JURISDICTIONAL GATEWAYS IN THE CPR

IF no substitute is negotiated for the Brussels Recast Regulation (1215/2012) on "Brexit", the provisions in the Civil Procedure Rules 1998 (CPR) for permission to serve claims out of the jurisdiction may assume a greater significance in future cross-border litigation. So the timing of the Supreme Court's decision in *Four Seasons Holding Inc. v Brownlie* [2017] UKSC 80, [2018] 1 W.L.R. 192 is apposite.

Sir Ian and Lady Brownlie, his daughter and two grandchildren were involved in a car accident in Egypt. Their chauffeur-driven car had been hired through the Four Seasons Hotel Cairo. Sir Ian and his daughter were killed. Lady Brownlie and the grandchildren were seriously injured but survived. Lady Brownlie sued Four Seasons Holdings Inc., a Canadian company, for damages for personal injury and for loss of dependency under the Fatal Accidents Act 1976. She also sued for damages as Sir Ian's executrix under the Law Reform (Miscellaneous Provisions) Act 1934. To proceed, she needed permission to serve out of the jurisdiction.

A claimant must jump three hurdles to obtain permission to serve out. First, the claim must have a reasonable prospect of success on the merits (CPR 6.37(1)(b)). This is the same test as for resisting summary judgment. Second, the claim must fit through a so-called jurisdictional "gateway" (CPR 6.37(1)(a)). These are listed at para. 3.1 of Practice Direction 6B (PD6B). Third, England must be the *forum conveniens*, or the "proper place", in which to bring the claim (CPR 6.37(3)).

Lady Brownlie fell at the first hurdle because she had sued the wrong entity. The defendant was the holding company in the Four Seasons Group, and neither owned nor operated the Cairo hotel. What the Supreme Court said on the jurisdictional gateways was therefore obiter dicta only. Nonetheless, this is the aspect of the judgment which will pique interest, and accordingly is the focus of this note.

The Supreme Court divided 3:2 on how to interpret gateway 9(a) (PD6B, para. 3.1(9)(a)). This allows for claims made in tort to be served out where "damage was sustained or will be sustained within the jurisdiction". The question was how widely "damage" should be understood.

Lady Hale, Lord Wilson and Lord Clarke held that the ordinary and natural meaning of gateway 9(a) included "all the detriment, physical, financial and social, which the plaintiff suffers as a result of the tortious conduct of the defendant" (at [52], per Lady Hale, citing *Flaherty v Girgis* (1985) 63 A.L.R. 466, 482, per Kirby P. and Samuels J.A.). It sufficed that, while the personal injury and Sir Ian's death had occurred in Egypt, Lady Brownlie (and Sir Ian's estate) had suffered consequential damage in England such as funeral and medical expenses, pain, suffering and loss of amenity.

https://doi.org/10.1017/S0008197318000223 Published online by Cambridge University Press

The majority interpretation of gateway 9(a) appears to be broader than that adopted by the Court of Appeal in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, 437. There, it was held that at least "some significant damage" must have been suffered in England. However, this widening of the gateway is unlikely to lead to a material difference in many cases. If no significant damage is suffered in England, a claim will likely still fall short at the *forum conveniens* stage.

A narrow reading, focused on direct damage, was rejected by the majority. This was, in part, because the gateway spoke of "damage" and not "the damage" (at [64], per Lord Wilson, at [68], per Lord Clarke; see also at [40]–[41], per Lady Hale). In any event, the line between direct and consequential damage was not an easy one to draw and so would lead to an unstable test (at [53], per Lady Hale). It was therefore preferable to adopt a lower but more stable hurdle at the gateway stage, leaving claims with a tenuous connection to England to fall over at the *forum conveniens* hurdle instead (at [51], [54], per Lady Hale).

The majority position appears to be some distance away from the old, restrictive principles governing the gateways. In *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (London 2017), [11.142], it is stated that it remains "cardinal" that the courts ought to be cautious about any application to serve out of the jurisdiction because of its interference with another state's sovereignty; that a claim must be within both the letter and the spirit of a gateway to proceed; and that any doubt in the interpretation of a gateway should be resolved in favour of a defendant. But the practice of the courts has been more relaxed than this for some time, and this trend may be given further impetus by the majority position in *Brownlie* on gateway 9(a).

