Neutral Citation Number: [2020] EWCA Civ 996

Case No: B3/2019/2556

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Nicol J
[2019] EWHC 2533 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE McCOMBE
and
LORD JUSTICE ARNOLD

- -

Between:

FS CAIRO (NILE PLAZA) LLC **(incorporated under the law of Egypt)**	**Appellant**
- and -	
CHRISTINE BROWNLIE **Widow and Executrix of Estate of PROFESSOR SIR IAN BROWNLIE, CBE, QC**	**Respondent**

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Marie Louise Kinsler QC and **Alistair Mackenzie** (instructed by **Kennedys Law LLP**) for the Appellant
Sarah Crowther QC and **Daniel Clarke** (instructed by **Kingsley Napley LLP**) for the Respondent

Hearing dates: 13 and 14 May 2020

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Approved Judgment

Lord Justice McCombe:

Introduction

1. This is the appeal of FS Cairo (Nile Plaza) LLC, an Egyptian company ("the Appellant") from the order of 1 October 2019 (sealed 09.10.19) of Mr Justice Nicol. By that order the judge gave permission to Lady Brownlie (either "the Respondent" or "Lady Brownlie") to substitute the Appellant as defendant to this action in place of Four Seasons Holdings Incorporated, ("FS Holdings") (a company incorporated under the law of British Columbia, Canada). Permission was also given to amend the Claim Form and Particulars of Claim. It was declared that the courts of England and Wales were the proper forum for the litigation of the Respondent's claims and that the High Court of Justice in this country had jurisdiction to try those claims. The Respondent was further given permission to serve the Claim Form and amended Particulars of Claim on the Appellant out of the jurisdiction in Egypt, but it was ordered, for practical purposes, that that service might be effected by service on its solicitors in London. Those were the same solicitors who had been acting for the "Four Seasons" organisation throughout. There were further ancillary orders.

Background

2. The background to the Respondent's claim can be stated very shortly.

3. The Respondent is the widow of Sir Ian Brownlie QC. In January 2010, she and her husband, his daughter, son-in-law and two grandchildren were on a holiday in Egypt and were staying at the Four Seasons Hotel Cairo at Nile Plaza. In her evidence in the action, the Respondent states that on a previous visit to the same hotel she had picked up at the hotel a leaflet advertising certain tours that the hotel provided. In advance of the holiday in question, she had booked, over the telephone with the hotel's concierge, one such tour involving a guided excursion to Fayoum in a chauffeur-driven car. The tour took place on 3 January 2010; the passengers were the Respondent and Sir Ian, his daughter and her two children. During the journey, the chauffeur-driven vehicle left the road and crashed. Sir Ian and the daughter were killed. The Respondent and the two children were seriously injured.

4. The Respondent claims that the Appellant, an Egyptian emanation of a large worldwide chain of hotels, is liable to her in damages for injury and losses suffered as a result of the accident. There was significant difficulty in identifying the correct "Four Seasons" company as the potential defendant to the claims. After the first stage of these proceedings had ended in the Supreme Court, and following what Lord Clarke of Stone-cum-Ebony described as "ducking and weaving" on the part of FS Holdings, it was seen that the decision to sue that company had been mistaken. The Appellant was substituted as defendant. The issue on this appeal is whether the judge was wrong to permit service of the claim on the Appellant out of the jurisdiction in Egypt with a view to the trial of her claims in the courts in this country. The judge held that England, rather than Egypt, was the more convenient place for trial. That conclusion is not contested in this court.

Summary of the Action to Date

5. The Respondent began these proceedings on 19 December 2012 claiming damages in contract and tort (a) for her own personal injury, (b) in her capacity as her late husband's executrix, under the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"), and (c) for bereavement and loss of dependency under the Fatal Accidents Act 1976 ("FAA 1976") as Sir Ian's widow. The Claim Form named FS Holdings as first defendant and an Egyptian company, Nova Park SAE ("Nova Park"), as second defendant. The difficulties of discovering the identity of the appropriate "Four Seasons" entity with whom the contract had been made, are summarised by the judge (at [10] to [13]). In short, following enquiries made by the Respondent's solicitors to the Four Seasons organisation at the outset, FS Holdings appeared to be a correct defendant and Nova Park had been identified, as the owner of the hotel premises, as a further defendant. Nova Park was not served with the Claim Form and took no part in the proceedings.

6. Permission to serve the proceedings on FS Holdings in Canada was granted by Master Yoxall on 15 April 2013 and they were so served on 10 May 2013. By application notice issued on 14 May 2013, FS Holdings sought orders staying/striking out the proceedings, alternatively a declaration that the English court had no jurisdiction to try the claims. That application succeeded before Master Cook. Tugendhat J allowed an appeal against that order on 19 February 2014. There was a further appeal to this court which came before Arden LJ (as she then was), Bean and King LJJ and on 3 July 2015 that appeal was allowed in part, permitting the Respondent to serve her claim based in contract and her claim under FAA 1976 out of the jurisdiction, but permission was refused in respect of her other claims in tort.

7. Finally, there was a further appeal and cross-appeal to the Supreme Court. The court allowed FS Holdings' appeal, holding that evidence, ultimately produced by that court's direction after some initial inconclusive exchanges between the court and FS Holdings' leading counsel on the first day of the hearing, showed that FS Holdings was a non-trading company which neither owned nor operated the Cairo hotel and that there was, therefore, no realistic prospect that Lady Brownlie would be able to show that she had contracted with that company or that it would be liable in tort for the negligence of the driver. It was held, therefore, that the English court had no jurisdiction to try the claims against FS Holdings. However, the court remitted ancillary matters to the High Court and, as Nicol J records (at [31] in his judgment) the Supreme Court ordered expressly that Lady Brownlie had permission to apply under CPR 17.4 and/or 19.4 – 19.5 to correct the name of the defendant to the proceedings or to add a new party as a defendant.

8. How the respective roles of FS Holdings and of the present Appellant, with regard to the operation of the Cairo hotel, were flushed out from within the Four Seasons corporate labyrinth by the Supreme Court is summarised by the judge in his judgment at [26] – [29]. It is informative that although the Supreme Court decided that the Respondent had never had a viable claim at any stage against FS Holdings, it made orders that there should be no order for costs of the proceedings either before Tugendhat J, the Court of Appeal or before the Supreme Court itself.

9. Having decided that FS Holdings was not the company responsible for the running of this particular hotel and that the claims against it, both in contract and tort, were not viable for that reason, it was not necessary for the Supreme Court to decide whether the intended claims in tort against FS Holdings were or were not within the "gateway"

under CPR Practice Direction 6B ("PD6B"), para. 3.1 (9)(a) permitting the court to grant permission for service out of the jurisdiction of:

> "a claim in tort where – (a) damage was sustained … within the jurisdiction".[1]

10. The Supreme Court nonetheless considered the question whether Lady Brownlie's claims in tort in respect of this accident, against a proper defendant, would fall within the definition in PD6B, para. 3.1 (9)(a). By a majority (Baroness Hale of Richmond, Lord Wilson of Culworth and Lord Clarke of Stone-cum-Ebony) decided that they would be within the definition. The minority (Lord Sumption and Lord Hughes of Ombersley) decided to the contrary. That difference of opinion is at the heart of one of the issues in the appeal before us.

The Amended Claim

11. The Claim Form and Particulars of Claim were amended to delete FS Holdings and Nova Park as defendants and to identify the Appellant as the new defendant to the action. The Claim Form was also amended to state that the Respondent's claim to damages against the Appellant is "pursuant to Egyptian law". That amendment was required since, as has always been common ground in respect of the new Egyptian defendant, this result followed (for the contract claims) from the EU Regulation known as "Rome I" (Regulation (EC) No. 593/2008 of the Council and Parliament) and (for the tort claims) from the Regulation known as "Rome II" (Regulation (EC) No. 864/2007); see the judgment below at [6].

12. On 29 October 2018, Foskett J gave the Respondent permission to serve the application out of the jurisdiction in Egypt. However, thereafter a consensual procedure was adopted for the new "Four Seasons" defendant, the Appellant, to challenge the proposed substitution of it as the new defendant and the intended amendments and to challenge yet again the jurisdiction of the English courts. Procedural directions were given by Stewart J by his order of 6 February 2019, including directions as to the provision of expert evidence as to Egyptian law "with respect to personal injury and wrongful death claims in contract and tort/delict, including in particular the law of limitation as it applies to such claims". The hearing of the issues took place before Nicol J on 24th-26th July 2019 and he gave judgment upon them on 1 October 2019.

Nicol J's Judgment

13. The learned judge heard extensive argument as to whether the change of defendant was properly to be allowed within the terms of the CPR, having regard, in particular, to issues of limitation, as to which a significant part of the expert evidence of Egyptian law was directed. The judge had to devote a large part of his very careful judgment to these CPR questions, none of which have been pursued on appeal. He

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[1] The later amendment to the paragraph to include cases where "…damage … will be sustained" within the jurisdiction was not, we were told, in force at the times relevant to the present case, having been added in 2015.

decided ([67]) that the claims were not rendered unarguable because of the evidence on the Egyptian law as to limitation. He also rejected ([71]) the Appellant's other arguments that he should not exercise his discretion to permit amendment in the Appellant's favour. The judge further rejected the Appellant's argument that the consequential amendments to the causes of action, deleting references to the 1934 Act and the FAA 1976, should be refused on the basis that they rendered such claims without any real prospect of success and/or failed to plead the Egyptian law provisions upon which reliance was placed. He addressed these points subsequently in his decision on jurisdiction.

14. On the jurisdiction issues, the judge held that the claims properly passed through both the contract and the tort "gateways" under PD6B. So far as the tort gateway was concerned, he stated ([108]) his respectful agreement with the view of the majority in the Supreme Court and held that the personal claims and the dependency claims, therefore, satisfied the requirements of the rule. So far as the contract claims were concerned the relevant PD6B requirement was also passed and was subject only to the arguments as to whether it had been shown that there was a "good arguable case" on those claims under Egyptian law.

15. The judge found that the Respondent had a "good arguable case" on each of the claims, sufficient to permit service out of the jurisdiction ([122] – [135]). Counsel then appearing for the Respondent relied upon the expert evidence of foreign law adduced and, in so far as there were any gaps in that evidence as to the causes of action in Egyptian law, he relied upon the presumption that that law was to be treated as the same as English law. This was on the basis of the standard statement of how issues of foreign law are determined in the English courts in *Dicey, Morris and Collins, The Conflict of Laws* (15th Edn. 2012) ("*Dicey*") at 9R-001 as follows:

> "Rule 25 – (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."

16. The extent of the applicability of the "presumption" that foreign law is the same as English law in the context of this case was the subject of substantial argument before the judge, as it has been before us. It is the subject of later parts of our judgments on this appeal. However, I should summarise the judge's conclusions ([127-129]) on whether a "good arguable case" on each of the claims had been made out and the extent to which the "presumption" might be applied.

17. So far as the tort claims were concerned the judge said:

> "127. The claims in tort are the following:
>
> i) Personal action based on vicarious liability
>
> ii) Personal action based on direct liability

> iii) Claim on behalf of Sir Ian's estate based on (a) vicarious liability and (b) direct liability
>
> iv) Claim as dependent based on (a) vicarious liability and (b) direct liability.
>
> 128. Subject to the limitation issue (which I have already considered above) Ms Kinsler accepted that the evidence of Mr Edge was sufficient to show that the Claimant had reasonably arguable tort claims based on vicarious liability ((i) above) and on behalf of the estate and as a dependent based on vicarious liability ((iii) (a) and (iv)(a) above). She maintained that these claims were not, though, adequately pleaded at present. She submitted that there was no evidence as to direct liability so as to show a reasonably arguable claim in respect of (ii), (iii) (b) or (iv)(b) above. She submitted that Mr Ezzo appeared to be saying that claims in contract and tort could not be combined.
>
> 129. In my view, in respect of those claims, for which Ms Kinsler argued that there was no evidence of Egyptian law, the Claimant is nonetheless able to rely on Dicey's Rule 25(2) and, for the reasons which I have already given, her present pleading is not such as to mean that any of her tort claims fail the merits test. I have already explained why I consider that her claims in tort remain reasonably arguable, notwithstanding the evidence of Egyptian law which has been presented."

The judge found that the courts in this country were the proper forum for resolution of the claims overall.

18. It is convenient to repeat here the judge's own summary of his conclusions on the wide-ranging arguments that were presented to him. (In the summary, he calls FS Holdings "Holdings" and the Appellant "LLC"):

> "140. In summary, I have concluded:
>
> i) As the parties have agreed, the Claimant's claims are all governed by either Rome I or Rome II. The governing law in both cases will be Egyptian law.
>
> ii) Because of the Foreign Limitation Periods Act 1984 s.8, s.1 of that Act will not apply, nor will Limitation Act 1980 s.35. If permission is given to substitute LLC for Holdings, there will be no relation back. Therefore, if and so far as any of the Claimant's claims are time barred by Egyptian law, the grant of permission to substitute will not prevent LLC from relying on such a defence.
>
> iii) In face of the argument that the Claimant's claims are barred by limitation, the Claimant has shown that it is reasonably arguable that this is not so. In those circumstances,

the qualification to the application of CPR r.19.2(1) does not apply and it is open to the Court to add LLC as a party to the claim pursuant to r.19.2 and to order that Holdings ceases to be a party pursuant to r.19.2(3).

iv) I exercise those powers and direct that LLC should be added as a party and Holdings should cease to be a party.

v) In the circumstances where there will be no relation back, it is not necessary for the Claimant to show that LLC does not have a reasonably arguable limitation defence.

vi) If I was wrong as to what the claimant must show in relation to the potential limitation defences available to LLC, I would conclude that the Claimant has failed to show that LLC would not have a reasonably arguable limitation defence.

vii) If I am wrong and the Claimant cannot rely on CPR r.19.2, she has a reasonably arguable case that her claims were not time-barred when the original action commended and so she has a reasonably arguable case that she can satisfy CPR r.19.5(2)(a). Further, if necessary, the Claimant is able to rely on r.19.5(3)(a) because LLC is to be substituted for Holdings which, I am satisfied, was sued in mistake for LLC.

viii) In the circumstances, it is not necessary for me to decide whether, in the further alternative, the Claimant could have relied on CPR r.19.5(3)(b).

ix) I give the Claimant permission to make the other amendments to the Claim Form in the form of the draft attached to the Application Notice and, so far as permission is necessary, permission to amend the POC in line with the DAPOC. I further give the Claimant permission to amend the Claim Form and the DAPOC to reflect the fact that there will be now only one defendant and not two.

x) The Claimant's claims in contract pass through the gateway in Practice Direction 6B paragraph (6)(a).

xi) The Claimant's claims in tort pass through the gateway in paragraph 9(a) of the Practice Direction.

xii) The Claimant's claims in contract are reasonably arguable.

xiii) The Claimant's claims in tort are reasonably arguable.

xiv) England and Wales is the proper forum for the Claimants' claims in both contract and tort to be litigated.

xv) I grant permission to the Claimant to serve her Claim Form out of the jurisdiction on LLC in Egypt.

19. As can be seen from this summary, very significant parts of the hearing before the judge and of his judgment were taken up by a multitude of issues arising on the application of the CPR, quite apart from the jurisdiction questions, only some of which are still in issue on this appeal. The Appellant sought permission to appeal on four grounds. It sought permission to challenge, under four broad heads, the conclusions summarised in [140] x) to xiv) of the judgment, quoted above, and the result in xv): these were the conclusions on the tort gateway (Ground 1A); the contract gateway (Ground 1B); the merits requirement (claims reasonably arguable) (Ground 2); and the approach to *forum conveniens* (Ground 3). The judge granted permission to appeal on Grounds 1A and 2 but he refused permission on Grounds 1B and 3.

Appeal to this Court

20. The Appellant applied to this court for permission to appeal on the two grounds on which the judge had refused permission. That application was refused by Irwin LJ by his order of 13 November 2019 (sealed 14.11.19). Therefore, there are two live Grounds of Appeal before us: (1) ground 1A, the tort gateway; and (2) ground 2, whether the Respondent's claims are "good arguable" ones/ whether they have a reasonable prospect of success.

21. I address, in this judgment, principally Ground 1A. Do the Respondent's claims in tort satisfy the requirements of PD6B para. 3.1(9)(a)? Are they claims made in tort where "damage was sustained … within the jurisdiction"? The principal judgment on ground 2 is given by Arnold LJ. I have read that judgment in draft. After careful consideration of it, unfortunately I find myself in disagreement with him on that issue and the last part of this judgment addresses that disagreement.

Ground 1A

22. The appeal on Ground 1A, the tort gateway, goes precisely to the point considered in the very full obiter dicta of the Supreme Court in its decision in this very case: now reported as *Brownlie v Four Seasons Holdings Inc.* [2018] 1 WLR 192 ("*Brownlie I"*). As already mentioned, the majority of the judges found that the claims did satisfy the requirement of the "gateway"; the minority found that they did not. Given this division of opinion, like the judge, I would feel strongly inclined to follow the majority conclusion, unless we are either obliged not to do so by other binding authority or we are clearly persuaded that we should not do so. It is noted, of course, that the passages on this point in all the judgments in the Supreme Court are indeed obiter dicta and, even if Lord Sumption did not do so, Lady Hale (at [33]) and Lord Wilson (at [57]) expressly sounded notes of caution about the views on the point expressed by the court. Nonetheless, it seems to me that the court had before them essentially all the same legal materials as have been before us and, having seen the printed cases, it seems they also had deployed before them much the same arguments as have been skilfully put by both counsel before us.

23. In an excellent argument for the Appellant, Ms Kinsler QC has submitted that we should prefer, and should follow, the reasoning of the Supreme Court minority. I have concluded, however, that we should follow the majority. As, strictly, we are not bound to take that course, I address Ms Kinsler's submissions and will endeavour to

explain shortly why it is that I find myself nonetheless persuaded by the judgments of Lady Hale, Lord Wilson and Lord Clarke, as opposed to that of Lord Sumption.

24. Ms Kinsler submits that the purpose of the gateway provision, in the form adopted in 1987, is to mirror the jurisdiction provisions governing such claims in Article 5(3) of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 which allows proceedings in tort/delict "in the courts of the place where the harmful event occurred or may occur", i.e. notwithstanding the usual rule of European Union (EU) law that a claim must be brought in the courts of the defendant's domicile. She argues that this purpose dictates that the meaning applied to the PD6B para. 3.1 (9)(a) should, therefore, mirror the manner in which such claims have been regarded in the law of the EU, not only at the time of the amendment in 1987 but also subsequently. It is submitted that this follows even though PD6B uses materially different language from the Convention and is dealing with claims against prospective defendants not domiciled in the EU, to whom (by definition) the restrictive regime of the Brussels Convention does not apply. She relies upon the statement of Lord Mance in *Bloomsbury International Ltd. v Sea Fish Industry Authority* [2011] 1 WLR 1546:

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. In this area, as in the area of contractual construction, "the notion of words having a natural meaning" is not always very helpful … and certainly not as a starting point, before identifying the legislative purpose and scheme."

