The place of damage & presumption

Daniel Black & Katherine Deal QC consider the importance & ramifications of the Supreme Court decision in *FS Cairo (Nile Plaza) LLC v Brownlie*

IN BRIEF

▶ On service out of the jurisdiction, this decision is likely to be welcomed by claimants as reflecting a sensible distinction between the place of an accident and its enduring consequences.

Across 75 pages (to add to the 30 pages in its 2017 decision) the Supreme Court has given a major judgment on the meaning of where damage is 'sustained' for the purpose of service of a claim out of the jurisdiction on a foreign domiciled defendant and additionally addressed the place and operation of the presumption that foreign law is the same as English law save insofar as proven otherwise (*FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45).

In the words of Lord Reed: 'This is a sad case with an unfortunate history'. In January 2010 a road traffic accident in Egypt caused serious injury to the Claimant, Lady Brownlie, while taking the life of her husband, Sir Ian. Sir Ian's daughter, Rebecca, was also killed and her two children injured.

Lady Brownlie has, over more than a decade, sought damages from the operator of the hotel in Egypt which provided the excursion during which the accident occurred for: (i) in her own right for her personal injuries; (ii) as executrix of Sir Ian's estate and on behalf of the estate and its heirs for his wrongful death; and (iii) for dependency for wrongful death.

The Supreme Court previously addressed this tragedy in December 2017 where, in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 2 All ER 91 the justices held that Lady Brownlie had, inadvertently, sued the wrong defendant. In Lord Reed's memorable turn of phrase, Four Seasons' 'ducking and weaving' came to an end when it was required by the Supreme Court mid-hearing to set out the details of its labyrinthine corporate structure, following which its appeal had to succeed (albeit with the justices of the Supreme Court) indicating their disapproval of Four Seasons' approach to the litigation by making no order as to costs). The remainder of the judgments going to the place of the damage were therefore obiter. The matter returned to the High Court, where Nicol J granted Lady Brownlie permission to substitute the current defendant for Four Seasons, and thereafter permission to serve it out of the jurisdiction in Egypt, where it is domiciled. The amended claim proceeded on the common ground that Lady Brownlie's claims, whether in tort or in contract, were governed by Egyptian law.

Two questions were at issue by the time the claim reached the Supreme Court for a second time:

> 'The first is whether the claims in tort pass through the gateway in CPR PD 6B, paragraph 3.1(9), on which the claimant relies: that is to say, whether they satisfy the requirement for suing a defendant who is outside the territorial jurisdiction of the English courts that "damage was sustained … within the jurisdiction". The second issue is whether the claims, both in contract and in tort, satisfy the requirement that they must have a reasonable prospect of success. That issue arises because it is common ground that the only claims which can be advanced are those available to the claimant under Egyptian law. The defendants maintain that the claimant must therefore adduce evidence of Egyptian law, whereas she maintains that she can rely on English law, on the basis that is applicable in the absence of satisfactory evidence of foreign law' (per Lord Reed at [4]).

In order to obtain permission to serve FS Cairo out of the jurisdiction, Lady Brownlie was required to satisfy the following test in respect of each claim. That:

(1) it passes through a 'jurisdictional gateway' under CPR rule 6, Practice Direction 6B;
(2) it has a reasonable prospect of success; and,
(3) England and Wales is the proper place in which to bring the claim.

The High Court and Court of Appeal (with Arnold LJ dissenting) had agreed that Lady Brownlie satisfied each element of this test.

FS Cairo appealed the findings on the first and second limbs to the Supreme Court. The appeal was dismissed.

On the first issue the majority (Lord Leggatt dissenting) held that indirect damage sufficed for the English and Welsh rules on service out. The Supreme Court considered that the word 'damage' in paragraph 3.1(9)(a) refers to the actionable harm, whether direct or indirect, which is caused by the wrongful act alleged [81].

The critical part of the decision is that the meaning of 'damage' is not to be limited to the 'damage' necessary to complete a cause of action in tort [49–51].This is said to be because such an approach is unduly restrictive when the Court is concerned 'with the scope of a jurisdictional rule which is intended to identify the appropriate forum for the adjudication of the resulting claim…there is no justification in principle or in practice, for limiting "damage" in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed.' [49].

