Neutral Citation Number: [2013] EWHC 2188 (QB)

Claim No: HQ12X01590

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand. London. WC2A 2LL

Date: 24 July 2013

Before :

SIR ROBERT NELSON
(sitting as a Judge of the High Court)

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Between :

FLORA STYLIANOU	**Claimant**
- and -	
MASATOMO TOYOSHIMA	**First Defendant**
- and -	
SUNCORP METWAY INSURANCE LIMITED	**Second Defendant**

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Mr Robert Weir QC and **Richard Royle** (instructed by **Bridge McFarland)** for the **Claimant**
Mr Neil Block QC and **Judith Ayling** (instructed by **Henmans Freeth LLP)** for the **Second Defendant**

Hearing dates: 19,23 and 24 April 2013

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Judgment Approved

Sir Robert Nelson:

1. On 25 April 2009 the Claimant was a front seat passenger in a motor car driven by the First Defendant in Western Australia when it was involved in a collision, as a result of which the Claimant sustained very serious injuries which rendered her tetraplegic. Ms Stylianou is a British citizen, habitually resident in England who was on holiday in Western Australia at the time of the collision. The First Defendant, who is Japanese and believed to be habitually resident in Japan, was insured by the Second Defendant (Suncorp), an insurance company registered in Queensland, Australia.

2. The Claimant was repatriated to England on 9 June 2009 and transferred to the Stoke Mandeville Hospital on 5 July 2009. On 13 November 2009 she issued proceedings against Mr Toyoshima in the District Court of Western Australia. Liability was admitted in the defence in those proceedings and thereafter voluntary interim payments made to the Claimant for her rehabilitation. The Western Australian claim is still extant, but currently stayed.

3. On 24 April 2012, the day before the 3-year limitation period in England expired, the Claimant commenced a claim in England against Mr Toyoshima and Suncorp claiming damages in respect of her personal injury arising out of the accident. On 19 April 2012 the Claimant applied for permission to serve the claim form and particulars of claim out of the jurisdiction and for an order for substituted service on Mr Toyoshima at Suncorp's Australian address in Brisbane. The application was granted by Master Fontaine on 21 June 2012 and Suncorp now apply to set aside that order and strike out the claim for abuse of process. It is Suncorp's contention that the Claimant cannot properly bring herself within the grounds set out at CPR 6.36, 6.37 and 6 BPD.3.1(9)(a), namely that the claim is made in tort where damage was sustained within the jurisdiction, and that in any event England is not the proper place in which to bring the claim and the court should not have exercised its discretion in the Claimant's favour on that issue. Permission should not therefore, the Defendant submits, have been given to serve the proceedings out of the jurisdiction. The applicable law, the Defendant submits, is Western Australian law, and the proper place to bring the claim is in Western Australia.

4. There are witness statements from the Claimant and from her Australian and English Solicitors before the Court including an additional statement for which I gave leave served on 26 April 2013. There are also statements from the Defendants' legal advisers. Each party has obtained a report from an expert in Australian law and procedure and those experts have produced a joint statement.

5. The Claimant is very seriously disabled and will be confined to a wheelchair for life. She is and will remain unfit to travel to Australia. The Western Australian proceedings are advanced as the Defendant's chronology shows. A detailed schedule of damages based upon the expert evidence obtained was served by the Claimant on the Defendant on 9 March 2012 in the Australian proceedings. That set out a claim for AUS$9 million. The incomplete first schedule served with the English proceedings set out a claim for £8.6 million. It is likely that damages awarded in England would be substantially in excess of those which would be likely to be awarded in Western Australia, mainly due to the fact that in Western Australia the discount rate for the assessment of future loss is fixed at 6%, considerably higher than in England. The Australian proceedings were commenced after expert legal advice had been obtained on the position under English law and those proceedings had been pursued for nearly 2.5 years prior to the proceedings being issued in England. Suncorp contends that the Claimant and her legal advisers were "forum shopping" in seeking to find the legal system which will be likely to award higher levels of compensation. Suncorp asserts that the information provided to Master Fontaine on behalf of the Claimant was 'economical' and potentially misleading in that it only referred to

steps having been taken to protect the Claimant's position in Western Australia and exhibited the defence rather than setting out the full extent of the advanced state of those proceedings.

6. The Claimant's evidence states that the reason why proceedings were commenced in Australia was to obtain interim payments for the Claimant's rehabilitation. Until Suncorp were forced to admit liability once proceedings had been brought against them in Western Australia they had not been prepared to make any payments to the Claimant. Such payments were essential for her because, without them, she was forced to stay at Stoke Mandeville Elospital longer than either she or the hospital wished her to do. There was uncertainty and indecision as to the effect of the provisions of Regulation EC No. 864/2007 of the European Parliament and of the Council of the European Union ("Rome II"). Mr Robert Weir QC ,who now appears on behalf of the Claimant, advised her in June 2011 as to the bringing of English proceedings and a detailed advice from Richard Royle, Sydney-based counsel, was obtained on 2 December 2011. Difference in time zones, difficulties in telephone communication and the Claimant's inability to operate a computer, all conspired to make the obtaining of instructions more difficult. All these matters, combined with the Claimant's indecision, caused the late issue of English proceedings. Suncorp submit that interim payments could have been obtained in England if proceedings had been commenced there.

<u>The requirements for permission to serve out of the jurisdiction</u>

7. CPR 6.36 and 6.37 set out three requirements. The burden is upon the Claimant to satisfy the Court that:

   (1) One of the grounds set out in CPR 6 BPD 3.1 has been established.

   (2) There is a serious issue to be tried.

   (3) England is the proper place in which to bring the claim. CPR 6.37(3) There is no dispute that there is a serious matter to be tried. In applying the statutory test of "proper place" the approach is the same as that in "forum conveniens". The guidance in relation to that common law test in *Spiliada Maritime Corp* v *Cansulex Ltd ("The Spiliada")* [1987] A.C. 460 still applies. See *VTB Capital pic* v *Nutritek International Corpn* [2013] 2 WLR 398.

8. The relevant ground under CPR 6 BPD.3.1 is that set out at (9)(a) which provides that:

> "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where-
>
> "…
>
> (9) A claim is made in tort where-
>
> (a) damage was sustained within the jurisdiction; ..."

9. The approach to giving permission to serve out of the jurisdiction is one of caution. This should be exercised when considering whether process should be served on a foreigner out of England. If there is any doubt in the construction of any of the heads of jurisdiction that doubt ought to be resolved in favour of the defendant. As the application for permission is made without notice to the defendant, a full and fair disclosure of all relevant facts ought to be made. The case must be within both the letter and the spirit of the rules: Dicey, Morris & Collins on the Conflict of Laws, 15th edition, para 11-142.

10. On their natural meaning, the words "damage... sustained within the jurisdiction" are wide enough to cover any kind of damage, direct or indirect. Prima facie therefore economic loss/fmancial damage, such as loss of earnings or loss of care sustained in the United Kingdom, is damage sustained within the jurisdiction, even though the initial injury causing direct physical harm occurred elsewhere.

