Personal Injury and Article 4(3) of Rome II Regulation

This blog post is a follow up to my earlier announcement on the decision of Owen v Galgey [2020] EHWC 3546 (QB).

Introduction

Cross border relations is bound to generate non-contractual disputes such as personal injury cases. In such situations, the law that applies is very important in determining the rights and obligations of the parties. The difference between two or more potentially applicable laws is of considerable significance for the parties involved in the case. For example a particular law may easily hold one party liable and/or provide a higher quantum of damages compared to another law. Thus, a preliminary decision on the applicable law could easily facilitate the settlement of the dispute between the parties without even going to trial.

Rome II Regulation[1] governs matters of non-contractual obligations. Article 4 of Rome II applies to general torts/delicts such as personal injury cases. It provides that:

1. 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.
2. 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.
3. 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 pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

In the recent case of *Owen v Galgey & Ors.,*[2] the English High Court was faced with the issue of applying Article 4 of Rome II to a personal injury case. This comment disagrees with the conclusion reached by the High Court Judge in displacing English law under Article 4(2) of Rome II, and applying French law under Article 4(3) of Rome II.

Facts

The Claimant is a British citizen domiciled and habitually resident in England who brought a claim for damages for personal injury sustained by him as result of an accident in France on the night of April 3rd 2018, when he fell into an empty swimming pool which was undergoing works at a villa in France – a holiday home owned by the First Defendant, whose wife is the Second Defendant. The First and Second Defendants are also British citizens who are domiciled and habitually resident in England. The Third Defendant is a company domiciled in France, and the insurer of the First and Second Defendants in respect of any claims brought against them in connection with the Villa. The Fourth Defendant is a contractor which was carrying out renovation works on the swimming pool at the time of the accident, and the Fifth Defendant is the insurer of the Fourth Defendant. The Fourth and Fifth Defendants are both companies which are domiciled in France.

It was common ground between the parties that French law applied to the Claimant's claims against the Fourth and Fifth Defendants. But there was a dispute at to the applicable law in relation to his claims against the First to Third Defendants. These Defendants contended that, by operation of Article 4(2) of Rome II, English law applies because the Claimant and the First and Second Defendants are habitually resident in England. However, the Claimant contended that French law applied by operation of Article 4(3) the Rome II because, he says, it is clear that the tort in this case is manifestly more closely connected with France than it is with England.

It was common ground that French law applied under Article 4(1) of Rome II because the direct damage occurred in France in this case; and English law applied under Article 4(2) of Rome II because the Claimant and First and Second

Defendants were all habitually resident in England. The legal issue to be resolved was therefore whether under Article 4(3) the tort/delict was manifestly more closely connected to France than it is with England.

Decision

In a nutshell, Linden J held that French law applied under Article 4(3) of Rome II. The Court considered Article 4 of Rome II as a whole and read it in conjunction with both the Explanatory Memorandum[3] and Recitals to Rome II.[4]

Linden J held that Article 4(2) created a special rule which automatically displaced Article 4(1), and Article 4(2) was intended to satisfy the legitimate expectation of the parties.[5] On this basis, he observed that Article 4(2) could only apply in two party cases (only one victim and one tortfeasor), and not multi-party situations.[6] Linden J explicitly disagreed with an earlier decision of Dingemans J in *Marshall v Motor Insurers' Bureau* & *Ors*[7] that held that Article 4(2) applied in multi-party situations.[8]

Linden J considered the relevant circumstances that could give rise to applying Article 4(3) in this case in the following chronological order:

1. the desire for a single law to govern the whole case involving the Claimant and the First to Fifth Defendants;[9]
2. the circumstances relating to all the parties in the case;[10]
3. the place of direct damage under Article 4(1);[11]
4. the habitual residences of the parties, including where any insurer defendants are registered at the time of the tortious incident and when the damage occurs;[12]
5. the habitual residence of the Claimant at the time of the consequences of the tort, including any consequential losses;[13]
6. the nationalities of the parties; [14] and
7. the fact that the parties have a pre-existing relationship in or with a particular country.[15]

Linden J held, following previous English decisions,[16] that the burden of proof was on the party that seeks to apply Article 4(3).[17] He held that Article 4(3) could only be applied as an exceptional remedy where a clear preponderance of

factors supports its application.[18] However he observed that the facts of the case do not have to be unusual for Article 4(3) to apply, though Article 4(3) was intended to operate in a clear and obvious case.[19]

After considering the submission of the parties in the case, Linden J preferred the Claimant's submission that Article 4(3) applied in this case. In his words: "France is where the centre of gravity of the situation is located and the preponderance of factors clearly points to this conclusion. This conclusion also accords with the legitimate expectations of the parties."[20]

Linden J gave great weight to the place of direct damage. In his words:

"The tort/delict occurred in France, as I have noted. This is also where the injury or direct damage occurred. The dispute centres on a property in France and it concerns structural features of that property and how the First, Second and Fourth Defendants dealt with works on a swimming pool there. Although these defendants deny that there was fault on the part of any of them, the First and Second Defendants say that the Fourth Defendant was responsible if the pool presented a danger and the Fourth Defendant says that they were. The allegations of contributory negligence/fault also centre on the Claimant's conduct whilst at the Villa in France.

