

Compass Chambers



Reivers, Rome & Renegades

Craig Murray KC
Cameron Smith, Advocate

22nd November 2024



The Reivers



“If Jesus Christ were emongst them,
they would deceave him.”

Raids, blackmail and terrorism

“Hot trod”





Cross-border raids

LJC Inglis:

“I am confident that we do not understand nine out of ten of the English cases which are quoted to us and that in attempts to apply that law we run the greatest risk of spoiling our own by mistaking theirs”

McCowan v Wright (1852) 15 D 229 at p 232





Klifa v. Slater [2022] EWHC 427





Klifa v. Slater [2022] EWHC 427

- Application for a stay on ground of *forum non conveniens*.
- On Brexit day, the Judgements Regulation 1215/2012 ceased to apply.
- Bringing with it the removal of the rule against *forum non conveniens* (***Owusu v. Jackson*** [2005] QB 801).

- ***Sim v. Robinow*** (1892) 19 R. 665 :

"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice." Lord Kinnear at p. 668.



Klifa v. Slater [2022] EWHC 427

Spiliada Maritime Corpn v. Cansulex [1987] AC 460 (at 464H)

- Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action;
- Burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. And if the court is satisfied that there is another available forum which is *prima facie* appropriate, the burden will shift to the claimant;
- The standard of proof for a more appropriate forum is “clearly or distinctly” more appropriate.

2-stage test:

- (1) Is there another available forum which is clearly and distinctly more appropriate;
- (2) Are there circumstances by which justice requires a stay should not be granted.

