Neutral Citation Number: [2019] EWHC 2533 (QB)

Case No: HQ12X05479

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/10/2019

Before :

MR JUSTICE NICOL

- -

Between :

Lady Christine Brownlie (widow and executrix of the estate of Professor Sir Ian Brownlie CBE QC)	**Claimant**
- and -	
Four Seasons Holdings Incorporated (a company incorporated in British Columbia, Canada)	**Defendant**

-and-

FS Cairo (Nile Plaza) LLC
(a company incorporated in the Arab Republic of Egypt)

Proposed Defendant

- -
- -

John Ross QC (instructed by **Kingsley Napley**) for the **Claimant**
Marie Louise Kinsler QC and Alistair Mackenzie (instructed by **Kennedys**) for the **Defendant and the Proposed Defendant**

Hearing dates: 24th, 25th and 26th July 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE NICOL

Mr Justice Nicol :

Introduction

1. I am considering applications by the Claimant to substitute the proposed Defendant ('LLC') as the defendant to these proceedings in place of the (effectively sole) existing defendant ('Holdings'), alternatively to correct the name of the Defendant from Holdings to LLC; for permission to amend the Claim Form and Particulars of Claim; and for permission to serve the Claim Form and Amended Particulars of Claim out of the jurisdiction on LLC in Egypt, where it is based.

2. The claim has already been the subject of much litigation including an appeal to the Supreme Court (*Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 (SC)).

3. The underlying facts were summarised by Lord Sumption in this way in [1] of the Supreme Court's judgment,

> 'The claimant, Lady Brownlie, is the widow of the distinguished international lawyer, Sir Ian Brownlie QC. In January 2010, she and her husband were on holiday in Egypt staying at the Four Seasons Hotel Cairo at Nile Plaza. Lady Brownlie's evidence is that on a previous visit to the hotel, she had picked up a leaflet published by the hotel advertising safari tours which it provided. Before leaving England on the subsequent trip, she telephoned the hotel and booked with the concierge an excursion to Fayoum in a hired chauffeur driven car. The excursion took place on 3rd January 2010 and ended in tragedy. The car left the road and crashed. The passengers, in addition to Sir Ian and Lady Brownlie were his daughter Rebecca, and Rebecca's two children. Sir Ian and Rebecca were killed. Lady Brownlie and the two children were seriously injured.'

4. Two defendants are currently named in the Claim Form. The first is Holdings. The second was Nova Park Cairo SAE ('Nova Park'), an Egyptian company which, it was understood, owned the hotel in Cairo at which the family stayed. Nova Park was never served and has effectively dropped out of the picture. LLC, it is now understood, was responsible at the relevant time for the operation and management of the Cairo hotel.

5. Lady Brownlie brings the claim in three capacities. The first is in her personal capacity in respect of the injuries which she herself suffered. The second, is as Sir Ian's executrix and on behalf of his estate for the claim which he had before his death. In English law, that would be a claim pursuant to the Law Reform (Miscellaneous Provisions) Act 1934. The third capacity is as his dependent. In English law, that would be a claim under the Fatal Accidents Act 1976. I say, in relation to her second and third capacities what the statutory basis for those claims 'would be' because it is common ground the governing law of her substantive claims is not English law but the law of Egypt.

6. Although this is common ground, it is necessary to explain why this is so. The applicable law in the contract claim is determined by an EU Regulation known as 'Rome I' (Regulation (EC) No. 593/2008 of the European Council and Parliament). By Article 4(1)(b) of Rome I, the applicable law is the law of the country where the

service provider is habitually resident. It is the Claimant's case that the 'service provider' in this case was LLC. As an Egyptian company, LLC would be treated as habitually resident in Egypt since that is likely to be where its central administration is (see Rome I Article 19). It makes no difference if the service provider is treated as the Limousine Company (AAHD – see below) since that, too, appears to be an Egyptian company. The applicable law for the claims in tort is governed by another EU Regulation (Regulation (EC) No. 864/2007 of the European Parliament and the Council), this one known as 'Rome II'. By Article 4(1) of Rome II, the applicable law is the place where the damage occurred. For these purposes, 'damage' means direct damage and indirect or consequential damage is not taken into account (see also Recital (17)). The same applies to claims following a fatality - see *Lazar v Allianz SpA* (Case C-350/14) [2016] 1 WLR 835. Mr Ross QC, on the Claimant's behalf, accepts that the direct damage to both the Claimant and her husband took place in Egypt, the place of the accident. Hence, he agrees that the applicable law for all of the tort claims will be Egyptian law. He accepts as well that this is the case in each of the capacities that Lady Brownlie brings her claim in tort. Egyptian law will govern liability, damages and limitation (Rome I Article 12 and Rome II Article 15), but not evidence and procedure (see Rome I Article 1(3) and Rome II Article 1(3)).

7. Sir Ian's two grandchildren who, as Lord Sumption said, were also injured in the accident are not parties to the present claim.

8. The claims identified in the Particulars of Claim (in both their original form and in the draft amended form) are based in both contract and tort.

9. The driver of the car in which the Brownlie family had been travelling was Hussein Mohammed Abdullah Salamah. He was prosecuted for involuntary manslaughter. He was convicted on 22nd April 2010 and sentenced to imprisonment. His appeal was dismissed on 2nd September 2010.

Procedural History

10. The Claimant's solicitors are Kingsley Napley ('KN'). On 7th June 2010 KN wrote a full letter of claim to the Legal Department of 'Four Seasons Hotels and Resorts' (It subsequently became apparent in the course of the Supreme Court hearing that there is no corporate entity with this name. Rather, it is used as a generic description for the Four Seasons group of companies). KN said that they had been instructed by Lady Christine Brownlie in connection with proposed legal proceedings against 'the Four Seasons Hotel Group Worldwide'. The letter included the following,

> 'there are some preliminary conclusions that can be drawn and they are as follows:-
>
> 1. No other vehicle was involved in the accident.
>
> 2. The vehicle was travelling at considerable speed. The terrain was apparently fairly smooth, but there would have been an obvious risk of potholes, or other hidden hazards.
>
> 3. The contract for the safari was made in England by telephone on the 21 December 2009. The contract was between our client and the Four

Seasons Hotel, and it was agreed that the cost of the safari would be added to the bill for the accommodation and other services at the Hotel.

4. The safari was arranged by the Four Seasons Hotel Group, which set the itinerary and provided the vehicle, driver, tour guide and police escort.

5. The Four Seasons Hotel is therefore directly and/or vicariously liable for the accident and any claims which may arise, be they in contract, negligence or pursuant to statute.'

The letter also asked that, if the addressee did not accept liability, they 'identify any other parties that you believe to be responsible.'

11. On 27th July 2010 Marilyn Waugh, who was described as 'Corporate Legal Advisor' replied on behalf of 'Four Seasons Hotels and Resorts'. She said that the correspondence had been passed to AAHD Limousine and the Four Seasons Hotel in Cairo at Nile Plaza because the accident had taken place in Cairo. Ms Waugh copied in Olivier Masson, the General Manager of the Four Seasons Hotel Cairo at Nile Plaza.

12. On 22nd August 2010 KN also received a fax from Dr Riad of an Egyptian firm of lawyers, Kosheri, Rashed and Riad, on behalf of Four Seasons Hotel Cairo at Nile Plaza. Mr Riad denied that the accident was caused by Four Seasons Hotels and Resorts, or by Four Seasons Hotel Cairo at Nile Plaza. It named the driver of the car (see above) and said he had been employed by AAHD Limousine Company and gave their address. Mr Riad denied that the Hotel was responsible for the accident. Its role had been merely to relay the request for the tour to AAHD.

13. On 9th May 2011 KN wrote again to Dr Riad maintaining that the contract would have been with 'the Four Seasons Hotel Group'. It said that KN intended to serve the proceedings at the principal place of business of the group in London. It again sought information as to the identity of Four Seasons Hotels and Resorts and Four Seasons Hotel Cairo at Nile Plaza, and their relationship to the parent company in Canada. On 16th May 2011 Ms Waugh again wrote to KN to say that any claim should be brought against AAHD Limousine Company or its insurer. The addresses of both were given.

14. The Claim Form was issued on 19th December 2012. The claim was in contract and in tort. The Claimant sued in the three capacities which I have previously mentioned. The claim on behalf of Sir Ian's estate expressly relied on the Law Reform (Miscellaneous Provisions) Act 1934 and her claim as a dependent expressly relied on Fatal Accidents Act 1976. There were the two defendants: Holdings and Nova Park Cairo SAE, the latter described as the owner of the Four Seasons Hotel Cairo at Nile Plaza. As I have said, the 2nd Defendant was not served and it has played no part in the proceedings.

15. At an early stage, the Claimant appreciated that Holdings could not be served in the jurisdiction. To serve Holdings out of the jurisdiction and in Canada it needed the court's permission. This was not a case to which r.6.32 or r.6.33 applied (r.6.33 governs, among other matters, cases where the Claimant is entitled to serve outside the jurisdiction pursuant to the Brussels Recast Regulation – 1215/2012, but that is confined to cases where the defendant is domiciled in another Member State and not

where, as in the case of Holdings and LLC, the defendant's domicile is in a non-Member State – see articles 4 and 6 of the Recast Brussels Regulation). Rule 6.36 required the Claimant to show that her case came within at least one of the grounds set out in paragraph 3.1 of Practice Direction 6B. These are commonly referred to as the jurisdictional 'gateways'.

16. In this case, as the witness statement of Terence Donovan of KN dated 8th April 2013 made clear, the Claimant relied on the gateway in paragraph 6(a) on the ground that her claim was made in respect of a contract which had been made within the jurisdiction, and also on the gateway in paragraph 9(a) on the ground that the Claimant made a claim in tort where damage was sustained or will be sustained within the Court's jurisdiction and also on paragraph (3) because Holdings was a necessary and proper party to the claim. Of course, in 2013 those claims were advanced against Holdings. It will be necessary to return to examine in more detail as to how the Claimant now submits she can pass through the gateways in paragraphs 9(a) and 6(a) in relation to her claim against LLC (No reliance is or could be placed on paragraph 3).

17. On 15th April 2013 Master Yoxall gave the Claimant permission at an *ex parte* hearing to serve Holdings out of the jurisdiction at the address in Canada from which Ms Waugh had corresponded.

18. Draft Particulars of Claim were prepared. Mr Ross says that these remain a draft and they were never served. At certain later stages, it was understood that they had been served and I have seen a signed version dated 15th April 2015. It may not matter. I shall continue to refer to them as 'draft Particulars of Claim.' ('DPOC') Much later what is described as 'draft Amended Particulars of Claim' ('DAPOC') were prepared. Strictly speaking, if the original were never served, there is no need for them to be described as 'Amended' (and no need for the Court to give permission to amend – see CPR r.17.1(1)), but it is convenient to refer to them as such so as to distinguish one document from the other. In any case, if the DPOC were served, the Claimant's application is sufficiently wide to seek the court's permission for the amendment.

19. The DPOC described the Defendant (Holdings) in this way,

> 'The Defendant is, and was at all material times, a corporate entity engaged, among other things, in the ownership and/or operation and/or organisation of a chain of international hotels which included the Four Seasons Cairo at Nile Plaza Hotel, Cairo Egypt.' The Defendant is also engaged in the sale and supply of excursions and other leisure services to guests staying at the Hotels. The Defendant is a corporate entity registered in British Columbia, Canada.'

20. Mr Donovan's witness statement of 8th April 2013 at paragraph 20 said this,

> 'The Defendant [i.e. Holdings] is a corporate entity engaged, among other things, in the ownership and/or operation and/or organisation of a chain of international Hotels which included the Four Seasons Cairo at Nile Plaza Hotel, Cairo, Egypt. The Defendant is also engaged in the sale and supply of excursions and other leisure services to guests staying at the Hotels. The Defendant is a corporate entity registered in British Columbia, Canada … The Claimant reasonably believed at the time of contracting, that the Defendant was the owner of the Hotel

> and the provider or supplier of the excursion. There was no disclosure of the existence or identity of any other contracting party (whether Egyptian or otherwise) at the time of contracting. In the circumstances, the Claimant's case is that a contract was entered with the Defendant for the provision of the relevant excursion....'