The First and Second Defendants also had a significant and long-standing connection to France, the accident occurred on their property…

…the situation in relation to the swimming pool which is said to have been the cause of the accident was firmly rooted in France and it resulted from works which were being carried out by the Fourth Defendant as a result of it being contracted to do so by the First and Second Defendants. The liability of the First and Second Defendants, if any, will be affected by how they dealt with that situation, including by evidence about their dealings with the Fourth Defendant. That situation had no significant connections with England other than the nationality and habitual place of residence of the First and Second Defendants."[21]

Linden J also gave great weight to the desire to apply a single law to govern the whole case against the First to Fifth Defendants.[22] In his words:

"…the works were carried out by a French company pursuant to a contract with

them which is governed by French law. Their insurer, the Third Defendant, is a French company and they are insured under a contract which is governed by French law… It is also common ground that the claim against the Fourth Defendant, and therefore against the Fifth Defendant, also a French company, is entirely governed by French law and will require the court to decide whether the Fourth Defendant or, at least by implication, the First and Second Defendants were "custodians" of the property for the purposes of French law."[23]

On the other hand Linden J did not give great weight to the common habitual residence, common nationalities and common domiciles of the Claimant and First and Second Defendants, and the place of consequential loss which pointed to England. Linden J did not consider the pre-existing relationship between the Claimant and First and Second Defendants to be a strong connecting factor in favour of English law applying in this case. He did not regard their relationship as contractual but one that appears to be "the agreement resulted from a casual conversation between social acquaintances in the context of mutual favours having been done in the past."[24] He considered that if there was a contract between the parties, he would have held that French law applied under Article 4(3) of Rome I Regulation[25] because the parties mutually performed their obligations in France.

In the final analysis, Linden J held as follows:

"To my mind the tort/delict in this case is much more closely connected to the state of the swimming pool which, as I have said, was part of a property in France and resulted from the French law contract between the First and Second Defendants and the Fourth Defendant. If any of the Defendants is liable, that liability will be closely connected with this contract. This point, taken in combination with the other points to which I have referred, in my view clearly outweighs the existence of any contract with the Claimant relating to the Villa, even if I had found there to be a contractual relationship and even if it was governed by English law.

Similarly, although I have taken into account the nationality and habitual place of residence of the Claimant and the First and Second Defendants, these do not seem to me to alter the conclusion to which I have come. I have also taken into account the fact that the consequences of the accident have to a significant extent been suffered by the Claimant whilst he was in England, but in my view the other

factors to which I have referred clearly outweigh this consideration.

I therefore propose to declare that the law applicable to the claims brought by the Claimant against the First, Second and Third Defendants is French law."[26]

Comment

Owen is the second English case to utilise Article 4(3) as a displacement tool.[27] Interestingly, *Owen* and *Marshall* are both cases where Article 4(3) was used to trump Article 4(2) in order to restore the application of Article 4(1). These judicial decisions put to rest any contrary view that Article 4(3) cannot be used to restore the application of Article 4(1), when Article 4(2) automatically displaces Article 4(1). In this connection, I agree with the judges' conclusion on the basis that Article 4(3) operates as an escape clause to both Article 4(1)&(2). Such an approach also honours the requirement of reconciling certainty and flexibility in Recital 14 to Rome II. A contrary approach will unduly circumscribe the application of Article 4(3) of Rome II.

I do not agree with Linden J that Article 4(2) of Rome II only applies in two party cases (one victim and one tortfeasor) and does not apply in multi-party cases. I prefer the contrary decision of Dingemans J in *Marshall*. Interpreting Article 4(2) as being only applicable to two party cases is a very narrow interpretation. Moreover, the fact that Article 4(2) is a strong exception to Article 4(1) does not mean that Article 4(2) should be unduly circumscribed. Article 4(2) should not be applied mechanically or without thought. It must be given some common sense interpretation that suits the realities of cross-border relations in torts.

