A Year in International PI

James Candlin and Rachit Buch

With thanks to Alex Carington, James Beeton and Spencer Turner

Agenda

- Package travel update: *Griffiths v TUI* and coronavirus
- Contribution claims: *Roberts v SSAFA*
- Brexit: What next for cross-border PI litigation?
- Proving foreign law: *FS Cairo (Nile Plaza) LLC v Brownlie*

12 King's Bench Walk

Griffiths v TUI

12
King's Bench Walk

- **The facts**
  - 2 week holiday to Turkey
  - Ill on second day
  - Improved; went to town for medicines
  - Had a meal in town
  - Ill again/symptoms returned three days later

Griffiths v TUI

@ https://www.thedrinksbusiness.com/2020/05/brewdog-releases-barnard-castle-eye-test-beer/

Griffiths v TUI

12
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- **Expert evidence**
  - C: Dr Linzi Thomas & Prof Pennington
  - D: Part 35 questions
  - Prof Pennington not called for XX
  - C's evidence accepted in full

Griffiths v TUI

- **[10]** “These were uncontroverted in the sense that the Defendant did not call any evidence to challenge or undermine the factual basis for Professor Pennington's report, for example by calling witnesses of fact or putting in documentary evidence; nor was there any successful attempt by the Defendant to undermine the factual basis for the report through cross-examination of the Claimant and his wife, nor by cross- examination of Professor Pennington. In this sense, and unusually, the evidence of Professor Pennington was truly "uncontroverted".”

Griffiths v TUI

- D submitted expert evidence needed to be
  - (1) Complete
  - (2) Sufficiently reasoned
  - (3) Not undermined by factual evidence

Griffiths v TUI

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- **BUT**
  - Where evidence is uncontroverted, judge's role is to decide if the report meets certain minimum criteria (compliance with 35PD3)
  - If it does, opinion will be accepted
  - Judge is not entitled to consider weight to ascribe to opinions in same way as with controverted evidence
  - ***Kennedy v Cordia*** [2016] 1 W.L.R. 597 vs ***Coopers Payen v Southampton Container*** [2004] Lloyds Rep 331

Griffiths v TUI

12
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- Tactics:
  - What is the basis of the defence (1) no pathogen, focus on lack of numbers, may not need expert evidence; (2) pathogen and supportive expert report for C, will need to challenge by Part 35 questions, rival evidence or XX
  - Still able to challenge factual basis of expert evidence BUT may still need expert report on alternative scenario (see [19] *Griffiths*)
  - At trial, simply not admitting/accepting C's evidence is not enough. Even if it is garbage

Griffiths v TUI

12
King's Bench Walk

- Wider significance: gloss on ***Wood v TUI*** of *quantitative* cases vs *qualitative* cases
  - No pathogen: absence of ' numbers' might be fatal to claim
  - Pathogen + expert evidence: might be enough
- Watch this space… Permission to appeal not yet heard

Coronavirus

- Flights only
  - Refund - EC 2004/261 Art 51(a) and 8(1)(a)
  - Compensation – Art 5(3) extraordinary circumstances exception; E.C. and C.A.A. statements in March 2020 state will be applied to Covid-19 cancellations

- Package holidays
  - Refund – Regs 13/14 2018 Regs implied into each contract; 'unavoidable and extraordinary circumstances' cancellations permitted with full refund and no further compensation
  - Refund must be without undue delay and in any event within 14 days

Contribution claims

- ***Roberts v The Soldiers, Sailors, Airmen And Families Association – Forces Help & Anor*** [2020] EWCA Civ 926
  - C's claim: clinical negligence suffered by C at birth resulting in brain damage
  - C brought claim against SSAFA and Ministry of Defence
  - SSAFA and MoD sought contribution claims against the German hospital

Contribution claims

- Applicable law, limitation and procedure collide
  - German law applied to the claim and liability of the contribution claim
  - Availability of a contribution claim under German law was statute-barred
  - If Civil Liability (Contribution) Act 1978 had extra territorial effect, contribution claim would be within time
- Soole J at first instance held that 1978 Act did apply

Contribution claims

- Court of Appeal:
  - 'Tortuous' but clear wording of the 1978 Act itself clearly applied regardless of the substantive law involved (s.1(6))
  - Irwin and Phillips LJJ also held that Act supersedes any other right, which includes foreign law, other than express contractual provision (s.7(3). David Richard LJ dissented on this issue)
- Right *to claim* a contribution claim governed by 1978 Act even if the *claim for* a contribution is governed by foreign law
- This should apply regardless of whether Rome II applies but no express decision on this point

The “B” Word

Withdrawal Agreement: Jurisdiction

- Transition period: expires 31 December 2020
- EU rules cover proceedings "instituted" in the UK before end of transition period
- EU rules cover proceedings instituted **after** transition period if they are 'related to' proceedings instituted before end of transition for lis pendens purposes
- EU rules continue to cover proceedings instituted in EU Member States post-transition period

Lugano to the rescue?

