Neutral Citation Number:[2020] EWHC 3546 (QB)

Case No: QB-2019-000981

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2020

Before:

MR JUSTICE LINDEN

- -

Between:

MR GARY OWEN	**Claimant**
- and –	
(1) MR WILLIAM GALGEY **(2) MRS SARAH GALGEY** **(3) ALLIANZ IARD SA (A company incorporated under the laws of France)** **(4) MAINTENANCE INSTALLATION REALISATION PISCINES SARL (t/a M.I.R PISCINES) (A company incorporated under the laws of France)** **(5) CAISSE REGIONALE D'ASSURANCES MUTUELLES AGRICOLES MEDITERRANEE CRAMA (t/a GROUPAMA MEDITERRANEE (A company incorporated under the laws of France)**	**Defendants**

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Mr Luka Krsljanin (instructed by **Pierre Thomas & Partners**) for the Claimant
Mr Bernard Doherty (instructed by **BLM**) for the First to Third Defendants

Hearing dates: 9 and 10 December 2020

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JUDGMENT

Covid- 19 Protocol: This judgement was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judicial website. The date and time for hand -down is deemed to be 10:30am 21 December 2020

THE HONOURABLE MR JUSTICE LINDEN:

Introduction

1. The Claimant is a British citizen who is domiciled and habitually resident in England. In these proceedings he brings a claim for damages for personal injury sustained by him as result of an accident in France on the night of 3 April 2018, when he fell into an empty swimming pool which was undergoing works at a villa in France ("the Villa"). The Villa is, and was at the material time, a holiday home owned by the First Defendant, whose wife is the Second Defendant. They are also British citizens who are domiciled and habitually resident here.

2. The Third Defendant is a company domiciled in France, and the public liability 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 public liability insurer of the Fourth Defendant. The Fourth and Fifth Defendants are both companies which are domiciled in France.

3. There is no dispute as to the jurisdiction of the English courts to determine the Claim. It is also agreed between the parties that French law applies to the Claimant's claims against the Fourth and Fifth Defendants. But there is a dispute at to the applicable law in relation to his claims against the First to Third Defendants. These Defendants contend that, by operation of Article 4(2) Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("the Rome II Regulation"), English law applies because the Claimant and the First and Second Defendants are habitually resident in England. However, the Claimant contends that French law applies by operation of Article 4(3) the Rome II Regulation because, he says, it is clear that the tort in this case is manifestly more closely connected with France than it is with England.

4. At a Costs and Case Management Conference on 27 February 2020, Master Thornett therefore ordered a trial of the following preliminary issue:

> *"Which law applies to determine the claim(s) brought by the Claimant against the First, Second and Third Defendants, pursuant to the provisions of Regulation (EC) No 864/2007 ("the Rome II Regulation")?"*

5. The hearing before me in relation to this issue took place via Microsoft Teams but was a public hearing. Mr Luka Krsljanin appeared for the Claimant and Mr Bernard Doherty for the First to Third Defendants. The Fourth and Fifth Defendants sent an observer but did not participate in the hearing. I am grateful to both Counsel for their helpful skeleton arguments and oral submissions.

Article 4 of the Rome II Regulation

6. Article 4 of the Rome II Rome Regulation provides 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."* (emphasis added)

7. It is common ground that the damage in this case occurred in France and the law of France is therefore the law indicated by Article 4(1). However, because the Claimant and the First and Second Defendants were habitually resident in England at the time when the damage occurred, the effect of Article 4(2) is that English law will govern the claim against them unless Article 4(3) applies. The legal issue is therefore whether, in the words of Article 4(3), *"it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with" France* than it is with England.

The agreed facts

8. Paragraph 3 of Master Thornett's Order provided that, by 4pm on 19 June 2020, the parties to the preliminary issue would file and serve any evidence on which they relied, but the Master gave permission for them to file and serve an agreed statement of facts in place of witness evidence. In the event, the preliminary issue was argued on the basis of a statement of agreed facts as well as one or two points which emerge from the statements of case and the correspondence between the parties. There was no written or oral witness evidence as such.

9. The "Agreed Statement of Facts", which I will set out in full, is caveated as follows:

> *"This is the statement of facts agreed between the Claimant on the one hand and the First, Second and Third Defendants on the other hand, for the purposes of the preliminary issue hearing regarding applicable law between the said parties, as per paragraph 3 of the court order dated 27 February 2020. It is intended solely for the purposes of that preliminary issue hearing and is without prejudice to the evidence the parties may adduce at a later stage of proceedings."*

10. It goes on to state:

> *"1. The Claimant and the First and Second Defendants have known each other for about seven years before the accident, having met for the first time in around May/June 2011. They live in nearby villages in Hampshire (Denmead for the*

Claimant, Hambledon for the First and Second Defendants), which are 2.5 miles apart.

2. The Claimant is a self-employed builder. Around late 2011, the First Defendant hired the Claimant to carry out minor renovation works on the First and Second Defendants' house. He was hired for major renovations in 2013 after the First and Second Defendants had obtained the necessary planning permission.

3. Since then they have been acquaintances. The Claimant also provided occasional gratuitous ad hoc assistance on minor household issues.

4. The First Defendant is the owner of the villa Les Planas in Monoblet, France, which he inherited from his mother along with his brother and sister, from whom he then bought their shares. Monoblet is located in the Gard region of Languedoc-Roussillon, in Southern France, about 40 miles north of Montpellier. He and the Second Defendant (who are husband and wife) use it as a family holiday home and let it out as a holiday rental when not using it themselves. The First and Second Defendant's family in a typical year visit the house 3 to 5 times, staying approximately 6 to 9 weeks per year in the villa, and occasionally invite friends and extended family to stay with them at the villa.

5. In 2016, the First and Second Defendants started major refurbishment works on the villa.

6. In November 2016, the First and Second Defendants were looking for someone to drive some building materials to the villa and asked the Claimant if he knew anyone who might be interested. The Claimant offered to do it. The Claimant and his wife drove down from England to Southern France and delivered these materials to the villa, which was being attended by a tradesman who was carrying out refurbishment works. The First and Second Defendant refunded the Claimant for his travel expenses. On that occasion, the Claimant and his wife stayed one night in the villa.

7. At some date prior March 2018, the First and Second Defendants had hired the Fourth Defendant, a French-domiciled company specialising in the construction and maintenance of swimming pools and associated products, to fully refurbish the outside pool. The works involved putting steps into the pool and a new liner and heating system and new paving or coping stones around the edge of the pool. The pool was drained for the purposes of the work.

8. In March 2018, in casual conversation the Second Defendant informed the Claimant that the refurbishment of the villa was nearing its end but there was some delay in getting it ready to be rented for the upcoming holiday season. She asked the Claimant to help with the laying of a laminate floor, tiling of a balcony and a small toilet floor, plus the fitting of a shower screen, which she anticipated would take only a few days.

9. In return, the First and Second Defendants invited the Claimant, his wife and children to stay at the villa for the two-weeks' Easter holiday.