In the minority, Lord Sumption (supported by Lord Hughes only) argued that gateway 9(a) should be understood more restrictively. "Damage" meant direct damage or, to use his language, the "damage done to an interest protected by the law" (at [23]). In a personal injury case such as *Brownlie* that meant that the personal injury needed to have been sustained in England.

Lord Sumption considered the more restrictive interpretation to be supported by the history of the gateway, which had been drafted to match the provision for "special jurisdiction" for tort claims falling within the Brussels regime (now Article 7(2) of the Brussels Recast Regulation). This argument for consistency between the gateway and the Brussels regime, which also found favour with the Court of Appeal in *Brownlie*, is problematic and the majority's rejection of it should be welcomed. The language of Article 7(2) and its predecessors – looking for the location of the "harmful event" – is entirely different from the language of "damage" used in gateway 9(a). Further, the restrictive interpretation of "harmful event", excluding consequential damage, has been developed by the European Court of Justice after the drafting of gateway 9(a). The

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consistency argument adopted by the Court of Appeal and Lord Sumption was therefore unsound on its own historical and linguistic terms (at [50], per Lady Hale). In any event, the argument elided fundamental differences in the structure of the two regimes, as Lady Hale pointed out in her judgment (at [51], echoing a powerful argument advanced by A. Briggs, "The Hidden Depths of the Law of Jurisdiction" [2016] L.M.C.L.Q. 236, 244–47).

Passing comment was also made by Lord Sumption and Lady Hale on gateway 6(a) (PD6B, para. 3.1(6)(a)). This allows for a claim made in respect of a contract to be served out where the contract "was within the jurisdiction". Orthodoxy is that a contract is made at the place where an offer is accepted. The place in question varies depending on the mode of communication used by the acceptor. As Lord Sumption rightly noted, this is "arbitrary", causes "serious practical difficulties" and is "not at all satisfactory" (at [16]). Both he and Lady Hale raised the possibility that the gateway could be redrafted in broader terms (ibid. and at [34], per Lord Sumption). It is, however, already perfectly possible for courts to read the current language of gateway 6(a) in broader terms: see e.g. *Apple Corps Ltd. v Apple Computer Inc.* [2004] EWHC 768 (Ch). Indeed, it may be considered inconsistent to continue to interpret gateway 6(a) restrictively while reading gateway 9(a) in the broad terms adopted by the majority in *Brownlie*.

The final point to note relates to the evidential standard applied when fitting a claim through a gateway. The common law had settled on a "good arguable case". But more recently courts have tended to adopt the formulation of "much the better of the argument", first used in *Canada Trust Co. v Stolzenberg (No. 2)* [1997] EWCA Civ 2592; [1998] 1 W.L.R. 547, 555. Lord Sumption doubted the utility or suitability of "much" (at [7]), which mirrors criticism in commentary: see in particular, Briggs, "The Hidden Depths", p. 241. However, Lord Sumption considered (at [7]) "the better of the argument" to be a "serviceable test" for a good arguable case, so long as it was understood as requiring no more than the following:

> (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

In light of these three guiding principles it is difficult to see what is really left of a "the better of the argument" test. Certainly, this appears to be how Lady Hale, who supported Lord Sumption on this point, understood the

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effect of his reasoning (at [33]). It remains to be seen whether the courts adopt this evidential standard for the Brussels Recast Regulation as well as for the CPR gateways. On the one hand, the interlocutory considerations evoked by Lord Sumption in *Brownlie* apply equally in that context; on the other, the Brussels regime may justify a more exacting standard than the common law (see Briggs, "The Hidden Depths", pp. 239–44).

It remains unclear whether the courts will settle on a broad or restrictive approach to the jurisdictional gateways. *Brownlie* suggests the former, but is sure not to be the last word on the subject.

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https://doi.org/10.1017/S0008197318000223 Published online by Cambridge University Press