Neutral Citation Number: [2015] EWCA Civ 665

Case No: B3/2014/0787

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
Queen's Bench Division
The Honourable Mr Justice Tugendhat
[2014] EWHC 273 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2015

Before:

LADY JUSTICE ARDEN
LORD JUSTICE BEAN
and
LADY JUSTICE KING

- -

Between:

Lady Christine Brownlie	**Respondent**
- and -	
Four Seasons Holdings Incorporated	**Appellant**

- -
- -

Howard Palmer QC and Marie Louise Kinsler (instructed by **Kennedys Law LLP**) for the **Appellant**
John Ross QC and Matthew Chapman (instructed by **Kingsley Napley LLP**) for the **Respondent**

Hearing dates: 25-26 February 2015

- -

Approved Judgment

LADY JUSTICE ARDEN:

OVERVIEW

1. The appellant is a Canadian corporation which runs the Four Seasons chain of hotels. This appeal arises out of an excursion which the respondent, Lady Brownlie, her husband, Sir Ian Brownlie and close family undertook in Egypt on 3 January 2010. Lady Brownlie and Sir Ian Brownlie were both citizens and residents of the UK. Lady Brownlie was injured and her husband, the late Sir Ian Brownlie, was tragically killed in a motor accident while on this excursion. The excursion was organised by the concierge of the Four Seasons Hotel Cairo at Nile Plaza, Egypt ("the hotel"). Lady Brownlie returned after the accident to the UK.

2. Lady Brownlie has now brought proceedings in this jurisdiction to recover damages in contract and also in tort, She has three tort claims: (1) for her own injuries (her "personal claim"), (2) for her loss as a dependent of Sir Ian Brownlie under the Fatal Accidents Act 1976 ("FAA76") (her "FAA76 claim"), and (3) for the loss and damage suffered by Sir Ian in her capacity as executrix of Sir Ian Brownlie's estate, under the Law Reform (Miscellaneous Provisions) Act 1934 ("LRMPA34") (the "LRMPA34 claim"). She obtained the court's permission pursuant to the Civil Procedure Rules ("CPR") to serve these proceedings on the appellant in Canada on a without notice application but the appellant then applied to set that permission aside. Permission must be set aside unless Lady Brownlie can show a "good arguable case" in relation to her claims: as to her claims in contract, that the contract in question was (a) made in England or (b) governed by English law; and, in relation to her claims in tort, that the appellant is the proper defendant and that damage was "sustained" in this jurisdiction (see paragraphs 3.1(6)(a) and (c) and 3.1(9)(a) of the Practice Direction 6B of the CPR set out in para 27 below).

3. The appellant was successful before Master Cook but unsuccessful before the judge, Tugendhat J, in its application to set aside the court's permission to serve the proceedings out of the jurisdiction. I summarise their judgments in paragraphs 31 to 45 below. The appellant now appeals to this court.

4. This appeal involves the elucidation and application of established principle, known as the *Canada Trust* gloss, and (so far as this court is concerned) a novel question of law in relation to the tort claim about where the damage was sustained. I summarise my conclusion in this judgment in paragraph 93 below.

CONTRACT FOR THE EXCURSION

5. Lady Brownlie had stayed at the hotel the previous year and then obtained a brochure on excursions which the hotel offered. The first page of the brochure was in the form of a letter addressed to "Dear Guest" and signed by the "Chief Concierge". Guests were invited to contact the Concierge. The brochure did not name the service provider but on the last page there was the logo of the Four Seasons chain, in the form of a stylised tree, and the following text:

FOUR SEASONS HOTEL

Cairo at Nile Plaza

1089 CORNICHE EL NIL

GARDEN CITY, 11619, CAIRO – EGYPT…

For reservations please call the concierge Ext 2200

6. Shortly before leaving England (on 19 December 2009) with Sir Ian Brownlie, Lady Brownlie telephoned the concierge at Four Seasons Cairo at Nile Plaza. Lady Brownlie made the booking for her chosen excursion in a telephone call to a female member of the concierge team. Sir Ian Brownlie's daughter, Rebecca, and her two sons, were to go on the excursion as well. At some point Lady Brownlie must have chosen the particular excursion that she wanted to take, which was to Al-Fayoum. The accident occurred during the excursion but we are not concerned with the circumstances.

7. The arrangements which Lady Brownlie made with the concierge were clearly contractual. But on whose behalf was the concierge acting? As explained in the next section of this judgment, Lady Brownlie's representatives set about taking steps to identify the other contracting party.

UNSUCCESSFUL ATTEMPTS TO IDENTIFY OTHER CONTRACTING PARTY

8. On 7 June 2010 Lady Brownlie's solicitors wrote a letter to the appellant. They addressed the letter to:

> "Four Seasons Hotels and Resorts
>
> Legal Department
>
> 1165 Leslie Street
>
> Toronto, Ontario, Canada".

9. After setting out the nature of the claim, they asked the addressee to confirm that it accepted primary liability for the claim and was content for it to be brought in the English court. The letter went on to ask that, if liability were not accepted, the addressee should give reasons and identify any other parties believed to be responsible. The solicitors also asked for pre-action disclosure of documents relating to the booking for the selected excursion in particular:

> "Documentation between the Hotel, the driver and the tour guides. For example, contracts of employment, booking forms and payment schedules".

10. On 27 July 2010 the solicitors received a substantive reply. It was on letter paper headed with the tree logo and the words, "Four Seasons Hotels and Resorts". The writer of the letter identified herself as "Marilyn Waugh LLB, Corporate Legal Advisor". The address from which the letter was sent was the address in Toronto to which the solicitors' letter had been sent. In addition to the address and telephone number there appears the website address www.fourseasons.com. A copy of the letter is said to have been sent to: "Olivier Masson, General Manager Four Seasons Hotel at Nile Plaza". The letter stated:

> "Please be advised that we have provided your earlier correspondence to AAHB Limousine and to Four Seasons Hotel at Nile Plaza for handling as the accident took place in the vicinity of Cairo. We requested that your correspondence be provided to their respective insurance carriers for direct response. We will follow up and request a timely response".