10. During the day of 3 April 2018, the Fourth Defendant's staff had been carrying out work on the pool. The Fourth Defendant's staff concluded work for the day at about 4 or 5pm and left the pool area with the intention of returning to it the following working day, so as to carry out further works necessary to complete the project. The pool was empty and uncovered. The precise state of the pool is not relevant to the preliminary issue hearing.

11. The Claimant, his wife, his children and his dogs arrived at the villa on 3 April 2018 via van. At that time, the Second Defendant was driving the First Defendant to the airport where he had to catch a plane back to the UK. As such, the Claimant and his family spent time in the nearby village whilst waiting for the Second Defendant to return to the villa. The Second Defendant arrived at the villa later that day.

12. The Claimant and his family waited outside the property until the Second Defendant returned from the airport. When she arrived, they unloaded some of their bags and some household items they had brought for the Second Defendant. The Claimant and his family settled in, and they all had dinner shortly thereafter.

13. After dinner, at about 10pm, the Claimant was injured in an accident. Whilst walking through the swimming pool area to his vehicle, to check on the family's dogs, he fell into the empty pool.

14. The Claimant called the Second Defendant and told her of his accident. His wife and the Second Defendant went to his aid, and an ambulance was called. The Claimant was taken to Nimes Hospital, where he was diagnosed with a sub-arachnoid haemorrhage and a fractured T12 vertebra. He remained hospitalised for six days, receiving treatment for his head and back injuries."

11. Mr Krsljanin also relied on the following statement in an email, dated 28 July 2020, from the solicitors for the relevant Defendants to his instructing solicitor:

"It is not in dispute; indeed it is in the agreed facts, that [the first defendant] owned the villa in France and that he rented it out. Naturally as an honest citizen, he paid all taxes due. He also pays tax in the UK. In France, his Personal 'Numero Fiscal' is ….and Professional 'Numero Fiscal' is …."

12. It was also common ground that:

i) The contract of insurance between the First and Second Defendants and the Third Defendant is governed by French law;

ii) The contract between the First Defendant and the Fourth Defendant was governed by French law. To underscore this point, Mr Krsljanin took me to the Fourth Defendant's quote for the work on the swimming pool, dated 22 January 2018, which was in the sum of just over 22,000 euros. He also showed me the First Defendant's acceptance of that quote by email dated 27 January 2018, and pointed out that both of these documents were written in French;

iii) The contract of insurance between the Fourth and Fifth Defendants is also governed by French law.

iv) As I have noted, the Claimant's claims against the Fourth and Fifth Defendants are governed by French law.

The statements of case

13. It is not necessary to summarise the statements of case in any detail, but I note the following points in relation to the Claim:

i) The Claim is pleaded exclusively on the basis that the applicable law is French law.

ii) The Claimant's case against the First and Second Defendants is that they were *"custodians"* of the Villa, including the swimming pool, and were therefore strictly liable, under Article 1242 of the French Civil Code, for any damage caused by the property. He alleges that the pool was in a poor or abnormal condition in that it was empty, there was a 7-8 foot drop from the edge of the pool to its floor, there was no lighting - so that the edge of the pool was not reasonably visible at night - and there were no fences, barriers or warnings to alert a person to the fact that they were approaching the edge of the pool, or to prevent them from falling in.

iii) Secondly, the Claimant also alleges that the First and Second Defendants were negligent or at fault, contrary to Articles 1240-1241 of the French Civil Code. In broad terms, he repeats the criticisms summarised in paragraph 13(ii) above. But he also complains that they failed to warn him to be careful and/or to suggest that he take an alternative route when walking between the parking area and the house and/or to accompany him when he was doing so.

iv) Thirdly, the Claimant alleges that the First and Second Defendants were in breach of their health and safety obligations imposed by Article L4532 of the Code du Travail by failing to appoint an appropriate person to implement health and safety measures, or to ensure that an adequate risk assessment was undertaken, and in allowing the alleged state of affairs in relation to the pool which I have summarised above.

v) The Third Defendant is claimed against directly as the insurer of the First and Second Defendants and in respect of their alleged liabilities, as is permitted under French law.

vi) Essentially the same case is pleaded against the Fourth Defendant save for the complaints about failure to warn the Claimant personally, failure to suggest an alternative route and/or to accompany him, and the alleged breaches of the Code du Travail. It is said that the Fourth Defendant was a custodian of the swimming pool and its immediate surroundings for as long as it was carrying out the works and that it was therefore strictly liable pursuant to Article 1242 of the French Civil Code, or alternatively negligent or at fault contrary to Articles 1241-1242.

vii) The Fifth Defendant is sued directly as the insurer of the Fourth Defendant, and in respect of its alleged liabilities, as French law permits.

14. As for the positions of the Defendants:

i) The First to Third Defendants admit that the First Defendant was the owner of the Villa but make no admission as to whether the First and Second Defendants were custodians of the Villa for the relevant purposes. They also reject the Claimant's pleaded criticisms of them, essentially on the basis that the swimming pool was not in a poor or dangerous condition and that the measures advocated by the Claimant were not needed given that the pool area was enclosed by a fence and had to be accessed through a gate, given that there was adequate lighting and given that the Claimant was sufficiently familiar with the lay out of the Villa and the condition of the swimming pool. They also plead that *"in any event…the responsibility for the works and accordingly any protective barriers or the like rested with the fourth defendant"*. Liability is therefore denied. Contributory negligence is pleaded against the Claimant under English law: essentially it is said that he had been drinking and had not taken sufficient care when walking to the parking area and should have used a torch.

ii) The Third Defendant admits that it may be sued directly under French law but relies on the same defences as the First and Second Defendants to deny liability.

iii) The Fourth Defendant denies that the swimming pool was within its keeping or custody for the purposes of Article 1242 of the Code, and pleads that the First and/or Second Defendants were the custodians of the Villa, and therefore the pool, for the relevant purposes. The Fourth Defendant also rejects the Claimant's pleaded criticisms of the condition of the pool and the lack of safety measures on broadly the same bases as do the First to Third Defendants (i.e. they deny that the pool presented a danger and they say that there were adequate safeguards in place in any event) but they also point out that they worked during the day and contend that they were not contracted to install lighting or asked to consider the adequacy of the lighting. Liability is therefore denied. Contributory fault is pleaded against the Claimant under French law, essentially on the same basis as is pleaded by the First to Third Defendants, but it is also pleaded that he should have asked for and taken an alternative route.

iv) The Fifth Defendant admits that it may be sued directly under French law and relies on the defences of the Fourth Defendant.

