BROWNLIE v FOUR SEASONS (NO. 2): A BINDING DECISION ON THE MEANING OF THE TORT JURISDICTION GATEWAY, FOR NOW

On 29 July 2020 the Court of Appeal handed down judgment in Brownlie (No. 2) [2020] EWCA Civ 995, the most recent instalment of one of the longest-running jurisdiction disputes in English personal injury law. It upheld the decision of Nicol J and agreed with the majority of the Supreme Court in Brownlie (No. 1), [2017] UKSC 80.

Background

Both the facts and the central legal issue in *Brownlie (No 2)* are beguilingly simple. In January 2010, Lady Brownlie, together with her husband, the highly regarded international lawyer Professor Sir Ian Brownlie QC, their daughter, and two grandsons, set out on a day trip which they had booked with the Four Seasons Hotel Cairo, where they were staying. Their tour vehicle, which was in poor condition, badly maintained, and negligently driven, went off the road and crashed in the desert outside the city. Sir Ian and his daughter were killed. Lady Brownlie was seriously injured and the two boys left distressed and traumatised.

Lady Brownlie began formal proceedings in 2012 against Four Seasons (FS), the hotel group which she believed had sold her the excursion over the telephone in England, prior to her holiday. In April 2013 permission was given by Master Yoxall to serve the claim form in Canada at the Head Office of FS, with a view to the trial of the claim taking place in England. FS challenged jurisdiction and in July 2013 the claim form was set aside. Lady Brownlie's appeal before Tugendhat J succeeded in February 2014, but FS appealed again. The Court of Appeal dismissed the appeal in respect of the wrongful death claim but permitted it on the personal injury claim.

Both sides then appealed to the Supreme Court but, in a surprising move, the Supreme Court adjourned its proceedings to permit FS to adduce further evidence regarding its corporate structure. At the resumed hearing the Supreme Court allowed FS's appeal. Following what Lord Clarke of Stone-cum-Ebony described as a campaign of 'ducking and weaving' on the part of FS, it was finally clear that Lady Brownlie's contract was with *FS Cairo*, one of the local companies in the Four Seasons Group, and *not* with FS, the parent company in Canada.

Undeterred, Lady Brownlie amended her claim and applied to substitute FS Cairo for FS. The hearing before Nicol J on these applications lasted three days and Lady Brownlie was successful. However, FS Cairo was given permission to appeal and the Court of Appeal heard the appeal at a remote hearing on 13 and 14 May 2020.

The issue on appeal: 'some substantial damage' or 'all damage'?

What is the issue which has taken up eight and a half years of litigation? It is the meaning of the word 'damage' in the tort gateway for jurisdiction contained in Practice Direction 6B to CPR Part 6. PD6B para 3.1(9)(a) permits the court to grant permission for service outside the jurisdiction for:

> 'a claim in tort where – (a) damage was sustained…within the jurisdiction'.

Lady Brownlie relied on the case of *Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc* [1990] 1 QB 391, and submitted that, for the purpose of the tort gateway, it was enough that some substantial damage had or would be suffered in England and Wales. In Lady Brownlie's case, this

would include pain, suffering, and loss of amenity arising from her injuries, bereavement, and loss of dependency.

At the time of *Metall*, the relevant gateway provision was set out in the Rules of the Supreme Court (RSC, the pre-cursor to the CPR) at O.11 r(1)(f), as amended in 1987. It was identical to the current provision at PD6B para 3.1(9)(a), save that it included a definite article before 'damage', such that it provided that *the* damage must have been sustained in England and Wales in order for its courts to have jurisdiction. In *Metall*, the Second Defendant argued that that since the draftsman had used the definite article, it was necessary that *all* of the damage should have been sustained within the jurisdiction in order for the claim to pass through the gateway. The Court in *Metall* responded to the Second Defendant's proposed interpretation of the provision, at [437], as follows:

> 'it could lead to an absurd result if there were no one place in which all the plaintiff's damage had been suffered. The judge rejected this argument and so do we. *It is enough if some significant damage has been sustained in England.'* (my emphasis)

Accordingly, when O.11 r(1)(f) was imported into the CPR, *the damage* became *damage*.

Against Lady Brownlie's argument that the *Metall* interpretation should stand, FS Cairo argued that the purpose of the gateway provision, in the form adopted in the 1987 RSC, was to mirror the jurisdiction provisions in the EU jurisdiction regime, i.e. the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention). This allowed proceedings in tort 'in the courts of the event where the harmful event occurred or may occur'. Further, FS Cairo argued that the correct interpretation of the provision was intended to follow EU jurisprudence as it developed over time. This would mean that the gateway currently requires that the damage *which completes the cause of action* in law is sustained in England (in line with *Lazar v Allianz Case C-350/14*). On this interpretation, the English court would have no jurisdiction in cases of road traffic accidents abroad where the immediate injury is sustained in the accident (that is, in almost all cases).

