

Recent Updates on Jurisdiction in Cross Border Cases

Both the Brussels Regulation and the Lugano Convention have now ceased to apply for any cases started after 31 December 2020, and whilst the UK has formally requested accession to the Lugano Convention, this is unfortunately unlikely to be granted any time soon (this is being blocked by the EU having all the non-EU contracting parties already agreed to the UK accession).

This means that the UK is limited to the use of domestic common law rules (previously used for non-EU matters) to deal with jurisdiction issues.

The domestic common law rules on jurisdiction establish that permission of the court is required before a claim can be served abroad (i.e. pursued in the jurisdiction of England and Wales).

As such, CPR r 6.37(5) provides that “*the court will not give permission unless satisfied that England and Wales is the proper place to bring the claim*”.

The main principles of this rule can be summarised as follows;

- The burden to show that England is “clearly” the proper place to bring the claim is on the claimant – this was determined on the case of *Spilada Maritime Corporation v Cansulex* 1987 AC 46
- However, the determination of the applicable forum will be made taking into account the specific facts of each case, as determined in the case of *VTB Capital Plc v Nutriek Capital Holdings Ltd* [2013] UKSC 5 and *Jong v HSBC Private Bank (Monaco) SA* [2015] 2 CLC 607, CA.

In practice, this means that the court will only grant permission for service abroad if it considers that the following three conditions are satisfied:

1. **The “gateway requirement”**: that there is a good arguable case that the claim falls within one of the tort gateways for non-contractual claims included in Practice Direction 6B (i.e.: PD6B) of the Civil Procedural Rules.¹
2. **“The merits test”**: that the claim has a realistic prospect of success.

¹ A claim is made in tort where the “damage” was (or will be) sustained within the jurisdiction, it results from an act committed within the jurisdiction or the claim is governed by the law of England and Wales.

The Supreme Court considered in the case of *FS Cairo v Brownlie* (2021) that “*damage*” means direct or indirect damage, this is, damage sustained within the foreign jurisdiction where the accident occurred, but also the ongoing damage that the victim continues to suffer in the jurisdiction of England and Wales. Unfortunately, there is still quite a wide interpretation of this gateway.

The court must be satisfied that the overall claim has enough merits before granting permission to serve abroad.

3. **“*Forum conveniens*”**: That the court is satisfied that the jurisdiction of England and Wales is the proper forum to bring the claim (i.e.. *forum conveniens*)

In order to determine the appropriate forum for a claim, the court must balance various factors such as the place of the accident, location of the parties, witnesses and experts, applicable law, if liability is straight forward, language of evidence in original form and translating/interpreting costs, costs in general, remote evidence at trial, etc.

In reality, the issue of “*forum conveniens*” is extremely difficult to predict as it will depend on the specifics of each case.

In order to understand how the determination of the “*forum conveniens*” works in practice, it is worth analysing recent cases where the issue was considered:

- a) *Graham v Fidelidade* [2024] – England appropriate forum
- b) *Lunn v Antartic Logistics Centre International (Pty) Ltd* [2024] – England appropriate forum
- c) *Aulla v Reale Seguros* (2024) – Spain appropriate forum
- d) *Appeal on Kumar Limbu & Ors v Dyson Technology Ltd & Ors* [2024] – Initially Malaysia appropriate forum – Court of Appeal determined England appropriate forum
- e) *Marinakis v Karipidis & Ors* [2025] EWHC 13 (KB) – England appropriate forum

a) *Graham v Fidelidade* [2024] – England appropriate forum.

This matter relates to a road traffic accident in Portugal when the claimant’s vehicle was hit by a vehicle insured by the defendant. The claimant sustained serious injury to his left leg resulting in an eventual amputation and was left with lifelong care needs due to his lack of mobility.

The claimant was a British national who had been traveling around Europe for the last eight years, but he owned a property in England and returned to England following the accident.

The claimant pursued a claim directly against the insurer of the defendant’s vehicle and liability was admitted. The claimant then requested the court’s permission for service abroad which was eventually granted. The defendant challenged that the claim was made “in tort” and made applications seeking to set aside the court order granting permission for service abroad.

The court concluded that the claim was “made in tort” and refused the defendant’s application. In reaching their conclusion, the court took into account the following factors:

- Liability was admitted, so the focus was on assessing the damages claim.
- The existence of evidence confirming the risk that justice will not be done if the claim is pursued in the foreign jurisdiction.
- Compliance with the “*forum conveniens*” principle
- Convenience, expense and the availability of witnesses
- Applicable law ²
- Place of commission of the tort³
- Enforcement. The court took into account the potential difficulties of enforcing the claim in Portugal.

b) Lunn v Antarctic Logistics Centre International (Pty) Ltd [2024] EWHC 1662 (KB)

This case had a procedural history before the defendant’s application to challenge jurisdiction, and concerns an accident occurred in Antarctica which is an uncharted territory. The defendant alleged that many of their witnesses were Russian and unable to travel to England (due to restrictions caused by the war in Ukraine). However, the defendant failed to identify particular witnesses, and the rest of their allegations in support of the English forum were also somewhat unconvincing which contributed to the court dismissing their application.

c) Aulla v Reale Seguros (2024) – (unreported) - Spain appropriate forum.