11. This is the effect of the decision in the cases of *Booth* v *Phillips* [2004] 1 WLR 3292 and *S.A. Cooley (by his father and litigation friend P.A. Cooley)* v *T.R. Ramsey* [2008] ILP r 27, [2008] EWHC 129 (QB). Those decisions are both challenged by Suncorp as being incorrectly decided, but in any event, Mr Neil Block QC on behalf of Suncorp submits that the situation is now different because they were decided before Rome II came into force. The terms of Rome II when read, as they must be with CPR 6, require a narrow interpretation of "damage ... sustained within the jurisdiction" limiting its meaning to direct damage.

12. The key European Regulations relied upon by Mr Block QC are Regulation (EC) No. 44/2001 of the Council of the European Union ("Brussels I"), Regulation (EC) No. 593/2008 of the European Parliament and of the Council of the European Union ("Rome I"), and Rome II. I shall consider these in turn.

The European Statutory Framework

Brussels 1

13. This Regulation deals with jurisdiction and recognition and enforcement of judgments in civil and commercial matters. By its 'General Provision', persons domiciled in a Member State whatever their nationality, shall be sued in the courts of that Member State. Article 2.

14. Article 5(3), under 'Special Jurisdiction', states that a person domiciled in a Member State may, in another Member State, be sued:

> "3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;"

15. Article 5(3) was considered in *Handelskwekerij G. J. Bier B.V v Mines de Potasse d'Alsace S.A.* [1978] 1 QB 708. It was there held by the European Court of Justice that the phrase "the place where the harmful event occurred" covered a wide diversity of kinds of liability and that it therefore should be construed as referring both to the place where the tortious act occurred and the place where the damage occurred. That accordingly, where the act occurred in one Member State and the damage occurred in another Member State, the Claimant had the option of suing the defendant in the courts of either State. The case of *Bier* was distinguished by another ECJ decision in the case of *Marinari v Lloyds Bank pic* [1996] QB 217 where it was held that whilst the term "place where the harmful event occurred" could cover both the place where the damage occurred and the place where the event giving rise to it, it could not be construed so extensively so as to encompass any place where the adverse consequences of an event that had already caused actual damage elsewhere could be felt, and it did not include the place where the victim claimed to have suffered financial loss consequential on initial damage arising and suffered by him in another contracting State.

16. Under Articles 9 and 11 an insurer may be sued in a Member State in the courts of the Member State where he is domiciled or, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts of the place where the claimant is domiciled. Article 11 permits an insurer to be joined in proceedings which the injured party has brought against the insured and Article 9 applies to actions brought directly against an insurer.

17. Brussels I therefore applies where a defendant is domiciled in a Member State. Where this is so he can be sued there or in another Member State. As neither of the Defendants is domiciled in a Member State, Brussels I has no application to the Claimant's case as the Defendant accepts in paragraph 75 of its skeleton argument. Recital 9 of Brussels I states that where a defendant is not domiciled in the Member State he is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised. Thus the jurisdiction rules of the forum are applicable.

18. Neither Rome II, which deals with the applicable law to non-contractual obligations such as tort, nor indeed Rome I, which deals with the applicable law to contractual obligations, determine where, i.e. in what jurisdiction, a claim can be brought. Mr Block QC accepts that this is so, but submits that firstly it would be absurd if "damage" under the CPR could be construed in one way for applicable law and another for jurisdiction, and secondly that the CPR must in any event be construed in accordance with the dominant and binding European Regulations in Rome II. These, he submits, as in the case of all European Regulations, are part of English law and must be applied.

Rome I

19. Rome I deals with the law applicable to contractual obligations. Article 3 states that a contract should be governed by the law chosen by the parties. Article 12 states that the law applicable to a contract by virtue of the regulation shall govern "within the limits of the powers conferred on the court by its procedural law... the assessment of damages in so far as it is governed by rules of law".

20. The Rome I regulation is dated 17 June 2008 but, apart from Article 26, applied from 17 December 2009.

Rome II

21. The Rome II regulation deals with the law applicable to non-contractual obligations such as tort. It is dated 11 July 2007, but applied from 11 January 2009 apart from Article 29.

22. The aim of the Rome II Regulation is to guarantee certainty in the law and to seek to strike a reasonable balance between the persons claimed to be liable and the person sustaining the damage. Brussels I permitted claimants to opt for the courts of one Member State rather than another, simply because the law applicable in the courts of that State would be more favourable to them. The Rome II Regulation sought to prevent this by creating certainty as to the applicable law. (Explanatory Memorandum, paras 1.2 and 3)

23. Article I of the Regulation states that it applies in situations involving conflict of laws as to non-contractual obligations in civil and commercial matters. By Article 1(3) the Regulation does not apply to evidence and procedure.

24. Under Article 2(1) it is stated that:-

> "for the purpose of this Regulation, damage shall cover any consequence arising out of the tort/delict..."

25. The regulation has universal application and is therefore to be applied whether or not it is the law of a Member State (Article 3).

26. Article 4(1) provides the general rule for the applicable law, 4(2) is an exception to this rule and Article 4(3) is an "escape clause" from Article 4(1) and (2). (Recitals (17) and (18)).

27. Article 4 under the Chapter II heading of torts/delicts states as follows:-

> "Article 4
>
> General rule
>
> 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."

28. Article 7 relates to Environmental damage. The law applicable arising out of Environmental damage or damage sustained by persons or property as a result of such damage, shall be the law determined pursuant to Article 4(1) unless the person seeking compensation chooses to base the claim on the law of the country in which the event giving rise to the damage occurred.

29. Under Article 14 the parties may agree to submit non-contractual obligations to the law of their choice by an agreement entered into after the event giving rise to the damage occurred. The choice has to be expressed or demonstrated with reasonable certainty by the circumstances of the case.

30. Article 15 provides:-

> "Scope of the law applicable
>
> The law applicable to non-contractual obligations under this regulation shall govern in particular:
>
> …
>
> (c) the existence, the nature and the assessment of damage or the remedy claimed;
>
> (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provisions of compensation.."

31. Article 18 provides that direct action against the insurer of the person liable is permitted if the law applicable to the non-contractual obligation or the law applicable to the insurance contracts

so provided.

32. The applicable law under the Regulation applies to burden of proof to the extent that the applicable law contains rules which raise presumptions of law or determine the burden of proof. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum. (Article 22(1) and (2).

33. The Recitals to the Regulation can be used for understanding and interpreting the Regulation but cannot override the proper interpretation of the Regulation. If there is an inconsistency the wording of the Article itself prevails.

34. Recital (1) states that the objective which the Community has set itself is oi maintaining and developing an area of freedom, security and justice. The Community is therefore to adopt measures relating to judicial co-operation in civil matters with cross-boarder impact "to the extent necessary for the proper functioning of the internal market."

