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Foreign Claims and Foreign Laws

FS Cairo (*Nile Plaza) LLC v Lady Brownlie*

If a tort is committed against me while I am abroad,[1] is my suffering consequential economic loss in England sufficient to establish the jurisdiction of the English courts over the defendant? In *FS Cairo (Nile Plaza) LLC v Lady Brownlie*,[2] (*Brownlie No 2*) the Supreme Court held: yes. The second issue before the Supreme Court was under what conditions I can then rely on English law in pleading my claim, even if a foreign law applies to that claim. The answer: where neither party pleads that foreign law applies to the claim or when the foreign law that applies is materially similar to English law.

The *Brownlie* litigation has been the object of much commentary already,[3] so that the facts can be briefly summarised for our purposes. In 2009, Lady Brownlie booked a stay for herself and her husband, Sir Ian Brownlie, at the Four Seasons Hotel Cairo at Nile Plaza in Egypt. Before departing to Egypt, Lady Brownlie called the hotel to book a tour advertised on a brochure she had picked up during a previous stay at the same hotel. Tragically, the tour ended in an accident which took the life of Sir Ian Brownlie and his daughter, Rebecca, and left Lady Brownlie and Rebecca's two children seriously injured.

Lady Brownlie wished to bring claims against the hotel in both contract and tort before the English courts. To establish the personal jurisdiction of the English court over the Hotel, Lady Brownlie had to apply to the court for permission for service of the claim form outside the jurisdiction under r.6.36 of the Civil Procedure Rules (CPR). For such an application to be successful, the claimant must demonstrate that one of the so-called gateways in para 3.1 of Practice Direction 6B (PD6B) is made out, that England is the proper place to bring the claim,[4] and that the claim has a reasonable prospect of success or presents a serious issue on the merits.[5]

Issue 1: The Tort Gateway

Lady Brownlie sought to fit her tort claims within gateway 9(a), available when 'damage was sustained … within the jurisdiction'.[6] As such, the first question for the Supreme Court was whether the loss of income that Lady Brownlie had suffered in England was 'damage' within the meaning of gateway 9(a).

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* Somerville College, Oxford. Many thanks to Simon Whittaker for comments on an earlier draft of this note. All opinions and errors remain my own.

[1] As of writing, the rules described in this note apply irrespective of whether the defendant is domiciled in a Member State to the Lugano Convention or abroad elsewhere.

[2] [2021] UKSC 45; [2021] 3 WLR 1011.

[3] In this quarterly, see Dickinson, '*Faulty Powers: One-Star Service in the English Courts*' [2018] LMCLQ 189 and Briggs, '*Holiday Torts and Damage within the Jurisdiction*' [2018] LMCLQ 196.

[4] CPR r.6.37(3)

[5] *Brownlie (No 2)* [2021] UKSC 45, [99].

[6] PD 6B 3.1 (9)(a)

Lord Lloyd-Jones (with whom Lord Reed, Lord Briggs, and Lord Burrows agreed, Lord Leggatt dissenting on this point) held that 'damage' for the purpose of gateway 9(a) is not restricted to direct damage.[7] Instead, it includes indirect or consequential damage, such that the loss of income suffered by Lady Brownlie constituted 'damage' for the purpose of gateway 9(a). In so holding, the majority came to the same conclusion as the majority in *Brownlie (No 1)*.[8]

Lord Lloyd-Jones's view rests on two prongs. First, because the English jurisdiction is protected by the need to show that England is the proper place in which to bring the claim (also known as *forum conveniens*), there is no good reason to adopt a narrow interpretation of 'damage' for the purpose of gateway 9(a).[9] The claim falling within the scope of one of the gateways in para 3.1 is not sufficient for the English court to have jurisdiction over the defendant. Instead, following CPR r.6.37(3), the claimant must also show that England is the proper place to bring the claim. At this stage of the enquiry, the court can, and often will, take the very same considerations into account that underpin the gateways. For example, as part of the *forum conveniens* enquiry, the court will usually consider where the substance of the tort took place.[10] However, unlike when the court is considering whether the claim falls within the scope of one of the gateways, at the *forum conveniens* stage the court can carefully consider the significance of the gateway considerations to the case before it. It is difficult to see why a narrow, rigid interpretation of the gateways should prevail when the same concerns can be more carefully addressed by the *forum conveniens* enquiry.