21. The DPOC said that it was the Claimant's case that a contract had been entered into with the Defendant for the excursion. She also relied on the common law duty of care which she alleged she was owed by the Defendant. The DPOC also pleaded the leaflet which the hotel had been provided and which listed various tours that were offered including this particular excursion and which had led the Claimant to book members of her family on the Fayoum excursion through an employee of the hotel. The Particulars of Negligence relied on both vicarious liability (see paragraph 33 of the DPOC particulars (a) – (i)) and on direct liability (see paragraph 33 of the DPOC particulars (j) – (u)).

22. Although copies of the claim form and its accompanying documents were served on the Four Seasons Hotel in London, The Claimant did not rely on this as good service. In accordance with the order of Master Yoxall, they were served in Canada.

23. Following service, Holdings invoked the procedure in CPR Part 11 to contest the jurisdiction of the English Court. Holdings relied on the witness statement of Timothy Newman dated 15th May 2013 and the witness statement of Joseph McManus dated 1st July 2013. Mr Newman and Mr McManus were both solicitors in Kennedys who were then solicitors for Holdings. On 31st July 2013 Master Cook allowed Holdings' application. The Claimant appealed. On 19th February 2014 Tugendhat J. allowed her appeal - see [2014] EWHC 273 (QB).

24. Holdings appealed to the Court of Appeal. On 3rd July 2015 that Court (Arden, Bean and King LJJ) gave judgment on the appeal. It dismissed the appeal in respect of the contract claim. It decided that Tugendhat J. had been right to find that the Claimant had a good arguable case as to the identity of the contracting party (viz she had a good arguable case that Holdings had been party to the contract to provide the excursion and that the contract had been made in England). So far as the tort claim was concerned, the Court of Appeal held that the Claimant did not have a good arguable case that damage was sustained in England since the accident had taken place in Egypt and only consequential loss was incurred in England. It was different with the dependency claim under the Fatal Accidents Act 1976. That claim was for an independent loss. It was not consequential damage and it did occur within the jurisdiction and so the dependency claim could continue – see *Brownlie v Four Seasons Holdings Inc* [2013] EWCA Civ 663, [2016] 1 WLR 1814 CA.

25. Both Holdings and the Claimant were given permission to appeal to the Supreme Court.

26. The appeal hearing in the Supreme Court began on 9th May 2017. In the course of the hearing on the first day, Holdings was asked for further information as to the Four Seasons corporate structure. That led to a letter from Kennedys which was dated 9th May 2017 and which attached a corporate structure chart. This was produced over night and so was available on 10th May 2017 when the hearing of the appeal resumed.

27. The Supreme Court considered that the information which it had sought should be provided in a more formal manner. Accordingly, it adjourned the hearing of the appeal for Holdings to provide a witness statement. Holdings did so on 24th May 2017 when Ms Barbara Henderson made a witness statement which also attached certain documents that elaborated on the corporate structure. She was an employee of an associated company of Holdings and she held the position of Senior Vice President Corporate Finance.

28. From Ms Henderson's witness statement, it became apparent to the Claimant and her lawyers that while Nova Park (named currently as the 2nd Defendant) was the owner of the Four Seasons Cairo hotel, at the relevant time, the hotel was managed and operated by LLC. In his 5th witness statement (dated 3rd April 2019) Mr Donovan says the Claimant was unaware of the existence of LLC until the Supreme Court hearing. With some justification, Mr Ross described the Four Seasons corporate structure as 'labyrinthine'. The General Manager of the hotel at the relevant time was Olivier Masson (although the Claimant understands that he is no longer).

29. Ms Henderson's witness statement explained that the Four Seasons' Hotel in Cairo had been owned by an Egyptian company known as Novapark Cairo Company. In 1996 a hotel management agreement had been entered into between Novapark Cairo Company, as the then owner of the hotel and Four Seasons Cairo (Nile Plaza) BV (Cairo Branch), an unincorporated branch of a Dutch company. In 2004 LLC was incorporated and effectively took over the management and operational functions of the Cairo hotel. One of the functions of LLC after it took over this role was to employ and supervise the hotel staff including the General Manager and the Concierge. Ms Henderson identified the Concierge as Adel Hamza. Other contracts existed granting licences for the use of the Four Seasons' trademarks and other intellectual property.

30. The hearing of the appeal resumed again on 20th July 2017. Judgment was reserved. Judgment was handed down on 19th December 2017 – [2018] UKSC 80, [2018] 1 WLR 192 SC. Holdings' appeal was allowed, and it was accepted that the Claimant did not have a reasonably arguable case against Holdings in contract or in tort. On this the Supreme Court was unanimous. However, the Justices differed in their reasoning in relation to the tort claim. Lady Hale PSC, Lord Wilson and Lord Clarke JJSC considered (*obiter*) that the Court of Appeal had been wrong to find that consequential damage suffered in England was not sufficient to give English courts jurisdiction. Lord Sumption and Lord Hughes JJSC dissented on this issue and would have agreed with the Court of Appeal.

31. Although the judgments were delivered on 19th December 2017, it was not until 17th July 2018 that the decision was embodied in a formal order of the Supreme Court (and the formal order was not dated until 24th July 2018). While this confirmed that the English courts had no jurisdiction to try any of the claims presently made against Holdings, the Claimant's claim was declared to be otherwise extant. The Supreme Court directed that all consequential matters should be remitted to the High Court and the Claimant had permission to issue an application pursuant to CPR r.17.4 and/or r. 19.4-19.5 to correct the name of the Defendant to substitute or add a party to the proceedings. The costs orders made by Tugendhat J. and the Court of Appeal were set aside and replaced with no order as to costs. No order as to costs was made regarding the costs of the appeal to the Supreme Court. Various other consequential directions were made.

32. The Claimant issued her application on 17th August 2018. By it, she seeks the following relief:

    i) The correction or substitution of LLC in place of Holdings.

    ii) Amendment of the Claim Form and Particulars of Claim.

    iii) Permission to serve the Claim Form and Particulars of Claim and other documents out of the jurisdiction.

33. On 29th October 2018 Foskett J. gave the Claimant permission to serve the application notice out of the jurisdiction on LLC. In fact, the parties later agreed that service could be effected on Kennedys (who are solicitors for both Holdings and LLC) at their offices in London. This was without prejudice to the contentions of both Holdings and LLC that the English courts had no jurisdiction. This agreement was recited in a preamble to the order of Stewart J. on 6th February 2019 who also set a timetable for the service of evidence and other preparation for the present hearing. Among those directions was permission for the Claimant and LLC to rely on expert evidence as to Egyptian law. This was necessary since the requirements of foreign law (if disputed) involve issues of fact for which expert evidence is necessary.

34. Where a claimant wants to sue a defendant, who is out of the jurisdiction, the usual procedure is for her or him to apply *ex parte* to a Master. If permission is granted but the defendant contests the jurisdiction of the English Court, the defendant will then usually enter a limited Acknowledgement of Service and an application notice which seeks a hearing *inter partes* when jurisdiction can be debated. That, as I have shown, was the procedure which was followed in relation to Holdings. Pragmatically, the *ex parte* stage and the *inter partes* stage have been combined in the present hearing to decide if the English court has jurisdiction to decide the claims against LLC.

35. Three days were set aside for the hearing of these applications. The weather was extraordinarily hot and, as a result, we rose early on one day. I was anxious that each party should feel that she or it had had a full opportunity to advance their case. I therefore allowed them the opportunity to submit a round of post-hearing written submissions (to be exchanged) and a further round of replies. I received from both parties written submissions dated 30th July 2019 and replies dated 31st July 2019. I am very grateful to counsel for their helpful written and oral submissions.

Substitution of LLC as the defendant

36. I recognise that the powers of the court in this regard are circumscribed. At least once a limitation period has expired, there is not a general discretion to add a party to the action comparable to that which exists via s.33 of the Limitation Act 1980 to disapply the primary limitation period in a personal injury action (see *Armes v Godfrey Morgan Solicitors Ltd* [2017] EWCA Civ 323, [2018] 1 WLR 936 CA at [26]).

37. The Claimant's application notice referred in this regard to CPR rr.17 and 19. Rule 17 allows the Court to grant permission to 'correct' the name of a party – see for instance r.17.4(3). In his oral submissions, Mr Ross did not pursue his application to *correct* the name of the defendant from Holdings to LLC. I need say no more, therefore about

r.17 in the present context, although I shall need to return to it when considering the application to amend the Claim Form and the Particulars of Claim.

38. The powers to authorise the *substitution* of one party by another are different depending on whether a relevant limitation period has expired. It is common ground that Egyptian law will determine whether that is the case – for the contract claims see Rome I Article 12(1)(d), for the tort claims see Rome II Article 15(h). Before turning to the evidence on that issue, is necessary to set out the relevant parts of the CPR and the legislation on this issue.

39. Rule 19.2 is headed 'Change of parties - general'. It says:

> '(1) This rule applies where a party is to be added or substituted except where the case falls within r.19.5 (special provisions about changing parties after the end of a relevant limitation period).
>
> (2) The court may order a person to be added as a new party if –
>
> > (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
> >
> > (b) ...
>
> (3) The court may order that any person cease to be a party if it is not desirable for that person to be a party to the proceedings.
>
> (4) The court may order a new party to be substituted for an existing one if –
>
> > (a) the existing party's interest or liability has passed to the new party; and
> >
> > (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute between the proceedings.'

40. It might be thought that r.19.2(4) dealt comprehensively with substitution and, since 19.2(4)(a) and (b) were cumulative conditions, if both those conditions were not satisfied there would be no power to order substitution. However, that is not the case. As the Court of Appeal held in *London Borough of Hounslow v Cumar* [2012] EWCA Civ 1426 even if, for instance, 'the existing party's interest has not passed to the new party' so that r.19.2(4)(a) is not satisfied, the court may still exercise its power to order the addition of the new party under r.19.2(2) and the removal of the old party under r.19.2(3), thus achieving substitution in substance, if not in form.

41. In *Insight Group Ltd v Kingston Smith (a firm)* [2012] EWHC 3644 (QB), [2014] 1 WLR 1448 Leggatt J. observed in the course of his judgment at [19],

> 'Different rules apply depending on whether or not the limitation period has expired. The requirements are more restrictive if the limitation period has not yet expired. Although that may at first sight seem paradoxical, it is explained by the fact that a fresh action can be started. If instead of starting a fresh action an application is made to add or substitute a new party in the existing action, CPR r.19.2 applies.'

He then quoted r.19.4 and drew attention to the fact that paragraph r.19.2(4)(a) was not satisfied in the case before him and (so it was thought) the court had no power to order substitution. *London Borough of Hounslow v Cumar* was not, apparently, cited to Leggatt J., perhaps because the Court of Appeal gave its judgment on 2nd October 2012 and the argument before Leggatt J. had taken place on 30th November 2012. In any event, *Cumar* is plainly binding on me.

42. As r.19.2(1) makes clear, this power cannot be invoked where r.19.5 applies. Rule 19.5 says the following,

> '(1) This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) the Limitation Act 1980
>
> (b) the Foreign Limitation Periods Act 1984; or
>
> (c) any other enactment which allows such a change, or under which such a change is allowed.
>
> (2) The court may add or substitute a party only if –
>
> (a) the relevant limitation period was current when the proceedings were started; and
>
> (b) the addition or substitution is necessary.
>
> (3) The addition or substitution of a party is necessary only if the court is satisfied that –
>
> (a) the new party is to be substituted for a party who was named in the claim form in mistake for the new party;
>
> (b) the claim cannot properly be carried on by or against the original party unless the new party is added or substituted as claimant or defendant; or
>
> (c) the original party has died or had a bankruptcy order made against him and his interest or liability has passed to the new party…'

43. Rule 19.5(1)(b) refers to the Foreign Limitations Act 1984. Section 1 of that Act (so far as material) says,

> '(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter –
>
> (a) The law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings ...; and

(b) ... the law of England and Wales shall not so apply

...

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(a) above whether and the time at which, proceedings have been commenced in respect of any matter, and accordingly section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(a) above as it applies in relation to time limits under that Act.

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(a) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country....'

44. Section 1(3) of the Foreign Limitation Periods Act 1984 refers to Limitation Act 1980 s.35. This says,

'(1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced –

(a) in the case of any new claim made in or by way of third party proceedings, on the date on which those proceedings commenced; and

(b) in the case of any other new claim, on the same date as the original action.

(2) In this section a new claim means any claim by way of set-off or counter-claim, and any claim involving either-

(a) the addition or substitution of a new cause of action; or

(b) the addition or substitution of a new party; ...