35. Recital (2) states that the measures are to include those promoting the compatibility of the Rules applicable in the Member States concerning the conflict of laws in the jurisdiction.

36. Recital (6) states:-

> "The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought."

37. Recital (7) states that the substantive scope and provisions of the regulation should be consistent with Brussels 1 and with the law applicable to contractual obligations, now Rome 1.

38. Recital (14) states:-

> "The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice.
> This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner."

39. Recital (17) states:-

> "The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively."

40. Recital (18) states:-

> "(18) The general rule in this Regulation should be the lex loci damni provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an "escape clause" from Article 4(1) and (2) where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country."

41. Article 31 states

> "(31) To respect the principle of party autonomy and to enhance legal certainly, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This obligation should be expressed or demonstrated with reasonable certainty by the circumstance of the case. Where establishing the existence of the agreement, the court has to respect the intention of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice."

42. Recital (33) states as follows:-

> "(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident take place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual loses and costs of after-care and medical attention."

1. The Effect of Brussels 1, Rome 1 and Rome 2 on the interpretation of CPR 6.36 and 6 BPD3.1(9)(a)

Brussels 1

43. The interpretation of the rules relating to service out of the jurisdiction under the CPR as they then were was considered in the cases of *Booth v Phillips* [2004] 1WLR3292 and *S.A Cooley* (by his father and litigation friend) *P. A. Cooley v T. R Ramsey* [2008] ILPr27. Tugendhat J in *Cooley* specifically considered the application of Brussels I in a fully reasoned judgment. Those decisions have been recently followed in *Michael Wink* v *Croatia Osiguranje D.D* [2013] EWHC 1118 (QB). Although Mr Block QC contends that *Booth* and *Cooley*, and no doubt *Wink*, were wrongly decided, he addresses his argument before me on the premise that the subsequent application of the Rome II Regulation requires a different interpretation of the CPR to that which Mr Nigel Teare QC, sitting as a Deputy High Court judge as he then was, and Tugendhat J decided in the cases of *Booth* and *Cooley* respectively.

44. Professor Adrian Briggs in the 5th edition of Civil Jurisdiction and Judgments 2009 supports the reasoning in *Booth* and *Cooley*. He considers that the function of Article 5(3) of Brussels I, as an exception to the general jurisdiction of Article 2, and as a rule of 'Special Jurisdiction' not further controlled in its application by the principle of conveniens, is quite separate and distinct, and has a function quite different from the rules as to service out of the jurisdiction set out in the CPR. In the CPR, Professor Briggs says, the claimant must also, separately clearly and distinctly, satisfy the requirement of forum conveniens before the court may exercise its power to give permission to serve the claim form out of the jurisdiction. He accordingly submits that damage may be sustained within the jurisdiction even in cases in which the damage which is

done has its secondary effect in England, indirectly or consequentially, and whether as a result of other occurrences of damage to property or person sustained elsewhere (paragraph 4.65). Against that, Dicey, Morris and Collins note the decisions of *Booth* and *Cooley*, but do not discuss them, simply stating "sed quaere". The case of *Newsat Holdings Ltd* v *Zani* [2006] EWHC (Comm) 342 is obiter on the issue of "damage sustained" and its conclusion on this issue is doubted by Professor Briggs.

45. Haddon-Cave J in the case of *Wink* followed *Cooley* stating that Tugendhat J was right to dismiss the argument that the CPR had to be read consistently with Article 5(3) of Brussels I. Haddon-Cave J said:-

> "The case law of the Court of Justice (CJEU) on Article 5(3) of the Brussels Convention/Brussels I Regulation is not relevant to the construction of Ground 9(a) because the two schemes are fundamentally different in structure and policy. The EU Rules seek certainty at the price of inflexibility: thus forum conveniens arguments are not permitted (see *Owusu* v *Jackson [2005] ECR1/01383)*. By contrast, in respect of non- Regulation countries, the common law rules adopt a more flexible legal framework which admits forum conveniens and makes the assumption of jurisdiction discretionary."

46. For my part I am satisfied that the decisions in *Booth*, *Cooley* and *Wink* are correct and I adopt the reasoning there set out and that of Professor Briggs.

Rome I and Rome II

47. Rome II is part of English law. It has to be read consistently with Rome I and Brussels I (Recital 7). Its "measures" are to include "those promoting the compatibility of the rules applicable to Member States concerning the conflict of laws and jurisdiction" (Recital 2). I understand this to mean that the Rome II Regulation is to be part of those measures, including Brussels I on jurisdiction, intended to promote judicial co-operation in civil matters with a cross-boarder impact (Recital 1) and form part of a compatible set of rules seeking to do so. This does not, however, in my judgment mean that the rules of jurisdiction under Brussels I are to be overridden by the provisions of Rome II. Brussels I relates to a different subject-matter, namely jurisdiction and has to be construed as a separate Regulation, albeit consistently with the other Regulations forming part of the compatible set of measures. Rome II does not abolish the discretion which was to be exercised under the CPR in relation to non-Member States.

48. Mr Block submits that because of the need for consistency under Recitals (2) and (7), "damage" in CPR 9(a) must bear the same meaning as it does in Article 4 of Rome II, and hence mean direct damage only, and not include indirect damage such as financial or economic loss.

49. There is in my view a difficulty with this argument: Article 2 states that "damage" for the purposes of Rome II "shall cover any consequence arising out of the tort/delicf". This on its face is wide enough to include any damage, direct or indirect which the Regulation as a whole covers. I do not consider this inconsistent with Article 4(1) but rather, as Mr Robert Weir QC submits on behalf of the Claimant, that Article 4(1) expressly excludes indirect damage which would otherwise be included by virtue of Article 2. Article 2 is clear in its drafting and there is no reason to regard it as inconsistent with the Regulation generally, and hence to be disregarded. I see no reason why "damage" under the CPR should be interpreted as in a specific Article under Rome II such as Article 4 which defines the applicable law, rather than interpreted as in a general Article, such as Article 2 which applies to the Regulation as a whole apart from Article

50. Recital 17 of Rome II relates to Article 4(1) and for the reasons which I shall later explain, Article 4(3) is intended to cover all consequences of the event which caused the damage, including direct or indirect losses. Articles 4(1) and 4(3) do not therefore bear a consistent meaning, unless the interpretation I have given to Article 2 is correct. In other words Article 4(1) would include indirect losses under the general interpretation of the Regulation by Article 2 and hence has to specifically exclude such losses from its meaning.

51. Mr Block also submits that it would be inconsistent and absurd if the same phrase could have two different meanings in the same case, one to include indirect loss under CPR relating to jurisdiction and the other excluding indirect loss and referring only to direct loss when the applicable law was to be determined. But such inconsistencies may exist as the tests are different under Brussels I and Rome II and in the CPR. The latter includes the exercise of discretion, and hence consideration of forum conveniens to ensure the proper place for the trial is selected whereas Brussels I and Rome II do not.

