Michaelmas Term
[2021] UKSC 45
On appeal from: [2020] EWCA Civ 996

JUDGMENT

FS Cairo (Nile Plaza) LLC (Appellant) vLady Brownlie (as Dependant and Executrix of Professor Sir Ian Brownlie CBE QC) (Respondent)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Briggs
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON
20 October 2021

Heard on 13 and 14 January 2021

Appellant
Marie Louise Kinsler QC
Howard Palmer QC
Alistair Mackenzie
Benjamin Phelps
(Instructed by Kennedys Law LLP (London))

Respondent
Sarah Crowther QC
Daniel Clarke
Joshua Cainer
(Instructed by Kingsley Napley LLP)

LORD REED:

1.
This is a sad case with an unfortunate history. It arises out of a road accident in Egypt in January 2010 in which the claimant, Lady Brownlie, was seriously injured, her husband, Sir Ian Brownlie, was killed, Sir Ian's daughter Rebecca was also killed, and Rebecca's two children were injured.

2.
The nature and history of the proceedings are fully explained in the judgments of Lord Lloyd-Jones and Lord Leggatt. In summary, the claimant seeks to recover damages from the operator of the hotel in Egypt which provided the excursion during which the accident occurred. She claims damages pursuant to Egyptian law, both in contract and in tort, first, in her own right, for her personal injuries; secondly, as executrix of Sir Ian's estate and on behalf of the estate and its heirs, for his wrongful death; and thirdly, for dependency for wrongful death.

3.
The claim form was issued in December 2012. Proceedings followed in which the jurisdiction of the English courts was challenged. It ultimately emerged, during the hearing of an appeal to this court, that the claimant had named the wrong company in the Four Seasons group as the defendant, and that the operator of the hotel was FS Cairo (Nile Plaza) LLC, an Egyptian company. The High Court subsequently permitted the claimant to amend the claim form so as to substitute that company as the defendant, and to serve the amended claim form on the defendant in Egypt.

4.
The present appeal raises two issues. The first is whether the claims in tort pass through the gateway in CPR PD 6B, paragraph 3.1(9), on which the claimant relies: that is to say, whether they satisfy the requirement for suing a defendant who is outside the territorial jurisdiction of the English courts that "damage was sustained … within the jurisdiction". The second issue is whether the claims, both in contract and in tort, satisfy the requirement that they must have a reasonable prospect of success. That issue arises because it is common ground that the only claims which can be advanced are those available to the claimant under Egyptian law. The defendants maintain that the claimant must therefore adduce evidence of Egyptian law, whereas she maintains that she can rely on English law, on the basis that is applicable in the absence of satisfactory evidence of foreign law.

5.
In relation to the first issue, concerning the tort gateway, Lord Briggs, Lord Burrows and I agree with the judgment of Lord Lloyd-Jones, rejecting the defendant's contentions. We respectfully differ from the view expressed by Lord Leggatt in his judgment, which dissents on that issue.

6.
In relation to the second issue, concerning foreign law, the court is unanimous in rejecting the defendant's contentions. Lord Lloyd-Jones, Lord Briggs, Lord Burrows and I all agree with the judgment of Lord Leggatt in relation to that issue.

7.
It follows that the court, by a majority of four to one, concludes that the appeal should be dismissed on both issues.

LORD LLOYD-JONES: (with whom Lord Reed, Lord Briggs and Lord Burrows agree)

Factual background

8.
This action arises out of a tragic road traffic accident in Egypt in January 2010.

9.
In March 2009, the claimant, Lady Brownlie, booked a holiday which included a stay at the Four Seasons Hotel Cairo at Nile Plaza ("the hotel"), commencing on 31 December 2009. Prior to departing

from the United Kingdom on 21 December 2009, the claimant made a telephone call direct to the hotel to book an excursion she had seen advertised in a brochure, signed by the hotel concierge which contained the Four Seasons marque and logo, that she had picked up in the hotel during a previous stay there the previous year. She booked a limousine “safari” excursion to Al-Fayoum and certain other desert locations outside Cairo, for the claimant, her husband, Sir Ian Brownlie, his daughter Rebecca, and Rebecca’s two children.

10.
The tour took place on 3 January 2010. There was a guide and a driver. During the tour the vehicle broke down and a replacement car and driver arrived to complete the tour. Towards the end of the tour the vehicle in which the party was travelling left the road and crashed. Sir Ian and Rebecca were killed. The claimant and the two children were seriously injured.

The claims

11.
The proceedings as originally constituted were issued in England on 19 December 2012. The claim form named Four Seasons Holdings Incorporated (“FSHI”), a company incorporated under the law of British Columbia, Canada, as first defendant. Nova Park SAE (“Nova Park”), an Egyptian company, was named as second defendant but, following further enquiries by the claimant’s solicitors, Nova Park was not served with the claim form and took no part in the proceedings. The claimant claimed damages in contract and tort (a) for her own personal injury, (b) in her capacity as her late husband’s executrix under the Law Reform (Miscellaneous Provisions) Act 1934 (“the 1934 Act”), and (c) for bereavement and loss of dependency under the Fatal Accidents Act 1976 (“the 1976 Act”) as Sir Ian’s widow.

12.
The particulars of claim in their original form included pleaded claims in contract and in tort against FSHI. The claimant maintained that the contract for the provision of the excursion into which she had entered was made by FSHI as principal or as agent for an undisclosed and unidentified principal with the result that it was liable to be sued as if it were the principal to the contract. The claimant alleged that the contract was subject to an implied term that the excursion be supplied with reasonable care and skill so as to enable the claimant and her husband to be reasonably safe. The particulars of claim alleged that the accident was caused by the negligence and/or breach of contract of FSHI, its employees, suppliers, sub-contractors, their agents and/or employees. Particulars were provided of the negligence of the driver of the vehicle and of FSHI, its employees, suppliers, sub-contractors, their agents and/or employees. It further alleged a failure to exercise reasonable care and skill with respect to the planning, organisation, management and operation of the excursion and a failure to exercise reasonable care and skill to ensure the reasonable safety of the claimant and her husband. Particulars were provided of the claimant’s injury, losses and expenses. The claim form then set out the claims in respect of the death of Sir Ian on behalf of his estate and by the claimant as his dependant.

13.
On 15 April 2013 Master Yoxall granted permission to serve the proceedings out of the jurisdiction on FSHI. So far as the claim was founded on contract the application was based on Practice Direction 6B, paragraph 3.1(6)(a) supplementing CPR Part 6, (“the contract … was made within the jurisdiction”). So far as it was founded on tort, it was based on Practice Direction 6B, paragraph 3.1(9)(a) (“damage was sustained … within the jurisdiction”).

14.

On an application by FSHI under CPR Part 11 to challenge the jurisdiction of the English courts, Master Cook made an order dated 31 July 2013 which set aside the order of Master Yoxall and set aside the claim form and service of it on FSHI.

15.
On the claimant's appeal against the order of Master Cook, Tugendhat J allowed the appeal and, by order dated 27 February 2014, set aside the order of Master Cook, restored the order of Master Yoxall and declared that the court had jurisdiction to try the claims: [2014] EWHC 273 (QB).

16.
On FSHI's appeal against the order of Tugendhat J and by order dated 6 July 2015, the Court of Appeal (Arden, Bean and King LJJ) affirmed the decision of Tugendhat J, save that it held that the court did not have jurisdiction in respect of the claimant's tort claims for personal injury or pursuant to the Law Reform (Miscellaneous Provisions) Act 1934: [2015] EWCA Civ 665; [2016] 1 WLR 1814.

17.
FSHI was granted permission to appeal by the Supreme Court by order dated 14 January 2016. The Supreme Court, by order dated 21 June 2016, also granted the claimant permission to cross-appeal on the issues of jurisdiction to try the tort claims for personal injury and pursuant to the Law Reform (Miscellaneous Provisions) Act 1934. The Supreme Court (Lady Hale, Lord Wilson, Lord Sumption, Lord Hughes and Lord Clarke) heard the appeal on 9 and 10 May 2017 and 20 July 2017.

18.
During the hearing before the Supreme Court it emerged that FSHI was a non-trading holding company which neither owned nor operated the hotel. The Supreme Court, in its judgments handed down on 19 December 2017, ("Brownlie I") allowed FSHI's appeal, holding that the evidence showed that there was no realistic prospect that the claimant would be able to establish at trial that she had contracted with FSHI or that FSHI was liable in negligence, and that therefore the courts of England and Wales had no jurisdiction to try any of the claims against FSHI. The Supreme Court granted the claimant permission to apply to correct the name of the defendant, to substitute or to add a party to the proceedings, and remitted ancillary matters to the High Court. In the judgments handed down on 19 December 2017, the members of the Supreme Court expressed differing obiter views on the meaning of "damage" in Practice Direction 6B, paragraph 3.1(9)(a): [2017] UKSC 80; [2018] 1 WLR 192.

19.
The claimant subsequently applied to substitute FS Cairo (Nile Plaza) LLC, ("the defendant"), a company incorporated under the laws of Egypt, for FSHI, to amend the proceedings and for permission to serve the claim out of the jurisdiction against the defendant. The present appeal concerns the application to serve the reconstituted proceedings out of the jurisdiction.

20.
On 29 October 2018, Foskett J made an order granting the claimant permission to serve her application notice, for orders for the substitution of the defendant and to amend the proceedings, out of the jurisdiction on the defendant.

21.
On 6 February 2019, Stewart J made an order, by consent, giving directions for the hearing of the claimant's applications. The order included a direction for sequential service with the claimant to serve her evidence first and the defendant to serve evidence in response, with the claimant and the

defendant having permission “to rely on expert evidence in writing as to Egyptian law with respect to personal injury and wrongful death claims in contract and tort/delict, including in particular the law of limitation as it applies to such claims”.

22.
By order dated 1 October 2019, Nicol J ordered that the defendant be substituted as defendant, permitted the claimant to add the defendant as a party to the claim and ordered that FSHI cease to be a party. He also granted the claimant permission to amend the claim form and particulars of claim, and declared that the court had jurisdiction to try the claimant’s claims in contract and in tort. He granted the defendant permission to appeal to the Court of Appeal on two grounds: the scope of the tort gateway and the requirement that there be a serious issue to try on the merits: [2019] EWHC 2533 (QB). No permission to appeal was sought concerning the order adding the defendant as a party to the claim. On 14 November 2019 Irwin LJ refused the defendant’s application for permission to appeal on the contract gateway and the approach to forum conveniens.

23.
By order dated 29 July 2020, the Court of Appeal (McCombe, Underhill and Arnold LJJ) affirmed the decision of Nicol J by a majority, Arnold LJ dissenting on both grounds: [2020] EWCA Civ 996; [2021] 2 All ER 605.

24.
The Court of Appeal granted the defendant permission to appeal to the Supreme Court on the scope of the tort gateway and the requirement that there be a serious issue to be tried on the merits. The claimant sought permission, insofar as the issue was not already within the scope of the appeal, to cross-appeal on whether she should be required, as the Court of Appeal ordered, to amend to plead “the content of Egyptian law, including the relevant principles and sources on which she relies and upon which each of her claims are based” in her particulars of claim.

The issues on appeal

25.
For the reasons given at para 29 below, the present proceedings are outside the scope of the Brussels system for determining jurisdiction in civil and commercial matters, so we are concerned with the domestic rules of England and Wales. These require that in order to obtain permission to serve proceedings out of the jurisdiction in a case to which the Brussels system does not apply, a claimant must establish

(1)
a good arguable case that the claims fall within one of the gateways in CPR PD 6B, paragraph 3.1;

(2)
a serious issue to be tried on the merits; and

(3)
that England is the appropriate forum for trial and the court ought to exercise its discretion to permit service out of the jurisdiction.

In the present case Nicol J held that the claimant’s claims in contract passed through the relevant gateway. He also held that England is the most appropriate forum for the trial of all of the claims. There has been no appeal on these issues. Accordingly, issue (1) above is satisfied with regard to the claims in contract and issue (3) is satisfied with regard to all of the claims. However, the defendant

objects that the claims in tort do not pass through the gateway in CPR PD 6B, paragraph 3.1(9) on which the claimant relies.

26.
Following the ruling of the Supreme Court in Brownlie I, the claimant accepts that the only claims she can advance are those which are available to her under Egyptian law and she has amended her claim form and particulars of claim. However, the defendant objects that the amended statements of case do not plead any Egyptian law, the only references to Egyptian law being in generic terms in the prayers of both the amended claim form and the amended particulars of claim. The defendant maintains that, in light of the rule that foreign law is treated as a matter of fact which must be both pleaded and proved, the failure of the claimant to do so means that the claim is fatally flawed and that there is, therefore, no serious issue to be tried on the merits.

27.
The issues on this appeal are therefore as follows:

(1)
In relation to the claims in tort, namely

(a)
a claim for damages for personal injury in her own right;

(b)
a claim for damages in her capacity as executrix of the estate of her late husband for wrongful death; and

(c)
a claim for damages for bereavement and loss of dependency in her capacity as her late husband’s widow;

whether the claimant has established that the jurisdictional gateway at CPR PD 6B paragraph 3.1(9)(a) is satisfied in respect of those claims.

(2)
Whether the claimant has established that she has reasonable prospects of success in respect of her claims:

(a)
In contract; and

(b)
In tort.

Issue 1: The tort gateway

28.
In the present case we are concerned directly with what may be described as the domestic rules in England and Wales relating to service of civil proceedings on a defendant out of the jurisdiction. These rules are now set out in the Civil Procedure Rules and Practice Directions made under them and were previously to be found in the Rules of the Supreme Court. These rules require the claim to pass through one of a number of statutory gateways and, in addition, require that there should be shown to be a serious issue to be tried and that this is the proper place to bring the claim. The inquiry

as to the proper place to bring the claim is referred to as forum non conveniens. This requirement is reflected in CPR rule 6.37(3) and the applicable principles are stated by Lord Goff in Spiliada Maritime Corpn v Cansulex Ltd[1987] AC 460.

29.
In recent decades this system has operated in this jurisdiction in parallel to an EU system relating to civil jurisdiction and judgments established originally by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Brussels Convention") to which the United Kingdom acceded in 1978 and found more recently in Council Regulation (EC) No 44/2001 ("Brussels Regulation I") and Parliament and Council Regulation (EU) No 1215/2012 ("the Brussels Recast Regulation"). Under the Brussels system the general rule is that a defendant domiciled in a member state of the European Union is to be sued in the state of his domicile, but this is subject to a series of limited exceptions in cases of "special jurisdiction". Following the withdrawal of the United Kingdom from the European Union, the Brussels system no longer applies in this jurisdiction. The present proceedings are in any event outside the scope of the Brussels system because the defendant is not domiciled in a member state of the European Union. It will, however, be necessary to refer at various points to the Brussels system by way of comparison.

30.
CPR rules 6.36 and 6.37 provide in relevant part:

"Service of the claim form where the permission of the court is required 6.36. In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."

"Application for permission to serve the claim form out of the jurisdiction 6.37 … (3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."

CPR PD 6B paragraph 3.1(9) provides:

"Service out of the jurisdiction where permission is required. 3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where -

…

Claims in tort

(9) A claim is made in tort where -

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

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

In the present case the issue is whether each of the tort claims advanced is a claim where damage was sustained within the jurisdiction. It is common ground between the parties that sub-paragraph (b) cannot apply as the relevant conduct - the "act committed" - occurred entirely in Egypt and not in England.

31.

The claimant must show a “good arguable case” that the claim enters one of the jurisdictional gateways (Vitkovice Horni A Hutni Tezirstvo v Korner[1951] AC 869, 880 per Lord Simonds; Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran[1994] 1 AC 438, 453 per Lord Goff of Chieveley).

32.
In the present case there are no factual disputes bearing on the applicability of sub-paragraph 9(a). This ground of appeal turns on the question of law as to the breadth of the gateway.

33.
On behalf of the defendant it is submitted that the tort ground in sub-paragraph (a) does not apply to the claimant’s claims as it only applies to found jurisdiction where initial or direct damage was sustained in England and Wales. In particular, it does not extend to any further consequences that the claimant may suffer as a result of the initial damage. The defendant submits that in the specific context of a road traffic accident, causing personal injury or death resulting from personal injury, the initial or direct damage is that sustained by the injured person at the time and place of the accident, ie, when the tortfeasor physically harms the injured person. On that basis it is submitted that the ground does not apply to claims arising from road traffic accidents which occurred outside England and Wales. The defendant submits that this construction is clear when the relevant words are read in the context of the legislative scheme and purpose of the jurisdictional grounds and in the light of the legislative history of this particular ground.

34.
On behalf of the claimant it is submitted that the narrow reading of the sub-paragraph for which the defendant contends lacks any basis and would represent a significant change in the law. Relying on the decision of the Court of Appeal in Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc [1990] 1 QB 391, it is submitted that the relevant gateway is not qualified in the manner suggested by the defendant and that what is required is that some significant damage is sustained in England and Wales. Damage in the form of pain, suffering and loss of amenity resulting from personal injury, it is submitted, is not sustained at a single point in time when the injury is initially suffered or when a legal cause of action is completed but extends to the continuing damage suffered thereafter.

Domestic and EU systems

35.
Before addressing these submissions in detail, it is necessary to say something about the evolution of the domestic rule and its relationship to the Brussels system. Before the Civil Jurisdiction and Judgments Act 1982 (“the 1982 Act”) came into force, the Rules of the Supreme Court Order 11, rule 1(1)(h) had permitted service out of the jurisdiction “if the action begun by the writ is founded on a tort committed within the jurisdiction”. The Rules of the Supreme Court (Amendment No 2) 1983 (SI 1983/1181 (L21)) amended this rule, with effect from the date when the 1982 Act came into force, to apply to cases where “the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction” (RSC Order 11, rule 1(1)(f)). This change is likely to have been prompted by the fact that under the Brussels Convention, to which the United Kingdom acceded in 1978 and which was given effect in domestic law within the United Kingdom by the 1982 Act, article 5(3) created a rule of special jurisdiction that a person domiciled in a contracting state could be sued in another contracting state in matters relating to tort, delict or quasi-delict “in the courts for the place where the harmful event occurred”. This rule was subsequently set out in article 5(3) of the Brussels Regulation I and it now appears in article 7(2) of the Brussels Recast Regulation. In

Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA (Case C-21/76) [EU:C:1976:166]; [1978] QB 708, the European Court of Justice had held that article 5(3) should be read as referring to both the place where the tortious act occurred and the place where the damage occurred, where they are not identical. As a result, where the River Rhine was polluted in France and damage occurred downstream in the Netherlands, the claimant had the option of suing the tortfeasor in the courts of either state. It is likely that the amendment to the RSC to widen the tort gateway was effected because it was appreciated that it would otherwise have been narrower than the head of special jurisdiction in article 5(3) of the Brussels Convention.

