CASE NOTE: *BROWNLIE v FOUR SEASONS HOLDINGS INCORPORATED* [2014] EWHC 273 (QB)

Matthew Chapman and John Ross QC

Introduction

This appeal arose out of a tragic fatal accident. The claimant was the widow and dependant of the deceased, Professor Sir Ian Brownlie CBE, QC. The deceased and his married daughter lost their lives in a road traffic accident in Egypt on 3 January 2010. The appeal arose out of the challenge to the jurisdiction of the English Court that was brought by the defendant, a company incorporated in Canada, pursuant to CPR Part 11. The factual background was as follows. The claimant and her late husband visited Egypt in January 2010; their visit to Egypt was the second part of a 14 night holiday that they took over the Christmas/New Year period 2009/10. The tour operator for the holiday was a limited company registered in England/Wales. The holiday commenced on 22 December 2009 with a flight from London Heathrow to Delhi and was scheduled to end on 5 January 2010 with a flight from Cairo back to London Heathrow. Accommodation and a variety of modes of transport were included in the cost of the holiday, as were several excursions. The claimant and the deceased travelled from Delhi to Cairo via Dubai on 31 December 2009. The accommodation arranged for them in Cairo comprised five nights at the Four Seasons Cairo at the Nile Plaza Hotel. The claimant and her late husband did not book any excursions in Egypt through the tour operator and it was common ground that the road traffic accident had occurred in the course of an excursion that did not form part of any regulated package holiday.

Instead, for the purposes of booking an excursion in Egypt, the claimant used a brochure which she had collected in the Four Seasons Hotel when she had stayed there with Sir Ian over the previous Christmas holiday period. This brochure featured the excursions that could be booked and which were arranged by Four Seasons. The booklet was headed, "*EGYPT'S SIGHTS & TOURS*" and contained the logo/marque of the defendant. A number of excursions featured in the brochure, among them, captioned "*TOUR 16 Full Day Tour/Approximately 16 hours*" was "*SAFARI IN FAYOUM*".

The claimant wished to book the 'Safari in Fayoum' excursion and, accordingly, telephoned the Four Seasons Hotel from the UK in order to make a booking. Alterations were required (by the claimant) to the scheduled itinerary for the excursion that featured in the brochure. For example, the claimant informed the hotel concierge that she would need a car for five people and that her preference was for the excursion to take place on a Sunday. It was arranged that the car would collect the claimant's party from the hotel at 7.30 am (local time) and would aim to return to Cairo before rush hour (the claimant and her late husband would be travel-

ling with Sir Ian's daughter, Rebecca, and her two young sons). The cost of the excursion included a vehicle, a guide, a driver and a police escort.

The claimant and Sir Ian Brownlie arrived at the Four Seasons Hotel as scheduled on 31 December 2009. While checking in it was confirmed that there was a handwritten booking for the excursion and the claimant was provided with a two page leaflet with a description of the excursion that had been arranged for her.