52. Rome II has universal application (Article 3) in the sense that the applicable law, whatever it may be, is applied to the case before the court, wherever the defendant maybe resident. But Rome II does not determine whether the court has jurisdiction under Brussels I.

53. I accept Mr Weir's submission that Rome II does not concern jurisdiction and that it does not override CPR 9(a). Where Brussels I does not apply, the issue of jurisdiction will be governed by a country's own rules, i.e. in England and Wales, the CPR. The Brussels I scheme is different to the CPR as Mr Weir points out in paragraph 25 of his written submission. The exercise of discretion under the CPR as to whether to serve abroad or not is a valuable safety valve and renders unnecessary a narrow definition of "damage" under CPR 9(a). I am satisfied that Rome II is concerned with the applicable law and neither Article 4 of Rome II nor indeed any other part of the Regulation alters the interpretation of CPR 9(a) as found in *Cooley* and *Wink*.

54. Rome II applies in this case to the determination of the applicable law and hence to the issue of discretion. Which law is applicable to a given case is a relevant, though not decisive factor, to take into account when exercising discretion. *VTB Capital PLC* v *Nutritek International Corporation* [2013] UKSC 5 paragraph 10. I now turn to the issue of discretion.

2. Discretion - Applicable law

55. I shall consider first the question of the applicable law which is a relevant factor in the exercise of the general forum conveniens discretion. There are two issues here, firstly whether under Article 4(3) the applicable law is English law, and secondly if it is not, whether nevertheless the central point at issue between the parties on this point, namely the discount rate, is a procedural matter and henceforth to be dealt with under English law, or a substantive matter, i.e. a rule of law, in which case it would fall to be dealt with under Western Australian law.

56. As this is an interlocutory hearing it can be said that the court is not making a final determination of the issue of applicable law, but it nevertheless has to be fully considered for the purpose of the exercise of discretion, (see *Alliance Bank JSC v Aquanta Corporation* [2012] EWCA Civ 1588).

57. The parties are agreed that under the general rule of Article 4(1) of Rome II the applicable law is Western Australian law. Mr Weir submits however that under Article 4(3) the Claimant's case is manifestly more closely connected with England rather than Australia and that therefore English law should be the applicable law. It is accepted that the burden of establishing this is

upon the Claimant.

58. Mr Weir submits that Article 4(2) makes it clear that residence is a highly relevant factor. This case revolves entirely around the Claimant and her injuries: she is English and living out the consequences of her catastrophic injury in England. The claim to be heard is wholly concerned with the assessment of those damages as liability has been admitted. The centre of gravity of the situation is plainly England and so, Mr Weir submits, English law should apply. Article 4 has to take into account Recital (33). Mr Weir submits that the way in which the actual circumstances of the specific victim can most readily be taken into account, which Recital (33) requires, including in particular the actual losses, costs of aftercare and medical attention, is by finding that English law is in fact the applicable law.

59. Mr Block submits on behalf of the Defendant that Article 4(3) applies only exceptionally as is set out on page 12 of the Explanatory Memorandum in Recital 18. It is, he submits, only an escape clause to be rarely used, and cannot apply here as if it did, it would apply to every accident abroad where there was no issue on liability and rapid repatriation. It is not possible, Mr Block submits, to elevate the issue of quantum as the only important issue as Article 4(3) relates to the whole tort not just part of it. Furthermore, indirect damage is not covered by Article 4(3) as Recital 17 shows. Dicey, Morris and Collins shows at paragraph 35/032, Mr Block submits, that what is relevant under Article 4(3) is events not damage, though it is to be noted however that Dicey also states that as the court must have regard to "all the circumstances of the case" the event or events which give rise to damage, whether direct or indirect could be circumstances relevantly considered under Article 4(3), "as could factors relating to the parties, and possibly also factors relating to the consequences of the event or events".

60. The tenor of the Regulation as a whole, and in particular Article 15, Mr Block submits, indicates that it is direct damage not indirect damage which must be considered and that applies to Article 4(3) as well.

61. Whilst it is clear that Article 4(3) is only intended to be an escape clause, and I accept that it is only to be applied exceptionally so as to preserve the intended application of the general rule to most cases (see, obiter, Moore-Bick LJ in *Jacobs v Motor Insurers Bureau* [2011] 1 WLR 2619), I do not consider that Article 4(3) is to be construed in the same manner as Article 4(1) and should therefore only apply to direct damage.

62. The use of the words "in all the circumstances" in Article 4(3) requires the court to consider all relevant material, so as to be able to assess whether the particular circumstances of the individual case are so exceptional that the general rule should not apply. I agree with the editors of Dicey that such a consideration is intended to include factors relating to the parties and, in my view, would also include the consequences of the event or tort/delict. Such consequences would cover the injuries and damage arising from the tort, whether direct or indirect. If such a broad interpretation is not given to Article 4(3) so that all the circumstances can be considered, the court will not be able to exercise its judgment properly in the individual case and decide whether those circumstances reveal that the tort is manifestly more closely connected with a country other than that indicated in Article 4(1).

63. The test "manifestly more closely connected" is similar to that of the "proper place" for the case to be heard, which requires the court to decide which is the "natural forum", that is the one with which the action has the "most real and substantial connection". The task of the court in determining the proper place for the case to be tried is to "identify the forum in which the case can be suitably tried for the interests of all parties and for the ends of justice": *Spiliada Maritime Corpn* v *Cansulex Ltd* [1987] 1 AC 460 and *VTB Capital pic* v *Nutritek International*

Corpn [2013] 2 WLR 398.

64. Whilst the test under Article 4(3) and the test for forum conveniens are similar, they are not identical, nor will they necessarily lead to the same result. As can be seen from the cases of *Booth* and *Wink*, English courts accept jurisdiction in cases where foreign law is the applicable law (see also Recital 6 Rome II). The fact that Article 4(1) of Rome II establishes a general rule which can only be departed from exceptionally, 4(3) is a clear difference from the forum conveniens test which has no such restriction. It is, however, the case that the forum test requires the circumstances to be clear before service out of the jurisdiction can be ordered.

65. In order to consider "all the circumstances" under Article 4(3), I shall enumerate the parties' submissions as to forum. Mr Weir relies in particular upon the fact that the Claimant is English and returned to her permanent place of residence shortly after the accident. She had been on an extensive holiday in Australia. Virtually all her losses are sustained in England, which is where she relies on state benefits. She received none in Western Australia, only hospital treatment. The Claimant cannot travel to Australia by reason of her injuries and must give her evidence in England. The witnesses of fact and the 12-plus expert witnesses in the case all come from England. It is unlikely that Suncorp will call any witnesses of fact. The documents in the case, relating to medical records, social service records and the like are all English documents.