Interpreting Article 4 Rome II

The Explanatory Memorandum to Rome II

15. I was taken to the Explanatory Memorandum of the Commission of the European Communities (COM (2003) 427, dated 22 July 2003), which led to the Rome II Regulation. This document explains that the aim of the proposed Rome II Regulation was to achieve increased legal certainty – *"to improve the foreseeability of solutions"* - by the introduction of a single set of conflict rules in relation to non-contractual obligations which would apply to all Member States. Rome II would thus extend the harmonisation of private international law in relation to civil and commercial

obligations which was already well advanced in the form of the then Brussels I Regulation (44/2001) and the Rome Convention of 1980, relating to contractual obligations. Hitherto, there had been significant divergence in the national systems of conflict rules of the then 15 Member States in relation to non-contractual obligations.

16. Some of the approaches to conflict issues in the Member States were also considered problematic in themselves. In particular, the *lex loci delicti commissi* rule – that the applicable law should be the law of the place where the tortious act was committed – had been found to be problematic in the case of complex torts where the harmful event and the loss sustained were spread over several countries. For this reason, Member States were moving towards the application of the law of the place in which the damage was sustained, and the Commission's proposal was that this should become the general rule. This general rule was enshrined in what was to become Article 4(1) and the Commission explained (pages 10-11) that:

    i) *"In most cases this corresponds to the law of the injured party's country of residence…."*;

    ii) *"The place or places where indirect damage, if any, was sustained are not relevant for determining the applicable law..."*;

    iii) *"The solution in Article [4(1)] meets the concern for certainty in the law..."*;

    iv) *"The rule also reflects the need to strike a reasonable balance between the various interests at stake. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim' s legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation. The solution in Article [4] is therefore a compromise between the two extreme solutions of applying the law of the place where the event giving rise to the damage occurs and giving the victim the option*."

17. The Explanatory Memorandum then explained the rationale for the exceptions to Article 4(1) as follows:

> *"But the application of the basic rule might well be inappropriate where the situation has only a tenuous connection with the country where the damage occurs. The following paragraphs therefore exclude it in specified circumstances."*

18. What became Article 4(2) was then explained as follows:

> *"Paragraph 2 introduces <u>a special rule</u> where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country being applicable. This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. <u>It reflects the legitimate expectations of the two parties</u>."* (emphasis added)

19. Article 4(3) was explained as follows:

> *"Like Article 4(5) of the Rome Convention, paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.*
>
> *Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. Experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some Member States tend to begin in fact with the exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions. That is why the rules in Article [4](1) and (2) of the proposed Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be "manifestly more closely connected" with another country...."* (emphasis added)

The Recitals to the Rome II Regulation

20. The aims and concerns expressed in the Explanatory Memorandum are reflected in the Recitals to the Regulation. Recital 6 emphasises that:

> *"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"* (emphasis added)

21. However, this aim was not the only considerations which underpinned Rome II, as the Explanatory Memorandum and Recital 14 make clear:

> *"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."* (emphasis added)

22. Recital 15 then records that the principle of *lex loci delicti commissi* – that the applicable law should be the law of the place where the tort was committed - which was applied in almost all of the Member states, engendered uncertainty. The new general rule was therefore announced at Recital 16 as follows:

> *"Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage,*

and also reflects the modern approach to civil liability and the development of systems of strict liability." (emphasis added)

23. Recital 17 then applies this principle to personal injury claims:

"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" (emphasis added)

24. Recital 18 then explains the structure of Article 4 as follows:

"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." (emphasis added)

Analysis of Article 4

Article 4(1)

25. Article 4(1) of Rome II states the default position. Certainty is achieved by identifying a decisive criterion which, in the vast majority of cases, will establish the necessary connection between the applicable law of the country in question and the obligations arising out of the tort/delict. The Explanatory Memorandum also points out that in the majority of cases the place of damage will correspond to the injured party's place of residence, as I have pointed out. I also note that, consistently with the Explanatory Memorandum and Recitals 15 and 16, Article 4(1) distinguishes between the tortious event, the damage which occurs as a result, and the obligations arising out of the tortious event.

Article 4(2)

26. Article 4(2) then creates a special rule which will only be relevant if, at the time when the damage occurs, there is a mismatch between the habitual residence of both parties and the place where the damage occurs: the damage occurred in Country A, but at the time the parties were habitually resident in Country B. If they were both habitually resident in Country A at the relevant time, or did not have a common habitual residence, Article 4(2) has no role to play because the applicable law is decided under Article 4(1), subject to Article 4(3).

27. The fact that both parties are habitually resident in the same country at the time when the damage occurs is therefore another potentially decisive criterion for establishing sufficiency of connection between the applicable law of the country in question and the obligations arising out of the tort/delict. The result is also in keeping with the legitimate expectations of the parties given that they will be subject to the law of the country in which both are habitually resident. These considerations tend to support the

view that Article 4(2) only applies to two party cases or, at least, cases where all parties are habitually resident in the same country at the time when the damage occurs. In such a case, there is necessarily a significant connection between them, their rights and obligations arising out of the tort/delict, and the system of law which is required to be applied to their dispute, even if the dispute arises out of events which occurred elsewhere. The special rule is also justified on the basis that the parties may legitimately expect this is the position.

28. Where, on the other hand, only one party to the dispute has a particular habitual residence at the time that the damage occurs, or there are two parties with the same place of habitual residence but other parties with different places of habitual residence, there is not necessarily a strong connection between the case and the habitual residence of one of the parties, or of the claimant and one of the defendants, on the basis of the habitual residence criterion alone. The rationale for Article 4(2) – that a single habitual residence for both or all parties to the dispute, of itself, establishes a strong connection with that particular country - does not apply in the same way. Nor is it clear that the parties would have any particular expectation, based on the criterion of habitual residence alone, which displaced the expectation that the applicable law was that of the country in which the damage occurred, or some other country with which the situation was clearly more closely connected.

29. Indeed, on the basis of the text of Recital 18 and Article 4(2) itself there is a respectable argument that Article 4(2) only applies to two party cases and does not apply in multi-party cases. As noted above, Article 4(2) refers to two persons – the person sustaining damage and the person claimed to be liable - *"both"* having their habitual residence in the same country. The impression given by the Explanatory Memorandum, in the passage cited above at paragraph 18 and by Recital 18, is similar. This approach would also be consistent with the rationale for Article 4(2) suggested above, and with the fact that Article 4(2) is intended to be a *"special"* rule/connection which operates as an *"exception"* to the general principle. A narrow reading would therefore be justified: i.e. that the rule only applied in a narrow and particular set of circumstances in which it gave decisive weight to what, on any view, was a strong connecting factor.

The **Marshall** case

30. However, the argument that Article 4(2) only applies in two party cases was rejected by Dingemans J (as he then was) in **Marshall v (1) Motor Insurance Bureau; (2) Pickard (3) Generalli France Assurances and Pickard v Motor Insurers' Bureau** [2015] EWHA 3421 (QB). In brief summary, **Marshall** concerned a road traffic accident in France in which a Peugeot driven by a Ms Bivard had driven into Mr Marshall and Mr Pickard on a motorway at approximately 90 mph, after she had fallen asleep at the wheel. They had been standing on the hard shoulder, Mr Pickard's Ford Fiesta having broken down whilst he was driving back with Mr Marshall to England where they were both habitually resident. They were being assisted by a vehicle recovery truck, which was registered in France, of which Generali France Assurances was the insurer. Mr Marshall was killed and Mr Pickard was seriously injured.

