Remaining options to bring an overseas personal injury claim – in England and Scotland

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Background

- United Kingdom EU Membership Referendum on 23.06.2016
- Decision was UK voted to leave by 52% to 48%
- Transition period leading up to Exit Day – 11pm GMT 31.12.2020
- European Union (Withdrawal Agreement) Act 2020.
- For proceedings commenced on or after 01.01.2021 neither the Brussels Regulation nor the Lugano Convention will apply.

- Rome I and II continue as part of domestic law by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendments etc) (EU Exit) Regulations (SI2019/834)

Pre-Brexit Jurisdiction Rules

- **Recast Regulation 1215/2012**
  - Direct actions against motor insurer (Arts 11 and 13 Recast as clarified in the case of FBTO Schadeveringen NV v Odenbreit)

- **Lugano II Convention 2007**
  - Which largely mirrored the Recast regulations and dealt with jurisdiction and enforcement between the EU and EFTA (Iceland, Norway, Switzerland)

- **Civil Jurisdiction and Judgments Act 1982 (1982 Act)**
  - Intra-UK Jurisdiction rules
- **Domestic rules** – for everything else!

Service – Pre-Brexit

- **Service Generally**
  - Regulation (EC) No 1393/2007 'Service Regulations'

- **Service for motor claims**
  - The Fourth Motor Insurance Directive required each motor insurer in the European Union to have a claims handling representative in each Member State
  - Proceedings could be served on the claims handling representative rather than on the Foreign Insurer (*Spedition Welter GmbH v Avanssur SA C-306/12*)

Service – Post-Brexit

- Foreign Insurers no longer required to appoint a UKHA.
- Now need to serve Defendant or their nominated solicitors.
- Primary Service methods
  - CPR 6.40(3)(b)
    - *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 'Hague convention'*
  - CPR 6.40(3)(c)
    - *by any other Method permitted by the law of the country in which it is to be serve*

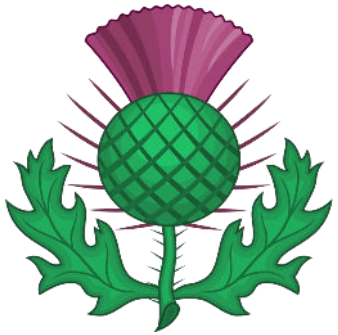
Enforcement –Pre Brexit

- **Article 39 of Regulation (EU) 1215/2012, Brussels I (recast)**
  - *"A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required".*

- **Article 33 of the Lugano Convention**
  - *"A judgment given in a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required."*

Enforcement – Post Brexit

December 2020 (north of the border)



- Every case in the department reliant on *Odenbreit* or consumer contract jurisdiction needed raised and served.
- Shout out to PEOPIL President Ana Romero who arranged notary service of about 25 actions arising from accidents in Spain.
- At least five other PEOPIL members around Europe assisted with urgent service requirements.
- Problem with Scottish cases is when they are defended, they immediately go onto a ‘light-touch’ timetable. Minimal case management by the court.
- Spent much of the next two years catching up with cases litigated far too soon.
- Some longer-running cases still ongoing.

… and south of the border

- By s.20 of the European Union (Withdrawal) Act 2018 the first “exit day” was 11pm on 29.03.2019.
- The UK then had 5 exit days... 12.04.2019, 22.05.2019, 31.10.2019 and finally 31.12.2020!
- Proceedings had to be ‘commenced’ by exit day. But what did that mean?
- Was issuing proceedings sufficient? Or did proceedings also need to be served? (Pandya v Intersalonika)
- This caused uncertainty, stress and considerable panic ... On numerous occasions!

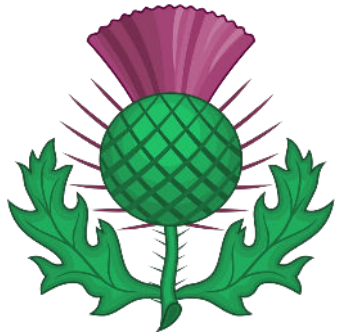
The Brussels legacy provisions

- Sections 15A – 15E & 42A of 1982 Act inserted by Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulation 2019
- Applies only if the subject matter/nature of proceedings fall within the scope of art 1 Brussels Recast (1215/2012)
- Replicates the consumer contract / contract of employment provisions of Brussels Recast (1215/2012) post-Brexit.
- CJEU case law prior to 31.12.2020 will remain relevant.
- Consumer Contact (s.15B). The consumer has a choice to bring proceedings:
  - in Defendant / 'other part's' home court
  - in the Consumer's home court
- Employment contract proceedings may be brought... (s. 15C)
  - The Employer's home Court
  - Where the employee habitually carries out the work or last did so
- No need for permission to serve out (in England)
- Forum non conveniens issues may still apply.

