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FOIL UPDATE 20th October 2021



Brownlie: the claimant wins (at last) on jurisdiction

FS Cairo (Nile Plaza) LLC v Brownlie (2021) UKSC 45

In January 2010, the claimant/respondent and her husband 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 the claimant booked through the hotel. The vehicle they were travelling in during the tour crashed, killing the claimant's husband and seriously injuring the claimant.

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

The claimant successfully sought permission to substitute the present defendant/appellant 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") was whether the claimant's claims in tort satisfied the requirements of the relevant jurisdictional 'gateway' in the Civil Procedure Rules (CPR). The second (the "foreign law issue") was whether, in order to show that her claims in both contract and tort had a reasonable prospect of success, the claimant must provide evidence of Egyptian law.

IN BRIEF

The UK Supreme Court has dismissed the defendant's appeal and found that the claimant satisfies both the requirements of the 'tort gateway' and the 'foreign law' issue.

She may now proceed with her claims against the Egyptian based defendant.

The Supreme Court dismissed the appeal on both issues.

The tort gateway issue

A majority made the following findings.

Before permission might be given for service of a claim form outside the jurisdiction, the claimant must establish that:

- (1) the claim fell within one of the gateways set out in paragraph 3.1 of Practice Direction (PD) 6B to the CPR;
- (2) the claim had a reasonable prospect of success; and
- (3) England and Wales was the appropriate forum in which to bring the claim.

Those conditions were the domestic rules regarding service out of the jurisdiction; they might be contrasted with the EU system.

The claimant submitted that her tortious claims met the criterion for the gateway in paragraph 3.1(9)(a) of PD 6B, namely that "damage was sustained... within the jurisdiction". The defendant submitted that paragraph 3.1(9)(a) only founded jurisdiction where the initial or direct damage was sustained in England and Wales.

The claimant instead maintained that the requirements of the gateway were satisfied if significant damage was sustained in the jurisdiction.

The Supreme Court considered that the word "damage" in paragraph 3.1(9)(a) referred to actionable harm, direct or indirect, caused by the wrongful act alleged. Its meaning should not be limited to the damage necessary to complete a cause of action in tort because such an approach was unduly restrictive. The notion that paragraph 3.1(9)(a) should be interpreted in light of the distinction between direct and indirect damage which had developed in EU law was also misplaced. It was 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 were fundamental differences between the two systems.

The additional requirement that England was the appropriate forum in which to bring a claim prevented the acceptance of jurisdiction in situations where there was no substantial connection between the wrongdoing and England. The claimant's tortious claims related to actionable harm which was sustained in England; they therefore passed through the relevant gateway.

The foreign law issue

The court held unanimously that it was common ground that the claimant's claims were governed by Egyptian law. One of the requirements for obtaining permission for service out of the jurisdiction was that the claim as pleaded had a reasonable prospect of success. The defendant argued that the claimant had failed to show that certain of her claims had a reasonable prospect of success because she had not adduced sufficient evidence of Egyptian law. The claimant submitted that it was sufficient to rely on the rule that in the absence of satisfactory evidence of foreign law the court would apply English law.

The Supreme Court distinguished between two conceptually distinct rules: the ‘default rule’ on the one hand and the ‘presumption of similarity’ on the other. The default rule was not concerned with establishing the content of foreign law but treated English law as applicable in its own right when foreign law was not pleaded. The justification underlying the default rule was that, if a party decided not to rely on a particular rule of law, it was not for the court to apply it of its own motion. However, if a party pleaded that foreign law was applicable, they must then show that they had a good claim or defence under that law. The presumption of similarity was a rule of evidence concerned with what the content of foreign law should be taken to be. It was engaged only where it was reasonable to expect that the applicable foreign law was likely to be materially similar to English law on the matter in issue. The presumption of similarity was thus only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence. Because the application of the presumption of similarity was fact-specific, it was impossible to state any hard and fast rules as to when it might properly be employed (although some general observations might nonetheless be made).

The claimant’s claims were pleaded under Egyptian law. There was thus no scope for applying English law by default. However, the judge was entitled to rely on the presumption that Egyptian law was materially similar to English law in concluding that the claims were reasonably arguable for the purposes of establishing jurisdiction.

The full judgment may be found at: <https://www.bailii.org/uk/cases/UKSC/2021/45.html>

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