was correct?"), that conflate the two questions and inconsistently compare valuations at the start of the transaction with valuations at its end (see Janet O'Sullivan, "Negligent Professional Advice and Market Movements" [1997] C.L.J. 19). *MBS* does little to clear up this mess. It appears merely to say that one asks the "scope" question, then the somewhat mysterious "nexus" question and then, as a "cross-check" one carries out the "*SAAMCO* counterfactual" calculation to ensure that the "nexus" question has not led the court astray.

The central difficulty seems to be failing to ask what effect X has on Y *controlling for* Z. Courts ask a historical question, "would Y have happened if X had not happened?", and a normative question, "to what extent does the fact that Z has happened exonerate the defendant?". But neither of these establishes what the claimant lost as a result of the breach alone.

Lords Leggatt and Burrows concur in the result but dissent from the majority's reasoning. Both regard the six new questions as unnecessary. Lord Leggatt insists that conventional ideas of legal causation suffice. Lord Burrows largely agrees but adds that we should recognise that the existing law, especially the *SAAMCO* version of "scope of the duty", rests on normative decisions about risk allocation, not on facts about causation.

Whether the majority's six questions survive remains unclear. Some might see this case as a new start – as a new *Donoghue* – and certainly its division of the "duty of care" into two distinct issues, actionable loss and risk allocation, has attractions. But doubts must remain about whether the "nexus" question makes sense and about whether it clarifies or further confuses the relationship between what the claimant has lost and how the claimant lost it.

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PLEADING AND PROVING FOREIGN LAW

A LONG jurisdictional battle has concluded after a second Supreme Court judgment: *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2021] 3 W.L.R. 1011 ("*Brownlie II*"). Led by Lord Lloyd-Jones, the Supreme Court confirmed the broad approach to the tort gateway adopted *obiter* by a majority of Justices four years ago: *Brownlie v Four Seasons Holdings Inc.* [2017] UKSC 80, [2018] 1 W.L.R. 192 ("*Brownlie I*"). Lord Leggatt, dissenting on the gateway issue, gave the judgment on the question of pleading and proving foreign law. This note focuses on the latter issue.

In 2010, Sir Ian and Lady Brownlie and his daughter and grandchildren were staying at the Four Seasons Hotel Cairo. On a hotel excursion, there was a car accident, killing Sir Ian and his daughter. In *Brownlie I*, Lady

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Brownlie sued the incorrect (Canadian) entity, so permission to serve out of the jurisdiction was refused. However, at the same time, she was granted permission to join the correct (Egyptian) entity. It was the Egyptian not the Canadian entity that operated the hotel. Lady Brownlie's claims against the Egyptian defendant were for breach of contract and in the tort of negligence in her personal capacity (for her personal injuries), as executrix of her husband's estate (for his), and as his widow for bereavement damages and dependency. Egyptian law applied. For the tort claim, that was the place of the accident and so the direct damage for the Rome II Regulation EC/864/2007. It was also the place where the defendant habitually resided for the contractual claim under the Rome I Regulation EC/593/2008.

When the court's permission is required to serve out of the jurisdiction, a claim must satisfy three requirements: (1) it must have reasonable prospects of success; (2) it must be capable of passing through a jurisdictional "gateway"; and (3) England must be the proper place or *forum conveniens* to determine the claim (CPR 6.37). The third requirement had been determined in Lady Brownlie's favour by Nicol J. ([2019] EWHC 2533 (Q.B.)). Permission to appeal on that point was refused. Yet the only reason of any credibility given for England being the proper place was that, by 2019, the claim had already been in the English court system "for a substantial length of time" (at [139(i)]). But for the unhappy *Brownlie I* litigation, the suspicion is that the court might have refused jurisdiction, and rightly so. After all, this was a claim against an Egyptian entity, for an accident which had occurred in Egypt, which was governed by Egyptian law, and there was no compelling evidence that justice would not be done in an Egyptian court.

The defendant argued that Lady Brownlie had not demonstrated reasonable prospects of success for the claims made in her personal capacity. Her pleaded case sought "damages pursuant to Egyptian law" without further explication. Expert evidence served in the proceedings on Egyptian law had not remedied this omission. Lady Brownlie instead relied on the "presumption" that, in the absence of evidence to the contrary, foreign law is the same as English law. This is expressed to be a single rule in *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed. (London 2018), paragraph 9R-001. However, Lord Leggatt clarified that there were two different rules (at [112]):

> (1) A "default rule" that English law applies in its own right to a claim where foreign law is not pleaded.
> (2) Once foreign law is pleaded, a "presumption" that its content is similar to English law in the absence of evidence to the contrary.