31. In **Marshall** it was common ground that French law applied to Mr Marshall's widow's claims against Ms Bivard and Generali but there was an issue as to whether

Mrs Marshall was able to bring claims under French law against Mr Pickard. Mr Pickard and Generali had been added as defendants by Mrs Marshall when the MIB asserted that they, rather than the MIB, were liable on the basis that the Ford Fiesta and the recovery truck had been *"involved"* in the accident for the purposes of French law. This was also MIB's argument in denying Mr Pickard's claim. On the other hand, Mr Pickard's insurers, Royal and Sun Alliance ("RSA"), argued that English law was applicable on the basis that Mr Marshall and Mr Pickard were both habitually resident in England at the time of the accident: Article 4(2) therefore applied. It was common ground that if French law applied to Mrs Marshall's claim against Mr Pickard, and if the Ford Fiesta was *"involved"* in the accident for the purposes of French law, then RSA was liable as the insurer of the Ford Fiesta. If the recovery truck was *"involved"* Generali would also be liable under French law, as the insurer, in relation to the claims of both Mrs Marshall and Mr Pickard.

32. Dingemans J held that, by virtue of Article 4(3), Article 4(2) was disapplied and French law was applicable to Mrs Marshall's claim against Mr Pickard. At paragraph 20 he said this:

> *"..... In this case there are a number of circumstances which, in my judgment, make it clear that the tort/delict is manifestly more closely connected with France than England and Wales. These are: first that both Mr Marshall and Mr Pickard were hit by the French car driven by Ms Bivard, a national of France, on a French motorway. Any claims made by Mr Marshall and Mr Pickard against Ms Bivard, her insurers (or the FdG as she had no insurers) are governed by the laws of France; secondly the collision by Ms Bivard with Mr Marshall and Mr Pickard was, as a matter of fact and regardless of issues of fault or applicable law, the cause of the accident, the injuries suffered by Mr Marshall and Mr Pickard and the subsequent collisions; and thirdly any claims that Mr Marshall and Mr Pickard have against Generali, as insurers of the vehicle recovery truck, are also governed by the laws of France."*

33. He therefore placed particular emphasis on the fact that the accident occurred in France and involved a French car driven by a French driver, any claims against whom were governed by French law. Second, he emphasised the fact that the French driver was the cause of the accident and the injuries to the claimants and, third, he relied on the fact that any claims which Mr Marshall and Mr Pickard had against Generali were governed by French law. As will have been noted, the result was that, by operation of Article 4(3), the applicable law was that indicated by Article 4(1).

34. One of the arguments before Dingemans J was that Article 4(2) did not apply because there was more than one defendant to Mrs Marshall's claim whereas the provision only applied in two party cases where both parties habitually reside in the same Member State. If this was right, then French law would apply by operation of Article 4(1). At paragraph 17, Dingemans J said:

> *"I do not accept that this proposed interpretation is either reasonable or right. It is correct that article 4(2) is an exception to the new rule set out in article 4(1) of applying the law where the direct damage occurred, but it is an exception based on the legitimate expectation of the parties, as the relevant travaux preparatoires and other materials show. The proposition that a coach crash involving a number of different Claimants should be excluded from the effect of article 4(2) simply*

> *because there is more than one injured person is not sustainable. To read the word "person" as applying only to one party involves adopting a particular approach of English law to the construction of limitation or exception clauses while ignoring the fact that this is a European Regulation and subject to the rules of interpretation relating to such Regulations."*

35. This holding was not challenged before me. I also see the force of an argument that the logic of a "two party dispute only" limitation to the application of Article 4(2) is that if there were one accident in Country A and a claim by one claimant against 10 defendants, with all 11 parties having their habitual residence in Country B, Article 4(2) would not apply to determine the applicable law. Although it might be said that the habitual residences of the parties could be relied on under Article 4(3) to trump Article 4(1), and achieve a result consistent with the rationale for Article 4(2), it seems to me that this approach provides a less direct or certain route to the "right answer" in such a case, and is therefore less consistent with the overall scheme of the Article and the Regulation.

Relevant circumstances under Article 4(3)

36. However, in support of his analysis of Article 4(2) Dingemans J went on to say at paragraph 18:

> *"In my judgment article 4(2) applies, on the natural wording of the article, to the claims made by Mrs Marshall against Mr Pickard. Most of the potential problems identified with multi party cases which were relied on to justify a very strict approach to article 4(2) are addressed by a proper approach to article 4(3). This is not to elevate article 4(3) into the starting point for any type of case, including multi party cases, but it is to give proper effect to its terms. This is because it would be an unusual result of choice of law's provisions if at the moment that Mr Marshall was hit by the Peugeot motor car his claims against Ms Bivard and Mr Pickard were subject to two different governing laws."* (emphasis added)

37. It is important to highlight what I understand to be the rationale for this view. As I read his judgment, Dingemans J was not suggesting that the issue is simply the convenience of the parties or the court as such. The text of Article 4(3) calls for consideration of factors which are relevant to an assessment of the *degree of connection* with the alternative country contended for. Convenience or the risk of complexity in the proceedings, of itself, is unlikely to be a directly relevant factor in assessing this question, one way or the other. Mr Krsjlanin ultimately accepted this. As will be seen below, he made submissions as to the complexity which would result if the Claimant's claims were to be litigated under two systems of law in parallel, albeit in the same court. But he said that the complications which he highlighted merely served to demonstrate that Mr Doherty's arguments were not based on *"a proper approach to Article 4(3)"* because they produce a problematic result and because the conclusion that the law of two countries applies to the same dispute is surprising: the decision as to applicable law is fundamentally based on the strength of connection between the case and a given country, and one would therefore expect a single country to be identified as the one with which the case has the closest connection.

38. The reason why it is relevant that there are parties to the dispute who are subject to the law of a country other than the law suggested by Article 4(2) in relation to the claim against a particular defendant (Country A) can be put in negative or positive terms. On the one hand, the fact that there are parties to the dispute whose liabilities are subject to the laws of a different country (that of Country B) undermines the connection between the case and Country A and, on the other, it is positive evidence of a connection between the case and Country B. Similarly, as I have pointed out, the strength of the connection with Country A which is necessarily present in a case where all parties to a dispute had the same *habitual residence* at the time when the damage occurred is undermined where some of the parties to the dispute had their habitual residence in Country B. On the other hand, the involvement of the parties who are habitually resident in Country B strengthens the connection between the case and Country B. In each case, the fact that there are other systems of law and habitual residences "in play" in the dispute necessarily affects the legitimate expectations of the parties to the dispute, including the expectations of the parties which are subject to the same system of law and/or have a common habitual residence.