66. The Claimant will be able to prepare her case much more readily in England if the case is to be tried there, and can see her Solicitors regularly in person and liaise with all those involved in advising her. The experts will be able to attend trial if it is in England and the Judge will have a full working knowledge of state funding which is relevant to the quantification of damages in personal injury cases. The Claimant is likely to receive higher damages in England. The discount rate at 6% in Australia will prevent the Claimant from receiving damages which will meet her actual needs. She will be thrown back into reliance upon the State. There will be no delay if the matter is tried in England compared with Western Australia.

67. Furthermore, there are no connecting factors with Western Australia other than the accident itself. Neither of the Defendants was or is resident in Western Australia. A trial in Australia would be substantially difficult; the Claimant cannot travel there and it would cost enormous sums to send 12-plus experts to Australia. Video evidence and evidence by examiner are both unsatisfactory methods and the prospect of a Western Australian judge travelling to England to try the case could not be guaranteed.

68. The Western Australian claim would be withdrawn if the matter were to be tried in England and the costs of those proceedings could be dealt with by an undertaking by the Claimant to pay the Defendant's wasted costs and set them off against damages or, if necessary, to pay the Defendant's costs of the Australian action in any event. Those proceedings were instigated because Rome II clouded the issue, and because the Claimant was acutely vulnerable and was advised that she needed to force the insurers to respond to the claim in order to obtain an interim payment.

69. Mr Weir submits that all these factors demonstrate that the tort is manifestly more closely connected with England than with Australia and hence English law should apply.

70. Mr Block relies upon the fact that the accident occurred in Western Australia, that the damage was sustained in Western Australia, that the Defendant Suncorp is based in Queensland and that its insurance policy is governed by Western Australian law. The applicable law, Mr Block submits, is the law of Western Australia and a court in Western Australia is best placed to apply this law. The Claimant, having taken legal advice in England and Australia, chose to issue and pursue a claim in Western Australia knowing that it was based on Western Australian law. That

claim proceeded for nearly 2.5 years to an advanced state with a detailed schedule and counter-schedule served. There was, therefore, substantial preparation in that claim over a considerable period of time.

71. Mr Block submits that costs would escalate if the claim were permitted to be brought in the English courts and that if her Western Australian claim was abandoned, any costs order would not sufficiently compensate Suncorp which has already spent AUS$60,000 on that claim. Suncorp has also made a Protective Costs Offer in the Western Australian claim and will lose the benefit of this if the claim is not proceeded with there. Such an order would be difficult if not impossible to enforce in England. It would, Mr Block submits, be quicker and cheaper to bring the Western Australian proceedings to a conclusion as the English claim has considerable catching up to do. The parties have agreed to litigate in Western Australia and be bound by Western Australian law by taking and defending proceedings there.

72. There is no new or unexpected or unpredictable logistical problem which has arisen now which has not already been facing the Claimant since she has been pursuing the claim in Australia. During that period of time she has successfully instructed Australian Solicitors. If necessary, evidence could be taken on commission or via a video link and it may be possible that the Western Australian court could sit in England to hear the evidence. Had Suncorp been properly informed of the application for service out of the jurisdiction, it would have applied for an anti-suit injunction in Western Australia. There is no doubt that the Claimant would receive substantial justice in the Western Australian courts as the Claimant's legal representatives have conceded.

73. Mr Block submits that the factors upon which he relies are powerful and demonstrate why the court should not exercise its discretion in favour of the Claimant.

74. Before assessing the various factors under Article 4(3), I turn to Mr Weir's point on recital (33), which has been the subject of academic debate. Mr Weir submits that the Recital must be taken into account in applying Article 4 as the manner in which the actual circumstances of the specific victim can most readily be weighed and assessed, including in particular actual losses, aftercare and medical attention, is by finding that English law is the applicable law. The full consideration of the circumstances in the light of the application of recital (33) confirms that the "centre of gravity" of the situation is England and so English law should apply.

75. The status and effect of recital (33), however, are "extremely obscure" as Dicey states at paragraph 34-057. The Recital is potentially relevant to Article 15(c) as well as Article 4, but, as a Recital, it cannot create a new substantive EU rule, and insofar as it appears to be in conflict with Articles 4(1), 4(3) and 15(c), it cannot override them. Taken literally, it might be thought to require the court to apply the law of the residence of the victim when quantifying damages, but such an interpretation would be contrary to Article 4 and the express words of Article 15. The explanation of the origin of recital (33) may be as stated in Doherty "Accidents Abroad International Personal Injury Claims", 1st edition, 2009 where it is described as a "vestige" of a rejected amendment proposed by the European Parliament which would have made the law of the victim's domicile applicable to the assessment of quantum in Road Traffic Act claims.

76. In Cheshire, North and Fawcett "Private International Law", 14th edition at page 846 it is said that the European Parliament regarded the calculation of damages by reference to the law of the country in which the damage occurred rather than the country where the victim habitually resided, as being unsatisfactory. The editors of Cheshire state that the European Parliament, therefore, secured the introduction of recital (33) which ensured that the court seised of the dispute will "take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of aftercare and medical attention".

77. Dicey suggests that recital (33) may serve merely as a reminder to the courts of Member States that they should not, when assessing damages in accordance with the law applicable, ignore the fact that the victim, resident abroad, may be in a different economic position from a locally resident victim.

78. The solution to the problem lies, in my judgment, not in the choice of any particular law as Mr Weir submits, but in the court looking at the actual costs, for example, of aftercare in the victim's place of residence, and taking those into account when assessing damages, but only insofar as the applicable law permits it to do so. Recital (33) cannot override the proper interpretation of Article 4(1) which expressly chooses, as recital 17 makes clear, the law of the country where the damage occurs, i.e. where the injury was sustained, rather than the law of the victim's habitual residence.

79. One of the matters to take into account, both under Article 4(3) and the forum conveniens test, is the issue and pursuit of proceedings in Western Australia by the Claimant. This, Mr Block submits is a stand-alone point under Article 14. He submits that, by her active pursuit of the claim in Western Australia, the Claimant evinced an intention to be bound by West Australian law. She had, therefore, demonstrated a choice with reasonable certainty which constituted an agreement under Article 14. The steps taken by her were considerable and could not be described in any way as simply submitting to the jurisdiction in order to protect her interests. The litigation was actively pursued through the obtaining of expert evidence and the drafting of a very detailed schedule, reaching the pre-trial conference stage. Whether or not the Western Australian action amounts to an agreement under Article 14, Mr Block submits that it is a very important factor in accessing the closeness of the connection with English law.

80. Mr Weir submits that there cannot have been any agreement as Suncorp was not a party to the Western Australian proceedings and, furthermore, Western Australian law applied automatically when the Claimant brought her action. She was advised to bring those proceedings in Western Australia in order to secure an interim payment and did not in reality make a choice of Western Australian law. It is, however, the case that when the Claimant issued her proceedings in Western Australia she must have known, or her legal representatives did, that she was submitting to Western Australian law.

81. Mr Block submits that Mr Weir's point about Suncorp not being a party is without merit. The driver of the car was a party to both sets of proceedings, in England and in Australia, and Suncorp accepted service on behalf of the driver in the Australian proceedings. Suncorp could be sued direct in the United Kingdom and the driver could no longer be located. Any agreement would, therefore, have had to have been with Suncorp.