25. The Brussels Convention (to which the United Kingdom had acceded in 1978) was replaced by Council Regulation (EC) No 44/2001 ("Brussels I") and this was in turn replaced by Regulation (EU) No. 1215/2012 ("Brussels I recast"). This EU legislation, in its present form, continues to employ the same language of "in the courts for the place where the harmful event occurred and may occur" to confer jurisdiction in tort/delict claims exceptionally on the courts of member states in which defendants are not domiciled. That is the language that has been interpreted by what is now the Court of Justice of the European Union ("CJEU") over the years. Whatever the prompt for the change of wording in RSC O.11 in 1987 (and we have been referred to no relevant "travaux préparatoires" leading to that change) the words used in our rules were not, and are not, those words, and the nature of the jurisdiction on non-Convention cases is materially different. I am content to assume the 1987 change to O.11, as noted by the Court of Appeal in 1989, was prompted by one *particular* decision of the European Court which illustrated how narrow the original tort gateway had been in English law (under O.11 r. 1(1)(f) in its previous form). In my judgment, the change that was then made should not be taken to have admitted, by language entirely different from that of the Convention/Brussels I/Brussels I recast, the subsequent narrow interpretation which the CJEU has found to be required by the language of that convention/regulation. I do not consider that the 1987 change to O.11, noted by this court in 1989, was necessarily thought to have reflected an intention that the words of O.11 should simply "parrot" the jurisprudence of the European court from time to time in its decisions on the different wording of the very different jurisdiction regime under the Convention.

26. In England and Wales jurisdiction over a defendant has traditionally been based upon the ability to serve that defendant within the jurisdiction of the court or outside the jurisdiction in accordance with rules of court. Under the old Rules of the Supreme Court ("RSC"), the predecessor of the present Civil Procedure Rules ("CPR"), tort claims were covered by O.11 r.1(1)(f) which originally permitted service abroad of claims in tort where the action was "founded on a tort committed within the jurisdiction". This was changed (with effect from 1 January 1987) to enable the court to permit foreign service where "the damage was sustained, or resulted from an act committed, within the jurisdiction". It may be that the change was made enable the rule to align the rule with Article 5(3) of Brussels I as interpreted up to that time: see below. When the provision was imported into the new CPR 6.20(8) (with effect from 6 May 2000) the definite article was omitted from the phrase "*the* damage" and the requirement became that "*damage* was sustained within the jurisdiction". That version was transposed into PD6B when the relevant rules generally were relegated to a Practice Direction on 1 October 2008.

27. As Lady Hale observed in *Brownlie 1* (at [40]) the omission of the definite article was so omitted from PD6B para. 3.1 (9)(a)

> "… in line with the holding of the Court of Appeal in *Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc.* [1990] 1 QB 391, 437 that the provision as then in force (even with the definite article – "the damage") did not require all the damage to be sustained in England; it was enough that if "some significant damage" had been sustained here".

28. Lord Sumption said much the same at [30]. He went on to say, however, with reference to other English cases to which I will refer later, that the provision had "generally" been construed in light of the subsequent case law of the CJEU.

29. As I have said, the *Metall und Rohstoff* case was decided when the wording referred to "the damage" being sustained within the jurisdiction. However, the court decided that where "the damage was sustained", in that case, involved choices between England, Switzerland and/or Belgium. The court observed at p.437:

> "It was argued for [the second defendant] that since the draftsman had used the definite article and not simply referred to 'damage', it is necessary that all the damage should have been sustained within the jurisdiction. No authority was cited to support the suggestion that this is the correct construction of the Convention to which the rule gives effect and it could lead to an absurd result if there were no one place in which all the plaintiff's damage had been suffered. The judge rejected this argument and so do we. It is enough if *some significant damage* has been sustained in England." (My emphasis)

At p.449E in that case, as Lord Wilson notes, the plaintiff was able to found jurisdiction in England for its tort claim on the basis that: "Significant damage has been suffered within the jurisdiction", notwithstanding that damage might have been suffered elsewhere also. The threshold was not even that most of the damage could be said to have been suffered here.

30. The division of view between the two "camps" in the Supreme Court, on this part of the argument, is encapsulated by the contrasting comments (in *Brownlie 1*) of Lord Sumption (at the end of [30]) and of Lord Wilson (at [63]).

31. Lord Sumption said:

> "… it would be strange if the effect of expanding the gateway to match the wider special jurisdiction authorised in Convention cases had been to make it very much wider than even the Convention authorised."

Then Lord Wilson's statement was:

> "63. The passage of the court's judgment in the *Metall* case set out above leads (and entitles) Lord Sumption at para. 30 above to cite the case as exemplifying construction of rule 1(1)(f) and its successors in the light of the case law of the Court of Justice. But it is, I suggest, of greater significance that, as Lord Sumption explains in para. 29 above by reference in particular to the judgment of the Grand Chamber in the *Marinari* case, the Court of Justice has rejected any suggestion that the requisite "harmful event" has occurred in a member state in circumstances in which only a significant part of the damage has been sustained there. If, unlike in the *Bier* case, damage is sustained in the state in which the causal act took place, the recast regulation does not confer jurisdiction upon the courts of a second state even if *significant further damage* is sustained there: see paras 14 and 15 of that judgment. Where, by contrast, the jurisdiction of the English court is not governed by EU law, the decision in the *Metall* case demonstrates that our rules create a gateway wider, as is now clear, than EU law would permit." (Emphasis added)

32. Also illustrating well the division between majority and minority, Lady Hale said at [50]:

> "50. Indeed, I see no reason to think that those who framed the RSC and CPR intended them precisely to mirror the interpretation later given to the Brussels Convention. The language used in the Rules, although no doubt intended to widen the gateway so as to encompass the cases covered by the Brussels Convention, is quite different from the language of the Convention. The *Dumez* and *Marinari* decisions came afterwards, to restrict the scope of the language used in the Convention, but they do not override the language of the Rules in non-EU cases. They are of no help in construing Rules which have remained in essentially the same language ever since. If the Rules Committee had wanted to assimilate the Rules after the decisions in *Booth* and *Cooley*, they could easily have done

> so, and now more easily, as the gateways are contained in a Practice Direction rather than a Rule."

(I return below to the cases cited by Lord Wilson and Lady Hale in the passages just quoted.)

33. The majority view in the Supreme Court, therefore, was that understanding of the English procedural rule, as amended in 1987, should not be coloured, in non-Convention cases, by later interpretations of the very different words of the Convention itself in later CJEU cases. I find this argument compelling. Moreover, it would have been no part of this country's obligation to give effect to European legislation that those parts of our law which were *not* enacted to give effect to European law should necessarily be interpreted consistently with it.

34. At the time of the decision in *Metall und Rohstoff*, as the court said, the new rule introduced in 1987 had come about to give effect to Brussels I and to a single decision on it in *Handelswerkerij GJ Bier BV v Mines de Potasse d'Alsace CA (Case 21/76)* [1978] QB 708 ("*Bier*"); see [1990] 1 QB at 437A.

35. In *Bier* pollution of the Rhine by wrongful acts in France caused physical damage and loss in the Netherlands. The court had to consider, of course, "where the harmful event occurred" and one can see immediately the dilemma if there could be only one qualifying harmful event. The decision was that, at the plaintiff's option, the suit could be brought either where the damage was sustained or the place (if different) where the act was done that gave rise to the damage. Prior to 1987 in England jurisdiction in tort was confined to claims "founded on a tort committed within the jurisdiction", i.e. somewhat closer to the phrase "where the harmful event occurred". However, the option given to plaintiffs by *Bier* meant that our rule, in its old form, was *narrower* than the interpretation given to Brussels I by the European Court in *Bier*. The rule was duly amended. The Court of Appeal in *Metall und Rohstoff*, like Gatehouse J at first instance in that case, rejected the idea that all the damage had to have been sustained within the jurisdiction: "significant damage" would do. That was the principle decided in the case.

36. In *Netherlands v Rüffer (Case 814/79)* a barge, allegedly sunk negligently in German waters, was recovered and then disposed of, by the Dutch state, at Delfzijl in the Netherlands. The Dutch authorities sought to recover their losses in the Dutch courts. The European Court, perhaps not surprisingly, held that "the harmful event" had not occurred in the Netherlands. The loss claimed, it was held, was the quantification of loss caused by harm that had occurred in Germany. There was the further compelling argument that to hold otherwise would have undermined the scheme under Brussels I that the plaintiff did not have the simple option of suing in the courts of his own domicile. There is no such scheme in English law for cases not governed by Brussels I. The CPR provision which we have to apply does not apply to claims where the English court has jurisdiction under Brussels I; such cases do not require the court's permission and the procedures are governed separately by CPR 6.33. In *Rüffer* there was no physical harm caused in the Netherlands, but the case does not assist, in my judgment, with a case where such harm is inflicted in one country and continues, with other consequences, in another country, as in the case before us.

37. In *Dumez France SA v Hessische Landesbank (Case 220/88)* [1980] ECR I-49. Wrongful acts in Germany caused the insolvency of German subsidiaries of a French company, with resultant loss to the French company who wished to bring a claim in the courts in France against the defendant German bank. The European Court held that the loss was the indirect consequences of losses originally caused to the subsidiaries. This case is far removed from the facts in the present case. The loss there had been caused to the subsidiaries which were entirely different legal entities from the parent which wanted to bring proceedings in France. The harm was caused to them and was their loss which no doubt they could have recovered in claims by them in Germany, with resultant benefit to the parent. However, the loss was not that of the parent at all.

38. Finally, in the European cases, I should refer to *Marinari v Lloyds Bank plc (Case C-364/93)* [1996] QB 217. The claim was by an Italian national who said that the bank, at a branch in Manchester, had wrongfully impounded certain promissory notes, allegedly causing consequential loss in Italy where he then wished to bring his claim. The bank had thought that the notes were of a suspicious character and had contacted the police; the claimant had been arrested. He wanted to claim damages for the value of the notes and compensation for the consequences of his arrest, including damage to his reputation. The CJEU held that Italy was not the place "where the harmful event occurred".

39. As this was the last of the EU cases to which we were referred, it is perhaps helpful to summarise the effect of the European cases to which reference has already been made in the CJEU's own words, describing the derogation (in article 5(3)) from the general rule (in article 2) that defendants are to be sued in the courts of their domicile:

> "10. As the court has held on several occasions – in *Mines de Potasse d'Alsace* [1978] QB. 708, 729, para. 11 [i.e. *Bier*]: *Dumez France* [1990] E.C.R. I-49, 79, para. 17, and *Shevill v. Presses Alliance S.A. (Case C-68/93)* [1995] 2 A.C. 18, 61, para. 19 – that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the state of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.
>
> 11. In *Mines de Potasse d'Alsace* [1978] Q.B. 708, 7131, paras. 24 and 25, and *Shevill* [1995] 2 A.C. 18, 61, para. 20, the court held that where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" in article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.

> 12. In those two judgments, the court considered that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction. It added that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.
>
> 13. The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it: such an extension would negate the general principle laid down in the first paragraph of article 2 of the Convention that the courts of the contracting state where the defendant is domiciled are to have jurisdiction and would lead to recognition, in cases other than those expressly indicated, of the jurisdiction of the courts for the plaintiff's domicile, which the Convention militates against by excluding, in the second paragraph of article 3, the application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a contracting state.
>
> 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.

40. In my judgment, as Lord Wilson points out at [63] of *Brownlie 1* , quoted above, this formulation would conflict with the approach of the Court of Appeal in *Metall und Rohstoff*: if damage is sustained in the state where the causal act took place, there would not be jurisdiction in the courts of a second state even if "significant" further damage was sustained there. Therefore, the tort gateway ought to be construed in such cases as wider than the gateway that EU law would permit. As I consider emerges from the cases at first instance in this country (to which I return), it is that distinction that has been appreciated in the decisions there made.

41. I turn to two further Court of Appeal cases, on very different facts, to which we have been referred: *Société Commerciale de Réassurance v Eras International (The Eras Eil Actions)* [1992] 1 Lloyd's Rep. 570 (*"Eras"*) and *ABCI v Banque Franco-Tunisienne* [2003] 2 Lloyd's Rep. 146 (*"ABCI*").

42. *Eras* arose out of an extremely complex factual background and serial litigation arising out of a "disastrous outcome" of a reinsurance pool arrangement operating in the United States. Simplifying significantly, the pool had been set up at the instigation of an English group of companies called "Clarksons". The managers of the pool, under arrangements made with Clarksons, were an American group called "Howdens". Following the disaster, numerous actions were brought in England by individual reinsurers against Clarksons. Clarksons in turn made claims over against Howdens and sought to serve some of those claims under separate writs upon Howdens in the United States. So far as founded in tort, Clarksons contended that they had suffered damage in their pocket in London and that, therefore, damage had been sustained in England. Howdens contended that both the negligent acts alleged, and any resultant damage, occurred in the United States where the consequences of the pool enterprise manifested themselves in great losses.

43. Giving the judgment of the court (for himself, Nourse LJ and Nicholls LJ (as he then was)) Mustill LJ (as he then was) noted that the rule change effective at that time was intended to give effect to Brussels I, as interpreted by the European Court in *Bier*. However, he said that neither the draftsman of the rule nor of Brussels I contemplated actions founded upon economic torts. He noted that the only English case bearing upon the matter was *Metall und Rohstoff* from which he quoted extensively. He said (at p. 590) that the case was …

> "… sufficient to dispose of any possible argument to the effect that since Clarksons may well have suffered damage in addition to any suffered within the jurisdiction par. (f) could not apply – and indeed we believe that no such argument was advanced to us. What the case does not decide is that Mr Justice Waller was necessarily wrong in holding on the facts of the present case that r.1(1)(f) applied because Clarksons had suffered damage in their pockets in England. The decision shows only that on the particular facts damage to Metall & Rohstoff could for the purposes of the rule be suffered in London where the warrants were converted as well as their principal place of business. Beyond this we doubt whether much can be extracted from *Metall & Rohstoff*, although it is very important on the general principles to be applied to O.11 cases."

44. Mustill LJ then considered *Bier* and *Rüffer*. He said of *Bier* that the conclusion of the court was precisely in accord with the provisions of our rules of court ...

> "… but advances the present controversy not at all since it is not concerned with the financial consequences of a tort which itself is wholly economic in nature.
>
> At first sight the opinion of Sir Gordon Slynn A.G, [sic. Warner A.G (as he then was)] in [*Rüffer*] seems closer to the point."

It was noted that in *Rüffer* the court had rejected the claim for jurisdiction in the Netherlands based upon that being the seat of government where the state suffered financial loss, Mustill LJ then continued (at p.591):

> "The reasoning of the Advocate General is in our respectful opinion unanswerable, and could properly be applied to the present case if Clarksons had been basing their claim to be within r.1(1)(f) solely on the situs of the head office of their group. But they can say more than this, for the damage of which they complain is their exposure to claims by [reinsurers]. These are being pursued in England, and if successful will result in judgments of the English Court enforceable against Clarksons in England. We consider that in a real sense this amounts to the suffering of damage in England."

45. It can be seen that *Eras*, like *Rüffer*, is miles away from the facts of the present case and, in any event, it was clear that the claimant Clarksons had a claim to damages for loss suffered in England, wherever else they may have suffered loss. The torts alleged in the present case are not "wholly economic in nature" at all. Admittedly, the court arrived at its conclusion by the route of comparing the two European cases. However, it was not considering a case like the present where physical and other damage was suffered sequentially both outside and then inside the jurisdiction. Nor was the point taken that O.11 was not concerned with claims within the Convention and that the words of the Rules were (and still are), in any event, quite different from the words used in the Convention. Advocate-General Warner's second point, adopted by the European Court in *Rüffer*, was that the claim to jurisdiction in the Netherlands undermined the scheme under article 2 (and following) of the Convention in which the primary rule is that persons domiciled in a member state of the EU shall be sued in the courts of that member state. No such scheme is inherent in our rules in cases where the Convention does not apply, indeed far from it. As Lady Hale said in *Brownlie 1* (at [40]) with regard to this very case:

> "It goes without saying, however, that we are not here concerned with a claim which is governed by the jurisdictional rules of European law. We are dealing with a claim against a defendant who is not domiciled in a member state, which is therefore governed by the jurisdictional rules of the law of England and Wales, now contained in the Civil Procedure Rules …"

46. The other Court of Appeal case upon which Ms Kinsler relied was *ABCI,* another case in which the damage was purely economic. In this case the plaintiffs (ABCI) agreed to buy 50% of the shares in Banque Franco-Tunisienne (BFT) for the Tunisian Dinar equivalent of approximately US$2.8 million. The purchase was made allegedly in reliance on certain accounts said to have contained fraudulent misrepresentations which were said to be the result of a conspiracy between BFT and the other defendants to defraud ABCI. STB challenged the jurisdiction of the English courts on the basis that no relevant act or damage had occurred in England. It was held that there was no arguable case that the damage had been sustained in England. The court (Tuckey LJ and Mance LJ and Black J (as they respectively then were)) held that, on the evidence the damage was sustained where the investment had been made; it examined the source of the investment funds. The loss had been suffered in Switzerland, where the purchase moneys were debited from its bank account, or possibly in France on the basis of certain telex communications referred to in the

judgment. There was no documentation revealing any banking relationship or bank account in London. It had been submitted for ABCI that damage could be sustained in more than one place, relying upon *Bier*. Delivering the court's judgment, Mance LJ said (at [43]) that the rule change in 1987 had been

> "… underpinned by the consideration that, although the present is not in fact a European case, cl. 1(f) was introduced in 1987 in order to ensure that English law was consistent with art. 5(3) of the Brussels Convention Mr Milligan submits that damage can be sustained in the sense of cl (f) in two different places, clearly that can be so in some cases, e.g. pollution from one source affecting different places (cf. [*Bier*]). But the proposition that the Appellants could be regarded as having sustained damage within cl (f) both in the place where they purported to make or hold a board meeting ratifying the share subscription contract and the place where they made their investment, allegedly under it, is less easy to digest.
>
> 44. In our judgment cl. (f) is looking to *the direct damage sounding in monetary terms which the wrongful act produced upon the claimant*: see [*Dumez*] …In the present case that means the loss sustained by actually investing in an (allegedly worthless) company, not the entry into any prior contractual commitment which might or might not have been followed by the making of such an investment before discovery of the inaccuracy in the accounts." (Emphasis added.)

For my part, I cannot see that the various losses said to have been suffered by Lady Brownlie in this case are other than "the direct damage sounding in monetary terms which the [allegedly] wrongful act produced upon the claimant". Clearly, the majority of the Supreme Court in this case did not consider the fact that this case is not within the scope of the Convention to be "by the way" (as Mance LJ said of the claims in *ABCI*) and neither do I.

47. In my judgment, it is clear that in *Eras* Clarksons were liable to suffer damage in England by reason of the suits brought against them here, wherever else damage had been suffered. In *ABCI* the damage sustained was caused by the debits from ABCI's foreign bank accounts which had no connection with England. There seems to me to be little relevant comparison of those cases with a case like this one where damage is caused to a person because of personal injures inflicted upon him or her abroad and the immediate and direct results of those injuries are suffered first abroad and are carried back to the home country.

48. In *Brownlie 1*, Lady Hale referred with approval to the line of first instance decisions holding that, in a case not governed by EU jurisdictional rules, a claim in tort may be brought in England if damage is suffered here as a result of personal injuries inflicted abroad. It is not necessary, I think, for present purposes to refer to all those decisions which Lady Hale summarises in her judgment. It suffices to note that she and Lords Wilson and Clarke found the reasoning in them to be correct.