The Civil Procedure Rules (CPR)

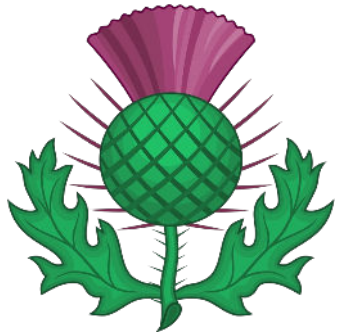
- Rule 6.37 Permission is required to serve a defendant out of the jurisdiction
- Rule 6.37(3) “The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.”
- The claimant is required to establish the follow three key elements:
  - The applicability of one of the jurisdictional gateway at paragraph 3.1 of Practice Direction 6B;
  - Reasonable prospects of success; and
  - England and Wales is a proper place to bring the claim.
- Many different ‘gateways’ to identify when the English Courts may have jurisdiction over a matter... Tort, contract anchor defendant...
- Tort Gateway: FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45
- Even where permission granted a defendant may still challenge the Court’s jurisdiction once served

Service in Scotland



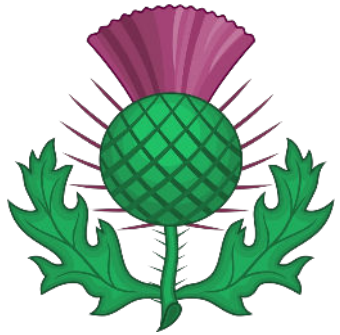
- Concept of ‘permission to serve out of the jurisdiction in England’ has no equivalent in Scottish procedure.
- Service is purely procedural.
- Needs to be completed before the limitation period.
- Equivalent of issuing is signeting (in the Court of Session) or warranting (in the Sheriff Courts).
- But service ahead of the limitation period is a necessity.

Differences post-Brexit in Scotland



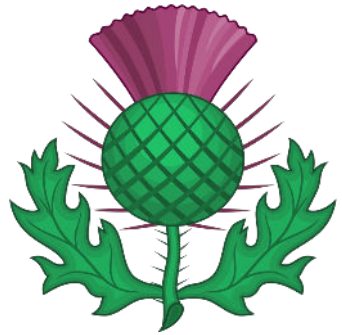
- Don't have any equivalent of *Brownlie* in England and Wales, or procedural rules that provide gateways to justify jurisdiction against a foreign defender.
- You have to rely on one of the substantive bases for jurisdiction in Schedule 8.
- Open to the defenders to deny jurisdiction. Then for pursuer to prove jurisdiction, but defender has to insist on their jurisdiction defence very early on in the court action or they're deemed to have accepted it (*Heriot-Watt University v Schlamp* 2021 SC (SAC) 39).
- Open to a defender to admit jurisdiction *per se* but argue *forum non conveniens* (burden is then on defender to prove FNC).

Schedule 8 CJJA in Scotland



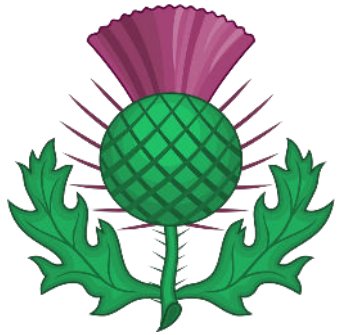
- Mostly includes the grounds for jurisdiction in the Brussels 1a Regulation and the Lugano Convention.
  - Place of performance of the contract, locus of delict/tort, domicile of defender, operations arising from a branch, agency or other establishment.
  - For personal injury purposes, the key exception is a lack of *Odenbreit*, and no equivalent of *Brownlie*.
- Unlike a case brought under the Brussels 1a Regulation, which has provisions to ensure legal certainty in relation to jurisdiction, it is open to a defender to plead *forum non conveniens* in a case based on the Schedule 8 jurisdiction grounds.
- A lot of offshore industry cases can be run through Scotland regardless of the location in the world of accidents due to the management responsibilities of oil companies' Aberdeen offices which are often the largest or head office in Europe.