82. I am not satisfied that an agreement was entered into within the meaning of Article 14. Suncorp was not a party to the Australian proceedings, but even if Article 14 should be construed more widely as to the meaning of "parties", I do not accept that there was an "agreement" between the parties which arose by inference or implication from the "choice" of Western Australian proceedings in the circumstances facing the Claimant at the time they were commenced. I am nevertheless satisfied that the continued and active pursuit of the proceedings in Western Australia, including the service of a detailed schedule of damages based on evidence obtained, is an important factor to take into consideration under Article 4(3) and the forum conveniens test.

83. There are powerful reasons for saying that the Claimant's condition and the English evidential connection with any trial, wherever it takes place, provide strong connecting factors with England. But under Article 4(3) the court has to be satisfied that the tort is manifestly more

closely connected with English law. When all the circumstances are taken into account, including the Australian litigation, I conclude that the tort/delict is not manifestly more closely connected with English law. This is not one of those exceptional cases where the general rule under Article 4(1) should be displaced.

Article 15(c) and Article 1(3)

84. The alternative route relied upon by the Claimant to contend that the applicable law is English law is Article 15. On its face, Article 15 is clear: "The existence and both the nature and assessment of damage or the remedy claimed are to be governed by the applicable law", i.e. not by the procedural law of the place where the case is tried. Mr Weir submits, however, that Article 15(c) must be read with the words "insofar as governed by law" included by implication so as to make Article 15 consistent with Article 12(c) of Rome I, where the assessment of damages in contract cases is expressly stated to be governed by the law applicable "within the limits of the powers conferred on the court by its procedural law" and "...insofar as it is governed by law".

85. As the key issue in dispute between the parties as to choice of law, namely the discount rate, is a factual issue, Mr Weir submits, Article 1(3) means that English rules of evidence and procedure must apply to the determination of the discount rate and the multipliers which follow from them. Such an issue of fact falls within "evidence and procedure" which is expressly excluded from the application of the regulations by Article 1(3). The necessary implication of the words "insofar as governed by law" under Article 15, re-asserts the distinction under English law between heads of damage which are governed by fact, and hence by the law of the forum and heads of damage governed by rules of law, which are governed by the law applicable.

86. Mr Block submits that this is not so. Article 15(c) is clear - its effect is to reverse the decision in English law in *Harding* v *Wealands* [2007] 2 AC 1, and make the assessment of damages in all cases subject to the applicable law and not, as it was under *Harding,* the law of the forum relating to evidence or procedure.

87. Academic opinion on this issue is divided. Dicey and Dickinson, "The Rome II Regulation: The Law Applicable to Non-contractual Obligations" (Oxford 2008) support Mr Block's argument, whereas Cheshire supports Mr Weir's argument in relation to the implication of similar words "insofar as prescribed by law", albeit implied for a different reason.

88. Dicey at paragraph 7-050 states that the availability of particular heads of damage is to be treated as a substantive matter under Article 15(c) thereby reversing the effect of *Boys v Chaplin* [1971] AC 356 and resulting in a different outcome if the facts of *Harding* v *Wealands* were to arise again today. Rules imposing a statutory ceiling on the level of damages affect the assessment of those damages and are to be treated as substantive so that the applicable law, rather than the law of the forum, would be applied. Dicey says that it appears that the English courts should endeavour to consider the rules of the applicable law together with relevant judicial practices and guidelines as to their application "so as to endeavour to apply the law of damages to reflect, as accurately as possible, the level of damages that would actually be awarded in the courts of the country whose law is applicable". At paragraph 34-036 Dicey states that whatever may be the position in cases to which the regulation does not apply, issues such as the nature and assessment of damage or the remedy claimed cannot be considered to fall within the scope of the exclusion of matters of "evidence and procedure" in Article 1(3) and they will henceforth be governed not by the *lex fori*, but by the law to which the Regulation refers. Dicey suggests that the Article 1(3) exclusion should be "interpreted narrowly as covering matters only, such as the constitution and powers of courts and the mode of trial, that are an integral and indispensable

feature of the forum's legal framework for resolving disputes, such that they cannot satisfactorily be replaced by corresponding rules of the *lex causae*(See also Dicey, para 34-053, 056).

89. Dickinson states that:

> ".. the court seised should look to particular tariffs, guidelines or formulae which are used in practice by foreign judges in the calculation of damages, as well as the approach in calculating awards in individual cases. The applicable law will also determine the extent to which the specific facts (for example social and economic conditions in a particular place) are relevant to the assessment of damages. Proof of the underlying facts will, however, remain a matter for the law of the forum in accordance with Article 1(3)...".

90. Cheshire states that an early proposal for Rome II stated that the applicable law covered the measure of damages "insofar as prescribed by law" so that it was only where the applicable law had rules of law on the measure of damages that the forum was required to apply that rule. In the final version of Article 15(c) no such wording was included. Cheshire states that there is nothing to suggest that this was a deliberate omission, and it will be sensible to interpret Article 15(c) as being implicitly limited to the assessment of damages "insofar as prescribed by law" (page 845). As Cheshire stated, however, this left the difficulty of determining whether there was a rule of law in relation to assessment, or whether it was a question of fact. The editor states that a ceiling on damages in a statute or an international convention clearly involves a rule of law and is subject to the applicable law, as were rules requiring accrued benefits to be deducted when assessing damages. The more difficult thing to identify was a question of fact. Insofar as the calculation took into account the social and economic conditions in the country, that must be regarded as a question of fact, but the question remained as to whether a particular method of calculation was a rule of law or a matter of fact.

91. I prefer the approach of Dicey and Dickinson as followed by Tugendhat J in the case of Stephen *John Kilfoy Wall* v *Mutuelle De Poitiers Assurances* [2013] EWHC 53 (QB). In that case it was agreed that French law applied and that evidence before the English court as to what level of damages would be actually awarded by a French court was required. Without it, the English court could not reflect that level of damages. Tugendhat J concluded that the English court was not required to put itself in the position of a court in France and decide the case as that court would have decided it and adopt new procedures in order to do so. The court must determine in accordance with its own procedure what evidence was required in order to prove French law, and how it was to be applied to an award of damages. What expert evidence the court should order and in particular the number of experts to achieve that was a matter of procedure within Article 1(3).

92. The wording of Article 15(c) is clear, and it is to be noted that in 15(d) a decision was made to use the words, within the limits conferred on the court by its "procedural law". If it had been so intended such words, and "insofar as governed by law" or similar words could have been included in Article 15(c), but they were not. This is consistent with the intention to produce certainty and to reject the law of the victim's country of residence as the applicable law. A choice appears to have been made not to follow the wording in Rome I, as similar wording was used in Article 15(d). I am satisfied that the proper construction of Article 1(3) is restricted to the constitution, powers of courts and mode of trial as Dicey states and Tugendhat J in *Wall* decided.