The Court of Appeal's decision

By a majority, the Court of Appeal followed the Supreme Court in *Brownlie (No 1*) and held that the meaning of 'damage' in the tort jurisdiction gateway means 'any substantial damage'.

The Court rejected FS Cairo's submissions, noting that the English procedural rule, as amended in 1987 and as it is today in PD6B, is in materially different language to the European provision, as it then was and as it is today under Brussels Recast. Had there ever been an intention for the provisions to mirror one another, the rule could have been amended to that effect, but this was never done. Further, there is no reason why the CPR, applying as they do to determine jurisdiction disputes in non-EU countries, should follow EU jurisdiction rules. At [51], McCombe LJ explained:

> 'Given the different policies of the English law and European law, I see nothing frightening in the existence of parallel jurisdiction in the courts of different countries in respect of tortious liabilities.'

The Court also noted that the 'substantial damage' interpretation has been applied in a series of first instance personal injury and wrongful death cases, for example *Cooley v* Ramsey [2008] EWHC 129 (QB) and *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB)). Indeed, at [50], McCombe LJ cited with approval Haddon-Cave J's reliance on this 'simple and obvious meaning of the word

'damage' in *Wink*, noting that s2(7) of the Civil Procedure Rules Act 1997 in fact requires the Rule committee to 'make rules which are both simple and simply expressed'.

Pleading foreign law

The case also raised a question of evidence and procedure in the pleading of foreign law. It is a very well-established rule that foreign law is a matter of evidence and must be pleaded and proved. However, there is also a sister rule of English law (termed 'the default rule' by Arnold LJ and Underhill LJ in this case) which permits the court to proceed on the basis that there is no material difference between English law and the otherwise applicable foreign law unless and until one of the parties shows that there is in evidence (see Rule 25 at para 9R-001 in *Dicey, Morris and Collins, The Conflict of Laws* (15th edition)).

FS Cairo argued that, even if Lady Brownlie's claim could get through the jurisdiction gateway, it did not have a reasonable prospect of success, which a necessary requirement for permission to serve the claim form outside the jurisdiction. Lady Brownlie had not pleaded Egyptian law in her application for service out of the jurisdiction. FS Cairo argued that as the sources and structure of Egyptian law were so different from English law, it was very unlikely that that Egyptian law's effect in Lady Brownlie's situation would be, even substantially, the same as English law. FS Cairo submitted that in such circumstances, the default rule should not apply and Lady Brownlie's failure to plead Egyptian law should result in her application for service being denied.

The Court of Appeal held that Lady Brownlie was entitled to rely on the presumption that the Egyptian law of negligence and wrongful death for breach of contract was materially the same as English law, so as to establish that the claim had reasonable prospects of success. It was not incumbent on Lady Brownlie to plead and prove the substance of Egyptian law as it applied to her claim in her application; nor was it necessary for her to plead reliance on the default rule itself (on the latter point, see *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2018] EWHC 2759 (Comm) at [11]).

In his judgment, Underhill LJ gave helpful guidance on the application of the default rule generally. At [184], he considered the sequence of pleading foreign law and observed that:

> 'the default rule is to be applied flexibly. It is always open to a court to direct that where a claimant accepts that foreign law applies to their claim (or it has been held that it does) they must plead the content of that law first. Such a direction might be made on the basis that the default rule was inappropriate for reasons concerning the nature of the claim…but it might also be appropriate for case management or other reasons peculiar to the particular case.'

McCombe LJ at [62] noted that:

> '[t]here are limits to the practicality of dealing justly with subtle arguments of foreign law, as with any other disputes of fact, at the jurisdiction stage: see *Lungowe v Vedanta Resources plc* [2019] 2 WLR 1051, at [44] – [48] and [63] – [65].'

Thus, the Court of Appeal took the view that the game of poker over who will plead foreign law first ought not to be encouraged, notwithstanding our adversarial system in England and Wales. These are essentially case management decisions and the objective should be a fair outcome at trial, not a technical opportunity to strike out before even pleading a defence in respect of uncontroversial propositions of foreign law.

Conclusion

The *Brownlie (No. 2)* ruling constitutes binding authority on the important issue of the tort gateway which has frequently challenged the appellate courts in recent years. It means that those who suffer injury or illness outside England and Wales can, subject to *forum conveniens* arguments, bring their claims for damages before their home courts. However, this is even now not the end of the *Brownlie* jurisdiction saga. FS Cairo has obtained permission to appeal for a second time to the Supreme Court.

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