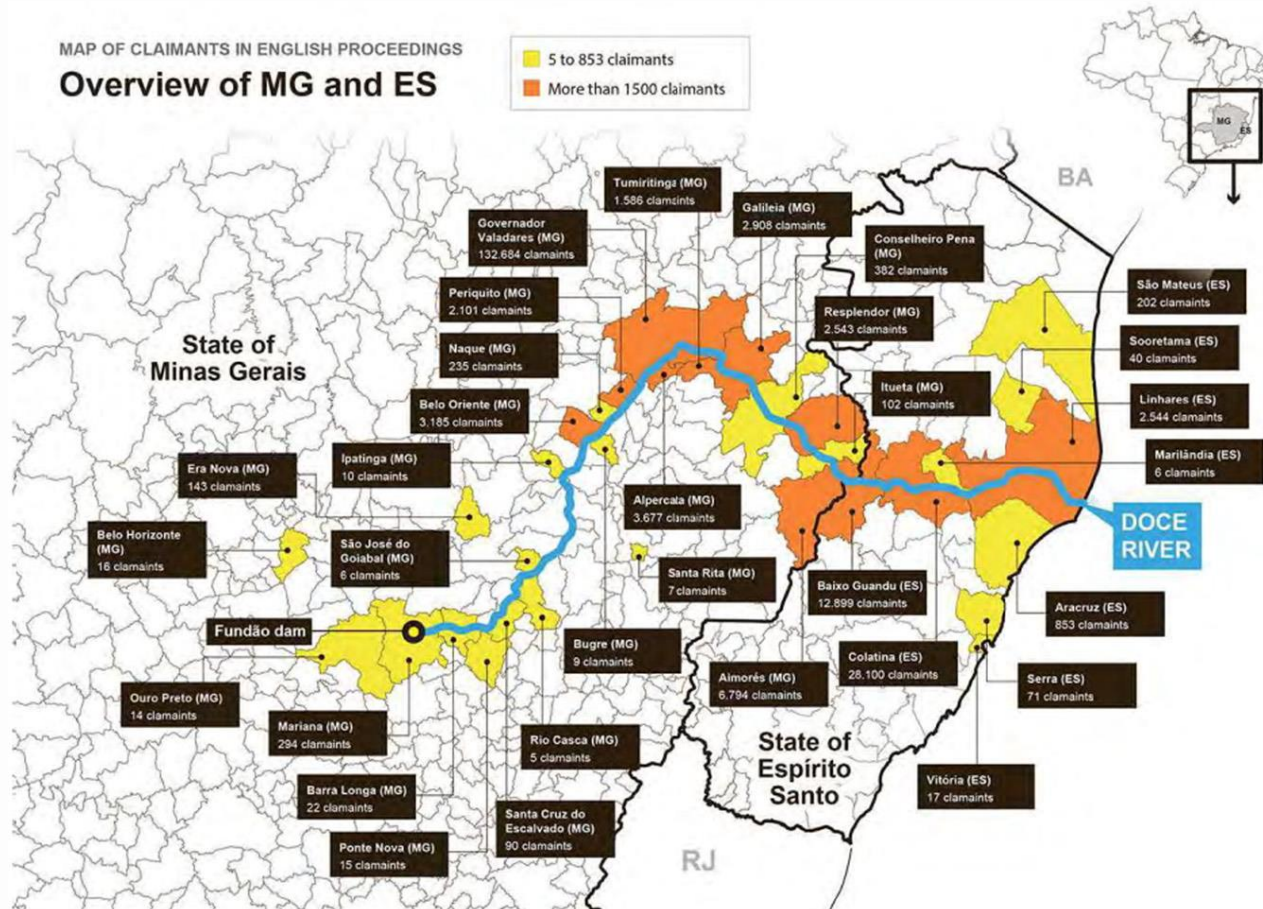


Municipio de Mariana v. BHP Group (UK) Ltd





Município de Mariana v. BHP Group (UK) Ltd





Município de Mariana v. BHP Group (UK) Ltd

- Turner J.

He held that although the English court had jurisdiction under Brussels Recast Regulation (the general principle being that individuals should be sued only in their member state of domicile), Art. 34 allowed the English court to stay proceedings in favour of Brazilian courts if it is expedient and necessary for the proper administration of justice.



Municipio de Mariana v. BHP Group (UK) Ltd

- Forum non conveniens:

“[T]he task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice” Lord Collins JSC in *Altimo* [2012] 1 WLR 1804

He was “... entirely satisfied that these claims would be not merely challenging but irredeemably unmanageable if allowed to proceed any further in this jurisdiction.”