93. I accept Mr Block's submission that the assessment of damage (which includes damages - see the French version of the Regulation - 'dommages') is, by virtue of Article 15(c) to be governed by the applicable law, not by evidence and procedure of the forum, save insofar as the assessment relates to matters of the powers of the court and the mode of trial. I am satisfied that there is no proper basis upon which the words "insofar as governed by law" or similar words can be implied or read into Article 15(c).

94. If I am wrong in this conclusion, and because the point was argued before me, 1 shall deal with the matter on the basis that English law and procedure applies to the process of assessment of damages where that process is not governed by rules of law of the applicable law.

95. Mr Weir submits that a discount rate is an attempt, factually, to calculate future economic loss by way of a current lump sum. Life expectancy tables are fact, and a discount rate is simply a means of converting future recurring losses over a person's life into the current lump sum required in its calculation of damages by the English courts. The discount rate is, therefore, Mr Weir submits, also a matter of fact. As indeed is inflation and other local economic facts which recital (33) requires the court to take into account. Dicey, Mr Weir submits, makes no mention of discount rate which is not the same as a statutory ceiling, which might properly be regarded, as Dicey says, as a matter of law.

96. I do not accept Mr Weir's submission. The Law Reform (Miscellaneous Provisions) Act 1941 states, by section 5, that future loss shall be quantified by adopting a discount rate of 6%. In other words, this is mandatory. Whilst there have been decisions in Queensland, on the basis of the expert evidence before me, tempering the effect of this, no such decisions have yet been made in Western Australia. Further, I see no difference between a mandatory 6% discount rate which operates as a ceiling on damages for future loss created by statute and a general ceiling on damages so created. In my judgment, the 6% discount is a rule of law.

97. I therefore conclude that, by virtue of Article 4(1), the applicable law is Western Australian law, and that none of the routes submitted by Mr Weir displace the general rule or otherwise satisfy me that it is inapplicable.

3. Discretion - forum conveniens

98. I now turn to consider the exercise of discretion overall in accordance with the test set out in *Spiliada* and following cases, apart from the issue of applicable law which I have just dealt with, though taking my conclusions on that issue into account in the overall exercise of discretion. I have already set out the factors relied upon by each party and will now consider some of those in greater detail.

99. The starting point is that the accident occurred in Western Australia, involved an English victim, normally resident in the UK and a Japanese motorist who was normally resident in Japan. The motorist was insured by Suncorp from Queensland who issued an insurance policy governed by the law of Western Australia. The injury resulting in the need for compensation occurred in Western Australia, but virtually all of the consequential loss has arisen, and will continue to arise, in England to where the Claimant was repatriated some seven weeks after the accident. The Claimant will continue to suffer the consequences of her very grave injury in England where she will continue to live. She is unable to travel and is not and will not be able to go to Australia for a trial.

100. The Claimant accepts that she would obtain substantial justice in Australia if the case were to be tried there, but she would receive higher damages in England if the case were to be tried here, in particular because of the difference in discount rates between English and Western Australian

law. The socio economic culture and conditions in Australia are not relevant to the Claimant's losses.

101. A trial in Australia would necessitate evidence by video link or by an examiner, or on commission. There is an 8-hour time difference between England and Western Australia which, when combined with her serious injuries, her condition, and her lack of internet and computer skills makes the taking of instructions from her difficult. This has already proved to be the case, though the Claimant and her legal representatives have coped with the Australian litigation to the advanced stage it had reached before it was stayed. It is likely that there will be greater difficulty in taking instructions during a trial in Australia. The need to take instructions arises more frequently during the course of a trial and difficult decisions may be rendered more difficult by distance and difference in time zones.

102. The trial, wherever it takes place, will require 12-plus expert witnesses, all from England. If in Australia, any witness not agreed will have to travel from England to give evidence. The medical records, social service records and other quantum documents are English documents. The costs of trial will increase if the claim is brought in England.

103. The Claimant chose to commence proceedings in Western Australia on 13 November 2009 after taking advice in England and Australia. She did so in order to secure an interim or voluntary payment from Suncorp, which until then had been declined, and because there was then uncertainty as to the effect of Rome II on whether a claim could be brought by her in England. Her proceedings in Western Australia were subject to Western Australian law as her legal advisers and hence the Claimant must have known.

104. Advice on the Rome II issue was obtained by the Claimant's legal advisers as set out in Donna Percy's further statement dated 26 April 2013. Advice was first received from a solicitor involved in the case of *Harding* in September 2009. In February 2011 written advice was obtained from London Counsel and in June 2011 a conference took place in London with Richard Royle, a Sydney-based Counsel involved in the matter of *Cooley*, and Robert Weir QC. A written advice was obtained from Richard Royle on 2 December 2011 and forwarded to the Claimant on 6 December 2011. She did not make a decision to issue proceedings in England, then without the benefit of ATE insurance, until 2 March 2012.

105. Substantial steps have been taken in the Western Australian proceedings over a period of about two and a half years. Expert evidence has been obtained, and a detailed schedule of claim served on 12 March 2012. £70,000 interim payments had been made by Suncorp on a voluntary basis since liability was admitted in its defence and AUS$60,000 costs have been incurred by Suncorp in dealing with the litigation. The pre-trial conference was adjourned on 5 May 2012 and several occasions thereafter until 25 October 2012 when the action was stayed pending the result of this application.

106. On 14 June 2012 a Costs Protective Offer of compromise was made by the Defendant in the Western Australian proceedings and served on the Claimant. A Part 36 offer in England would not provide protection in respect of costs already incurred. The proceedings in Western Australia require a listing conference to take place and further medical evidence to be obtained. They would probably be ready for a 10-day trial in about February 2014 or shortly thereafter. A trial in England would be based on the same evidence which has already been obtained in the Western Australian proceedings, and would probably be ready for a 10-day hearing in about Spring to mid-2014, depending on when the listing office was told that the case would be ready for trial.

107. The Claimant's solicitors did not give prior notice of when they would be applying for

permission to serve out of the jurisdiction, nor was any letter before action served, nor was the pre-action protocol complied with. Had they taken these steps the Defendant's Solicitors state that they would have applied for an anti-suit injunction in Australia.

108. The Claimant is prepared to give undertakings to the Defendant to withdraw the Australian proceedings if she is allowed to continue with her claim in England, and to pay Suncorp their wasted costs of the proceedings in Australia or, if necessary, to pay all their costs in any event and set them off against damages awarded. Suncorp is not satisfied that any undertaking relating to wasted costs can deal properly with the situation. The Costs Protective Offer cannot protect them in the UK proceedings and may require, Mr Block submits, expert Australian evidence to make a comparison between what occurred in England and what would have occurred in a trial in Western Australia, thereby incurring the costs of a trial within a trial. A limited undertaking as to wasted costs would create yet another area of dispute. Mr Block submits that it is probable that a date for listing in the United Kingdom would probably be much later than the Australian dates as it will be two months before the listing officer could be asked for a date. There is, he submits, no new logistical problem for the Claimant beyond that which she has already had to deal with. Electronic evidence is nowadays adequate.