The reasons for this are first, that many torts (such as trespass to the person) are actionable without proof of damage [49]. Secondly, relying on the decision of the *Privy Council in Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458—which concerned a company that had manufactured and sold in England to an Australian company a drug containing thalidomide without warning as to its harmful effect on the unborn—the Supreme Court held that even where a tort requires proof of damage to be actionable the reasons to restrict the meaning of damage are 'unconvincing' because, adopting the reasoning of the *Distillers'* decision, at the stage of determining the appropriate forum the search for the Court is for the degree of connection between the cause of action and the country concerned, and this is to be the determining factor [49–50].

The third reason was that all the circumstances of the case may link the wrongdoing to a particular jurisdiction and this was all supported by the lack of the word 'the' before the word 'damage' in the current version of the rule [51]. As such, where actionable harm has occurred in England and Wales a tort claim will pass through the gateway despite the tort being completed abroad.

Further, any notion that paragraph 3.1(9)(a) is to be interpreted in light of the distinction between direct and indirect damage which has developed in EU law was deprecated (at [52]–[55]). The reasons for this are structural. In essence, the Supreme Court adopted the view that there are other protections in our law to make sure England and Wales is the appropriate forum. This is in contrast to the system under the Brussels Recast Regulation which, in seeking to ensure the free movement of judgments, takes a regimental, mandatory approach to jurisdiction [55], the balance of factors between alternative jurisdictions having been taken into account already in the way the Regulation was drafted. In England and Wales however the question about where is 'appropriate' plays a vital part in the decision as to whether to accept jurisdiction in an individual case. This position could not, however, command the assent of Lord Leggatt who adopted the view that the 'gateway' should be narrower, finding that the harm was sustained in Egypt.

But Lord Leggatt led the court on the second issue. The Supreme Court was unanimous in holding that Lady Brownlie could show the claims had reasonable prospects of success because of the 'presumption of similarity' between English and foreign law.

The fundamentals are: first, there is a default rule that English courts will apply English law if there is no attempt to claim under foreign law. This is not affected by Rome II [113]–[118]. Second, the presumption of similarity may kick in if there is an attempt to claim under foreign law, but no proof is actually led [119]–[125]. However, the presumption operates in a context and fact-specific manner [127ff].

On these points the Supreme Court gave general guidance at [143]–[149].

i. It may more readily be applied where the foreign law is a common law system, but there are 'great and broad principles of law' likely to impose an obligation in all developed systems.
ii. It may more readily be applied where the relevant domestic law is a rule of common law than statute law.
iii. The uncertainty is unproblematic, as it is always open to the pleader to remove that uncertainty by proving foreign law.
iv. It may more readily be applied at an earlier stage of proceedings, and may less readily be applied at full trial.
v. Expert evidence is not the sole source, and 'the old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated'. Sometimes, reliance on the text itself might be fine.

Comment

On service out of the jurisdiction, the decision is likely to be welcomed by claimants as reflecting a sensible distinction between the place of an accident and its enduring consequences. It is a fitting approach in a system which engages discretion and the judicial balancing of factors. It is undoubtedly correct that ours is a system which operates in marked contrast to the Brussels regime (as the disquiet in some English judicial quarters over restrictive effect of decisions such as *Owusu v Jackson* [2005] ECR I-01383 in that regime made clear).

The Supreme Court is surely right to say that adopting the Brussels system, as the UK did during its time as an EU member state, did not require the assimilation of the tests for allocating jurisdiction between those instruments and the common law, nor does the language reveal such an intention (see analysis at [55]).

On the presumption of foreign law issue, the operation of the default rule and the operation of the similarity principle are well established. Likewise, it is surely proper that it is for the defendant to take the point that foreign law is different if it wishes to challenge the presumption—in some cases both sides may be perfectly content to argue the case on the facts without a need to scrutinise the foreign law. This may also help minimise tactical games-playing by defendants. Yet the position may be less welcome in practice, and risks creating uncertainty and further complexity. Some of the court's restated guidance might be taken to suggest the safest course is to seek some limited evidence of foreign law in order to convince the judge that it is safe to apply the presumption (see, for example, the discussion at [148]).

Further the reasoning raises the possibility that its long tail will be to create a distinction between types of claims and / or laws for which the presumption of similarity is applicable. The Supreme Court relies on a quotation from *Cuba Railroad Co v Crosby*, 222 US 473 (1912) in the United States Supreme Court that 'in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money for goods or services, or battery of the person… courts would assume a liability to exist if nothing to the contrary appeared… Such matters are likely to impose an obligation in all civilized countries'. Just how expansively such an approach applies across more complex causes of action is an issue which it can be imagined may cause controversy. NLJ

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