FS Cairo (Nile Plaza) LLC v Lady Brownlie: A Gateway to Further Litigation?

Background

The Supreme Court's judgment in FS Cairo *(Nile Plaza) LLC v Lady Brownlie (as Dependant and Executrix of Professor Brownlie)*[1] is the latest word (and the Supreme Court's second judgment[2]) in litigation which was commenced as far back as December 2012. That litigation arose out of a tragic accident which befell, inter alia, Lady Brownlie and her husband in Egypt in January 2010: Lady Brownlie was seriously injured and her husband was killed. After the accident, Lady Brownlie brought proceedings in England, claiming damages in contract and tort: (i) for her own personal injury; (ii) in her capacity as her husband's executrix under the Law Reform (Miscellaneous Provisions) Act 1934; and (iii) for bereavement and loss of dependency under the Fatal Accidents Act 1976 as her husband's widow.

The Legal Test

In order to be able to sue in England, Lady Brownlie had to obtain permission from the English court to serve proceedings on the defendant, an Egyptian company, out of the jurisdiction. To obtain permission, Lady Brownlie had to establish:

1. that she had a good arguable case her claims fell within one of the gateways set out in Practice Direction 6B, paragraph 3.1;

2. that there was a serious issue to be tried on the merits; and

3. that England was the appropriate forum for trial and that the court ought to exercise its discretion so as to permit service out of the jurisdiction.

1) [2021] UKSC 45.
2) Its first may be found here: [2017] UKSC 80; [2018] 1 WLR 192.

Issues Before the Supreme Court

The circumstances in which the case came, for a second time, before the Supreme Court are summarised in the judgment of Lord Lloyd-Jones.[3] On this occasion, the Supreme Court had to determine two issues in particular.[4] The first issue was whether the claims in tort passed through the gateway in PD 6B, paragraph 3.1(9), which requires the claimant to show, insofar as relevant, that "damage was sustained within the jurisdiction". The second issue was whether the claimant could show that the claims brought in contract and in tort had a reasonable prospect of success. That second issue arose because, as was common ground between the parties, the only claims which the claimant could advance were governed by Egyptian law.

The Resolution of the First Issue

On the first issue, the defendant contended that the gateway in PD6B, paragraph 3.1(9) only applied to initial or direct damage sustained in England and Wales. By contrast, Lady Brownlie submitted[5] it was sufficient to show that some significant damage had been sustained in England and Wales. The Supreme Court, following the obiter remarks of the majority when the matter had first come before that Court, found for Lady Brownlie. In consequence, the word "damage" in PD6B, para 3.1(9) "simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged".[6]

3) [2021] UKSC 45, [12 – 24].
4) Ibid, [4].
5) Relying on the decision of the Court of Appeal in *Metall und Rohstoff AG v Donaldson* [1990] 1 QB 391.
6) [2021] UKSC 45, [81].

Such a wide reading of the word "damage" increases by some significant margin a claimant's chances of bringing herself within the PD6B, paragraph 3.1(9) gateway. In consequence – as the majority recognised[7] - given the gateway's width, the third limb of the test governing the grant of permission to serve out (i.e. whether England is the appropriate forum) has to do a lot more of the work in order to determine whether to grant permission to serve out. All the more so given the apparent threat, as outlined in Lord Leggatt's dissenting judgment on this point,[8] of an individual who has suffered injury abroad either returning to England or visiting England, bringing their injuries with them, simply in order to sue the tortfeasor here.

Whether the third limb of the test can take the strain or not in such cases may well be proven in due course if, as a result of the Supreme Court's judgment, courts at first instance are required to consider in detail and often the question of *forum conveniens*. At all roads, when seeking permission to serve a defendant out of the jurisdiction, it will always be to the claimant's enormous advantage to demonstrate clearly that England is indeed the appropriate forum in which to sue.

The Resolution of the Second Issue

On the second issue, the defendant argued that Lady Brownlie had failed to demonstrate that certain of her claims had a real prospect of success because she had failed to adduce sufficient evidence of the content of the Egyptian law governing those claims. Lady Brownlie submitted that she could simply rely on a rule to the effect that, in the absence of satisfactory evidence of foreign law, the court would apply English law.

7) Ibid, [82].
8) [194].

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The Supreme Court reiterated that where foreign law is relied on, it is up to the claimant to plead that foreign law so that the defendant knows the case which it has to meet.[9] It then distinguished between two conceptually distinct points:[10] a "default rule", treating English law as applicable in its own right when a party does not plead foreign law, and a "presumption of similarity", which is concerned to establish the content of foreign law and is engaged only where it is reasonable to expect that the applicable foreign law is likely to be materially similar on the matter in issue.

Having provided general guidance on the application of the presumption of similarity, the Supreme Court concluded that, while Lady Brownlie's claims were pleaded under Egyptian law (such that there was no room for the application of the "default rule"), Lady Brownlie was entitled to rely on the "presumption of similarity" in order to establish that Egyptian law was materially similar to English law. From that, it followed that she could demonstrate that her claims were reasonably arguable, as required by the second limb of the test governing the grant of permission to serve out of the jurisdiction.

In setting out its guidance on the second issue, the Supreme Court appeared to fire a warning shot across the bows of those who would wish to bring proceedings in England in circumstances where foreign law governs the substantive claim made. Where a claimant does not, at the outset, plead fully the specific rules of foreign law on which she relies, she runs the risk of needing to persuade the court to grant permission to amend later on in time if the need to set out those rules arises. Such permission may not be granted.

Conclusion

It may well be that the Supreme Court's conclusions on the issues before it have clarified the law but will prompt significant future litigation in this country as parties test on specific sets of facts how far the gateway in PD6B, para 3.1(9) stretches or in what intimate detail they must plead points of foreign law.

At all roads, one might think that the Supreme Court's judgment places the onus on parties and judges to exercise restraint and to make sensible case management decisions in order to keep jurisdictional disputes in hand.

Anthony Kennedy
Associate Member

9) [100].
10) [112].