The "default rule" did not detain the Supreme Court for long in *Brownlie II* because the claimant had expressly pleaded reliance on Egyptian law, although Lady Brownlie was required to provide further particulars of

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exactly what rules or provisions of Egyptian law she relied upon (at [165]). The rationale for the rule, according to Lord Leggatt, was procedural: a court cannot apply a particular rule in civil litigation unless a party relies on it as part of their case. As a procedural requirement, it survives Rome I and II, which do not oust such matters. Lord Leggatt betrayed some ambivalence when making this argument, saying it was valid "so far as it goes" (at [114]). The distinction between procedure and substance in private international law is certainly difficult, but it has to be drawn in order to fit the rule into a coherent scheme with the Regulations. In any event, the better analysis is that foreign law *as such* is never applied; the English court can only ever apply its own law. The question is whether, in justice, English law should be adapted to reflect (so far as possible) the rules of another jurisdiction because of some connection between that jurisdiction and the dispute before the English court. However, if neither party contends that such a modification is required to do justice, the English court has no reason to do anything other than apply the usual domestic law. None of this was spelled out by Lord Leggatt, although perhaps it did not need to be given Lady Brownlie's pleaded case.

The greater debate in *Brownlie II* was over the "presumption of similarity", and whether it could be used to plug the gaps in Lady Brownlie's expert evidence. As the presumption is a rule of evidence, it is also not affected by the Regulations. Lord Leggatt emphasised that it could only be used where it was "reasonable to expect that the applicable foreign law is likely to be materially similar to English on the matter in issue" (at [126]). This was a factual question and there was no bright-line rule against using the presumption to cure an oversight in expert evidence (at [151]). Indeed, in a short passage likely to be significant to the future of the rules on proving the content of foreign law in English courts (at [148]), Lord Leggatt suggested that the view that foreign law must be proved by expert evidence was "outdated" and the court should be free in appropriate cases to consider sources from the foreign jurisdiction for itself. This is a radical and refreshing approach; until now, at first instance, the courts continue to adhere to the principle they are not entitled to construe a foreign code for themselves but must consider it through the medium of expert evidence: see, for example, *Banco Santander Totta S. A. v Companhia de Carris de Ferro de Lisboa S.A.* [2016] EWHC 465 (Comm), [2016] 4 W.L.R. 49, at [237] (Blair J.).

As to the presumption's strength, whilst making it clear that he was generalising, Lord Leggatt indicated that it was more likely to be appropriate where the foreign law was also a common law system; less likely to be appropriate where the rule was contained in a statute; and more readily applied in pre-trial circumstances (like an application for permission to serve out) where an allegation need only be shown to have a real prospect of success as opposed to a trial where it needs to be made out on the

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balance of probabilities (at [143]–[147]). The presumption therefore appears to be less potent than traditionally thought; cf. *Dicey, Morris & Collins*, paragraph 9-002, which states that the presumption should not be applied where "wholly artificial". Moreover, the type of factors identified by Lord Leggatt potentially open the gate to difficult comparative law arguments when parties now seek to rely on the presumption. Nonetheless, this weakened presumption was still strong enough to get Lady Brownlie over the first requirement for permission to serve out.

Finally, a brief note on the gateway issue, which concerned the proper scope of PD 6B, paragraph 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". While Lord Leggatt preferred the more restrictive approach of Lord Sumption and Lord Hughes, Lord Lloyd-Jones supported by the other Justices essentially adopted the analysis of Lady Hale, Lord Wilson and Lord Clarke in *Brownlie I*, which did not restrict paragraph 3.1(9)(a) to direct damage. For details of the debate, the reader is referred to the note of *Brownlie I* in this Journal: [2018] C.L.J. 36. As explained there, the majority approach was preferred since it provided a more stable test, leaving claims with a tenuous connection to England to fall over at the *forum conveniens* hurdle instead. On the facts at hand, of course, there was no difficulty in identifying the direct damage, which had clearly occurred in Egypt. But the broader approach would assist in tort claims for pure economic loss, where identifying direct loss is much more difficult. Yet in *Brownlie II*, at [75]–[76], Lord Lloyd-Jones suggested that the broad interpretation of the gateway had limits in the context of pure economic loss. There is therefore likely to be significant argument to come over the tort gateway in cases of pure economic loss, even if the unprecedented battle over jurisdiction in *Brownlie* itself may now have drawn to a close.

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