Municipio de Mariana v. BHP Group (UK) Ltd

CA in 2022 [2022] 1 WLR 4691

- “[334] There is a tension in the authorities as to how the two stages are to be applied where a foreign forum of competent jurisdiction has been identified by the defendant, but a question arises as to whether it is available to the claimant in practice. In particular, does stage one require the defendant to satisfy the court that the identified forum is available in practice? Or is that a question which only arises at stage two, with the burden resting on the claimant?”
- The trial on “threshold liability issues” of 12 weeks’ duration commenced on 21st October 2024 before Mrs Justice O’Farrell.

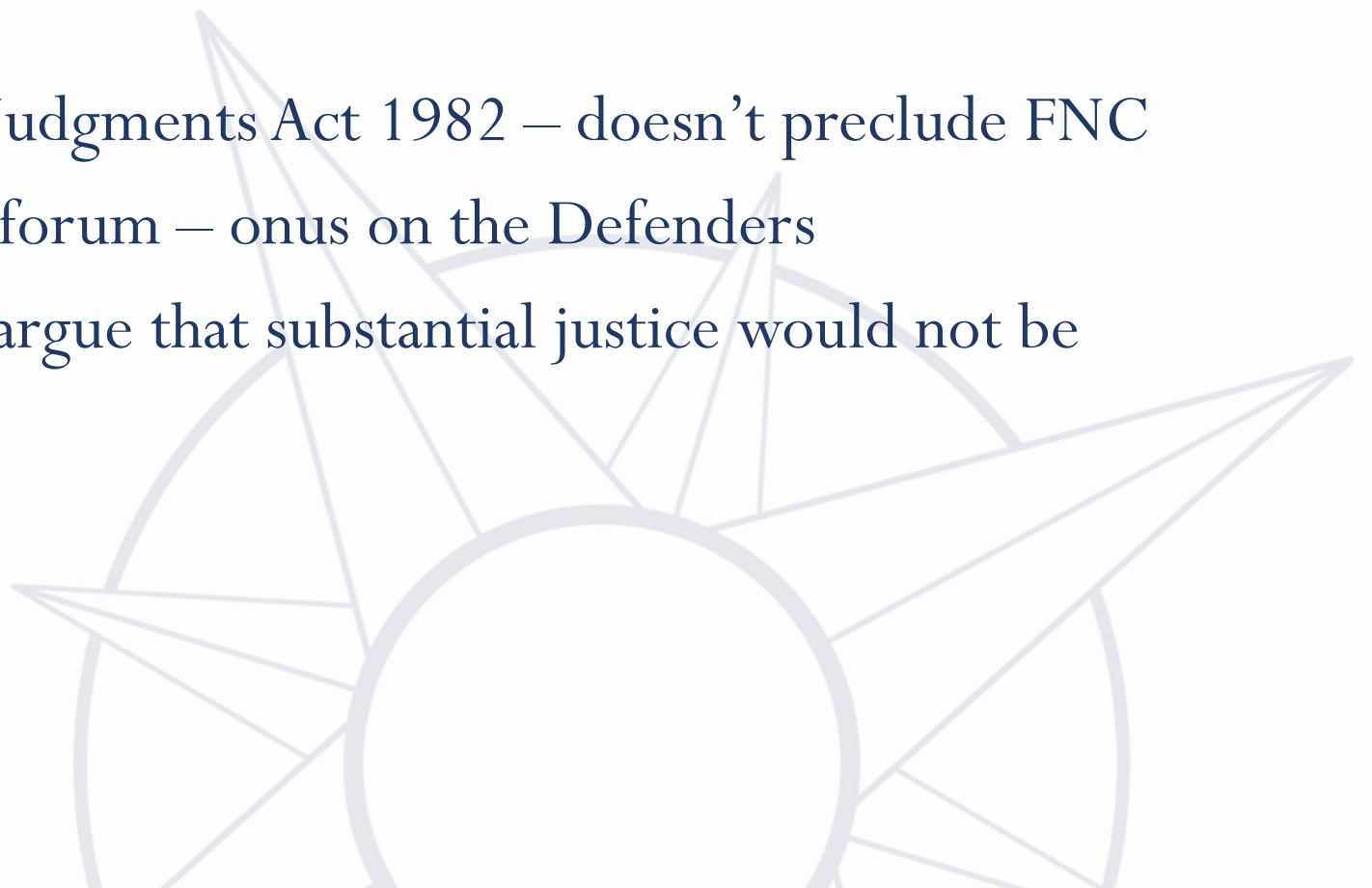
Campbell v. James Findlay (Kenya) Ltd 2023 SC 139