49. I would only mention, by way of example, the decision of Haddon-Cave J (as he then was) in *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB), in which Ms Kinsler and Ms Crowther were, strangely enough, pitched on precisely the opposite sides of the arguments for which they now contend before us. That, of course, is the quite proper role of counsel in the English courts; they advance arguments without adopting personal opinions; counsels' personal views are irrelevant.

50. In *Wink*, which was also a case of injury to a British national, domiciled in England, as a result of a road accident abroad, Haddon-Cave J (at [37] to [42]) cogently rejects arguments almost identical to those presented to us by Ms Kinsler in the present case, for reasons which I find entirely convincing. I note, in particular, that he relied upon the simple and obvious meaning of the word "damage" used in the rule with which we are concerned and that the Rule committee is enjoined to "make rules which are both simple and simply expressed": Civil Procedure Rules Act 1997 s.2(7). There is nothing in the words used to suggest the need to bring into the construction of them a number of complex European decisions upon the quite different words used in Brussels I which have been adopted for an entirely different jurisdictional scheme altogether. The requirement to show an arguable case of "significant damage" derived from the *Metall und Rohstoff* case is sufficient for the understanding of the meaning of our rule. As Haddon-Cave J said at [41]:

> "The case law of the Court of Justice ("CJEU") on Article 5(3) of the Brussels Convention/Brussels I Regulation is not relevant to the construction of ground 9(a) because the two schemes are fundamentally different in structure and policy. The EU rules seek certainty at the price of inflexibility: thus *forum conveniens* arguments are not permitted … By contrast, in respect of non-Regulation countries, the common law rules adopt a more flexible legal framework which admits *forum conveniens* and makes assumption of jurisdiction discretionary."

51. Of course, the element of discretion is limited to cases which properly fall within the various "gateways" under PD6B para. 3.1 on their true construction, but it is important to recall that a vital part of the scheme under those provisions *is* precisely that residual discretion. In such circumstances, one need not be fearful of arguments raised *in terrorem* against supposedly exorbitant jurisdiction. There is no need, moreover, to import the stultifying rigidity of a different jurisdictional scheme in setting the boundaries of the common law scheme in such matters. Given the different policies of the English law and European law, I see nothing frightening in the existence of parallel jurisdiction in the courts of different countries in respect of tortious liabilities. It is simply a corollary of the global economy in many aspects of life, including in finance, commerce, and tourism. Tested on the facts of this case, there is certainly nothing remarkable in the Egyptian arm of the multinational organisation to which this defendant belongs, and which looks for customers from all over the world, being the potential subject of litigation in a country other than that of its incorporation.

52. As Lady Hale noted (at [52] in *Brownlie 1*) in construing a similar jurisdictional rule to our own, the Court of Appeal of New South Wales in *Flaherty v Girgis* (1985) 63 ALR 466, 482 said that "damage" in the rule "… includes all the detriment, physical,

financial and social which the plaintiff suffers as a result of the tortious conduct of the defendant"[2]: see also Lord Clarke at [69]. Coherence in the common law systems is important. It seems to me to be appropriate, in construing a rule applicable to the common law world, to adopt a meaning parallel to that adopted in another important common law jurisdiction in cases such as the present. That is better than to adopt a meaning attributed to entirely different words, in a different statutory enactment, produced for an entirely different overall scheme. Again as Lady Hale said (at [53] in *Brownlie 1*,

> "Nor do I find… the distinction between direct and indirect damage easy to draw in all cases. If I am injured in a road accident, the pain, suffering and loss of amenity that I suffer are all part of the same injury and in cases of permanent disability will be with me wherever I am."

(I would add to that list the losses caused by bereavement and dependency.)

53. To my mind the distinction between "direct" and "indirect" damage is virtually meaningless in the present context when one is asking the proper question whether a claimant has suffered "significant damage" in the jurisdiction. Even in cases of economic loss, moreover, I can see no reason why the suffering of "significant damage" in this country might not amount to a proper "connecting factor" between this country and a foreign defendant, even if other such damage is suffered elsewhere, justifying the assumption of jurisdiction in a proper case. There is no need to import the legalistic niceties inherent in the concepts of direct and indirect damage. Such jurisdiction may not necessarily be exclusive. It may be that other "significant damage" is inflicted in the defendant's country also and the rules of that country may give its courts jurisdiction also. It is then a question of balance for the court to decide whether this country's jurisdiction should be asserted in the face of a parallel jurisdiction of the courts of the country abroad.

54. The judges in the first instance cases referred to by Lady Hale construed the ordinary English word "damage" in a sensible common-sense manner which the Civil Procedure Act 1997 requires in the framing of the rules overall. In my view, that approach ought to follow when a court later construes those rules in an individual case. The courts did so in the context of personal injury cases, as applying to the damage resulting from injuries to the person. There are, in my judgment, clear differences between the nature of the damage suffered in such cases and the nature of the damage suffered in very different circumstances in, for example, *Eras* and *ABCI*. However, there is nothing particularly difficult in deciding, in a purely financial case also, whether such "significant damage" has been sustained in this country, whether exclusively or in addition to damage suffered elsewhere.

55. I do not share the "serious reservations" about the first instance cases expressed by this court in *Erste Group Bank AG v JSC "VMZ Red October"* [2015] 1 CLC 706, 748 at [104] – [105]. Further, along with all the judges in the Supreme Court in *Brownlie 1*, I do not find that the interpretation of "damage" in PD6B para. 3.1(9)(a),

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[2] *Flaherty v Girgis* went on to a further appeal in the High Court of Australia, (1986-1987) 162 CLR 574, but on an entirely different constitutional point, particular to Australian State/Federal law.

can be assisted by matters affecting the applicable proper law under Rome II, as found by this court in *Brownlie 1* [2015] EWCA Civ 665, at [83] – [84]: see per Lord Sumption in *Brownlie 1* at [22] and Lady Hale at [49]. I did not take Ms Kinsler so to argue.

56. For these reasons, I would uphold the decision of Nicol J that the Respondent's claims in tort (whether personal or as executrix or dependant) in this case fall within the "gateway" of PD6B para. 3.1 (9)(a).

Ground 2

57. I turn to Ground 2 ("good arguable case") which is addressed initially by Arnold LJ in his judgment. I acknowledge with gratitude his summary of the expert evidence of foreign law, that was before Nicol J and is before us. I do not propose to add to that summary.

58. Underhill and Arnold LJJ have stated their diverging views upon the application of the "presumption"/"default rule" that a foreign law is taken to be the same as English law. I do not intend to add significantly to that debate or to say more on the question of whose procedural responsibility it is (claimant or defendant) to plead first the content of a foreign law when it is said to differ from English law.

59. It is agreed in this court (subject to ground 1) that the judge cannot be faulted in his conclusion that Lady Brownlie has shown a "good arguable case" in respect of the vicarious liability claims in tort, both in her personal capacity and on behalf of the estate. For my part, I would reach the same conclusion with regard to the other claims made (both in contract and tort). However, I would add a direction, in exercise of the case management powers of the court, that Lady Brownlie should set out in outline (in a revised pleading) the main principles of Egyptian law upon which each of the claims are based. I would so order, not as a condition of permission to serve out of the jurisdiction but to achieve orderly progress in the resolution of the claims. Ancillary directions as to further pleading in response by the Appellant can be left to the High Court. In my judgment, the nature of the claim, the expert evidence, and the pleaded case, together with the history of the proceedings, justify that course.

60. I think it is necessary to take the expert evidence, the pleadings and the possible application of rule 25 of *Dicey* together to see whether or not the judge was right to be satisfied that Lady Brownlie has demonstrated a good arguable case for her claims overall. At what is still unfortunately an early stage of the proceedings, in my view, one needs to step back from detail and look at the case in the round. Having considered in draft my Lords' judgments on this ground and the cases there cited, it seems to me that the question of how and when foreign law is to be pleaded and proved is determined substantially by what is in the interests of efficient procedural management of each case. In an English court, issues of foreign law are issues of fact and are not to be debated at length on a preliminary application about jurisdiction. The same holds good for the extent to which the default rule should be applied. On the other hand, no party is to be ambushed by a surprise point of foreign law and, as far as necessary, pleading and the exchange of expert evidence may be required.

61. On Lady Brownlie's case, the family's tragic accident occurred on a journey undertaken, for the purpose of a guided excursion, under a contract made with the

Appellant company. Given the driver's conviction of a serious offence there seems to be little question about fault on his part. So much seems in effect to have been accepted by the Appellant before the judge: [139 (vii)] of the judgment. Para. 33 of the Amended Particulars of Claim also sets out a number of allegations of fault on the part of the Appellant. The pleading alleges breaches of duty in contract and tort. The existence of a contract can hardly be doubted, and the allegations of fault include serious criticism of the Appellant in the adequacy of the driver selection and of the vehicle provided and its equipment (2-wheel drive only, no seat belts, inadequate tyres, an unsuitable/defective inner tube fitted to a tubeless tyre, etc.).

62. It would be strange if such claims were not considered at least seriously arguable under *any* system of law. Whether the potential claims sound in what we would call contract and/or in tort (or both), and whether claims under both heads are permitted in any single set of proceedings under Egyptian law, may be nice arguments for trial. It is not suggested that the claims do not have any real basis in fact and, if that is right, the precise legal basis of potential liability seems to me to be of subsidiary importance at this stage. Neither expert suggests that there could be no conceivable claim against the Appellant in such circumstances, which is hardly surprising. There are limits to the practicality of dealing justly with subtle arguments of foreign law, as with any other disputes of fact, at the jurisdiction stage: see *Lungowe v Vedanta Resources plc* [2019] 2 WLR 1051, at [44] – [48] and [63] – [65]. Further, the claims here cannot be seen as pure Micawberism: loc. cit. at [45].

63. It seems to me to be unfortunate if it is necessary for the court to examine at this stage the minutiae of foreign law, in the relatively straightforward factual context of a case arising out of a road accident or that jurisdiction in such a case should be resolved by the technical issue of who should plead her/its case on foreign law first. As Underhill LJ says (at [207]), there is nothing problematic in presuming that under the law of a foreign country it would be a requirement of a contract for the provision of the services of a car and driver, for an excursion such as this, that reasonable care should be exercised in the selection of the driver and of the vehicle. The details of foreign law seem to me to be issues for more extensive expert evidence in due course, supported by source material, (and cross-examination on it) at a trial: see the passage from the *PT Pan Indonesia Bank* case, cited by Underhill LJ at [188].

64. Mr Edge's evidence adduced on behalf of Lady Brownlie pitched the case on the grounds of a general liability in tort on the basis of fault: para. 20 of his first statement. Para. 33 j. onwards of the Particulars of Claim set out a catalogue of fault on the part of "the Defendant …" (i.e. the Appellant) "… its employees, suppliers, sub-contractors, their agents and/or employees". That seems to me to be allegation of direct and/or vicarious liability capable of support in Egyptian law by Mr Edge's para. 20. Mr Edge gives further detailed evidence on vicarious liability and on limitation. It can be seen from Nicol J's judgment (and from Stewart J's directions order) that limitation was a very significant part of the argument below.

65. Mr Ezzo produced a witness statement the thrust of which was to say that the governing relationship was a commercial *contract* for carriage and/or transportation, with a concomitant strict liability for death and personal injury suffered in performance of the contract. However, he went on to say that such a claim would be statute-barred. He then said that other claims, i.e. in tort, were barred by the civil law doctrine of "*cumul*" because the potential source of the proposed defendant's liability

was under the contract and a claim in tort could not be brought alongside it. Mr Edge responded (para. 10 of his second statement) by denying that there was a commercial contract of carriage and stating,

> "… the driver of the car was negligent and as a matter of tort, the proposed Defendant is (*by means of the contract*) vicariously liable for the negligent wrongdoing. The Claimant's reference to the contract, is simply the means by which the responsibility of the proposed Defendant (as a/the superior) for organising the excursion and choosing the driver and the driver's firm to perform the contract can be established …" (emphasis added)

66. In other words, according to Mr Edge, the contract is a relevant feature of the defendant's potential liability. It is perhaps a matter for academic argument whether that amounts to saying that, in Egyptian law, there was a claim *under* the contract or a claim in tort *because* there was a contract in the background. Subject to requiring a more detailed pleading of Egyptian law, however, I consider that, in these circumstances, Lady Brownlie has established a good arguable case in both tort and contract. It would be seriously unfortunate if only a claim in tort were permitted and there could then be yet further argument that liability depended upon a contractual foundation, which was impermissible owing to the limited nature of the permission to serve outside the jurisdiction.

67. In the end, therefore, I would dismiss the appeal. I would, however, give a direction for further pleading of Lady Brownlie's case under Egyptian law, as I propose in paragraph 59 above.

Lord Justice Arnold:

68. I am grateful to McCombe LJ for setting out the background and much of the relevant material. In order to obtain the permission of the Court to serve the Claim Form on the Defendant ("FS Cairo") out of the jurisdiction in Egypt, Lady Brownlie has to establish in respect of each claim she advances that: (i) she has a "good arguable case" that one of the jurisdictional gateways set out in paragraph 3.1 of CPR Practice Direction 6B applies; (ii) the claim has a real prospect of success; and (iii) England is the proper place in which to bring the claim. FS Cairo's grounds of appeal concern requirements (i) and (ii).

Ground 1A

69. Ground 1A depends on the correct interpretation of PD 6B paragraph 3.1(9)(a), which I shall refer to as "gateway 9a". As the split decision of the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 ("*Brownlie I*") indicates, there are strong arguments on each side of the issue. Given that (i) the views expressed in the Supreme Court were all obiter, (ii) there was only a bare majority in favour of the broader interpretation, and (iii) two of majority acknowledged the need for caution in relying upon the view they expressed, I consider that we should make up our own minds as to the correct answer. After some hesitation, I have come to the opposite conclusion to McCombe LJ. My reasons are as follows.

70. My starting point is that the word "damage" in gateway 9a is capable of being interpreted broadly or narrowly. Accordingly, it seems to me that counsel for FS Cairo is correct that it is important to have regard to the context and purpose of the rule.

71. The context of the rule is that it forms one of the gateways through which a claim must pass in order for permission to serve the claim form out of the jurisdiction to be granted. The gateways represent the considered judgment of the Civil Procedure Rules Committee as to the classes of case in which it may (but not necessarily will) be appropriate to bring a foreign defendant before the courts of England and Wales. (Although the gateways are contained in a Practice Direction rather than in a rule of the CPR, which may be thought somewhat questionable from a constitutional perspective, they nevertheless need, and receive, the approval of the Committee.) Thus the purpose of the rule is to identify situations in which there is a sufficient connecting factor with England and Wales to justify our courts asserting jurisdiction over foreign defendants (provided that the court is satisfied that England and Wales is the proper place in which to bring the claim: CPR rule 6.37(3)). As Lord Sumption pointed out in *Brownlie I* at [28], "English law has never asserted a jurisdiction for its courts on the basis of the English identity of the claimant, whether by virtue of residence, domicile or nationality". It follows, in my opinion, that the courts should be cautious about interpreting the rule broadly.

72. The next point is that the rule applies to all claims "made in tort". It does not differentiate between torts which cause personal injury and other torts. It follows, in my opinion, that the interpretation of the rule cannot be driven by policy considerations which are peculiar to personal injury cases. On the contrary, it is necessary to resist the temptation to allow one's natural sympathy for English and Welsh claimants who have been injured as a result of torts committed abroad to colour the interpretation of the rule, since it is important not to facilitate forum shopping in cases involving purely economic damage. For this reason I am unable to accord the line of first instance decisions in the personal injury context relied upon by counsel for Lady Brownlie the weight that they were given in *Brownlie I* by Lady Hale at [41]-[48] and [52], Lord Wilson at [65] and Lord Clarke at [69].

73. Counsel for FS Cairo placed considerable reliance upon the fact that what was then RSC Order 11 rule 1(1)(f) was amended with effect from 1 January 1987 in order to be consistent with what was then Article 5(3) of the Brussels Convention. In my judgment, however, this point is not determinative. The amendment was not made in order to comply with Article 5(3), because permission of the court to serve out was not required where the claim form could be served out pursuant to the provisions of the Convention, but in order to avoid the incongruity of service out being precluded in cases which paralleled cases in which service out was possible under the Convention. The wording which was adopted even then (let alone after the 2000 amendment) did not replicate the wording of Article 5(3), however. Accordingly, while this aspect of the legislative history supports the conclusion that what is now gateway 9a must be interpreted at least as broadly as what is now Article 7(2) of European Parliament and Council Regulation 1215/2012/EU of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Brussels I Regulation (recast)"), it does not support the conclusion that gateway

9a should not be interpreted more broadly than Article 7(2). To that extent, I agree with Lord Wilson in *Brownlie I* at [61].

74. On the other hand, I am unimpressed by the point made by counsel for Lady Brownlie, and accepted by Lady Hale in *Brownlie I* at [50], that the Court of Justice of the European Union's interpretation of Article 7(2) has developed since the amendment in 1987. Where domestic legislation was adopted in order to give effect to European legislation, it must (so far as possible) be interpreted consistently with the latter as it is interpreted from time to time by the CJEU. I consider that the same approach should be adopted with respect to domestic legislation which was adopted in order to be consistent with European legislation. It follows, for example, that gateway 9a should be interpreted as permitting service out of a claim for a negative declaration that no tort has been committed by the claimant against the defendant if a claim by the defendant against the claimant would fall within it: see *Fujifilm Kyowa Kirin Biologics Company Ltd v AbbVie Biotechnology Ltd* [2016] EWHC 2204 (Pat), [2017] Bus LR 333 following Case C-133/11 *Folien Fischer AG v Ritrama SpA* [EU:C:2012:664], [2013] QB 523.

75. As has often been pointed out, the scheme of the English legislation is different to that of the European legislation. The scheme of the European legislation is necessarily an inflexible one, and one which gives primacy to the jurisdiction of the defendant's domicile, in order to maximise certainty and minimise jurisdictional conflict. Accordingly, the European legislation does not have the safety valve provided by the doctrine of *forum non conveniens* in the domestic legislation. I accept that, other things being equal, this is a factor which favours a broader, rather than a narrower, construction of the gateways. In my view, however, it is important not to place too much weight on this factor. Save in clear-cut cases, disputes as to the appropriate forum are expensive and uncertain. They are expensive because of the need for evidence and argument as to the connections between the dispute and the respective fora, and they are uncertain because they depend upon judicial evaluation. It would therefore be unsatisfactory to adopt an interpretation of gateway 9a which is so broad that most of the work in identifying cases in which foreign defendants should be brought before an English court is left to be done by *forum conveniens*. That would be a recipe for litigation.

76. Counsel for Lady Brownlie relied strongly on *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. In that case M & R was a Swiss company which traded on the London Metal Exchange through an English broker, AML. M & R's chief aluminium trader carried out a series of fraudulent trades with the assistance of employees of AML. M & R obtained a judgment against AML for over £50 million plus costs, but only recovered £6.7 million due to the insolvency of AML. M & R brought proceedings against AML's American parent companies, and obtained permission to serve them out of the jurisdiction which the American companies applied to set aside. Although M & R advanced other claims, the only cause of action which the Court of Appeal held to be arguable was inducing or procuring breach of contract. This was based on breaches of the trading contracts and of a compromise agreement entered into by M & R and AML as part of the discharge of a *Mareva* injunction. The Court of Appeal went on to hold that M & R satisfied the requirements of Order 11 rule 1(1)(f) in respect of these claims.