39. The importance of this point is obvious when the nature of the exercise to be conducted under Article 4(3) is considered. Where Article 4(2) produces the answer "Country A", and there is an argument under Article 4(3), the court is called on to evaluate whether the tort/delict is *"manifestly more closely connected with"* Country B. The exercise under Article 4(3) therefore involves a comparison between the factors which connect the tort/delict with Country A and those which connect it with Country B. Mr Doherty was content to refer to this as a "balancing exercise", albeit he rightly emphasised that the balance must clearly come down in favour of Country B if the law of that country is to be applicable.

40. I also agree with Mr Doherty that the effect of **Marshall** is that Article 4(2) may be applied to any defendant in multi-party litigation which, or who, has the same habitual residence as the claimant at the time when the damage occurred, and it is capable of yielding a particular result in the case of each defendant to which it applies: see also paragraph 35-030 Dicey, Morris and Collins *"Conflict of Laws"* 15th Edition. But Article 4(3) may then displace the answer indicated by Article 4(2) for that pairing and one of the factors which may lead to a different answer under Article 4(3) may be that the claim against another defendant or other defendants is governed by the law of another country.

41. Where I disagree with Mr Doherty is in relation to his contention that the factors relating to the particular pairing should be given greater weight than the factors which relate to parties which are not caught by Article 4(2) or should be the focus of the court's inquiry. I note that Article 4(3) requires consideration of *"all the circumstances of the case"*. The relevance and weight which should be given to a particular circumstance are indicated by the question which is sought to be addressed by reference to *"all the circumstances of the case"*, namely whether "*the tort/delict is manifestly more closely connected with a country other than that indicated by"* Article 4(1) or (2). The connections which are required to be examined under Article 4(3) are the connections between the event which caused the damage (the "fait dommageable" in the French version; the *"tort/delict"* in the English translation) and the countries whose applicable law is contended for by the parties. The degree of

relevance, or the weight, of a factor will therefore be determined by the extent to which it sheds light on this particular issue.

42. I note that this aspect of Mr Doherty's argument is perilously similar to the argument put forward on behalf of Mr Pickard and RSA in seeking permission to appeal the decision of Dingemans J in **Marshall**. In **Pickard v Motor Insurers' Bureau** [2017] RTR 274 Cranston J, who refused permission after a hearing, recorded their argument as follows at paragraph 20 of his judgment:

> *"Mr Weir criticised the judge for taking into account the three circumstances he mentioned in [20] of his judgment, since none of these were circumstances of the case against Mr Pickard, the alleged tortfeasor."* (emphasis added)

43. At paragraphs 11-14, Cranston J then summarised the way in which that criticism was developed for the purposes of the proposed appeal. At the end of paragraph 14 it was noted that Mr Weir QC's argument was that:

> *"The reference to "all the circumstances of the case" is to the circumstances of the case brought by the victims against a given tortfeasor. This interpretation furthered certainty, ...since otherwise it would be difficult to limit the circumstances to which reference could be made. The judge was accordingly wrong and the three circumstances to which he referred were legally irrelevant."* (emphasis added)

44. Cranston J rejected this argument at paragraphs 14 and 15:

> *"The starting point in considering these submissions must be the words of the Regulation, in particular art.4(3). It demands that attention be given to "all the circumstances of the case" to determine if "the tort/delict" is "manifestly more closely connected with" a country other than that which is pinpointed by the application of art.4(1) or (2). To my mind the phrase "all the circumstances of the case" points to precisely that, all the circumstances surrounding the tort. Those circumstances are not limited by art.4(3), by a phrase such as "brought against the tortfeasor".*
>
> *15 Certainly all parts of art.4 must be read together, but art.4(3) is focused on the law of the country with which the tort/delict is manifestly more closely connected. Consequently, it is not on all fours with art.4(1) and (2), which are concerned with the law applicable to "a non-contractual obligation arising out of a tort". "Tort" can refer to the road traffic accident in this context, just as readily as it can to the cause of action (to use the English approach) applying between the particular victim and particular tortfeasor. That a tort is part of a multi-party accident may be highly relevant to the country with which it is manifestly most closely connected."* (emphasis added)

45. Whilst not binding on me, it will be apparent that I respectfully agree with Cranston J's views. Although Mr Doherty's submission was that *less weight* should be given to the circumstances relating to other parties, rather than that such circumstances were *"legally irrelevant"*, it was in effect a watered-down version of Mr Weir's argument in **Marshall**. In my view, it meets with the same (well founded) objections.

46. As to other potential or actual issues in relation to what may be relevant circumstances for the purposes of Article 4(3), obviously the fact that the tort occurred in Country B is a relevant circumstance, given that the question is as to the closeness of the connection between the tortious event and the other country: **Winrow v Hemphhill (2) Aegeas Insurance Limited** [2014] EWHC 3164 at paragraph 43.

47. So is the fact that the direct damage occurred in the competing country: **Winrow** paragraph 43. Indeed, in **Marshall**, Dingemans J held that Article 4(3) may override Article 4(2) and lead back to the country indicated by Article 4(1), as I have noted. He said:

> *"19…. There are some textbooks which suggest that such an approach is impermissible, because of the words "other than that indicated in paragraphs 1 or 2". However, at the end of the day no one argued that such a construction was right. In my judgment the parties were right to accept that a governing law mandated by article 4(1), but excluded by article 4(2), might be required by article 4(3). This is because the wording is "in paragraphs 1 or 2" and not "in paragraphs 1 and 2" (my underlining), and it is possible for article 4(1) and article 4(2) to provide for different answers"*

48. Similarly, the habitual residences of the parties, including where any insurer defendants are registered (see Article 23) at the time of the tortious incident and when the damage occurs, are relevant. As to Mr Doherty's submission that Article 4(2) requires that the fact that the claimant and one of the defendants had their habitual residence in one country at the time when the damage occurred be given particular weight under Article 4(3), this is similar to his argument that the focus should be on factors which relate to these parties, which I have addressed at paragraphs 41-45, above. I agree that, logically, the proponent of an answer other than that indicated by Article 4(2) must do more than point to the fact that the damage occurred in Country B. As Article 4(2) trumps Article 4(1), this fact of itself cannot be sufficient to displace Article 4(2). To this extent, the common habitual residence of the claimant and a particular defendant carries particular weight. However, as has been pointed out, the strength of this consideration is obvious where all of the parties have their habitual residence in the same country at the relevant time, but it is undermined when there are other parties who have their habitual residence in a different country or countries. Moreover, what was said in **Winrow** about the relevance of habitual residence was said in the context of a case where the answer under both Articles 4(1) and (2) was Germany because this was where the damage had occurred and where the claimant and the first defendant were habitually resident.

49. The habitual residence of the Claimant at the time of the consequences of the tort, including any consequential losses, has also been held to be relevant: see paragraphs 39 and 43 **Winrow** and **Stylianou v Toyoshima** [2013] EWHC 2188 (QB). I do not propose to depart from this view, as it was not argued that I should, although I share the doubts about its correctness expressed by Plender & Wilderspin *("The European Private International Law of Obligations"* 4th Edition paragraphs 18-111 to 18-115) and prefer the view that since what falls to be determined is, in effect, the rights and obligations of the parties at the time of the tort/delict which is said to give rise to the relevant liabilities, the decision should be made by reference to the circumstances at the time of the tort/delict rather than, in effect, as at the time of the court's decision and therefore after the event.