11. On 22 August 2010 Lady Brownlie's solicitors received a fax from lawyers in Cairo, containing the following:

> "1. The unfortunate accident that caused the death of the late Sir Ian Brownlie was not caused by Four Seasons Hotels and Resorts, nor by Four Seasons Hotel, Cairo at Nile Plaza, but was caused by Mr Hassan Mohammed Abdullah Salima who was employed as a driver at the time of the accident by AAHD Limousine Company … [the address in Egypt is given]
>
> 2. Mr Salima never worked for Four Seasons Hotels and Resorts nor for the Four Seasons Hotel, Cairo at Nile Plaza…
>
> 5. The role of Four Seasons Hotel, Cairo at Nile Plaza in this case was merely to relay this request to AAHD which executed it by one of its cars driven by one of its own employees without any involvement of Four Seasons Hotels and Resorts or of the Four Seasons Hotel Cairo at Nile Plaza…".

12. The letter further stated that only the driver and his employer, AAHD Limousine Company, were responsible and it gave their insurers' address. The letter is signed by Dr Tarek F Riad, who is described as "Legal Advisor for Four Seasons Hotel Cairo at Nile Plaza".

13. On 9 May 2010 Lady Brownlie's solicitors replied to Dr Riad. They made the point that the hotel staff gave every indication that the contract for the excursion was with

the hotel, and at no time had it been suggested that the Hotel was simply acting as an agent for the car hire company. They went on to ask if there was any difference between "Four Seasons Hotels and Resorts" and "Four Seasons Hotel Cairo at Nile Plaza," and if so, what the relationship between the companies was. There was no reply to this letter. They asked the same question of Ms Waugh but she simply replied that they should bring any claim against AAHD Limousine Company. At some point, however, Lady Brownlie's solicitors identified that the building occupied by the Four Seasons Hotel at Nile Plaza was owned by a local company, Nova Park Cairo SAE ("the Egyptian company").

LADY BROWNLIE STARTS THESE PROCEEDINGS

14. On 19 December 2012 Lady Brownlie began these proceedings against the appellant and against the Egyptian company but the Egyptian company was not served. The proceedings alleged that Sir Ian and Lady Brownlie believed that the appellant managed the Four Seasons Hotel Cairo at Nile Plaza.

15. The particulars of claim state that Lady Brownlie contracted with the appellant for the provision of the excursion, alternatively the appellant owed her and Sir Ian Brownlie a duty of care at common law to exercise reasonable care and skill to ensure their reasonable safety whilst travelling on the excursion.

16. Before I summarise the judgments of Master Cook and Tugendhat J, I need to explain two points. The first concerns the meaning of "good arguable case", which must be shown to obtain permission to serve out, and the second point is about the Rome Regulations.

"GOOD ARGUABLE CASE" AND THE *CANADA TRUST* GLOSS

17. When the court is deciding whether it has jurisdiction, it must scrutinise most jealously the factor which gives rise to jurisdiction. As Pearson J held in *Société Générale de Paris v Dreyfus Bros* (1885) 29 Ch D 239 at 242–243

> … it becomes a very serious question … whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

18. The court has jurisdiction if a "good arguable" case is shown that the case falls within one of the cases set out in the CPR (known as "jurisdictional gateways"). I consider in paragraphs 27 and 71 below what provisions of the CPR are relevant. At this point, I need to explain what is required to show a "good arguable case". To establish whether a good arguable case has been made out that the claim falls within one or more of the jurisdictional gateways, the court has to apply what has become known as the "*Canada Trust* gloss". The appellant argues that the judge failed to do this. The *Canada Trust* gloss is drawn from the following passage in the judgment of Waller LJ in *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 247:

> 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, i.e. 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.(underlining added)

19. The approach of Waller LJ was approved by Lord Steyn in the House of Lords in that case and by Lord Rodger in the Privy Council in *Bols Distilleries v Superior Yacht Services* [2007] 1 WLR 12 at [28]. However, the *Canada Trust* gloss requires explication. It is not easy to apply where there is a disputed issue of fact. Neither party has given disclosure or been cross-examined. Waller LJ held that the court "must be concerned not even to appear to express some concluded view as to the merits."

20. In *Antonio Gramsci Shipping Corporation v Recoletos Ltd* [2012] 2 Lloyd's Reports 365, Teare J stressed the importance of not deciding issues which would have to be decided at trial. He held:

> I am bound to apply the '*Canada Trust* gloss' whilst being careful not to prejudice the determination of the factual issue at trial. The '*Canada Trust* gloss' does however advise the court to concentrate on whether the court is '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'. It seems to me that in a case where there is, in the main, a conflict of evidence which cannot be resolved without appearing to conduct a pre-trial it is particularly important that the court asks itself whether factors exist which allow the court to take jurisdiction.

21. In my judgment, when applying the *Canada Trust* gloss, we are entitled to bear in mind that Waller LJ also held that:

> (1) the test was flexible (at 555H);
>
> (2) the court should not be drawn into deciding issues of fact (at 555F), and
>
> (3) the decision is to be made on the material available (at 555F).

22. Our conclusion will not be binding at trial. However, the issue (as in Issue 2 below) may simply not matter at trial, in which case this is the only chance the parties have to air it.

23. As submitted on behalf of Lady Brownlie, 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).

24. In any event, the court is not bound to accept a witness statement which is inherently defective, and certainly should not do so if it conflicts with other incontrovertible evidence or is unreliable for some other tangible reason, or, as Christopher Clarke J (as he then was) put it in *Cherney v Deripaska* [2008] EWHC 1530 at [44], "wholly implausible".

ROME REGULATIONS

25. The Rome I Regulation on the law applicable to contractual obligations ((EC) 593/2008) ("Rome I") applies to Lady Brownlie's contractual claim. The Rome II Regulation on the law applicable to non-contractual obligations ((EC) 864/2207) ("Rome II") applies to Lady Brownlie's tort claims.