36.
In Metall und Rohstoff, the claimants sought permission to serve out of the jurisdiction proceedings alleging, inter alia, torts of conspiracy and inducing breach of contract. The Court of Appeal referred (at p 437) to the change to rule 1(1)(f) which it said was in order to give effect to the Brussels Convention and the decision in Bier. The Court of Appeal considered that under the domestic rule jurisdiction might be assumed only where the claim was founded on a tort and either the damage was sustained within the jurisdiction or the damage resulted from an act committed within the jurisdiction. The first limb raised the question of what damage was referred to. It had been submitted for one of the defendants that since the draftsman had used the definite article and had not simply referred to "damage", it was necessary that all the damage should have been sustained within the jurisdiction. The court rejected the submission. It was not supported by authority and could lead to an absurd result if there were no one place in which all the claimant's damage had been suffered. In the court's view it was enough if some significant damage had been sustained in England.

37.
It is convenient to refer at this point to the decision of the Court of Justice in Netherlands vRüffer (Case C-814/79) [1980] ECR I-3807. In that case a barge, allegedly sunk by the negligence of its German domiciled owner, in a collision in the Ems estuary at a point which was deemed to be in Germany, was recovered and then disposed of by the Dutch State in the Netherlands. The Dutch State sought to recover its loss in the Dutch courts on the basis that the harmful event had occurred in the Netherlands. It is hardly surprising that Advocate General Warner rejected this submission, explaining that Bier did not support the contention that the place where the harmful event occurred could be the place where the plaintiff company had its seat or the place where the amount of the damage to its business was quantified. If the place where the plaintiff had its seat could be regarded as the place where the harmful event occurred, this would be tantamount to holding that under the Brussels Convention a plaintiff in tort had the option of suing in the courts of his own domicile, which was inconsistent with the scheme of article 2 of the Brussels Convention. Furthermore, the sale of the wreck was not a harmful event but a means of mitigating the damage which had been suffered.

38.
In Societe Commerciale de Reassurance v Eras International Ltd (The Eras Eil Actions) [1992] 1 Lloyd's Rep 570, a case on the domestic rules of jurisdiction concerning the financial consequences of a tort which itself was wholly economic in nature, Mustill LJ, delivering the judgment of the Court of Appeal, considered the reasoning of the Advocate General in Rüffer to be unanswerable and observed that it could have been applied to that case if the claimants had been basing their claim solely on the situs of the head office of their group. In the Eras Eil Actions, however, the claim to jurisdiction was not founded simply on the situs of the claimants. Mustill LJ went on to observe that the claimants could say more than that, for the damage of which they complained was their exposure to claims which were being pursued in England and if successful would result in judgments in England

enforceable in England. In the court's view (at p 591) "in a real sense this amounts to the suffering of damage in England". I consider that the court was justified in taking this wider view of damage and in addressing where in a real sense the damage was suffered. Moreover, it is significant that the Court of Appeal did not concentrate its attention on the place where the cause of action was completed.

39.
When the Rules of the Supreme Court were replaced by the Civil Procedure Rules in 2000, the equivalent rule to RSC Order 11, rule 1(1)(f) was CPR rule 6.20(8) which permitted service out of the jurisdiction with the permission of the court if:

"... a claim is made in tort, where -

(a) damage was sustained within the jurisdiction; or

(b) the damage sustained resulted from an act committed within the jurisdiction; ..." (The Civil Procedure (Amendment) Rules 2000, 2000 No 221 (L1) Schedule 1)

The omission of the definite article in sub-paragraph (a) was, no doubt, intended to reflect the decision in Metall und Rohstoff. The definite article is also omitted in the present formulation of the rule which now appears in the Practice Direction 6B to CPR rule 6 (set out at para 30 above).

40.
More recently the case law of the Court of Justice in Luxembourg has restricted the notion of the place where the damage occurred under article 5(3) of the Brussels Convention (subsequently article 5(3) of Brussels Regulation I and article 7(2) of the Brussels Recast Regulation). In Dumez France SA v Hessische Landesbank (Case C-220/88) [1990] ECR I-49 it limited the concept to the place where damage was suffered by the primary and not a secondary victim. In Marinari v Lloyds Bank plc (Zubaidi Trading Co, Intervener) (Case C-364/94) [1996] QB 217 the Court of Justice limited it further by restricting special jurisdiction to the place where the immediate damage, as opposed to consequential damage, occurred.

41.
In Dumez France SA v Hessische Landesbank French companies sought to establish in proceedings in France quasi-delictual liability in respect of damage they claimed to have suffered owing to the insolvency of their German subsidiaries brought about by the cancellation by German banks of loans intended to finance a property development project. The French claimants argued that the place where the harmful event occurred was the place where their interests were adversely affected; the financial loss which they suffered following the insolvency of their subsidiaries in Germany was the place of their registered offices in France. In rejecting the submission, the Court of Justice considered that the damage alleged was no more than the indirect consequence of the harm initially suffered by other legal persons who were the direct victims of damage, and that the expression "place where the damage occurred" in Bier did not refer to the place where the indirect victims of the damage suffer the repercussions on their own assets. The Court of Justice drew attention to the general rule in article 2 of the Brussels Convention that the courts of the state of the defendant's domicile would have jurisdiction and to "the hostility of the Convention towards the attribution of jurisdiction to the courts of the plaintiff's domicile" as demonstrated by article 3. It was only by way of exception to the general rule that special jurisdiction was allowed in certain cases, including that envisaged by article 5(3). The Court of Justice emphasised that those cases of special jurisdiction, the choice of which was a matter for the plaintiff, are based on the existence of a particularly close connecting factor between the dispute and courts other than those of the state of the defendant's domicile. It explained that, in

order to promote recognition and enforcement of judgments in other states, it was necessary to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions. Accordingly, the concept of the place where the damage occurred could be understood only as indicating “the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event”.

42.
In Marinari v Lloyds Bank plc the claimant had lodged promissory notes with the bank in Manchester. The bank was suspicious and informed the police and, as a result, the claimant was arrested and the notes sequestrated. The claimant brought proceedings in Italy alleging financial and reputational loss. The bank objected that the Italian court lacked jurisdiction because the damage relied on as founding jurisdiction had occurred in England. The Grand Chamber reiterated its previous statements in Bier and Dumez that this head of special jurisdiction is exceptional in nature and is based on the existence of a particularly close connecting factor between the dispute and the courts other than those of the state of the defendant’s domicile. Article 5(3) could not be construed “so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere”. It could not be construed as including the place where the claimant claimed to have suffered financial damage consequential upon initial damage arising and suffered by him in another member state. In this way the Grand Chamber distinguished between direct and indirect damage.

43.
Within the Brussels system, the distinction between direct and indirect damage is, however, sometimes elusive. The approach of the Court of Justice to financial losses allegedly caused by acting on negligent professional advice has varied. In Kolassa v Barclays Bank Plc (Case C-375/13) EU:C:2015:37; [2016] 1 All ER (Comm) 733, the court accepted that “[t]he courts where the claimant is domiciled have jurisdiction [under article 5(3)] on the basis of the place where the loss occurred … in particular when that loss occurred itself directly in the applicant’s bank account held with a bank established within the area of jurisdiction of those courts” (at paras 55, 57). However, in Universal Music International Holding BV v Schilling (Case C-12/15) EU:C:2016:449; [2016] QB 967, where it was alleged that a negligently drafted share purchase option had substantially increased the price payable, the Court of Justice held that the damage occurred in the Czech Republic where the contract was negotiated and entered into and where the damage became certain as a result of the compromise of an arbitration between the parties to the contract (paras 30, 31). It considered that “purely financial damage which occurs directly in the applicant’s bank account cannot, in itself, be qualified as a ‘relevant connecting factor’, pursuant to article 5(3)” and distinguished Kolassa on the basis that that decision was made “within the specific context of the case which gave rise to that judgment, a distinctive feature of which was the existence of circumstances contributing to attributing jurisdiction to those courts” (para 37). (See Adrian Briggs, “Holiday Torts and Damage within the Jurisdiction” [2018] LMCLQ 196, p 199; cf ABCI(formerly Arab Business Consortium International Finance and Investment Cov Banque Franco-Tunsienne[2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep 146, para 44 per Mance LJ, cited at para 72 below.)

44.
In Verein für Konsumenteninformation v Volkswagen AG (Case C-343/19) [2021] 1 WLR 40 the Court of Justice distinguished Dumez and Marinari. The claimant association sued Volkswagen in Austria in tort, delict or quasi-delict on behalf of persons who had purchased in Austria motor cars

manufactured by Volkswagen in Germany which were alleged to have been fitted with a device which falsified the emissions readings. On a preliminary reference on the issue of jurisdiction under article 7(2) of the Brussels Recast Regulation, the Court of Justice noted that the damage alleged took the form of a loss in value of the vehicles stemming from the difference between the price paid and their actual value owing to the installation of the device. The court considered (at paras 30-35) that while those vehicles became defective as soon as that software had been installed, the damage asserted occurred only when those vehicles were purchased, as they were acquired for a price higher than their actual value. Such damage constituted initial damage and not an indirect consequence of the harm initially suffered by other persons. Moreover, such damage was not purely financial damage but material damage stemming from the fact that the purchaser received a defective vehicle. In the court's view the damage suffered by the final purchaser was neither indirect nor purely financial and occurred when the vehicle was purchased in Austria. Similarly, in Tibor-Trans Fuvarozó és Kereskedelmi Kft v DAF Trucks NV (Case C-451/18) the Court of Justice held (at para 31) that the damage suffered by a Hungarian indirect purchaser of trucks, as a result of an infringement of article 101 TFEU by a cartel of manufacturers, was not merely a financial consequence of the damage that would be suffered by direct purchasers, such as dealerships, but was the immediate consequence of the infringement and was therefore direct damage within article 7(2).

Brownlie I

45.
It is an unusual feature of the present appeal that in Brownlie I the Supreme Court has already considered the precise issue with which we are now concerned in the context of the same litigation. The decision of the court in that earlier appeal was that there was no realistic prospect that the claimant would be able to succeed at trial against FSHI, which was at that time the defendant, and that accordingly the claim had no reasonable prospect of success. As a result, what was said on this issue in Brownlie I was entirely obiter, a fact stressed by the members of the court. Nevertheless, the present issue was addressed in considerable detail in the judgments delivered and, entirely understandably, the views expressed featured prominently in the submissions made on the present appeal.

46.
The members of the court in Brownlie I were in agreement in rejecting an argument based on the analogy of Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ("the Rome II Regulation"). Article 4 provides that the applicable law shall be "the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred". Although it draws a distinction between direct and indirect damage, the Rome II Regulation is concerned with choice of law not with jurisdiction. The two issues are distinct and are not analogous. There can only be one applicable law, whereas under both the Brussels system and under our domestic rules there can be more than one appropriate jurisdiction. The members of the Supreme Court in Brownlie I were clearly correct in rejecting the suggested analogy.

47.
That, however, was the full extent of the agreement in Brownlie I on the breadth of the tort gateway. The majority (Lady Hale, Lord Wilson and Lord Clarke) considered that the word "damage" in paragraph 3.1(9)(a) was intended to bear its natural and ordinary meaning and that in the case of personal injury or wrongful death that extended to actionable harm caused by the tortious act alleged, including all the bodily and consequential financial effects, which a claimant suffers as a result of the

tortious conduct. In coming to this view, the majority rejected a narrower reading which sought to distinguish between direct and indirect damage, founded on the nature of a cause of action in tort or on the relationship of the tort gateway to the special jurisdiction in tort within the Brussels system. Furthermore, the majority considered that its reading would not permit claimants to bring proceedings wherever they chose. There remained a requirement that there should be a substantial connection between the claim and this jurisdiction and that would be protected by the exercise of judicial discretion. In a dissenting judgment, with which Lord Hughes agreed, Lord Sumption considered that “damage” in paragraph 3.1(9)(a) means direct damage. A number of different lines of reasoning led him to this conclusion, in particular (1) the nature of the duty broken in a personal injury action and the character of the damage recoverable for the breach, (2) what he considered to be the deliberate assimilation of the domestic rule in relation to tort claims to the corresponding head of special jurisdiction in the Brussels system, and (3) the need to identify some substantial and not merely casual or adventitious link between the cause of action and this jurisdiction.

Damage

48.
In support of his view that “damage” in paragraph 3.1(9)(a) is limited to direct damage, Lord Sumption considered (at para 23) that there is a fundamental difference between the damage done to an interest protected by law and facts which are merely evidence of the financial value of that damage. The law of tort is primarily concerned with non-pecuniary interests such as bodily integrity, physical property and reputation and, save in limited cases, does not protect pecuniary interests as such. Where the interest in bodily integrity is deliberately or negligently injured, the tort is complete at the time of injury, notwithstanding that damage is an essential element of it. In this regard he pointed to the requirement that all the damage flowing from bodily injury or damage to property must be claimed in one action which may be brought as soon as the claimant has been injured or his or her property damaged and to the fact that, although damage is an essential element of a cause of action in tort, the limitation period in respect of any damage flowing from the breach will run from that time. While Lord Sumption accepted that “damage” as that word is used in the rule is not necessarily limited to the damage which serves to complete a cause of action in tort, he maintained that the two concepts are clearly related. In his view “damage” within the rule does not extend to the financial or physical consequences of that damage.

49.
To my mind, this approach is unduly restrictive. We are concerned here not with the completion of a cause of action in tort, a matter of substantive law, but with the scope of a jurisdictional rule which is intended to identify the appropriate forum for the adjudication of the resulting claim. In my view there is no justification in principle or in practice, for limiting “damage” in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed. First, while damage is an essential element of many torts including negligence, many other torts, including trespass to the person and trespass to goods, are actionable per se, without proof of damage. There is therefore no warrant for reading paragraph 3.1(9)(a), which is a rule of general application to claims in tort, in such a restrictive way.

50.
Secondly, even in the case of those torts where actionability is conditional on proof of damage, the suggested link between damage completing a cause of action and the identification of an appropriate jurisdiction is unconvincing. In Distillers Co (Biochemicals) Ltd v Thompson[1971] AC 458, Distillers

had manufactured and sold in England to an Australian company a drug containing thalidomide without warning as to its harmful effect on an unborn child. The claimant's mother, when pregnant, purchased and consumed the drug in New South Wales and the claimant was born with disabilities. Section 18(4) of the Common Law Procedure Act, New South Wales (SI 1899/21) permitted a judge, in a case of non-appearance of the defendant, to enter judgment if satisfied "that there is a cause of action which arose within the jurisdiction". In considering within this jurisdictional context where the cause of action arose, the Judicial Committee of the Privy Council on an appeal from the Supreme Court of New South Wales, having rejected a submission that every ingredient of a cause of action must have occurred within the jurisdiction, continued (at p 467E-G):

"No (ii) of the three possible theories - viz, that it is necessary and sufficient that the last ingredient of the cause of action, the event which completes it and brings it into being, has occurred within the jurisdiction - seems to their Lordships to be wrong as a theory. The last event might happen in a particular case to be the determining factor on its own merits, by reason of its inherent importance, but not because it is the last event. Decisions under statutes of limitation are not applicable. The question in that context being when did the cause of action accrue so that the plaintiff became able to sue, the answer is that the cause of action accrued when it became complete, as the plaintiff could not sue before then. But when the question is which country's courts should have jurisdiction to try the action, the approach should be different: the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor."

The Privy Council in Distillers concluded that, in the context of the applicable legislation, the correct approach was, when the tort was complete, to look back over the series of events constituting it and ask the question where in substance did the cause of action arise (at p 468E). The importance of the decision for present purposes is that, notwithstanding that in Distillers the statute expressly founded jurisdiction on where the cause of action arose, the Privy Council rejected as wrong in law an approach based on where the act which completed the cause of action occurred.

51.
Thirdly, damage is likely to be relevant to the identification of an appropriate jurisdiction for the adjudication of a claim in tort not because it may complete a cause of action but, more generally, because the damage actually suffered by the victim may, depending on all the circumstances of the case, serve to link the wrongdoing to a particular jurisdiction. In my view, therefore, there is no reason to read "damage" in paragraph 3.1(9)(a) as limited to the damage which violates the claimant's right and which completes the cause of action. On the contrary, the word in its ordinary and natural meaning and when considered in the light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link a tort to the jurisdiction where such damage is suffered. Moreover, this reading is supported by the omission of the definite article in the current article of the rule, an amendment which was intended to reflect the decision in Metall und Rohstoff that it is sufficient that some significant damage has been sustained in the jurisdiction. (See Brownlie I per Lord Wilson at para 64, per Lord Clarke at para 68.)

The analogy of article 5(3)/7(2)

52.
A second line of argument favoured by the minority in Brownlie I is founded on the history of the tort gateway and its relationship with the special jurisdiction created by article 5(3) of the Brussels Convention (subsequently article 5(3) of Brussels Regulation I and article 7(2) of the Brussels Recast

Regulation) whereby a person domiciled in a contracting state could be sued in another contracting state in matters relating to tort, delict or quasi-delict “in the courts for the place where the harmful event occurred”.

53.
I am unable to agree with Lord Sumption’s statement in Brownlie I that:

“in its current form, the jurisdictional gateway in the English rules for claims in tort was deliberately drafted so as to assimilate the tests for asserting jurisdiction over persons domiciled in an EU member state and persons domiciled elsewhere.” (para 30)

While there are general statements in a number of cases in this jurisdiction to the effect that the addition of the reference to damage sustained was intended to give effect to article 5(2) of the Brussels Convention as interpreted by the Court of Justice in Bier (see Metall und Rohstoff at p 437A, B-D; the Eras Eil Actions [1992] 1 Lloyd’s Rep 570, 589; ABCI v Banque Franco-Tunisienne[2003] EWCA Civ 205, para 41), this is to my mind an over-generalisation.

54.
As I have explained, the amendment to the domestic rule in respect of tort claims substituted for a jurisdictional gateway applicable where a tort was committed within the jurisdiction a gateway applicable where “the damage was sustained or resulted from an act committed within the jurisdiction”. This amendment occurred at the same time as the introduction into our domestic law of the parallel but distinct Brussels system applicable in relation to cases where the defendant was domiciled in an EU member state. It seems clear that it was appreciated at that time that it was necessary to amend the domestic rule for tort cases in this way, for otherwise the exceptional special jurisdiction in tort in the Brussels system would have been wider than the domestic tort gateway. The intention was to widen the domestic gateway so as to encompass the cases covered by the Brussels Convention. (See Brownlie I per Lady Hale at para 50; per Lord Wilson at paras 61, 63.) However, it does not follow that what was effected at that time was an assimilation of the two tests. Had that been the intention, it could have been achieved by the use of the same terminology; in fact the language employed in the amended rule was and has remained very different from that of the Brussels Convention. Nor is there any basis for an assumption that, following the amendment to the RSC, the domestic gateway was thereafter to be tied to EU law on the scope of article 5(3) as that was developed by later decisions of the Court of Justice. In this regard it is highly significant that the decisions of the Court of Justice in Dumez and Marinari, which restricted the scope of the special jurisdiction in tort under the Brussels system, were made some years after the amendment of the domestic rule.