(3) Except as provided by... rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim ...

(4) Rules of Court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.

(5) The conditions referred to in subsection (4) above are the following

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same or substantially the

same facts as are already in issue on any claim in the original action

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

(6) The addition or substitution of a new party shall not be regarded for the purposes of subsection (5) (b) above as necessary for the determination of the original action unless

(a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name; or

(b) any claim made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

...'

45. The correct approach to issues of this kind as they arise ordinarily in actions to which English law (including the Limitation Act 1980 s. 35) applies was considered by the Court of Appeal in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597. That was a case which concerned a new cause of action rather than the substitution of a new party, but since provision for both (where there are potential limitation issues) derive from Limitation Act 1980 s.35, that difference is not material. Indeed, Mr Ross did not suggest otherwise. Tomlinson LJ explained that there was an initial burden on the defendant to show that it would have a *prima facie* defence of limitation – see [27]. However, if that was done, the burden then passed to the claimant who must show that the limitation defence was not reasonably arguable – see *ibid*. The Court explained that the justification for placing so onerous a standard on the claimant was that, if the amendment was allowed, it would relate back to the commencement of the original action – see Limitation Act 1980 s.35(1)(b). Where there is a dispute as to whether the defendant would have a limitation defence, the application to amend or substitute is effectively a determination of that issue at the interlocutory stage. Accordingly, the defendant should only be shut out from that putative defence if the limitation defence is not reasonably arguable. I shall refer to this as 'the enhanced standard of proof'.

46. In the present context, however, there is an important twist. In 2009 s.8 was added to the Foreign Limitations Periods Act 1984 by The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 SI 2008 No. 2986 and by The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 SI 2009 No. 3064. Section 8(1) provides,

> 'Where in England and Wales the law of a country other than England falls to be taken into account by virtue of any choice of law rule contained in the Rome I Regulation or the Rome II Regulation, sections 1, 2 and 4 above shall not apply in relation to that matter.'

47. This has important consequences for the present litigation. As I have already said, it is common ground that the Claimant's contract claims are within Rome I and the Claimant's tort claims are within Rome II. Thus, by s. 8 of the 1984 Act, s. 1 of that Act does not apply to any of her claims. It was s.1(3) of the 1984 Act which extended the Limitation Act 1980 s.35 to proceedings governed by foreign law. Therefore, because of s.8 of the 1984 Act, s. 35 of the 1980 Act does not apply to any of the Claimant's claims. In turn, this means that, if permission is granted, s.35(1)(b) will not operate so as to deem the claims against LLC to have been started on the same date as the original action. In other words, if permission is granted to substitute LLC for Holdings and to permit the claims in tort and contract to be brought against LLC, those claims will not relate back to the date of the original action. This conclusion is supported by the decision of Stuart-Smith J. in *Daniel Vilca v Xstrata Ltd.* [2018] EWHC 27 (QB) at [109]-[112].

48. So far, this was common ground between the parties. But, it seems to me, that s.8 of the Foreign Limitation Periods Act 1984 has at least one further consequence. As I have shown, the rationale in *Ballinger* for imposing an enhanced standard of proof on the claimant (i.e. to show that the limitation defence which the defendant has shown is *prima facie* engaged is not reasonably arguable) is critically dependent on the notion of relation back. As Tomlinson LJ said in *Ballinger* at [25],

> 'It must be borne in mind that the context of the debate is the doctrine of relation back introduced by section 35(1) of the Limitation Act 1980. If a new claim is permitted by way of amendment it is treated as having been made by a separate action commenced on the same date as the original action. So where an amendment is permitted to introduce a new claim which was in time at the date of the commencement of the action but arguably out of time on the date on which permission to amend is granted, the defendant is thereafter precluded from reliance at trial on the arguable limitation defence.'

49. Where, as in the present context, there will be no relation back, the rationale for imposing this enhanced standard of proof falls away. In the absence of any relation back, the defendant will be able to pursue its limitation defence even if permission to substitute is granted.

50. In her post-hearing note of 30th July 2019, Ms Kinsler QC, for Holdings and LLC, advanced three arguments as to why I should nonetheless apply the enhanced standard of proof. These were:

    i) *Ballinger* was binding authority as to the standard of proof.

    ii) There was no warrant for applying a different standard of proof depending on whether or not, if permission were granted, there would be relation back. Rule 19.5 applies where limitation is governed by Rome I and Rome II and there is no justification for distinguishing between such cases and others where s.35 of Limitation Act 1980 does apply.

    iii) In *Ballinger* the Court of Appeal had applied *Welsh Development Agency v Redpath* [1994] 1 WLR 1409 where Glidewell LJ had said that this standard was required were s.35(1) 'does *or may well* give the plaintiff an advantage [Ms Kinsler's emphasis]'.

iv) In her further written submissions of 31st July 2019, Ms Kinsler argued further that the drafter of Rule 19 could have distinguished between cases where relation back would apply and cases where it would not. The drafter had chosen not to do so.

51. I do not find any of these arguments persuasive. In my judgment, the rationale for the decision in *Ballinger* was critically dependent on the application of the principle of relation back. I am confronted with a situation where statute provides that such a principle has no application. That is not a situation contemplated by *Ballinger* and I do not accept that this decision therefore binds me as to the standard of proof. As to Ms Kinsler's second and fourth reasons, I note that r.19.5 says nothing about the standard of proof required. It is *Ballinger,* and not the Rules themselves, which says that (ordinarily) the Claimant must show that there is no reasonably arguable limitation defence (what I have called the enhanced standard of proof). Nor do I regard my conclusion as incompatible with *Welsh Development Agency v Redpath.* Section 8 of the Foreign Limitation Periods Act 1984 is quite clear. There will be no relation back. If permission to substitute is granted it will still be open to LLC to argue any limitation defence that is open to it. I recognise, as Ms Kinsler submitted, that there is no prior authority directly in point, but that is because, so far as I am aware, no previous case has had to confront this issue. Of course, the Claimant must show a reasonably arguable claim in both contract and tort. If there is a limitation defence which is bound to defeat those claims, she will not be able to do so. However, in my judgment it is not necessary for the Claimant to go further and demonstrate that the defendant has no reasonably arguable limitation defence.

52. I need to address another issue which arises because of the disapplication of s.1 of Foreign Limitation Periods Act 1984 by s.8 of that Act. I quoted above r.19.5(1) of the CPR, but for convenience repeat it here,

> 'This rule applies to a change of parties after the end of a period of limitation under –
>
> (a) The Limitation Act 1980;
>
> (b) the Foreign Limitation Periods Act 1984; or
>
> (c) any other enactment which allows such a change, or under which such a change is allowed.'

53. Section 8 of the Foreign Limitation Periods Act 1984 means that the Claimant cannot rely on r.19.5(1)(b), but Ms Kinsler accepts that Rome I and Rome II, as EU Regulations, are directly effective in the UK and fall within the term 'enactment' – see *PJSC Tatneft v Bogolyubov* [2017] EWCA Civ 1581 at [80]. The Court of Appeal was there considering r.17.4(1)(b), but that difference is immaterial since that provision is in substantially the same terms as r.19.5(1). While neither Rome I nor Rome II expressly 'allow such a change [of parties after the end of the limitation period]', each Regulation reserves to the law of the forum matters of procedure (See Rome I Article 1(3) and Rome II Article 1(3)) and, in this sense, the two Regulations are examples of enactments 'under which such a change is allowed' in the sense of not prohibited – see *Tatneft* at [83]. I recognise that the views of the Court of Appeal

in *Tatneft* on these issues were *obiter* (see [66]) but they are nonetheless, persuasive and I, with respect, agree with them.

The Expert evidence on whether LLC would have a limitation defence to the claims

54. I have reports on Egyptian law from Mr Ian Edge, a London barrister and academic, who was instructed on behalf of the Claimant, and from Mr Tarek Ezzo who has practised law in Egypt for over 30 years and who was instructed on behalf of Holdings and LLC.

55. At this stage I am focussing on their evidence as to the impact of Egyptian law or laws on limitation. For the present purposes, I shall assume that the Claimant would otherwise have reasonable prospects of establishing her claims, although I shall need to return to that subject when I turn to consider the applications for permission to serve the claim form out of the jurisdiction.

56. Stewart J. ordered a sequential service of expert evidence. Mr Edge's first report is dated 4th April 2019. Mr Ezzo responded on 20th May 2019. Mr Edge provided a supplementary report on 4th July 2019.

57. Mr Edge's evidence is that the relevant provisions of Egyptian law are in the Egyptian Civil Code ('ECC'). So far as limitation is concerned, he refers to Article 172 of the ECC which says,

> '(1) A claim for compensation arising from an unlawful act will lapse by limitations with the end of three years from the day on which the injured party learnt of the occurrence of the damage and the person responsible for it. This claim will lapse in every circumstance with the end of 15 years from the day on which the unlawful act occurred.
>
> (2) However if this claim arose from a crime and the criminal action does not lapse after the end of the deadlines recorded above in the previous paragraph, the claim for compensation will only lapse with the lapse of the criminal legal action.'

58. Mr Edge emphasises that the 3 year limitation period in Article 172(1) does not begin to run until the claimant knew the identity of the 'person responsible'. He accepts that the case law on which he relies does not deal expressly with the situation where it is not known which particular corporate entity is responsible as the superior (or employer). He adds

> 'However, it is clear from the above cited cases and commentary that the victim must have real and actual knowledge of who is the superior who can be held liable for the acts of a subordinate over whom they have control before proceedings can be brought and time begin to run.'

Mr Edge, as I understand it, is speaking here only of the 3 year limitation period. What might be called the '15 year longstop' will operate irrespective of a victim's ignorance either of the damage or the person responsible.

59. Mr Edge refers also to the possibility that a limitation period will be interrupted. Article 338 of the ECC says,

> 'Prescription is interrupted with a judiciary claim even though a case is filed with a non-competent court.'

If there is an interruption, Article 385 of the ECC provides that time starts to run afresh after the interruption is over.

60. Mr Edge's opinion is that a claim against a wrong defendant will likewise interrupt the running of time and he relies on the views of Abd Al-Razzaq Al-Sanhuri, who, Mr Edge says, was the drafter of the ECC and who has subsequently commented extensively on it.

61. Mr Ezzo's evidence is that the relevant law is the Egyptian Commercial Code ('ECommC'). He argues that this applies to contracts of carriage, defined by Article 208 as

> 'agreement by which the carrier is obliged to transport someone or an object by his own means to certain place against freight'.

He refers as well to ECommC Article 209(2) which says

> 'Also these provisions will apply to the transport even though it was coupled with another missions of a different nature, unless such missions were the main purpose from the contract.'

62. Under the Commercial Code, Mr Ezzo says that limitation is governed by Article 272(1) which says,

> 'All action arising from the transporting contract, the merits of which are concerned with claiming compensation from the carrier for the passenger's death or for causing physical harm to him, shall prescribe with the lapse of two years. This period shall begin in case of the passenger's death from the date decease occurs, and in the case of physical injury from the date the accident takes place.'

Mr Ezzo also gives evidence as to how a limitation period under the ECommC may be interrupted and the effect of the interruption. In the circumstances, it is not necessary for me to set these out.

63. In his Supplementary Report, Mr Edge disagrees with the proposition that the ECommC is relevant. It applies to those who are traders (defined in ECommC Articles 4-9) and, he says, the Claimant is not a trader. He quotes ECommC Article 3 which says,

> 'If the contract is commercial with regard to one of its parties, the provisions of the commercial code shall not be applicable except to the obligations of that party exclusively: the provisions of the civil code shall apply to the obligations of the other party unless otherwise prescribed in the law.'

64. Mr Edge argues therefore that, even if this was a commercial contract, the Claimant was governed by the Civil Code and its prescription periods.

65. However, he also argues that this was not a simple contract of carriage. Rather, it was a package of which carriage was only part. He refers me to ECommC Article 209(2) – see above.

66. Mr Edge maintains his view that the 3 year limitation period in ECC Article 172 only begins to run when the identity of the person responsible is known. He draws attention to the drafting history of this part of the ECC and says that, at one stage, the expression 'the person responsible for it [the damage]' was added in substitution for the phrase 'the person who caused it'. The Committee responsible for the drafting of the ECC accepted this change.