26. This appeal is particularly concerned with the following Articles of Rome II which prescribe which law is to apply to a claim for tort:

> **TORTS/DELICTS**
>
> **Article 4**
>
> **General rule**
>
> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a

> contract, that is closely connected with the tort/delict in question.
>
> **Article 15**
>
> **Scope of the law applicable**
>
> The law applicable to non-contractual obligations under this Regulation shall govern in particular:
>
> …
>
> (f) persons entitled to compensation for damage sustained personally;…

LEAVE TO SERVE OUT OF JURISDICTION CHALLENGED

27. In April 2013, Lady Brownlie applied for permission to serve her claim form out of the jurisdiction. Lady Brownlie relied on paragraph 3.1(6)(a) and (c) and 3.1(9)(a) of the Practice Direction 6B of the CPR. These permit service out of the jurisdiction if:

> "(6) A claim is made in respect of a contract where the contract (a) was made within the jurisdiction . . . (c) is governed by English law; . . .
>
> (9) A claim is made in tort where (a) damage was sustained within the jurisdiction; . . .

28. Terrence Donovan, a partner in Kingsley Napley, her solicitors, filed a lengthy witness statement in support. On 21 April 2013, Master Yoxall granted Lady Brownlie permission to serve these proceedings out of the jurisdiction.

29. The appellant then applied to have the permission set aside. Its application was supported by two witness statements. These statements did not comply with the CPR because the makers did not state the source of information which the maker had obtained from someone else. Timothy James Newman, a solicitor employed by Kennedys, the appellant's solicitors, made the first witness statement on 2 May 2013 He did not state the source of his information as required by paragraph 18(2) to the Practice Direction to CPR 32. He did not provide evidence of matters as they were at the date of the excursion but of the state of matters as at the date of his witness statement. Accordingly he said: (1) that the appellant would "contend" that it is a company formed in British Columbia. (2) that it carries on business in the operation of hotels. (3) that it does not own the Cairo hotel. (4) that "owners of the Hotel [that is, any hotel] enter into various agreements with a number of Four Seasons entities depending on the jurisdiction. These agreements will cover licensing, management and advisory issues." (5) that "the appellant is not a party to any agreement in place with the Cairo Hotel." Joseph Gerard McManus, a partner in Kennedys, made the second witness statement on 2 July 2013 He stated that he believed the content of his witness statement to be true and in so far as it was based on information outside his own knowledge he believed it to be true, based on his investigations and instructions from the appellant. But he still did not name the source of his information as required

by CPR 32. He confirmed, again as of the time of his witness statement, that the appellant "[does] not own the Cairo hotel and that it "[does] not operate" the Cairo hotel.

30. On 31 July 2013, Master Cook set aside the order of Master Yoxall and declared that this court has no jurisdiction to try this claim. I turn next to summarise the Master's reasons.

MASTER COOK: CLAIMANT HAS NO ARGUABLE CASE

(a) Contract

31. Master Cook held that Lady Brownlie's case that she reasonably believed that she was contracting with the appellant, rather than the hotel itself, was not supported by evidence. While the fact the hotel was a Four Seasons hotel may have been a factor in her choosing to book there, there was no evidence it was a dominant factor. He found that it is "not unusual or novel" for a hotel to be owned and managed by a company established for this purpose in the country in which the hotel is located (even if it is part of a chain). Master Cook found that the other contracting party was the hotel. He also found that the contract was made in Egypt, on the concierge hearing that Lady Brownlie agreed to the excursion on the terms proposed.

32. The Master found that there was no evidence of a real choice of jurisdiction under Article 3, Rome I. The Master considered whether there was an express choice of law for the purposes of Article 3, Rome I and concluded there was no express choice. He then turned to Article 4 which deals with applicable law where there is no choice of law by the parties. He held that it was likely that neither party gave it real thought. He held that the service provider was the hotel, that it was incorporated in Egypt and that it therefore had habitual residence there. Under the rules set out in Article 4(1) Rome I, the applicable law to the contract was therefore Egyptian law. He held that Article 4(3) Rome I, which alternatively provides for the applicable law to be that with which the contract is manifestly more closely connected, could not apply, as the contract was made in Egypt, performed in Egypt and paid for in Egypt, it could not be said to be manifestly more closely connected with England.

(b) Tort

33. The Master found it difficult to see how the hotel or appellant could be vicariously liable for any tort committed by the driver, as the evidence demonstrated that he was not employed by them. As regards any issue of direct liability, the key matter was duty of care. In light of the above, any suggestion that the appellant owed a duty of care to Lady Brownlie in relation to the excursion was found to be "fanciful and bound to fail". Any duty would have been owed by the hotel. The Master said that he could not understand why the hotel was not served.

34. Lady Brownlie appealed to the judge, who allowed the appeal for the reasons set out in paragraphs 35 to 45 below.

JUDGE: CLAIMANT HAS SUFFICIENTLY ARGUABLE CASE

(a) Contract

35. The judge noted that the appellant'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. The judge was critical of the use of defective witness statements and the failure to obtain permission from the court to do so.

36. The judge noted that the appellant's evidence was on any analysis limited. The mere fact that the Egyptian company owned the hotel did not mean that it managed the hotel.

37. The judge held that the evidence from the appellant could not sustain the Master's conclusions that the appellant did not itself operate hotels or (as the Master had concluded) that it was not unusual for an international hotel to be owned or operated by a local company. There was no evidence that the other contracting party to the contract with Lady Brownlie was the local company which owned the hotel. The judge therefore ruled that the Master was in error in concluding that the appellant was the other contracting party and he considered the matter afresh.

38. The judge identified three issues: (1) was there a sufficiently arguable case that the appellant made a contract with Lady Brownlie? (2) was there a sufficiently arguable case that the contract was made in England; and (3) was there a sufficiently arguable case that the contract was governed by English law. Question (2) could only arise on the present application. It would not be an issue at trial though it might be relevant to the question of the proper law.

39. The judge considered that the brochure was the most important evidence. He held that the wording at the end (para. 5 above) would lead a reasonable person to understand (as Lady Brownlie herself did understand) that she was contracting with an international company known to trade under the name and logo of Four Seasons. The appellant fitted that description. The appellant had not identified any other company (Judgment, para. 71). There was no relevant evidence to the contrary and the judge decided that he could place little weight on the witness statements of Mr Newman and Mr McManus because they did not state the source of their information. He considered that the appellant's evidence was evasive and that the appellant could have no complaint if the court did not take into account evidence which it had chosen not to mention at this stage: *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 at [91].