Secondly, there is no reason to assume that gateway 9(a) is intended to mimic the restrictive Art 7(2) of the Brussels Regulation.[11] [12] Art 7(2) confers jurisdiction on the courts of the place where the harmful event occurred. The place of the harmful event is either the place where the event giving rise to the damage occurred[13] or the place where the direct damage occurred.[14] There is reason to adopt such a reading in the context of the Regulation. There, Art 7(2) is a ground of special jurisdiction subordinate to the general rule that a defendant should be sued in their place of domicile. However, this reason does not apply to how we should interpret 'damage' in gateway 9(a). The gateways are not subordinate grounds of jurisdiction and, thus, do not need to be interpreted in a similarly restrictive manner.[15]

Lord Leggatt, dissenting on this issue, preferred the narrower interpretation, limiting damage in the context of gateway 9(a) to the direct damage suffered by the claimant.[16] Lord Leggatt's two main reasons are powerful, although, in my view, ultimately unconvincing. First, his Lordship held that to consider the reasons of justice underlying the gateway enquiry alongside practical reasons in determining whether England is the proper place to bring the claim

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[7] *Brownlie (No 2)* [2021] UKSC 45, [81].
[8] [2017] UKSC 80
[9] *Brownlie (No 2)* [2021] UKSC 45 [77].
[10] *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5; [2013] 1 Lloyds Rep 446; [2013] 2 AC 337, [18].
[11] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJL 351/1.
[12] *Brownlie (No 2)* [2021] UKSC 45, [53]. This view that there is such a relationship between gateway 9(a) and Art 7(2) was expressed by Lord Sumption in his dissenting judgment in *Brownlie (No 1)* [2017] UKSC 80.
[13] *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* (Case C-21/76) [1976] ECR 1735; [1978] QB 708.
[14] *Marinari v Lloyd's Bank plc* (Case C-364/94) [1996] QB 217.
[15] *Brownlie (No 2)* [2021] UKSC 45, [55]-[56].
[16] ibid [209].

constitutes a category error. The gateways serve the purpose of establishing whether the connection between the claim and the jurisdiction is sufficiently material to justify invoking the English courts' jurisdiction. These reasons are seen as necessary in the interests of justice.[17] By contrast, the reasons considered in the *forum conveniens* enquiry are predominantly practical, such as the availability of witnesses and evidence, and the English court's familiarity with the law governing the claim.[18] Thus, the reasons raised by the gateway enquiry and by the *forum conveniens* enquiry are of different types, such that they cannot be weighed up against each other and cannot be traded off for one another. Nonetheless, courts have readily undertaken such trading off, allowing claims to be brought in England even in the absence of any substantial connection between the claim and the jurisdiction.[19] Lord Leggatt sees the narrow interpretation of gateway 9(a) as a solution to this problem: some direct damage must be suffered in England before an English court will embark on the *forum conveniens* enquiry. As such, the need for a substantial connection between the claim and the English jurisdiction cannot be discounted in favour of other reasons.[20]

Lord Leggatt's second reason for adopting a narrower interpretation of gateway 9(a) is that it would be inconsistent with notions of justice to open the English forum to those that have suffered only indirect damage in England.[21] Lord Leggatt makes the point by invoking the following example:[22]

> 'Suppose that a British citizen who has lived her whole life in England drives carelessly on an English road and collides with another vehicle causing a serious injury to a passenger travelling in that vehicle. It so happens that the passenger is a tourist visiting this country from, say, the People's Republic of China. The passenger returns home to China and wishes to bring a claim for damages for personal injury against the driver in his local court. He argues that the claim ought to be tried in China as, although the claim is governed by English law, no significant issue of law is likely to arise and liability is likely to be admitted; most of the witnesses whose evidence is relevant to the quantum of the claim, including the claimant himself, are situated in China and do not speak English, and most of the documents relating to quantum are in the Chinese language; moreover, the claim would be tried more quickly and cheaply in the Chinese courts. In such a case I cannot accept that the fact that the claimant has suffered continuing pain and incurred the cost of medical treatment and loss of earnings in China would amount to a link with that jurisdiction capable of justifying permitting proceedings to be brought against the driver in China, provided only that the Chinese court considers that practical considerations of the kind mentioned make China, on balance, the proper place in which to bring the claim.'