My conclusions on whether LLC would have a limitation defence to the claims

67. I have said above that, even though there is no relation back, the evidence about the Egyptian law of limitation is relevant in the context of whether the Claimant can show that she has a reasonably arguable case. If it were the position that the Defendant would have an unanswerable limitation defence, that would plainly not be so. But I emphasise that, at this point, I am considering the effect of limitation on the reasonable arguability of the Claimant's claims. In my view, if (as I am presently assuming) the Claimant's claims are otherwise reasonably arguable, they are not rendered unarguable because of the evidence regarding the Egyptian law of limitation. My reasons are as follows:

    i) Ms Kinsler may be right that, if the ECommC applies, the obligations of the commercial party are governed by it, even if the Claimant's obligations are not. ECommC Article 3 does indeed seem to say as much. But that is beside the point since the Claimant has a reasonable argument that ECommC is not relevant because, as Mr Ross submitted, the excursion was about much more than transporting her and her family from one place to another. It was integral to the contract that there were other elements, notably the provision of the guide, the meals and the police escort which accompanied their party. The Claimant thus has a reasonable argument that the contract came within the exclusion in ECommC Article 209(2) with the result that the ECommC did not apply to the excursion contract.

    ii) Since there will be no relation back, I am concerned with whether a claim now against LLC would be out of time. The accident was in January 2010. Clearly the 15 year longstop in ECC Article 172(1) will not bar the claim.

    iii) On the facts of the present case, the provisions of ECC Article 172(2) are not material. The claims do arise from a crime. The driver was prosecuted and convicted. The proceedings against him ended in September 2010, but that addition to the limitation period is minor and of no significance.

    iv) It is reasonably arguable that the 3 year limitation period under ECC Article 172(1) does not begin to run until 'the person responsible' has been identified and that, for these purposes, 'the person responsible' does not simply mean the driver who physically caused the accident, but that, on the basis of Mr Edge's evidence, the term also embraces the corporate entity who was responsible. In her written submissions of 31st July 2019, Ms Kinsler describes Mr Edge as a 'non-fluent, non-qualified translator'. It may in due course be necessary to

examine more closely the nuances of the Arabic expressions which are used in Egyptian law, but, for present purposes I am satisfied that Mr Edge is sufficiently qualified (he describes himself as having a 'good knowledge of written Arabic') to provide an expert opinion on Egyptian law. Ms Kinsler has the point that, in his supplementary report, Mr Edge quotes from the Explanatory Memorandum which he says Mr Ezzo ought to have translated and which, in Mr Edge's own translation, speaks of 'the identity of the person who caused [the damage]'. In my view, though, it is clear from the paragraph that immediately follows this one in Mr Edge's supplementary report, that in his view there was a deliberate change in the course of the drafting of the Civil Code to substitute the expression 'the person responsible' in place of 'the person who caused' the damage. Ms Kinsler may have a forensic point in relation to the earlier paragraph in Mr Edge's report, but it is not of such potency that it alters my conclusion.

v) Since LLC was not identified until (at the earliest) 9th May 2017, the three year limitation period will not have expired by the time LLC can be substituted as defendant in the action.

vi) In these circumstances, it is not necessary to wrestle with the meaning of ECC Article 383 and whether a claim against the wrong defendant (Holdings) can effectively interrupt the running of time in favour of a different defendant (LLC). For what it is worth, I would agree with Ms Kinsler that this would be a surprising result.

vii) In her written submissions of 31st July 2019, Ms Kinsler criticises the Claimant for not making clear the basis of each of her claims in Egyptian law. I will return to those arguments when I consider whether (apart from limitation) the Claimant has reasonably arguable cases for each of the claims which she advances. For present purposes, though, any lack of particularity is beside the point. It would be open to LLC to seek to argue that her claims, whatever their other merit, are barred by limitation. Mr Ezzo sets out a case as to why that might be, but I have explained above why I do not regard his evidence on limitation as leaving the Claimant without reasonably arguable cases.

68. I reach these conclusions, as I must, on the evidence now before me. Once Mr Edge and Mr Ezzo give oral evidence, the position may be different. But that will be a matter for the trial judge to determine.

69. I have said above that I do not regard the *Ballinger* enhanced standard of proof to be appropriate. If I am wrong about that, and the question for me is whether the Claimant has shown that LLC has no reasonably arguable limitation defence, my answer would be that she has not crossed that higher hurdle. At trial, Mr Ezzo's views may prevail. I cannot say that his opinions are so illogical or that there are other grounds for setting them entirely aside.

Further consequences of my conclusions regarding limitation

70. I have said above that the Claimant's claims are not rendered unarguable by the evidence as to limitation in Egyptian law. Putting it another way, the Claimant has reasonably arguable responses to the putative limitation defences. Given that and

given that there will be no relation back, it seems to me that the right provision to consider the application to substitute LLC as the defendant is Rule 19.2. By r.19.2(1) that rule is subject to a qualification where r.19.5 applies, but it must be for the defendant to establish that the exception is applicable. Since I consider that the Claimant has a reasonably arguable response to any limitation defence and since there will be no relation back, in my view that has not been done. Plainly, r.19.2 confers a discretionary power, but it is not a discretion which is circumscribed as is appropriate when the prospective defendant has a reasonably arguable limitation defence which would be lost by the application of the relation back principle.

71. Ms Kinsler argued that I should not exercise discretion in the Claimant's favour. She argued:

    i) *The proposed substitution does not have the effect which the Claimant desires of relation back*. I agree that granting permission to substitute will not have the effect of relation back. That follows from the Foreign Limitation Periods Act 1984 s.8. The position will then be no different than if the Claimant were to issue fresh proceedings against LLC. However, I do not agree that this is a potent argument against the exercise of discretion. There will be some saving of time and cost in allowing the Claimant to proceed by way of substituting LLC for Holdings rather than issuing entirely fresh proceedings.

    ii) *Discretion should be refused because the claims against LLC have no reasonable prospect of success* It is convenient for me to deal with this issue in the context of the application to serve LLC out of the jurisdiction. For the reasons I give there, I do not accept that the Claimant's claims lack a reasonable prospect of success.

    iii) *The Claimant's claim in contract was time-barred even when the original claim was issued. CPR r.19.5(2) cannot be satisfied in relation to that claim and it is desirable that all of the Claimant's claims are dealt with in the same action.* On the view I have reached, the applicable rule is Rule 19.2, and so the requirements of r.19.5(2) are not material. Below I go on to consider the position if I am wrong about the applicability of r.19.2 including the position in relation to r.19.5(2). As will be seen, I would not, in any event, accept that r.19.5(2) is an obstacle to the Claimant's application.

72. I do not, therefore, accept any of Ms Kinsler's arguments against the exercise of discretion. There are, on the contrary, good reasons why the Court should exercise discretion in the Claimant's favour. These overlap with the arguments which I shall come to consider as to whether England is the proper forum to litigate her claims.

73. Since, in my view, the applicable rule for the application to substitute LLC for Holdings is r.19.2 and not r.19.5, the other requirements of r.19.5 are not relevant. However, since the matters were fully argued I shall examine whether the requirements in r.19.5(2) and r.19.5(3)(a) are fulfilled in case my conclusion as to the applicability of r.19.2 is wrong.

In the event that CPRr.19.5 does apply can the Claimant satisfy r.19.5(2)(a) (that the limitation period was current when the proceedings were started)?

74. The requirement that the Claimant show that the limitation period was current at the time the original proceedings were started makes sense when the principle of relation back applies. If the limitation period was not then current, then substitution will serve no useful purpose since the claim can anyway be defeated by limitation. When relation back does not apply (as in the present case) the requirement is redundant. If the limitation period has expired at the time the new party is substituted it will almost necessarily have expired at the earlier stage of the commencement of proceedings.

75. In any case, the requirement in the present case adds nothing material. Ms Kinsler argued that the claim in contract had expired before proceedings had commenced. That was on the premise that ECommC applied to the contract and the limitation period was therefore only 2 years. However, I have held above that it is reasonably arguable that ECommC was not the applicable Egyptian law and she also has a reasonable argument that under the ECC the contract claim was not time barred when the claim was originally issued. If the Claimant is right on these matters, she is entitled to say that r.19.5(2)(a) is satisfied. In my view it is sufficient if the Claimant has a reasonable argument to that effect, and Ms Kinsler agreed that a reasonable argument as to this matter would be sufficient for the Claimant. In my view, the Claimant does have a reasonable argument that she can satisfy r.19.5(2)(a).

In the event that CPR r.19.5 does apply was Holdings named in mistake for LLC so that she can rely on r.19.5(3)(a)?

76. It will be recalled that, by r.19.5(2)(b) after a limitation period has elapsed, one of the conditions for ordering substitution is that the 'substitution is necessary.' Rule 19.5(3)(a) then says,

> 'The addition or substitution of a party is necessary only if the court is satisfied that – (a) the new party is to be substituted for a party who was named in mistake for the new party…'

77. Mr Ross submits that this is what happened in the present case. He argues that Holdings was named in mistake for LLC.

78. Ms Kinsler denies that there was a relevant mistake. She notes that, in the DPOC, Holdings is described in this way,

> 'The Defendant is, and was at all material times, a corporate entity engaged, among other things in the ownership and/or operation and/or organisation of a chain of international Hotels which included the Four Seasons Cairo at Nile Plaza Hotel, Cairo Egypt. The Defendant is also engaged in the sale and supply of excursions and other leisure services to guests staying at the Hotels. The Defendant is a corporate entity registered in Canada.'

Ms Kinsler observes that LLC is not:

i) A corporate entity engaged in the ownership and/or operation and/or organisation of a chain of international Hotels.

ii) A corporate entity registered in Canada.

79. Ms Kinsler submits that these two features were repeated in other material before the Court. She refers to

i) Correspondence, particularly

a) The letter before claim from KN on 7th June 2010 which spoke of 'proposed legal proceedings against the Four Seasons Hotel Group Worldwide.'

b) The letter from KN to Dr Riad on 9th May 2011 which spoke of the Claimant's intention to issue proceedings against 'the Four Seasons Hotel Group'. It asked for the relationship of 'Four Seasons Hotels and Resorts' and 'Four Seasons Hotel at Cairo Nile Plaza' to 'the parent company in Canada.'

ii) Application notices and witness statements

a) The application notice seeking leave to serve the claim form out of the jurisdiction on Holdings referred to the principal defendant as 'Four Seasons Hotel Group Inc'. Mr Donovan's 1st witness statement of 8th April 2013 repeated the description of Holdings in the DPOC. His witness statement continued, that the Claimant, 'reasonably believed, at the time of contracting, that the Defendant was the owner of the Hotel and the provider or supplier of the excursion. There was no disclosure of the existence or identity of any other contracting party (whether Egyptian or otherwise) at the time of contracting.'

b) In his 2nd witness statement dated 25th June 2013 Mr Donovan recounted how he had gone to the Four Seasons Hotel in London. He spoke to the duty manager and explained that he had documents which would need 'to be forwarded to the Head Office of the Four Seasons Hotel Group in Canada.' Later in this same statement Mr Donovan says, 'It is my understanding that the Defendant [i.e. Holdings] is the parent company of the "Four Seasons chain" and that the Cairo Hotel was part of that chain.'

c) In her first witness statement of 27th June 2013, the Claimant said,

> 'For us, this was all consistent with the tour being part of the five star service that was being provided by the hotel. That was exactly what we wanted. When we travelled we did not leave our legal brains behind us, and we booked through the hotel because we wanted to deal with an international company with a very good reputation, rather than contracting with an unknown Egyptian limousine company. The tour guide was Dr Latif. I do not know his precise relationship with the hotel was, but as mentioned above, he was part of the service that I had booked with the hotel.'

iii) The submissions of Mr Ross in the Supreme Court were to like effect.

80. Ms Kinsler submitted that all of these were consistent with the Claimant intending to sue a Canadian company which ran an international chain of hotels and which was the parent company of the Four Season chain. She argues that LLC does not match that description and that the Claimant is trying to do what was said to be impermissible in *International Bulk Shipping v Minerals and Metal Trading Corporation of India* [1996] 2 Lloyd's Rep 474, namely 'reverse [her] intended original identification of the party' intended to be sued – see Evans LJ at p.480.

81. At the time of the judgment in *International Bulk Shipping* the CPR had not been introduced. The Rules of the Supreme Court O.20 r.5 allowed an amendment to the name of a party (in limited circumstances) even after the expiry of a relevant limitation period. The nearest equivalent to CPRr.19.5(3)(a) was O.20 r.5(3) which said,

> 'An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue, or, as the case may be, intended to be sued.'

