The thread that runs all through the Court of Appeal judgments is that BMBF was carrying out a normal financial transaction for good business reasons; on the evidence there was nothing artificial about the scheme. The composite transaction doctrine applies only where the steps inserted have no business purpose and so could not apply here and, even if it did apply, then its conditions were not satisfied.

There is much about the BMBF case that is unsatisfactory. Park J. was leading counsel in many of the House of Lords cases which have shaped the law and there is much about his approach which is convincing and attractive. However, the facts as interpreted by the Court of Appeal seem to preclude the deployment of that approach. The judges in the Court of Appeal were clearly unhappy with what *MacNiven* had left them to do. In that case Lord Hoffmann said that a concept was juristic if an ordinary person would say that one should ask a lawyer for an answer (para. [58]); one senses that the Court of Appeal thought the test should be to ask Lord Hoffmann. Leave to appeal has been granted—by the House of Lords. If the House takes the same view of the facts as the Court of Appeal, this may prove to be a superfluous exercise. The appeal will only be justified if the House brings some intellectual cohesion to an area of law which is in danger of falling into disrepute and is of critical importance to taxpayers and revenue departments alike. Whether that is achieved depends in part on the arguments being properly presented and analysed; sadly, it may also depend on who is on the panel which hears the case.

JOHN TILEY

IDENTIFYING THE LOCUS OF THE TORT

IN *Ennstone Building Products Ltd.* v. *Stranger Ltd.* [2002] EWCA (Civ) 916, [2002] 1 W.L.R. 3059 the claimant, who had supplied sandstone for a building in Edinburgh, retained the defendant to investigate and report when the stone developed unsightly staining. The contract was concluded at the defendant's Scottish office and provided that research and testing were to be carried out in both England and Scotland, but predominantly in Scotland. Both parties were English companies.

The defendant reported, recommending that the sandstone be treated with oxalic acid, and this treatment was duly carried out. A few months later, however, the stone had again become disfigured.

When independent consultants advised that oxalic acid was likely to have exacerbated the staining problem, the claimant sued the defendant for negligence and/or breach of contract.

A trial of preliminary issues was ordered to determine both the governing law of the contract and the appropriate choice of law for the tort claim. The significance of these issues was that under Scottish law the claim was statute-barred. The judge at first instance held that Scottish law governed both claims: as the applicable law of the contract, under Article 4(2) of the Rome Convention, and, by way of an exception to double actionability, as the *lex loci delicti*. The claimant appealed successfully on both counts.

The Court of Appeal judgment raises a number of interesting issues about the scope of Article 4(2) of the Rome Convention. However, this note focuses on the court's decision that the locus of the tort was England and examines the two material considerations upon which that decision was based. The first of these was the proposition, said to derive from *Diamond* v. *Bank of London & Montreal Ltd.* [1979] Q.B. 333, that, in the case of fraudulent or negligent misrepresentation, the tort is committed where the representation is received. The second was the court's finding that the crucial breach of duty was the defendant's recommendation, contained in a report sent to the claimant at its premises in County Durham, to use oxalic acid to clean the stone.

The events in *Ennstone* all occurred before 1 May 1996 and thus the Private International Law (Miscellaneous Provisions) Act 1995 did not apply. That Act replaces the requirement of double actionability, in most cases involving foreign torts, with a general rule based on the applicability of the *lex loci delicti*, subject to a proper law exception. In future, cases involving fraudulent or negligent representations will fall under section 11(2)(*c*) of the Act and will be governed by "the law of the country in which the most significant element or elements of [the events constituting the tort] occurred". However, *Ennstone* is likely to retain significance under the 1995 Act given the view of both the Law Commission and Dicey and Morris that cases involving fraudulent and negligent representations should continue to be decided in a way which is consistent with the existing case law and with the ratio of *Diamond*, in particular. (See Law Com. Working Paper No. 87, *Private International Law Choice of Law in Tort and Delict* (1984), paras. 5.26–5.27; Dicey and Morris, *The Conflict of Laws*, 13th edn. (London 2000), paras. 35-085–35-086.)

In *Diamond*, the plaintiff brought an action for fraudulent misrepresentation against a bank in Nassau on the basis of an

inaccurate credit reference provided by the bank. A manager at the bank had provided the reference by telephone to the plaintiff in London. The Court of Appeal, although rejecting the plaintiff's application on other grounds, was prepared to accept that the substance of the tort was committed within the jurisdiction.

This decision deserved closer attention by the court in *Ennstone*. In *Diamond* it was held that a misrepresentation occurs where the relevant statement is received *and acted upon*, not merely where it is received (pp. 346 and 349). That this is the ratio of the case was confirmed by the Court of Appeal in *Cordoba Shipping Co. Ltd.* v. *National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep. 91, 92 and 96 and is now well established. In *Ennstone* the report was received in England but it was relied on in Edinburgh when the claimant attempted to clean the Standard Life building with oxalic acid, and in such circumstances the rule in *Diamond* unhelpfully points to two different *loci*.

An analogous case was considered by the High Court of Australia in *Voth* v. *Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538. The facts of that case were that an accountant was engaged in Missouri, in the United States, to provide accounting services to a Kansas company. The accounts were later relied upon in Australia by the parent company of the Kansas company. The parent company alleged that the accounts were negligently prepared and that it had suffered loss as a result. The issue before the court, on a *forum non conveniens* application, was where the tort had occurred.

The majority acknowledged that the rule in *Diamond* would pose a problem wherever a fraudulent or negligent statement was received in one place and acted upon in another (p. 568). Looking for a way out of this problem, they turned to the rule in *Distillers (Biochemicals) Ltd.* v. *Thompson* [1971] A.C. 458, saying that "in every case the place to be assigned to a statement initiated in one place and received in another is a matter to be determined by reference to the events and by asking, as laid down in *Distillers*, where, in substance, the act took place" (p. 568). In the event, it was held that the locus of the tort committed by the accountants was Kansas, where the accounts were prepared, and not Australia, where they were received and relied upon by the parent company. *Voth* is a useful example of how a case involving a statement received in one place and acted upon in another might be dealt with by the English courts.

As for the court's finding in *Ennstone* that the crucial breach of duty on the part of the defendant was its recommendation to use oxalic acid to clean the stone, this was far from being an obvious

or inevitable characterisation of the facts. Indeed, the defendant's breach could be better described as the negligent provision of services. The defendant's argument that it was required to do more than just provide advice was a strong one: it was engaged to provide consultancy and testing services, not merely to provide a recommendation. Moreover, any error in the final report must presumably have been the result of an earlier omission or miscalculation in the research and testing.

Voth is itself a strong decision in a case where the breach has been characterised as the negligent provision of services. It provides clear authority for the proposition that a claim regarding the negligent production of accountancy advice may arise where the accountancy is performed, rather than where the information is relied upon (p. 569). It is not a great leap from there to the proposition that a claim for the negligent provision of professional services in general may arise where those services are performed. Such a rule is surely more appropriate than the rule in *Diamond* wherever the bulk of services to be provided consists of research, development and preparation and where any report or advice is merely the end product of these services.

JOANNA PERKINS