77. In considering this decision, I think it is important to have regard not merely to the statement of principle at 437C-D quoted by McCombe LJ in paragraph 29 above, but also to how it was applied by the Court of Appeal to the facts of the case. The Court concluded at 448H that, although there had been earlier breaches which took place in New York, it was "the action taken by AML in London in breach of the trading contracts, not the action taken in New York, which really injured M & R". As for the compromise agreement, this was breached in London. Accordingly, the Court stated at 449A-B:

> "The damage which M. & R. suffered as a result of the trading contract breaches was, in our view, suffered in London: M. & R. did not receive the ledger credit payment which should have been made in London, did not receive the warrants which should have been delivered in London and suffered the detrimental closing out of their accounts in London. Similarly, it appears to us that the damage caused to M. & R. by the compromise agreement breach was suffered in London since security which should have been available to M. & R. in London was (it is said) wrongly charged in London and paid out of London."

78. It follows that *Metall und Rohstoff* is only really authority for the proposition that, if most of the damage caused by the tort has been sustained in England and Wales, it is immaterial that a small amount of damage has also been suffered outside the jurisdiction. It is in this context that the Court's reference at 437D to "some significant damage" must be understood.

79. It should also be noted that, although no argument was presented to the Court concerning the distinction between direct and indirect damage, on the facts as analysed by the Court the damage sustained in London appears to have been direct rather than indirect damage. Certainly, *Metall und Rohstoff* does not support the proposition that indirect damage is sufficient.

80. I agree with the point made in *Brownlie I* by Lady Hale at [40] and Lord Wilson at [62] that the 2000 amendment to Order 11 rule 1(1)(f) appears to have amounted to a codification of the decision in *Metall und Rohstoff*, but otherwise I do not see that it adds to the debate.

81. For her part counsel for FS Cairo relied strongly on *The Eras Eil* [1992] 1 Lloyds Rep 570 and *ABCI v Banque Franco-Tunisienne* [2003] EWCA Civ 205, [2003] 2 Lloyds Rep 146.

82. So far as *The Eras Eil* is concerned, it suffices to note that Mustill LJ (i) recognised at 590 that all that *Metall und Rohstoff* decided was that it was immaterial that some damage was suffered outside the jurisdiction and (ii) held on the facts at 591 that Clarksons was "in a real sense … suffering … damage in England". Again, there was no argument about the difference between direct and indirect damage, but the damage sustained by Clarksons appears to have been direct rather than indirect damage.

83. Turning to *ABCI*, McCombe LJ has set out in paragraph 46 the facts of the case and the key passage in the judgment of the Court of Appeal delivered by Mance LJ. As McCombe LJ explains, the Court held that, for the purposes of Order 11 rule 1(1)(f),

ABCI had not sustained damage in England and Wales, but in either Switzerland or France. ABCI argued that it had suffered damage in this jurisdiction one of two ways: it had committed itself to investing here; and it had arranged payment here or from here. The first basis was rejected on the ground that it was not sufficient that there was a prior contractual commitment which had been made in London. The second basis was rejected on the ground that the money which had been invested and lost had been borrowed from one Swiss bank and held in an account with another Swiss bank prior to the investment, although apparently on instructions given from France.

84. Counsel for FS Cairo did not suggest that this decision was binding authority that direct as opposed to indirect damage was required, but she submitted that it was strongly persuasive. I agree with this. Not only did Mance LJ state in terms that para (f) "is looking to the direct damage … which the wrongful act produced", but in addition he cited *Dumez France v Hessiche Landesbank* [1990] ECR I-74. In that case the CJEU stated at [21]:

> "Moreover, whilst the place where the initial damage manifested itself is usually closely related to the other components of the liability, in most cases the domicile of the indirect victim is not so related."

85. The CJEU made essentially the same point in *Marinari v Lloyds Bank plc* [1995] ECR I-2733 at [21]:

> "Finally, as regards the argument as to the relevance of the location of the assets when the obligation to redress the damage arose, the proposed interpretation might confer jurisdiction on a court which had no connection at all with the subject-matter of the dispute, whereas it is that connection which justifies the special jurisdiction provided for in Article 5(3) of the Convention. Indeed, the expenses and losses of profit incurred as a result of the initial harmful event might be incurred elsewhere so that, as far as the efficiency of proof is concerned, that court would be entirely inappropriate."

86. The point which the CJEU made in these passages is not a point which depends on the scheme of the Convention, rather it is a fundamental point about what counts as a sufficient connecting factor when allocating jurisdiction. As the Court rightly indicates, indirect damage may be suffered at a far remove from the place where the wrongful act took place. It is one thing for jurisdiction to be asserted by a court located where direct damage is sustained as a result of the tort. It is quite another to allow jurisdiction to be asserted where indirect damage is sustained.

87. Finally, counsel for FS Cairo relied lightly and by analogy on Case C-350/14 *Lazar v Allianz SpA* [EU:C:2015:802]. This is a decision on the interpretation of Article 4(1) of European Parliament and Council Regulation 864/2007/EC of 11 July 2007 on the law applicable to non-contractual obligations ("the Rome II Regulation"). As the Supreme Court unanimously agreed in *Brownlie I* (see Lord Sumption at [21] and Lady Hale at [49]), the latter provision is not directly relevant to the present issue, since jurisdiction and applicable law are distinct concepts. Even so, I find the reasoning of the CJEU (which is not cited in any of the judgments in the Supreme Court) persuasive when it comes to identification of the relevant connecting factor for the purposes of jurisdiction:

> "23. In order to identify the law applicable to a non-contractual obligation arising from a tort or delict, Article 4(1) of that regulation adopts 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. The damage which must be taken into account in order to determine the place where the damage occurred is the direct damage, as is clear from recital 16 of that regulation.
>
> 24. In the event of physical injuries caused to a person or the damage caused to goods, the EU legislature stated, in recital 17 in the preamble to the Rome II Regulation, that the county of the place where the direct damage occurs is the country of the place where the injuries were suffered or the goods were damaged.
>
> 25. It follows that, where it is possible to identify the occurrence of direct damage, which is usually the case with a road traffic accident, the place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of that accident. In the present case, the damage is constituted by the injuries which led to the death of Mr Lazar's daughter, which, according to the referring court, occurred in Italy. The damage sustained by the close relatives of the deceased, must be regarded as indirect consequences of the accident at issue in the main proceedings, within the meaning of Article 4(1) of the Rome II Regulation."

88. Accordingly, I conclude that what must be shown for the purpose of gateway 9a is that direct damage was sustained within the jurisdiction, and that it is not sufficient that indirect damage was suffered here. Only by requiring direct damage can gateway 9a represent a sufficient connection with this jurisdiction to justify our courts asserting jurisdiction over foreign defendants. Otherwise, it would not only confer on the courts of England and Wales what Lord Sumption described in *Brownlie I* at [29] as "universal jurisdiction to entertain claims by English residents for the more serious personal injuries suffered anywhere in the world", but an equally broad jurisdiction over torts causing purely economic damage.

89. It only remains to say that it is not necessary for present purposes to explore further precisely what the Court of Appeal in *Metall und Rohstoff* meant by "some significant damage". Counsel for FS Cairo submitted that this simply meant more than *de minimis*. Counsel for Lady Brownlie disagreed, but declined our invitation to provide an alternative explanation of, or gloss upon, the Court's wording.

90. Turning to the facts of the present case, applying the test I have set out in paragraph 88 above, the question is whether Lady Brownlie suffered direct damage within the jurisdiction with respect to any of the three heads of damage she claims, namely (a) damages for her own pain, suffering and loss of amenity, (b) damages suffered by Sir Ian's estate and (c) damages for her bereavement and loss of dependency.

91. In the case of damages suffered by Sir Ian's estate and damages for Lady Brownlie's bereavement and loss of dependency, these seem to me plainly to be indirect consequences of the death of Sir Ian in Egypt. In the case of Lady Brownlie's own pain, suffering and loss of amenity, I agree with Lady Hale in *Brownlie I* at [53] that the position is less clear cut. As she says, someone who is injured suffers pain and loss of amenity wherever they are. It seems to me, however, that the direct consequences of the tort took place in Egypt: it was there that Lady Brownlie suffered the injury that caused her the pain and the loss of amenity she experienced. She only experienced pain and loss of amenity in England and Wales because she subsequently returned here.

92. I would therefore hold that Lady Brownlie has not established a good arguable case that her claims in tort fall within gateway 9a.

Ground 2

93. As noted above, Lady Brownlie must establish that she has a real prospect of success in respect of each claim advanced. As McCombe LJ has explained, Lady Brownlie claims that FS Cairo is liable on three bases, namely (i) vicarious liability in tort, (ii) direct liability in tort and (iii) contractual liability. On each basis she claims the three heads of damage discussed above.

Lady Brownlie's pleaded case

94. Lady Brownlie's claim was originally pleaded by reference to English law, including express reliance upon the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. Following the decision of the Supreme Court in *Brownlie I*, however, Lady Brownlie has accepted that the only claims she can advance are those which are available to her under Egyptian law. This is because of the application of the choice of law rules contained in European Parliament and Regulation 593/2008/EC of 17 June 2008 on the law applicable to contractual obligations ("the Rome I Regulation") and the Rome II Regulation. Since this is common ground, it is not necessary to go into the details. It should, however, be noted that the Supreme Court specifically and unanimously held, albeit obiter, that Lady Brownlie could not rely upon the Fatal Accidents Act 1976 because it had no application to a tort which was not governed by English law: see *Brownlie I* at [18] (Lord Sumption, with whom the other members of the Court agreed on this point). It also noted that claims might well be available to Lady Brownlie under Egyptian law, but as matters then stood no such claims were advanced.

95. Accordingly, Lady Brownlie amended the brief details of claim section of her Claim Form as follows:

> "The Claimant seeks damages pursuant to Egyptian Law:
>
> 1. In her own right, for her personal injuries.
>
> 2. ~~Under the Law Reform (Miscellaneous Provisions) Act 1934, i~~In her capacity as Executrix of her late husband's Estate and on behalf of the Estate and its heirs, for wrongful death.

> 3. ~~Under the Fatal Accidents Act 1976, in her capacity as her late husband's dependent widow~~ For dependency for wrongful death."

96. Lady Brownlie also produced draft Amended Particulars of Claim which delete references to the 1934 Act and the 1976 Act, and insert the words "pursuant to Egyptian law" into three paragraphs of the prayer for relief. No particulars of Egyptian law are given, however.

The expert evidence of Egyptian law

97. On 6 February 2019 Stewart J made a case management order concerning Lady Brownlie's application for permission to serve the proceedings out of the jurisdiction on FS Cairo, paragraph 4 of which provided:

> "The Claimant and the Proposed Defendant shall both, if so advised, have permission to rely on expert evidence in writing as to Egyptian law with respect to personal injury and wrongful death claims in contract and tort/delict, including in particular the law of limitation as it applies to such claims."

98. Sensibly, it appears to have been agreed between the parties that the expert evidence as to Egyptian law would be served sequentially. Accordingly, Lady Brownlie first served an expert report from Ian Edge dated 4 April 2019. Mr Edge is both a barrister practising at the English Bar and a well-known expert on the laws of Middle Eastern countries, and in particular Egypt, who has taught at the School of Oriental and African Studies for many years and published extensively in that field.

99. Having summarised the background (paragraphs 1-6) and set out his qualifications (paragraphs 7-10), Mr Edge explained that his letter of instructions included "a very detailed and comprehensive description of the history of this case" and was accompanied by two lever arch files of materials (paragraphs 11 and 12). He proceeded to describe the Egyptian legal system, which is a civil law system with elements of Islamic law (paragraphs 13-15). Next, he explained that two key sources of law are the Egyptian Civil Code ("the ECC") and the commentary on it entitled *Al-Wasit* by Al-Sanhuri who drafted much of the ECC (paragraphs 16-19).

100. Under the heading "Tortious Obligations", Mr Edge stated at paragraph 20:

> "The ECC provisions on obligations comprise some general principles followed by specific examples. As regards tort the ECC follows French law in having only a few broad general principles the most important of which is Article 163 ECC which states that a person who commits a fault resulting in damage to another must pay compensation. This Article establishes the three-fold test in tort of finding a fault, a causal link and damage. None of these is defined in the ECC but jurisprudence shows that once a fault is established (which may be any negligent act or imprudent act) then all the damage that follows from it is compensable. As long as the act was one of the causes of the ultimate damage then it is not necessary for it to be the

> most proximate or chief cause. Egyptian law is therefore more liberal in finding tortious liability than is English law."

101. Read in context, this paragraph appears to be an introduction to the following section of Mr Edge's report, which is a discussion of vicarious liability (paragraphs 21-38). In this section Mr Edge sets out a translation of Article 174 of the ECC, which deals with vicarious liability. He then proceeds to explain in detail the relevant principles of Egyptian law by reference to Article 174, several passages in *Al-Wasit* and several decisions of the Egyptian Court of Cassation (which occupies the same position in the judicial hierarchy as the French *Cour de Cassation* and thus is roughly equivalent to the UK Supreme Court). He then proceeds to express the following opinion as to the application of these principles to the present case at paragraph 38:

> "In summary, therefore, the proposed Defendant FS Cairo (Nile Plaza) LLC who were the operators and managers of the Four Seasons Cairo Hotel which advertised, marketed and sold and organised the index excursion to the Claimant and her husband are vicariously responsible for and liable to any persons injured or killed due to the negligence of the engaged driver on the basis laid down in Article 174 of the ECC. Prima facie the driver was at fault as shown by the fact that he was convicted of a criminal offence (the equivalent of manslaughter) arising out of the accident; but the hotel operators and managers, who were the sellers and organisers of the index excursion, are vicariously liable for the unlawful acts committed by its subordinate persons which included the driver of the defective car that caused the accident in this case."

(Strictly speaking, this paragraph of the report is inadmissible, since the function of an expert witness as to foreign law is to explain the sources and principles of that law, not to apply it to the facts of the case; but nevertheless it is helpful in showing how Lady Brownlie's case on vicarious liability may be articulated.)

102. Mr Edge then discussed limitation as a defence in Egyptian law in considerable detail (paragraphs 39-58). Next, he briefly outlined Lady Brownlie's capacity to claim damages under Egyptian law both on her behalf and on behalf of Sir Ian's estate and how damages were calculated by Egyptian courts (paragraphs 59-61). In paragraph 62 he explained that civil proceedings in Egypt were often protracted. Finally, he set out "Conclusions" summarising his opinion on the limitation issues in the present case (paragraphs 62-63).

103. Nowhere in Mr Edge's first report is there is any discussion of contractual liability under Egyptian law. Nor is there any discussion of the principles of Egyptian law which would apply to a direct tortious claim by Lady Brownlie against FS Cairo.

104. FS Cairo served a responsive report from Tarek Ezzo dated 20 May 2019. Mr Ezzo is a practising lawyer based in Alexandria, Egypt. In the first section of his report, Mr Ezzo set out his qualifications, his instructions and the documents he had been provided with, including Mr Edge's first report (paragraphs 1-5). In the second section he gave a brief overview of the Egyptian legal system (paragraphs 6-9). In the third section he described litigation in the Egyptian courts in some detail (paragraphs 10-22).

105. In the fourth section Mr Ezzo considered "Claims in Contract and Relevant Limitation Law". He began by explaining in paragraph 24:

> "I have been asked to address the different potential causes of action available to the Claimant in respect of the claims she seeks to bring against the Proposed Defendant on her own behalf and on behalf of her husband's estate. For reasons that I will address further below, it is necessary to consider the Claimant's potential contractual claims first.
>
> My report below is prepared on the assumption that there was a contract between the Claimant and the Proposed Defendant. I am instructed that I am not required to express a view on this issue."

106. Mr Ezzo proceeded to set out a number of provisions of the Egyptian Commercial Code ("the ECommC") and explained that this provided for strict liability for death and personal injury suffered by persons during the performance of a contract of carriage (paragraph 25-27). He then stated in a second paragraph 26 (there is an error in the paragraph numbering of Mr Ezzo's report at this point):

> "An Egyptian judge will have to apply the provisions of the Commercial Law in the presence of a Carriage Contract and/or a Transportation Agreement, those provisions will apply exclusively in accordance to article (209) quoted above. This means that where the provisions apply there is no other possible basis in Egyptian law for holding the carrier liable, including reliance on general provisions of the Civil Code."

107. Mr Ezzo then discussed limitation, stating that there was a two-year limitation period in respect of the strict liability and discussing the circumstances in which that could be interrupted (paragraphs 27-36).

108. In the fifth section of his report Mr Ezzo considered "Claims in Tort and Relevant Limitation Law". He began by stating at paragraph 37:

> "It is not permissible that a claimant brings a claim in tort in circumstances where there is a claim in contract and it is not permissible to a claimant to bring a claim based upon contractual liability and tort liability in the same time."

(I interpolate that this non-cumulation principle is common in civil law systems: see, for example, Case C-666/18 *IT Developments SAS v Free Mobile SAS* [EU:C:2019:1099] at [23] summarising the position in French law.) He went on to explain that this meant that, if there was a carriage contract, then liability would be governed by the relevant provisions of the ECommC, and therefore a claimant could not bring a tort claim against the carrier. Mr Ezzo nevertheless went on to discuss what the limitation position would be if there was somehow a relevant tortious liability (paragraphs 40-50).

109. In reply to Mr Ezzo's report, Lady Brownlie served a second report from Mr Edge dated 4 July 2019. Mr Edge began by explaining in paragraph 4 that he would deal with three legal issues arising from Mr Ezzo's report: (i) whether Lady Brownlie and

her fellow passengers were subject to a commercial contract of carriage and whether the ECommC applied; (ii) whether the doctrine of *cumul* (i.e. non-cumulation) applied; and (iii) an issue with respect to Article 172 of the ECC concerning limitation.

110. So far as the first issue was concerned, Mr Edge opined that there was no commercial contract of carriage between Lady Brownlie and either the driver of the car or FS Cairo as defined in the ECommC, and therefore the ECommC was irrelevant (paragraphs 5-9). *En passant* he remarked in paragraph 7 that, if (contrary to his opinion) there was a commercial contract of carriage, Lady Brownlie as a non-commercial party would be governed by the ECC and thus by the prescription periods therein.

111. With respect to the second issue Mr Edge said:

> "10. The Claimant's pleaded case is that the driver of the car was negligent and, as a matter of tort, the proposed Defendant is (by means of the contract) vicariously liable for that negligent wrongdoing. The Claimant's reference to the contract, is simply the means by which the responsibility of the proposed Defendant (as a/the superior) for organising the excursion and choosing the driver and the driver's firm to perform the contract can be established.
>
> 11. In all the circumstances, the Claimant's pleaded case does not offend the doctrine of *cumul* as it is understood in and applied under Egyptian law."

