Court of Appeal—wider interpretation of tort gateway now on sturdier ground (FS Cairo LLC v Brownlie)

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Dispute Resolution analysis: In the newest installment of the Four Seasons saga, the Court of Appeal heard from one of the Egyptian companies subject to claims of Sir Brownlie's estate. This judgment considered the correct interpretation of CPR PD 6B, para 3.1(9)(a), the tort gateway in non-EU Regulation cases and applied the obiter approach of the majority of the Supreme Court given in the same case. It also discussed the rules as to foreign law evidence in the context of applications for permission to serve out. Arnold LJ dissented on both elements of the decision. Written by Natalie Todd, partner, and Anastasia Tropsha, trainee solicitor, at PCB Litigation LLP.

FS Cairo (Nile Plaza) LLC v Brownlie (widow and executrix of the estate of Professor Sir Ian Brownlie, CBE, QC) [2020] EWCA Civ 996

What are the practical implications of this case?

Tort gateway

This judgment of the Court of Appeal provides welcome clarification for practitioners as to the application of the jurisdictional gateway rule in CPR PD 6B, para 3.1(9), when seeking to serve a claim form out of the jurisdiction in respect of a tort claim—the correct approach had been the subject to conflicting opinions of the Supreme Court in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80.

A key element for practitioners is that this gateway provides the court with a more flexible jurisdictional framework than in cases within the Brussels regime. This judgment means that when applying the para 3.1(9) gateway to non-Regulation cases, it will only be necessary to show that 'some significant damage' occurred in England, whether the damage was direct or indirect.

The court provided a helpful comparative analysis of jurisdiction provisions under English and EU law by reference to CPR PD 6B, Article 5(3) Brussels Convention 1968 Article 5(3) of Regulation (EC) 44/2001, Brussels I and Article 7(2) of Regulation (EU) 1215/2012), Brussels I (recast).

Use of foreign law

This Court of Appeal judgment also addresses arguments on foreign law evidence and the applicability of the default rule, which is that the court will apply English law in cases without satisfactory evidence of foreign law. Arnold LJ dissented, but the majority held that:

- the rule did not disapply what would otherwise be applicable foreign law; it applied foreign law by using the default rule to establish its effect (*O v A* [2014] EWCA Civ 1277)
- in some cases where foreign law applied, the court would not proceed on the basis of English law, and the party whose case was governed by foreign law would have to plead and prove its content
- where the default rule's application was appropriate, it was a sensible way of avoiding the expense and complication of having to investigate foreign law (paras [168-188] of the judgment)

For service out a claimant can rely on the default rule until substantive evidence of applicable foreign law is produced; a mere objection to the rule is insufficient (paras [208-219] of the judgment).

What was the background?

FS Cairo, a company in the Four Seasons group, appealed against the decision that England was the proper forum for the claims the respondent had brought against it, that English courts had jurisdiction and that permission was granted to serve the claims out of the jurisdiction.

In 2010 the respondent stayed at the appellant company's hotel and had booked a tour offered by the hotel, which involved an excursion provided by a limousine company. The accident happened during the tour. In 2012 the respondent brought a claim in contract, a direct claim in tort, and a vicarious liability tort claim. In 2017, following a jurisdiction challenge by the appellant and several appeals, the Supreme Court, in a *obiter* part of the decision, held by a majority of three to two that the respondent's claims would fall within the definition in CPR PD 6B, para 3.1(9)(a), applying a wider interpretation.

However, the defendant had been identified incorrectly and was replaced with the present appellant in 2018. In 2019 Nicol J at first instance decided that the claims had a real prospect of success and passed through both the contract and tort jurisdictional gateways and that these were good arguable claims with a real prospect of success. It is this decision of Nicol J that was subject to the current appeal.

What did the court decide?

Interpretation of the tort gateway

The Court of Appeal agreed with the approach of the majority of the obiter judgment in the Supreme Court and the appealed decision of Nicol J. The majority of the Supreme Court had taken the view that in non-EU regulation cases, i.e. those falling outside the application of Regulation (EU) 1215/2012, Brussels I (recast), the tort gateway pursuant to CPR PD 6B para 3.1(9)(a) should be construed in line with Lady Hale's view in *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, para [50]. That is, to allow 'significant damage', whether direct or indirect, to suffice to establish jurisdiction in a multi-state case as a connecting factor, even where such damage had also occurred elsewhere. This is because the construction of the CPR gateway has been held to intentionally differ from the wording of the Brussels I (recast) regulation and its precursor instruments. Since the gateway rules came into force, various Court of Justice decisions have been decided eg *Dumez France SA v Hessische Landesbank* (Case 220/88) [1980] ECR I-49 and *Marinari v Lloyds Bank plc* (Case C-364/93) [1996] QB 217. However, these decisions have not influenced the rules applicable to tort gateway cases, as there has been no corresponding change to the wording used for this gateway by the rules committee.

On this point, Arnold LJ disagreed with the majority, as in his view 'direct damage' was necessary to establish jurisdiction.

Note: in 2015 the Mance Committee, or the Lord Chancellor's Advisory Committee on Private International Law, considered the jurisdictional gateways and made a number of changes, including changes to the tort gateway although the change did not address the issue under consideration in this judgment. For guidance on the changes, see Practice Note: Changes to gateways for permission to serve out of the jurisdiction (October 2015) [Archived].

Foreign law evidence

As detailed evidence had not been adduced by the respondent regarding relevant provisions of Egyptian law, it was necessary to show that the appellant would have a reasonable prospect of being able to rely on the default rule. The Court of Appeal, agreeing with Nicol J, held that as the appellant had not put forward evidence to show that the respondent would not be able to rely on the default rule, there were no substantive or procedural hindrances to the respondent's doing so, nor did this prevent the permission to serve out from being given.

Arnold LJ dissented in part and held that the burden was on the claimant to provide evidence of foreign law and that the default rule was inappropriate for the current case (paras [138]–[151] of the judgment).

Case details:

- Court: Court of Appeal, Civil Division
- Judge: Underhill VP, Lord Justice McCombe, Lord Justice Underhill
- Date of judgment: 29 July 2020

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