law.