The better view is that the two reasons given by Lord Leggatt ultimately amount to the same objection: it is unjust to allow a defendant to be sued in England if they have no substantial connection with the English jurisdiction. In essence, the first reason collapses into the second. The category error referred to by Lord Leggatt is more widespread than his Lordship acknowledges. It also arises in cases where the claimant is entitled to serve the claim form on

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[17] ibid [192].
[18] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460; [1987] 1 Lloyds Rep 1, per Lord Goff.
[19] E.g. *Stylianou v Toyoshima* [2013] EWHC 2188 (QB), cited in *Brownlie (No 2)* [2021] UKSC 45 at [204].
[20] *Brownlie (No 2)* [2021] UKSC 45, [198].
[21] ibid [207].
[22] ibid.

the defendant as of right, as where the defendant is present in the jurisdiction.[23] However, in those cases, the existence of this category error does not cause us any great concern, and there have been no calls to address the category error outside of the context of applications for service out. The reason why the category error is said to be concerning in cases of service out is because, when the defendant is out of the jurisdiction, it appears unjust to allow service out unless some substantial connection between the claim and the English jurisdiction can be established.[24] Practical *forum conveniens* reasons cannot outweigh this injustice.

So, does this injustice exist? The better view is that it does not. Ultimately, what we are concerned with is the allocation of the risk of having to appear before a foreign court. Should the claimant bear the risk of having to sue abroad if they suffer some accident while abroad or should all members of society bear the risk that, were we to be involved in an accident with a tourist, we may be sued abroad?[25] In my view this risk should be borne equally by everyone. There is no good reason to single out the claimant and impose the whole of the risk on them; the claimant will hardly have chosen to accept this risk.[26] Furthermore, in an ever-shrinking world, the assurance of English justice when engaging in activities abroad is surely more valuable than the assurance that, in the unlikely event that we are involved in an accident with a tourist, we may be sued in a jurisdiction with which we have no substantial connection.[27] No full exploration of these matters can be provided within the confines of this note. However, it should be apparent that there is at least a strong argument that no injustice is perpetrated by allowing a claimant to sue a jurisdiction that lacks the substantial connection to the claim that Lord Leggatt requires.

Thus, Lord Leggatt's reasons for preferring a narrow interpretation of 'damage' in the context of gateway 9(a) appear unconvincing. In light of this, the majority's broader interpretation of gateway 9(a), which includes indirect damage, is to be welcomed.

There is, however, a final point that should be made on this issue. The Supreme Court has repeatedly emphasised that arguments on jurisdiction should not take up substantial resources.[28] Despite this, the Court in *Brownlie (No 2)* was adamant that the *forum conveniens* enquiry should be the main tool by which the English jurisdiction is policed. But *forum conveniens* is expensive. If we want our jurisdiction enquiry to be fact-sensitive and contextual, i.e. *forum conveniens*, we cannot demand that disputes on jurisdiction should remain cheap and short. The aims are incompatible, such that one must give. So far, the Court has not told us which.

Issue 2: Foreign Law as English Law

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[23] *Maharanee Seethadevi Gaekwar v Wildenstein* [1972] 2 QB 283. In such cases the claimant does not need to satisfy any of the gateways in PD6B.

[24] Dickinson, '*Service abroad – an inconvenient obstacle?*' (2014) 130 LQR 197, 200; Hoyle, '*Failures for Consideration: Re-Analysing Jurisdiction in Unjust Enrichment Claims*' (2020) 83 MLR 1008, 1011.

[25] This analysis concedes the point made by Lord Leggatt at [208] that 'English courts should do as we would be done by.' Whether this should be the case unclear. The quality of English justice may justify that English courts adopt a more expansive reading of their own jurisdiction than some foreign courts might.

[26] Any suggestion that they have chosen to accept this risk is artificial at best. Few claimants, if any, will have given the question of what jurisdiction they may be able to sue in any thought before going abroad.

[27] Of course, if the defendant is liable to suffer great injustice when sued abroad, the English jurisdiction may, subject to England being the natural forum, also come to the defendant's aid with an anti-suit injunction.