55.
On the contrary, fundamental differences between the two systems would have made such an assimilation totally inappropriate. The Brussels system seeks to facilitate the free movement of judgments by providing for a clear and certain attribution of jurisdiction (Marinari at para 40). To that end, it establishes in article 2 a basic rule that a defendant domiciled in an EU state should be sued in its state of domicile. Heads of special jurisdiction, including the tort head, are limited exceptions and are to be interpreted narrowly in order to protect the basic rule in article 2 and to avoid a proliferation of possible jurisdictions which might pose a threat to the enforceability of judgments. These points are emphasised in decisions of the Court of Justice such as Dumez and Marinari and the results of those cases have to be read in this light. There is no corresponding reason to approach the gateways of the domestic law test in such a restrictive way. Furthermore, the allocation of jurisdiction

under the Brussels system is mandatory and notions of discretion and forum non conveniens play no part (Owusu v Jackson [2005] ECR I-01383; cf Verein für Konsumenteninformation v Volkswagen AG (Case C-343/19), para 38; Tibor-Trans Fuvarozó és Kereskedelmi Kft v DAF Trucks NV (Case C-451/18), para 31). By contrast, within our domestic system the requirement of passing through one of the jurisdictional gateways is only one element of the test to be satisfied; in addition it must be demonstrated that England and Wales is the proper place in which to bring the claim and forum non conveniens and discretion play a vital part in the decision as to whether to accept jurisdiction. Within the Brussels system the notion of direct damage, as developed by the Court of Justice in Dumez and Marinari is an autonomous EU law concept which determines whether the particular kind of loss sustained has sufficient connection to displace the article 2 general rule. Within our domestic system the function of determining whether this is the appropriate jurisdiction is not performed simply by the breadth of the gateway but in addition by the forum non conveniens discretion. There is, therefore, no sound basis for seeking to assimilate the limited, exceptional jurisdiction under article 5(3)/7(2) of the Brussels system with the tort gateway in our domestic system. In particular, the scope of the exceptional special jurisdiction under the Brussels system cannot be the defining consideration for the scope of the tort gateway in our domestic system.

56.
Furthermore, it seems clear that special jurisdiction in cases of tort under article 5(3)/7(2) is narrower, in at least one important respect, than under the tort gateway in paragraph 3(1)(9)(a) of Practice Direction 6B. It follows from Marinari that in the Brussels system if damage is sustained in the place where the causal act took place, there will not be jurisdiction in the courts of a second state even if significant further damage was sustained there. Professor Adrian Briggs explains in “Holiday Torts and Damage within the Jurisdiction” [2018] LMCLQ 196, 199:

“The imperative to try to concentrate the jurisdictionally significant damage in one place is driven by the need to confine special jurisdiction to its properly subordinate place within the overall scheme of the Regulation.”

Our domestic system is not subject to any such constraint. As Lord Wilson pointed out in Brownlie I (at para 63), Marinari is inconsistent with the decision of the Court of Appeal in Metall und Rohstoff and demonstrates that our domestic rules create a gateway potentially wider than the Brussels system would permit.

Authorities

57.
The wider reading of the tort gateway which was adopted by the majority in Brownlie I, is supported by a line of first instance decisions in personal injury cases. In Booth v Phillips[2004] EWHC 1437 (Comm); [2004] 1 WLR 3292 the claimant’s husband died while working as chief engineer on board a vessel in Egypt. She brought proceedings in negligence in England in her own right for the loss of her dependency and as executrix of her husband’s estate for funeral expenses against, inter alia, the owners and managers of the vessel. Mr Nigel Teare QC refused an application to set aside service out of the jurisdiction, rejecting a submission that “damage” in the rule referred to damage which completes the cause of action in tort and that that damage was the death of the claimant’s husband which had occurred in Egypt. In the judge’s view the word should be given its ordinary and natural meaning, namely harm which had been sustained by the claimant, whether physical or economic. Furthermore, the absence of the definite article in what was then CPR rule 6.20(8)(a) suggested that it was sufficient for the purposes of that sub-paragraph that some damage (not all of the damage) was

sustained within the jurisdiction. In the judge's view this was not an improbably wide construction because before jurisdiction was exercised the court had to be satisfied that it was appropriate to exercise that jurisdiction which involved considering whether England was the forum in which the case could most suitably be tried for the interests of all the parties and for the ends of justice (at paras 35-37). The claimant's loss of financial dependency was damage sustained in England where she lived, as were the funeral expenses (at para 44).

58.
In Cooley v Ramsey[2008] EWHC 129 (QB); [2008] IL Pr 27 the claimant was severely disabled as a result of a road accident in New South Wales which, it was not disputed, had been caused by the defendant's negligence. He was repatriated to England. It was the claimant's case that he would remain in need of lifetime care, support and medical attention and that he had no residual earning capacity. He issued proceedings in England against the defendant and obtained permission to serve them out of the jurisdiction. The defendant sought to set aside the order for service out of the jurisdiction, arguing that the reasoning in Booth v Phillips was inconsistent with the cases under article 5(3) of the Brussels I Regulation. Tugendhat J rejected the application. In his view Parliament had not fully assimilated the domestic rules with the Brussels system. The significant difference which had been left in being was that under the Brussels system the court retained no discretion, whereas discretion was retained under the domestic rules. Citing Professor Adrian Briggs, he concluded, at para 36, that "there is no compelling reason to apply this line of Convention and, probably, Regulation authority outside the field of application of the Convention or Regulation itself". The claimant was able to bring his proceedings in England.

59.
Similarly, in Harty v Sabre International Security Ltd (formerly SIS Iraq Ltd)[2011] EWHC 852 (QB) (Macduff J) the claimant who had been injured in a road accident in Iraq was permitted to serve proceedings out of the jurisdiction. On this occasion the relevant argument seems to have been limited to the exercise of the court's discretion.

60.
In Wink v Croatio Osiguranje DD[2013] EWHC 1118 (QB) the claimant, who was domiciled in England, was seriously injured in a road accident while on holiday in Croatia which at that time was not a member of the European Union. Accordingly, the jurisdictional issue was governed by domestic rules and not the Brussels system. Haddon-Cave J rejected a submission that "damage" in gateway 9(a) was limited to direct damage only (at paras 32-35). First, there were no limiting words which would justify such a narrow meaning and exclude indirect damage. The ordinary and natural meaning of "damage" was any damage flowing from the tort. Secondly, the suggested construction was tantamount to saying that damage was sustained only where the injury occurred. However, that was plainly not the case in many instances including that case where the sequelae flowing from the original accident or injury in Croatia continued to be suffered long afterwards in England in the form of substantial pain and suffering and economic loss. Thirdly, he considered that the defendant's submission involved re-writing sub-paragraph 9(a) so as to read "the injury was sustained within the jurisdiction". Moreover, he considered (at para 37) that the fact that a tort may be complete on proof of loss or damage did not mean that jurisdiction could not properly be founded by proof that some of that loss or damage occurred in the jurisdiction in question.

61.
In Stylianou v Toyoshima[2013] EWHC 2188 (QB) the claimant had been repatriated to England after being seriously injured in a road accident in Western Australia. Sir Robert Nelson rejected a

submission that the CPR should be interpreted in accordance with article 4(1) of the Rome II Regulation which had come into force since the decisions in Booth and Cooley. Rome II did not concern jurisdiction and did not override the CPR rule. Furthermore, the Brussels scheme differed from the domestic rules in that the discretion under the CPR as to service out of the jurisdiction was a valuable safety valve and rendered unnecessary a narrow definition of “damage” under the CPR.

62.
Erste Group Bank AG (London Branch) v JSC “VMZ Red October” is not a personal injury case but it may conveniently be considered at this point. At first instance ([2013] EWHC 2926 (Comm); [2014] BPIR 81, paras 141-148) Flaux J rejected a submission that the domestic tort gateway should be construed in accordance with article 5(3) and the case law under that article. In particular he rejected as “hopeless” a submission that Cooley and Wink could be distinguished because the judges in those cases failed to appreciate that when the Rules Committee altered the wording of the gateway it was intending to mirror the meaning and effect of article 5(3) as interpreted by Professor Jenard in his report. In both Cooley and Wink the reason for rejecting the attempt to equate paragraph 3.1(9) with article 5(3) was that the terms of the domestic rule are wider and the English court retains a discretion as to jurisdiction absent from the Brussels Convention. Professor Jenard’s report was only concerned with the position under the Convention. Flaux J agreed with Tugendhat J in Cooley and Haddon-Cave J in Wink that the correct approach to the meaning of paragraph 3.1(9) was that adopted by Mr Teare QC in Booth. On appeal to the Court of Appeal [2015] EWCA Civ 379; [2015] 1 CLC 706, that court observed (at para 103) that but for the string of first instance authorities to the contrary, it would have regarded as very attractive the submission that the tort gateway was intended to reflect the European jurisprudence. It was, however, unnecessary to decide the point.

63.
In Pike v The Indian Hotels Co Ltd[2013] EWHC 4096 (QB) the first claimant brought proceedings in negligence in respect of injuries suffered when he attempted to escape from a terrorist attack on the Taj Mahal Palace hotel in Mumbai. Stewart J considered each of the battery of arguments deployed in previous cases in favour of limiting “damage” in ground 9(a) to direct damage and rejected each in turn.

64.
In Brownlie I Lady Hale surveyed this line of authority in detail and concluded (at para 48) that, despite the increasingly sophisticated arguments made against them, the decisions were correct. I agree. This is an impressive and coherent line of authority. It is founded on a correct appreciation of the essential differences between the Brussels system and the domestic rules of jurisdiction applicable in this country and demonstrates that within the latter system there is no need to adopt an unnaturally narrow meaning of “damage” because concerns as to the possibility of an inappropriate exercise of jurisdiction are met by judicial discretion. In my view, the analogy of EU law has never required or justified the narrow reading of the domestic provision for which the defendant contends.

65.
That “damage” in paragraph 3.1(9)(a) extends to the harm which has been sustained by the claimant is also supported by decisions in other common law jurisdictions.

66.
In Flaherty v Girgis(1985) 63 ALR 466, the claimant, a resident of New South Wales, was injured in a road accident in Queensland. She was treated in Queensland and in New South Wales. She brought proceedings in New South Wales which were served on the defendant in Queensland. The applicable

rule permitted service outside the state “where the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring”. On behalf of the defendant it was submitted that “damage” within the rule was limited to the immediate consequences of the proposed defendant’s tort, ie, the immediate physical injuries and losses which occurred in Queensland as distinct from the longer term physical and financial consequences which occurred in New South Wales. It was further submitted that “damage” within the rule was limited to that damage which constituted the necessary element in the cause of action in tort which, once established in another jurisdiction, rendered the rule inoperative in respect of damage and losses additionally suffered in New South Wales. The Supreme Court of New South Wales, Court of Appeal (Kirby P, Samuels and McHugh JJA) rejected these submissions. McHugh JA, with whom the other members of the court agreed on this issue, observed (at p 482):

“In Crofter Handwoven Harris Tweed Co v Veitch[1942] AC 435 at 442 Viscount Simon LC pointed out that ‘“injury” is limited to actionable wrong, while “damage”, in contrast with injury, means loss or harm occurring in fact, whether actionable as an injury or not’. Damage, therefore, is to be contrasted with the element necessary to complete a cause of action; it includes all the detriment, physical, financial and social which the plaintiff suffers as the result of the tortious conduct of the defendant.”

(See also, to similar effect Challenor v Douglas, Cross J, [1983] 2 NSWLR 405; Skyrotors Ltd v Carriere Technical Industries Ltd(1979) 102 DLR (3d) 323; Vile v Von Wendt(1979) 103 DLR (3d) 356.) Flaherty and the other cases referred to above are decisions from federal jurisdictions, and it is sometimes suggested that different considerations may apply to the allocation of jurisdiction between different jurisdictions within a single State. (See, for example, Spiliada Maritime Corpn v Cansulex Ltd[1987] 1 AC 460 at pp 476H-477A per Lord Goff). In Flaherty, however, Kirby P expressly drew attention (at p 468) to the fact that the rule also contemplated service beyond the Australian Federation in foreign countries. That decision clearly takes account of these potential applications.

67.
In Hong Kong, Order 11 of the Rules of the High Court provides, in terms identical to the pre-2000 English domestic gateway, that permission may be given to serve a writ out of the jurisdiction if “the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction”. The Hong Kong courts have followed Metall und Rohstoff in concluding that, in considering whether damage is sustained in Hong Kong, it is sufficient if some significant damage has been sustained there (Dynasty Line Ltd v Sukamto Sia[2009] HKCA 198, para 33). In Fong Chak Kwan v Ascentic Ltd[2020] HKCFI 679 the claimant had been seriously injured in an industrial accident while working at a site in Ningbo City, Mainland China. Ng J, after examining the authorities in great detail, followed the majority view in Brownlie I. In particular she concluded (at paras 255-260) that the claim was not founded on the mere fact that the claimant was resident in Hong Kong; in her view the claimant had incurred damage, albeit secondary or consequential damage, in Hong Kong. Furthermore, she considered that any concern that a wide interpretation of “damage” would confer a universal jurisdiction to entertain claims by local residents in respect of personal injuries suffered anywhere in the world, was sufficiently addressed by the discretion as to forum non conveniens.

68.
These authorities strongly support the conclusion that in the present case damage was sustained within the jurisdiction within gateway 9(a).

69.

It is convenient to deal at this point with another line of authority which concerns torts resulting in pure economic loss which is not consequent on personal injury or damage to property.

70.
The Eras Eil Actions have been referred to at para 38 above. They concerned a reinsurance pool arrangement operating in the United States which had been set up at the instigation of an English group of companies (Clarksons) and managed by an American group (Howdens). Following a "disastrous outcome", numerous actions were brought in England and Wales against Clarksons which, in turn, sought to make claims over against Howdens by separate writs issued in this jurisdiction which they sought to serve in the United States. Clarksons maintained that they had suffered damage in their pocket in London and that therefore damage had been sustained in England and Wales. Mustill LJ considered (at p 590) that the conclusion in Bier was precisely in accord with the provisions of our rules of court "but advances the present controversy not at all since it is not concerned with the financial consequences of a tort which itself is wholly economic in nature". As we have seen, he further considered that the reasoning of Advocate General Warner in Rüffer was unanswerable and that, for the same reasons, had Clarksons' claim been based solely on the situs of the head office of their group, there would have been no jurisdiction under the domestic tort gateway. However, their claim was not so limited. The damage for which Clarksons claimed was their exposure to claims by reinsurers which were being pursued in England and Wales and which, if successful, would result in judgments enforceable here. That was considered to amount, "in a real sense", to the suffering of damage in England (at p 591). The decision is concerned only with pure economic loss and casts no light on a case like the present where physical and other damage were suffered sequentially first outside and then inside the jurisdiction.

71.
In Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd[1996] CLC 1902 goods exported by the English claimant to Nigeria were not paid for. The claimant sought to amend the proceedings to bring new claims for conversion of or wrongful interference with the consignments or documents against a Nigerian bank. Rix J rejected a submission that the damage had been sustained in England and Wales for the purposes of the domestic tort gateway. He concluded that the damage was sustained in Nigeria where the documents and goods were lost and only the financial consequences were felt in England.

72.
In ABCI the claimants ("ABCI") agreed to buy a proportion of the shares in Banque Franco-Tunisienne ("BFT"). It was alleged that the purchase had been induced by fraudulent misrepresentations which were the result of a conspiracy between BFT and the other defendants to defraud ABCI. The jurisdiction of the courts of England and Wales was challenged on the basis that no relevant act or damage had been sustained in England and Wales. The Court of Appeal considered that the damage had been sustained where the investment had been made and rejected a submission that the claimants could be regarded as having sustained damage within the domestic tort gateway "both in the place where they purported to make or hold a board meeting ratifying the share subscription contract and the place where they made their investment". Mance LJ, applying the approach adopted under the Brussels system, continued:

"In our judgment cl (f) is looking to the direct damage sounding in monetary terms which the wrongful act produced upon the claimant: see Dumez France v Hessische Landesbank (Helaba) (Case C-220/88) [1990] ECR 1-49, cited by Mr Justice Rix in Domicrest at pp 377C-378A) and Mr Justice Rix's own analysis at p 381C of the outcome in the Minster Investments case. In the present case that

means the loss sustained by actually investing in an (allegedly worthless) company, not the entry into of any prior contractual commitment which might or might not have been followed by the making of such an investment before discovery of the inaccuracy of the accounts." (at para 44)

The Court of Appeal held that the damage sustained was caused by the debits from ABCI's foreign bank accounts which had no connection with England and Wales. Once again, this decision is remote from the present case. If, however, the formulation of the test by Mance LJ is appropriate, a matter considered below, in common with McCombe LJ in the Court of Appeal in the present case (at para 47) I cannot see that the various losses suffered by Lady Brownlie in this case are other than "the direct damage sounding in monetary terms which the [allegedly] wrongful act produced upon the claimant".

73.
Similarly, in Eurasia Sports Ltd v Tsai[2018] EWCA Civ 1742; [2018] 1 WLR 6089 the Court of Appeal held that a claim in conspiracy did not satisfy the domestic tort gateway. Floyd LJ considered that in the circumstances of that case damage was to be characterised as the impact of the defendants' failure to meet their monetary obligations by providing security which had been sustained in Malta, the place where the money was to be received. Relying by analogy on Dumez, he stated (at para 21) that the place where the damage was sustained was not simply where the claimant sustained financial loss, but the place "where the event giving rise to the damage directly produces its harmful effects on the person who is the victim of the act". Once again, if this is the appropriate test, it seems to me that in the present case the event giving rise to the damage directly produced its harmful effects on Lady Brownlie in England and Wales.

74.
It is, however, necessary to approach these cases with a degree of caution. First, they proceed on the erroneous assumption that the domestic tort gateway should be interpreted in line with the special rule of tort jurisdiction under the Brussels system and fail to appreciate the fundamental differences between the two systems. Thus, in the Eras Eil Actions (at p 589) Mustill LJ observed that the change in our domestic tort gateway was intended to give effect to the Brussels Convention as interpreted by the European Court in Bier. Similarly, in ABCI v Banque Franco-Tunisienne (at para 41) Mance LJ observed that the domestic rule change in 1987 had been "underpinned by the consideration that, although the present is not in fact a European case, cl 1(f) was introduced in 1987 in order to ensure that English law was consistent with article 5(3) of the Brussels Convention". (See also Bastone & Firminger at p 1912 per Rix J where reliance was placed on Marinari; Eurasia Sports Ltd v Tsai at para 21 per Floyd LJ where reliance was placed on the analogy of Dumez.) The differences between the two systems are important and have increased as the systems have diverged. This line of authority fails to recognise this.