On the day of the excursion Sir Ian's daughter, Rebecca, and her husband were in the foyer of the hotel (with their two young sons). Transport for the excursion was already waiting: a jeep vehicle. The claimant, her late husband, Rebecca and the two children set off in the jeep at around 7.45 am. The tour guide, also provided as part of the excursion, accompanied them in the vehicle. The party set out with the police escort which had been arranged for the excursion and travelled out of Cairo on paved roads. After around an hour and a half it was discovered that the vehicle had a punctured tyre and it was not carrying a suitable spare. The claimant's party was, therefore, taken to a nearby hotel while the vehicle returned (it was understood to the Four Seasons Hotel) in order to change the tyre. A replacement driver and vehicle eventually arrived to collect the claimant and the rest of the family. The vehicle was a similar four wheel drive transport. The claimant's party picked up the itinerary with a visit to a beauty spot: the Wadi El Rayan. This took them off the paved road. They arrived at the marine fossil park in Wadi El Rayan at around 1 pm. After this visit the tour guide informed them that they had lost a good deal of time and, therefore, it was necessary to skip the remainder of the itinerary (except for lunch) in order to return to Cairo before the rush hour. The police escort remained with the party. As they set off the visibility was good; they were passing through flat countryside. Save for the police escort which was ahead, there were no other vehicles in the vicinity. The vehicle was not fitted with seat belts. The terrain was flat and visibility and road conditions were good. The vehicle was travelling fast. For unknown reasons, the police escort had pulled away to a considerable distance and the vehicle in which the family were travelling picked up speed (as if attempting to catch up with the police escort). There was a sudden loss of control of the vehicle while it was travelling at considerable, and, so the claimant alleged, unsafe speed. Sir Ian Brownlie, who was ejected from the vehicle, and his daughter lost their lives. The claimant was seriously injured (the tour guide and driver were also injured). An English woman, who had happened to be following, stopped and offered assistance. The police escort also returned quickly. The driver of the vehicle was convicted of driving offences with respect to the accident.

The claimant brought proceedings against the defendant in respect of the accident and its consequences. Her claim was pleaded in tort and contract. Service was effected in Canada and was acknowledged with an indication that the defendant would contest jurisdiction in England. The Acknowledgement of Service was followed by the appropriate application pursuant to CPR Part 11 and this application was heard by Master Cook. He concluded that the defendant's application should be granted and the grant of permission for service of the Claim Form outside the jurisdiction was, among other orders made, set aside. The claimant appealed and this was heard by Tugendhat J on 29 January 2014.

The central issue at first instance and on appeal concerned the identity of the party to be correctly named 'defendant' (as the corporate entity operating/managing the hotel and entering into the contract for the excursion and/or owing the claimant a duty of care in tort): the

apparent owners of the land and buildings of the hotel, Nova Park Cairo SAE (an Egyptian corporate entity), or the named defendant, a Canadian company whose branding appeared in the hotel's promotional material (in particular, the brochure that was consulted before the excursion was booked). The defendant argued the former; the claimant, the latter.

Legal framework

This was largely common ground both at first instance and on appeal. The test for jurisdiction is sometimes expressed as a set of 'gateways' and is as follows (taken from CPR 6.36 and 6.37 and paragraph 3.1 of Practice Direction 6B):

a. Gateway condition 1:
   (i) For a claim in contract, the (excursion) contract was made within the jurisdiction or the contract was governed by English law (paras 3.1(6)(a) and (c)); or,
   (ii) For a claim in tort, the claimant sustained damage within England and Wales (para 3.1(9)(a));
b. Gateway condition 2: in either case, the claim has a reasonable prospect of success; and,

   If, *but only if*, gateway conditions 1 and 2 are satisfied then:
c. *Forum conveniens*: See *Spiliada*:
   (i) Is England and Wales 'clearly the most appropriate forum for the trial of this action'"
   (ii) If not (and if the Court is satisfied that there is, on the face of it, another forum which is more appropriate for the trial of the action) are there special circumstances by reason of which the trial should nevertheless take place within the jurisdiction?

Judgment on appeal

Tugendhat J determined that Master Cook had wrongly set aside permission for service out of the jurisdiction and had erred in (effectively) trying the merits of the claim. He considered the following issues (on appeal), applying (to the factual evidence) the standard of proof discussed in *Canada Trust v Stolzenberg (No 2)* [1998] 1 WLR 547 (CA) and *Antonio Gramsci Shipping Corporation v Recoletos Limited* [2012] EWHC 1887:

Who was the contracting party?

The brochure for the excursion was referred to by the Judge as "the most important evidence". The name and logo found on this document fitted the description of the defendant even if the brochure did not name the defendant in terms. In the circumstances, the claimant had a good, indeed, much the better, argument that a contract existed between the parties. Absent evidence of another management company responsible for the hotel (and no such evidence was before the Court), the brochure would have led a reasonable person to understand (as the claimant did) that they were contracting with 'Four Seasons'.