50. However, although subsequent events may be relevant, it would appear from the policy of Article 4(1), as identified in the Explanatory Memorandum and Recitals (16) and (17) in particular, and from the text of Article 4(1) itself, that the place where indirect damage is suffered is a less weighty consideration than the place of direct damage. This is because, as Slade J said in **Winrow** at paragraph 46:

> *"The "centre of gravity" referred to in the Commission Proposal for Rome II and by Flaux J in [Fortress Value Recovery Fund ILLC and others v Blue Skye Special Opportunities Fund LP and others [2013] EWHC 14] in considering Article 4(3) is the centre of gravity of the tort not of the damage and consequential loss caused by the tort."*

51. The nationalities of the parties are also relevant: see **Winrow** at paragraphs 54 and 55, and **Marshall** at paragraph 22.

52. So is the fact that the parties have a pre-existing relationship in or with a particular country. This is apparent from the second sentence of Article 4(3) although, in **Marshall**, Dingemans J did not appear to attach a great deal of weight to this particular feature of the case. At paragraph 21 he said this:

> *"I note that Mr Marshall and Mr Pickard had been working together in France for some 2 and a half months, and this was relied on by the parties other than RSA in support of the case that article 4(3) applied, but in my judgment that factor would not have come close to avoiding the effect of article 4(2) if it had stood alone.."*

The example given in the second sentence of Article 4(3)

53. I agree with Cranston J's observation, at paragraph 16 of his judgment in **Pickard**, that the second sentence of Article 4(3) *"is…. but an example of the circumstances which may bear on identifying the country with the most manifest connection"*. I also note that the example given in Article 4(3) is of a contract or other pre-existing relationship *"that is closely connected with the tort/delict in question"*. This, it appears, may have been what lay behind Dingemans J's view that the pre-existing relationship between Mr Pickard and Mr Marshall in France did not carry great weight in the context of the other circumstances of the case. Whilst this relationship may have accounted for the fact that Mr Pickard and Mr Marshall were driving back to England together, and were therefore on the side of the motorway at the time of the accident, the relationship and the agreement to drive home together were not *"closely connected with the tort/delict in question"*. The weight given to this consideration might have been greater if, for example, Mr Marshall had contracted with Mr Pickard to drive him home under a contract governed by French law and Mr Pickard had crashed the car in the course of carrying out the contract.

54. The Explanatory Memorandum explains the example in Article 4(3) as follows at page 12:

> *"Paragraph 3 then allows the court to be guided, for example, by the fact that the parties are already bound by a pre-existing relationship. This is a factor that can be taken into account to determine whether there is a manifestly closer connection with a country other than the one designated by the strict rules. But*

the law applicable to the pre-existing relationship does not apply automatically, and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship."

55. It adds, at page 13:

"By having the same law apply to all their relationships, this solution respects the parties' legitimate expectations and meets the need for sound administration of justice. On a more technical level, it means that the consequences of the fact that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another can be mitigated, until such time as the Court of Justice comes up with its own autonomous response to the situation.."

56. Plender and Wilderspin give as an example of where a pre-existing contract has a close connection with the tort, a case where the tortious liability arises out of, or in connection with, the performance of the contract: see paragraph 18-116 of their 4th Edition. They give the example of an employee who is injured by a colleague whilst working on a temporary assignment abroad. They also note, as the Explanatory Memorandum does, that the nature of the pre-existing relationship which is governed by the law of a particular country need not be contractual and they note that the law applicable to a contract between two of the parties to a dispute may also establish the relevant connection for the purposes of claims between other parties to the same dispute: see paragraph 18-117.

The burden and standard of proof under Article 4(3)

57. As to how clear cut the case for the application of the law of an alternative country must be, it was common ground before me that the burden is on the party which seeks to displace Article 4(1): see paragraph 16 **Winrow**. Also, as Dingemans J noted at paragraph 20 of his judgment in **Marshall**:

"It is also common ground that article 4(3) imposes a "high hurdle" in the path of a party seeking to displace the law indicated by articles 4(1) or 4(2), and that it is necessary to show that the "centre of gravity" of the case is with the suggested applicable law."

58. I note that at paragraph 35-032 the authors of Dicey, Morris and Collins say:

"...the requirement that the tort be manifestly more closely connected with the law of another country (which must be ''clear from the circumstances of the case'') emphasises that the court must be satisfied that the threshold of closer connection has been clearly demonstrated. Nevertheless, the approach of the European Court and the English courts to the similarly (although not identically) worded rule of displacement in Art.4(5) of the Rome Convention suggests that it should not be necessary to demonstrate the absence of any ''real'' or ''genuine'' connection with the country whose law is otherwise applicable, and that a clear preponderance of factors pointing to a country other than that whose law applies under Art.4(1) or (2) is all that is required."

59. These observations are consistent with what was said in the Explanatory Memorandum.

60. Mr Doherty also emphasised the statements in the Explanatory Memorandum, cited above at paragraph 19, that a key aim of the Rome II Regulation was improve the foreseeability of outcomes, and that because Regulation 4(3) generates a degree of uncertainty *"it must remain exceptional"*. However, I note that the relevant passage went on to explain that experience with the approach under Rome Convention had been that the courts in some Member States started with the exception rather than the presumptions. The aim of ensuring that Article 4(3) was truly applied as an exception was therefore to be achieved by providing that Articles 4(1) and (2) create rules rather than presumptions, and by requiring that it be *"clear"* that there is a *"manifestly"* or obviously closer connection with the country other than that which is indicated by Articles 4(1) and (2).

61. Article 4(3) is an exception/exceptional in these senses but in my view, there is no additional test of exceptionality and it is therefore not necessary for the court to be satisfied, for example, that the facts of the case are also exceptional or unusual in nature before applying Article 4(3). What is required is the application of the words of Article 4 with an awareness of aims of Rome II. The aim of Articles 4(1) and (2) in particular, is to achieve certainty. They will provide the answer in a given case unless they can be displaced. But the Regulation also aims *"to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation."* through Article 4(3), albeit this provision will only operate in a clear and obvious case.

The submissions on behalf of the parties

Mr Krsljanin.