112. The remainder of Mr Edge's second report discussed the third issue, concerning limitation (paragraphs 12-23). He then summarised his conclusions at paragraph 24 as follows:

> "(i) Neither the Claimant nor any of the other victims was party to any commercial contract of carriage.
>
> (ii) Even if they were (which I dispute) then, as non-traders, they were subject to the provisions of Egyptian civil law which included the Egyptian Civil Code and particularly its provisions as to limitation.
>
> (iii) The doctrine of *cumul* has no application as the Claimant's case is simply one in tort against the company vicariously liable for the unlawful acts of its servants or agents.
>
> (iv) …."

113. Consistently with the statements made in paragraphs 10 and 24(iii) of the report, there is no discussion in Mr Edge's second report of the principles which would govern a contractual claim by Lady Brownlie against FS Cairo under the ECC. Nor is there any discussion of the principles of Egyptian law which would apply to a direct tortious claim by Lady Brownlie against FS Cairo.

Vicarious liability in tort

114. For reasons that will appear, it is convenient first to consider Lady Brownlie's claim that FS Cairo is vicariously liable in tort for the negligence of the limousine company and/or the driver before turning to her claims that it is directly liable in tort and/or contract. Although there is a limitation issue between the parties concerning this claim, Nicol J concluded that Lady Brownlie had a reasonably arguable case that the claim was not barred by limitation, and there is no appeal against that conclusion.

115. As the judge noted at [128], counsel for FS Cairo accepted before him that, subject to the limitation issue, the evidence of Mr Edge was sufficient to show that Lady Brownlie had a reasonably arguable claim against FS Cairo for vicarious liability in tort. (As counsel for FS Cairo explained to us, she also accepted that there was a triable issue as to the application of the doctrine of *cumul*.) The only point taken by counsel for FS Cairo was that no such case was pleaded in Lady Brownlie's draft Amended Particulars of Claim. The judge implicitly rejected this point at [129], but he gave no reasons for doing so.

116. Counsel for FS Cairo is correct that no such case is pleaded in Lady Brownlie's draft Amended Particulars of Claim: there is not a word about the relevant principles or sources of Egyptian law. Counsel for Lady Brownlie faintly suggested that it was sufficient to state "pursuant to Egyptian law" in the prayer, but in my view it is plain that that is not sufficient. Foreign law is a question of fact, and the relevant facts must be pleaded. As Sir Andrew Morritt C stated in *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3612 (Ch), [2017] 1 All ER (Comm) 1160 at [39], a statement of case which makes "no attempt to say what [the foreign law] is or, in the sense of legal source, where it is to be found" is "deficient".

117. It is not as if counsel for Lady Brownlie would face any difficulty in pleading her case, because Mr Edge's first report clearly sets out the relevant principles and sources of Egyptian law.

118. The real question is what consequences, if any, flow from the failure of counsel then acting for Lady Brownlie to plead these matters in the draft Amended Particulars of Claim. Counsel for FS Cairo submitted that it followed that the judge had been wrong to grant permission to serve the proceedings out of the jurisdiction, and his order should be set aside.

119. I do not accept this submission. What the claimant requires in a case such as the present is permission to serve the claim form out of the jurisdiction. CPR rule 6.38 provides, so far as relevant:

> "(1) Unless paragraph (2) or (3) applies, where the permission of the court is required for the claimant to serve the claim form out of the jurisdiction, the claimant must obtain permission to serve any other document in the proceedings out of the jurisdiction.
>
> (2) Where –
>
> (a) the court gives permission for a claim form to be served on a defendant out of the jurisdiction; and
>
> (b) the claim form states that particulars of claim are to follow,

> the permission of the court is not required to serve the particulars of claim."

120. When applying for permission to serve the claim form out of the jurisdiction, it is usual and desirable for the claimant either to append the Particulars of Claim to the Claim Form or to exhibit draft Particulars of Claim to the witness statement in support of the application, but as rule 6.38(2) makes clear, neither is required. Accordingly, what matters is whether the evidence establishes a reasonably arguable case, not whether that case has yet been adequately pleaded. This is not to say that the Particulars of Claim is an unimportant document, because the defendant's time for filing an acknowledgement of service, and hence its time for challenging the jurisdiction of the court, does not start to run until the Particulars of Claim is served: see CPR rules 10.3(1)(a) and 11(2),(4)(a). Moreover, the Particulars of Claim when served will form the basis for the court's assessment in the event of a jurisdictional challenge.

121. Given that Lady Brownlie's team did produce draft Amended Particulars of Claim purporting, but failing, to plead her claim in Egyptian law before the judge, I consider that the correct course was for the judge to grant permission to serve the claim form out of the jurisdiction conditional on the statement of case being revised so as to plead the relevant principles and sources of foreign law.

Direct liability in tort and contractual liability

122. As discussed above, Mr Edge's reports do not discuss either the principles of Egyptian law which would apply to a direct tortious claim by Lady Brownlie against FS Cairo or the principles of Egyptian law which would govern a contractual claim by Lady Brownlie against FS Cairo under the ECC. In the case of a direct claim in tort, for example, there is no discussion of the extent to which Egyptian law imposes a duty of care to the client on someone who arranges an excursion to be performed by a third party contractor to ensure that the contractor's vehicle is appropriate and roadworthy and its driver competent. In the case of a contractual claim there is no discussion of the extent to which the ECC imposes liability on an agent for the acts of an undisclosed principal or the extent to which the ECC imposes a contractual duty of care in circumstances such as these. Indeed, one does not even know from Mr Edge's report whether Egyptian law recognises the concept of an implied term of a contract of the kind pleaded by Lady Brownlie in the Amended Particulars of Claim (it is not contended by Lady Brownlie that there was any express duty of care in the contract she alleges was made with FS Cairo). Given Mr Edge's expertise in both English and Egyptian law, I doubt that this is accidental. On the contrary, I think it likely that he focussed his reports on vicarious liability for good reason.

123. Be that as it may, counsel for Lady Brownlie submitted that, despite these deficiencies, Mr Edge's evidence was sufficient to establish a real prospect of success with respect to both direct liability in tort and contractual liability. In my judgment this argument is not open to Lady Brownlie, since that was not the basis upon which the judge decided the matter and there is no respondent's notice.

124. In any event, I do not accept that Mr Edge's evidence does suffice. So far as direct liability in tort is concerned, counsel relied on paragraph 20 of Mr Edge's first report. That is just a general statement as to the nature of Egyptian tort law. As noted above,

in context, it provides an introduction to Mr Edge's discussion of vicarious liability. It does not purport to discuss points such as those mentioned in paragraph 122 above. As for contractual liability, counsel relied on paragraph 7 of Mr Edge's second report. This is even worse, because in that section of his report Mr Edge is addressing, and refuting, Mr Ezzo's opinion that there was a commercial contract of carriage governed by the ECommC. Not only does Mr Edge not address points such as those mentioned in paragraph 122, but also he expressly states in paragraphs 10 and 24(iii) that in his view the only relevance of the contract is that it provides part of the foundation for the claim of vicarious liability. Thus, by contrast with the claim of vicarious liability, Mr Edge's reports would not enable counsel for Lady Brownlie properly to plead the principles and sources of Egyptian law applicable to the claims of direct tortious liability and contractual liability. (It follows that the order which McCombe and Underhill LJJ propose, on "case management" grounds, will effectively enable Lady Brownlie to rely upon expert evidence which she has not yet obtained, which she has no permission to rely upon for the purposes of the jurisdictional dispute and which FS Cairo has had no chance to answer, contrary to the order of Stewart J.)

125. I can now turn at last to the principal legal issue raised by this part of the case. Rule 25 in Dicey, Morris and Collins, *The Conflict of Laws* (15th edition) states:

> "(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."

126. Before the judge, counsel for Lady Brownlie submitted that, to the extent that Mr Edge was silent, Lady Brownlie could rely on Rule 25(2). The judge accepted that submission in relation to both the direct tort claim and the contract claim: see his judgment at [126], [129] and [134]. FS Cairo contends that the judge was wrong in law so to hold.

127. Rule 25(2) is often described as a "presumption" that foreign law is the same as English law, but as the formulation in *Dicey* indicates, it is better regarded as a default rule. Since the publication of Richard Fentiman's seminal work *Foreign Law in English Courts* (OUP) in 1998, it has increasingly been recognised that the rule is problematic. More recently, it has been trenchantly criticised by Anthony Gray in his article "Choice of Law: The Presumption in the Proof of Foreign Law" (2008) 31 UNSW Law Journal 136-157, which contains a valuable analysis of the English and Commonwealth authorities up to that date.

128. Counsel for FS Cairo emphasised that she was not arguing that the rule did not exist or should be abolished, merely that it could not be relied upon by Lady Brownlie in the particular circumstances of the present case. For her part, counsel for Lady Brownlie acknowledged that the rule was not universally applicable, but subject to exceptions, as this Court held in *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350 at [64]-[68] (Peter Gibson LJ giving the judgment of the Court). For example, the rule is not applicable to claims for infringement of foreign intellectual property rights because they are territorial and differ from territory to territory: see

Alfred Dunhill Ltd v Sunoptic SA [1979] FSR 337 at 368-369 (Roskill LJ, with whom Megaw and Browne LJJ agreed), *Mother Bertha Music Ltd v Bourne Music Ltd* [1997] EMLR 457 at 490-493 (Ferris J), *HG Investment Managers Ltd v HIG European Capital Partners LLP* [2009] FSR 26 at [15]-[21] (Master Bragge), *Seven Arts Entertainment Ltd v Content Media Corp Ltd* [2013] EWHC 588 (Ch) at [85]-[87] (Sales J) and (by implication) *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 2 AC 208 at [109] (Lord Walker of Gestingthorpe and Lord Collins of Mapesbury, with whom Lord Phillips of Worth Matravers, Baroness Hale of Richmond and Lord Mance all agreed on this point). Counsel for Lady Brownlie submitted, however, that nothing prevented Lady Brownlie from relying upon the rule in the present case.

129. Given the very specific and somewhat unusual circumstances of the present case, it is not necessary to consider the interesting taxonomy of situations in which the rule is not applicable suggested by counsel for FS Cairo.

130. The starting point is that the law which is applicable to Lady Brownlie's claims is determined by mandatory rules of private international law, namely the Rome I Regulation (contract) and the Rome II Regulation (tort) which form part of English law (and will constitute retained EU law under the EU Withdrawal Act 2018 even after the end of the implementation period under the EU Withdrawal Agreement). Lady Brownlie no longer disputes that these rules dictate the application of Egyptian law.

131. As Fentiman points at out at page 61, where a choice of law is mandatory, the consequence:

> "is not merely that a claimant must rely upon foreign law, perhaps by alleging merely that the applicable law is foreign. It is that the foreign law must in some cases be applied. But if foreign law must be applied in a given case it is hard to see how such a duty could be meaningful unless it also entails an obligation to establish the content of the foreign law."

132. Counsel for FS Cairo submitted that the mandatory rules do not generally prevent parties from expressly or impliedly agreeing that the substantive content of the applicable law is the same as English law. (There may, however, be exceptions to this. Two potential examples are where either Article 3(3) or Article 9(3) of the Rome I Regulation applies. In the case of intellectual property rights and related rights, such agreement is possible in respect of unregistered rights (see e.g. *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC (Ch) at [622]) and claims for infringement of registered rights, but probably not in respect of claims to invalidate registered rights, which necessarily depend on the application of the law under which the right was created. None of the conceivable exceptions is relevant to this case, however.)

133. Although counsel for Lady Brownlie was hesitant about accepting this, she advanced no submission to the contrary. Moreover, she pointed out that Article 1(3) of the Rome I Regulation and Article 2(3) of the Rome II Regulation provide that they do not apply to evidence and procedure, which supports counsel for FS Cairo's submission. Still further, I think that both counsel recognised that the submission is supported by the obiter observations of Arden LJ, with whom Jackson LJ and

McFarlane LJJ agreed, in *OPO v MLA* [2014] EWCA Civ 1277, [2015] EMLR 4 at [108] and [111], and of Arden LJ, with whom Bean and King LJJ agreed, in *Brownlie I* [2015] EWCA Civ 665, [2016] 1 WLR 1824 at [88]-[89] (both quoted in part by Underhill LJ in paragraph 171 below).

134. I accept counsel for FS Cairo's submission. I would add that allowing the parties expressly or impliedly to agree that the substantive content of the applicable law is the same as English law does a lot of the work that might otherwise need to be done by Rule 25(2).

135. In the service out context the claimant is required affirmatively to establish a real prospect of success by evidence (which may include the Particulars of Claim and/or the application notice if verified by a statement of truth: r. 32.6(2)): see r. 6.37(1)(b) and note 6.37.15 in *Civil Procedure* (2020 edition) and the authorities cited. Moreover, the application for permission is normally made without notice, which carries with it a duty of disclosure: see note 6.37.4 in *Civil Procedure* and the authorities cited.

136. No difficulty arises in a case where the claimant contends that English law is the applicable law, even if the claimant recognises that it is arguable that some other law applies (although the duty of disclosure may in that case require the claimant to disclose that to the court).

137. If the claimant accepts that the applicable law is a foreign law, then the duty of disclosure requires the claimant to disclose that to the court. I do not consider that, at the stage of the without notice application, a claimant who accepts that the applicable law is a foreign law is obliged to provide evidence of the foreign law (or to plead it). Rather, it is open to the claimant to rely upon Rule 25(2); but again the duty of disclosure requires the claimant to disclose that to the court. Faced with such a position, a defendant who wishes to dispute the jurisdiction of the court may choose expressly to agree that the substantive content of the applicable law is the same as English law, thereby saving both parties the trouble and expense of obtaining evidence of the foreign law. Alternatively, the defendant may silently acquiesce in the position adopted by the claimant, thereby impliedly agreeing to it.

138. 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). It is well established, and not in dispute in this case, that, at the stage of a jurisdictional challenge by the defendant, the burden of proof remains on the claimant. That must include the burden of proving the law upon which the claimant's cause of action depends. It would be contrary to principle to permit the claimant to reverse the burden of proof by requiring the defendant to adduce evidence that the foreign law is different to English law. As Fentiman states at pages 152-153:

> "It is intuitively unacceptable for a party to seek the application of foreign law and at the same time, with luminous inconsistency, to invite the court to apply English law by declining to offer evidence of any other. It is also potentially unfair that one party should (in effect) be made to prove (or disprove) a matter which another has introduced … [T]he idea

> that an unproved foreign law is presumed to be the same as English law may allow a plaintiff to allege a fact which is arguable but which may have scant foundation – typically that a tort is actionable in the *lex loci* when in truth it is not.
>
> It may also be inconsistent with general principle that a plaintiff should shelter behind the presumption of similarity so as to avoid establishing the truth of any assertion as to foreign law. But for that presumption the usual rule would presumably apply whereby any assertion of fact must be established by evidence, which imposes the burden of proof on one who makes such an assertion …
>
> Such arguments suggest that a party who relies upon foreign law must normally offer evidence as to its content or face dismissal of its claim or defence. It must be emphasised, however, that this does not depend upon whether or not the introduction of foreign law is, by the relevant choice of law rule, mandatory. The requirement is a matter of fairness and consistency and applies even if a claimant voluntarily relies upon foreign law. But a further, obvious consideration supports the proof of foreign law in cases where the introduction of foreign law is obligatory. In such a case it would undermine the very purpose of having a mandatory choice of law rule if its application could be avoided merely be omitting to lead evidence as to foreign law."

139. Not only would it be contrary to principle to permit the claimant to reverse the burden of proof in this way, but also it would be contrary to authority. I shall refer to five authorities in this regard.

140. The first is *Dunhill v Sunoptic*, where the plaintiffs sought a worldwide injunction to restrain alleged passing off, but only adduced evidence as to Swiss law and otherwise relied upon the presumption that foreign law was the same as English law. The Court of Appeal granted an injunction covering the UK and Switzerland, but refused it in respect of any other country. The key point, which is not dependent on the fact that the case was an intellectual property case, was made by Roskill LJ at 369:

> "I think [counsel for the defendants] was right when he said that the effect of [counsel for the plaintiffs'] argument on this branch of the case was to cast a negative burden on a defendant when in truth the whole of the burden of proof rests on the plaintiff."

141. The second authority is the Chancellor's statement in *Global v Ara* at [39] concerning the Part 20 claim in that case, which implicitly relied on the law of Saudi Arabia but did not plead the content of that law:

> "It is not a mere pleading point but one of justice. If, as in this case, the true claim is based on propositions of foreign law then the party who advances it should make it good by reference to the system of law on which he relies."

142. The third authority is *Belhaj v Straw*. At first instance ([2013] EWHC 4111 (QB)) Simon J stated at [140(c)]:

> "It is not consonant with the overriding objective of the Civil Procedure Rules, in a case where the Private International Law (Miscellaneous Provisions) Act 1995 applies, for a party either to decline to plead the relevant provisions of the applicable law or to rely on a presumption that a foreign law is the same as English law. Such an approach is evasive."

As counsel for FS Cairo submitted, where foreign law applies pursuant to the mandatory choice of law rules in the Rome I Regulation or the Rome II Regulation, the position is *a fortiori*.

143. The judgment of Lord Dyson MR, Lloyd Jones LJ and Sharp LJ on the appeal to this Court [2014] EWCA 1394, [2015] 2 WLR 1105 at [149]-[159] is to the same effect, although not so pithily expressed, as the statements of Roskill LJ and Morritt C quoted above. As the Court said:

> "[154] …it is clear from the particulars of claim, that each cause of action depends on establishing that the conduct of the actual perpetrators (the agents of the foreign state) is unlawful, so that for their claim in false imprisonment, for example, the issue will be whether those who detained the claimants ie the Chinese, Malaysian, Thai, United States and Libyan authorities, acting through their agents, acted unlawfully. We do not think it can be sensibly suggested that it is necessary for the defendants to set out in their pleadings the provisions of the laws of China, Malaysia, Thailand, the United States and Libya to arrest, detain and deport immigrants and explain where they were different from English law, before the court could determine whether the conduct of the local perpetrators was governed by the laws of those jurisdictions or English law. Nor do we accept that unless and until that is done, the court should otherwise proceed on the inherently improbable basis that English law and the laws of the jurisdictions we have mentioned on the conduct on which the claimants rely and which they must prove to be unlawful, are the same.
>
> 155. We are not surprised that the judge was unimpressed by the claimants' arguments on this (pleading) point, which he characterised as evasive, unrealistic and contrary to the overriding objective. …
>
> …
>
> 158. The inevitable result of all this is that the claimants will have to plead their grounds for asserting that the conduct alleged is unlawful in accordance with the judge's order; and if they do not do so, or fail to prove their case on the point, their pleading will be deficient and their claims will fail …. This is no more and no less than is appropriate in our view in accordance with the ordinary rules of pleading which require litigants to set out the material facts which they must prove in order to make good their claim: see CPR r 16.4(1)(a)."

144. I would add that the Court in that case agreed at [156] with the view expressed by Simon J that the obiter observations in Potter, Buxton and Hooper LJJ in *PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd* [2005] EWCA Civ 422, [2007] 2 Lloyd's Rep 72 at [70] (quoted by Underhill LJ at paragraph 188) "provided no support for the proposition that the parties were entitled to proceed on an unreal basis either that English law applies, or that English law is the same as foreign law." Although the Court did not explain why, there are at least two reasons in addition to the fact that the observations in *PT Pan* were obiter. The first is that the Court of Appeal in *PT Pan* upheld at [71] the view expressed by David Steel J at first instance (quoted by the Court at [36]) that the evidence of Indonesian law which had been adduced by the defendant did not persuade him that a point of banking law was different under Indonesian law to English law, and thus there was a good arguable case to the contrary. Neither the judge nor the Court of Appeal applied Rule 25(2), but rather they assessed the cogency of the evidence of the foreign law and found it wanting. The second is that the observations of the Court of Appeal in *PT Pan* were made without reference to authority.