Moving to the crux of the case, I disagree with the conclusion reached by Linden J that French law applied in this case. Applying the test of Article 4(3), the tort was not *manifestly* more closely connected with France. In other words, it was not obvious that Article 4(3) outweighed the application of Article 4(2). To my mind, the arguments between the opposing parties were evenly balanced as to whether the tort was *manifestly* more closely connected with France. Article 4(2) in this case, which pointed to English law, was also corroborated by the common domiciles and common nationalities of the Claimant and First and Second Defendants which should have been regarded as a strong connecting factor in this case. In addition, the non-contractual pre-existing relationship between the

Claimant and First and Second Defendants, and consequential loss pointed to England, though I concede that these factors are not very strong in this case.

It is important to stress that Article 4(2) of Rome II is a fixed rule and not a presumption of closest connection as it was under Article 4(2) of the Rome Convention.[28] Once Article 4(2) of Rome II applies, it automatically displaces Article 4(1), except Article 4(3) regards the place of damage as *manifestly* more closely connected with another country. Linden J appeared to give decisive weight to the place of damage and the desire to apply a single law to all the parties in the case, but did not pay due regard to the fixed rule in Article 4(2) and the fact that it was corroborated by other factors such as the common nationalities and domiciles of the Claimant and First and Second Defendants involved in the case.

Conclusion

Owen presents another interesting case on the application of Article 4 of Rome II to personal injury cases. It is the second case an English judge would be satisfied that Article 4(3) should be utilised as a displacement tool. The use of the escape clause is by no means an easy exercise. It involves a degree of evaluation and discretion on the part of the judge. Indeed, Article 4(3) is very fact dependent. In this case, Linden J preferred the argument of the Claimant that French law applied in this case under Article 4(3). From my reading of the case, I am not convinced that this was a case where Article 4(3) *manifestly* outweighed Article 4(2). It remains to be seen whether the First, Second and Third Defendants will appeal the case, proceed to trial or settle out of court.

[1]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 ("Rome II"). It takes effect in courts of Member States only for events giving rise to damage occurring after 11 January 2009, as decided by the Court of Justice of the European Union (CJEU) in Case C-412/10 *Homawoo* EU:C:2011:747 [37].

[2] [2020] EWHC 3546 (QB)

[3]Explanatory memorandum from the Commission, accompanying the Proposal

for Rome II, COM(2003) 427final (Explanatory Memorandum).

[4] *Ibid* [15] – [24].

[5] *Ibid* [26] – [27].

[6] *Ibid* [27] – [29], [35]. However, the argument as to whether Article 4(2) applied only in two party situations was not put forward before Linden J.

[7] [2015] EWHC 3421 (QB) [17].

[8] *Owen* (n 2) [35].

[9] *Ibid* [36] – [38]. In this connection, Linden J considered and followed the decision in of Dingemans J in *Marshall* (n 7) [18].

[10]*Owen* (n 2) [39] – [45]. In this connection, Linden J considered and followed the decision of Cranston J in *Pickard v Marshall* & *Ors* [2017] EWCA Civ 17 [14] – [15].

[11]*Owen* (n 2) [46]. Linden J followed *Winrow v Hemphhill* & *Anor.* [2014] EWHC 3164 [43], and Dingemans J in *Marshall* (n 7) [19].

[12] *Owen* (n 2) [48]

[13] *Ibid* [49]. Linden J followed *Winrow* (n 11) [39]&[43] and *Stylianou v Toyoshima* [2013] EWHC 2188 (QB). At paragraph 50 Linden J stated that less weight was to be given to this factor.

[14] *Ibid* [51]. Linden J followed *Winrow* (n 11) [54]&[55] and *Marshall* (n 7) [22].

[15] *Ibid* [52] – [[56]

[16] *Winrow* (n 11) [16] and *Marshall* (n 7) [20].

[17] *Owen* (n 2) [57].

[18]*Ibid* [58]

[19] *Ibid* [61].

[20] *Ibid* [74].

[21]*Ibid* [75]-[77]

[22] Indeed, it was common ground in this case that the contract of insurance between the First, Second and Third Defendants was governed by French law; the contract between the First Defendant and the Fourth Defendant was governed by French law; the contract of insurance between the Fourth and Fifth Defendants was governed by French law; and the Claimant's claims against the Fourth and Fifth Defendants are governed by French law. *Ibid* [12]

[23]*Ibid* [76].

[24] *Ibid* [78].

[25]Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 ("Rome I").

[26] *Ibid* [81] – [83].

[27] *Marshall* (n 7) was the first case to successfully utilise escape clause as a displacement tool.

[28][1980] OJ L266.