20 October 2021

PRESS SUMMARY

FS Cairo (Nile Plaza) LLC (Appellant) v Lady Brownlie (as Dependant and Executrix of Professor Sir Ian Brownlie CBE QC) (Respondent)
[2021] UKSC 45
On appeal from: [2020] EWCA Civ 996

JUSTICES: Lord Reed (President), Lord Lloyd-Jones, Lord Briggs, Lord Leggatt, Lord Burrows

BACKGROUND TO THE APPEAL

In January 2010, Lady Brownlie and her husband, Sir Ian Brownlie QC, were on holiday in Egypt. They stayed at the Four Seasons Hotel Cairo at Nile Plaza. On 3 January 2010, they went on a guided driving tour which Lady Brownlie booked through the hotel. The vehicle they were travelling in during the tour crashed, killing Sir Ian and seriously injuring Lady Brownlie.

Lady Brownlie issued a claim in England seeking damages in contract and tort. The case reached the Supreme Court which found that the company sued by Lady Brownlie was not the operator of the hotel and remitted the matter to the High Court.

Lady Brownlie successfully sought permission to substitute the present defendant and to serve the proceedings on them out of the jurisdiction. The defendant appealed on the question of whether permission should have been given to serve the proceedings out of the jurisdiction. The Court of Appeal dismissed the appeal.

The defendant raised two issues before the Supreme Court. The first (the "**tort gateway issue**") is whether Lady Brownlie's claims in tort satisfy the requirements of the relevant jurisdictional 'gateway' in the Civil Procedure Rules (the "**CPR**"). The second (the "**foreign law issue**") is whether, in order to show that her claims in both contract and tort have a reasonable prospect of success, Lady Brownlie must provide evidence of Egyptian law.

JUDGMENT

The Supreme Court dismisses the appellant's appeal on both issues. In relation to the tort gateway issue, Lord Lloyd-Jones (with whom Lord Reed, Lord Briggs, and Lord Burrows agree) gives the lead judgment. Lord Leggatt dissents and would have allowed the appeal on that issue. As to the foreign law issue, Lord Leggatt gives the unanimous judgment.

REASONS FOR THE JUDGMENT

The tort gateway issue

Before permission may be given for service of a claim form outside the jurisdiction, the claimant must establish that: (1) the claim falls within one of the gateways set out in paragraph 3.1 of Practice Direction ("**PD**") 6B to the CPR; (2) the claim has a reasonable prospect of success; and (3) England and Wales is the appropriate forum in which to bring the claim [**25**]. Those conditions are the domestic rules regarding service out of the jurisdiction; they may be contrasted with the EU system [**28-29**].

Lady Brownlie submits that her tortious claims meet the criterion for the gateway in paragraph 3.1(9)(a) of PD 6B, namely that "damage was sustained … within the jurisdiction" [**30**]. The appellant submits

that paragraph 3.1(9)(a) only founds jurisdiction where the initial or direct damage was sustained in England and Wales. Lady Brownlie instead maintains that the requirements of the gateway are satisfied if significant damage is sustained in the jurisdiction [**33-34**].

The Supreme Court considers that the word "damage" in paragraph 3.1(9)(a) refers to actionable harm, direct or indirect, caused by the wrongful act alleged [**81**]. Its meaning should not be limited to the damage necessary to complete a cause of action in tort because such an approach is unduly restrictive [**49-51**]. The notion that paragraph 3.1(9)(a) should be interpreted in light of the distinction between direct and indirect damage which has developed in EU law is also misplaced [**81**]. It is an over-generalisation to state that the gateway was drafted in order to assimilate the domestic rules with the EU system. In any event, there are fundamental differences between the two systems [**52-56**]. The additional requirement that England is the appropriate forum in which to bring a claim prevents the acceptance of jurisdiction in situations where there is no substantial connection between the wrongdoing and England [**77-79**]. Lady Brownlie's tortious claims relate to actionable harm which was sustained in England; they therefore pass through the relevant gateway [**83**].

Lord Leggatt dissents on this issue. He favours a narrower interpretation of paragraph 3.1(9)(a) [**208**]. He considers that Lady Brownlie's tortious claims do not pass through the relevant gateway because Egypt is the place where all of the damage in this claim was sustained [**209**].

The foreign law issue

It is common ground that Lady Brownlie's claims are governed by Egyptian law [**98**]. One of the requirements for obtaining permission for service out of the jurisdiction is that the claim as pleaded has a reasonable prospect of success [**99-100**]. The appellant argues that Lady Brownlie has failed to show that certain of her claims have a reasonable prospect of success because she has not adduced sufficient evidence of Egyptian law. Lady Brownlie submits that it is sufficient to rely on the rule that in the absence of satisfactory evidence of foreign law the court will apply English law [**102-103, 105-106**].

The Supreme Court distinguishes between two conceptually distinct rules: the 'default rule' on the one hand and the 'presumption of similarity' on the other. The default rule is not concerned with establishing the content of foreign law but treats English law as applicable in its own right when foreign law is not pleaded [**112**]. The justification underlying the default rule is that, if a party decides not to rely on a particular rule of law, it is not for the court to apply it of its own motion [**113-116**]. However, if a party pleads that foreign law is applicable they must then show that they have a good claim or defence under that law [**116-117**]. The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be [**112**]. It is engaged only where it is reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue [**126**]. The presumption of similarity is thus only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence [**149**]. Because the application of the presumption of similarity is fact-specific, it is impossible to state any hard and fast rules as to when it may properly be employed (although some general observations may nonetheless be made) [**122-125, 143-148**].

Lady Brownlie's claims are pleaded under Egyptian law. There is thus no scope for applying English law by default [**118**]. However, the judge was entitled to rely on the presumption that Egyptian law is materially similar to English law in concluding that Lady Brownlie's claims are reasonably arguable for the purposes of establishing jurisdiction [**157-160**].

References in square brackets are to paragraphs in the judgment