145. The fourth authority is *OPO v MLA*. In that case the claimant contended that the applicable law was English law, whereas the defendant contended that it was the law of a foreign country referred to as Ruritania for anonymity reasons. Neither party had adduced expert evidence as to the relevant aspects of Ruritanian law. Arden LJ concluded that it was likely that English law applied by virtue of Article 4(3) of the Rome II Regulation. Prior to reaching that conclusion, in the course of considering the effect of Article 4(1) if it was not disapplied by Article 4(3) and discussing what Simon J had said in *Belhaj v Straw*, Arden LJ stated at [110]:

> "… the overriding objective of the CPR does not require a party to plead a case on which he does not rely."

In context, the point Arden LJ was making was that the claimant was not required to plead Ruritanian law, since he contended that English law applied. As counsel for FS Cairo submitted, this statement implies that a party *is* required to plead a case as to a foreign law on which it does rely.

146. It is convenient to note at this point that the position in *Brownlie I* when it was before the Court of Appeal was similar to that in *OPO v MLA*: Lady Brownlie contended that English law applied, whereas Four Seasons contended that Egyptian law applied, but neither party had at that stage adduced any evidence as to Egyptian law. It is not necessary for the purposes of the present case to decide whether Arden LJ was correct to suggest in both cases that, in a case where the claimant contends that English law applies, but the defendant establishes that a foreign law applies, and neither party has adduced evidence as to the foreign law, the claimant may rely upon Rule 25(2). In such cases, however, it would seem logical to conclude that the burden of proving the foreign law should lie upon the defendant as the party asserting foreign law and that, in default of such proof, English law should be applied.

147. The fifth authority is the closest to the present case, since it concerned a similar attempt by a claimant to rely upon Rule 25(2) to fill a gap in its expert evidence as to foreign law, which is why I have left it to last. Cooke J rejected the attempt in *Tamil Nadu Electricity Board v ST-CMS Electric Company Pvt Ltd* [2007] EWHC 1713 (Comm), [2008] 1 Lloyds Rep 93 for the following reasons:

> "98. … I can see no basis for allowing TNEB to rely on any presumption as to the equivalence of Indian law with English law. The artificiality of such a presumption, when the parties have been permitted and have produced expert evidence of Indian law, is obvious. …
>
> 99. It would not be right to allow this issue to be determined in the way that TNEB submits. The Order of Simon J referred to an agreed list of issues, of which this issue did not form part. The whole purpose of the list of issues, and of the order for expert evidence on Indian law, was for the parties to set out and prove their respective cases on Indian law on the defined issues. It would be wrong to subvert that, by allowing reliance on the presumption of similarity in law, when, as a result of its own actions or inactions, the Indian law evidence provided by TNEB, in accordance with the Court's case management order, did not cover the issue now sought to be raised. I was referred to *Foreign Law in English Courts*, by Richard Fentiman, at pages 60–64 and 143–153, from which the following propositions can, accurately, in my judgment, be garnered:
>
> i) There is no adequate support in the decided authorities for the principle that English law should govern by default, where foreign law is relied on by a party, who declines to, or is unable, to prove it.
>
> ii) It would be wrong to allow the presumption to be used by a party where he pleads or wishes to rely on foreign law but declines to prove it. That would reward a person who alleges foreign law without proving it. The presumption is aimed at the situation where foreign law is neither pleaded nor proved and the parties and the court are to be taken as content to proceed on the basis of the presumption, since no one has sought to establish that there is any relevant difference.
>
> iii) If the failure to prove foreign law by a party is the result of a tactical decision, after seeking to rely on it, reliance by that party may amount to an abuse of process, depending on the circumstances."

148. Finally on the authorities, I should mention *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2018] EWHC 2759 (Comm), [2019] 1 WLR 82. I agree with the point made by Andrew Baker J at [14] that there is a distinction between the questions of (i) whether a party needs to rely upon (and therefore plead and prove) foreign law and (ii) whether a party must plead and prove foreign law if it is relied on by that party. As discussed above, the first question is a substantive question as to the applicable law applying the relevant rules of private international law, whereas the second question is a question of procedure and evidence. In so far as his judgment suggests that a claimant who needs to, and does, rely upon foreign law can reverse the burden of proof by invoking Rule 25(2), however, then I respectfully disagree with it. I note that some of the authorities and commentaries I have discussed were not cited to him. Furthermore, he relied upon dicta in *OPO v MLA* and *Brownlie I* without, it seems to me, taking fully into account

the context of those dicta. This is not to say that his decision was wrong, since it may well have been justified on the grounds that (a) the defendants relied upon Iranian law but had not identified any relevant difference between Iranian law and English law, (b) the defendants had (it appears tactically) not adduced any evidence as to Iranian law and (c) the case was ready for trial.

149. In the present case Lady Brownlie not merely accepts that the applicable law is Egyptian law by virtue of Rome I and Rome II, but also positively relies upon Egyptian law in her Amended Claim Form and in the prayer to her draft Amended Particulars of Claim. Accordingly, the burden of proving the relevant Egyptian law lies squarely on Lady Brownlie. Moreover, there is no question of any express or implied agreement by FS Cairo that Egyptian law is the same as English law.

150. That is reinforced by the fact that the parties were given permission to adduce expert evidence as to Egyptian law, and both parties did so. At that stage, therefore, Lady Brownlie did not attempt to rely upon Rule 25(2), but to discharge her burden of proof. Moreover, as counsel for FS Cairo pointed out, the evidence of both parties' experts demonstrates that Egyptian law is not the same as English law.

151. In those circumstances there is simply no room for any presumption or default rule that Egyptian law is the same as English law. Moreover, any attempt to apply such a presumption or default rule in this case would lead to absurdity. First, it would involve Lady Brownlie relying upon a mixture of Egyptian law and English law, particularly in relation to the direct claim in tort. Secondly, at least in relation to the contract claim, it would involve Lady Brownlie relying upon the legal content of the provisions contained in the 1934 Act and the 1976 Act, despite having rightly accepted that she cannot rely upon those Acts and deleting all references to them. This is because Mr Edge's only discussion of Lady Brownlie's capacity to claim damages under Egyptian law is in paragraphs 59 and 60 of his first report. In context, he is discussing her claim for vicarious liability in tort. Given what he says in paragraph 20, it is reasonable to suppose that the same principles would apply to a direct claim in tort; but given the absence of any discussion of contractual liability, there is no basis for concluding that they would also apply to a claim in contract.

152. 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). In any other context, the idea that lacunae in a claimant's expert evidence could be filled by a legal fiction would be given short shrift. I see no reason why it should be permitted in this context.

153. If the gaps in Lady Brownlie's expert evidence cannot be filled by resorting to Rule 25(2), then I respectfully disagree with McCombe LJ's suggestion in paragraph 62 that they may be filled by assertions that "*any* system of law" would provide for direct tortious and contractual liability of FS Cairo on the basis of the facts pleaded in the draft Amended Particulars of Claim and that "the precise legal basis of potential liability [is] of subsidiary importance".

154. In my view there are four problems with this suggestion. First, no such case was advanced by counsel for Lady Brownlie (and if it had been, she would have again faced the problem of the absence of a respondent's notice). Secondly, it is contrary to

the principle, which is not in dispute in this case, that the burden lies on the claimant to establish by evidence a real prospect of success in respect of *each* claim advanced. Thirdly, it is contrary to the purpose and effect of Stewart J's order. Fourthly, it not obvious to me that Egyptian law would recognise concepts such as those discussed in paragraph 122 above.

Conclusion on ground 2

155. For the reasons given above, if Lady Brownlie had a good arguable case that her tort claims fell within gateway 9a, I would uphold the judge's conclusion that Lady Brownlie has a real prospect of success on her claim that FS Cairo is vicariously liable in tort, but impose a condition on the grant of permission to serve out the claim form of the jurisdiction that she amend her Particulars of Claim to plead the relevant principles and sources of Egyptian law. I would in any event discharge the judge's order in so far as he granted permission to serve out in respect of the direct tort and contract claims.

Overall conclusion

156. For the reasons given above, I would allow the appeal and set aside the order for service out.

Lord Justice Underhill:

157. As explained above, McCombe LJ has produced a summary of the background to the claims and the sad history of this litigation and the first judgment on ground 1A, and Arnold LJ has produced the first judgment on ground 2. I am very grateful to both of them and as a result of their judgments I am able to proceed directly to considering the two grounds of appeal as they now stand before us.

GROUND 1A

158. We are in an unusual position as regards this ground. The Supreme Court has fully considered the very issue which it raises, and in the context of this very case, and has expressed a clear view, albeit by a three-two majority. But because of the turn which the appeal took, as described by McCombe LJ at paras. 7-9 above, it did so on what was necessarily an *obiter* basis; and two members of the majority went out of their way to emphasise that that was the case, Lady Hale saying at para. 33 of her judgment that everything said on the tort gateway issue should be treated with caution and Lord Wilson pointing out at para. 57 that the Court might have heard less full argument than its importance required. It is thus our responsibility to reach our own decision on the issue. However, I do not think that it would be right to treat the judgments of the majority as if they were no more than a contribution to the debate that deserves our respect and careful consideration. In my view the approach that accords proper weight to a fully considered but *obiter* view of a majority in the Supreme Court should be the same as that which a first-instance court takes to the decision of a court of co-ordinate jurisdiction, namely that we should follow it unless we are satisfied that it is clearly wrong. It would be easier for us to be satisfied of that if it could be demonstrated that the argument before us had raised aspects of the tort gateway issue

of which the Supreme Court may have been unaware; but we have seen the printed cases and we also have the earlier judgment of this Court, and it seems that the essential points made in the arguments before us were all squarely before the Court.

159. If, as I believe, that is the correct approach, I have to say that I am not persuaded that the view of the majority was wrong. There are powerful points to be made on both sides, as the division of opinion both in the Court itself and between McCombe LJ and Arnold LJ demonstrates. As everyone agrees, the language of the Practice Direction is capable of both a wide and a narrow interpretation, and I do not believe that the history of the circumstances in which it took its current form affords any clear guide to which should be preferred. Accordingly, the choice between the two interpretations depends on general considerations of legal principle and policy. It seems to me that the real question is whether it is appropriate to have a gateway so wide that it would admit any claim in tort where the claimant has suffered significant damage of any kind within England and Wales, and thus to leave it to the discretion formerly known as *forum non conveniens* to restrict what would otherwise be an exorbitant exercise of jurisdiction. I see the force of Lord Sumption's objection (see paras. 28 and 31) that such a use of the discretion is contrary to principle, but Lady Hale (at para. 54) and Lord Wilson (at para. 66) considered and specifically rejected that objection. I also see the force of the point made by Arnold LJ at para. 75 above about the increased scope for dispute at the permission stage; but that cannot be decisive in itself, and the majority in the Supreme Court must be taken to have appreciated that a "robust" or "muscular" deployment of the discretion would increase the scope for such disputes and must have regarded that as acceptable.

160. I accordingly think that we should follow the view of the majority in the Supreme Court and I would dismiss the appeal on ground 1A. In those circumstances I do not think there is any value in my contributing to the debate about which of the two approaches would be preferable, or more in accordance with the case-law so fully reviewed by My Lords, if the Supreme Court had not spoken.

161. I would add by way of coda that it is rather surprising that there appear to be no accessible pre-legislative materials casting light on the policy underlying so important an issue as the basis on which the courts of England and Wales should, in modern conditions, be entitled to accept jurisdiction over a foreign defendant. This is not, as might appear at first sight, because the question is the subject of a mere Practice Direction (though I am bound to say that that too seems surprising and rather unsatisfactory): the terms of paragraph 3.1 of PD 6B were taken unchanged from what was previously CPR 6.20 (8), and that in turn was taken, with one change, from O. 11 r. 1 (1) (f), so that any substantive pre-legislative materials would relate to those rules rather than the Practice Direction. However we were not referred to any pre-legislative materials relating to those earlier versions, and I infer that there has been no general review of the question for very many years. I would assume that the impending departure of the UK from the Brussels regime has prompted a careful review within government, with appropriate consultation, about the principles which should govern the assumption of jurisdiction by the courts of this country not only over defendants situated in the EU but over other foreign defendants. Such a review will inevitably cover the case of claimants who sustain damage in this jurisdiction as a result of a harmful event suffered abroad. New rules, based on clear principles, would be of great value.

GROUND 2

Introduction

162. I, like McCombe LJ, agree with Arnold LJ that the Judge was right to find that the Respondent had shown that she had a real prospect of success in a claim based on the vicarious liability of the Appellant in tort; and that the appeal under ground 2 should to that extent be dismissed. There is nothing I wish to add to what Arnold LJ says on that question. Arnold and McCombe LJJ would direct that the Respondent be required to plead the matters of Egyptian law on which she relies: I return to this at paras. 223-4 below.

163. I do not, however, agree with Arnold LJ that the Judge was wrong to make the same finding about the Respondent's proposed direct claim in tort and about her proposed claim in contract. That is also McCombe LJ's conclusion, but our reasons may not wholly correspond, and I should explain mine in full. For the sake of simplicity I will begin by considering only the contractual claim. But essentially the same issues arise in relation to the direct claim in tort, and I will return to it briefly at the end.

164. I start by identifying the basis on which the Respondent asserts that the Appellant was liable in contract. That appears from paras. 31-33 of the Amended Particulars of Claim. Paras. 31-32 read:

> "31. The Claimant states that a contract was entered with the Defendant for the provision of the relevant excursion and that the same was subject to an implied term that the excursion be supplied with reasonable care and skill so as to enable the Claimant and the deceased to be reasonably safe. The said term is to be implied as necessary, in the context of a consumer contract, to give effect to the intention of the parties.
>
> 32. For the avoidance of doubt, the Claimant states that:
>
> (a) The Defendant was the principal to a contract for the provision of the excursion; alternatively,
>
> (b) The Defendant was agent for an undisclosed and unidentified principal to a contract for the excursion and, accordingly, is liable to be sued as if it were the principal to the contract."

Para. 33 pleads detailed "Particulars of Negligence and/or Breach of Contract", but I need not set them out because they are confined to pleading the factual matters which would constitute a breach of the reasonable safety term if one were established, and no issue of law arises in relation to them.

165. The Respondent claims not only for the loss and damage that she has suffered as a result of her own injuries but also for the loss to her husband's estate resulting from his death and her loss as his dependant. In her original brief details of claim she pleaded that those parts of her claim were made, respectively, "under the Law Reform (Miscellaneous Provisions) Act 1934" and "under the Fatal Accidents Act 1976, in her capacity as her late husband's dependent widow". But in the light of observations

made by the Supreme Court to which I refer at para. 201 below she has deleted those words and made an amendment, as a result of which they now read "In her capacity as Executrix of her late husband's Estate and on behalf of the Estate and its heirs, for wrongful death" and "For dependency for wrongful death": the full amended prayer is set out at para. 95 of Arnold LJ's judgment. Equivalent amendments are made to the Particulars of Claim.

166. The propositions of law on which the Respondent's contractual claim depends are thus:

(1) that the Appellant was a party to the contract under which the excursion was supplied, notwithstanding that the actual services were provided by a third party, on one or other of the bases identified in para. 32, i.e. either because it was the principal or because it was acting as agent for an undisclosed principal;

(2) that that contract contained an implied "reasonable safety" term of the kind pleaded under para. 31; and

(3) that she is entitled to bring such a claim in relation to her husband's loss in her capacity as his executrix and in relation to her losses as his dependant.

I will call those "the essential propositions". Given that it was common ground that the applicable law for the purpose of the claim is Egyptian law, it was necessary for the Respondent to show before Nicol J that she had a real prospect of establishing that Egyptian law recognises those propositions.

167. The definitive way for the Respondent to demonstrate that would have been for her to adduce evidence of the content[3] of Egyptian law covering the same subject-matter as the essential propositions. As Arnold LJ has demonstrated, neither Mr Edge's first nor his second report contains any evidence about the Egyptian law of contract as it would apply to the pleaded claims; indeed, he appears to say in his second report that no claim in contract is being made. Mr Ezzo does in his report discuss at some length the provisions of the Egyptian Commercial Code relating to contracts of carriage, and the applicable limitation regime (which he says would be time-barred), but the relevance of his discussion is only to his contention that any claim in tort would be defeated by the doctrine of *cumul*. He says in terms that his report was prepared "on the assumption that there was a contract between [the Respondent] and [the Appellant]" and that he was instructed that he need not express a view "on this issue". It is unclear exactly what issue he is referring to, but he says nothing about the first two essential propositions. As to the third proposition, Mr Edge does say, albeit only in the context of a vicarious liability claim in tort, that the Respondent would be entitled to bring a claim as her husband's executrix and dependant: to anticipate, I believe that that evidence is a sufficient basis for a decision, at the permission stage, as regards the contractual claim also (see para. 203 below), but that is a distinct point.

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[3] Referring to the "content" of a foreign law is rather clumsy, but it is used in some of the authorities and I have not found a better alternative shorthand. I take it to mean the same as Arnold LJ's formulation, at, e.g, para. 121, "the relevant principles and sources of foreign law", i.e. those principles that establish the propositions on which the claimant must rely in order to establish their claim and the sources from which those principles derive.

168. In the absence, therefore, of any expert evidence (at least as regards the first two of the essential propositions), the issue becomes whether the Respondent can rely on the principle identified as rule 25 (2) in *Dicey*; or, more accurately, whether she has a reasonable prospect of doing so. As regards this I would uphold the Judge's decision. My reasons are as follows.

The Default Rule: The Law

169. Although Arnold LJ has already done so, for ease of reference I will set out again the formulation of rule 25 at para 9R-001 of *Dicey*:

> "(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."

We are concerned with para. (2). As *Dicey* goes on to say at para. 9-025, although the rule there stated is sometimes referred to in the cases as raising a "presumption of similarity" (in the relevant respects) between English law and the foreign law in question, that terminology may be problematic, and like Arnold LJ I will refer to it as "the default rule".

170. I do not need to embark on any general exposition of the scope and effect of the default rule. Three points are sufficient for my purpose.

171. First, the rule does not take effect by disapplying what would otherwise be the applicable foreign law. On the contrary, it is a rule of evidence, intended to address the situation where foreign law does apply (or at least may do so) but there is no evidence about its content. Conceptually, the Court is applying the foreign law but using the default rule to establish its effect. That seems to me to be recognised in the formulation of rule 25 (2) itself, but it is in any event established as a matter of authority. In *OPO v MLA* [2014] EWCA Civ 1277, [2015] EMLR 4, it was argued that a claimant could not rely on the default rule because it was inconsistent with the provisions of article 4 (1) of Rome II which prescribed the applicable law. That argument was rejected by this Court. At para. 108 of her judgment Arden LJ, with whom Jackson and McFarlane LJJ agreed, said:

> "I do not accept the submission that, even though there is no evidence of Ruritanian law[4], the presumption that foreign law is the same as English law does not apply. That is a rule of evidence applied by the English courts."