75.
Secondly, as Mustill LJ expressly acknowledged in the Eras EilActions (at p 590), there is an important difference in this regard between physical damage and "the financial consequences of a tort which itself is wholly economic in nature". The nature of pure economic loss creates a need for constraints on the legal consequences of remote effects and can give rise to complex and difficult issues as to where the damage was suffered, calling for a careful analysis of transactions. As a result, the more remote economic repercussions of the causative event will not found jurisdiction. By contrast the tort alleged in the present case is not "wholly economic in nature". The damage sustained by Lady Brownlie in the present case is simply not comparable to that in cases such as the Eras Eil Actions and ABCI.

76.
I would certainly not disagree with the proposition, supported by the economic loss cases, that to hold that the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction. However, this is not such a case. In a case of personal injury or wrongful death “damage” within gateway 9(a) extends, both in its natural and ordinary meaning and on a purposive reading, to the actionable harm caused by the tortious act, including all the bodily and consequential financial effects which the claimant suffers. In this context it is neither necessary nor appropriate to seek to limit the scope of the provision by a restrictive reading or by attempting to distinguish between direct and indirect effects, a distinction which itself can give rise to great difficulty and uncertainty. The damage of which Lady Brownlie complains has, in a very real sense, been sustained by her in this jurisdiction. She has largely endured the pain, suffering and loss of amenity consequent on her own personal injury in this jurisdiction and the financial consequences of her husband’s death have also largely been sustained in this jurisdiction. Furthermore, this does not amount to permitting claimants to bring proceedings wherever they choose, for the additional reason that the requirement of a substantial connection between the claim and this jurisdiction will be protected by the operation of the principle of forum non conveniens, considered in detail below. This approach is not inconsistent with the cases on economic loss considered above.

Discretion

77.
A third objection advanced by Lord Sumption in Brownlie I to the wider reading of “damage” in rule 3.1(9)(a) is that all of the jurisdictional gateways in the Practice Direction are intended to identify some substantial link between the cause of action and England and that this purpose is better served by locating jurisdiction in the place where the relevant interest of the claimant was damaged than by asking where he or she experienced the effects of the damage. In the context of personal injury claims, it is suggested, the latter approach would confer on the English courts what would amount to a universal jurisdiction to entertain claims by English residents for the more serious personal injuries suffered anywhere in the world, a jurisdiction which would be so wide as to conflict with the purpose of the rule. This, however, overlooks the fact that the jurisdictional gateways in the Practice Direction, however wide or narrow, form only one element of the jurisdictional test. Before the court will give permission to serve proceedings out of the jurisdiction, not only must a claim pass through one of the gateways, but it must also be shown that England is the proper place in which to bring the claim. I am unable to agree with the statement of Lord Sumption in Brownlie I (at para 31) that “[t]he discretion as to forum non conveniens authorises the court to decline a jurisdiction which it possesses as a matter of law”. The gateways alone do not confer jurisdiction and the discretionary test must be satisfied before permission to serve out of the jurisdiction will be given. (See CPR rule 6.37(3) set out at para 30 above.) Provided that the discretionary test is correctly applied, there should, therefore, be no danger that the wider reading of “damage” would establish a jurisdiction simply on the basis of the English identity of the claimant or that it would permit foreign defendants to be brought before the English courts in cases where there is no substantial connection between the wrongdoing and the jurisdiction. In this regard the domestic system is markedly different from the Brussels regime which does not possess such a safety valve. As a result, there is no need to adopt an unnaturally restrictive reading of the domestic gateways.

78.

In Brownlie I Lord Sumption suggested (at para 31) that the main determining factor in the exercise of discretion on forum non conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation. While it is correct that practical issues can feature large in the exercise of the discretion, the discretion is not so limited. As Lord Wilson pointed out in Brownlie I (at para 66) the Spiliada criteria are not limited to matters of mere practical convenience. On the contrary, Lord Goff made clear in Spiliada (at p 474E-G) that the Latin tag is something of a misnomer:

“I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However, the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of ‘mere practical convenience’.”

Having considered the leading Scottish authorities he concluded:

“In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word ‘convenience’ and to refer rather, as Lord Dunedin did [in Societe du Gaz de Paris v Societe Anonyme de Navigation ‘Les Armateurs Francais’, 1926 SC (HL) 13, 18] to the appropriate forum.” (Original emphasis)

In applying the principle, the ultimate objective is “to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice” (per Lord Goff at p 480G).

79.
The discretionary test of forum non conveniens, well established in our law, is an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England. Where a claim passes through a qualifying gateway, there remains a burden on the claimant to persuade the court that England and Wales is the proper place in which to bring the claim. Unless that is established, permission to serve out of the jurisdiction will be refused (CPR rule 6.37(3)). In addition - and this is a point to which I attach particular importance - the forum non conveniens principle is not a mere general discretion, the application of which may vary according to the differing subjective views of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structured discretion, the details of which have been refined in the decided cases, in a readily predictable manner.

80.
In the present case it cannot be suggested that the links between the claim and this jurisdiction are merely casual or adventitious. Nicol J, in considering whether England is the proper forum for the litigation of the claimant’s claims, while also considering procedural advantages and disadvantages of the competing jurisdictions, gave weight to the fact that to a significant extent the claimant’s losses had been experienced in England (at para 139(viii)). There has been no appeal against his conclusion that England is the proper place in which to bring the claim, permission to appeal having been refused by the judge and the Court of Appeal.

<u>The scope of gateway 9(a)</u>

81.
For the reasons set out above, I consider that there is no sound reason to limit “damage” in gateway 9(a) to damage which completes a cause of action. Furthermore, I can see no reason to apply within English domestic rules the distinction between direct and indirect damage which has now developed in the Brussels system. To my mind, the word “damage” in paragraph 3.1(9)(a) of Practice Direction 6B simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged. This reading reflects the ordinary and natural meaning of the word and is in accordance with the purpose of the provision and with principle. There is no need to limit its scope to direct as opposed to indirect damage, a distinction which in any event I consider obscure and likely to give rise to difficulty in its application. Furthermore, the Court of Appeal in Metall und Rohstoff was clearly correct in holding that a claimant may suffer damage within the meaning of the domestic tort gateway in more than one place.

82.
The wider reading of damage within the meaning of the tort gateway, which I favour, does not confer on all claimants in personal injury cases a right to bring proceedings in the jurisdiction of their residence. The courts will be astute in ascertaining whether the dispute has its closest connection with this jurisdiction and the principle of forum non conveniens will provide a robust and effective mechanism for ensuring that claims which do not have their closest connection with this jurisdiction will not be accepted here.

83.
In the present case the claimant makes claims under three heads: (1) a claim for damages for personal injury in her own right; (2) a claim for damages in her capacity as executrix of the estate of her late husband for wrongful death; and (3) a claim for damages for bereavement and loss of dependency in her capacity as her late husband’s widow. In my view, all three heads of claim should be considered to relate to actionable harm suffered in the jurisdiction as a result of the wrongful acts alleged and therefore to pass through gateway 9(a). In this regard, I can see no reason to distinguish between the different heads of claim. So far as the first head is concerned, the pain, suffering and physical injury were suffered sequentially, first in Egypt and then in England. As Lady Hale observed in Brownlie I (at para 54), if I am seriously injured in a road accident, the pain, suffering and loss of amenity which I suffer are all part of the same injury and in cases of permanent disability will be with me wherever I am. The damage is in a very real sense sustained in the jurisdiction. This is equally true of the second and third heads of claim. The injury to Sir Ian’s estate and the claimant’s bereavement and loss of dependency can properly be regarded as sustained in this jurisdiction. To employ the language of McHugh JA in Flaherty v Girgis, damage in this context is not confined to the element necessary to complete a cause of action but includes all the detriment, physical, financial and social which the claimant suffers as a result of the tortious conduct of the defendant. Furthermore, as Nicol J has demonstrated, this is the proper jurisdiction in which to bring the claim.

Conclusion on Issue 1

84.
For the reasons set above, I would dismiss the appeal on Issue 1.

Gateway 4A

85.
Finally, in this regard, I should mention that in the course of oral submissions we invited the parties to make further submissions in writing as to whether the claimant could have relied on ground (4A)

(Practice Direction 6B, rule 3.1(4A)) which came into force on 1 October 2015 and which provides that the court may give permission to serve a claim form out of the jurisdiction where:

“A claim is made against the defendant in reliance on one or more of paras (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.”

86.
Following the oral hearing of the appeal we were informed that the claimant does not seek to rely on ground (4A) at this stage of the proceedings. The question whether the claimant would have been able to rely on ground (4A) in her application notice of 17 August 2018 is not before the court and the claimant has refrained from making any submissions on that point. It has not been suggested that the possible application of ground (4A) has any bearing on the issues which arise for consideration on this appeal.

87.
The claimant sought permission to serve her application notice as reconstituted out of the jurisdiction on ground (6) (claims in relation to contracts) and ground (9) (claims in tort). Nicol J held that the claimant’s claims in contract passed through the gateway of ground (6). He also held that England is the most appropriate forum for the trial of all of the claims, whether in contract or in tort. There has been no appeal on these issues. I understand that a majority in the Supreme Court agrees that the claims in tort pass through the gateway of ground (9). Furthermore, I understand that the Supreme Court concludes unanimously that the claims in contract and in tort give rise to a serious issue to be tried. However, in the circumstances outlined above, I say nothing further about the possible relevance of ground (4A).

Issue 2: The foreign law issue

88.
I agree with Lord Leggatt on the issues of proof of foreign law and the presumption of similarity, for the reasons he gives.

Conclusion

89.
For these reasons I would dismiss the appellant’s appeal and I would refuse the respondent permission to appeal against the order that she plead in her particulars of claim “the content of Egyptian law, including the relevant principles and sources on which she relies and upon which each of her claims is based”.

LORD LEGGATT: (dissenting on the tort gateway issue but with whom Lord Reed, Lord Lloyd-Jones, Lord Briggs and Lord Burrows agree on the foreign law issue)

Introduction

90.
I will not repeat in any detail the tragic facts or sorry history of these proceedings, which have been summarised by Lord Lloyd-Jones, but will address with only brief introduction the two legal issues of general importance raised on this appeal. The first is whether, in order to show that her claims have a reasonable prospect of success, the claimant needed to adduce evidence of Egyptian law - which is agreed to be the law applicable to her claims - or whether she could rely on English law for that

purpose. The second issue, on which I have the misfortune to differ from Lord Lloyd-Jones, is whether her claims in tort satisfy the requirement for suing a defendant who is outside the territorial jurisdiction of the English courts that “damage was sustained … within the jurisdiction”.

The claims

91.
As Lord Lloyd-Jones has described, the claims arise out of a road accident in Egypt on 3 January 2010 in which the claimant, Lady Brownlie, was seriously injured and her husband, Sir Ian Brownlie, was killed. (Sir Ian Brownlie’s daughter was also killed and her two children injured in the accident but no claims are made on their behalf in these proceedings). The fatal accident occurred during a limousine “safari” excursion provided by the Four Seasons Hotel Cairo at Nile Plaza where they were staying on a short holiday in Egypt. The claimant had booked the excursion in a telephone call made to the hotel before leaving England.

92.
The claimant is seeking to sue the operator of the hotel in the English courts. Her first attempt foundered when it ultimately became clear on an appeal to the Supreme Court that the claimant had named the wrong company in the Four Seasons group as the defendant and that the operator of the hotel was FS Cairo (Nile Plaza) LLC (“FS Cairo”), an Egyptian company. There has been no appeal from the subsequent decision of Nicol J to allow the claim form to be amended to substitute FS Cairo as the defendant; but the judge’s decision to permit service of the claim form on FS Cairo in Egypt has brought this claim to the Supreme Court on appeal for a second time.

93.
Lady Brownlie’s claims are made in three different capacities: (i) in her own right, for her own personal injuries; (ii) as executrix on behalf of her husband’s estate, for his wrongful death; and (iii) as his widow, for bereavement damages and dependency. Her claims in all three capacities are pleaded as claims for breach of contract and in the tort of negligence.

94.
The contractual claims are based on what is said to be an implied term of the contract to provide the excursion that the defendant would exercise reasonable care and skill to ensure that the claimant and her husband were reasonably safe. The matters relied on to establish a breach of this duty include supplying a vehicle with defective tyres and no seat belts and failing to ensure that the driver was experienced, properly trained and suitable.

95.
The same matters are relied on to support a claim for breach of a duty of care said to have been owed by the defendant to the claimant and her husband in tort to ensure their reasonable safety during the excursion. In addition, a claim in tort is made on the separate basis that the driver of the vehicle was negligent in driving too fast and losing control of the vehicle and that the defendant is vicariously liable for the driver’s acts and omissions. I will refer to these two different claims in tort as, respectively, the “direct liability claim” and the “vicarious liability claim”.

The Foreign Law Issue

The applicable law

96.

Which system of law governs a claim for breach of contract brought in England and Wales is determined by the rules of private international law contained in Regulation (EC) 593/2008 ("the Rome I Regulation"). Where, as in this case, the law applicable to the contract has not been chosen by the parties, under article 4(1)(b) of the Rome I Regulation a contract for the provision of services is governed by the law of the country where the service provider has its habitual residence, which, in the case of a company, is the place of its central administration: see article 19(1). The contract by which the defendant agreed to provide the excursion booked by the claimant was a contract for the provision of services and the defendant has its central administration in Egypt. The contract is therefore governed by Egyptian law.

97.
Which system of law applies to a claim in tort is determined by the rules of private international law contained in Regulation (EC) 864/2007 ("the Rome II Regulation"). Pursuant to article 4(1) of the Rome II Regulation, the applicable law is:

"the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

It is agreed that, for the purposes of this rule, the country in which the damage occurred in this case is Egypt.

98.
It is accordingly common ground that the law applicable to all the claims asserted in these proceedings is the law of Egypt.

Pleading and evidence of Egyptian law

99.
One of the requirements, reflected in CPR rule 6.37(1)(b), which a claimant must satisfy before permission may be granted to serve a claim form on a defendant outside the territorial jurisdiction of the court is to show that the claim has a reasonable prospect of success. The test has also been formulated in the case law as a "real prospect of success" or a "serious issue to be tried". There is no practical difference between these formulations and the test is the same as that for resisting summary judgment: see Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd[2011] UKPC 7; [2012] 1 WLR 1804, paras 71, 82; VTB Capital plc v Nutritek International Corpn[2013] UKSC 5; [2013] 2 AC 337, para 164; Vedanta Resources Plc v Lungowe[2019] UKSC 20; [2020] AC 1045, para 42. The rationale for the requirement is that the court should not subject a foreign litigant to the inconvenience and expense of defending proceedings in this country which are liable to be summarily dismissed.

100.
Where - as in the present proceedings - the claim form which the claimant seeks permission to serve out of the jurisdiction is accompanied by particulars of claim, this court has recently emphasised that the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the claim asserted has a real prospect of success: see Okpabi v Royal Dutch Shell plc[2021] UKSC 3; [2021] 1 WLR 1294, para 22. Foreign law, when relied on, is a matter which must be pleaded so that the defendant knows the case it has to meet: see eg Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno Di Pietro Ostali SNC [1971] 1 WLR 1128. However, although the amended claim form and particulars of claim describe the relief claimed in these proceedings as

“damages pursuant to Egyptian law”, they do not specify any rule or provision of Egyptian law on which the claimant intends to rely.

101.
In connection with the claimant’s applications for permission to amend the claim form and to serve it on FS Cairo in Egypt, the parties nonetheless, in accordance with a case management order made by consent, served written expert evidence of Egyptian law.

The alleged gap in the Egyptian law evidence

102.
At the hearing of the applications, FS Cairo accepted that the expert evidence of Egyptian law adduced by the claimant was sufficient to show that she has a reasonable prospect of succeeding in her vicarious liability claim in tort in all three capacities in which she is suing. However, it argued that she had adduced no evidence of Egyptian law to support her direct liability claim in tort or claim for breach of contract, with the result that the claimant had failed to show that either of those claims has a reasonable prospect of success.

103.
In response, the claimant relied on the proposition stated as rule 25(2) in Dicey, Morris and Collins,The Conflict of Laws, 15th ed (2012), para 9R-001, that, in a case to which foreign law applies, “in the absence of satisfactory evidence of foreign law, the court will apply English law”.

104.
The judge accepted that, in so far as evidence of Egyptian law was lacking, the claimant was entitled to rely on English law and, on that basis, had satisfied the requirement of showing that her contract claim and direct liability claim in tort have reasonable prospects of success. The Court of Appeal by a majority (Underhill and McCombe LJJ, with Arnold LJ dissenting) upheld this decision.

105.
On this appeal the defendant argues that, in a case where foreign law applies pursuant to mandatory choice of law rules, it is wrong in principle to apply English law or any presumption that the applicable foreign law is similar to English law. To do so would unjustifiably reverse the burden of proof. At all events, there is no justification for applying English law or any such presumption where, as in the present case, the claimant has asserted that foreign law is applicable and has adduced evidence of that foreign law but there are gaps in the evidence.

106.
The claimant’s response is that the rule stated in Dicey (quoted at para 103 above) is well established; that there is no exception relevant in this case; that Egyptian law has not been shown to differ from English law in any material respect; that it is not disputed that the contract claim and direct liability claim in tort have reasonable prospects of success if English law is applied; and that the courts below were therefore right to hold that all the pleaded claims satisfy the requirement for service out of the jurisdiction.

107.
To resolve this dispute, it is first necessary to identify the basis and scope of the rule which allows domestic law to be applied in some cases even though, according to the relevant rules of private international law, the claim is governed by foreign law.

Presumption or default rule?

108.
Historically, the rule on which the claimant relies has been expressed as a presumption that, in the absence of evidence to the contrary, foreign law is presumed to be the same as English law. For example, in Dynamit AG v Rio Tinto Co Ltd[1918] AC 260, 295, Lord Dunedin said:

“I am clear that it is for those who say that the German law is different from the English to aver it as fact and to prove it. This they have not done, and that being so the German law must be presumed to be the same as the English.”

In the same case Lord Parker of Waddington said at p 301:

“Until the contrary be proved, the general law of a foreign State is presumed to be the same as the law of this country.”

Many statements to similar effect can be found in the case law. To give one other, more recent example, in Bumper Development Corpn v Comr of Police of the Metropolis[1991] 1 WLR 1362, 1368F, Purchas LJ giving the judgment of the Court of Appeal said:

“It is trite law that foreign law in our courts is treated as a question of fact which must be proved in evidence. In the absence of any evidence to the contrary, it is to be assumed to be the same as English law.”