40. The judge found that there was a sufficiently strong case that the contract between the appellant and Lady Brownlie was made in England. In his view, the most probable analysis of what had occurred was as follows: (i) the brochure was an invitation to treat; (ii) in her telephone call Lady Brownlie expressed her interest and invited the concierge to put forward some suggestions to meet her requirements which was not for the identical excursion as was set out in the brochure, as she wanted a shorter tour; (iii) the concierge made suggestions; (iv) Lady Brownlie offered to take those suggestions up; and (v) the concierge gave a verbal acceptance on behalf of the hotel. It was common ground that the contract was made at the place where the acceptance was received: *Entores Ltd v Miles Far East Corporation* [1955] 2 (QB) 327 at 334 to 335. Accordingly, the contract for the excursion was concluded in England where the concierge's acceptance was heard. There was no evidence from the concierge. The judge accepted that the point was difficult and that it might be

thought that the offer was made by the concierge. He considered that both parties could be said to have a good arguable case. It was difficult to apply the *Canada Trust* gloss. Nonetheless there were sufficient factors to allow the court to take jurisdiction.

41. The judge agreed with the Master that the contract was not governed by English law. Since the contract was one of services, the law of the place where the service provider had his habitual residence applied. The judge rejected the argument that the parties agreed on English law. The applicable law therefore depended on who the other contracting party was, which was not an issue that the judge could determine.

(b) Tort claims

42. The judge identified the applicable law might be the law of England or Egypt (under Article 4(1)) or Canada (under Article 4(3)). The judge found that, as there was no evidence before him of the contents of either Egyptian or Canadian law, he could adopt a presumption that they were similar to English law. However, he stated that this finding did not determine jurisdiction. The judge went on to state that he did not need to form a view as to the relevant law, save to say it seemed unlikely that it would be Egyptian law.

43. The judge held that Lady Brownlie had an arguable case that the damage was suffered within the jurisdiction. He held that *Cooley v Ramsey* [2008] EWHC 129 and *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 establish that, where a party is injured in an accident abroad and continues to suffer the effects in this jurisdiction, he can satisfy the requirements of CPR PD 6B paragraph 3.1(9)(a).

44. The judge dealt with *forum conveniens*. He concluded that England was clearly the most appropriate jurisdiction in which to try this claim and that conclusion was not challenged on this appeal. The judge concluded with criticisms of the appellant and its advisers. The judge considered that it was unacceptable for the solicitors to breach the rules on witness statements as they had done.

45. The judge was critical of Mr Newman and Mr McManus. They wrote to the judge after receiving his judgment stating that they accepted that they had failed to comply with the rules but had no intention to deceive. The judge replied that he would not make any further comment beyond what appeared in the judgment.

ISSUES ON THIS APPEAL

46. There are three issues on this appeal:

Issue 1: Was the judge wrong to find that a good arguable case that the other contracting party to the contract for the excursion was the appellant?

Issue 2: Was the judge wrong to hold that Lady Brownlie had a good arguable case that the contract for the excursion was made in England?

Issue 3: Should the judge have held that the damage was sustained in Egypt?

ISSUE 1: NO GOOD ARGUABLE CASE CLAIMANT CONTRACTED WITH APPELLANT FOR THE EXCURSION?

47. Mr Howard Palmer QC, for the appellant, made submissions on a number of topics under this issue.

48. *Effect of the evidence*: Mr Palmer submits the judge misinterpreted the appellant's evidence. The Master correctly found that statements as to the present state of affairs about the appellant also applied to the past. He submits that the present tense includes the past.

49. *Procedural irregularity:* Mr Palmer submits that the appellant's evidence had not been challenged before the Master. Mr Palmer submits that criticism of the appellant's evidence was not a ground of appeal from the Master and the appeal to the judge was not a rehearing. Mr Palmer made it clear that the appellant has taken its stand on the evidence as it stood before the Master and has not sought to file any further evidence.

50. *No good arguable case:* Mr Palmer submits that Lady Brownlie's case is unsustainable. At the time of contracting, she did not know of the existence of Four Seasons Holding Inc. Her evidence simply says that that she and Sir Ian Brownlie wanted to deal with an international company with a very good reputation, rather than contracting with an unknown Egyptian limousine company. Mr Palmer submits that the content of the claim form is part of the evidence and that, since it shows the Egyptian company as having a trading address at the hotel, that is evidence that it is the hotel operator. The appellant could have sued that company or AAHD Limousine Company. Mr Palmer submits that the brochure no more identifies the appellant than a document saying McDonalds at a McDonalds restaurant would show that the food was made by the parent company of the group.

51. *Local companies operating under licence*: Mr Palmer submits that hotels operate under a licence from the appellant. Mr Palmer relies on paragraph 7(d) of Mr Newman's witness statement to the effect that the appellant enters into agreements with local operators. He submits that the owner of the Cairo hotel had an agreement with Four Seasons and that those companies are entering into agreement with the hotels and that they cover different things such as licensing and use of the logo and advisory work.

52. Mr Palmer submits that the judge did not take into account that it was common ground that the Master was correct to say in paragraph 29 that the appellant is a separate legal entity which does not operate or own hotels. The Master was correct to say at paragraph 32 of his judgment that it was not novel for companies to be owned locally. So, submits Mr Palmer, whether you disregard Mr McManus' statement and Mr Newman's statement or not, the court must be forced to conclude that there is no good arguable case on the contracting party. It was material also on his submission that Ms Waugh sent the correspondence on to Cairo.

53. *Reversal of the burden of proof*: There was no ground of appeal which entitled the judge at paragraph 61 of his judgment to reverse the Master. Moreover, submits Mr Palmer, the judge effectively placed the burden of proving that there was no jurisdiction on the appellant and this was plainly contrary to the rule that the burden in

jurisdiction cases lies on the claimant: see *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337 at [36], [39], [90] and [91]. Mr Palmer submits that, where the issue is, "is the contract made with this appellant?", the defendant has a choice whether to go into the detail or simply to put the question in issue. The judge reversed the reasoning in *VTB* by holding that if the defendant is reticent it cannot complain if the court speculates that it was the contracting party.

54. *Defects in the evidence*: Mr Palmer submits that Mr McManus made his statement under great pressure of time, but he accepts that he was not as assiduous as he should have been.

