# Grenfell and the Stretch to Pennsylvania for Punitive Damages

*Introduction*

1. In *Kristen Behrens, Esq., as Administratrix, et al. v. Arconic, Inc., et al* [1] a US federal district court in Pennsylvania has dismissed on grounds of *forum non conveniens* claims brought by victims of the Grenfell Tower fire against:

- The US manufacturer of the combustible cladding tiles; and
- The US parent company of the fridge-freezer in which the fire ignited.

2. Baylson J, sitting in the United States District Court for the Eastern District of Pennsylvania (a first instance federal court), after extensive consideration of the factors connecting the claims with England and Pennsylvania, found that the "*balance of conveniences clearly favors trial in the UK*". [3] The court granted the motion to dismiss the claims, subject to a number of conditions preserving the victims' rights in subsequent proceedings.

3. The final condition imposed by the federal district court in its dismissal of these product liability claims was: "*If the UK court determines that Pennsylvania law (or the law of another state in the United States) applies to damages and that one or both Defendants may be liable for punitive damages, but decides to grant dismissal of the damages phase without prejudice in the UK for determination in the US, Plaintiffs may reinstate this action in this Court*". [4]

4. This note will consider the judgment, this condition imposed on the dismissal of the claims on grounds of *forum non conveniens*, and the prospect of an English court remitting assessment of damages, and in particular punitive damages, against US manufacturers implicated in the Grenfell tragedy to the US for determination.

*The Grenfell tragedy*

5. 72 people lost their lives and hundreds of others suffered physical and mental injuries when a fire engulfed Grenfell Tower, a high-rise residential building in North Kensington, West London. The tragedy started in the early hours of 14 June 2017, when a fire originated in a Hotpoint fridge-freezer in Flat 16 and spread to combustible cladding covering the façade of the Tower. [5]

*US proceedings*

6. In *Behrens*, the court noted that victims had issued civil proceedings in both England and the United States. *Behrens* was a products liability action brought by the estates of sixty-nine of the deceased and 177 injured survivors (both directly and indirectly affected) against:

- The Whirlpool Corporation, the US company which had acquired the company that manufactured the "Hotpoint" fridge-freezer that had caught fire; and
- Companies in the Arconic group of companies that had manufactured the cladding installed on the exterior of Grenfell Tower.

The plaintiffs sought compensatory and punitive damages under Pennsylvania law. The action was started in federal court under diversity jurisdiction (the plaintiffs and defendants being from different states).



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*Forum non conveniens*

7. The defendants brought a motion to dismiss the claims for *forum non conveniens* (i.e. arguing that the Pennsylvania courts were not the appropriate forum for resolution of the dispute), submitting that the courts in England & Wales were the appropriate forum. The court, following Third Circuit Court of Appeal (a federal appeal court) authority, adopted a three-part test:

- Determining whether an adequate alternative forum can entertain the case;
- If so, determining the appropriate amount of deference to be given the plaintiff's choice of forum;
- Balancing the relevant public and private interest factors. [6]

8. The court found that there was no question that England was an adequate alternative forum to adjudicate the case. [7]

9. A significant difference between English and Pennsylvania adjudication which troubled the court however was that "*one form of damages that are available under Pennsylvania law – punitive damages – are likely unavailable under English law.*" [8] Under the law of Pennsylvania, punitive damages are available if "*the defendant has acted in an outrageous fashion due to either the defendant's evil motive or his reckless indifference to the rights of others.*" [9] The defendant's conduct must rise to the level of "*willful, wanton or reckless*" for punitive damages to be warranted. [10] The court referred to *"the fairly substantial evidence that has been uncovered demonstrating that Arconic managers in Pennsylvania and elsewhere in the United States delayed approving a request from Arconic's French subsidiary AAP SAS to develop, manufacture, and sell a more fire-retardant version of Reynobond, specifically Reynobond A2, on grounds that its development was too expensive*." The court stated that if the plaintiffs' contentions were accepted and causation made good, Arconic would be liable for punitive damages under Pennsylvania law. [11]

10. The court noted that, although exemplary damages were available under English law, they were of much more limited scope than Pennsylvania punitive damages. Expert reports on English law adduced by both the plaintiffs and defendants agreed that:

- Exemplary damages were confined to situations where:
  *(a) There had been oppressive, arbitrary or unconstitutional conduct by government servants;*
  (b) *or where the conduct giving rise to the cause of action was calculated to result in profit which might exceed the likely compensation;*
- No case brought under the Consumer Protection Act 1987 was known to have awarded exemplary damages; and
- Exemplary damages were not likely to be available to the plaintiffs in the present case. [12]

11. The court proceeded on (a) the basis that it was likely Pennsylvania law would apply to the assessment of damages if the claims were to remain before it; [13] and (b) the assumption that an English court hearing the claims would apply English law. [14] Therefore, the Court approached the motion on the basis that if the action proceeded before the District Court, it was likely the plaintiffs would be able to pursue punitive damages, but if the action was dismissed and the case heard in England, the plaintiffs would be unable to pursue a punitive remedy. [15] The court observed that the "*difference in available damages is challenging given the evidence that has been discovered in this case*". [16]

12. The court stated that if it had been "*free to consider, as an important* [*forum non conveniens*] *factor, that punitive damages as understood in Pennsylvania law are likely unavailable in England, the decision very well may have been a denial of the motion to dismiss*". However, that course was barred by US Supreme Court authority expressly foreclosing reliance on differences in the availability of damages in the *forum non conveniens* analysis. [17]

13. The court, clearly concerned by the vision of the availability of punitive damages being denied the Grenfell victims



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fashioned a novel approach, keeping the prospect of punitive damages alive. The court said:

> "*Under the governing precedents, damages cannot be a leading issue in the forum non conveniens analysis, but they are a prominent and worthy issue in this case because of the horrendousness of the tragedy. Because the legal system is Plaintiffs' sole source of redress, this Court's* [*forum non conveniens*] *dismissal will be without prejudice so that if the UK courts conclude that Arconic and/or Whirlpool are liable and that the conduct of Arconic and/or Whirlpool was "so outrageous" as to be "willful, wanton or reckless," the UK court may grant* [*forum non conveniens*] *dismissal on the issue of damages. Plaintiffs may then seek to reinstate this action. If, instead, the UK court applying English choice of law principles determines that Pennsylvania law on punitive damages should apply and decides to allow punitive damages itself, reinstating this action would not be necessary*." [18]

14. The court in a footnote recognized "*that its approach – dismissing the case for forum non conveniens, but retaining the possibility of adjudicating the damages phase – is novel*". [19]

15. The court accorded moderate deference to the plaintiffs' choice of the Pennsylvania forum but found after extensive consideration of the evidential position, together with detailed dissection of US, UK and Pennsylvania interests, that the "*overall balance*" weighed heavily in favour of dismissal on *forum non conveniens* grounds. The court also held that the defendants had satisfied the burden of showing that litigating the case in Pennsylvania would result in "*oppressiveness and vexation…out of all proportion to the [P]laintiffs' convenience*" and had established that "*litigating in the UK, by contrast, 'will best serve the convenience of the parties and the ends of justice'*". [20]

*The prospect of an English forum finding that Pennsylvania law on punitive damages applies and awarding punitive damages*

16. The court in *Behrens* stated that reinstating the action in Pennsylvania would not be necessary if "*the UK court applying English choice of law principles determines that Pennsylvania law on punitive damages should apply and decides to allow punitive damages itself*". [21]

17. The choice of law rules for product liability claims set out in Article 5 of the Rome II Regulation [22] seem likely to be found pointing to English law. To the extent that the provisions of the Private International Law (Miscellaneous Provisions) Act 1995 (PILA) applied, s.11 of the Act would render English law applicable to claims for personal injury or death as the law of the country where the victims sustained their injuries. [23]

18. If an English court applied English law to the product liability claims by reason of Rome II, English law would also govern "*the existence, the nature and the assessment of damage or the remedy claimed*". [24]

19. If English law were applied by reason of PILA, English law as the *lex causae* would govern entitlement to heads of damages and English law as the *lex fori* would govern assessment of damages. In *Cox v Ergo Versicherung AG*, Lord Sumption discussing the leading case of *Harding v Wealands* [25] said: "*At common law the kinds of damage recoverable was a question of substance, whereas their quantification or assessment went to the availability and extent of the remedy and as such were questions of procedure for the law of the forum*". [26]

*The difference between an English court making an award of punitive damages and a Pennsylvania court*