109.
This was how the law was originally stated in AV Dicey’s influential work, A Digest of the Law of England with Reference to the Conflict of Laws, 1st ed (1896). In the first edition of Dicey, the presumption was referred to only in a review of American case law, which contained the statement: “in the absence of proof of the foreign law, it will be presumed to be the same as that of the forum”. In the fourth edition, published in 1927, the statement was elevated to one of Dicey’s rules of English law concerning the conflict of laws (rule 204) and expanded to read, at pp 805-806:

“In any matter to which in the opinion of an English court foreign law is applicable, any differences alleged to exist between foreign and English law must be proved by expert evidence to the satisfaction of the court, as matters of fact, not of law, and in the absence of satisfactory proof the foreign law must be held to be identical with the English law respecting the matter in question.”

The rule was stated in the same terms in the following two editions, published in 1932 and 1949. In the seventh edition, however, published in 1958, the rule (now rule 205) was reformulated to state, at p 1107:

“(1) In any case to which, in accordance with this Digest, 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.”

Apart from the omission of the words “in accordance with this Digest”, the rule has continued to be stated in these terms in all subsequent editions, including the most recent 15th edition.

110.
It is unclear what prompted the change made in the seventh edition of Dicey. However, the commentary on the rule in the current edition, after referring to cases where it has been doubted

whether the court was entitled to presume that the foreign law was the same as that of the forum, says that “[i]n view of these difficulties, it is better to abandon the terminology of presumption and simply to say that where foreign law is not proved, the court applies English law”: see Dicey, Morris and Collins,The Conflict of Laws, 15th ed (2012), para 9-025. After discussion of case law, the conclusion is drawn at para 9-029 that:

“there are cases in which the default application of a rule of English law is simply too problematic to be appropriate, but … no sharp line exists to define the limits of the principle that in default of sufficient proof, foreign law will be taken to be the same as English law.”

111.
This last statement is ambiguous as to whether the rule involves “the default application of a rule of English law” or, after all, a presumption that, in the absence of sufficient proof, “foreign law will be taken to be the same as English law”. Such elision of the two concepts can also be seen in some judicial decisions. The potential for confusion is increased by the fact that the expression “default rule” is capable of being used - as it was by Underhill LJ in the Court of Appeal in the present case - to refer to a situation where “the court is applying the foreign law but using the default rule to establish its effect”: see [2020] EWCA Civ 996, para 171. On this usage the “default rule” is just another name for the presumption that foreign law is the same as English law.

112.
For my part, I think it preferable in the interests of clarity not to treat the terms “presumption” and “default rule” as interchangeable and to recognise that there are two different rules which are conceptually quite distinct. So too are their respective rationales. The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be. By contrast, the “default rule” (as I shall use that term) is not concerned with establishing the content of foreign law but treats English law as applicable in its own right where foreign law is not pleaded.

The default rule

113.
The obvious objection to the default rule is that, where the relevant rules of English private international law provide that the law applicable to an obligation is the law of another country, it is the duty of the court to apply that system of law and not English law to the obligation. The answer given to that objection by those who defend the default rule is that, in an adversarial system such as that in England and Wales, if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion. The issues in proceedings are defined by the parties’ statements of case. Thus, it is for each party to choose whether to plead a case that a foreign system of law is applicable to the claim; but neither party is obliged to do so and, if neither party does, the court will apply its own law to the issues in dispute.

114.
I think this justification for applying English domestic law by default is valid so far as it goes. Article 1(3) of each of the Rome I and Rome II Regulations provides that (with immaterial exceptions) the Regulation “shall not apply to evidence and procedure”. The rule that (with limited exceptions) the court is not obliged to decide a case in accordance with a rule of law on which neither party chooses to rely is a rule of English civil procedure. The Rome I and Rome II Regulations therefore do not seek to oust it. (If, which I doubt, the Court of Appeal in Belhaj v Straw[2014] EWCA Civ 1394; [2017] AC 964, para 155, intended to suggest otherwise, I agree with the reasons given by Andrew Baker J in Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA[2018] EWHC 2759

(Comm); [2019] 1 WLR 82, para 21, for regarding the suggestion as mistaken.) In accordance with this procedural rule, the English court is not obliged to apply the choice of law rules contained in the Rome I and Rome II Regulations if neither party chooses to assert in its statement of case that foreign law is applicable. That is so even if the case is one to which a foreign system of law would clearly have to be applied if either party chose to rely on that fact. It may also be said that in such a situation the parties are tacitly agreeing that English law should be applied to decide the case. There is no public policy which prevents this. Indeed, the freedom to agree after the event to submit a contractual or non-contractual obligation to a law of the parties' choice different from the law previously or otherwise applicable is expressly affirmed by, respectively, article 3(2) of the Rome I Regulation and article 14(1)(a) of the Rome II Regulation.

115.
Not uncommonly, actions are brought in the English courts in which the parties are content for the court to apply English law, even though it is apparent that foreign law would be applicable if either party chose to rely on it. A notable example is Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676, the leading case on the effect of a clause in a contract for the sale of goods which provides for the seller to retain title to the goods until payment is made. The contract terms in issue in that case were written in the Dutch language and expressly governed by Dutch law, but neither party pleaded Dutch law and the court accordingly applied English law to the contracts. Such an approach makes good practical sense where there is or is likely to be insufficient difference between the foreign law in question and English law to justify the inconvenience and cost of asserting and proving a difference.

116.
The rationale for applying English law by default, however, depends upon neither party choosing to advance a case that foreign law is applicable. If either party pleads that under the relevant rules of English private international law foreign law is applicable to an obligation, and that case is well founded, it is the duty of the court to apply foreign law. To apply English domestic law in that situation would ex hypothesi be unlawful. In accordance with general principle, the burden is on the party who is making or defending a claim, as the case may be, to prove that it has a legally valid claim or defence. Where the law applicable to the claim or defence is a foreign system of law, this will require the party to show that it has a good claim or defence under that law.

117.
An argument has been made by one of the leading scholars in this field, Professor Adrian Briggs, that, if a party who bears the burden of proving foreign law fails to prove its content, the court should apply English law instead. In The Conflict of Laws, 4th ed (2019), p 11, he writes:

"In the absence of proof of the content of foreign law, an English judge still has to adjudicate. The default position was, and is, that English law will be applied, faute de mieux; …"

I cannot accept that it is consistent with legal principle, however, to apply English law by default if the party who has the burden of proving that it has a good claim or defence under foreign law fails to do so. An English judge does not in that event still have to adjudicate - if by that is meant decide the case by applying a system of law (English law) which has been shown not to be applicable. Rather, the ordinary consequence must follow that, if a party fails to prove its claim or defence, the claim is dismissed or the defence rejected. Where it is asserted and established that the applicable law is a foreign system of law, there is simply no scope for applying English law in its own right.

118.

That is the position in the present case. As mentioned, the only claims made in the amended claim form and particulars of claim are claims for damages “pursuant to Egyptian law”. There is accordingly no scope for applying English law by default. It follows that, if English law has any role to play, it can only be on the basis of a presumption that the content of the applicable foreign law is materially similar to the English law on the matter in question.

The presumption of similarity

119.
As already indicated, that is indeed the basis on which English courts (and courts in other common law jurisdictions) have historically applied domestic law in cases where foreign law is recognised to be applicable but the content of the foreign law has not been proved. Since this presumption is part of the law of evidence, it is also not affected by the Rome I and Rome II Regulations: see OPO v MLA[2014] EWCA Civ 1277; [2015] EMLR 4, para 108.

120.
In recent years the presumption of similarity has been strongly criticised by some academic writers. A leading critic has been Professor Richard Fentiman, whose arguments in Foreign Law in English Courts: Pleading, Proof and Choice of Law (1998) are relied on by counsel for the defendant on this appeal. The defendant also referred to Adrian Briggs, The Conflict of Laws, 4th ed (2019), pp 7-11, and Anthony Gray, “Choice of Law: The Presumption in the Proof of Foreign Law” (2008) 31 UNSWLJ 136.

121.
The crux of the criticisms made by these writers is that the presumption of similarity is a legal fiction which should have no place in modern law and that the presumption is unfair to defendants because its effect is to reverse the burden of proof. The thrust of Professor Fentiman’s arguments is well conveyed in the following passage:

“It is intuitively unacceptable for a party to seek the application of foreign law and at the same time, with luminous inconsistency, to invite the court to apply English law by declining to offer evidence of any other. It is also potentially unfair that one party should (in effect) be made to prove (or disprove) a matter which another has introduced. … Such arguments suggest that a party who relies upon foreign law must normally offer evidence as to its content or face dismissal of its claim or defence.”

See Foreign Law in English Courts: Pleading, Proof and Choice of Law (1998) at pp 152-153.

122.
These arguments, in my view, would have force if the presumption were inflexible and applied in circumstances where there is good reason to think that the applicable foreign law is different in a material respect from English law. However, that is not and has never been the effect of the presumption. The common law has never required unrealistic or unreasonable assumptions to be made about the content of foreign law. Where it applies, the presumption of similarity is justified by a combination of three factors.

123.
First, while there are of course many differences between the laws of different countries, there are also often similarities. That is most obviously true where the laws have a common origin, as in the case of countries which apply the common law. While there is a natural tendency for the laws of such countries to diverge over time, that tendency is reduced by the respect which courts in common law

jurisdictions afford to decisions of the courts of other common law countries as persuasive authority on the content of their own law. Even where the foreign system of law is a civil law system with its historical roots in Roman law, there is often good reason to expect that the foreign law will provide the same answer to a legal question, even if the result is reached by a different legal route. Such parallels have been enhanced where international conventions aimed at harmonisation of laws have been adopted, mainly in areas of commercial law. In Muduroglu Ltd v TC Ziraat Bankasi [1986] QB 1225, 1246, Mustill LJ observed that "in so many practical respects there is insufficient difference between the commercial laws of one trading nation and another to make it worth while asserting and proving a difference". This same insufficiency of difference will often make it reasonable to start from an assumption that the applicable foreign law is likely to be materially similar to English law.

124.
The requirement of materiality is the second factor which it is important to keep in mind. Unless there is a real likelihood that any differences between the applicable foreign law and English law on a particular issue may lead to a different outcome, there is no good reason to put a party to the trouble and expense of adducing evidence of foreign law. The object of adjudication is not to achieve a goal of abstract legal purity but to do practical justice between the parties. Moreover, unlike decisions applying English law which may be relied on as precedents in later cases, where foreign law applies there is no larger purpose to be served beyond reaching the correct result in the instant case.

125.
A third important factor is that the presumption of similarity does not itself determine any legal issue. It only ever operates unless and until evidence of foreign law is adduced. Nor does the presumption alter the legal burden of proof. Where the presumption applies, it merely places the burden of adducing evidence on a party who wishes to displace it. It is always open to a party to adduce evidence of the applicable foreign law showing that it is in fact materially different from English law on the point in issue.

The limits of the presumption

126.
These factors provide good pragmatic reasons for applying the presumption in a range of cases, but they also determine its proper limits. There is no warrant for applying the presumption of similarity unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)?

Cases applying or declining to apply the presumption

127.
This guiding principle has been implicit - and sometimes explicit - in the way in which the presumption has been applied from the beginning. Of the scores of cases in which courts in England and Wales and other common law jurisdictions have applied or declined to apply the presumption, I shall highlight a few which illustrate the underlying principle.

128.
An early instance of the presumption being applied is Bentinck v Willink(1842) 2 Hare 1; 67 ER 1. In a dispute concerning a mortgage governed by Dutch law, a point arose on which there was no evidence of the relevant Dutch law. Sir James Wigram V-C said (at 2 Hare 1, 8):

“… there being no suggestion of any peculiarity in that respect in the Dutch law, I can only consider what the law of this Court is. Now I believe that no point is better settled than this - that where a mortgagor is proceeding against his mortgagee, a Court of Equity will not compel the mortgagee to produce his securities, except on payment of the mortgagee’s claim; and the rule does not depend upon any peculiarities of system, but is founded on principles of abstract justice.”

129.
That reasoning may be contrasted with Guepratte v Young (1851) 4 De G & Sm 217; 64 ER 804, where the question was whether a contract entered into by a married woman domiciled in France with respect to her reversionary interests in trust funds (which would have been invalid in English law) was valid in French law. Sir James Knight Bruce V-C said (at p 224) that:

“whatever may be the English law concerning the rights, powers and capacities of married men and their wives, as to the wives’ reversionary interests in personalty, it ought, in my opinion, not to create a presumption or lead to any inference as to the law of France, on such subjects; … the difference of that law from ours in this respect ought to have been considered by the Master as not less probable than the concord, until knowledge of the truth had been obtained …”

130.
In Pickering v Stephenson(1872) LR 14 Eq 322, an injunction was granted to restrain English directors and shareholders of a Turkish company from using the company’s funds to pay the costs of an action for a libel which affected them only as individuals. Sir John Wickens V-C accepted that the relationship between the company and its members and directors was governed by Turkish law as to which there was no evidence. He nevertheless applied the principle that the governing body of a corporation cannot in general use corporate funds for any purpose other than those for which the funds were contributed, stating (at p 340):

“This is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence.”

The Vice-Chancellor went on to say that possibly in this or that system of law the line may be drawn more or less sharply by decisions; but in the case before the court it was appropriate to assume that the line would be drawn under Turkish law in the same way as under English law in the absence of contrary evidence.

131.
In Saxby v Fulton[1909] 2 KB 208 the court was asked to assume, in the absence of evidence, that the law in Monte Carlo was the same as in England as regards gaming. Bray J declined to make this assumption on the basis that it was notorious that in Monte Carlo roulette is not an unlawful game.

132.
It is apparent from the first edition of Dicey, mentioned above, that many of the early cases in which the presumption of similarity was relied on arose in the United States (typically where a court of one State had to apply the law of another). The classic US case on the scope of the presumption is Cuba Railroad Co v Crosby, 222 US 473 (1912). This involved a claim in tort arising out of an accident at work in Cuba and governed by Cuban law. The US Supreme Court held that the judge had been wrong to apply the presumption that Cuban law was the same as the law of the forum, when no evidence had been given as to the Cuban law. Justice Holmes, who delivered the opinion of the court, said (at p 478):

“It may be that, in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person, or conversion of goods, courts would assume a liability to exist if nothing to the contrary appeared … Such matters are likely to impose an obligation in all civilized countries. But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law.”

Having noted that Cuba had inherited the law of Spain, Justice Holmes said (at p 479):

“There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise … Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different system prevails, obviously the limits must be narrower still.” (Citations omitted; emphasis added)

133.
Another instructive decision is the South African case of Schnaider v Jaffe (1916) 7 CPD 696. On an appeal to the Cape of Good Hope Provincial Division the issue was whether an antenuptial contract providing that each spouse would be responsible for his or her own debts was valid. The contract was made in Russia and its validity was governed by Russian law. A creditor who was seeking to seize the husband’s goods in execution of a debt incurred by the wife contended that the antenuptial contract was invalid. In the absence of any evidence of Russian law, the creditor sought to rely on the presumption that the relevant Russian law was the same as the domestic law. Under South African legislation an antenuptial contract was only valid if registered (a requirement which had not existed at common law). The creditor argued that, presuming Russian law to be the same as the South African law, since there was no evidence that the contract relied on had been registered, it must be regarded as invalid. The court rejected this argument. Gardiner J, with whom Searle J concurred, said (at p 701):

“… we cannot presume that the law which the legislature of this country enacted some 40 years ago, and which changed what had been the law of South Africa for over 200 years, is to be found in the jurisprudence of Russia.”

In determining the proper approach, Gardiner J quoted with approval, at p 699, the following passage from Storey’s Commentaries on the Conflict of Laws, 8th ed (1883), section 637:

“Presumption has a proper place within limits in regard to foreign laws. Thus it would not be necessary to give evidence that in a foreign country breach of contract, battery, conversion or damage caused by fraud or negligence would give a right of action. … The presumption arises on grounds of probability, growing out of the fact that the law is known to be widespread and uniform. Nothing short of this should be sufficient to turn the burden of proof upon him who would deny the existence of such law.”

134.
Although not cited in Schnaider v Jaffe, a similar approach had been taken by the Supreme Court of Canada in Purdom v Pavey & Co(1896) 26 SCR 412, 417, where the question was whether a debt could be enforced against a mortgagee of land in Oregon if it was proved that the mortgage was

entered into with the intention of defrauding creditors. In circumstances where at common law and until the enactment of statutes “of comparatively modern date”, a mortgagee’s interest was not available to satisfy creditors, the court declined to presume that “the law of Oregon corresponds with the present state of our own statutory law”.

135.
More recently, detailed consideration was given to the question of whether or when the presumption is applicable to statute law by the CanadianFederal Court of Appeal in The Ship “Mercury Bell” v Amosin(1986) 27 DLR (4th) 641. Marceau J (with whom Lacombe J agreed) said at p 650:

“What has appeared constant to me, however, in reading the cases, is the reluctance of the judges to dispose of litigation involving foreign people and foreign law on the basis of provisions of our legislation peculiar to local situations or linked to local conditions or establishing regulatory requirements. Such reluctance recognizes a distinction between substantive provisions of a general character and others of a localized or regulatory character; this distinction … is wholly rational which is more than can be said of a simple division between common law and statute law.”

136.
In Österreichische Länderbank v S’Elite Ltd [1981] QB 565, a claim on a dishonoured bill of exchange was defended on the ground that the drawing of the bill at a time when the drawer was insolvent amounted to a fraudulent preference as defined by section 44(1) of the Bankruptcy Act 1914 and that this constituted “fraud” within the meaning of sections 29(2) and 30(2) of the Bills of Exchange Act 1882, so as to render the claimant’s title to the bill defective. The validity of the bill of exchange was governed by Austrian law. Roskill LJ, with whom the other members of the Court of Appeal agreed, doubted (obiter at p 569) that the relevant Austrian law could be presumed to be the same as the relevant English law. In Shaker v Al-Bedrawi[2002] EWCA Civ 1452; [2003] Ch 350, discussed below, the Court of Appeal cited this case as an example of a class of cases where English statute law “creates some special institution” (see paras 64, 67).

137.
A very thorough survey of the relevant case law in England, Australia and other common law countries, which refers to the cases cited above among others, is to be found in the judgment of Heydon JA in Damberg v Damberg[2001] NSWCA 87, a decision of the New South Wales Court of Appeal. This survey shows that the presumption that foreign law is materially similar to domestic law is by no means invariable and that there are numerous cases in which courts have declined to adopt it. Damberg v Damberg was itself such case, as the New South Wales Court of Appeal refused to presume that the German law governing the taxation of capital gains was materially similar to the Australian law.

Shaker v Al-Bedrawi

138.
In most of the English cases in which the presumption has been applied, or not, there has been no detailed discussion of the issue. An exception is Shaker v Al-Bedrawi[2002] EWCA Civ 1452; [2003] Ch 350, which raised a question whether a distribution of profits by a company incorporated in Pennsylvania was unlawful. The question was governed by Pennsylvanian law but, in the absence of evidence of Pennsylvanian law, the judge applied the provisions of Part VIII of the English Companies Act 1985 and, presuming the Pennsylvanian law to be similar, concluded that the distribution was unlawful. The Court of Appeal held that he had been wrong to do so.