Ruling on Issue 1

55. We did not call on the respondent on this issue.

56. In my judgment it was open to the judge to find that the evidence before the Master was deficient whether or not that point was taken in the grounds of appeal from the Master's judgment. If that point took the appellant by surprise, it should have asked for an adjournment. The appellant took no step to remedy the obvious defects in their evidence. It provided no explanation for taking no action to cure its errors.

57. The appellant's evidence is only expressed in the present tense. The court cannot be expected to read it as speaking to some unspecified date in the past when it plainly says nothing of the sort. A court mindful of the unco-operative attitude adopted to the requests for information made before starting proceedings was entitled to be cautious about the appellant's evidence.

58. In addition, as regards licences with local companies, the appellant's evidence relied on unattributed hearsay. In rejecting this evidence, the judge did not put the burden of proof on the defendant. The appellant was entitled to "keep his powder dry" and let Lady Brownlie try to prove her case on jurisdiction but the position then is that the court is entitled to proceed on the basis that the appellant will make no positive case at trial either. As Lord Neuberger explained in *VTB*:

> [91] However, if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make, out its case... if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial. …

59. On the evidence as it stood, the judge was right to conclude for the purposes of the jurisdictional question before him that her case was the much better argument on the issue of identity of the entity managing the hotel. Lady Brownlie could point to the brochure and the appellant's plain reticence to disclose details of the contractual relationship it contended it had with a local operator. Mr Palmer attempted unconvincingly to rely on Lady Brownlie's solicitors' endorsement on the claim form

about the trading address of the Egyptian company: that endorsement is plainly not evidence of the appellant's asserted relationship.

60. The Master considered that the appellant had arrangements with local companies. That was, with respect, speculation and if it really was as simple as that, it is difficult to understand why the court was not given proper evidence. The court is entitled to entertain doubts as to whether that evidence will be forthcoming at trial in the absence of some satisfactory explanation. The judge was in my judgment plainly right not to accept that point without relevant evidence or that explanation. It is not a satisfactory explanation that the maker of the witness statement was acting under time constraints.

61. I do not accept the argument that the judge exceeded the function of an appellate tribunal. The judge was in as good a position as the Master to form a view as to whether there was a good arguable case and whether the *Canada Trust* gloss was met. In those circumstances he was entitled and bound to consider whether the Master's decision was wrong. He was not reviewing the exercise by the Master of a discretion.

62. In the circumstances, in my judgment, the judge correctly applied the *Canada Trust* gloss. As explained above, he was not bound to accept defective evidence. He was entitled to give the appellant's evidence little weight because it simply did not address the question of the identity of the other contracting party at the time when Lady Brownlie booked the excursion. He could not exclude the possibility that there had been changes in the way the appellant organised its business or issued licences to local hotels between the two dates.

63. For these reasons, I would therefore reject the appellant's case on this issue.

ISSUE 2: NO GOOD ARGUABLE CASE CONTRACT FOR THE EXCURSION WAS MADE IN ENGLAND?

64. It is clearly right for Mr Palmer to make the point that Lady Brownlie's evidence does not descend to detail about the conversation with the concierge in which she booked the excursion to Al-Fayoum. Lady Brownlie's evidence did not address the point as to where the acceptance was received.

65. It is common ground that a contract concluded by telephone is made where the acceptance is received: *Entores v Miles far East Corporation* [1955] QB 327.

66. Mr Palmer submits that the supplier is the one who ultimately makes the final offer with the price and acceptance comes from the person who places the order. The evidence does not meet that point and so it cannot be said that the claimant has much the better argument. Mr Palmer submits that Lady Brownlie has to show that she has much the better argument, and it was not open to the judge to say it is six of one and half a dozen of another. There is no evidence as to who spoke last. Acceptance normally comes from the customer. It is a fair and natural inference that it has come from the customer.

67. Mr Palmer further submits that there was no evidence as to where the contract was concluded and that by definition the claimant could not have the better of the argument.

68. Mr John Ross QC, for Lady Brownlie, submits that there was a good arguable case that the contract was made in England. The question was to ascertain whether the acceptance was communicated back into this country. On his submission, the brochure was an invitation to treat. Lady Brownlie asked for a large number of variations, including:

    i) a car for five people;

    ii) the trip to take place on a Sunday.

    iii) Shortening of time from the usual 14-16 hours.

    iv) Start time of 7 30 am, not before dawn.

    v) visits to local beauty spots and a midday break with lunch in a Bedouin lodge near a lake.

Ruling on Issue 2

69. The judge approached the issue almost as a matter of horn-book law: there was no evidence as to foreign law and so he was bound to apply English law, the brochure was an invitation to treat and so Lady Brownlie had to make an offer to book an excursion and, for there to be a binding acceptance, the concierge had to accept. It was common ground that in law the contract for the excursion was made at the place where the words of acceptance were received. When the place where a contract was formed is in issue, the court has to do the best it can (per Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandesgesselchaft mbh* [1983] 2 AC 34 at 40G). I therefore reject Mr Palmer's submission in which the *Canada Trust* gloss could never be satisfied. At the end of the day a trial judge might well have no direct evidence and have to draw inferences. The court has to consider what is likely to have happened: Here Lady Brownlie had to approach the concierge and set out her requirements. The appellant does not suggest that it was the concierge who then made suggestions to Lady Brownlie. The concierge on this basis merely responded to Lady Brownlie's proposals, and that would mean that the concierge's role was to accept those proposals.

70. I do not consider it is necessary to go into all the points made by Mr Ross about the bespoke nature of the excursion which would only serve to reinforce that approach. In my judgment, in the absence of any evidence from the appellant about this, a good arguable case was shown and the *Canada Trust* gloss was satisfied in this case.

ISSUE 3: GOOD ARGUABLE CASE: DAMAGE SUSTAINED IN ENGLAND?

71. As I have held that there is a good arguable case in contract, the argument that there is no good arguable case that Lady Brownlie has sued the correct defendant falls away. The issue here is whether her tort claims satisfy the remainder of paragraph 3.1(9)(a) of the Practice Direction 6B of the CPR. Paragraph 3.1(9)(a) of the Practice Direction 6B of the CPR ("the tort gateway") permits service out of the jurisdiction of claims made in tort "where (a) damage was sustained within the jurisdiction; . . ." Mr Palmer submits that Lady Brownlie cannot meet this requirement of damage because it covers only direct loss or injury.