- UK Government's wants to accede to Lugano Convention
- Norway, Iceland and Switzerland were supportive
- UK submitted formal accession application in April 2020
- But EU (a Convention Contracting Party) is blocking UK accession
- Lugano is similar to Brussels I (Recast) but there are problems – e.g. the "Italian Torpedo" still applies (*Mastermelt Ltd v Siegfried Evionnaz SA*)

Or the Hague Convention?

- UK also intends to accede to the 2005 Hague Convention on Choice of Court Agreements after transition period
- Convention will apply between the EU and the UK to exclusive choice of court agreements concluded after the Convention enters into force in the UK

Withdrawal Agreement: Applicable law

- Rome I will continue to apply to contracts concluded before end of transition period
- Rome II will continue to apply to events giving rise to damage occurring before end of transition period
- Rome I and Rome II will also continue to apply in UK after exit day: Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019
- EU Member States will continue to apply Rome I and Rome II after the transition period as before

No deal

- UK no longer subject to Brussels I (Recast) or Brussels Convention: Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019
- If no Lugano accession, then CPR 6BPD 3.1 “service gateways” (and Hague Convention) will generally govern jurisdiction
- No Odenbreit service gateway: direct claims against insurers would have to fit into tort or contract gateways
- No longer any Owusu v Jackson bar on forum conveniens arguments
- Lis pendens rules and Turner v Grovit bar on anti-suit injunctions disappear
- Rome I and Rome II will continue to apply

Proving Foreign Law

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Background

- RTA which occurred in Egypt, killing C's husband and injuring C
- C's claim: (i) vicarious liability in tort, (ii) direct liability in tort, (iii) contractual liability
- Pleaded case originally based on Law Reform (Miscellaneous Provisions) Act 1934 and Fatal Accidents Act 1976
- But now agreed that Egyptian law applied under Rome I and Rome II
- References to the English statutes were deleted from C's statements of case
- But substance remained the same – C just added "pursuant to Egyptian law" into her prayer for relief

Foreign law evidence

- C and D both produced expert foreign law evidence
- All three appeal judges agreed C's evidence set out a reasonably arguable case on vicarious liability in tort
- However, all three also agreed that it did **not** discuss principles of Egyptian law governing a direct claim in tort or a contractual claim
- Arnold LJ suspected this was a tactical decision

The presumption of equivalence

- *Rule 25 in* Dicey, Morris and Collins, "The Conflict of Laws":

(1) *In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.*

(2) *In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.*

Approach 1: McCombe LJ

- No need for C to set out *'the minutiae of foreign law, in the relatively straightforward factual context of a case arising out of a road accident'*

- C's claims were likely to be seriously arguable under **any** system of law:

'It would be strange if such claims were not considered at least seriously arguable under any system of law … the precise legal basis of potential liability seems to me to be of subsidiary importance at this stage.'

Approach 2: Underhill LJ

- Open to parties to agree that presumption will apply
- But no general requirement for C to plead content of foreign law where she wants to rely on presumption
- If either party wants to allege that foreign law differs from English law, then that party has to plead and prove it:

'The effect of the default rule is – inevitably – that the burden of pleading (and, in the service out context, proving) the content of foreign law is on the party who wishes to contend that it is different from English law.'

Approach 3: Arnold LJ

- Also thought parties could agree presumption applies
- But disagreed where D objects to C relying on presumption:

'If the defendant objects to the claimant relying upon the default rule, however, then I consider that it is incumbent on the claimant to adduce evidence of the foreign law (and to plead that law in the Particulars of Claim)'

- The mishmash of English and foreign law was deeply unattractive:

'What counsel for Lady Brownlie is really trying to do by relying upon Rule 25(2) is to make up for gaps in her client's expert evidence as to Egyptian law (and moreover gaps which do not appear to be accidental so far as the expert is concerned)'

Decision

- McCombe and Underhill LJJ allowed C to rely on presumption
- McCombe LJ added direction that C '*should set out in outline (in a revised pleading) the main principles of Egyptian law upon which each of the claims are based*'
- This was 'to achieve orderly progress in the resolution of the claims'
- Underhill LJ was put in an awkward position: *'it is at first sight contradictory to require her to plead [the content of Egyptian law] … unless and until the Appellant does so'*
- But never mind: *'On balance, however, I accept that such an order can be justified as a matter of case-management in the particular circumstances of this case'*

Next stop: Supreme Court

- Court of Appeal granted permission to D to appeal to Supreme Court on all points
- Also recommended that any appeal be expedited
- Status of presumption of equivalence currently a complete mess