82. RSC O.20 r.5 was also in force when the Court of Appeal decided *The Sardinia Sulcis and Al Tawwab* [1991] 1 LL.L.R. 201 (CA). At p. 207 Lloyd LJ said,

> 'In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued and leave to amend would always be given…
>
> In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a description which was more or less specific to the particular case. Thus if, in the case of an intended defendant the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it will be otherwise. The point can be illustrated by *Rodriguez v R.J. Parker* [1967] 1 QB 116. In that case the identity of the intended defendant was the driver of a particular car. It was held that there was a mistake as to name. But if the plaintiff had sued the driver of a different car, there would have been a mistake as to identity. He would have got the wrong description.'

83. As I have shown there is a substantial difference between the terms of RSC O.20 r.5 and CPR r.19.5(3)(a). The old test from the Rules of the Supreme Court *has* been carried over into CPR r.17.4(3), which concerns the correction of the name of a party. Although the Claimant's application notice did invoke CPR r.17.4, as I have already said, in opening his oral submissions, Mr Ross disavowed any reliance on that provision.

84. Initially the view was taken in the Court of Appeal that the change in wording from the RSC to the CPR meant that the old authorities (including *Sardinia Sulcis* and *International Bulk Shipping*) were consigned to history – see *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] 1 WLR 2557. However, *Morgan Est* was

criticised in *Adelson v Associated Newspapers Ltd.* [2007] EWCA Civ 701, [2008] 1 WLR 585. *Adelson* reasserted the continuing potency of the authorities on RSC O.20.r.5. It said at [56],

> 'The nature of the mistake is not spelt out. This court has held that the mistake must be as to the name of the party rather than as to the identity of the party, applying the generous test of this type of mistake laid down in *The Sardinia Sulcis.* The "working test" suggested in *Weston v Gribben* [2007] CP Rep 10, in as much as it extends wider that the *Sardinia Sulcis* test, should not be relied upon.'

85. The *Weston v Gribben* 'working test' was a reference to what Sedley LJ had proposed in the course of argument in that case and which was approved by Lloyd LJ at [41]. It was in these terms,

> 'it may be a convenient working test to ask whether you can change the identity of the claimant, or as the case may be, the defendant without significantly changing the claim. For my part that seems to me to be a sensible approach, consistent with the terms of the rule and in particular of the Act.'

86. But, as *Adelson* made clear, that working test is not to be followed so far as it extends beyond the 'generous test' in *Sardinia Sulcis* itself.

87. In this regard Mr Ross relied heavily on the decision of Leggatt J. in *Insight Group v Kingston Smith (a firm)* [2014] 1 WLR 1448. I have referred to his decision already in the context of the power of the court effectively to substitute one party for another in CPR r.19.2(2) and (3) and noted that, in that regard, a relevant decision of the Court of Appeal had not been cited to him. That feature of his judgment aside, I respectfully, find his comments on r.19.5(3)(a) and the *Sardinia Sulcis* line of authorities very persuasive. At [34] he summarised *Adelson* as setting three requirements:

> '(1) The person who made the mistake must be the person responsible, directly or through an agent, for the issue of the claim form; (2) it must be shown that, had the mistake not been made, the new party would have been named; and (3) the mistake must be as to the name of the party.'

Leggatt J. added at [35]-[37],

> '35. There is a footnote which should be added to the *Adelson* case. In holding that the *Sardinia Sulcis* test still applies, the Court of Appeal cannot have intended to suggest that it remains necessary to show that the mistake was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued. As already mentioned, and as was noted in the *Adelson* case at para 44, that was a requirement of the old RSC Order 20 r.5 but it is not a requirement of CPR r.19.5(3). To that extent at least, the law has been liberalised.
>
> 36. This is confirmed by the decision of the Court of Appeal in *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662. In that case the Claimant initially sued Merck believing it to be manufacturer of a vaccine which the claimant had received and which he claimed had caused him personal injury. In fact, the

> vaccine had been manufactured by SmithKline. After the expiry of the limitation period Bell J granted an application to substitute SmithKline as the defendant. The order was upheld by the Court of Appeal. Keene LJ said at para 45 that "the claimant always intended to sue the manufacturer of the identified vaccine and that is sufficient to give the court the power to substitute the true manufacturer".
>
> 37. It could not be said, and was not suggested in the *SmithKline* case, that the claimant's mistake in naming Merck as the defendant instead of SmithKline was not misleading or such as to cause doubt as to the identity of the party to be sued. It obviously was. Indeed, SmithKline did not even become aware of the claim until after the limitation period had expired. Nevertheless, as was noted in the *Adelson* case [2008] 1 WLR 585, para 57, the Court of Appeal still held in the *SmithKline* case that the *Sardinia Sulcis* test could be, and was, satisfied. It cannot therefore be an element of the test, at any rate as it now applies, that the mistake was not misleading or such as to cause reasonable doubt as to the identity of the person intending to sue or intended to be sued.'

88. At [43] Leggatt J. began his consideration of the limits of the *Sardinia Sulcis* test. He said,

> 'It may be at some point in the future this area of the law will be considered again by a higher court. As the law now stands, however, following the *Adelson* case… the *Sardinia Sulcis* test must still be applied. That is not a task which the courts have found easy. It is always possible to describe the person whom the claimant intends to sue at many different levels of generality. In the *SmithKline* case…, for example, it could accurately be said that the claimant intended to name in the claim form: (a) the company called Merck and Co Inc; (b) the manufacturer of vaccine batch No 108A41A; (c) the manufacturer of the vaccine which the claimant received; (d) the producer of an allegedly defective product which had caused the claimant's injuries; and (e) the person legally liable for those injuries. If the claimant is mistaken in believing that the person sued fits all of those descriptions, how does one whether the claimant has got "the wrong description" or "the right description but the wrong name"?'

89. At [52] Leggatt J. began to express his conclusions on the authorities. He said,

> '52. It is not easy to derive from these authorities clear guidance as to where and how the line is to be drawn between those mistakes which on the *Sardinia Sulcis* test the court has the power to correct by substitution and those which it does not. It seems to me however, that the only way in which the *Sardinia Sulcis* test is workable at all is to identify the relevant description of the intended claimant or defendant by reference to what description is material from a legal point of view to the claim made. For example, in the *SmithKline* case … the claim was founded on the Consumer Protection Act 1987 which gives a right to a person injured by a defective product to recover compensation from the producer of the product. It was thus material to allege that the party sued was the producer of such a product. On the other hand, the fact that the product was a vaccine and identity of the batch from which it came were not material to existence of the cause of action and are therefore not essential facets of the description of the party whom the claimant intended to sue.

> 53. If one leaves aside the puzzling reference to the *Rodriguez* case… the descriptions given as examples by Lloyd LJ in *The Sardinia Sulcis*… - of employer, landlord, property owner and cargo owner – were all of this kind A person who is an employer or a landlord or who owns property or cargo carried on board a ship acquires by virtue of that role a set of legal rights and obligations which will generally be material to the claim made in the action. Thus, where for example the defendant is sued for breach of duty owed by reason of being the claimant's employer, or landlord, then that will be the relevant description of the intended defendant, and if the claimant turns out to have been mistaken in thinking that the person sued fitted that description because the actual employer or landlord was someone else, the mistake can be characterised as one as to the name.'

90. Leggatt J. noted at [55] that his formulation of the *Sardinia Sulcis* test conformed with the judgment of Stocker LJ in *Sardinia Sulcis* itself at p. 209. He acknowledged the difficulties which even this may pose.

91. In her written submissions of 30th July 2019 Ms Kinsler argued Leggatt J. effectively adopted a wider test than *Sardinia Sulcis* and, to that extent, his judgment should not be followed. She submitted that he considered the *Sardinia Sulcis* test to be unsatisfactory and that he could only reach his formulation of that test in [44] of his judgment, by setting aside the *Rodriguez* example. Ms Kinsler submits that in none of the cases referred to in *Sardinia Sulcis* was it necessary for the party seeking substitution to alter the description which had been given. The Claimant, she argues, on the contrary does seek to alter the description of her defendant as is apparent from her DPOC.

My conclusions on whether (if it had been necessary) the Claimant could rely on CPR r.19.5(3)(a)

92. Since I have held that the Claimant can seek substitution under r.19.2 and does not need to rely on r.19.5 at all, my conclusions on this issue are necessarily not critical to my decision on the Claimant's application to substitute LLC for Holdings.

93. However, were it necessary, I would conclude that her mistake was of the type that would allow the court to order substitution under r.19.5(3)(a). My reasons are as follows:

i) I do not accept Ms Kinsler's criticisms of Leggatt J's decision in *Insight Group*. Although, as I have shown, he identified difficulties with *Sardinia Sulcis*, it is clear, not least from [43], that he acknowledged that *Sardinia Sulcis* remained binding on him because of what had been said in *Adelson.*

ii) It is undoubtedly the case that the alteration of wording from RSC O.20 r.5 to CPR r.19.5(3)(a) must have some effect as Leggatt J. correctly observed at [43].

iii) The formulation which Leggatt J. adopted was very similar to that used by Stocker LJ in *Sardinia Sulcis* itself.

iv) The actual decision in *Rodriguez* also fits Leggatt J's formulation: the plaintiff intended to sue the driver who (he alleged) had caused the road accident. He was permitted to substitute the correct driver. What puzzled Leggatt J. was Lloyd LJ's comment that,

> 'if the plaintiffs had sued the driver of a different car, there would have been a mistake as to identity. He would have got the wrong description.'

With respect, it seems to me that Leggatt J's comments on this *obiter dicta* in [44] of his judgment in *Insight Group* are entirely apt.

v) It is quite right, as Ms Kinsler submitted, that LLC does not conform to all the descriptions which the Claimant or her solicitors used in the correspondence with the Four Seasons group, or in the Claim Form and DPOC. However, there may have to be some selection between the different descriptions which the Claimant has applied to the Defendant whom she did sue as Leggatt J. showed in [43] of his judgment in *Insight Group* by reference to the *SmithKline* case.

vi) I am persuaded by Mr Ross that it is clear that the Claimant intended to sue the employer of the Concierge, since it was the Concierge with whom she had negotiated for the provision of the excursion and it was his or her employer whom she regarded as the other party to the contract. It was also that organisation which she alleged was both directly and vicariously responsible in tort for the driver's faults or deficiencies which led to the accident.

vii) As Mr Ross observed, Joseph McManus of Kennedys, then acting on behalf of Holdings, said in his witness statement of 20th July 2013,

> 'The material excursion was indeed booked by telephone and added to the Claimant's bill. The excursion was booked by the concierge at the Cairo Hotel and the payment for this would have been accounted for in the Cairo Hotel's accounts.'

viii) In deciding who the Claimant intended to sue and the nature of her mistake, I agree that I can have regard to correspondence before and after the claim was issued as well as the pleadings themselves. I am less sure as to whether it is open to Ms Kinsler to rely on remarks made by Mr Ross in the course of his submissions to the Supreme Court (or, indeed at any other time in the litigation), since it is counsel's role to comment on the evidence, rather than to add to it. But this may not matter, since his comments did not take the matter any further.

ix) The change in wording from that in RSC O.20 r.5 to that in CPR r.19.5(3)(a) may sometimes be immaterial since, if there has been real doubt as to whom the Claimant intended to sue, that may be a reason for the Court to refuse to exercise its discretion to permit substitution (see *Insight Group* at [41]). I accept that it was plain that the original defendant whom the Claimant wished to sue was Holdings and was not LLC. But in the circumstances of this case, that fact would not deter me from exercising discretion in the Claimant's favour. For all the reasons already explained, if substitution is ordered, LLC will not be deprived of a limitation defence. Further, LLC was put on notice of

this litigation at an early stage and had the opportunity to conduct the investigations which were considered necessary.

x) Applying the three-part test in *Adelson:* (1) the person who made the mistake in this case was the person responsible directly, or through an agent, for the issue of the claim form; (2) had the mistake not been made, LLC would have been named as the defendant; (3) the mistake was to the name of the party applying the *Sardinia Sulcis* test.

In the event that CPR r.19.5 does apply, can the Claimant rely on r.19.5(3)(b)?

94. Mr Ross argued that, if the Claimant could not rely on r.19.5(3)(a) she could rely on r.19.5(3)(b) since her claim could not properly be carried on against Holdings unless LLC was substituted as defendant. Ms Kinsler submitted that, if the Claimant failed to come within r.19.5(3)(a) she would necessarily fail to satisfy paragraph (b).