72. This argument has several steps. First, Mr Palmer submits that the applicable law must be the law of Egypt under Article 4(1) of Rome II (see paragraph 25 above). He submits that there is no basis on which some other law could apply under Article 4(2) or (3). In particular reliance can only be placed on Article 4(3) in exceptional circumstances, and the judge found that the applicable law of the contract was Egyptian law. Second, by virtue of Article 15, Egyptian law will on Mr Palmer's submission also govern the question of damages. Mr Palmer emphasises that the FAA76 requires the claim to be brought under that Act which has limited extraterritorial application, and cannot apply to a fatal accident occurring abroad and having no connection with England or English law: see *Cox v Ergo Versicherung AG* [2014] AC 1379 at 959 to 962, where it was common ground that liability for the fatal accident occurring in Germany was governed by German law; and compare *Shaker v Al-Bedrawi* [2003] Ch 350, [60] to [69]. He submits that similarly the LRMPA34 claim cannot be brought under English law.

73. Second, or alternatively, Mr Palmer submits that in the context of the Rome Regulations it is not open to the court to apply the presumption that, where no direct evidence is given, the court may presume that the foreign law is the same as English law. Although this court decided the contrary in *OPO v MLA* [2014] EWCA Civ 1277, the Supreme Court reversed that decision. In submissions lodged after the hearing of this appeal, and the handing down of the Supreme Court's decision, Mr Palmer submits that even though the Supreme Court reversed this court's decision in *OPO* on different grounds, this court's decision on the presumption is no longer binding authority. Mr Palmer goes on to argue that, since the presumption does not apply and Lady Brownlie has not adduced evidence that her claims would lie under Egyptian law, the court cannot in any event be satisfied that there is a good arguable case. As Mr Palmer put it in paragraph 66 of his original skeleton argument:

> The Claimant has failed to demonstrate a completed cause of action in tort, since she has not demonstrated, nor pleaded, that Egyptian law provides a remedy to her in tort. In particular, the Claimant relies on the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 for remedies arising out of the death of her husband (2/7/67 ff.), which do not form part of Egyptian law. No claim is made on the basis of Egyptian law and there is no evidence of Egyptian law before the Court

74. Third, Mr Palmer then addresses the High Court decisions which support Lady Brownlie's argument on the place where damage was sustained. For example, in *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB), Haddon-Cave J drew a distinction between the expression "damage" and the expression "the damage". In so holding, Haddon-Cave J was following the decision of Tugendhat J in *Cooley v Ramsey* [2008] EWHC 129 and other cases.

75. Mr Palmer submits that these decisions are wrong. For damage to mean "any damage" so that jurisdiction is allocated according to where a particular expense was incurred undermines the harmonising effect of Rome II. In any event, the natural reading of the tort gateway is that personal injury is incurred once and for all when the injury is inflicted. As Lord Hoffmann held in *Harding v Wealands* [2007] 1 AC 1:

> 24 In applying this distinction to actions in tort, the courts have distinguished between the kind of *damage* which constitutes an actionable injury and the assessment of compensation (i e *damages*) for the injury which has been held to be actionable.

76. Moreover, Mr Palmer submits that his interpretation is supported by the history of the jurisdictional rules in the English procedural rule governing service out of the jurisdiction, originally RSC Ord. 11, and the Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Brussels Convention"), which was replaced in 2001 by Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels 1 Regulation"). The Brussels 1 Regulation was in turn replaced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as the Brussels 1 Regulation (recast)), which came into force in the UK in 2015.

77. The Court of Justice of the European Union ("the CJEU") interpreted the requirement in the Brussels Convention for damage to occur in the jurisdiction to mean that it was insufficient that consequential loss should occur in the jurisdiction: C- 21/76 *Handelskwekerij G. J. Bier B.V. v Mines de Potasse D'Alsace S.A.* [1978] 708; C-364/93 *Marinari v Lloyds Bank plc* [1995] ECR 1-2719, [1996] QB 217 and C-200/88, *Henderson v Jaouen* [2002] 1 WLR 2971, *Dumez France v Hessischse Landesbank* [1990] 1-ECR 49; see also *Société Commerciale de Reassurance v Eras International Ltd* [1972] 1 Lloyd's Law Rep 570. It suffices to take what was said on this point in *Marinari:*

> 14. Whilst it is thus recognised that the term "place where the harmful event occurred" within the meaning of article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot, however, be construed so extensively as to encompass any place where the adverse consequences of an event that has already caused actual damage elsewhere can be felt.
>
> 15. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage consequential on initial damage arising and suffered by him in another contracting state.

78. Mr Palmer also relied on *Metall Und Rohstoff A.G. V. Donaldson Lufkin & Jenrette Inc.* [1987 M. No. 1772] [1990] 1 Q.B. 391 at 436 to 437, but this does not deal with consequential loss. His real point is that in the *Wink* and other decisions the court was not taken to the legislative history under the Brussels Convention. He submits that the context of Rome II is similar and that the CJEU's interpretation of the Brussels Convention should apply also to Rome II.

79. Mr Palmer further submits that *Dumez France v Hessiche Landesbrank* [1990] ECR 1-49 (C-220/08) shows that EU law would require a derivative claim to be brought in

the place where the harmful event occurred. In this case, the claimants were parent companies seeking to recover losses which the defendant bank had caused to them (i.e. their investment in their subsidiaries) by withdrawing a guarantee. The court held that where a claim was no more than an indirect claim for the loss suffered by the primary victim of the harm, the claim had to be brought in the jurisdiction where the incident occurred.