She made the same point, in response to the same argument, in *Brownlie 1* [2015] EWCA Civ 665, [2016] 1 WLR 1814. At para. 89 of her judgment, with which Bean and King LJJ agreed, she said:

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[4] At that point the foreign law in question was not being specified in order to make it more difficult to identify the claimant. As a result of the decision of the Supreme Court (*Rhodes v OPO* [2015] UKSC 32, [2016] AC 219) we now know that it was US law.

> "… [Counsel for the defendant] 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 [counsel'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 [counsel'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."

172. Ms Kinsler submitted that those parts of Arden LJ's judgments were *obiter*. I do not agree. They were clearly necessary parts of the reasoning on which she decided both cases.

173. Ms Kinsler also relied on the principle enunciated by Taylor LJ in *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 (see pp. 880-883) to the effect that a decision of this Court cannot be treated as authoritative if it was the subject of an appeal to the House of Lords or the Supreme Court, even if they were decided on other grounds. That was the case in both *OPO* and *Brownlie 1*. I have always found that principle rather surprising, and, as this Court pointed out at para. 62 of its judgment in *Gilham v Ministry of Justice* [2017] EWCA Civ 2220, [2018] ICR 827, *Al-Mehdawi* was itself the subject of an appeal to the House of Lords, which declined to consider whether Taylor LJ was right (see the speech of Lord Bridge, at p. 894B) and decided the case on another point; we are thus in the Gilbertian situation that the application of Taylor LJ's reasoning means that it is itself not authoritative. But I need not confront this paradox, since even if it was not formally authoritative I would not wish to depart from what Arden LJ said in both cases unless I were satisfied that it was wrong. That is far from being the case: in fact it seems to me to constitute a coherent (though I accept not uncontroversial[5]) analysis that produces a fair and workable result.

174. Secondly, the default rule does not apply in every case. In some cases where foreign law applies the court will not be prepared to proceed on the basis of English law, and the party whose case is governed by foreign law (typically the claimant) will accordingly be required to plead and prove its content. That point was first clearly identified by this Court in *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452, [2003] Ch 350, and was repeated more recently in *Belhaj v Straw* [2014] EWCA Civ 1394,

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[5] We were referred to passages from Professor Fentiman's *Foreign Law in English Courts.* In Chapter III he acknowledges the conceptual distinction between the issue of whether foreign law applies and the issue of whether it is necessary to plead and prove its content (see pp. 60-62); but it is his view that where the application of foreign law is mandatory that should mean that its content must be pleaded and proved. But that pre-dates *OPO* and is inconsistent with it.

[2015] 2 WLR 1105, where the Court (Lord Dyson MR, Lloyd-Jones and Sharp LJJ) said at para. 158 of its judgment:

> "… the presumption of similarity is not one in any event that applies inflexibly, regardless of the circumstances, and is subject to a number of exceptions …".

At para. 128 of his judgment Arnold LJ identifies claims for infringement of foreign intellectual property rights as one category of case to which the rule does not apply: see also *Dicey* at paras. 9-026-029. The law in this area is still developing, and the overall principles which lead to particular types of case or issue falling outside the scope of the rule have not yet been clearly identified. Like Arnold LJ, I do not find it necessary for the purpose of this appeal to engage in any general taxonomic exercise. I will simply adopt *Dicey's* characterisation of these cases as being those "in which the default application of a rule of English law is simply too problematic to be appropriate" – or, for short, where it is "inappropriate". But I would add that the necessary flexibility means also that the interests of fair and effective case-management may justify departing from it in the circumstances of a particular case.

175. Thirdly, although observations can be found in some of the cases which refer to the rule with disfavour, as representing an outdated and parochial assumption of the superiority of English law, I do not share that view. On the contrary, in those cases where its application is not inappropriate it seems to me to represent a sensible and just way of avoiding the expense and complication of the parties having to investigate and prove foreign law. That is most obviously sensible where the likelihood is that the effect of the applicable law will be substantially the same as that of English law (typically, though not only, where the law in question is that of a common law jurisdiction). But it may also be attractive to the parties in cases where it is recognised that the foreign law in question is very different in its sources and structure, so that it it is entirely conceivable that it might produce a different substantive outcome from English law; even in such a case the trouble and expense of establishing whether that is so may be viewed by the parties as disproportionate. It is important not to lose sight of the fact that the rule only applies if both parties are content that it should: either can ensure that the relevant foreign law is applied substantively as well as nominally by pleading and proving its content.[6] Once it is appreciated that that is the purpose of the rule, many of the criticisms sometimes made of it fall away. In cases where it is applied the court is not wilfully shutting its eyes to the obvious fact that (say) the Egyptian law of contract does not look like anything in *Chitty*. Rather, it is proceeding, for good pragmatic reasons, on the assumed basis that Egyptian law will be, in the relevant respects, to substantially the same effect as English law, whatever the differences in its structure or formulation. That will sometimes be contrary to the actual facts, but to regard that as an objection misses the point that the whole object of the exercise is not to have to go to the trouble

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6 In this connection I note Arnold LJ's observation that most of the work of rule 25 (2) could be done by recognising that parties are entitled to agree that English law should be apply to a claim or issue and that that agreement may be tacit as well as express: see para. 134 of his judgment. I agree, but I would be cautious about abandoning altogether its distinct status as a rule of evidence: there may be circumstances in which its application is justified but which would be problematic to fit into an analysis based on a real agreement.

of finding out what the facts are. It is for the same reason no objection to say that the exercise is "artificial": in one sense artificiality is necessarily inherent in the default rule.[7]

176. The issue before us concerns the circumstances in which it is incumbent on a claimant to plead and prove the substance of foreign law. It arises in the particular context of an (*inter partes*) application for permission to serve proceedings outside the jurisdiction, but I think it will be useful first to identify the correct approach in a case where service out is not required.

177. I take first the position where the claimant's position is that their claim is governed by English law, even if they appreciate that the defendant will argue otherwise. In such a case they will simply plead their case without reference to foreign law, and the burden will be on the defendant to plead that foreign law applies and the relevant content of that law. That is straightforward, and I state it only as a jumping-off point for what follows.

178. I turn to the position where the claimant accepts that foreign law – say, Ruritanian law – applies but does not wish to rely on its actual content and is willing to rely on the default rule. In my view it is obvious that in this case also (subject to para. 181 below) they cannot be obliged to plead from the start the relevant content of Ruritanian law. If it were otherwise there would be no scope for the application of the default rule. That conclusion is consistent with the Civil Procedure Rules. Rule 16.4 (1) (a) requires a claimant to plead in their particulars of claim only a concise statement of the facts on which they rely: thus if they are not relying on the content of Ruritanian law they are not required to plead it. That is confirmed by Arden LJ at para. 110 of her judgment in *OPO*, where she says that "the overriding objective of the CPR does not require a party to plead a case on which he does not rely"[8]: I respectfully disagree with Arnold LJ's explanation of this observation at para. 145 of his judgment, which seems to me inconsistent with the primary point being made by Arden LJ at para. 108 (see para. 171 above). It follows that the claimant in this situation can and should simply plead their case as if English law applied. (I would add that in my view it would nevertheless be good practice in such a case for the claimant to plead that they accept that Ruritanian law applies, while making it clear that in reliance on the default rule they do not intend to plead its content: that will let everyone know where they stand and would promote the over-riding objective. I cannot however see that the Rules impose a specific obligation to this effect.)

179. If in such a case the defendant wishes to rely substantively on Ruritanian law, then the ordinary principles of pleading – see CPR 16.5 (2) – require them to plead in their

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[7] That is not to say that the artificiality of applying the default rule may not in particular circumstances be a reason for deciding that it would be "inappropriate". But it is necessary to rely on more simply than the inherent artificiality of applying English law to a claim governed by a different law.

[8] The reason why Arden LJ referred to the overriding objective rather than specifically to CPR 16.4 (1) (a) appears to be that she was responding to (and disagreeing with) an observation by Simon J at first instance in *Belhaj* that to rely on the default rule in the circumstances there under consideration would not be "consonant with the overriding objective": the passage is quoted by Arnold LJ at para. 142.

defence (a) that Ruritanian law applies (unless the claimant has already conceded that that is the case) and (b) its relevant content; and the claimant would plead any contrary case by way of reply (or perhaps, if that were more convenient, by way of amendment to their particulars).

180. The approach in the previous paragraphs is consistent with the statement in *Dicey*, at para. 9-003, that:

> "The general rule is that if a party wishes to rely on as foreign law he must plead it in the same way as any other fact. Unless this is done, the court will in principle decide a case containing foreign elements as though it were a purely domestic English case."

181. The sequence of pleading will of course be different if it is decided that the application of the default rule is inappropriate in the particular circumstances of the case (see para. 174 above). In such a case the claimant will indeed be obliged to rely on the actual content of Ruritanian law and accordingly to plead it. But such cases will be by way of exception to the general rule.

182. Essentially the same principles that I have set out in the preceding paragraphs were recently advanced in clear terms by Andrew Baker J in *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2018] EWHC 2759 (Comm). In that case the claimant had pleaded claims against the relevant defendants for knowing receipt, dishonest assistance and unlawful means conspiracy, without reference to any foreign law. The defence averred that the claims were based on acts done in Iran and the UAE and were governed by Iranian law, but it did not plead the content of Iranian law or, therefore, that it was to any different effect from English law. The claimant conceded that the claims were governed by Iranian law but contended that it was entitled to rely on the default rule unless and until the defendant pleaded a substantive case based on Iranian law. The Judge upheld that contention. At para. 11 of his judgment he set out his analysis of the relevant principles as follows:

> "(i) It is not necessary for a claimant to plead the existence of, or an intention to rely at trial upon, Rule 25(2). It goes without saying that it will apply – otherwise it would not be the default rule that it is – unless reason not to apply it be demonstrated.
>
> (ii) It follows that even a plea as to applicable law, let alone a plea as to the content of some possibly applicable foreign law, is not a material averment a claimant is required to make if the matters, as pleaded, that it says create liability do not involve or imply the advancing by it of any case as to the content of some foreign law.
>
> (iii) A claimant might of necessity plead some matter of foreign law, but for which it would fail to disclose any cause of action (imagine, for example, a negligence claim for bad advice about possible US tax liabilities); or a claimant might choose, whether or not it would have a claim by reference to English law, to base its claim upon a system of foreign law it said was applicable. In either type of case, different considerations would arise.

> (iv) Where, however, as in this case, a claimant neither needs nor chooses to plead foreign law, in order to plead what would be a complete and viable cause of action if the claim be determined under English law, as by default it will be, a contention that it is inappropriate to determine the claim by reference to English law, so that it should fail come what may, is a reasoned denial of liability. Since determination of the claim under English law is the default rule in English proceedings, even where (in principle) the law governing a claim is or might be a foreign law, any contention that it is inappropriate to apply that rule must necessarily be founded upon matters particular to the claim in question.
>
> (v) In principle, therefore, and in line with CPR 16.5(2)(a), it is for a defendant, if it wishes to raise any such contention at trial, to plead it as a reasoned denial of liability, setting out the matters particular to the claim said to render it inappropriate to judge it by reference to English law. If it does not do so, then no such contention will be open to it at trial, subject to (vi) below. …"

Ms Crowther submitted that that was an accurate statement of the law. I agree.

183. One point that I wish to emphasise, which appears both in my own analysis and in Andrew Baker J's, is that it can make no difference to the issue of who has the burden of pleading foreign law that the claimant has expressly acknowledged that foreign law applies (i.e. as opposed to simply pleading on the basis of English law). Indeed, as noted at para. 171 above, by definition the default rule only comes into play where foreign law does apply. The distinction between accepting the application of foreign law and pleading its content is arguably not sufficiently appreciated in some of the authorities.

184. Finally as regards the sequence of pleading, although the foregoing in my view represents the approach to be followed in ordinary cases, I repeat that the default rule is to be applied flexibly. It is always open to a court to direct that where a claimant accepts that foreign law applies to their claim (or it has been held that it does) they must plead the content of that law first. Such a direction might be made on the basis that the default rule was inappropriate for reasons concerning the nature of the claim, as mentioned at para. 172 above; but it might also be appropriate for case management or other reasons peculiar to the particular case. (Likewise, to get ahead of myself, it might sometimes be appropriate to direct that evidence of foreign law be served in a different sequence from the sequence of pleading.)

185. The present case concerns, as I say above, the application of the default rule in the particular context of an application for permission to serve out of the jurisdiction, which raises particular issues of its own. Arnold LJ addresses the applicable principles at paras. 135-139 of his judgment. I agree with what he says at paras. 135-137. What he says there is consistent with my own analysis of the correct approach in cases where jurisdiction is not in issue, but he draws attention to the additional obligations imposed on the claimant by the duty of disclosure.

186. However, I must respectfully part company with paras. 138-139, which address the position where the claimant has accepted that foreign law applies but has adduced no

evidence of its content and where the defendant objects to their relying on the default rule but does not wish to adduce their own evidence of foreign law in advance of seeing such evidence from the claimant. I do not know how often defendants in practice adopt that position: I suspect that in many or most cases they simply adduce their own evidence of foreign law in support of the application to set aside. But the question is whether in principle they would be entitled, as Arnold LJ believes, to insist on the claimant adducing evidence of foreign law before they do so.

187. As to that, I can see no basis in principle why the sequence of evidence in the context of a jurisdictional challenge should be any different from the sequence of pleading in a case where no jurisdictional issue arises, as expounded above. I of course accept that, as Arnold LJ says, the burden is on the claimant seeking permission to serve out to show that the claim has a real prospect of success. But I do not see why that burden cannot be discharged by relying on the default rule unless and until the defendant adduces substantive evidence of the applicable foreign law: it is the production of such evidence that disapplies the default rule, not merely a party registering an objection to its application, as Arnold LJ suggests at the beginning of para. 138. To characterise that approach as "reversing the burden of proof" is tendentious. 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.

188. I am supported in that view by the observations of this Court (Potter, Buxton and Hooper LJJ) in *PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd* [2005] EWCA Civ 422, [2007] 2 Lloyd's Rep 72. That case was concerned with a challenge to the grant of permission to serve proceedings out of the jurisdiction. One of the grounds involved the issue of the burden of adducing evidence of foreign law. In the event the appeal was decided on other grounds, but the Court addressed that issue. At para. 70 of its judgment it said:

> "*In deciding issues raised before the court which are asserted to be governed by foreign law, the court proceeds upon the basis that such law is to the same effect as English law unless material is provided which demonstrates the contrary*. Mere assertion is insufficient unless it is supported by credible evidence as to the foreign law. This is a necessary rule if proceedings are not to be stultified or unduly delayed, particularly in the interlocutory stages, in any case where the answer to a claim with a foreign element is clear so far as English law is concerned. It will often be the case that the material provided as to foreign law will be of an incomplete or provisional nature unsupported by detailed authority or by materials of the weight or complexity suitable to a final disposal, but nonetheless sufficient to satisfy the court that an arguable defence or other relevant issue has been established for the purposes of a decision at that stage of the proceedings. Nonetheless, *the party who asserts that the application of foreign law would provide a different result bears the burden of satisfying the court that that is so*. If the evidence proffered is of such incomplete, inconsistent or unconvincing character that it is insufficient for its purpose, it is not necessary for the opposing party to

> adduce his own contradictory evidence from an expert in the relevant foreign law."

The essential passages for our purposes are those which I have italicised but I have included the entire paragraph for completeness. What the Court there says is indeed obiter, but it is nevertheless persuasive, and it was said in the context of a dispute about jurisdiction. I am not shaken in that view by the points made by Arnold LJ at para. 144 of his judgment.

189. At paras. 140-147 of his judgment Arnold LJ supports his contrary view by reference to five authorities. One is *OPO*, on which I have already expressed my view (see paras. 171-3 above). I will consider first the two on which Ms Kinsler principally relied in her submissions before us.

190. The first is *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3612 (Ch). In that case a Part 20 defendant was seeking to challenge the grant of permission to serve him out of the jurisdiction. The claim against him alleged breaches of duties said to be owed to one of the defendants as an employee and/or fiduciary arising out of contracts which it seems to have been accepted were governed by Saudi law. The application was heard by Sir Andrew Morritt C. One of the issues was whether the defendant should have pleaded Saudi law in its Part 20 claim form, which was pleaded purely by reference to English law. In the event the issue did not fall for decision but the Chancellor nevertheless addressed it in his judgment. Counsel for the defendant had sought to defend his omission to plead Saudi law by reference to the default rule as then expounded in *Dicey*, submitting that "it was sufficient in the first instance to rely on the so-called presumption referred to in the second passage and leave it to the defendant to ascertain and rely on any aspect of the foreign law he considered to be different and material" (see para. 38 of the judgment). The Chancellor said that that approach "[did] not reflect my experience either at the bar or on the bench" and (at para. 39) that the failure to plead the substance of the relevant Saudi law rendered the pleading deficient. The passage quoted by Arnold LJ at para. 141 follows immediately thereafter. The effect of that passage, read in the context of counsel's argument, does indeed on its face appear to be that in any case governed by foreign law a party must plead and prove the substantive law supporting any necessary legal propositions, and not rely on the default rule. I can only say that if that were the case it would, as I have already said, deprive the rule of any content, and I do not believe that it can be right. I strongly suspect that the Chancellor's intended reasoning was more limited. The decision is not binding on us and the passages in question are shortly reasoned and contained in an *obiter* part of an *ex tempore* judgment. In those circumstances I will only say that for the reasons already given I must respectfully disagree with what the Chancellor appears to say.

191. The second is the decision of this Court in *Belhaj*, to which I have already briefly referred. The claimants in that case claimed damages against various ministers, officials and other emanations of the UK government arising out of their mistreatment in four foreign states – China, Malaysia, Thailand and Libya – where they had been taken following being "rendered" with the defendants' participation, and also on a US-registered aircraft. Various interlocutory issues arose, one of which concerned what was the law applicable to the claims. The defendants contended that, applying the relevant provisions of the Private International Law (Miscellaneous Provisions) Act 1995, it was the law of the various states in which the mistreatment occurred (or

US law in the case of the aircraft); but they did not plead the content of the laws in question. The claimants' position had various aspects, but the relevant point for our purposes is that they submitted that it was not possible for them to plead a position on what the applicable law was until there had been findings of fact which might bear on that question, and that the case should proceed in the meantime on the basis of the default rule. At first instance – [2013] EWHC 4111 (QB) – Simon J held that that approach was evasive; that it was appropriate to decide the appropriate law on the basis of the pleadings as they then stood; and that it was, as the defendants contended, the law of the five countries where the claimants had been mistreated.

192. The Court upheld Simon J's decision on the applicable law issue. Its reasoning involves various strands. The only aspect which is relevant for our purposes is what it described (see para. 149) as "the real bone of contention between the parties", namely "who should plead their case on (the content of) foreign law first". The claimants had argued that the effect of Simon J's order would be, wrongly, to put the burden on them to plead the details of five different systems of law in circumstances where they did not seek to aver that those systems were any different from English law. The Court at para. 153 described this as "a wholly artificial and unrealistic way of looking at the case *when one considers the nature of the allegations made by the appellants* [my emphasis], and … the concession made by [counsel for the claimants]" – that concession being that it was unlikely that English law applied; and at para. 158 it confirmed that the result of its decision was that the claimants would have to plead their case that the conduct alleged was unlawful under the laws of the five countries in question, observing that that was in accordance with the requirement of CPR 16.4 (1) (a).