95. In expressing my views on the application of paragraph (a) I have already gone further in this already lengthy judgment than necessary. Although the application of paragraph (b) was argued before me, in my judgment it is not necessary or proportionate to extend this judgment further still by seeking to resolve the present dispute. It is sufficient for me to say that, had it been material to decide the matter, I would have seen considerable force in Ms Kinsler's submission that the broad interpretation of paragraph (b) which Mr Ross urged would have rendered paragraph (a) substantially redundant.

The Claimant's application for permission to amend the claim form (and the particulars of claim)

96. The Claimant accepts that the Claim Form has been served (on Holdings). She accepts therefore that she needs permission to amend the claim form – see CPR r.17.1(2)(b). As I have said, there is some uncertainty as to whether the Particulars of Claim have been served, or whether they were only sent in draft. However, if they have been served, the Claimant also needs the Court's permission to amend those.

97. Of course, a major change to the Claim Form is that a new defendant is named. I have, however, dealt with that change in relation to substitution. Here I am concerned with the other alterations which the Claimant wishes to make to the Claim Form (and Particulars of Claim).

98. In the Claim Form the other amendments in substance are:

i) To make express that the claims are all made under Egyptian law;

ii) To delete the reference to the Law Reform (Miscellaneous Provisions) Act 1934 and to substitute that she brings that claim on behalf of her late husband's estate and on behalf of his estate and heirs;

iii) To delete the reference to the Fatal Accidents Act 1976 and to substitute 'for dependency for wrongful death'.

iv) There is some other minor tidying up which will need to be done now that the Claimant wishes to sue only one defendant.

99. The amendments to the Particulars of Claim make comparable changes to the prayers as are to be made in the Claim Form. Paragraph 5 is also amended to delete the reference to the chain of international hotels. The amendments to paragraph 7 would add the following,

> 'The index excursion contract was made in England and/or the Claimant in respect of her own personal injury and as a person suffering loss and damage by reason of the wrongful death of her late husband, sustained damage and/or will suffer damage within the jurisdiction (see CPR Part 6 PD 6B, paragraph 3.16(a) and 3.1(9)(a).'

There are other minor amendments to the loss and injury which the Claimant suffered in her personal capacity.

100. Mr Ross submits that if and so far as these add or substitute a new claim, such a claim arises out of the same facts or substantially the same facts as a claim previously made and that permission to make the amendments should be granted under CPR r.17.4(2).

101. In her submissions of 30th July 2019 Ms Kinsler summarised LLC's position on the cause of action amendments in this way:

i) The amendments should be refused on the basis that they have no reasonable prospects of success, as they fail to plead any Egyptian law to found a cause of action.

ii) For the purpose of the present hearing and without prejudice to its position on any appeal, [Holdings/LLC] do not argue that the amendments should be refused on the basis that:

a) They would have the effect of adding or substituting a new claim within the meaning of CPR 17.4(2) and/or

b) They do not arise out of the same facts or substantially the same facts as a claim in respect of which the claimant has already claimed a remedy in the proceedings within the meaning of CPR 17.4(2).

102. I shall address the issue of whether the presently pleaded claims have a reasonable prospect of success in the course of deciding whether the Claimant should have permission to serve the claim form out of the jurisdiction on LLC. Otherwise I note that LLC does not object to the amendments to the Claim Form and Particulars of Claim.

The Application to serve the Claim Form out of the Jurisdiction

103. The Recast Brussels Regulation of the Council and the Parliament on jurisdiction and enforcement in civil and commercial matters No. 1215/2012 governs the law on this issue. However, LLC is domiciled in Egypt. Accordingly, by Article 6 of the Regulation, it is English law which determines whether the English courts have jurisdiction.

104. As a matter of English law, there are three stages to this application:

i) Does each of the claims which the Claimant wishes to pursue against LLC pass through one or other of the jurisdictional gateways?

ii) Does each of the claims which the Claimant wishes to pursue against LLC have a reasonable prospect of success?

iii) Is England the convenient forum for the Claimant's claims to be litigated?

Can the Claimant's tort claims pass through the tort gateway?

105. It will be recalled that Practice Direction 6B paragraph 9(a) applies to

> 'a claim in tort where – (a) damage was sustained, or will be sustained, within the jurisdiction.'

106. The argument here turns on a question of law. Mr Ross argues that the Claimant satisfies this test because she is resident in England. In her personal capacity she has continued to suffer loss here ever since her return to England. As Sir Ian's dependent, she has likewise suffered loss in England. Ms Kinsler responds that all of the loss suffered in England was consequential to the accident itself and that, to pass through the tort gateway, consequential damage is not sufficient. She also submits that a conservative approach to the construction of the gateways is appropriate and consistent with authority, see for instance *The Hagen* [1908] P 189 at 201. The purpose of the jurisdictional gateways is to mark out those cases where there is a substantial connection between England and the cause of action. Ms Kinsler submits that there is no such connection where, as in this case, the Claimant can only point to indirect damage suffered within the jurisdiction. Ms Kinsler also relies on the legislative history of what is now paragraph 9(a). Formerly, the RSC provided that the tort gateway was only satisfied if the tort was committed in the jurisdiction. In 1987 the Rules of the Supreme Court were amended to allow a claim in tort to be brought in England alternatively if 'the damage' was suffered in England. The purpose of the change was to bring English law into line with the Brussels Regulation on Jurisdiction Article 5(3). This allowed a claim to be brought in the courts of the Member State where the harmful event occurred and the Court of Justice adopted the distinction between direct and indirect losses. The Brussels Regulation has now been replaced by the Recast Brussels Regulation (Regulation 1215/2012) but Article 7(2) is to the same effect.

107. Ms Kinsler is able to rely on the decision of the Court of Appeal in *Brownlie v Four Seasons.* It will be recalled that the Court of Appeal ruled that the Claimant could not pass through the tort gateway for her personal claim or for the claim on behalf of the estate. The Court of Appeal said that her claim under the Fatal Accidents Act was different because the loss which she suffered as Sir Ian's dependent was suffered in England. In the Supreme Court, Ms Kinsler could also rely on the minority judgments of Lord Sumption and Lord Hughes, who, like the Court of Appeal, would have held that indirect or consequential loss was not sufficient to pass through the tort gateway.

108. Mr Ross conversely invokes the views of the majority in the Supreme Court expressed by Lady Hale, Lord Wilson and Lord Clarke who would have approved a number of first instance decisions to the effect that consequential damage is sufficient to satisfy the tort gateway. I recognise that all of the views of the Judges in the

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

109. It seems to me that no different consideration applies to the Claimant's claim as Sir Ian's dependent. The Supreme Court followed its earlier decision in *Cox v Ergo Versicherung AG*, [2014 UKSC 22, [2014] AC 1379 that the Fatal Accidents Act 1976 had no extra-territorial effect. That will be a relevant matter for me to consider in the context of whether the this aspect of the Claimant's claim has a reasonable prospect of success, but if consequential damage is sufficient to pass through the tort gateway for Lady Brownlie's personal claim, I cannot see why it should be any different for the purposes of her claim as her husband's dependent.

Can the Claimant's contract claims pass through the contract gateway?

110. Paragraph 6(a) of Practice Direction 6B says,

> 'A claim is made in respect of a contract where the contract – (a) was made within the jurisdiction.'

111. The parties were agreed that, as an issue concerning procedure, this was a question to be decided by English law. As Ms Kinsler observed, if this issue is decided in the Claimant's favour, it will cease to be of any relevance. The place where the contract was made is irrelevant for the purpose of deciding the applicable law of the contract which, as I have already noted, is agreed to be Egyptian law. The place where the contract was made will have no other relevance to the proceedings.

112. Mr Ross's argument is that it is elementary contract law that a contract made orally (including a contract made over the telephone) is made in the place where the acceptance of the offer is heard by the offeror – see *Entores v Miles Far East Corporation* [1955] 2 QB 327 CA. As Lady Hale said in *Brownlie v Four Seasons Holdings Inc* at [34] that judgment was not the place to cast doubt on the Court of Appeal's decision in *Entores*.

113. Ms Kinsler acknowledges that (for the contract gateway) the law is settled. However, she submits that the evidence is insufficient for the claimant to show that she does have a good arguable case that the contract was made in England.

114. Ms Kinsler refers me to what Lord Sumption said in *Brownlie v Four Seasons* at [7] (after referring to the 'good arguable case' test in *Canada Trust Co v Stolzenberg (No.2)* [1998] 1 WLR 547 at 555),

> 'The reference to "a much better argument on the material available " is not a reversion to the civil burden of proof which the House of Lords rejected in *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or

> some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context.'

115. Lady Hale at [34] of *Brownlie v Four Seasons* said

> 'I agree (1) that the correct test is "a good arguable case" and glosses should be avoided: I do not read Lord Sumption's explication in para 7 as glossing the test.'

116. In *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9] the Supreme Court adopted what Lord Sumption had said in *Brownlie*.

117. Ms Kinsler observes that, in the Court of Appeal, Arden LJ said at [64],

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

118. That said, the Court of Appeal gave its ruling on this issue at [69]-[70] where Arden LJ said,

> '69....
>
> Here Lady Brownlie had to approach the concierge and set out her requirements. The Appellant [Holdings] does not suggest that it was the concierge who then made suggestions to Lady Brownlie. The concierge on this basis merely responded to Lady Brownlie's proposals, and that would mean the concierge's role was to accept those proposals.
>
> 70. I do not consider it necessary to go into all the points made by Mr Ross about the bespoke nature of the excursion which would only serve to reinforce that approach. In my judgment in the absence of any evidence from the appellant about this, a good arguable case was shown and the *Canada Trust* gloss was satisfied in this case.'

119. Those were the views of the Court of Appeal on the evidence as it then stood. However, in my judgment, there has been no material addition to the evidence about the circumstances of the making of the contract since then. The views of the Court of Appeal are not binding on LLC who were not then a party (or even a prospective party) to the proceedings. However, the analysis of Arden LJ is one with which I respectfully agree and adopt.

120. It follows that, in my view the contract claim also passes through the jurisdictional gateway.

Service out of the jurisdiction: the merits test: the nature of the test

121. Ms Kinsler argued that the Claimant had to show that each of her claims had a reasonable prospect of success. The purpose of this merits test, she submitted, was to ensure that the English court did not take jurisdiction over a foreign defendant in relation to a claim which the defendant would be entitled to have struck out or summarily dismissed. As Lord Briggs said in *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [2019] 2 WLR 1051 at [9] this broadly replicates the summary judgment test. I did not understand Mr Ross to disagree as to the nature of the test. I recognise that I am dealing with matters at an interlocutory stage where the evidence may be incomplete. I should be cautious about expressing concluded views on matters which may look different after a trial. (see *Canada Trust v Stolzenberg (No.2)* above at p.555).

Service out of the jurisdiction: the merits test: the scope for reliance on a 'presumption' that foreign law reaches the same result as English law

122. *Dicey and Morris and Collins The Conflict of Laws* (15th edition 2012) at 9R-001 says this,

> '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.'

123. While, as I have said, the Claimant has relied on the expert evidence of Mr Edge, where Mr Edge is silent, Mr Ross has invoked the principle in Rule 25(2). Furthermore, he submits that the Claimant's pleading (which alleges that the estate is entitled to relief 'under Egyptian law' and the Claimant is entitled to compensation as Sir Ian's dependent 'under Egyptian law') are not deficient because she can rely on Dicey's Rule 25(2).

