

## The Thursday Morning Webinar

# Dealing with Deaths Abroad

The webinar will start shortly



## Establishing the facts

### Tools at your disposal:

- The local criminal investigation;
- Any English criminal investigation;
- Any other local or international investigation - for example, FIS, PADI, professional and sporting bodies.

## Establishing the facts

### Tools at your disposal:

- The local inquest.
- The English inquest.

## Local inquest

- Local investigations/processes need to be completed before repatriation can be considered.
- Issues to consider:
  - Time!
  - Retention of organs

## What authorisation will be needed?

Points to bear in mind if the deceased is to be brought back to the UK:

- Registration of death according to local regulations/laws of country where deceased died
- Death certificate (translated in English)
- Authorisation to move body
- Passport
- Register with British Consul (not necessary)
- Certificate of embalming

Cremation

## The English inquest

Following a death abroad, a coroner will usually only become involved if:

- the deceased's body is repatriated to England and Wales;
- the apparent circumstances of the death would have led the coroner to investigate the death, if it had occurred in England or Wales.

Jurisdiction of coroner: *R v West Yorkshire Coroner, ex parte Smith (No 1)* [1983] QB 335

## The English inquest

- Coroner has *“no power to investigate overseas, send investigators overseas or require police to investigate overseas. Nor can the coroner compel the disclosure of documentation from the overseas country or compel witnesses from the country to attend to give evidence”*

*(Shafi v Her Majesty’s Senior Coroner for East London [2015] EWHC 2106 (Admin))*

## The English inquest

Obligation to investigate: section 1(2) CJA 2009, i.e. a reason to suspect that -

- a) The deceased died a violent or unnatural death;
- b) The cause of death is unknown; or
- c) The deceased died while in custody or otherwise in state detention.

### Article 2 inquests

- Bear in mind the scope may be affected, because of the territorial scope of instrument.
- *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26



## Bereavement awards

- Dependent upon whether the claim is governed by English law or foreign law (*Cox v Ergo Versicherung AG* [2014] UKSC 22)

### English law:

- FAA 1976 will apply

### Rome II:

- Foreign law equivalent of FAA will apply

## Making a claim: applicable law

Article 4(1) of Rome II (Regulation (EU) 864/2007):

*“Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict 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 occur.”*

## Making a claim: applicable law

Article 4(2) of Rome II (Regulation (EU) 864/2007):

*“However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.”*

## Making a claim: applicable law

Article 4(3) of Rome II (Regulation (EU) 864/2007):

*“Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.”*

## Making a claim: applicable law

The applicable law governs substance but not procedure: Articles 15 and 1(3) of Rome II:

Substance:

- Liability, including contributory negligence, and quantum, including indemnity limits and caps.
- Limitation.

Procedure:

- Evidence: *Wall v Mutuelle de Poitiers Assurances* [2014] 1 WLR 4263.
- Costs.

## Making a claim: jurisdiction

The jurisdictional gateways: CPR Part 6, PD6B:

- Damage has been, or will be, sustained within the jurisdiction. It is now clear that damage may be direct or indirect.
- Anchor Defendants: a ‘necessary or proper party to the claim’.

## Making a claim: jurisdiction

CPR Part 6.37: applying for permission to serve the claim form:

- The claim must be able to pass through one of the gateways.
- The Claimant must believe that the claim has a reasonable prospect of success.
- The court must be satisfied that this is the proper place in which to bring the claim.

## Making a claim: service

CPR Part 6.37: the court may give directions for service. Generally the safest course is either:

- Service via the Foreign Process Section.
- Service via a method permitted by the law of the country in which proceedings are to be served.

But **BEWARE THE BACKLOG**: be ready to make an application for an extension of the lifetime of the claim form.



## *Brownlie: the facts*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

- On 3<sup>rd</sup> January 2010 Sir Ian Brownlie QC and his daughter were killed, and Lady Brownlie and their two grandchildren were seriously injured, in a road traffic accident which took place in Egypt.
- The accident occurred during the course of an excursion provided by the Egyptian hotel at which the party was staying at the time.

## *Brownlie: the facts*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

- The excursion had been booked by Lady Brownlie over the telephone prior to the party's arrival in Egypt.
- After much 'ducking and weaving' on the part of the hotel's parent company (Four Seasons), it was established that the correct Defendant to the claim was FS Cairo, an Egyptian company.