20. Even if the English court were to apply Pennsylvanian law to the product liability claims against the US defendants, with the effect that punitive damages were available, the outcome could well differ from the outcome in front of a court in Pennsylvania because:



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- The Pennsylvanian law on damages could exceptionally be disapplied by an English forum on public policy grounds if the foreign punitive damages laws were of "an excessive nature". [27] It might, however, be considered that where punitive damages are part of the law of the paying party's domicile and/or place of misconduct that English public policy should take a back seat;
- It would be a judge quantifying damages rather than a jury. Exemplary damages in English courts are available in civil cases heard by juries, such as cases of false imprisonment and libel. That would not be the case for the claims being brought by the Grenfell victims, which could only be heard by a judge rather than a jury;
- An English judge could well be influenced by the principles for quantifying exemplary damages when quantifying punitive damages available under an applicable foreign law. Relevant considerations that may militate in favour of a different or lower award include: (a) the claimant requires to be the victim of the behaviour requiring deterrence; (b) that there be moderation in awards; (c) the means of the parties; (d) the conduct of the parties; (e) the amount awarded as compensation; (f) any criminal penalty; (g) the position with joint wrongdoers; and (h) the position with multiple claimants. [28]

*Comment: the prospect of a claim for punitive damages returning to Pennsylvania*

21. The alternative to an English court awarding punitive damages according to Pennsylvania law that was contemplated by the court in *Behrens* was that "*if the UK courts conclude that Arconic and/or Whirlpool are liable and that the conduct of Arconic and/or Whirlpool was "so outrageous" as to be "willful, wanton or reckless," the UK court may grant FNC [forum non conveniens] dismissal on the issue of damages. Plaintiffs may then seek to reinstate this action*". [29] However, it is notable that the order of the court in *Behrens* did not require the English court to make a finding in relation to the nature of the US corporate defendants' conduct, merely that Pennsylvania law applied and that the defendants "*may be*" liable for punitive damages. [30]

22. The court in *Behrens* found that, overall, England, not Pennsylvania, was the appropriate forum for the Grenfell victims to bring product liability claims against the US manufacturers implicated in the tragedy. However, one probable consequence of that finding did not sit well with the court: the fact that the Grenfell victims might be unable to pursue a claim for punitive damages against the US defendants, should it be found that their conduct was wilful, wanton or reckless. [31] The solution adopted was the imposition of a condition on dismissal of the claims in Pennsylvania, the terms of which appear to invite an English court hearing future Grenfell claims against these particular US defendants to decide the liability issues but to decline on *forum non conveniens* grounds to hear the damages aspect of the case against the US manufacturers. In these circumstances, the court in *Behrens* seems to consider that the Pennsylvania court might be a more appropriate forum to deal with damages, and in particular punitive damages.

23. The condition imposed on the *forum non conveniens* dismissal by the court in *Behrens* keeping open the possibility of the determination as to damages in the claims by Grenfell victims returning from an English court to a Pennsylvania court is striking. It has the appearance of a proposed *quid pro quo*. The US court has exhibited restraint and ruled in a spirit of comity respecting the English courts' claim to exercise their jurisdiction to decide claims with strong English connections. The US court appears to be proposing that there should be a reciprocal element of take and give by the English courts. However, any argument for the English court to stay the assessment of damages for determination by the US court, would have to overcome several high hurdles:

- Displacing English law as the governing law in the product liability claims and the assessment of damages in them in favour of Pennsylvania law would seem challenging;
- In a case where the English court has jurisdiction on matters of liability, it may view the law of England and Wales as capable of delivering a just outcome through the conventional approach (at least to English eyes) of redress confined to compensatory damages ;
- Any decision by the English court to stay the determination of damages for *forum non conveniens* would seem to carry with it the implication that the US corporate defendants ought to be exposed to an award of punitive



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damages, which is a decision an English court applying English law will not be well positioned to make;
- The English court will also have before it multiple claims against other (non-US-connected) defendants. It is probable that the US defendants will form part of the web of contribution claims brought by and against defendants. It is difficult to see how the damages claims against the US defendants can be disentangled from that and dealt with separately in Pennsylvania whilst still ensuring a just damages outcome across the board in the English proceedings;
- The proposal does not seem to sit comfortably with how the English courts generally approach *forum non conveniens* challenges, which is by looking for the natural forum "*in which the case may be tried more suitably for the interests of all the parties and the ends of justice*", [32] and with which the case has "*the most real and substantial connection*". [33] The focus of the court would conventionally be on the connections between the proposed alternative forum and the dispute as a whole, rather than the assessment and quantification of damages as separate matters.