109. Mr Block also submits that the failure to give adequate disclosure of the Western Australian proceedings in the application before Master Fontaine other than a bare reference to its existence together with a copy of the defence, was a breach of the duty to give full disclosure in the making of ex parte applications such as permission to serve out of the jurisdiction. The lack of information was misleading and should in itself lead to a stay being granted.

110. Mr Weir submits that the Claimant was acutely vulnerable in 2009. She had been forced to stay at Stoke Mandeville Hospital for longer than either she or the hospital wished because of lack of funds to enable her to set up properly adapted accommodation. She felt that she was forced into issuing proceedings in Australia at that time. It was right that she had been advised in 2011 that she could bring proceedings in the United Kingdom, but she had been unable to make a decision until March 2012. There had been no steps in the Australian action between May 2011 and January 2012 and there was no duplication as the preparation for Western Australia was valid for England. As to costs, proper undertakings can deal with those. As to the Costs Protective Offer in Western Australia, that would be relevant to costs in England where a Part 36 offer can also be made. The anti-suit injunction has no prospects of success, Mr Weir contends. This is not a case of forum shopping, but one where a weaker party is seeing to bring her claim in a country of her residence as it is the most appropriate place to bring the claim. The problems of trial in Australia are substantial and it will be deeply impractical for the witnesses to go to Australia. The Claimant would be unable to take an active part in her claim. As to the disclosure of the Western Australian proceedings, Mr Weir accepts that the disclosure could have been fuller, but submits that had it been, there would have been no difference to the outcome, in other words the application would still have been granted.

111. I have taken into account all the helpful submissions, made both orally and in writing, I have weighed the various factors and concluded that the most real and substantial connection with the action is England; this is the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. I have come to this conclusion in spite of the fact that the accident occurred in Australia, the injuries were sustained there, the applicable law is, as I have found, Western Australian, and that proceedings in Australia were actively continued for nearly two and a half years. What has weighed most heavily in the balance for me is that the issue in this case is the quantum of the Claimant's claim, that she is English, resides here, and will continue to live and suffer the consequences of her grave injuries in England. She cannot travel to Australia and the obtaining of instructions from her during a hearing will be very

difficult for a gravely injured claimant in a different time zone many thousands of miles away. If the case does not settle, it is important that a Claimant so injured can be actively involved in the resolution of her claim for damages so that it can be concluded with appropriate finality.

112. The fact that all the medical evidence and documentation on the sole issue, quantum, is English and that were the trial to take place in Australia, a large number of expert witnesses would have to travel there in order to give evidence in the trial, is also an important factor. I do not consider that electronic evidence or taking of evidence by examiner or on commission would be an adequate substitute or solve the inherent problems involved in a claimant being unable to be at trial.

113. The fact that the Claimant actively pursued a claim in Western Australia for nearly two and a half years is clearly an important factor in the balance. (CPR 6.37.17 and *Cleveland Museum of Art* v *Capricorn Art International SA* [1989] 5 BCC 860). I take into account that the Claimant was in a vulnerable state in Stoke Mandeville Hospital when proceedings were commenced, that Suncorp did not make any voluntary payments until after proceedings were commenced against them, that there was uncertainty as to the effect of Rome II on bringing proceedings in England and that the Claimant was advised that the issue of proceedings in Australia would be a clear and certain way of achieving what she needed, namely an interim payment. The proceedings in Australia could have been withdrawn or stayed earlier, but it is unlikely that that would have occurred prior to the Claimant's legal advisers indicating that proceedings could be issued in England. That, coupled with difficulties in getting ATE insurance together with the Claimant's own indecision, are likely to have resulted in the continuance of the Australian proceedings. Had there been no legal impediment to the bringing of proceedings in England, it is probable that they would have been brought there. Nevertheless the fact remains that the proceedings were actively pursued to the schedule of damage and counter-schedule and a Costs Protective Offer.

114. I am satisfied that the issues of costs on the withdrawal of the Australian proceedings can properly be dealt with by suitable undertakings or orders of the court. As the applicable law is Western Australian and expert evidence will have to be given as to that law, and its application, the Costs Protective Offer can be considered by the court as well as any Part 36 offer that is made.

115. It is important to appreciate that what the court must chose when exercising the forum conveniens discretion is the appropriate forum for the trial of the action. The question to be asked is whether the court is satisfied that England "... is the proper place in which to bring the claim". It is this, namely the trial of the action, which I find has the most real and substantial connection with England and that when the circumstances as a whole are weighed and considered, England is the proper place in which to bring the claim. The test under forum conveniens is different to the similar test under Article 4(3) of Rome II as this test relates to which law is the applicable law rather than the proper place for the trial. Furthermore, Article 4(3) is only to apply in exceptional circumstances.

116. I am equally satisfied that the Defendant must, if the Western Australian proceedings are to be discontinued, be properly protected as to costs. When this judgment is handed down I will hear argument as to any necessary consequential orders and the scope of any undertakings which the Claimant should give to the court, if those cannot be agreed beforehand.

Disclosure

117. The disclosure of the Western Australian proceedings in the application for service out of the jurisdiction was inadequate in that it did not state that the proceedings were still underway and

that a schedule of damage and counter-schedule had already been served. This was clearly relevant information and should have been provided. It is probable that the order for service out of the jurisdiction would still have been made in all the circumstances and it should not, therefore, be stayed for non-disclosure. Nevertheless the disclosure was inadequate and the Claimant should not be permitted at any stage of these proceedings to recover any costs in respect of that application.

Abuse of process

118. Mr Block QC submits that the Claimant is indulging in late forum shopping, attempting to avoid Western Australian law and the appropriate discount rate. It is, he submits, an abuse of process for Suncorp to be vexed in the English proceedings having regard to the advanced state of the Western Australian proceedings. *(Pfizer Ltd* v *Dainippon Sumitomo Pharma Co Ltd* [2006] EWHC 1424 (Ch)).

119. I do not consider that the issuing of the claim in England, given the advanced state of the Western Australian proceedings, was an abuse of process in all the circumstances. There are, it seems to me, two essential reasons for the bringing of the proceedings in England. Firstly, the increased damages which it might result in and, secondly, the need for the Claimant to have the trial in a place where she and the witnesses can attend and deal properly with the litigation. This does not amount to an abuse of process.

Conclusions

120. I, therefore, conclude that:

(1) The consequential financial losses suffered by the Claimant in England constitute damage sustained within the jurisdiction under CPR 6.36 and 6 BPD 31(9)(a).

(2) The applicable law is Western Australian law.

(3) The proper place in which to bring the claim is England.

121. I, therefore, decline to stay the English proceedings and dismiss the Defendant's application. I will hear submissions on costs and consequential orders after the judgment has been handed down.