## *Brownlie: the proceedings*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

SPOILER: proceedings are still ongoing:

- The claim was issued against the Canadian parent company on 10<sup>th</sup> December 2012. Amongst others, there were claims for bereavement damages and damages under the Fatal Accidents Act 1976.
- The court gave permission to serve proceedings out of the jurisdiction, and this was done. Thereafter....

## *Brownlie: the proceedings*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

- The Defendant made an application for a declaration that the court did not have jurisdiction to hear the claim.
- The application succeeded, failed on appeal, and partially succeeded on appeal to the Court of Appeal.
- Everybody appealed to the Supreme Court.
- At this point the identity of the correct Defendant was established.

## *Brownlie*: the proceedings

*Four Seasons Holdings Inc v Brownlie* [2018] 1WLR 192, [2020] 7 WLUK 417, *FS Cairo v Brownlie* [2021] 2 All ER 605

- The application therefore succeeded - the wrong Defendant had been sued.

BUT

- The Supreme Court gave permission for the correct Defendant to be substituted for the incorrect entity and remitted the case to the High Court.
- They decided, by a majority, and obiter, that the claims fell within the tort gateway.

## *Brownlie: the proceedings*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

- The court gave permission for the claim to be served on the substituted Defendant out of the jurisdiction - and the substituted Defendant made an application to the High Court to challenge jurisdiction. By this point it was late 2018 and the litigation had been running for six years.

## *Brownlie: the proceedings*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

- On 1<sup>st</sup> October 2019 Nicol J gave the first instance judgment in the second set of proceedings.
- He held that the claims passed through the tort gateway and that there was a good arguable case in relation to them. The courts of England and Wales were the proper forum for the claims.
- The Defendant appealed to the Court of Appeal.

## *Brownlie: the proceedings*

*Four Seasons Holdings Inc v Brownlie [2018] 1WLR 192, [2020] 7 WLUK 417, FS Cairo v Brownlie [2021] 2 All ER 605*

- On 29<sup>th</sup> July 2020 the matter came before the Court of Appeal, composed of Underhill LJ, McCombe LJ, and Arnold LJ (who dissented in part)....
- ....and on 11<sup>th</sup> January 2021 the Supreme Court heard a further appeal...
- ...judgment is awaited on this latest appeal...over 11 years after the accident, and nearly nine years after proceedings were issued.



## *Brownlie* in the Court of Appeal: applicable law

*Four Seasons Holdings Inc v Brownlie* [2018] 1WLR 192, [2020] 7 WLUK 417, *FS Cairo v Brownlie* [2021] 2 All ER 605

- The parties agreed that pursuant to Article 4(1) of Rome II Egyptian law was the applicable law - therefore, the Supreme Court had held, no claim could be made pursuant to the Fatal Accidents Act 1976.
- There was a dispute about whether it was for the Claimant to plead the relevant provisions of Egyptian law - the Court of Appeal held that it was not.

[paras.63, 94, 178, 201.]

## *Brownlie* in the Court of Appeal: jurisdiction

*Four Seasons Holdings Inc v Brownlie* [2018] 1WLR 192, [2020] 7 WLUK 417, *FS Cairo v Brownlie* [2021] 2 All ER 605

- The claims for bereavement and dependency (under Egyptian law) related to damage sustained within the jurisdiction of England and Wales.
- The claims therefore passed through the tort gateway because they related to *indirect* significant damage sustained within the jurisdiction.

[paras.52, 53.]

## *Brownlie* in the Supreme Court

We await the decision of the Supreme Court with interest - but it does appear to be clear that:

- The applicable law will be governed by Rome II, with the effect that generally there will be no claim under the Fatal Accidents Act 1976.
- The English courts will have a discretion to accept jurisdiction over claims for bereavement and dependency, if these are recoverable under the applicable law.
- The English courts may well accept jurisdiction in those circumstances.
- There is no procedural rule that the provisions of the applicable law must be pleaded.

Next time:

8<sup>th</sup> July, 12pm

Join Edward Faulks QC, Jack Harding,  
Saleem Khalid and Susanna Bennett  
for a discussion on vicarious liability

Sarah Prager

[sprager@1chancerylane.com](mailto:sprager@1chancerylane.com)

Dom Smith

[dsmith@1chancerylane.com](mailto:dsmith@1chancerylane.com)