124. Ms Kinsler argues this way.

i) The Fatal Accidents Act 1976 does not have extra-territorial effect - see *Cox v Ergo Versicherung AG* [2014] AC 1379. The Claimant appears to recognise that the same must be true of the Law Reform (Miscellaneous Provisions) Act 1934, hence her deletion of the express reference to this statute and to the Fatal Accidents Act 1976 and the substitution of the phrase 'under Egyptian law'.

ii) As Dicey's Rule 25(1) states, foreign law is a question of fact. It must be pleaded and proved. The DAPOC singularly fail to plead the provisions of Egyptian law on which the Claimant relies. This is also contrary to the Claimant's obligation in CPR r.16.4(1)(a) whereby the Particulars of Claim must include 'a concise statement of the facts on which the Claimant relies.'

iii) Chapter 9 of *Dicey* acknowledges the uncertainty of the 'presumption', especially in the context of statutory law – see for instance para 9-027.

iv) In the present context, where the issue is whether a foreign person should be made subject to the jurisdiction of the English court, it is important that the

filter of the merits test is applied on a true and realistic basis. That would not be the case if the Claimant could rely on the presumption.

v) It is apparent from the evidence of Egyptian law which has been provided that the structure of that system of law is different to English law. Egyptian law is essentially code based as opposed to our combination of common law and statute.

vi) *Dicey*'s rule 25(2) was considered by Simon J. in *Belhaj v Straw* [2013] EWHC 4111 (QB). He summarised the facts of the case at [1] where he said,

> 'In this action the Claimants seek a declaration of illegality and claim damages arising from what they contend was the participation of the seven Defendants [who included the former Foreign Secretary Jack Straw] in their unlawful abduction, kidnapping and illicit removal across state borders to Libya in March 2004. The claim encompasses allegations that they were unlawfully detained and/or mistreated in four foreign states, China, Malaysia, Thailand and Libya, and on board a US registered aircraft; and that their detention and mistreatment was carried on by agents of the States concerned.'

In his judgment, Simon J. dealt with two preliminary issues - see [2] - namely (1) whether certain of the claims should be dismissed as non-justiciable and (2) in the event that they were not dismissed what were the applicable laws for determining the Claimants' causes of action? As he added,

> 'Although (2) was argued as a matter of principle, in practice it was an argument about which party should plead the foreign laws that apply.'

At [140] Simon J. said,

> 'In my judgment the position is as follows:
>
> (a) Although it is open to criticism and subject to exceptions, a court of first instance cannot ignore the rule [in a footnote Simon J. added 'It has existed since at least the decisions in *Dynamit AG v Rio Tinto Co* [1918] AC 260, 301 and *The Parchim* [1918] AC 157, 161.] that, in the absence of evidence, foreign law is presumed to be the same as English law.
>
> ...
>
> (b) 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 foreign law is the same as English law. Such an approach is evasive. There may of course be an issue as to which particular law applies, but that is a

> different matter. The "parochial" approach which "presupposes that it is inherently just for the rules of the English domestic law of tort to be indiscriminately applied regardless of the foreign character of the circumstances of the parties", is precisely the mischief which the Law Commission sought to remedy and was remedied by the 1995 Act, see per Brooke LJ (with whom May and Rix LJJ agreed) in *R (Al-Jedda) v Secretary of State for the Home Department* [2007] QB 621 at [103] in a judgment which was upheld by the House of Lords. ([2008] 1 AC 332).'

Ms Kinsler argues that the present case is *a fortiori* since Rome I and Rome II dictate that Egyptian law shall apply to these claims.

vii) Simon J.'s decision was appealed to the Court of Appeal [2014] EWCA Civ 1394, [2015] 2 WLR 1105 where the court said at [157],

> 'In view of our conclusions it is not necessary to address some of the broader issues potentially raised by the defendants' arguments on the presumption (including the criticisms made of it in the modern world pleading and practice which Mr Phillips touched on in his written arguments and to which the judge briefly referred before stating his conclusions) except to say that in our view the presumption of similarity is not one in any event that applies inflexibly, regardless of circumstances and is subject to a number of exceptions: see *Shaker v Al-Bedrawi* [2003] Ch 350 [64] and *Balmoral v Group Ltd v Borealis (UK) Ltd* [2006] 2 CLC 220 [428]. One exception must be, as here, the issue of the applicable law is plainly engaged on the pleadings and on the facts, and the court is in a position to adjudicate on the point.'

At [158] the Court of Appeal added that the obligation on the Claimants to set out their case on foreign law,

> 'is no more and no less than is appropriate 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).'[1]

viii) Ms Kinsler acknowledges that what was said on the subject in the Supreme Court in the present case was *obiter*. However, she submits that Lord Sumption's comments at [18] are supportive of LLC's case. Lord Sumption there said that, as presently pleaded, the Claimant had no reasonably arguable claim in tort. Ms Kinsler argues, that Lord Sumption would not have so concluded if the Dicey presumption had applied. She further argues that Lady Hale agreed with Lord Sumption in this regard at [33].

[1] The government's further appeal to the Supreme Court on other grounds was dismissed: [2017] UKSC 3, [2017] AC 964

125. Mr Ross argues that the principle expressed by *Dicey* does still apply and can be invoked by the Claimant. In particular, he submits as follows,

i) *Belhaj v Straw* was a very special case. In essence it involved a case management decision as to which side should plead their case on the various applicable foreign laws first – see particularly [149] and [154]-[155] of the Court of Appeal's decision. In this regard, Mr Ross relies on the decision of Andrew Baker J. in *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2018] EWHC 2759 (Comm), [2019] 1 WLR 82 particularly [15]-[22][2].

ii) LLC is yet to plead its case. The evidence is at an early stage and the interlocutory nature of the present applications is not a convenient stage to resolve potentially difficult issues of foreign law.

iii) In *Brownlie v Four Seasons* in the Court of Appeal Arden LJ referred to her earlier decision in *OPO v MLA and SLT* [2014] EWCA Civ 1277, [2015] EMLR 4 in which she had supported the continuing applicability of *Dicey*'s Rule 25(2). She acknowledged that the Supreme Court had subsequently reversed the Court of Appeal on other grounds – see *James Rhodes v OPO* [2015] UKSC 32, [2016] AC 219. Her earlier decision was no longer binding precedent, although it remained strong persuasive authority. She continued at [89] of her judgment by saying,

> '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 as to foreign law. Even if it did so it might not come to the right conclusion. If Mr Palmer's argument is right, it would moreover follow that the court could not act on any agreement of the parties as to what the foreign law was or any agreement by the parties not to plead foreign law. These seem to me to be startling conclusions. Accordingly, for these reasons, in addition to those which I gave in OPO, I reject Mr Palmer's submissions that the presumption as to foreign law being the same as English law does not apply and his overarching submission that Lady Brownlie has failed to show a completed cause of action in tort because she has not adduced evidence as to Egyptian law.'

In *Iranian Oil* (above) at [20] Andrew Baker J. described Arden LJ's analysis as 'compelling'.

126. My conclusions on this issue are that the Claimant is still entitled to rely on the presumption in Dicey's Rule 25(2). My reasons are as follows:

i) I agree with Simon J. in *Belhaj* that the principle which Dicey encapsulated in Rule 25(2) is of high authority and long standing. It is not for a Judge at first instance to conclude that it has been abrogated.

[2] At [20] Andrew Baker J. said that *Belhaj* was not cited or referred to in *Brownile.* Mr Ross and Ms Kinsler agreed that this was an error: *Belhaj* was cited in *Brownlie.*

ii) I also respectfully agree with the comments of Arden LJ in *Brownlie* that the presumption serves a real purpose in an adversarial system such as ours which relies on the parties to advance competing cases. Dicey's Rule 25(2) provides a sensible and necessary way for the court to proceed in the event that there is a lacuna in the evidence. It is not an arrogant Anglo-centric view of the world which is the foundation of the presumption, but rather a pragmatic way to proceed in the absence of contrary evidence.

iii) I do not consider that what Lord Sumption said in the Supreme Court in *Brownlie* is dispositive. At that stage the Claimant relied directly on the Fatal Accidents Act 1976. As Lord Sumption remarked that position was unsustainable in view of *Cox* because that statute did not have extra-territorial effect. What the Claimant now seeks to do is to plead that she has comparable rights under Egyptian law and rely on Dicey's Rule 25(2) for the proposition that Egyptian law has the same outcome as English law.

iv) I agree with Mr Ross that *Belhaj* is best seen as a case management decision as to which party should first plead the foreign law on which they rely. There is not in the present case the same imperative for the Claimant to plead first the provisions of Egyptian law on which she relies.

v) I am not sure that *Iranian Oil* provides quite the degree of support for the Claimant's case as Mr Ross argued. I note that at [11{iii)] of his decision Andrew Baker J. said,

> '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.'

Ms Kinsler is entitled to observe that the present is a case where, of necessity, the Claimant has to rely on Egyptian law and therefore, she argues, the Claimant must plead the detail of Egyptian law on which she relies. But that said, Andrew Baker J. was not saying in *Iranian Oil* that in the cases he addressed in [11 (iii)] a claimant could not rely on Dicey's rule 25(2). On the contrary, he said at [20] that there was no rule of general application that where a claim was governed by foreign law, the claimant had to plead a case as to the content of that foreign law.

vi) Ms Kinsler is entitled to say that Mr Ross somewhat overstates the position when he submitted that, if LLC was right, 'it would transform the practice in these types of foreign accidents-abroad claims...' There are, after all, examples of cases in the reports where the details of the foreign law on which claimants relied were pleaded. *Cox* was one such example. But, I nonetheless agree with Mr Ross that there are good practical reasons why, at the stage of deciding whether the claimant should have permission serve out of the jurisdiction, it should not be necessary to resolve issues of this kind.

vii) There is also some support for Mr Ross in the decision of the Court of Appeal in *Erste Group Bank AG, London Branch v JSC 'VMZ Red October'* [2015] EWCA Civ 379 at [110] –[112].

Service out of the jurisdiction: the merits test: the claims in tort

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 on (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.

Service out of the jurisdiction: the merits test: the claims in contract

130. Ms Kinsler argues first that Mr Edge does not give evidence as to whether the Claimant would have a claim in contract as a matter of Egyptian law. Indeed, his supplementary report appears to regard the reference to the contract to be material only to imposing vicarious liability on LLC. He says that, in these circumstances, the Claimant's pleaded case does not offend the doctrine of '*cumul'*.

131. Although it is not entirely clear, Mr Edge appears to be responding here to what Mr Ezzo said at paragraphs 37 and 38 of his report. These paragraphs of Mr Ezzo's report said,

> '37. It is not permissible that a claimant brings a claim in tort in circumstances where there is a claim in in contract and it is not permissible to a claimant to bring a claim based upon contractual and tort liability in the same time.
>
> 38. It is well established that it's not permissible to combine both liabilities on bases that allow duplicating the compensation and the overlap of the principles of

> both liabilities, so it's not permissible for the victim to combine between the contractual liability and the liability in tort to be awarded with a compensation twice, as it is forbidden to be compensated more than once.'

132. The point which Mr Ezzo is making is not clear. I agree with Mr Ross that he seems to be saying that the Claimant cannot, by combining different causes of action, be compensated more than once for the same loss. That would be eminently understandable, but irrelevant since I accept Mr Ross's assurance that Lady Brownlie is not seeking to recover her losses more than once. The lack of clarity in Mr Ezzo's report means that I am not (certainly not at this stage in the proceedings) taking the evidence to mean that the Claimant is unable, as a matter of Egyptian law, to sue in both contract and tort.

133. If and so far as Mr Edge understands the Claimant *not* to be bringing an action in contract (as well as tort), he is mistaken. The definitive sources of the claims which the Claimant is making are the Claim Form and the DPOC. As I read them, the claims are indeed in both contract and tort.

134. If and so far as there is a lack of evidence as to the Egyptian law in relation to the Claimant's contractual claim, she is entitled to rely on Dicey's rule 25(2) for the reasons which I have previously given. I have already explained why I consider that the Claimant's claims in contract and in tort are still reasonably arguable, notwithstanding the evidence of the Egyptian laws of limitation.

135. Accordingly, in my judgment the Claimant satisfies the merits test for all of the claims which she wishes to bring.

Service out of the jurisdiction: convenient forum

136. What is described in the White Book (2019 edition para 6.37.18) as the *locus classicus* is still Lord Goff's speech in *Spiliada Maritime Corporation v Consules Ltd (The Spiliada)* [1987] AC 460. While Lord Goff addressed both cases where a claimant has or seeks permission to serve out of the jurisdiction ('service out case') and where there has been service on a defendant in the jurisdiction ('service in case'), to the extent that there is a difference between the two, I, of course, am concerned with a service out case. I have followed these principles in my decision. I have also borne in mind, Ms Kinsler's emphasis that, by CPRr.6.37(3), I must be satisfied that 'England and Wales is *the* proper place in which to bring the claim.'. At p.481E Lord Goff also said,

> 'The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so.'