24. However, it is not unknown for English law to reinvent itself in response to tragedy. [34] The courts of England and Wales have extensive discretionary case management powers, including staying the whole or any part of proceedings, [35] which they exercise in accordance with the Overriding Objective of dealing with disputes justly and at proportionate cost. [36] An English court may take the view that these exceptional circumstances – one of the worst British peacetime tragedies, coupled with the US court's open armed conditional dismissal and clear concern over the possible conduct of its corporate citizens [37] – justify the exercise of that power to allow part of the case to be tried before the US Courts.

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[1] *Behrens v. Arconic, Inc.*, No. CV 19-2664, 2020 U.S. Dist. LEXIS 169216 (E.D. Pa. Sept. 16, 2020) ("***Behrens***").
[2] Grenfell Tower Inquiry Phase 1 Report, [2.12] and [2.13].
[3] *Behrens*,153-154.
[4] *Behrens*,155.
[5] Grenfell Tower Inquiry Phase 1 Report, [2.12] and [2.13].
[6] *Behrens*, 54, applying *Windt v Qwest Commc'ns Int'l, Inc.,* 529 F.3d 183 (3d Cir. 2008).
[7] *Behrens*, 55.
[8] *Behrens*, 60-61.
[9] *Behrens*,61, citing *Phillips v Cricket Lighters*, 584 Pa. 179, 883 A.2d 439, 445 (PA. 2005).
[10] *Behrens*,61, citing *Hutchison ex rel. Hutchison v Luddy*, 582 Pa. 114, 870 A.2d 766, 770 (Pa. 2005).
[11] *Behrens*, 61-62.
[12] *Behrens*, 64. A third category where exemplary damages are available in English law is where they are authorised by statute. See J Edelmen et al (Eds), *McGregor on Damages* (20th edn, 2017) at, [13-028].
[13] *Behrens,* 61, fn 32.
[14] *Behrens*,64, fn 34.
[15] *Behrens*,64.
[16] *Behrens*, 64, fn 35.
[17] *Behrens*, 65, citing *Piper Aircraft Co. v Reyno* 454 U.S. 235, 255 (1981).
[18] *Behrens*, 67.
[19] *Behrens* 67, fn 36.
[20] *Behrens*, 138-141.
[21] *Behrens*,67.
[22] Regulation (EC) No 864/2007, the relevant rules in which will continue to apply as a matter of domestic law after the end of the Brexit transition period – see: Article 66(b), EU-UK Withdrawal Agreement; section 3, European Union (Withdrawal) Act 2018; and regulation 11, The Law Applicable to Contractual Obligations and Non-Contractual



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Obligations (Amendment etc.) (EU Exit) Regulations 2019.
[23] The court heard expert evidence to this effect from Professor Adrian Briggs QC: "*According to Briggs' analysis, whether the Rome II Regulation or PILA provides the relevant rule, an English court presiding over this dispute would apply English law*". *Behrens*, 44.
[24] Article 15(c), Rome II.
[25] [2007] 2 AC 1.
[26] [2014] AC 1379, at [14].
[27] Recital 32, Rome II Regulation.
[28] See *McGregor on Damages*, at. [13-31] to [13-044].
[29] *Behrens*,67.
[30] *Behrens*, 155.
[31] The plaintiffs did not rely on prima facie evidence of such behaviour in respect of the claims against Whirlpool.
[32] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("The Spiliada"), 476.
[33] *The Spiliada*, [478].
[34] In *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, the House of Lords rewrote the law concerning liability for psychiatric injury in claims for nervous shock arising out of the Hillsborough Stadium disaster where 96 people lost their lives.
[35] CPR Part 3.1(2)(f).
[36] CPR Part 1.1 & 1.2.
[37] A preliminary assessment by the court in *Behrens* (at 121-126) of the law that would govern the availability of punitive damages and the amount of damages available for non-pecuniary losses applying Pennsylvania's particular brand of the "interest analysis" choice of law approach identified Pennsylvania as being interested in applying its law to resident manufacturers in respect of those issues and identified England as having no interests in the application of its law.



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