Jurisdiction

- *Forum non conveniens* – a blast from the past?
- Post Brexit – no Brussels ☹️
- s. 22 Civil Jurisdictions and Judgments Act 1982 – doesn't preclude FNC
- Kenya the more appropriate forum – onus on the Defenders
- If proved, switches to RP to argue that substantial justice would not be achievable in Kenya.





Rome I: Contractual obligations

- Regulation (EC) No. 5932/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
- Recital (11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.
- Article 12 provides the scope of the applicable law: primarily the interpretation and performance of the contract, as well as the remedies for breach of contract and assessment of damages, within the limits of the procedural law in the *lex fori*.



Rome II: Non-contractual obligations

- Recital (17) The applicable law is that of the country where the damage occurs, regardless of where the indirect consequences may occur. In personal injury, the applicable law is the country where the injury was sustained.
- **Art 4(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.
- **Art 4(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.



Rome II: Non-contractual obligations

- **Art. 4(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 preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.
- In Recital (18), Article 4(3) is described as an “escape clause” from Article 4(1) and (2).
- Intended to apply in exceptional circumstances where 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*” is required (Explanatory Memorandum).

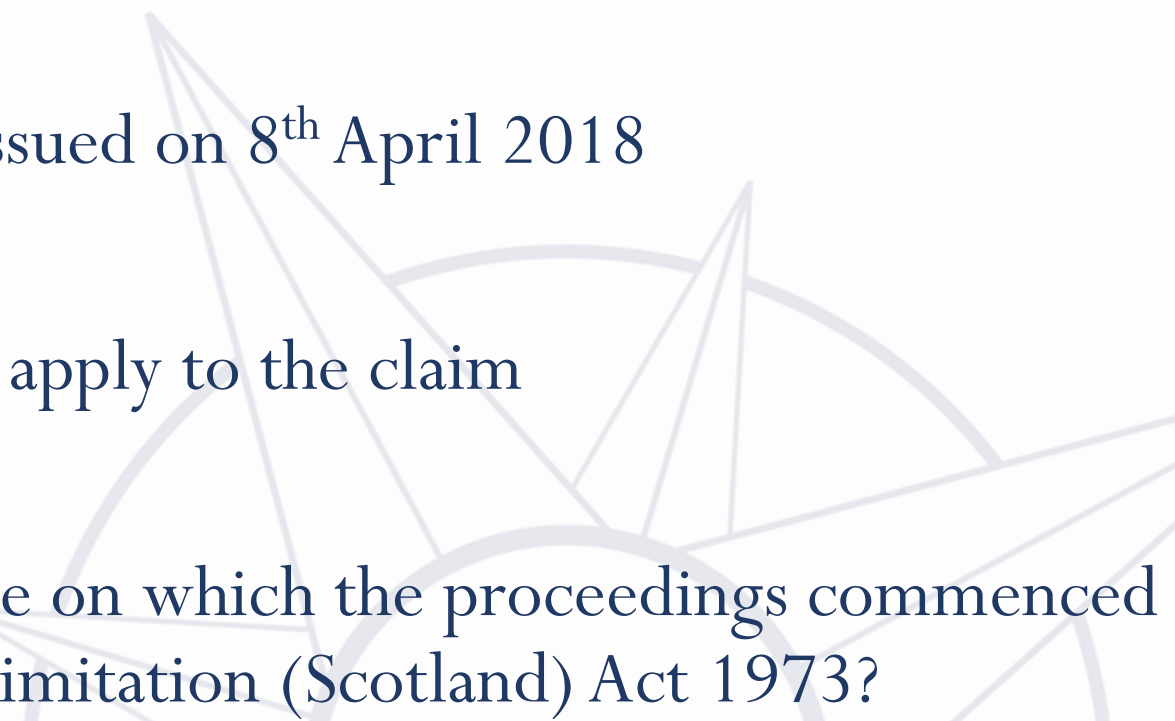


Rome II: Non-contractual obligations

- (1) It is the delict which must be manifestly more connected with a country other than the countries which would provide the applicable law under Article 4(1) or (2) rather than a connection of the parties or any of the issues arising in the claim (*Jacobs v. MIB* [2010] RTR 35 at [46]).
- (2) The connection is a clear preponderance of association with the country, rather than attempting to negative any association with a country identified in Article 4(1) or (2) (see *Owen v. Galgey* [2020] EWHC 3546 at [58] to [61]).
- (3) The court may take into account circumstances preparatory to the harmful event itself (*Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844, at [156])



Johnson v. Berentzen [2021] EWHC 1042 (QB)

- RTA in Scotland: English motorcyclist and German car driver
 - Proceedings in High Court issued on 8th April 2018
 - Agreed that Scots law would apply to the claim
 - Did that also apply to the date on which the proceedings commenced under the Prescription and Limitation (Scotland) Act 1973?
- 



State Immunity

- **State Immunity Act 1978**

1.— General immunity from jurisdiction.

(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

5. Personal injuries and damage to property.

A State is not immune as respects proceedings in respect of—

- (a) death or personal injury; or
- (b) damage to or loss of tangible property,

caused by an act or omission in the United Kingdom.

Morrison v. Mapfre Middlesea Insurance 2023 SC 97





Al-Masarir v. Kingdom of Saudi Arabia [2023] QB 475



04 Jan 2020

Activist Ghanem al-Masarir given permission to sue Saudi Arabia in UK over alleged hack of his phone



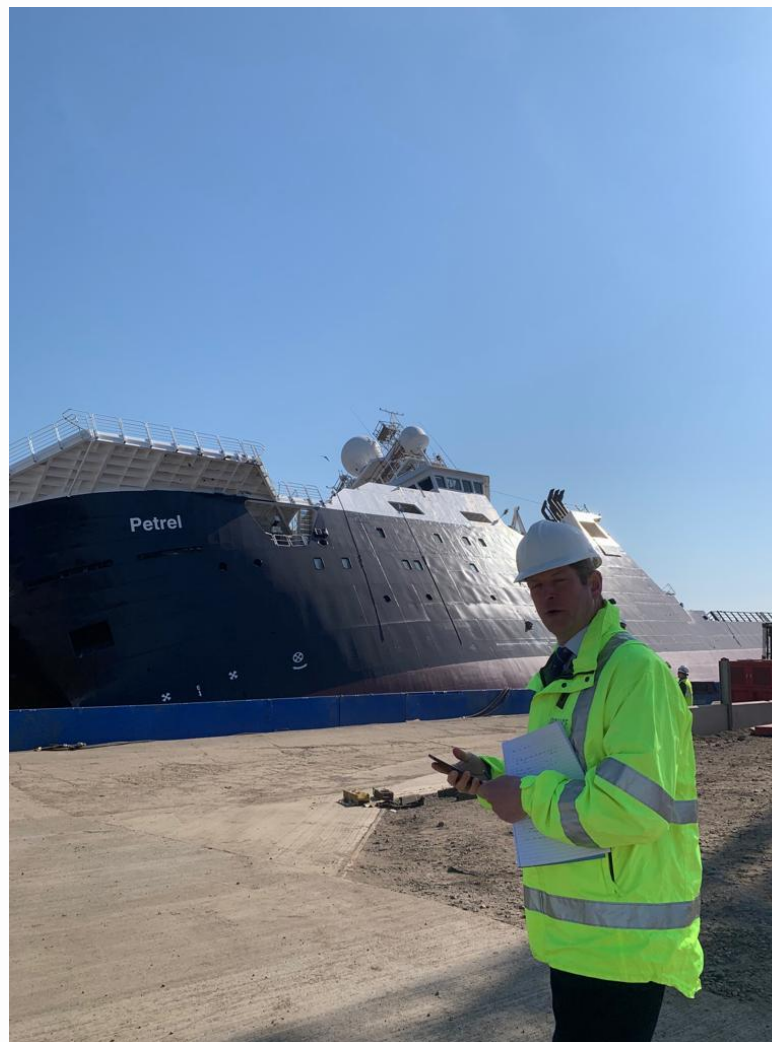


Sayn-Wittgenstein-Sayn v. His Majesty Juan Carlos [2023] EWHC 2478





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