[28] *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [2019] 2 Lloyds Rep 399; [2020] AC 1045, [6]-[14] and cited authorities.

The second question arose from the way in which the case was argued. The claims were agreed to be governed by Egyptian law.[29] As outlined above, for the court to take personal jurisdiction over the hotel, there had to be a serious issue on the merits of the case.[30] This required Lady Brownlie to plead the facts of her claim, including the content of the applicable Egyptian law.[31] However, little evidence of Egyptian law was produced. Instead, Lady Brownlie sought to rely on the presumption that, in the absence of contrary evidence, foreign law is the same as English law.[32] The defendant contended that where it is pleaded that foreign law applies, there is no scope for relying on this rule.[33]

The relevant rule has been formulated in different ways at different times. It has been said that there is a presumption that foreign law is the same as English law.[34] Alternatively, it has been said that, in the absence of proof of foreign law, English law applies.[35] In a (on this point) unanimous judgment, Lord Leggatt convincingly distinguished these two formulations of the rule:[36]

> 'The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be. By contrast, the "default rule" (as I shall use that term) is not concerned with establishing the content of foreign law but treats English law as applicable in its own right where foreign law is not pleaded.'

As outlined by Lord Leggatt, the default rule applies where foreign law is not pleaded. The presumption of similarity applies if 'in the circumstances [it is] reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue (meaning any differences between the two systems are unlikely to lead to a different substantive outcome)'.[37]

In my view this distinction is to be welcomed. Conceptually, there is a difference between rules of evidence and substantive rules (one may be presumed to have a thing without having it).[38] The presumption of similarity and the default rule also appear justifiable on their own terms. By limiting the application of the default rule to cases in which foreign law is not pleaded, the default rule represents nothing more than the fundamental procedural rule that English courts will not raise arguments of their own motion.[39] The rule is also compatible with the Rome regulations, as it is a procedural rule to which the Regulations do not apply.[40] The presumption is now also justifiable on its own terms. Previously, the presumption was often fictitious; in many cases it could hardly be reasonably assumed that foreign law and English law were materially identical. By narrowing the applicability of the presumption of similarity to

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[29] *Brownlie (No 2)* [2021] UKSC 45 [98].
[30] *ante*, text to fn 5.
[31] *Brownlie (No 2)* [2021] UKSC 45 [100]
[32] ibid [102]-[103]
[33] ibid [105].
[34] ibid [108].
[35] ibid [109]-[110].
[36] ibid [112].
[37] ibid [126].
[38] Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP, Oxford, 2021), 38.
[39] *Brownlie (No 2)* [2021] UKSC 45 [113].
[40] ibid [114]. Art 1(3) Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJL 199/40; Art 1(3) Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJL 177/6.

instances in which the similarity is likely to be true, the presumption is no longer fictitious. It now rests on reasonable inference.[41]

Nonetheless, working out the technicalities of when the presumption applies will require much judicial work. Lord Leggatt has provided some indications as to when the presumption is applicable. The presumption is more likely to be applicable when the foreign legal system is a common law system.[42] The presumption is less likely to be applicable where the English position is governed by statute.[43] In the absence of further guidance, the presumption is unlikely to be used by the faint of heart.

Conclusion:

As outlined throughout the course of this note, much in the decision of the Supreme Court is to be praised. The legal context justifies the broad reading of gateway 9(a) and the distinction between the default rule and the presumption of similarity brings welcome clarity to the law. The only thing to be regretted is that this case has come before the Supreme Court at all. The Supreme Court in *Brownlie (No 1)* offered the same view on gateway 9(a),[44] counsel could have argued the case as one that falls within the scope of gateway 4A,[45] which most probably applies,[46] and counsel could have introduced more evidence of Egyptian law. Hopefully, *Brownlie (No 2)* is the final instalment of the unfortunate Brownlie litigation before the Supreme Court.

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[41] *Brownlie (No 2)* [121].
[42] ibid [123], [144].
[43] ibid [145].
[44] *Brownlie (No 1)* [2017] UKSC 80.
[45] Gateway 4A allows the claimant to serve the defendant out of the jurisdiction with the permission of the court where: 'A claimant is made against the defendant in reliance of one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.'
[46] *Brownlie (No 2)* [214]-[216].