139.
The decision of the Court of Appeal has been hailed by Professor Fentiman as marking a radical departure in English law which ousted the presumption of similarity and established that the only basis on which domestic law may be applied in the absence of evidence of foreign law is the default rule: see R Fentiman, “Laws, Foreign Laws, and Facts” (2006) 59 Current Legal Problems 391, 419-423; and International Commercial Litigation, 2nd ed (2015), paras 20.90 - 20.102. No subsequent case has treated Shaker as having this effect, and I do not consider that such an interpretation is warranted. It is true that in Shaker the Court of Appeal purported to apply the “default rule” that “the court had to apply English law if foreign law was not pleaded and proved” (para 65). However, the cases relied on as authority for this rule were cases such as Dynamit AG v Rio Tinto Co Ltd[1918] AC 260 (see para 108 above) which are in fact authorities for the presumption of similarity. The judgment does not recognise that the two concepts are different.

140.
As Part VIII of the Companies Act 1985 by its terms applied only to companies registered under the UK Companies Acts, it plainly did not apply to a Pennsylvanian company. If the court had indeed been required to apply English law by default, the attempt to rely on Part VIII could therefore have been disposed of very shortly. Without expressing a final view on the point, the Court of Appeal did suggest that the fact that Part VIII applied only to UK companies might well be a sufficient indication that it could not be applied in that case (see paras 66-67). That suggestion was, in my opinion, misplaced, as the case was not one in which both parties were content to proceed on the basis that English law should be applied. It was common ground that the law to be applied was that of Pennsylvania. In these circumstances, as discussed above, there was no scope for the operation of the default rule. English law was only of potential relevance if and in so far it could be presumed that the law of Pennsylvania was materially similar. The fact that the English statute only applied to UK companies did not rule out such a presumption.

141.
Despite the view provisionally expressed, the Court of Appeal did not in fact treat the actual scope of Part VIII of the Companies Act as conclusive. The court accepted that the test was whether the relevant requirements of Part VIII represented a generally applicable rule of company law which was likely to apply in Pennsylvania (see para 67). That test presupposed that the relevant question was whether in the circumstances it could properly be presumed that the law of Pennsylvania was materially similar to the English statutory law. The Court of Appeal concluded that it could not, as the relevant requirements of Part VIII were derived from a European Community Directive on company law and it was unrealistic to expect the law of Pennsylvania to impose similar requirements (paras 68-69). That conclusion seems to me to be unexceptionable.

Subsequent cases

142.
Of the cases decided since Shaker, I should mention two that are particularly relied on by the claimant in which the presumption was successfully relied on in the context of an application for permission to serve proceedings out of the jurisdiction. In PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd[2005] EWCA Civ 422; [2005] 2 All ER (Comm) 325, para 70, the Court of Appeal (obiter) described the presumption of similarity as “a necessary rule if proceedings are not to be stultified or unduly delayed, particularly in the interlocutory stages, in any case where the answer to a claim with a foreign element is clear so far as English law is concerned”. More recently, in Qatar Airways Group QCSC v Middle East News FZ llc[2020] EWHC 2975 (QB), paras

171-190, Saini J held that it was sufficient on the facts of that case to rely on the presumption of similarity to show that claims for damages in tort for malicious publication worldwide of a video intended to damage the claimant's business had a real prospect of success.

General guidance

143.
Because the application of the presumption of similarity is fact-specific, it is impossible to state any hard and fast rules as to when it may properly be employed. In light of the authorities discussed above, however, the following observations may be made.

144.
First, for reasons already given, as a matter of broad generalisation the presumption is more likely to be appropriate where the applicable foreign law is another common law system rather than a system based on Roman law. There are, however, "great and broad" principles of law which are likely to impose an obligation in all developed legal systems.

145.
Second, also as a matter of broad generalisation, the presumption is less likely to be appropriate where the relevant domestic law is contained in a statute, but this depends on the nature of the statute and, more specifically, the relevant statutory provision. There is a difference between a statute which codifies general principles and one which introduces a local scheme of regulation. The fact that the events in question are not actually within the scope of the domestic statute, for example because it does not have extraterritorial effect, is not a bar to relying on the presumption - as the question is not whether the domestic statute itself applies but whether it is reasonable to presume, unless and until the contrary is shown, that the foreign system of law contains a materially similar rule. That may depend upon the particular aspect of the statutory rule on which a party is seeking to rely. To take an example, it might be reasonable to presume that, if death is caused by a wrongful act of the defendant, the foreign law will make provision for a claim for damages for bereavement. It also seems likely, however, that the extent of such provision will vary from one legal system to another. So, whereas it might be reasonable to presume that the spouse of the deceased is entitled to claim such damages, it might be hard to argue that, for example, the right of action should be presumed to extend - as it now does under section 1A of the Fatal Accidents Act 1976 in the UK - to a cohabiting partner of the deceased.

146.
Third, it is in the nature of the test that its application may often be uncertain so that it is difficult to predict whether a judge will consider that the presumption can be relied on in a particular case. I do not think this problematic, however, given that reliance on the presumption is always a matter of choice. It is always open to the party who is asserting a claim or defence based on foreign law to adduce direct evidence of the content of the relevant foreign law rather than take the risk of relying on the presumption. Equally, it is always open to the other party to adduce such evidence showing that the foreign law is materially different from the corresponding English law rather than take the risk that the presumption will be applied.

147.
Fourth, the procedural context in which the presumption is relied on matters. Self-evidently, there is more scope for relying on the presumption of similarity at an early stage of proceedings when all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect

of success. By contrast, to rely solely on the presumption to seek to prove a case based on foreign law at trial may be a much more precarious course.

148.
I would add that it should not be assumed that the only alternative to relying on the presumption of similarity is necessarily to tender evidence from an expert in the foreign system of law. The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says. If, for example, the question is whether a spouse has a right to claim damages for bereavement under the applicable foreign law, producing a copy of the relevant foreign legislation (with, if necessary, an English translation) is a much more secure basis for a finding than presuming that the foreign law is the same as the English law. Of course, a judge needs to be alert to whether the text relied on is current. But even if that cannot be guaranteed, the presumption of continuity may be a more reliable foundation in the absence of contrary evidence than the presumption of similarity.

149.
The essential point is that the presumption of similarity is only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence. When English courts are prepared in some cases to draw conclusions about the content of foreign law on such an indirect basis, it makes no sense to reject better, direct evidence when it is available just because it lacks the imprimatur of an expert witness.

Where evidence of foreign law is inadequate

150.
Unlike many cases in which a party seeks to rely on the presumption of similarity, the court in the present case has evidence of the applicable foreign law in the form of reports from experts on Egyptian law served by each party. The defendant argues that it is not permissible in such circumstances for the claimant to rely on the presumption of similarity with English law where there are gaps or shortcomings in the expert evidence.

151.
I see no reason why there should be any general rule to that effect. Inevitably, adducing direct evidence of foreign law narrows the potential for relying on the presumption; but whether it eliminates the potential for doing so altogether must depend on the circumstances. For one reason or another, the evidence tendered by the parties may be incomplete. A party or its expert may not have anticipated every point of foreign law which may arise in relation to a particular issue; or a party might consider it unnecessary or disproportionate to adduce evidence of foreign law on a particular matter and choose instead to rely on the presumption. There is no principled reason why reliance on the presumption should be prevented in such circumstances. A common example of a situation where evidence of foreign law is incomplete and where reliance on the presumption may be entirely appropriate is where the court is provided with the text of a foreign statute but does not have evidence either of how the particular statute, or statutes in general, would be interpreted by the foreign court. In such a situation it is often reasonable for the court to presume, in the absence of

contrary evidence, that the foreign court would apply similar principles of statutory interpretation to an English court.

152.
That is not to say that there cannot be circumstances in which it would be procedurally unfair to allow a party who has advanced a case based on foreign law and adduced evidence of foreign law in support of that case to invoke the presumption when this evidence proves inadequate. An example of such a case is Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd[2007] EWHC 1713 (Comm); [2007] 2 All ER (Comm) 701, cited by counsel for the defendant. In that case the court was asked to determine questions of Indian law with the assistance of expert evidence. During the hearing, the claimant applied for permission to raise a new point of Indian law which had not been addressed in the experts' reports and to introduce additional evidence of Indian law on this new point. Cooke J refused the application for case management reasons in circumstances where a list of issues had been agreed at the court's direction, of which this issue did not form part. Unsurprisingly, having refused to allow the new point to be raised, the judge also refused to allow the claimant to argue the point as one of English law relying on the presumption of similarity. As he said (at para 101):

"The mischief of putting the point in English law, rather than Indian law, remains the same in the context of case management, because a new issue is raised, which is not covered by the agreed list, whether in Indian or English law. I decline to allow it to be raised in this way at this late stage …"

The judge went on to explain why there was nothing in the new point anyway.

153.
This decision is not authority for any general rule that, where some evidence of foreign law has been adduced, the presumption cannot be relied on in relation to a point of foreign law not covered, or inadequately covered, by the evidence.

Applying the presumption in this case

154.
The main reason why directions were given for sequential exchange of written expert evidence of Egyptian law in this case was that FS Cairo was opposing the claimant's application to substitute it as the defendant on the ground that the claims against it were time-barred under Egyptian law. On one view - although the judge ultimately rejected it - it would have been necessary in order to resolve this issue to make a final determination of whether the claims were time-barred, and not merely to decide whether the contrary was reasonably arguable.

155.
The report from the claimant's expert, Mr Edge, set out the basis under Egyptian law for the vicarious liability claim in tort, together with the basis for his opinion that the limitation period (of three years) did not commence until the claimant learnt the identity of the hotel operator and accordingly had not expired. The defendant's expert, Mr Ezzo, in contrast, began by considering the potential claim for breach of contract. The thrust of his evidence was that any contract made with FS Cairo for the provision of a car and driver for an excursion was a contract of carriage and, as such, was exclusively governed by the Egyptian Commercial Code. Under the Commercial Code the carrier's liability for injury to a passenger is strict but is subject to a two-year time limit. Although the limitation period could be interrupted in certain circumstances, those circumstances did not apply in this case and the claim was therefore time-barred. Mr Ezzo also said that under Egyptian law it is not permissible to bring a claim in tort where there is a claim in contract and it is not permissible to bring a claim based

upon contractual liability and tort liability at the same time. However, if a court were to conclude that there was a relevant tortious liability, a claim based on such a liability would in his opinion be time-barred.

156.
In a supplemental report served in reply to the defendant's expert report, the claimant's expert, Mr Edge, expressed the views that the contract to provide the excursion was not a commercial contract of carriage, at any rate so far as the claimant's rights are concerned, and that the relevant limitation period is therefore that prescribed by the general Civil Code (and not the Commercial Code). Furthermore, the claimant's pleaded case does not offend the "doctrine of cumul" (which I understand to be a reference to the rule relied on by the defendant's expert that it is not permissible to bring a claim in tort where there is a claim in contract) because the claim made is one in tort and the contract is simply the means by which the defendant's vicarious liability for the negligence of the driver can be established. Mr Edge also responded to an argument made by Mr Ezzo about the operation of the limitation period under the Civil Code.

157.
In the absence of any evidence of Egyptian law, I would see no basis for challenging the decision of the judge that, at this stage of the proceedings, reliance on the presumption of similarity with English law is sufficient to show that the pleaded claims have a real prospect of success. While the precise nature and extent of the obligations owed will no doubt vary from one legal system to another, I agree with McCombe LJ in his judgment in the Court of Appeal (at para 62) that it seems reasonable to presume for the purpose of showing a serious issue to be tried that under any system of law a hotel operator who enters into a contract with a customer to take the customer and members of her family on an excursion in a chauffeur-driven car provided by the hotel will owe obligations under the contract and/or under the law of tort to ensure the safety of those concerned. The judge's view that the presumption could be relied on for this purpose is in any event an evaluative judgment with which an appellate court should be slow to interfere.

158.
The question then is whether the judge was wrong in law not to reach a different conclusion in light of the expert evidence of Egyptian law which the parties had served. The defendant accepts that the claimant's expert evidence was sufficient to show that the vicarious liability claim in tort has a real prospect of success. Furthermore, the expert evidence taken as a whole seems to me, if anything, to reinforce that conclusion as regards the claim in contract. It is true that, as counsel for the claimant accept, the supplemental report of the claimant's expert, Mr Edge, is incorrect in suggesting that the claimant is not making a claim in contract and that her case is simply one in tort. But the defendant's expert did not contend that FS Cairo has no potential contractual liability under Egyptian law. His argument was that the contract was one of carriage governed by the Commercial Code and, as such, is time-barred. The claimant's expert gave credible reasons for disputing that analysis and arguing that the relevant time limit is that prescribed by the general Civil Code, which had not expired. Even apart from the presumption, that seems to me enough to show that the claim for breach of contract has a real prospect of success.

159.
It appears to be common ground between the experts that Egyptian law applies what Mr Edge refers to as "the doctrine of cumul" which precludes combining liability in contract and liability in tort. As the expert evidence confirms, the Egyptian legal system is a civil law system, with a civil code that is based in large part upon the French Civil Code. I think that an English court is entitled to take judicial

notice of the fact that what is more commonly called the doctrine of “non cumul” (des responsabilités contractuelle et délictuelle) is a basic principle of civil law. Lord Goff of Chieveley did so when he said in Henderson v Merrett Syndicates Ltd (No 1)[1995] 2 AC 145, 184:

“All systems of law which recognise a law of contract and a law of tort (or delict) have to solve the problem of the possibility of concurrent claims arising from breach of duty under the two rubrics of the law. Although there are variants, broadly speaking two possible solutions present themselves: either to insist that the claimant should pursue his remedy in contract alone, or to allow him to choose which remedy he prefers. … France has adopted the former solution in its doctrine of non cumul, under which the concurrence of claims in contract and tort is outlawed …”

160.
All this suggests that the claimant will not under Egyptian law be able to establish, as she could in principle under English law, that the defendant has concurrent liabilities in contract and in tort. Whether she will be confined to her claim in contract, as the defendant’s expert contends, however, or whether she can pursue claims in tort if she does not maintain her claim in contract, as the evidence of the claimant’s expert suggests, is unclear. It is also unclear whether there is any distinction in this regard between the vicarious liability claim and the direct liability claim in tort. In these circumstances I do not think that the judge can be faulted on the current state of the evidence for holding that all the pleaded claims are reasonably arguable for the purpose of establishing the English court’s jurisdiction. I nevertheless consider that it was entirely appropriate, for reasons that I am about to give, for the Court of Appeal to require the claimant to serve revised particulars of claim giving proper particulars of how she intends to put her case under Egyptian law going forward.

Pleading claims in foreign law

161.
Although it upheld the judge’s decision granting permission to serve the claim form on the defendant in Egypt, the Court of Appeal ordered the claimant to serve revised particulars of claim pleading the content of Egyptian law, including the relevant principles and sources, on which she relies and upon which each of the claims is based.

162.
The claimant has applied for permission to cross-appeal on the ground that the Court of Appeal was wrong in principle to make this order. It is submitted that, at least until the defendant pleads a defence relying on particular rules of Egyptian law, the claimant is entitled to rely on the presumption in relation to all her claims and should not be required to plead a substantive case under foreign law first.

163.
This argument misunderstands the nature of the presumption, which again needs to be distinguished from the default rule. If it is realistic to suppose that the defendant might be content for the court to apply English law by default and the claimant would prefer this, a claimant may choose when commencing proceedings not to assert that the claim is governed by foreign law, even if under the relevant rules of private international law that would be the case, and simply to plead a claim based on English law. If the defendant does not respond by pleading that foreign law is applicable, the defendant may find that the time comes when it is too late to raise such a case - as happened, for example, in Balmoral Group Ltd v Borealis (UK) Ltd[2006] EWHC 1900 (Comm); [2006] 2 Lloyd’s Rep 629, para 433, and Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA[2018] EWHC 2759 (Comm); [2019] 1 WLR 82. If, however, the defendant pleads (or it is clear at

the outset that the defendant intends to plead) that foreign law is applicable, the claimant must decide whether to contend otherwise and whether to advance a claim for relief under foreign law.

164.
In the present case it is agreed that the law which the court must apply is the law of Egypt and the claimant has amended her claim form and particulars of claim to claim damages pursuant to Egyptian law.

165.
At that point it was, and is, incumbent on the claimant to specify in her statement of case any rules or provisions of Egyptian law on which she intends to rely so that the defendant knows in outline the case it has to meet. A claimant does not have to rely on any rules or provisions of foreign law: parties are entitled, if they choose, simply to rely on the presumption that the foreign law is materially similar to English law. But reliance on the presumption does not alter the ordinary rules of pleading. If a claimant chooses not to plead a case based on any specific rules of the foreign law, hoping to be allowed to do so later if it becomes expedient, the claimant takes the risk of needing to persuade the court at a future date to grant permission to amend - just as in any other situation where a party seeks to change its case. There is no special dispensation for a party who has previously chosen to rely solely on an evidential presumption.

166.
In this case the claimant has served two reports from an expert on Egyptian law which refer to rules of Egyptian law that are not currently pleaded. It is also unclear whether, where there are gaps in her evidence of foreign law, the claimant intends to fill those gaps or to continue to rely solely upon the presumption of similarity with English law. The defendant is entitled to know where the claimant stands on those matters. In these circumstances the direction made by the Court of Appeal requiring the claimant to plead her case on Egyptian law seems to me to be not merely well within the generous ambit of the court’s case management powers, but thoroughly desirable for the orderly progression of these proceedings. I would therefore dismiss the cross-appeal on this point.

The Tort Gateway Issue

167.
I turn to the other issue raised on this appeal, which concerns the scope of the jurisdictional “gateway” for claims in tort.

168.
The present case is one in which, pursuant to CPR rule 6.36, the court may only grant permission to serve a claim form on a defendant out of the jurisdiction if any of the grounds (colloquially referred to as “gateways”) set out in paragraph 3.1 of Practice Direction 6B apply. For claims in tort, the relevant gateway is ground (9). This applies where:

“A claim is made in tort where -

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

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

The claimant relies on ground 9(a) and argues that, although the accident in which she was injured and her husband was killed occurred in Egypt, “damage was sustained” in England and Wales that comes within this gateway.

The competing interpretations

169.
The claimant’s case on the meaning of ground 9(a) is that the term “damage” refers to any significant harm of any kind, whether physical, psychological or financial, which results - either directly or indirectly - from a tortious act committed by the defendant. In a case of the present kind, ground 9(a) thus encompasses not just the injuries sustained in the road accident allegedly caused by the defendant’s negligence but also the sequelae of those injuries and financial losses resulting from them. I will refer to this as the “broad” interpretation of the gateway. On this interpretation, ground 9(a) applies to the claims in tort made by the claimant because, after she returned home to England, she suffered continuing pain and disability from her injuries and incurred financial loss in England. The financial loss claimed included funeral and memorial expenses and probate costs incurred as executrix of her husband’s estate and loss of financial dependency and bereavement damages as his widow. On the claimant’s case, this pain and disability and financial loss was “damage … sustained … within the jurisdiction” which falls within ground 9(a).