Was the contract made within the jurisdiction?

There was a good arguable case that the contract was formed in England; the brochure constituted an invitation to treat against which the claimant made an offer as to the form and

content of the excursion (varying the advertised terms). An acceptance of the claimant's offer was then communicated back to her (in England) by the Cairo Hotel concierge during the course of their telephone conversation. According to *Entores Limited v Miles Far East Corporation* [1955] 2QB 327, as acceptance of the offer by the concierge was heard by the claimant in England, formation of the contract occurred there (and, therefore, within the jurisdiction).

Was the contract governed by English law?

In the event that the Court's conclusions were correct as to the identity of the contracting party and the location where the contract was made, this issue did not arise. Tugendhat J was constrained to consider this issue in the light of Regulation (EC) No 593/2008 (Rome I). On application of article 4(1)(b) of Rome I, it was concluded that the law of the excursion contract was not English law. Tugendhat J went on to state:

> *"The applicable law may well be the law of Canada, and in particular of the province of Canada where the defendant, as the service provider, has its habitual residence. But since the only issue I have to decide under this head is whether or not the contract was governed by English law, I decide that it was not governed by English law. It also seems unlikely that that applicable law will be found to be Egyptian law. I do not have to decide more than that, and it is better that I do not, since that may be an issue at trial."*

The claim in tort

The defendant relied on issues of applicable law in respect of the claimant's cause of action in tort (without placing before the Court any evidence as to material differences between the law of England and Wales and the law of any other jurisdiction that might be material to the manner in which the claimant pleaded her claim in tort against the defendant). Issues of applicable law in tort would, if the Court were required to consider them, fall to be determined by reference to Regulation (EC) No 84/2007 (Rome II). Tugendhat J directed himself as follows:

> *"Whether or not this court has jurisdiction to entertain this claim does not depend upon the claimant establishing that the law applicable to the law in tort is any particular law. The relevance of the law applicable to the tort is to separate issues, as to whether there is a sufficiently strong case on the merits of the claim, and what is the appropriate place to try the action. It does not seem to me that I need to form a view as to which law applies, save to say that it seems unlikely that there will be any relevant issue of Egyptian law."*

The Judge went on to conclude that, in the context of the contract likely existing between claimant and defendant (which constituted the Hotel concierge's agreement on the defendant's behalf to provide services as principal), there was a good arguable case that a duty was owed by the defendant to the claimant (by reference to cases such as *Moran v First Choice Holidays* [2005] EWHC 2478 (QB), *Susan Parker v TUI UK Ltd* [2009] EWCA 1261 and *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1996] 1 WLR 38 (PC)).

Forum Conveniens

Applying the test set out in *Spiliada*, Tugendhat J held that England was the appropriate forum to try the case:

> *"The issue which is most likely to be a live issue at any trial is the amount of special damages. That may require evidence from persons with knowledge of Sir Ian's professional practice as an international arbitrator, and of his health. Such persons are likely to be in England. Similarly, those with knowledge of the claimant's injuries and damage will be herself and her medical advisers in England. Although the location of the accident was Egypt, it seems unlikely that there will be any issue of fact relating to the accident itself. Nor is Egyptian law likely to apply. In the light of the conclusions I have reached it has not been necessary for me to consider whether the relevant considerations include the troubled political situation in Egypt. If there remains a live issue as to whether the defendant is the party to the contract made between the claimant and the Concierge, then it is likely that will depend largely on documentary evidence. If there are any hotel managers who can give evidence, the defendant has not identified them, and there is no knowing where they might now be. There is no suggestion that there might be any witnesses from Canada."*

The Court concluded that the claimant had passed through the gateway conditions for jurisdiction and the order granting permission for service outside the jurisdiction was restored.

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