80. Mr Palmer's argument receives strong support from recent observations by this court in *Erste Group Bank AG, London Branch v JSC "VMZ Red October* [2015] EWCA Civ 379, where this court doubted whether it was correct to interpret "damage" for the purposes of the tort jurisdictional gateway as extending to consequential loss. Gloster LJ, giving the judgment of the court (Aikens, Gloster and Briggs LJJ) observed:

> 104. … the effect of the first instance authorities is to make this gateway extraordinarily wide. For example, in *Booth v Phillips* [2004] 1 WLR 3292 it was sufficient that the executrix of the deceased, who had died in an accident in Egypt, had paid funeral expenses in England to enable her to serve out of the jurisdiction on behalf of his estate for the whole of the estate's loss: see paragraph 33. In *Cooley v Ramsey* [2008] EWHC 129 (QB) [2008] I.L.Pr 27, it was sufficient that the claimant, who had been left gravely handicapped by an accident in Australia, suffered loss of earnings after repatriation to England six months later. It follows that, subject to issues of *forum conveniens*, an English domiciled claimant injured anywhere in the world (outside the EU) may serve proceedings out of the jurisdiction for a claim in tort, provided that his injury caused him some loss after his return. The loss may apparently be continuing (e.g. loss of earnings) or it may be one-off (e.g. funeral expenses).
>
> 105. While we have serious reservations as to whether those first instance cases were right, it is unnecessary to decide on this appeal whether they should be overruled, and we would therefore prefer not to do so.

81. Mr Ross submits that this passage is *obiter* and not binding on this court. Mr Ross submits that in this case the damage occurred in England and Wales whether it was economic harm, funeral expenses or other damages. As respects the appellant's point about the absurdity of an "infinitely portable" claim, Mr Ross submits that this has already been considered in *Booth v Phillips* [2004] 1 WLR 3292 (QB) by Nigel Teare QC (as he then was). Mr Ross also cites the decisions to the same effect in *Harty v Sabre International Security Ltd & Another* [2011] EWHC 852 (QB), *Stylianou v Suncorp Metway Insurance Ltd* [2013] EWHC and *Pike v The Indian Hotels Company Ltd* [2013] EWHC 4096. The difference here is that there is a test of *forum conveniens* and it is sufficient if damage is sustained within the jurisdiction. As Haddon-Cave J held in *Wink*, this means that the authorities on Article 5(3) of the Brussels Convention do not apply. Forum conveniens is not applicable to the Brussels regime (Case 281/02 *Owusu v Jackson* [2005] QB 801).

82. Mr Ross submits that *Dumez* is inapplicable: this was a case under Article 5(3) and it is therefore irrelevant. Moreover he submits that if the court has jurisdiction under some of the claims, it should have jurisdiction over the Fatal Accident Acts claims as well.

Ruling on Issue 3

83. This is a difficult area. In my judgment, Article 4 of Rome II should be interpreted in the same way as Article 5(3) of the Brussels Convention because of their similar history and because Recital (17) makes it clear that the principle that there is no different rule for consequential financial losses for jurisdictional purposes applies. It provides:

> (17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

84. Recital (33) supports this conclusion because it provides that courts should take into account consequential losses when dealing with road traffic accident claims by persons not habitually resident in the court's jurisdiction:

> (33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

85. That means that the tort jurisdictional gateway should be interpreted consistently with Rome II and that no distinction can therefore be based on the fact that the tort gateway talks about "damage", which ordinarily would mean "any damage", rather than "the damage" or "the direct damage".

86. Thus far, I have accepted the appellant's case. I accept Mr Palmer's submission that Lady Brownlie's personal claim and the LRMPA34 claim must be brought in Egypt. However, for the reasons given in this paragraph, I do not consider that this conclusion applies to the FAA76 claim. On the one hand, three points can be made. First, this claim arises out of the same accident in Egypt as LRMPA34 claim and Lady Brownlie's personal claim. Second, Lady Brownlie can have no greater claim with regard to the FAA76 claim than the deceased himself had. Third, the FAA76 claim may involve a court making findings on an accident occurring in Egypt which may also be the subject of findings by an Egyptian court in any proceedings brought on the personal claim and the LRMPA34 claim. These points militate against

drawing any distinction between the FAA76 claim and Lady Brownlie's other claims. On the other hand:

i) The claim under the FAA76 is a separate statutory cause of action: see *Cox v Ergo*, above.

ii) 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.

iii) Sir Ian Brownlie's cause of action arising by virtue of the LRMPA34 is vested in his personal representatives acting on behalf of his estate. It was not essential that Lady Brownlie should have been his personal representative. Personal representatives have a different capacity when they enforce a FAA76 claim from when they enforce the claim of the deceased.

iv) To obtain an award of damages under the FAA76, something more must be shown that would not be shown in an action brought by Sir Ian Brownlie's estate, namely the measure of dependency. Lady Brownlie has to show not merely that the appellant was liable to Sir Ian Brownlie, but also that she was dependent on the deceased.

v) Even though the claim must be brought by the deceased's personal representatives, if she succeeds, the amount she recovers will form no part of Sir Ian Brownlie's estate.

vi) Her claim for damages is not a derivative claim in the way that in *Dumez* the shareholder's claim for reflective loss was derived from the subsidiary's loss. A reflective loss claim simply mirrors the loss of the original victim: dependency does not have to be shown.

vii) The holding in *Dumez* cannot apply to all claims that could not have been made if the accident had not happened. For instance, it clearly could not apply to a contract claim under a life insurance policy on the life of Sir Ian Brownlie to which Lady Brownlie was entitled.

viii) The risk of inconsistent findings by different courts can therefore never be wholly eliminated if there is a common issue of fact but a different cause of action.

ix) Lady Brownlie's FAA76 claim is not properly described as for consequential loss. It is for an independent loss.

87. If I am correct in my conclusion regarding Lady Brownlie's FAA76 claim, she has established a good arguable case that English law applies to it. It is unnecessary to consider Article 4(3) of Rome II in relation to this claim.

88. The remaining question is whether this court can, under Rome II, in the absence of proof as to Egyptian law, apply the presumption that Egyptian law is the same as English law. I would reject Mr Palmer's argument on this. In *OPO v (1) MLA (2)SLT* [2014] EWCA Civ 1277, this court decided that Article 4(1) of Rome II did not exclude the presumption. Giving the judgment of the court, I held:

> 111. There is no discussion in the judgment of Simon J, or the Law Commissions' report, of the important restriction on the presumption which would result if that were the effect of (in the case of the former) the Regulation or (in the case of the latter) what is now the 1995 Act. Nor is there any indication in the 1995 Act or the Regulation themselves as to what the court must do if there is no evidence as to foreign law. In my judgment, it is clearly a matter which has been left to be resolved in accordance with the rules of the forum. I note that the leading work on the subject, Dicey, Morris and Collins, *The Conflict of Laws*, (15th ed. 2012) previously took the contrary view, but no longer does so (see paragraph 35-122 of the main work and see paragraph 35-122 of the First Supplement published in January 2014 which merely notes the views of Simon J in *Belhaj* without expressing a view on this question). Accordingly I do not consider that the observations of Simon J should be taken as supporting the proposition for which Mr Dean has cited them.