62. Mr Krsljanin emphasised the following features of the case:

    i) First, the Claimant's claims against the Fourth and Fifth Defendants are governed by French law. He argued that this, in itself, is a significant factor connecting the tort to France.

    ii) Second, the accident arose out of a pre-existing contractual relationship between the First Defendant and the Fourth Defendant. His argument was that it occurred because the swimming pool at the Villa was undergoing works which were being carried out under a contract between these parties which was governed by French law. The contractor was therefore in an analogous position to Ms Bivard in the **Marshall** case whose actions were the cause of the accident in that case.

    iii) Third, although there are no contribution proceedings at the moment, in effect the Fourth Defendant is arguing that the First Defendant was liable as the custodian of the pool and there will therefore inevitably be an issue of French law, which the court has to resolve at trial, as to who was the "custodian" for relevant purposes.

iv) Fourth, there was the risk of complexity and an "artificial and strained" outcome if, for example, the court found that the Fourth Defendant was not the custodian but that any claim against the First Defendant failed under English law. There was also the possibility of the court needing to adjudicate liability and quantum in relation to both of these parties in parallel under different systems of law and finding that both claims succeeded but that the awards of damages were different. As I have noted, Mr Krsljanin accepted that these factors were not in themselves evidence of a connection with one country or the other, but he said that these sorts of results should cause the court to question the correctness of Mr Doherty's approach.

v) Fifth, the accident happened in France. In contrast to a road traffic accident, which might involve a transient presence in France, and vehicles registered in England, it took place on property which is inextricably linked to France. He submitted that it would be artificial for the case to be decided under the Occupiers Liability Act 1957 or common law principles applicable to the occupation of property in England.

vi) Sixth, the direct damage in this case occurred in France and the Claimant was treated for his injuries at a hospital in France.

vii) Seventh, he argued that the First and Second Defendant had a strong and longstanding connection to France. The Villa had been in the family for many years and had been owned by the First Defendant for some time. It was accurately described in the agreed facts as a "holiday home". The First and Second Defendant, their family and friends, used it regularly and they spent a significant number of days in France each year. They also rented it out as a holiday let, and therefore made a profit from it. The fact that the First Defendant was registered in France for tax for personal and professional purposes was a further indication of the continuity and significance of their presence in France. Although his skeleton argument suggested that their presence in France was "akin to a residence or even domicile", in his oral submissions Mr Krsljanin confirmed that he was not inviting me to find that they were habitually resident or domiciled in France the technical sense.

viii) Eighth, the insurers in this case are French companies and their contracts with the insured are governed by French law. In the case of the Fifth Defendant, the claim against it depends entirely on French law. In the case of the Third Defendant, Mr Krsljanin argued that it would have a legitimate expectation that its liabilities would be determined under French law given that the insurance related to a villa in France.

63. As for the pre-existing relationship between the Claimant and the First and Second Defendants, Mr Krsljanin submitted that this factor did not strongly connect the tort to England. He argued that:

i) The relationship prior to the arrangement which led to the Claimant and his family being in France was a social relationship and was only tenuously connected to the tort in any event.

ii) The arrangement which led to the Claimant and his family being in France was also an informal one, rather than contractual in nature. He said that English law applied to the question whether there was a contract and the onus was on the First to Third Defendants to prove any contract on which they relied. In this connection he relied on **MacInnes v Gross** [2017] EWHC 46 (QB) paragraph 84 and 95 and emphasised the degree of informality and the context in which the agreement was reached. There was no intention to contract or, at least, no such intention had been proved by the First and Second Defendant. In this regard, he pointed out that the Claimant had done gratuitous work for the First and Second Defendant before, including in relation to the Villa in November 2016, and he pointed me to texts in the bundle, in addition to the agreed facts, as showing that the relationship was a social one.

iii) If the arrangement was contractual, the contract was governed by French law given that the place for performance by both parties was France and could only be France. He accepted that if there was a contract it was a contract for the provision of services and therefore 4(1)(b) of Regulation (EC) 593/2008 ("the Rome I Regulation") would indicate that the applicable law was English law given that the habitual residence(s) of the service provider(s) was/were in England. But he submitted that the contract was manifestly more closely connected with France and that Article 4(3) of Rome I therefore applied to displace English law. In this connection he relied on **Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd** [2002] CLC 533, albeit this was a case under Article 4(5) of the Rome Convention rather than Article 4(3) of the Rome I Regulation and the language of the relevant provision was therefore materially different.

64. He accepted that the social relationship between the parties was based in England, but he argued that neither the prior relationship nor the particular arrangement which led to the Claimant being at the Villa in France was the cause of the accident or closely connected to it. The close connection was between the accident and the contract between the Claimant and the Fourth Defendant to carry out works on the pool.

Mr Doherty.

65. Mr Doherty emphasised that the aim of the Rome II Regulation was to achieve legal certainty and that Article 4(3) potentially undermines this principle, that the onus is on the Claimant to displace the result indicated by Article 4(2), that this is a high hurdle and that Article 4(3) is described in the Explanatory Memorandum and elsewhere as exceptional and as applicable only in clear and manifest cases. I have addressed these points above.

66. In terms of positive evidence of connections between the tort in the present case and England, Mr Doherty emphasised that the Claimant and the First and Second Defendants were resident in England with a pre-existing relationship there going back approximately 7 years. The arrangement for the Claimant to carry out work on the Villa and for him and his family to stay there was why they were in France at the relevant time. In effect, the First and Second Defendants were in the course of performing their side of the agreement when the accident happened. This agreement was contractual in nature and, in effect, the Claimant's allegation against the First and Second Defendants was that they had breached the terms of the contract relating to the

quiet enjoyment or safety of the property. But even if the court took the view that the arrangement was non-contractual it was closely connected to the tort for this reason.

67. In relation to the argument that the arrangement was contractual, Mr Doherty did not refer to any authority or materials from the text books, apparently because he did not regard the contractual (or otherwise) status of the arrangement as the crucial point. But he approached the issue on the basis that English law would apply to the question whether it was contractual. He pointed out that paragraph 8 of the Particulars of Claim pleads that it was agreed that the Claimant:

> *"would travel to the Villa, and would provide his professional services to help refurbish the Villa so that the First and Second Defendants could rent it out commercially ….In return it was agreed that the First and Second Defendant would permit the Claimant and his family to stay at the Villa free of charge for a period of ten days whilst the Claimant performed the refurbishment works".*

68. He said that there was a distinctly contractual flavour to this way of putting it.

69. In their Defence, the First to Third Defendants pleaded that the arrangement pleaded at paragraph 8 of the Particulars of Claim was contractual (paragraph 7(e)(v)).

i) Paragraph 8(h) of the Defence pleads the arrangement as follows:

> *"In early 2018, the first defendant entered into an arrangement with the claimant, by which the claimant and his family were to come to the villa for a holiday and in return the claimant would carry out some works at the villa";*

ii) Paragraph 10 pleads:

> *"As to paragraph 8 [of the Particulars of Claim], the villa was already being rented out commercially before April 2018 and the works to be undertaken by the claimant were not essential to the renting. The works which the claimant was to undertake were laying a laminate floor in a bedroom, erecting a shower screen, tiling a balcony floor and a small toilet room. The works would not have been full-time for the period of his visit"*

70. Mr Doherty argued that if the Claimant had done the work, he had agreed to do in the first couple of days of the visit, but had then been asked to leave, there would have been a claim available to him in contract. Similarly, if he had damaged the property, or the work which he did needed to be redone, there would be a contractual claim available to the First and Second Defendant. However, he acknowledged that the Claimant had not brought any claim based on this alleged contract and, indeed, that the existence of a contract is denied at paragraph 4(e)(i) of the Reply. This pleads that it was an informal arrangement between acquaintances with no intent to create legal relations, and that the Claimant had provided gratuitous assistance of this sort on several occasions prior to the accident.