137. Mr Ross argues that England is the convenient forum for the following reasons:

i) The Claimant is, and Sir Ian was, a UK national and domiciled in the UK.

ii) The negotiations between Lady Brownlie and the concierge were conducted in English. The brochure which led Lady Brownlie to book the excursion was in English. There was an English speaking guide as part of the excursion

package. The contractual documentation regarding the management of the hotel is in English as can be seen from the exhibits to Ms Henderson's witness statement.

iii) If the claims were litigated in Egypt, all the documents would have to be translated into Arabic, as would all the evidence of witnesses. Lady Brownlie does not speak Arabic and this would be burdensome and expensive for her.

iv) It is nine years since the accident and seven years since the litigation began. There would be yet further delay and expense if the litigation had to begin again in Egypt. While that is principally in consequence of the Claimant initially suing the wrong company, her mistake was entirely understandable given the labyrinthine corporate structure which the Four Seasons collection of companies has chosen to adopt and what Lord Clarke in the Supreme Court described as their 'ducking and weaving'. It was notable that, although Holdings was ultimately successful in the Supreme Court, the Supreme Court set aside the previous costs orders and made no order as to costs in the Supreme Court, the Court of Appeal and before Tugendhat J.

v) The accident took place in Egypt, but, given the driver's conviction, there is unlikely to be any issue as to his fault (so far as that is relevant to liability).

vi) The principal issues to be decided at trial are likely to be matters of quantum. As to those, the documents are likely to be in English and the relevant witnesses (both medical as to the Claimant's own injuries, and evidence as to Sir Ian's likely future earnings) will be in England.

vii) The experts on Egyptian law both speak English.

viii) There has been significant political change in Egypt in recent years. That, in turn, appears to have contributed to significant delays in civil litigation. Cases in the Egyptian courts are, in any case, likely to be lengthy because there appear to be appeals as of right without the filter of the need to obtain permission to appeal. Mr Edge estimates that it could take a total of 20 years for a case to reach the Court of Cassation (the highest civil court). He says 'the system is overburdened with too many cases and not enough judges.' Since the Claimant is now aged 74, that means the litigation might not be completed in her life-time.

ix) From time to time there has been advice from the UK government to avoid travel to Egypt. That appears to be another consequence of the uncertain political situation.

x) There has been no evidence as to what measures the Egyptian courts would be able to take to ensure that equality of arms between the Claimant who is an individual and LLC which has assistance from a large and multi-national chain of hotels.

xi) Mr Ross argues that the difficulties which the Claimant is likely to encounter if she has to litigate in Egypt are illustrated by the problems she encountered in

serving the application notice in respect of the matters presently before the Court.

xii) Tugendhat J. considered that England was the *forum conveniens*. Although Holdings (a Canadian company) was then the effective defendant, Ms Kinsler (who then represented Holdings) did not argue for Canada being the convenient forum. Then, as now, the choice was seen as being between Egypt and England. Tugendhat J's view was that England was clearly the most appropriate forum (see [120]-[127] of his judgment). Holdings did not pursue the contrary argument in the Court of Appeal.

xiii) From an early stage LLC has been on notice of these proceedings. Olivier Masson, who was the general manager of the hotel and also a director of LLC, was copied in to the correspondence from Ms Waugh and Dr Riad. Ms Waugh and Dr Riad will have also been in a position to provide LLC with legal advice.

138. Ms Kinsler argues that England is not the convenient forum because,

i) In *VTB Capital v Nutritek International Corporation* [2013] UKSC 5, [2013] 2 AC327 Lord Mance commented that the jurisdiction of the applicable law was a factor of particular force if issues of law were likely to be important - see [46]. That was the case here where there are likely to be issues (among other things) as to the particular rules of Egyptian law regarding limitation.

ii) Mr Ross is incorrect to submit that this would probably be a quantum only action. Mr McManus, a partner in Kennedys, confirms that there will be issues of liability as well as quantum. Apart from limitation, there are also likely to be liability issues concerning whether the Claimant is entitled as a matter of Egyptian law to bring a tortious claim (given the existence of the Commercial Code and the principle of 'cumul') and whether on the facts LLC had vicarious responsibility for the driver.

iii) Lord Mance also commented in *VTB Capital* that, while it was unhelpful to speak in terms of a presumption, 'the place of commission [of the tort] will normally establish a prima facie basis for treating that place as the appropriate jurisdiction' – see [51]. Any tort in this case was committed in Egypt.

iv) The direct consequences of the tort alleged by the Claimant (both to her and to Sir Ian) occurred in Egypt.

v) Ms Kinsler accepted that, given the conviction of the driver, any relevance of lack of care on his part was unlikely to be a contested issue in the litigation. However, whether LLC is vicariously liable for the tort of the driver (so far as this is an issue of fact) is likely to depend on the evidence of Egyptian witnesses.

vi) Most, if not all, documents relating to supervision, guidance and control will be located in Egypt and are likely to be written in Arabic.

vii) If and so far as the evidence in the criminal proceedings is relevant to the issues in the case, it will be more straightforward to obtain the criminal file if the proceedings take place in Egypt.

viii) Mr Ezzo's evidence is that from the beginning of proceedings until a final judgment is given by the Court of Cassation would take on average 7-8 years. Ms Kinsler submits that this is not materially different than would be the case in England. Furthermore, while an appeal is pending in the Court of Cassation, it is not common for enforcement of the judgment of the lower court to be stayed.

ix) Mr Ezzo's evidence was that the disruptions caused by political changes lasted for no more than a year from January 2011.

x) Where there are transnational disputes, it is commonplace for the parties to be nationals of and resident in different countries and to speak different languages. These are therefore neutral factors in deciding whether England is the convenient forum for the litigation.

xi) So far as there are documents in England (particularly documents relevant for determining quantum) it is relatively straightforward for them to be scanned and transmitted electronically – see *Vedanta Resources plc v Lungowe* [2019] UKSC 20 at [85(viii)].

xii) If the Claimant wished to rely on the absence of the Egyptian courts to ensure equality of arms, it was for her to adduce such evidence. As Ms Kinsler puts it,

> 'Not least given the requirements of international comity, the Court should not be invited at this stage to speculate that the Egyptian courts would allow any inequality of arms to create injustice.'

xiii) The difficulties which the Claimant had in serving the present application notices take her case no further. She did not have permission to serve those documents out of the jurisdiction at the stage when the difficulties arose and she did not follow the required channels for service of English court documents in Egypt.

xiv) The time taken in the present proceedings has been occupied with the claim made against another party (Holdings). Her claim against LLC will not start unless and until LLC is made a party to the present claim.

139. In my judgment, England is the proper forum for the litigation of the Claimant's claims. I reach this view for the following reasons:

i) In my view it is material that the present litigation has already continued for a substantial length of time. I appreciate, of course, that her claims so far have been directed at Holdings and that her claims against LLC will not formally commence unless and until LLC is joined to these proceedings. Ordinarily, it would hardly avail a litigant to pray in aid the period of time erroneously spent suing the wrong defendant. But, in my view, this case is out of the ordinary. The labyrinthine corporate structure for the Four Seasons chain of hotels and

what Lord Clarke characterised as the 'ducking and weaving' of Holdings does permit the Claimant to submit that her mistake in suing Holdings should not be held against her. On the contrary, the time it has taken to resolve, is a matter on which she is entitled to rely.

ii) Although Holdings and LLC are separate legal entities, they appear to share access to legal advice from Ms Waugh. LLC has also had the advantage of advice from Dr Riad at an early stage. Olivier Masson, the general manager of the hotel was copied in to correspondence from both Ms Waugh and Dr Riad. Thus, LLC is in a somewhat different position from another defendant who is brought into litigation at a late stage and who, for that reason, could ordinarily expect to suffer prejudice.

iii) Ms Kinsler has identified issues of Egyptian law which may need to be resolved and it may not be the case, as Mr Ross submitted, that the only issues in the litigation would be quantum. She is entitled to say that the place of the tort is another factor in favour of Egypt being the appropriate forum. However, in *VTB* Lord Mance was at pains to emphasise that these are but some of the considerations to be taken into account and what I would call a holistic approach is required to the identification of the proper forum.

iv) If the litigation was conducted in Egypt, it may well be difficult to predict the length of time it would take. However, it is significant that there is an appeal of right to the highest court. By contrast, in this country, an appeal, even to the Court of Appeal, requires permission and permission will be granted (see CPR r.52.6) only if the appeal would have a real prospect of success or there is some other compelling reason why permission to appeal should be granted. In such a system as Egypt, the scope for litigation to take longer would seem to be inevitable. I appreciate that a stay on enforcement of a judgment in the Claimant's favour might not be inevitable if there was an appeal to the Court of Cassation, but neither could that possibility be excluded.

v) To a significant extent the Claimant's losses have been experienced in England.

vi) I must decide this issue (and indeed the applications generally) on the evidence before me. While Ms Kinsler is right that I have no evidence of the deficiency in the powers of Egyptian courts to deal with inequality of arms, there is no evidence either that the criminal file would be more difficult to obtain (so far as its contents may be relevant) if the claims were litigated in England.

vii) I accept that these days the location of documents is a matter of minor importance. They can be relatively easily conveyed by one means or another across the globe.

viii) The location of witnesses is a different matter. Ms Kinsler accepted that the circumstances of the accident itself are unlikely to be contentious, given that the driver has been convicted. She has referred in general terms to potential witnesses which LLC may wish to call on the issue of whether LLC had sufficient powers of supervision to be responsible for the torts of the driver, but there is a dearth of evidence as to who these witnesses might be or what

they might say. On the other hand, it is apparent from the DPOC and the DAPOC that Lady Brownlie will need to give evidence of her own injuries and their effect on her. The DAPOC refers to a medical legal report from a Mr HS Dabis. It is also apparent that, in support of the dependency claim, evidence will or may be necessary as to Sir Ian's likely earnings. A schedule of those losses was (apparently) attached to the DPOC. As Tugendhat J. said at [124],

> 'That may require evidence from persons with knowledge of Sir Ian's professional practice as an international arbitrator, and of his health [I interpose Sir Ian was, after all, 77 at the time of his death]. Such persons are likely to be in England'.

Thus, even if Ms Kinsler is right and this would not be exclusively a quantum claim, the material before me as to witnesses, favours a trial in England.

I make it clear, that I have not otherwise relied on Tugendhat J's conclusion as to *forum conveniens*. LLC was not party to the hearing before him and the position has moved on somewhat since he was considering the appeal from Master Cook. I note, for instance, that at [125] Tugendhat J. said that Egyptian law was not likely to apply. It is now agreed that it will in respect of all of the Claimant's claims.

ix) Where there are disputes as to jurisdiction, it will be common for the parties to be of different nationalities and sometimes to speak different languages. That said, it is of some significance in this case, as Mr Ross submitted, that the brochure which prompted Lady Brownlie's booking was in English, her conversation with the Concierge in which she booked the excursion was in English. The guide spoke English. In *Wink v Croatia Osiguranje D.D.* [2013] EWHC 1118 (QB) the Claimant had been injured while on holiday in Croatia. One of the factors taken into account by Haddon-Cave J. was that,

> 'a trial in England would substantially reduce the need for translation and interpretation of evidence which would be required if the trial were to take place in Croatia'

On the evidence here the same might be said in this case if the trial was to take place in England rather than in Egypt.

x) I have not relied on Mr Ross's submissions as to the troubled political situation in Egypt. In his first witness statement, Mr Donovan alluded to these. The difficulty though, is that this statement was made on 8th April 2013 and there is little evidence as to the present position. Mr Donovan has made more recent statements, but, so far as I can see, they do not deal with the current political situation in Egypt. In his final oral submissions, Mr Ross referred to a Foreign and Commonwealth travel advisory against travel to Egypt, but there are dangers in relying on such sources of information because they lack precision. In any case they only purport to give a snapshot at a particular time. I also bear in mind that in *Vedanta Resources plc v Lungowe* (above) at [11] Lord Briggs said that,

> 'a conclusion that a foreign jurisdiction would not provide substantial justice risks offending international comity. Such a finding requires cogent evidence, which may properly be subjected to anxious scrutiny.'

xi) The nationality and domicile of the Claimant and her husband at least show that this is not a case of forum shopping (see *Wink* at [58]).

xii) There was no evidence as to the enforceability of an English judgment in Egypt and little in the way of submissions as to the enforceability of an Egyptian judgment in England. Mr Ross, somewhat tentatively suggested that whether an English judgment would or would not be enforceable in Egypt, LLC might be persuaded by others in its corporate family to meet an English judgment. It may be best to regard the enforceability of judgments as a neutral factor.

Summary of conclusions

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.