89. This case went to the Supreme Court, who reversed the decision of the Court of Appeal on the question whether there was a properly constituted tort under English law (*James Rhodes v OPO* [2015] UKSC 32). Accordingly the Supreme Court did not have to deal with the question whether the mandatory nature of Article 4(1) of Rome II excluded the presumption that foreign law is the same as English law in the absence of proof to the contrary. However, at [121], Lord Neuberger (with whom Lord Wilson agreed) specifically accepted the presumption could be applicable, although he did not give his reasons for that conclusion. I accept Mr Palmer's submission that the ruling on the presumption in *OPO* is no longer binding under the doctrine of precedent, though it would constitute strong persuasive authority: see *R v Secretary of State for the Home Department ex-parte Al-Mehdawi* [1990] 1AC 876 at 883 per Taylor LJ with whom Nicholls and O'Connor LJJ agreed. However, Mr Palmer did not seek to address the point made in paragraph 111 of my judgment in *OPO* that there is no indication in Rome II as to what the court must do if there is no evidence as to foreign law. In a common law system, such as that in England and Wales, the court does not have any inquisitorial function and cannot therefore conduct an inquiry itself as to foreign law. Even if it did so it might not come to the right conclusion. If Mr Palmer's argument is right, it would moreover follow that the court could not act on any agreement of the parties as to what the foreign law was or any agreement by the parties not to plead foreign law. These seem to me to be startling conclusions. Accordingly, for these reasons, in addition to those which I gave in *OPO*, I reject Mr Palmer's submissions that the presumption as to foreign law being the same as English law does not apply and his overarching submission that Lady Brownlie has failed to show a completed cause of action in tort because she has not adduced evidence as to Egyptian law.

90. Mr Palmer also submitted that Article 4(3) of Rome II did not apply. I agree that the circumstances of the tragic road accident are clearly the dominating factor in the personal injury claim by Lady Brownlie in her personal capacity and as a personal representative of Sir Ian Brownlie. In the circumstances, it could not be said that weight of the connecting factors was with this jurisdiction. Mr Palmer went on to rely

on *Shaker v Al-Bedrawi* [2003] Ch 350, where this court held that a mandatory rule in the Companies Act 1985 could not apply to a company incorporated in another jurisdiction. That case however, concerned a rule about the need to have "relevant accounts" (before making a distribution out of profits) which applied to companies incorporated in England or Scotland but which by its nature could not realistically be assumed to exist in foreign law.

91. To sum matters up on this issue, concerning Lady Brownlie's tort claims, therefore, I would, agree with the doubts expressed by this court in *Erste* about claims for consequential loss for foreign accidents being within the tort gateway. I would allow the appeal in respect of Lady Brownie's personal claim and in respect of the LRMPA34 claim (as defined in paragraph 2 of this judgment). However, for the reasons given above, I would dismiss the appeal insofar as it relates to Lady Brownlie's own tort claim under the FAA76.

REFERENCE TO THE CJEU FOR A PRELIMINARY RULING

92. A further question is whether this court should exercise its discretion to make a reference to the CJEU for a preliminary ruling on the interpretation of Rome II. Questions which might properly be referred include the question whether the presumption that English law is the same as foreign law would apply, and where relevant damage occurred in respect of the claims. I do not consider that this court should refer such questions to the CJEU. In the absence of Mr Palmer meeting the point which I made in *OPO* (see paragraph 88 above), I do not entertain sufficient doubt about the question whether the presumption that foreign law is the same as English law applies to justify a reference on that question. The other questions are clearly not *acte clair* in the light of the number of decisions which have reached a different conclusion from my own (see paragraph 74 above). Even so, I do not consider it would be right to make a reference. Such an order would involve considerable delay and commit the parties irreversibly to that route without a clear result at this time to this appeal. Neither party was in favour of this court making a reference: it may be that the parties wish for time to consider their next step. Furthermore, the Supreme Court already has some preview of these issues from its recent decision in *OPO* and it would therefore seem to be a better course for the Supreme Court to have the opportunity of considering the matter for itself if it wishes so to do. Moreover, the distinction which I have drawn between Lady Brownlie's FAA76 claim and her other claims is novel, and it is a point which the Supreme Court might wish to address itself. In all the circumstances, I have concluded that it would be inappropriate for this court in this case to make any reference to the CJEU.

SUMMARY OF CONCLUSIONS

93. For the reasons given in this judgment, my conclusions may be summarised as follows. I would dismiss the appeal on the contract claim. As far as the contract claim was concerned, the two points at issue are the identity of the contracting party and the place where the contract was made. On both points, the judge correctly applied the test of "good arguable case" to the available material. In relation to the tort claims, the issue as to good arguable case regarding the defendant's identity falls away. However, save in relation to the FAA76 claim, I conclude that 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 with regard to the LRMPA34 claim and Lady Brownlie's personal claim. By contrast, in relation to Lady Brownlie's FAA76 claim, which is brought to recover compensation for Lady Brownlie's loss of dependency, 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.

Lord Justice Bean

94. For the reasons given by Arden LJ I agree that the Claimant has shown at least a good arguable case that:

(a) her contract for the excursion was made with the First Defendant;

(b) it was made in England; and

(c) damage has been sustained in England in respect of her dependency claim under the FAA 1976, though not in respect of the claim on behalf of Sir Ian's estate under the LRMPA 1934.

Accordingly I too would allow the appeal in respect of the claim under the 1934 Act and Lady Brownlie's claim in tort in respect of her own injuries but dismiss the appeal in respect of the claim under the 1976 Act and the contract claim.

Lady Justice King

95. I also agree with the judgment of Arden LJ.