193. I have to say that the details of the Court's reasoning in paras. 153-158 are not entirely easy to summarise. I think that this is because, despite what it says about "the real bone of contention", the actual issue before it was not who should plead first but whether it was appropriate to reach a decision on the applicable law before any facts had been found: the interaction of those two issues complicates and somewhat obscures the analysis. However, what matters for our purposes is that the Court's reasoning was not based on any general propositions about the correct sequence of pleadings in a case where one party wishes to rely on the default rule. On the contrary, it was avowedly specific to the (very unusual) circumstances of the particular case. That is apparent from the words which I have italicised in para. 153, but it is to be noted also that in para. 157 the Court explicitly declined to address what it described as "some broader issues" which the defendant had apparently raised about the operation of the default rule, and instead made the point which I have quoted at para. 174 above, from which it appears that it treated the case as falling into the exceptional category where the application of the default rule is inappropriate. On that basis, of course, its reference to CPR 16.4 (1) (a) is unexceptionable, since where it is inappropriate to apply the default rule a claimant will indeed have to rely on the content of foreign law.

194. I also note that at para. 151 the Court referred to the passage from the judgment in *PT Pan* which I have set out above. It did not suggest that it stated the law wrongly. On the contrary, it distinguished it. It did so on the basis that the claim in that case involved "a complex international contract dispute" which was "not analogous on [its] facts to this [case]". It does not specifically identify why that made the difference or

the respects in which the facts were not analogous, but what matters is that the difference lay in the unusual facts of *Belhaj*. That is consistent with my analysis of its overall reasoning: *Belhaj* was a case where, for particular reasons, it would be inappropriate to apply the default rule. The Court also approved, at para. 156, an observation by Simon J to the effect that *P T Pan* did not support "the proposition that the parties were entitled to proceed on an unreal basis either that English law applies, or that English law is the same as foreign law". But that observation is similarly case-specific. For understandable reasons Simon J believed that it would be "unreal" to apply English law to the claimants' case: but the Court of Appeal cannot have understood him to be saying that it was always wrong (because "unreal") to proceed on the basis that foreign law was to the same effect as English law in the absence of evidence to the contrary.

195. I should finally say that if I were wrong in my analysis of the ratio in *Belhaj* there would be a conflict between it and *OPO*, to which the Court was not referred[9]. I would in those circumstances prefer the latter.

196. I cannot accordingly regard *Belhaj* as authority supporting the proposition that in a service out context a defendant is entitled, in a case acknowledged to be governed by foreign law, to require the claimant to produce evidence of the content of that law.

197. In *Iranian Offshore* Andrew Baker J at paras. 13-21 of his judgment conducts a careful analysis of *Global Multimedia* and *Belhaj* and concludes that he was not bound by either to accept the proposition that "where a claim is governed by foreign law the claimant must plead a case as to the content of that foreign law" (para. 20). His analysis is to essentially the same effect as mine.

198. The other case on which Ms Kinsler relied is *Tamil Nadu Electricity Board v St-Cms Electric Company Private Ltd* [2007] EWHC 1713 (Comm), [2008] 1 Lloyd's Rep 93. Arnold LJ has set out at para. 147 the relevant passage from the judgment of Cooke J. I accept that at least the second of the three propositions in para. 99 is capable of being understood in a way which is inconsistent with the law as I have set it out above. There is, as I emphasise at para. 183 above, nothing objectionable in a claimant accepting that their claim is governed by foreign law but making no attempt to prove the content of that law and instead relying on the default rule. It would be different if the effect of the pleading was that the claimant intended to rely on the substance of the foreign law but then failed to plead any relevant particulars and/or to prove it in the relevant respects; and it may be that that was all that Cooke J had in mind.

199. I should deal finally with the statement of Roskill LJ in *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 quoted by Arnold LJ at para. 140 (which was not in fact referred to by Ms Kinsler). I will not repeat Arnold LJ's helpful summary of the context, but I should note that immediately before the passage which he quotes Roskill LJ observed that no authority had been produced in support of that proposition that the default rule could be applied "in a case of this kind". I have already acknowledged that there is authority that the application of the default rule is not appropriate in the context claims for infringement of foreign intellectual property rights, and what Roskill LJ

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[9] I should say that the omission is venial since *OPO* was handed down in the interval between argument and judgment in *Belhaj*.

says is readily explicable on that basis. I do not understand him to have been advancing any proposition about the burden of pleading or proving the content of foreign law generally. That would in any event hardly be likely in the context of what was an *ex tempore* judgment, where the "worldwide scope" issue was of secondary importance and was disposed of in a few sentences. There is no general analysis of the effect of the default rule and it appears that no authorities about it were cited.

The Present Case

200. Ms Kinsler in her clear and well argued oral submissions advanced five reasons why the default rule should not operate in the present case. I take them in turn.

201. The first was that it could not operate if the rules of English law which would be "presumed" to form part of Egyptian law were of their nature incapable of applying in a case where English law was not the proper law. The Supreme Court had held that this was the case as regards the Respondent's claims on behalf of her husband's estate and as his dependant, under the 1934 and 1976 Acts respectively: see para. 18 of the judgment of Lord Sumption (with which the other members of the Court agreed), referring to *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379.

202. I am not sure about this. Lord Sumption's reasoning clearly means that the Respondent cannot rely on the 1934 and 1976 Acts as such, and in her pleadings she has duly deleted any reference to them. But Lord Sumption went on to say in terms that claims for bereavement and loss of dependency might well be available to her under Egyptian law even though as matters stood no such claims had been advanced; Lady Hale said the same at para. 33. The question for us is whether such claims under Egyptian law can be advanced in reliance on the default rule or whether the actual content of the relevant Egyptian law would have to be pleaded and proved. I do not think that Lord Sumption or Lady Hale were addressing that specific question: at that point the Respondent had not formally conceded that Egyptian law was the applicable law and thus had not pleaded (even in the minimalist way that she now does) that her claims were being brought under Egyptian law. My provisional view is that there is no reason in principle why the default rule could not be relied on for this purpose. If the rule applies, it does not mean that the Court is being asked to apply the 1934 and 1976 Acts as such. It means only that it is being asked to proceed on the basis that Egyptian law recognises substantially equivalent rights – that is, that it permits an executrix and widow to claim damages on behalf of her husband's estate and as his dependant.

203. However, we did not receive very detailed submissions on this point, and I need not definitively decide it since I believe that there was (just) sufficient evidence of the actual content of Egyptian law before Nicol J to entitle him to find that it did indeed allow for similar rights. At paras. 59-60 of Mr Edge's report he says that Egyptian law permitted the Respondent to advance her vicarious liability claim in tort in her capacity as executrix and dependant. Although it is unsatisfactory that he does not give the same evidence as regards the contractual claim, it is not unreasonable to infer that a similar rule would apply. It is important to recall that Nicol J was not obliged to make a definitive finding on the point: he needed only to decide whether the Respondent had a real prospect of showing that under Egyptian law she was entitled to claim in those capacities.

204. Ms Kinsler's second reason was that the default rule could not apply in favour of a party who relies on foreign law as the basis of their claim. As discussed above, that depends what you mean by "relies on foreign law". The Respondent relies on foreign law in the sense that she accepts that Egyptian law is the applicable law, but she does not do so in the sense that she relies on its actual content. It is, as I have said, precisely in those circumstances that the default rule, if otherwise appropriate, operates.

205. Ms Kinsler's third and fourth reasons are essentially the same. She submits that the default rule cannot operate in circumstances where the Court has evidence (third reason), or otherwise has reason to believe (fourth reason), that foreign law is different from English law; and that that was evidently the case here. She was not referring to evidence showing that Egyptian law is different from English law in the very respects on which the claim depends: obviously such evidence would displace the default rule, but the whole issue in this appeal arises from the fact that there is no such evidence. Rather, she made clear that what she meant was that the rule could not apply where the sources and structure of the foreign law in question were so different from those of English law that it was very unlikely that its effect in a particular situation would be, even substantially, the same. I do not accept that. I believe that the default rule may be just as beneficial in such a case as in one where the two systems of law are broadly similar: see para. 175 above. For the same reason I respectfully disagree with the similar point made by Arnold LJ at para. 150 of his judgment.

206. Ms Kinsler's fifth reason was that the default rule ought not to operate in the case of an application to serve out. I have explained why I do not believe that to be the case.

207. It was not part of Ms Kinsler's submissions, and I would not in any event accept, that there is anything in the nature of the Respondent's claims themselves that renders the application of the default rule inherently inappropriate: we are not in *Shaker* (or indeed *Belhaj*) territory. There can be nothing problematic (to use *Dicey's* term) in proceeding on the basis that under the law of a foreign country it would be a requirement of a contract for the provision of the services of a car and driver that the supplier would use reasonable care for the customer's safety – more particularly, that the car would be in a safe condition and that the driver would drive with reasonable care; or that if a guest makes such a contract with the concierge of a hotel the hotel itself will be, or will be treated as, a party even if the services are in fact provided by someone else. I do not of course say that that is inevitably the position under the Egyptian law – only that this is not the kind of case where the propositions on which the claimant relies are of their nature problematic to apply in the context of a foreign country or its institutions.

208. I do not therefore believe that there is anything about the nature of the Respondent's claims that disentitles her to rely on the default rule. The question remains whether she should nevertheless not be entitled to do so because of the particular way in which the case has proceeded. We can for present purposes ignore the early history and start with the remittal of the case to the High Court to decide whether she should have permission to serve the Appellant out of the jurisdiction.

209. By no later than the date of a witness statement from her solicitor, Mr Donovan, dated 16 August 2018 the Respondent made it clear that she intended to amend her claim

form and the prayer to her Particulars of Claim to plead that her claims were "pursuant to Egyptian law", on the basis that it was clear from the decision of the Supreme Court that that was the applicable law. That was an acknowledgment that Egyptian law was the applicable law, but I do not agree with Arnold LJ (see para. 149 of his judgment) that it meant that she "positively relies on" Egyptian law in the relevant sense of relying on its content: no attempt was made to amend the Particulars to plead any such content.

210. The Respondent thus remained, on the basis of my analysis above, entitled to rely on the default rule. She would, in effect, be asking the Court to proceed on the basis, unless the contrary was pleaded and proved by the Appellant, that the essential propositions underlying paras. 31 and 32 of the Amended Particulars of Claim were recognised in Egyptian law. Translating that into the context of a permission application, in order to prove that her claim had a real prospect of success she did not have to adduce any evidence of Egyptian law unless and until the defendant did so.

211. So far so good, but matters moved on. On 6 February 2019 Stewart J made the order referred to by Arnold LJ at para. 97 of his judgment. For ease of reference I will quote again the relevant part of the order, which reads:

> "The Claimant and the Proposed Defendant shall both, if so advised, have permission to rely on expert evidence in writing as to Egyptian law with respect to personal injury and wrongful death claims in contract and tort/delict, including in particular the law of limitation as it applies to such claims."

It should be noted that the order did not positively direct the parties to adduce evidence of the kind specified: rather, it gave them permission to do so "if so advised".

212. As Arnold LJ has noted, other paragraphs of the order provided (by consent) for the Respondent to adduce her evidence for the purpose of the substantive hearing of the applications first, and that also covered any expert evidence. The default position would otherwise have been that the Appellant should have gone first, but that sequence can of course be departed from by agreement or indeed by the Court if there are particular case management reasons for doing so.

213. We were not told the precise genesis of Stewart J's order, but it is sufficiently clear that what initially gave rise to it was the recognition that the belated substitution of the Appellant for the previous defendant raised a potential limitation point and that the parties wished to rely on Egyptian law in that regard. The witness statement of Mr Donovan to which I have already referred identifies that issue: he contends that as a matter of Egyptian law a claim against the Appellant would still be in time and says that if that is disputed he reserves the right to serve evidence of Egyptian law (see para. 20 (g)). The phrase in Stewart J's order "including *in particular* the law of limitation as it applies to such claims [my emphasis]" strongly suggests that that was the particular issue on which the parties wished to be entitled to adduce evidence, and I get a similar impression from a witness statement of the Appellant's solicitor, Mr McManus, dated 21 May 2019, which refers to evidence of Egyptian law only in the context of the limitation issue. But I accept of course that the scope of the evidence permitted by the order is wider than that, referring generally to "Egyptian law with

respect to personal injury and wrongful death claims in contract and tort/delict, including in particular the law of limitation…".

214. As we have seen, neither party in fact adduced any evidence of the substantive Egyptian law applying to personal injury claims in contract. Mr Edge's report for the Respondent simply did not address that part of her claim at all. We do not know why, though I agree with Arnold LJ that it is unlikely to have been accidental. Nor did Mr Ezzo. We do not know the reason for that either. One possibility is that both parties accepted that the essential propositions were recognised in Egyptian law and that the only issue was limitation (and, when Mr Ezzo raised it, *cumul*); but that is no more than speculation and it would be wrong to proceed on that basis.

215. The most straightforward analysis of the resulting situation is that since neither party's evidence stated the content of Egyptian law as regards the Respondent's contractual claim – that is, as regards what I have called the essential propositions – Nicol J was in the same position as if Stewart J's order had not been made and the position remains as summarised at para. 210 above; and that is the approach which he seems to have taken.

216. The contrary argument is that it is not right to treat the order of Stewart J as if it had not been made or to ignore the fact that both parties did in fact adduce evidence. Arnold LJ at para. 152 of his judgment treats this was a case where it was incumbent on the Respondent to adduce evidence of the actual content of Egyptian law of contract in the relevant respects but failed to do so. I see the attraction of that approach, not least because the Respondent's approach to the pleading and proof of Egyptian law does not seem to have been very clearly articulated. But I do not think that it is the correct analysis here, for the reasons which I explain below.

217. My starting-point is that Stewart J's order was permissive and not mandatory. It cannot be treated as a positive ruling that the application of the default rule was inappropriate in this case and accordingly that the Respondent's claims could only be proved by her pleading, and proving, the actual content of Egyptian law. If in the end neither party had chosen to adduce evidence at all I do not see how it could have been argued that by not doing so the Respondent had lost the right which she otherwise enjoyed to rely on the default rule unless and until the Appellant adduced evidence of the content of Egyptian law.

218. Of course that is not what happened: both parties did adduce evidence. The problem is that that evidence did not address the issue in question: in crude terms (this is in fact an over-simplification, but it will do for present purposes), it covered the Egyptian law of limitation and the doctrine of *cumul*, but not the issue of substantive liability. The question is whether, where the parties in a claim covered by foreign law have chosen to adduce evidence of the content of that law as regards some but not all of the issues raised by that claim, that fact precludes them (or, more particularly, the claimant) from relying on the default rule as regards the issues on which no such evidence is adduced. We were referred to no authority on the point, but I can see no reason in principle why it should, provided that the issues are substantially self-contained. The default rule is, as we have seen, a practical rule of evidence designed to assist in determining claims with a foreign element: I see no reason why its application needs to be all-or-nothing except in cases where dealing with different issues by reference to different systems of law might create real difficulties. (I

accordingly respectfully disagree with the first of the two points made by Arnold LJ at para. 151.) That is not the case here. The limitation and *cumul* issues do not depend on the issues which are otherwise determinative of liability. That is illustrated by the fact that Mr Ezzo felt able to give an opinion on both issues without saying anything about the substance of the contractual claim. I agree with Arnold LJ that it would normally be wrong to allow a party who had chosen to adduce evidence of foreign law on a particular issue to seek to repair deficiencies in the evidence relating to that very issue by invoking the default rule: the two routes should be treated as mutually exclusive. But that is not this case.

219. It seems to me that the only way in which the Respondent could be precluded from relying on the default rule in respect of the contractual liability issue would be if it could be said that Stewart J's order evidenced a common understanding that the Respondent would assume the burden of adducing evidence of the content of Egyptian law on all the issues raised by her claim. If that were the case she would be affixed with the consequences of any failure to do so. But no such common understanding could be established on the material before us, not least, though not only, because we do not have a complete picture of how Stewart J's order came to be made: I have already noted the focus on the limitation issue. Nor in any event did Ms Kinsler seek to put the case that way.

220. I should say, finally, that nothing that I have said about the pleading and proof of Egyptian law in this case, even to the extent that it represents the majority view, will necessarily be the last word on that question. Inevitably the decision on a jurisdiction challenge cannot definitively determine the issues, which will only fully crystallise after the close of pleadings and may well be the subject of further evidence.

Direct Liability in Tort

221. I can deal with this very briefly because the analysis is substantially identical. I have in fact had some difficulty in understanding from the Amended Particulars of Claim the nature and scope of the duty of care said to have been owed to the Respondent directly by the Appellant in the arranging of the excursion. However, it was not in issue before us that it was arguable that such a duty was owed in English law. I agree with Arnold LJ (see para. 124) that there is no evidence in the reports of either expert that Egyptian law recognises an equivalent duty. In this case also, therefore, the issue is whether the Respondent can rely on the default rule.

222. That issue raises the same questions as arise in relation to the contractual claim and I would answer them in the same way. Reliance on the default rule is not inappropriate in the sense explained at para. 174 above. Accordingly the Respondent was under no obligation to plead the actual content of Egyptian or, in the context of the jurisdictional challenge, to adduce evidence about it, unless and until the Appellant did so. That analysis is not affected by the making of Stewart J's order.

DISPOSAL

223. Since McCombe LJ and I are agreed in rejecting both grounds the appeal is dismissed in its entirety. That is subject to one point which for me at least is not entirely straightforward. McCombe LJ would require the Respondent now to plead the content of Egyptian law as regards all three of her heads of claim, as would Arnold LJ as regards the claim in vicarious liability. Since I would decide the appeal in the Respondent's favour on the basis that she was not obliged at the stage of the jurisdictional challenge to adduce evidence of the content of Egyptian law, it is at first sight contradictory to require her to plead it either, unless and until the Appellant does so. 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. I should give my reasons briefly.

224. The starting-point is that this is not a case where we do not know whether there will in fact be issues of foreign law: on the contrary, it is clear from the evidence in the jurisdiction challenge that there will be, at least as regards some points. On my analysis it would not follow from that fact alone that the Respondent should plead her case first. However, I am inclined to think that she should do so at least as regards her vicarious liability claim in tort: she has already obtained evidence of Egyptian law on that aspect, and indeed went first with it at the jurisdiction stage (following the sequence to which she had agreed), and there should accordingly be no significant difficulty and expense in her pleading it. And if that is so, then it seems to me cleaner that she should also go first in pleading the remaining Egyptian law on which she will have to rely as regards her other claims (and her entitlement to claim as her husband's executrix and dependant). It also appears to me that the precise basis of the claims being made may be relevant to the availability of a defence based on *cumul* and/or limitation, on both of which the Appellant has made it clear that it intends to rely; and the position will be easier for everyone if it can plead those defences in response to a substantive pleading of Egyptian law. If in the end it turns out that the Appellant accepts that Egyptian law recognises the essential propositions, then some costs may turn out to have been wasted, but that is a price worth paying for having a complete Egyptian law case pleaded from the start and avoiding the risk of it having to be pleaded piecemeal by way of reply or further amendment.