170.
The defendant’s case is that ground 9(a) applies only to “damage … sustained … within the jurisdiction” as a direct result of the defendant’s wrongful act and does not include indirect or consequential losses. On this interpretation, which I will refer to as the “narrow” interpretation of the gateway, damage was sustained in this case in Egypt as a direct result of the defendant’s allegedly wrongful act when the claimant and her husband were injured (in his case fatally) in a car crash on 3 January 2010. Indirect consequences of that accident and those injuries subsequently suffered by the claimant in England do not bring the facts of this case within the tort gateway.

171.
As an initial observation, if the claimant’s interpretation is correct, the tort “gateway” is not so much a gateway to bringing proceedings in England against a defendant who is in another country as an open territory with no fence. It would mean that ground 9(a) applies where anyone who lives in England is injured when travelling abroad provided only that the injury sustained is sufficiently serious to cause pain or disability which continues, or financial loss (such as loss of earnings or the cost of medical treatment) which is incurred, after the claimant returns home to England. In effect, therefore, the claimant’s interpretation makes it a sufficient factual basis on which to found jurisdiction over a foreigner who otherwise has no connection with England and Wales that the person whom he is alleged to have wrongfully injured in his own country is an English tourist. Whilst such a rule would no doubt be welcomed by people living in England and Wales who holiday abroad and may reduce the need for travel insurance, no one has suggested any principled basis for it.

Authorities

172.
There is nevertheless a line of first instance decisions cited by Lord Lloyd-Jones at paras 57-63 above which have accepted the broad interpretation of the tort gateway. These decisions were in turn influenced by cases in Australia and Canada to which Lord Lloyd-Jones has also referred (although the approach in Canada has since changed). The first of the English cases is Booth v Phillips[2004] EWHC 1437 (QB); [2004] 1 WLR 3292, where Mr Nigel Teare QC held that it was sufficient to show that

“damage was sustained” in England falling within ground 9(a) that the executrix of the deceased, who had died in an accident on board a ship in Egypt, had paid funeral expenses and suffered loss of dependency in England. In Cooley v Ramsey[2008] EWHC 129 (QB); [2008] IL Pr 27, it was held to be sufficient that the claimant, who had been left gravely handicapped by a road accident in Australia, suffered loss of earnings and costs of care after repatriation to England six months later. Wink v Croatio Osiguranje DD[2013] EWHC 1118 (QB) and Stylianou v Toyoshima[2013] EWHC 2188 (QB) were further cases in which a claimant who lived in England was seriously injured in a road accident abroad (while on holiday in, respectively, Croatia and Western Australia). In each case it was held that “damage was sustained” in England which fell within ground 9(a) by reason of the fact that the claimant suffered continuing physical effects of his injuries and incurred costs of care after being repatriated. This approach was again followed in Pike v The Indian Hotels Co Ltd[2013] EWHC 4096 (QB), where a British tourist who was staying in the Taj Mahal Palace hotel in Mumbai while on a holiday in India suffered serious injuries when attempting to climb out of a third-floor window to escape from a terrorist attack.

173.
In Erste Group Bank AG, London Branch v JSC “VMZ Red October”[2015] EWCA Civ 379; [2015] 1 CLC 706, paras 104-105, the Court of Appeal (Gloster, Aikens and Briggs LJJ) expressed “serious reservations” as to whether these first instance decisions were right in their interpretation of the tort jurisdictional gateway but found it unnecessary to decide the point on the facts of that case. In the proceedings originally brought by the present claimant (“Brownlie I”), the Court of Appeal (Arden LJ, Bean and King LJJ) held that ground 9(a) covers only direct damage and that the first instance cases which had adopted the broad interpretation of the gateway were wrongly decided: see Brownlie v Four Seasons Holdings Inc[2015] EWCA Civ 665; [2016] 1 WLR 1814. But on the further appeal to this court, a majority (Baroness Hale of Richmond, Lord Wilson and Lord Clarke of Stone-cum-Ebony) preferred the broad interpretation, although Lord Sumption and Lord Hughes disagreed: see Brownlie v Four Seasons Holdings Inc[2017] UKSC 80; [2018] 1 WLR 192.

174.
It is rare - and I hope will remain so - for the same question to reach the Supreme Court for a second time in what is essentially the same case - the only difference being that the current defendant is a different company in the same corporate group as the defendant to the original claim. However, the views expressed in Brownlie I about the correct interpretation of ground 9(a) were admittedly obiter dicta and did not establish a binding precedent, as this court concluded that the wrong defendant had been sued so that none of the gateways was applicable. Moreover, the issue is one on which judicial opinion has been split. We must in these circumstances form our own opinions on the meaning of the gateway.

Ordinary meaning

175.
In terms of principle, the main, if not the only, positive argument which has been advanced in favour of the broad interpretation of ground 9(a) is that it is said to be the “ordinary and natural meaning” of the language used. This was the argument accepted by Mr Nigel Teare QC in Booth v Phillips[2004] EWHC 1437 (Comm); [2004] 1 WLR 3292, the first in the line of cases mentioned above. His reasoning was that the word “damage” in what is now ground 9(a) “should be given its ordinary and natural meaning, namely, harm which has been sustained by the claimant, whether physical or economic”: see para 35. The same reasoning has been adopted (along with reliance on the earlier decisions) in the later first instance cases and it underpinned the view of the majority of this court in

Brownlie I. Baroness Hale said that she had for a while been attracted by a middle course which would restrict “damage” to continuing bodily (physical and psychological) effects of the wrongful act but would exclude consequential financial losses. However, she said that it was difficult to find a warrant for that distinction in the language used and she ultimately concluded that she would “adopt the ordinary and natural meaning of the language used in the Rules” (para 55).

176.
Where I part company with this approach is not in my understanding of what the word “damage” means as a word of the English language. It is in thinking that the width of the gateway does not depend on what that term means. I do not doubt that the word “damage” is apt to refer to any form of harm whether physical, psychological or economic. Still less would I disagree with the statement in Challenor v Douglas[1983] 2 NSWLR 405, 408G, cited by counsel for the claimant on this appeal, that: “Damage is damage”. So indeed it is, and it is not surprising - indeed it seems necessary - that such a broad term should be used in a rule which is applicable to all claims in tort, including therefore torts where the primary damage sustained is personal injury, others where it consists in physical damage to property and some torts (for example, in English law inducing a breach of contract or causing loss by unlawful means) where the damage sustained is inherently economic. I do not consider, however, that the scope of ground 9(a) can be ascertained simply by observing (correctly) that the word “damage” as a matter of ordinary language encompasses all these different forms of harm.

177.
The words of the rule must be read in context. The context is that they are intended to describe a ground on which a claim in tort may potentially be brought in England and Wales against someone situated in another country. It is clear from this context that the words of ground 9(a), although on their face entirely open-ended, do not refer to any physical, psychological or economic damage which the claimant has ever sustained in England and Wales in any circumstances during her lifetime. It is implicit that ground 9(a) applies only to damage which is connected in some way with the claim in tort which the claimant wishes to bring and with the act committed by the defendant which is said to give rise to that claim. The key question is the nature of the required connection. That is not stated in ground 9(a), which says nothing about how “damage … sustained … within the jurisdiction” must be connected with any conduct of the defendant in order to come within the gateway. The nature of the required connection therefore cannot be discovered simply by reflecting on the ordinary meanings of the words used.

178.
Thus, in a typical personal injury case where injury sustained in a road accident allegedly caused by negligent driving of the defendant results indirectly in financial loss to the claimant, I see no difficulty as a matter of ordinary language in describing such financial loss as “damage … sustained” by the claimant. I have more difficulty with the claimant’s contention that a person who suffers from enduring pain or disability caused by such an accident can be said to continue to “sustain damage” wherever she goes for as long as the pain or disability lasts (possibly the rest of her life). To my mind, this is a strained and unnatural use of language. But I accept that it is a possible meaning of the words used in ground 9(a). What is meant by the words “damage was sustained … within the jurisdiction”, however, is not the critical question. That question, as I see it, is whether ground 9(a) applies only where significant damage sustained within the jurisdiction was directly caused by a wrongful act of the defendant or whether it extends to damage sustained as an indirect consequence of an injury caused by such a wrongful act. The language of the rule is entirely silent about which of these interpretations is correct.

Relevance of the Brussels regime

179.
An argument for the narrow interpretation which has been relied in earlier cases, and again by the defendant on this appeal, is that ground (9)(a) was introduced in order to bring the tort gateway into line with what was originally article 5(2) of the Brussels Convention and is now article 7(2) of the Brussels Recast Regulation, and that it should in these circumstances be construed as having a similar meaning. Article 7(2) is one of a limited number of exceptions to the general rule laid down in article 4 of the Brussels Recast Regulation that persons domiciled in a member state of the European Union may only be sued in the courts of that member state. It provides that a person domiciled in a member state may be sued in another member state:

“in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.”

In interpreting this provision, the Court of Justice of the European Union has held that “the place where the harmful event occurred” refers both to the place where the tortious act occurred and, if different, the place where damage directly caused by the tortious act occurred, but does not extend to a place where indirect or consequential damage occurred: see eg Marinari v Lloyds Bank plc (Case C-364/93) [1996] QB 217, AMT Futures Ltd v Marzillier[2017] UKSC 13; [2018] AC 439, para 15, AB flyLAL-Lithuanian Airlines v Starptautiska Lidosta Riga VAS (Case C-27/17) [2019] 1 WLR 669, paras 31-32.

180.
I agree with Lord Lloyd-Jones, however, for the reasons he gives, that in interpreting the tort gateway which applies in cases not covered by the Brussels regime, no inference can properly be drawn that it is intended to have exactly the same scope as article 7(2). As Lord Lloyd-Jones has explained, when the Civil Jurisdiction and Judgments Act 1982 came into force, the English domestic rule was amended to include for the first time claims in tort where “the damage was sustained … within the jurisdiction”. (The definite article was later deleted to make it clear that any significant damage and not necessarily all relevant damage will suffice.) It appears that the reason for widening the rule in this way was to ensure that it was not narrower in scope than the corresponding rule in the Brussels regime. It does not follow, however, that the intention was to assimilate the two rules or to ensure that the domestic rule was no wider than its European counterpart. Not only is the wording of the two rules different, but the Brussels regime operates in a different way from the domestic rules. The Brussels regime is intended to allocate jurisdiction between member states of the EU in a uniform manner which leaves no room for discretion. As part of this scheme, the exceptions to the general rule that jurisdiction is based on the defendant’s domicile are intended to be narrowly confined. The domestic rules, on the other hand, are intended to apply in all situations where there is no such reciprocal arrangement allocating jurisdiction between the UK and the state where the defendant is domiciled and to operate more flexibly. In these circumstances it would be anomalous if ground (9) were narrower in scope than article 7(2) of the Brussels Recast Regulation; but there is no anomaly if ground (9) applies more widely.

Completing a cause of action

181.
Another point on which I agree with Lord Lloyd-Jones is that there is no reason to equate the meaning of the “damage … sustained” referred to in ground 9(a) with damage that completes a cause of action in tort. In addition to the reasons he gives, with which I agree, another reason is that the gateway

applies irrespective of the law applicable to the claim and there is no reason why the precise analysis of when the cause of action was complete under the applicable law should determine where proceedings may be brought.

Relevance of the Rome II Regulation

182.
I also agree with Lord Lloyd-Jones that it cannot be inferred that ground 9 has the same scope as article 4(1) of the Rome II Regulation (quoted at para 97 above). In determining the law applicable to a claim in tort, article 4(1) expressly draws a distinction between "the country in which the damage occurs" and "the country or countries in which the indirect consequences of [the event giving rise to the damage] occurred". Applying this distinction, the Court of Justice held in Lazar v Allianz SpA (Case C-350/14) [2016] 1 WLR 835 that, in a case arising from a road traffic accident, "the country in which the damage occurs" is the country where the injuries occurred, which in that case was Italy where the claimant's daughter was fatally injured in such an accident. Psychological or financial damage sustained in Romania by the close relatives of the deceased was classified as indirect consequences of the accident. Once again, however, not only is article 4(1) worded differently from ground 9, but the legal context is different. There is no necessary relationship between the law applicable to a claim and the question whether the courts of a country have jurisdiction over the claim.

Distinguishing direct and indirect damage

183.
Where the case law on both article 7(2) of the Brussels Recast Regulation and article 4(1) of the Rome II Regulation is in my view relevant is in rebutting an argument made by the claimant in this case that the broad interpretation of ground 9(a) should be adopted because the distinction between direct and indirect damage is not easy to draw in all cases. The case law on the European instruments shows that the distinction between direct and indirect damage from tortious conduct is one that is well recognised and that the task for the court in drawing it "is relatively straightforward in most circumstances" (per Lord Hodge in AMT Futures, para 24). The fact that there can sometimes be hard cases is not a good reason to decline to draw the distinction and to say that ground 9(a) applies to any damage connected to the defendant's act, however tenuous or adventitious the connection. Furthermore, as Professor Louise Merrett has pointed out in an insightful discussion of Brownlie I, it is not necessary to draw a line between direct and indirect damage generally, or for all purposes; all that is necessary is to establish where direct damage occurs, which in personal injury cases will clearly be where the accident took place: see Louise Merrett, "Forum Conveniens" in William Day and Sarah Worthington (eds), Challenging Private Law: Lord Sumption on the Supreme Court (2020) at p 376.

The economic tort cases

184.
I also note that, in interpreting and applying ground 9(a) of the domestic rule, the distinction between damage directly and indirectly caused by the defendant's act has been drawn by the English courts in cases not involving personal injury.

185.
In the Eras Eil Actions [1992] 1 Lloyd's Rep 570, 591, Mustill LJ observed that what are now ground 9(a) and article 7(2) operate easily enough where physical damage or personal injury are caused but

create problems in the case of economic torts. He rejected the concept that a claimant can be said to suffer loss falling within these rules in the country where its head office is situated on the basis that this would give a claimant in tort “the option of suing in the courts of his own domicile”.

186.
In Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd[1996] CLC 1902 an English company exported goods to Nigeria. The goods were never paid for and, amongst other claims, the exporter sought to bring a claim for conversion or wrongful interference with the goods against the third defendant, a Nigerian bank. It was argued that, although the wrongful acts took place in Nigeria, the damage was sustained in England for the purpose of what is now ground 9(a) because the exporter suffered loss in England. Rix J rejected this argument. He held that the damage was sustained in Nigeria, as it was there that the goods and documents of title were lost to the exporter: it was only the financial consequences of that loss which were felt in England.

187.
In ABCI (formerly Arab Business Consortium International Finance and Investment) v Banque Franco-Tunisienne[2003] EWCA Civ 205; [2003] 2 Lloyd’s Rep 146, Mance LJ giving the judgment of the Court of Appeal said (at para 44) in relation to what is now ground 9(a):

“In our judgment [ground 9(a)] is looking to the direct damage sounding in monetary terms which the wrongful act produced upon the claimant …”

Applying that test to a claim for damages for conspiracy to defraud the claimant, the Court of Appeal held that there was no good arguable case that the claimant had sustained damage in England that fell within the gateway.

188.
Eurasia Sports Ltd v Tsai[2018] EWCA Civ 1742; [2018] 1 WLR 6089 is another case in which a claim in tort for conspiracy was held not to satisfy the test in ground 9(a). Floyd LJ (with whose judgment Longmore and Gross LJJ agreed) said, at para 21:

“To pass through [the tort] gateway England and Wales must be the place where the damage was sustained. That place is not simply where the claimant sustains financial loss. It is where the event giving rise to the damage directly produces its harmful effects on the person who is the victim of the act.”

Applying this test, the Court of Appeal held that the relevant damage was sustained in Malta where money of which the claimant (a company incorporated in Alderney) was allegedly defrauded by the defendants should have been received.

189.
These authorities - which include three decisions of the Court of Appeal - are inconsistent with the broad interpretation of the tort gateway. In each of them the court adopted the distinction between damage directly and indirectly caused by the defendant’s tortious act. It is true that in each case the court considered that ground 9(a) should be interpreted in line with article 7(2) of the Brussels Recast Regulation (or its predecessors) - which, as I have indicated, is not an inference that I think it safe to make. I nevertheless consider that the courts in these cases were correct to adopt the narrow interpretation of the tort gateway for the reasons that I am about to give. I also find cogent the point made in these cases that, to hold that any loss felt by a claimant in the place where he or she resides (or, in the case of a corporation, has its business seat) is damage falling within the scope of ground

9(a) would be tantamount to holding that claimants in tort have the option of suing in the courts of their own country. Such an option is not an accepted or acceptable basis on which to found jurisdiction. This point seems to me just as pertinent in cases of personal injury as in cases where the claim is for conversion of goods or conspiracy to defraud. Conversely, these authorities also show that, if no distinction is drawn between damage directly and indirectly caused by the defendant's wrongful act, the logical consequence is that ground 9(a) will be satisfied in all cases where a claimant situated in England suffers any significant financial detriment for which damages are claimed in tort.

190.
No doubt in theory a distinction could be drawn of the kind which Lady Hale contemplated (but rejected) in Brownlie I (see para 175 above) between bodily and financial consequences of an initial bodily injury, or between cases where financial or other harm is consequential on bodily injury and cases where all the damage suffered is financial, which I understand to be the distinction drawn by Lord Lloyd-Jones at para 76 of his judgment. Once it is accepted, however, that the distinction between direct and indirect damage is relevant in cases of financial damage, I am unable to see any warrant in either the language or the purpose of the tort gateway for restricting the distinction to such cases and declining to apply it in cases involving bodily injury. I therefore do not think that the authorities referred to at paras 185-188 above can be distinguished on this ground. A critical consideration is the purpose of the jurisdictional gateways, to which I now turn.

Purpose of the jurisdictional gateways

191.
Where, as often happens and is the case here, a court is required to interpret legislative words which are capable as a matter of language of being understood in more than one way, the modern approach is to consider the purpose of the legislation and decide which meaning best fits that purpose. This purposive method of interpretation is just as applicable where the rule is contained in delegated legislation such as the Civil Procedure Rules or a Practice Direction which accompanies them (made pursuant to the Civil Procedure Act 1977 and Part 1 of Schedule 2 to the Constitutional Reform Act 2005) as it is in relation to primary legislation.

192.
The purpose of the jurisdictional gateways is clear. It is to identify a connection between a person situated abroad or an act done by that person on the one hand and this country on the other hand which is capable of providing a sufficient basis for the assertion by the English courts of jurisdiction over that person (it being a further question whether the court should exercise such jurisdiction). As Lord Sumption put it in Brownlie I at para 28, all the gateways are in different ways "concerned to identify some substantial and not merely casual or adventitious link between the cause of action and England".