Group Proceedings and FNC in Scotland



- Talking about these together as one of the first group proceedings in Scotland triggered a major *forum non conveniens* dispute.
- Newly allowed under S. 20 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Requires:
  - A representative party must be granted permission of the Court to bring group proceedings.
  - May be granted for 'opt-out' or 'opt-in' group proceedings.
  - 'Opt-out' proceedings can only apply to individual claimants domiciled in Scotland, or both them and claimants outside Scotland who have given express consent to be included in the group.
  - Court must be satisfied all of the claims made raise issues which are the same as, or similar or related to, each other.
  - And that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings.

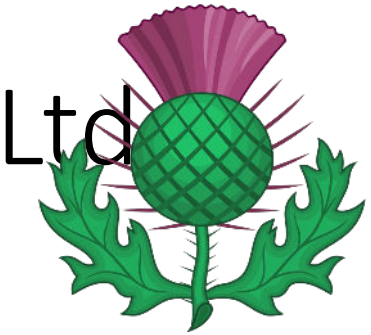
Group Proceedings and FNC in Scotland



- Group Proceedings so far:
  - Kenyan Tea-Pickers
  - VW Diesel Emissions
  - Celtic Boys Club
  - Easyjet Data Breach
- Representative Party
  - *Thompsons Solicitors Scotland v James Finlay (Kenya) Ltd* 2022 SLT 731
  - Solicitors acting in the claim initially applied to be the representative party themselves.
  - Refused – since then, have seen retired Kings' Counsel appointed as representative parties.

Hugh Campbell KC v James Finlay (Kenya) Ltd

2022 SLT 751



- Group Proceedings action.
- Defender is a major Kenyan tea plantation operator.
- It is incorporated in Scotland and has been in some form or another going back to 18th Century but its remaining operations there are limited.
- Claims are made by around 1500 former and current employees alleging musculoskeletal injuries arising from common unsafe working practices.
- Jurisdiction by domicile, but the case went to proof on the defender's plea that Scotland was *forum non conveniens*.

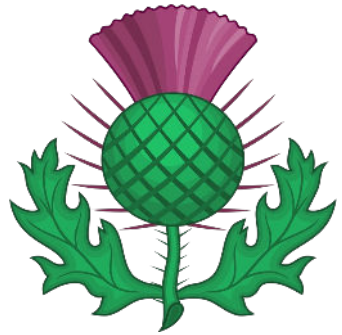
Hugh Campbell KC v James Finlay (Kenya) Ltd

2022 SLT 751

- Factors Considered:
  - Applicable law being the law of Kenya.
  - Whether the group members had prorogated the exclusive jurisdiction of the Kenyan courts in agreements with the defender.
  - If their exclusive remedy for workplace injury was the compensation scheme set by the Kenyan Work Injury Benefits Act 2016.
  - The lack of ongoing corporate activity in Scotland – defender essentially submitted incorporation in Scotland was a historical coincidence.
  - Practical difficulties of eliciting evidence from Kenyan witnesses in Scotland.
  - Lack of the court's understanding of Kenyan culture.
  - Lack of availability of legal aid, NGO funding or conditional fee arrangements in Kenya.
  - Access to justice in Kenya – pursuer's evidence was there was a substantial and material risk that the claims would not be heard or ever concluded in the Kenyan courts.

Hugh Campbell KC v James Finlay (Kenya) Ltd

2022 SLT 751



- Principles in relation to *forum non conveniens*
  - Court needs to be satisfied some other court of competent jurisdiction in which the case may be tried more suitably for the interests of all parties and for the ends of justice.
  - Onus is on the defender to raise and justify the plea.
  - The matter is not simply one of convenience.
  - Necessity to apply foreign law alone would not suffice to found the plea.
- Conclusions
  - Accepted that *prima facie* Kenya was the more natural forum for the claims.
  - But accepted the cogent evidence that there was a real and material risk the group members will not obtain access to substantial justice.
  - That issue of accessibility to justice was determinative in Lord Weir's view on the issue and refused to make a finding of *forum non conveniens*.
  - Currently on appeal to the Inner House of the Court of Session.

