

Supreme Court Clarifies the Scope of the Common Law Tort Gateway for Jurisdiction

3 February 2022

INTRODUCTION

In *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45, the Supreme Court dismissed an appeal by FS Cairo (Nile Plaza) LLC challenging the English Court's jurisdiction to serve the proceedings on them in Egypt. Importantly, the Supreme Court confirmed that a claimant may serve proceedings out of the jurisdiction under the common law tort gateway in CPR Practice Direction 6B, paragraph 3.1(9)(a) where direct or indirect damage was suffered within England and Wales.

BACKGROUND

This case arises out of a road accident that took place during a tourist excursion in Egypt in January 2010 in which Lady Brownlie (the "Claimant") was seriously injured, and her husband, Sir Ian Brownlie, was killed. The Claimant sought to recover damages from FS Cairo (Nile Plaza) LLC (the "Defendant"), an Egyptian hotel operator, who provided the excursion during which the accident occurred.

The Claimant alleged that the accident was caused by the Defendant's negligence and/or its breach of an implied term of reasonable care and skill in the contract for the provision of the excursion. The Claimant claimed contractual and tortious damages for: (1) her personal injuries; (2) Sir Ian Brownlie's wrongful death (as executrix of his estate); and (3) dependency for wrongful death.

In turn, the Defendant challenged the jurisdiction of the English Courts. The challenge made its way to the Supreme Court on an appeal from the Defendant. The Defendant's appeal to the Supreme Court raised a number of issues, including whether the claims in tort pass through the common law tort gateway in CPR PD 6B, paragraph 3.1(9)(a).

Notably, an unusual feature of this appeal was that the Supreme Court had, in mid-2017, *already* considered the issues with which this appeal was concerned (“*Brownlie I*”). However, it had emerged during *Brownlie I* that the Claimant had named the wrong company, Four Seasons Holdings Incorporated, as defendant. Accordingly, the Supreme Court granted the Claimant permission to apply to correct the name of the defendant and, in 2019, the High Court permitted the Claimant to substitute FS Cairo (Nile Plaza) LLC for Four Seasons Holdings Incorporated.

ENGLISH RULES ON SERVICE OF PROCEEDINGS OUTSIDE OF THE JURISDICTION

It should be noted that these proceedings were *outside* the scope of the Brussels system for determining jurisdiction, as the Defendant was not domiciled in a member state of the European Union.¹ Thus, the judgment was concerned with the domestic English rules governing jurisdiction, which require that in order to obtain permission to serve proceedings out of the jurisdiction, a claimant must establish:

- a “good arguable case” that the claim falls within one of the “gateways” in CPR PD 6B, paragraph 3.1;
- a “serious issue” to be tried on the merits; and
- that England is the appropriate forum (“*forum conveniens*”) for trial, and the court ought to exercise its discretion to permit service out of the jurisdiction.

JUDGMENT

CPR PD 6B, paragraph 3.1(9)(a) (the “Tort Gateway”) provides that a claimant may serve proceedings out of the jurisdiction with the permission of the court where the claim is made in tort and the “*damage was sustained...within the jurisdiction*”.

The Defendant argued that the Tort Gateway did not apply to the Claimant’s claims, as it only applies to found jurisdiction where initial or direct damage was sustained in England and Wales. In the context of a road accident, the Defendant argued that the initial or direct damage is that sustained by the injured person(s) at the time of the accident (i.e. personal injury or death). Contrastingly, the Claimant contended that all that is required is for some significant damage to be sustained in England and Wales, which includes any continuing, indirect damage suffered because of personal injury and

¹ Note, for proceedings commenced after 31 December 2020 the Brussels system no longer applies in this jurisdiction.

wrongful death abroad (i.e. pain, suffering, loss of amenity and other financial consequences).

In *Brownlie I*, the majority commented, *obiter*, that the word “*damage*” in the Tort Gateway was intended to bear its “*natural and ordinary*” meaning. Thus, in the case of personal injury or wrongful death, “*damage*” included any actionable harm caused by the tortious act (i.e. any bodily and consequential financial effects). The majority expressly rejected a narrower reading of “*damage*” that sought to distinguish between “direct” and “indirect” damage. Further, the majority observed that there was no justification for confining “*damage*” to that which completes a cause of action in tort.

In the present appeal, Lord Lloyd-Jones (with whom Lord Reed, Lord Briggs and Lord Burrows agreed) reflected his agreement with the majority in *Brownlie I* and held that “[i]n a case of personal injury or wrongful death ‘*damage*’ within [the Tort Gateway] extends, both in its natural and ordinary meaning and on a purposive reading, to the actionable harm caused by the tortious act, including all the bodily and consequential financial effects which the claimant suffers.” The Court also noted that it was unnecessary and inappropriate to seek to limit “*damage*” by distinguishing between the “direct” and “indirect” effects of the harm suffered. Therefore, in circumstances where the Claimant had suffered physical and economic harm within England, as a consequence of her personal injury and the wrongful death in Egypt, “*damage*” had been sustained within the jurisdiction, and so the English court had jurisdiction to serve proceedings on the Defendant in Egypt.

However, the Court noted that there was an important difference between physical damage and the “*financial consequences of a tort which itself was wholly economic in nature...*” (i.e. pure economic loss). The Supreme Court opined that the more remote economic repercussions of a tort will *not* found jurisdiction. In other words, “*damage*” under the Tort Gateway will not include “financial loss” suffered in England as a result of economic harm suffered abroad. By way of example, if a party has either interfered with another’s contractual relations or has deceived another person, and consequently caused economic loss in Country X outside of the jurisdiction (the “tort of interference with contractual relations” and “tort of deceit”, respectively), any consequential financial loss suffered in England will seemingly not satisfy the definition of “*damage*” under the Tort Gateway.

Finally, the Supreme Court also responded to arguments that their interpretation of “*damage*” was too wide and would lead to cases being brought before the English Courts in circumstances where there is merely a casual or adventitious link between the claim and England. The Court explicitly rejected this argument contending that there was a further “*safety valve*”, as claimants must show that England is the proper place (*forum*

conveniens) for trial and that the Court ought to exercise its discretion to permit service outside of the jurisdiction.

GOING FORWARD

A claimant may serve proceedings out of the jurisdiction under the common law tort gateway in CPR PD 6B, paragraph 3.1(9), so long as some actionable harm has been suffered in England and Wales, including any indirect physical or financial damage.

Remarks from the Supreme Court indicate that the more remote economic repercussions of a tort (i.e. pure economic loss) will not satisfy the definition of “*damage*” under CPR PD 6B, paragraph 3.1(9).

Note, the ability for a claimant to serve proceedings outside the jurisdiction is subject, as always, to the court finding a serious issue to be tried on the merits, and England and Wales being the proper forum in which to bring the claim.

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Please do not hesitate to contact us with any questions.

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