71. Mr Doherty also acknowledged that the Agreed Facts do not provide a detailed account of the exchanges between the parties which led to the agreement or of the context in which it was reached – see paragraphs 8 and 9, in particular - but he said that I should "take a view". He went on to argue that the contract was governed by

English law. It was a contract for the provision of services and there was no basis for displacing Article 4(1)(b) of the Rome I Regulation. **Samcrete** involved a totally different sort of contract and was decided under the Rome Convention in any event. He also drew attention to Article 4(1)(d) of Rome I which provides for the law of the habitual residence of the landlord and the tenant, where they are the same, to be the applicable law in cases of tenancies of 6 months or less. This, he argued, would have been the starting point if the Claimant had paid for the stay in the Villa.

72. But the emphasis of this aspect of Mr Doherty's argument was on the point that it was not for him to bring the case within the example in the second sentence of Article 4(3) given that he was not seeking to displace Article 4(2). Whether or not the agreement between the parties was contractual, their pre-existing relationship and agreement pointed to a strong connection with England and were therefore a strong pointer to this not being a case in which the tort was clearly and manifestly more closely connected with France. This factor clearly went into the balance in favour of English law being applicable.

73. As to the factors relied on by Mr Krsljanin, Mr Doherty submitted that:

i) The place where the Claimant was injured is relevant but cannot carry great weight given that Article 4(1) gives way to Article 4(2) where the latter is applicable and leads to a different result. I have touched on this argument at paragraph 48 above.

ii) Although the direct damage was suffered in France, the consequential losses suffered by the Claimant were largely if not entirely suffered in England to where he returned when he was discharged from hospital in France. again, I have considered this issue above at paragraphs 49-50.

iii) The First and Second Defendants' links to France could not carry great weight as they did not have a direct bearing on the fact that the accident occurred. He noted, as I have noted, that Dingemans J did not regard the fact that Mr Pickard and Mr Marshall had been working in France for 2.5 months prior to their accident was not given a great deal of weight by Dingemans J in the **Marshall** case.

iv) He disputed the argument that the Third Defendant would have a legitimate expectation that any claims relating to the Villa would be claims brought under French law. There was no evidence of this, and the expectation would be that the Third Defendant would cover all claims brought in relation to the Villa, whether under French law or otherwise. Nor was there any plea or suggestion on the part of the First to Third Defendants that the Third Defendant would not be liable in respect of any claims to which English law applied.

v) He accepted that the position of the Fourth and Fifth Defendants, including the fact that the claims against them are subject to French law, is relevant. However, he submitted that the focus should be on the factors which were applicable to the claim against the First to Third Defendants. I have addressed and rejected this argument at paragraphs 41-45 above.

vi) He argued that **Marshall** is distinguishable on the facts. That was a case in which there was a clear single cause of the accident and where that cause was overwhelmingly linked to France. In that case, there were no strong factors connecting the tort to England, such as a pre-existing relationship between the parties based there, as in this case.

vii) He submitted that the convenience of the parties and the court is not a factor in itself but, in any event, the court was well able to deal with any complexity which arose out of different systems of law applying to different Defendants. It would decide liability and quantum in relation to the First to Third Defendants and the Fourth and Fifth Defendants. If both were liable, the Claimant would be able to elect which judgment to enforce and there would could then be a claim for a contribution pursuant the Civil Liability (Contribution) Act 1978: see **Roberts v SSAFA** [2020] EWCA Civ 926. The possibility of different results as against different Defendants is inherent in the fact that different systems of law are applicable.

viii) He said that I should also be alive to the risk that allowing the displacement of Article 4(2) by the addition of defendants who are subject to French law will lead to abuses though claimants joining defendants simply to gain the benefit of an advantageous system of law.

ix) He accepted that the existence of the contract between the First and the Fourth Defendants which was governed by French law was relevant but said that this factor did not carry a great deal of weight. The arrangements between these parties ought not to affect the duties owed by the First and Second Defendants to the Claimant.

Conclusion

74. I prefer the arguments of Mr Krsljanin. In my view it is clear that the tort/delict in the present case is manifestly more closely connected with France. 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.

75. 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.

76. The First and Second Defendants also had a significant and long-standing connection to France, the accident occurred on their property and 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. The contract was to insure a property in France albeit one which, I accept, applied to claims under English and 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.

77. Whilst it cannot be said at this stage that, by analogy with **Marshall**, the accident was entirely caused by the Fourth Defendant in particular, 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.

78. I take the point that the Claimant and the First and Second Defendants were habitually resident in England at the relevant time, that there was a pre-existing relationship between them, and that the Claimant and his family came to be at the Villa as a result of an agreement which was made in England. But, applying an objective test (see Chitty on Contract Volume 1 at paragraph 2-171 in particular), I am not satisfied that this agreement, on the information available at this stage, was contractual in nature. Part of the difficulty in relation to this aspect of the First to Third Defendants' argument is that there is very little information before the court as to what precisely happened. Looking at the agreed facts in the context of the statements of case and the other materials which I have been shown, however, it appears that the agreement resulted from a casual conversation between social acquaintances in the context of mutual favours having been done in the past. It was informal in nature and it appears that the Claimant offered to do the work as a favour and the First and Second Defendant invited him and his family to the Villa to return that favour.

79. If I had found that there was a contract, I would also likely have found that it was governed by French law. Although it was entered into in England between British parties, it related entirely to a property in France. Performance of the contract on both sides could only be effected at a particular property in France and was very strongly connected to France in that it involved work on a villa there and a family holiday there. This and the other features of the case would have led me to conclude that Article 4(3) of the Rome I Regulation indicated that there was a manifestly closer connection between the contract and France, although I acknowledge that there is a degree of circularity in this approach. In reaching this view, I have not been greatly assisted by the **Samcrete** decision for the reasons given by Mr Doherty, but I have had regard to Dicey, Morris and Collins, 15th Edition, particularly at paragraph 32-80.

80. Mr Doherty understandably emphasised that, even if there was no contract with the Claimant, the relationship and the agreement which led to the Claimant and his family being in France were based and made in England. I was also initially attracted by his argument that in effect the Claimant's complaint is about the way in which the First and Second Defendants fulfilled their side of that agreement. But that is not the claim which he makes, and, in any event, their performance of the agreement was in the form of allowing the Claimant and his family to occupy a villa *in France*. Nor is this a

case in which, for example, the injury occurred whilst the Claimant was carrying out work on the Villa and potential tortious and contractual duties (if the relationship was contractual) therefore arose directly out of the relationship between the parties.

81. 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.

82. 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.

83. 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.