Forum non conveniens – the new battleground?

- The task of the court is to identify the forum in which the case can be suitably tried for **the interests of all the parties and for the end of justice.**
- ***Spiliada* [1986] UKHL 10**
  - Looking for "the place in which the case may be tried more suitably for the interests of all the parties and for the ends of justice" [page 474]
  - Not mere convenience of the parties [page 475]
  - Looking for the courts of the place "with which the action had the most real and substantial connection" [page 478]
- **A two-stage test…**
- Stage 1 – Connecting Factors
- Stage 2 – The need to do justice

c) Forum

- **First Stage – connecting factors**
  - Lord Briggs in ***Vedanta Resources plc v Lungowe*** **[2019] UKSC 20** at [66]:

    *"*That concept generally requires a summary examination of **connecting factors** between the case and one or more jurisdictions in which it could be litigated. Those include **matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language** so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the **system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."**

  - Note ***VTB Capital v Nutritek International*** **[2013] 2 AC 337** at [51]:

    "The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction…The significance attaching to the place of commission may be dwarfed by other countervailing factors."

c) Forum

- **First Stage – connecting factors**
  - Domicile
  - Residence
  - Any linked proceedings?
  - Applicable law
  - Is liability agreed? If so, place of the accident is likely to carry less weight.
  - If quantum only and a foreign law applies, what kind of assessment is required by the foreign law (algorithm vs discretion)?
  - Persisting symptoms and consequential damages – where will they be suffered?
  - Can the witnesses give evidence in English or will translators be required?
  - Will foreign experts be likely to need to give evidence, or will written (translated) reports be sufficient?
  - Where exactly will the case be heard in the alternative forum and what is the comparative convenience to the parties of that location?

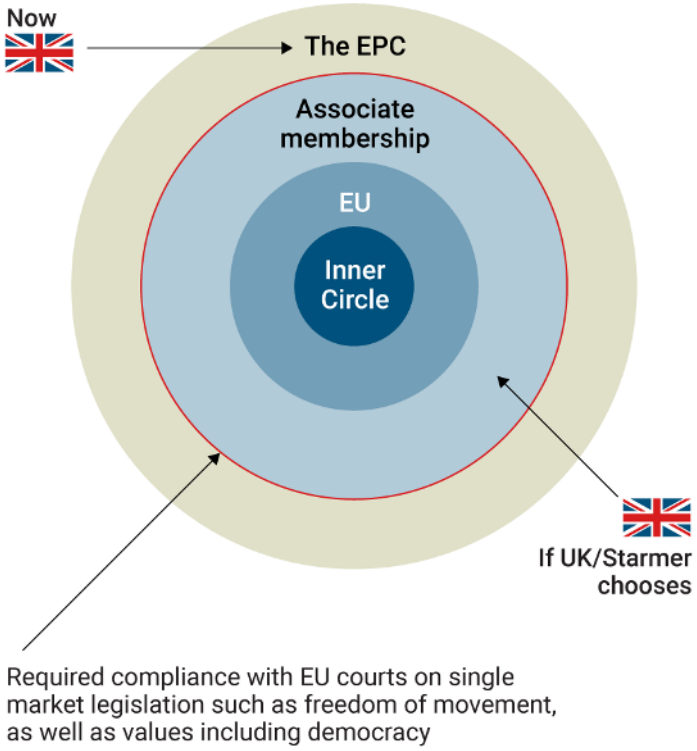
***Klifa v Slater* [2022] EWHC 427 (QB) -** A recent consideration of the forum test in the personal injury context emphasises the need to take a detailed look at the particular facts of the case when determining forum.

c) Forum

- **Second Stage – the need to do justice**
  - England may nevertheless be the appropriate forum if there is **a real risk that substantial justice will not be done elsewhere.**

- A New Hope?
- “Plan for EU ‘inner circle’ designed to tempt Labour”
- The Times 19.09.2023

How layers would work



The Inner Circle
Countries in the innermost circle would give up their national vetoes over Brussels budget contributions, taxation, defence, security and foreign policy

European Union (EU)
All current and future member states bound by same political objectives as in the current Lisbon Treaty

Associate membership
Association centred around single market, not bound by “ever closer union”

European Political Community (EPC) No EU integration. Focuses on geopolitical convergence, structured by bilateral agreements with EU

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