In this case, the claimant was domiciled in England and was in the course of a holiday in Spain at the time of the accident. The claimant was involved in a road traffic collision caused by the defendant’s insured in Spain. As a result of the collision, the claimant sustained serious injuries and was required to stay five weeks in a hospital in Spain before being transferred to an English hospital to receive further treatment. Liability was admitted.

² Whilst the claim for damages was to be assessed by Portuguese Law, the court concluded... “the evidence suggests that Portuguese law calculates pecuniary (or “*patrimonial*”) losses in a very similar way as English law; and the doctrine of adequate causality is described by the experts as meaning that it is “sufficient that the accident or event contributed to the severity of the overall injury”, a concept familiar to English law.”

³ Whilst the place of the tort was Portugal, the court concluded that “references to a presumption” to this effect are “unhelpful”; to view this factor in isolation may be “over-simplistic”; and “the significance attaching to the place of commission may be dwarfed by other countervailing factors”.

Proceedings were issued and the claimant sought and obtained permission to serve abroad, which was challenged by the defendant.

The court had to balance out all the elements of the case in order to determine if the jurisdiction of England and Wales was the appropriate forum. Despite the facts being quite similar to the case of *Graham* (above), the court found that the jurisdiction of England and Wales was not the appropriate forum. The order granting service abroad was therefore set aside as the claimant was not able to satisfy the “*forum conveniens*” principle.

The court considered that since the accident occurred in Spain, this made Spain the “natural forum” for the claim.

In addition, the court took into account the applicable law (Spanish) and whether or not there were “*relevant differences in the legal principles or rules*” when compared to English law. The court gave great importance to the fact that whilst the English court could potentially apply Spanish law, this would lead to delays and increased costs.

d) *Kumar Limbu & Ors v Dyson Technology Ltd & Ors* [2024] EWCA Civ 1564

This case involves an appeal from workers from Bangladesh and Nepal who alleged having been trafficked and subject to abusive working conditions by the defendants (companies based in England). Evidence suggests that the defendants were aware of the risks of forced labour in Malaysia.

The issue in dispute was whether the courts of England and Wales were the appropriate forum. In October 2023, the High Court determined that the Malaysian court was the most appropriate forum, and so the claimants appealed the decision.

On 13th December 2024, the Court of Appeal unanimously held that the lower court’s analysis was incorrect, particularly taking into account the defendants’ place of residence and the claimant’s access to justice and recognised the need to re-assess the balance of factors favouring either forum, which in practice meant that the service burden shifted to the defendant to show that another available forum was “clearly more appropriate”.

The Court of Appeal undertook its own evaluation bearing in mind the principles set out in the case of *Spilada* and concluded that England was clearly the most appropriate forum to try the case. In reaching their conclusion, the Court of Appeal held that the domicile of the defendants, the location of the issues, and practical convenience all favour a trial in England. The Court of Appeal also held that, in view of the claimants’ extreme poverty, there was a serious risk that they would be unable to bring claims in Malaysia.

e) Marinakis v Karipidis & Ors [2025] EWHC 13 (KB)

This case relates to a defamation claim. The four defendants made an application to set aside an earlier order permitting the claimant to serve its claim form outside the jurisdiction.

The original order was made without notice to the defendants, and without a hearing. The grounds upon which the defendants applied to the court for it to be set aside included that the claimant had not given full and frank disclosure; that England was not “clearly” the most appropriate forum; that the claim lacked merit and that it was an abuse of process.

The court considered that the claim met the “gateways requirement” and proceeded with the “merits test” against each one of the four defendants (and not against the claim as a whole). Interestingly, on this occasion, the court concluded that the “merits test” was only met against the first, third and fourth defendants, but not against the second defendant.

The judge also considered that the claimant’s arguments in favour of the proceedings being heard in England were the most appropriate on the basis that:

- The defamatory statements were within the jurisdiction.
- The defendants were domiciled in a range of jurisdictions but with a common campaign in England.
- There was nothing to suggest a large number of witnesses would be based in Greece.

In conclusion, the judge set aside the original order permitting the claimant to serve outside the jurisdiction *only* against the second defendant, and upheld it against the other defendants.

Conclusion

These cases illustrate the lack of a consistent approach to the determination of the “*forum conveniens*” in European personal injury cases, which lead to a substantial loss of legal certainty since the Brussels Recast Regulation ceased to apply. Clearly, the court’s decision will be determined by the specific facts of each case.

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