193.
The reason for imposing such a threshold requirement is in turn not hard to find. It would not be legitimate or just to the proposed defendant for an English court to assert power over that person to adjudicate on a claim without their consent merely on the ground that the person who wishes to bring the claim is in England nor even that England would clearly be the most suitable place, on balance, to hold a trial. The territorial nature of jurisdiction demands that there should be a substantial connection between the territory of the state from which the court's authority derives and either the proposed defendant or something which that person has done before the assertion of personal jurisdiction over the proposed defendant is justified.

194.
Treating it as sufficient to satisfy the tort jurisdictional gateway that an individual who sustained bodily injuries in an accident abroad returns to England, or visits England, bringing their injuries with them, would be inconsistent with this purpose. As noted earlier, the practical effect of such an interpretation would be that, in any claim in tort for serious injuries sustained in another country, it is treated as a link with England sufficient to satisfy the gateway test that the claimant is ordinarily resident here. That stands the underlying principle on its head since, as Lord Sumption observed in Brownlie I at para 28, personal connections between the parties and England are generally relevant to jurisdiction only in the case of the defendant. Indeed, the claimant would not even need to show residence in England. On the broad interpretation of ground 9(a) for which the claimant contends, the gateway is portable. If that interpretation is correct, a claimant can create a link with England which satisfies the gateway requirement for suing a foreign defendant in the English courts by travelling to England, for example for medical treatment, after the event giving rise to the damage has occurred. Thus, it would be enough to satisfy the gateway requirement for bringing a claim in tort in the English courts that, for example, an Egyptian claimant badly injured in Egypt in a road traffic collision with a vehicle driven by another Egyptian driver afterwards comes to England while still suffering pain or disability. An interpretation which has this consequence is not in my opinion a rational or defensible interpretation of the rules of court.

The proper forum

195.
The answer given on behalf of the claimant to this objection is that it does not matter if the gateway requirement is absurdly wide in this way because, to obtain permission to sue the defendant in England, the claimant also needs to satisfy the court, in accordance with CPR rule 6.37(3), that England and Wales is “the proper place in which to bring the claim”; and, in a case where the only connection with England is that the claimant is present here, this further requirement would not be met.

196.
I do not consider this an adequate answer. The purpose of having grounds for service out of the jurisdiction which must apply before the question whether England and Wales is the proper place in which to bring the claim arises is to make the existence of a sufficient connection with the jurisdiction a prerequisite to permitting a person outside the jurisdiction to be sued here. A test met by the occurrence in England and Wales of any harm resulting indirectly from a wrong committed elsewhere singularly fails to achieve this purpose. It provides an irrational and almost wholly ineffectual threshold requirement.

197.
There is a view, of which Professor Adrian Briggs is a distinguished advocate, that we would be better off without jurisdictional gateways at all, leaving everything to the doctrine of forum conveniens: see A Briggs, Civil Jurisdiction and Judgments, 7thed (2021), para 24.06. I do not share that view. For present purposes, however, this difference of opinion is not material. The policy reflected in the rules is to impose a threshold test which must be met before jurisdiction may be asserted over a foreign defendant. For as long as this remains the policy of the law, the duty of the courts is to give effect to it by interpreting the gateways so far as possible in ways which render them meaningful: it is not to undermine the legislative policy by interpreting one of the gateways in a way which deprives it of practical effect.

198.
A further reason why, in my view, it is wrong to rely on CPR rule 6.37(3) to compensate for an over-expansive interpretation of the tort gateway is that such an approach conflates two questions which under the framework for establishing jurisdiction are intended to be kept distinct. The question whether England and Wales is “the proper place in which to bring the claim” is intended to codify the doctrine of forum conveniens (also sometimes referred to as forum non conveniens), which applies where there is a sufficient basis for founding jurisdiction in England but there is also some other available forum, having competent jurisdiction, where the case could be tried. The test of forum conveniens, as Lord Lloyd-Jones has pointed out at para 78 above, is not concerned merely with practical convenience. As stated by Lord Goff of Chieveley in his classic exposition of the doctrine in Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)[1987] AC 460, 480G, the object of the inquiry is “to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice”. That, however, is an inquiry of a different kind and with a different purpose from the question whether there is a sufficient connection between the defendant and the jurisdiction to make it just or legitimate for the courts of England and Wales to assert jurisdiction over the defendant. Whereas the gateways look back to the events which gave rise to the claim, the test of forum conveniens looks forward to the nature and shape of the dispute at a trial. A key factor is usually where witnesses and documentary evidence are located (see eg VTB Capital plc v Nutritek International Corpn[2013] UKSC 5; [2013] 2 AC 337, para 62); but other factors are also relevant such as the law which the court will have to apply and the places where the parties respectively reside or carry on business: see TheSpiliada at p 481. In exceptional cases it may also be necessary to consider an allegation that the claimant would not be able to receive a fair trial in the alternative forum. None of those factors is relevant to whether there is a sufficient connection between the defendant and England to make it legitimate for the English court to assume jurisdiction in a case where the defendant has not submitted to the jurisdiction of the English courts, and it is wrong in principle as well as inconsistent with how the law has been applied to trade off the absence of such a connection against the relative advantages of England as a place to hold a trial. To elide the two questions, in my view, involves a category error.

199.
Even if - contrary to my opinion and to how I understand the structure of the rules - the two kinds of consideration could in principle properly be weighed against each other, attempting to do so would substantially increase the uncertainty already inherent in the test of forum conveniens. To put it at its lowest, there is no ready way to balance the lack of any substantial connection between the proposed defendant and England against factors which would make England a suitable forum for a trial. Widening what is already a very wide-ranging evaluative assessment to include the presence or strength of such a connection would exacerbate the unpredictability, inefficiency and unfairness of the “proper place” requirement as a means of determining whether proceedings may be brought in England.

200.
In the absence of any prescribed decision procedure or ranking of factors, different judges assessing whether England and Wales is the appropriate forum will inevitably attach different degrees of weight to different factors and may reach differing conclusions on similar facts without either conclusion being susceptible to legal challenge. Not only is such inconsistency of outcome itself a source of injustice, but it also encourages satellite litigation and causes defendants who have no real connection with England to have to incur the difficulty and expense of instructing English lawyers to apply in

England to contest the jurisdiction of the English courts. That gives a claimant a significant and unfair tactical advantage.

201.
Ever since Lord Templeman in The Spiliada at p 465 expressed the optimistic hope that in future cases "the judge will be allowed to study the evidence and refresh his memory of the speech of [Lord Goff] in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days" and "[a]n appeal should be rare," judges have regularly complained about the time and expense consumed in arguments about forum conveniens: see eg VTB Capital plc v Nutritek International Corpn[2013] UKSC 5; [2013] 2 AC 337, paras 81-89 (Lord Neuberger). It is, however, unfair to blame the parties for this consequence and unrealistic to expect otherwise when much often turns on whether jurisdiction can be established over a foreign defendant and the tendency of the English courts has been to expand the scope of a largely unfettered judicial discretion, with all the uncertainty and potential for costly disputes which that entails. In Club Resorts Ltd v Van Breda2012 SCC 17, para 73, LeBel J, giving the judgment of the Supreme Court of Canada, said:

"… the framework for the assumption of jurisdiction cannot be an unstable, ad hoc system made up 'on the fly' on a case-by-case basis - however laudable the objective of individual fairness may be. … Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court."

Save that in the first sentence I would replace "cannot" with "should not", I agree.

The overriding objective

202.
These considerations underline the need to interpret the gateways in a way which gives effect to their purpose and requires a real and substantial connection with England to be established before the court applies the test of forum conveniens. But they also bear in another way on how the gateways should be construed. CPR rule 1.2(b) requires the court in interpreting the Civil Procedure Rules to seek to give effect to the overriding objective of enabling the court to deal with cases justly and at proportionate cost. This includes, so far as is practicable, (a) ensuring that the parties are on an equal footing, (b) saving expense, (c) dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, (d) ensuring that it is dealt with expeditiously and fairly, and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases: see CPR rule 1.1(1). The point is well made by Professor Andrew Dickinson in a case note on Brownlie I that adopting a wide interpretation of the tort gateway which makes the assumption of jurisdiction almost wholly dependent on a discretionary test of forum conveniens conflicts with the overriding objective. It does so by potentially (a) placing the parties on an unequal footing, given the defendant's foreign residence and lack of connection to the English jurisdiction, (b) increasing expense, (c) adding complexity, (d) causing delay, and (e) occupying the public resources of the court: see Andrew Dickinson, "Faulty Powers: One-Star Service in the English Courts" [2018] LMCLQ 189. If an illustration is needed, the present case provides a dismal example.

How the test has been applied in practice

203.

A further concern about an approach which leaves almost everything to forum conveniens is that, if invited to exercise a largely unfettered discretion, judges cannot be relied on to require a real and substantial connection between the defendant's conduct and England and Wales to be shown before permitting a claimant to sue a foreign defendant. That at least is the lesson I draw from the series of first instance decisions which I have cited at para 163 above, holding that pain or financial loss felt in England in consequence of personal injuries sustained in an accident abroad was enough to get through the tort gateway. In each of those cases the judge went on to consider whether England was "the proper place in which to bring the claim". In every case the judge felt able to conclude that it was.

204.
Typical of the reasoning in these cases is Stylianou v Toyoshima[2013] EWHC 2188 (QB), paras 111-112, where the judge decided that England was the forum conveniens "in spite of the fact that the accident occurred in Australia, the injuries were sustained there, the applicable law is, as I have found, Western Australian, and that proceedings in Australia were actively continued for nearly two and a half years." What weighed most heavily in the balance for him was that the only issue in dispute was the quantum of the claim and the claimant was English, lived in England and could not travel to Australia because of her injuries which would make it hard for her to give instructions during the hearing. The fact that a large number of expert witnesses would have to travel to Australia in order to give evidence was also seen as an important factor. The fact that the defendant had no connection with England apart from having had the misfortune to be involved in a collision with a British holidaymaker while driving in Western Australia does not seem to have been given any weight at all.

205.
The reasons which persuaded the judge that England is the proper place in which to bring the present proceedings were of a similar nature to those relied on in the earlier cases. The main reasons appear to have been: that to a significant extent the claimant's losses have been experienced in England and the witnesses who would testify to those losses, including the claimant herself, live here; that a trial in England would be likely to reduce the need for translation (because English is more widely spoken in Egypt than Arabic is in England); and that, because in the Egyptian legal system there is an appeal as of right to the highest court, the scope for litigation to take longer if conducted in Egypt "would seem inevitable": see [2019] EWHC 2533 (QB), para 139. In relation to this last factor, the irony seems to have been lost that, ten years after the claim form was issued, these proceedings in England are still bogged down in a preliminary dispute about jurisdiction, which is now on a second appeal to this country's highest court.

206.
I have no doubt that the judges who decided that England was the appropriate forum in these cases were doing their best to be impartial. But it is human nature to wish, if possible, to allow a person who is before the court and who has suffered what may have been catastrophic injuries apparently as a result of another's wrongdoing to proceed with a claim for compensation rather than sending him or her away to try to bring proceedings in a foreign country. It is also human nature for a judge who has spent his or her professional career working in a particular legal system to attach more weight to its perceived advantages than those of the legal system of a faraway country of which the judge may know little or nothing. Such factors are likely, on the evidence of these cases, to incline a judge who is afforded a discretion to exercise it in favour of permitting service outside the jurisdiction, even if the claimant's injuries were sustained abroad and there is no real or substantial connection between the proposed defendant and the conduct which gave rise to the claim and England and Wales.

207.
To frame the question in a neutral way, I think it useful to contemplate the situation which arises in such cases in reverse. Suppose that a British citizen who has lived her whole life in England drives carelessly on an English road and collides with another vehicle causing a serious injury to a passenger travelling in that vehicle. It so happens that the passenger is a tourist visiting this country from, say, the People's Republic of China. The passenger returns home to China and wishes to bring a claim for damages for personal injury against the driver in his local court. He argues that the claim ought to be tried in China as, although the claim is governed by English law, no significant issue of law is likely to arise and liability is likely to be admitted; most of the witnesses whose evidence is relevant to the quantum of the claim, including the claimant himself, are situated in China and do not speak English, and most of the documents relating to quantum are in the Chinese language; moreover, the claim would be tried more quickly and cheaply in the Chinese courts. In such a case I cannot accept that the fact that the claimant has suffered continuing pain and incurred the cost of medical treatment and loss of earnings in China would amount to a link with that jurisdiction capable of justifying permitting proceedings to be brought against the driver in China, provided only that the Chinese court considers that practical considerations of the kind mentioned make China, on balance, the proper place in which to bring the claim.

208.
In my view, the English courts should do as we would be done by and interpret the tort gateway in a way which gives effect to its purpose of requiring a real and substantial connection with the jurisdiction and which provides a legitimate and stable basis for the assumption of jurisdiction over a foreign defendant. I accordingly consider that the narrow interpretation of the tort gateway adopted in the cases involving economic torts is correct and that the first instance cases which have adopted the broad interpretation in relation to personal injury claims were wrongly decided on this point and should be overruled.

Conclusion on the scope of the tort gateway

209.
I would therefore hold that, as in this case the road traffic accident and the injuries sustained in that accident occurred in Egypt, Egypt is the place where all the damage falling within the scope of ground 9(a) was sustained. The continuing pain and disability suffered, and financial costs incurred, after the claimant returned home to England was not damage directly caused by the defendant's alleged negligence and does not bring the claim within the tort gateway.

210.
That said, the extensive argument which the Court of Appeal and this court have received on this issue would seem to have been unnecessary, as it would appear that in this case the claimant did not actually need to establish that her claims in tort fall within ground (9). This is because she also has a claim for breach of contract against the same defendant which has been held to fall within the gateway for contractual claims and which arises out of the same or closely connected facts.

Passing through the contract gateway

211.
To found jurisdiction in England and Wales for her claim for breach of contract, the claimant relied on ground (6)(a), which applies where the contract was made within the jurisdiction. The judge concluded that the contract entered into when the claimant booked the sightseeing excursion in a telephone call made to the hotel before she left England came within this gateway. He reached that

conclusion by applying the rule that a contract entered into by an instantaneous form of communication such as telephone is made when and where the acceptance of an offer is received by the offeror. Although there is no evidence about the detail of the relevant conversation, in Brownlie I the Court of Appeal inferred that, when she telephoned the hotel, it is likely that the claimant made an offer by explaining her requirements for the excursion, which the hotel concierge accepted. The contract was made when and where the claimant heard that acceptance and was therefore made in England. On the application for permission to serve the amended claim form on the present defendant, Nicol J followed this approach and found that ground 6(a) was satisfied.

212.
On what was certainly a permissible view of the facts, the judge was bound to find as he did by the decision of the Court of Appeal in Entores Ltd v Miles Far East Corpn [1955] 2 QB 327. In that case the Court of Appeal applied rules developed for the purpose of deciding whether a contract has been concluded to answer the different question of where a contract was made in interpreting one of the grounds for asserting jurisdiction over a defendant situated abroad. I must say that I find that an unsatisfactory approach. It is a sound rule that no contract is made by instantaneous communication unless and until acceptance of an offer is received. If a telephone call gets cut off before an acceptance of an offer spoken by the offeree is heard by the offeror - to take an example discussed in the Entores case, it is fair to hold that no contract has been concluded. To apply the same approach to decide whether the English courts have jurisdiction in relation to a claim made under a contract, however, produces entirely arbitrary results. The connection with England is no greater where the party to an international call who is situated in England is the one who makes the offer than it is where that person is the party who accepts the offer by which a contract is made. There is no principled basis for distinguishing between the two situations. The fact that one party is in England when the contract was made should either be sufficient or insufficient to satisfy the gateway requirement. It makes no sense that the result should depend upon a fine analysis of exactly who said what to whom in the conversation in which the contract was made.

213.
The bare fact that one of the parties was in England when the contract was made is in modern times a tenuous connection with the jurisdiction - all the more so compared with other connecting factors which are sufficient to satisfy ground (6) such as the fact that the contract is governed by English law. There seems to me much to be said for treating ground 6(a) as inapplicable where one of the parties was situated in another country when the contract was made. This result could be achieved by interpreting or redrafting ground 6(a) to apply only when both parties were within the jurisdiction when they made the contract. The question does not arise for decision in this case, however, as permission to appeal from the judge’s conclusion on this issue was refused.

Connected claims

214.
Where (i) two different claims against a defendant arise out of the same or closely connected facts, (ii) one of the claims meets a gateway requirement but the other does not, and (iii) the court is satisfied that England and Wales is the proper place in which to bring both claims, can both claims be brought in the English courts? It might be thought that the answer should be “yes” and that the justice and convenience of trying the connected claims together ought, in these circumstances, to trump the fact that one of the claims is not, considered by itself, sufficiently connected with England and Wales to pass through the gateway for claims of the relevant type. There is nothing in the rules which says in terms that permission may only be given to serve a claim form out of the jurisdiction if each claim

included in the claim form individually falls within one or more of the gateways. But that is how the rules have been interpreted: see eg Metall und Rohstoff AG v Donaldson, Lufkin and Jenrette Inc [1990] 1 QB 391. The law was reformed in 2015, however, when on the recommendation of the Lord Chancellor's Advisory Committee on Private International Law a new ground (4A) was added to the list of grounds in the Practice Direction. Ground (4A) applies where:

"A claim is made against the defendant in reliance on one or more of [grounds] (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts."

215.
In the present case the claims made in tort arise out of facts which, to the extent that they are not exactly the same, are very closely connected to the facts which give rise to the claim in contract made against the same defendant in reliance on ground (6). The claims in tort therefore appear to fall squarely within ground (4A). As it has been held that the claim in contract falls within ground (6), it would accordingly seem unnecessary for the claimant to show that her claims in tort come within the tort gateway.

216.
Ground (4A) did not exist in 2013 when the claimant applied in Brownlie I for permission to serve her claim form out of the jurisdiction. However, it came into effect on 1 October 2015 and was therefore available when the application for permission to serve the claim form out of the jurisdiction on the present defendant was made in 2019. Unfortunately, ground (4A) appears to have been overlooked by the claimant's legal advisers until attention was drawn to it by Lord Burrows during the hearing of this appeal. The parties were given an opportunity to file written submissions after the hearing on the applicability of ground (4A). No doubt for good reason, the claimant took the position that she does not seek to rely upon ground (4A) at this stage of the proceedings, having not done so in the courts below.

Conclusion

217.
As the claimant has eschewed reliance on ground (4A), I would hold that she cannot bring her claims in tort in England. Considered independently of the claims in contract, the facts giving rise to those claims are insufficiently connected with England to pass through the gateway for claims in tort. I would accordingly allow the appeal on this issue, whilst dismissing the appeal in relation to the claims for breach of contract.