United Kingdom Supreme Court confirms that consequential loss satisfies the tort gateway for service out of the jurisdiction

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In *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45 ("***Brownlie* II**"), the Supreme Court held as a matter of *ratio* by a 4:1 majority that consequential loss satisfies the 'tort gateway' in Practice Direction ("**PD**") 6B, para. 3.1(9)(a).

Background

PD 6B, para. 3.1(9)(a) provides that tort claims can be served out of the jurisdiction of England & Wales where "damage was sustained, or will be sustained, within the jurisdiction". *Brownlie* concerned a car accident during a family holiday to Egypt, which tragically claimed the lives of Sir Ian Brownlie (Chichele Professor of Public International Law at the University of Oxford) and his daughter Rebecca: at [1], [10] & [91]. On her return to England, however, Lady Brownlie suffered consequential losses including bereavement and loss of dependency in this jurisdiction: at [83].

The question whether mere consequential loss satisfies the tort gateway had been considered before by the Supreme Court in the very same case: *Brownlie v Four Seasons* [2017] UKSC 80; [2018] 2 All ER 91 ("***Brownlie* I**"). By a 3:2 majority expressed "entirely *obiter*" (*Brownlie II*, at [45]) the Court had answered affirmatively: [48]-[55] (Baroness Hale), [56] (Lord Wilson) & [68]-[69] (Lord Clarke). However, the *obiter* nature of that holding combined with a forceful

dissent from Lord Sumption (see [23]-[31]) had served to prolong uncertainty on this point.

Majority's reasoning

When asked the same question again, however, a differently-constituted majority of the same Court gave the same answer. Lord Lloyd-Jones (with whom Lords Reed, Briggs, and Burrows agreed: see [5] & [7])) concluded that there was "no justification in principle or in practice, for limiting 'damage' in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed": at [49]. The 'consequential' losses suffered in England were accordingly sufficient to ground English jurisdiction for the tort claims.

Three main reasons were given. First, Lord Lloyd-Jones held that there had been no "assimilation" of the tests at common law and under the Brussels Convention/Regulation, which would have been "totally inappropriate" given the "fundamental differences between the two systems": at [54]-[55]. Second, his Lordship pointed to what he described as an "impressive and coherent line" of (mostly first-instance) authority to the same effect: at [64]. Third, it was said that the "safety valve" of *forum conveniens* meant that there was "no need to adopt an unnaturally restrictive reading of the domestic gateways": at [77].

Economic torts?

What is now the position as regards pure economic loss cases? Although Lord Lloyd-Jones concluded that the term "damage" in PD 6B, para. 3.1(9)(a) "simply refers to actionable harm, direct or indirect, caused by the wrongful act alleged" (at [81]), his Lordship expressly stated that:

- “I would certainly not disagree with the proposition, supported by the economic loss cases, that to hold that the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction”: at [76].

- “The nature of pure economic loss creates a need for constraints on the legal consequences of remote effects and can give rise to complex and difficult issues as to where the damage was suffered, calling for a careful analysis of transactions. As a result, the more remote economic repercussions of the causative event will not found jurisdiction”: at [75].

The status of previous decisions on the meaning of PD 6B, para. 3.1(9)(a) in economic tort cases appears to have been called into doubt by *Brownlie II* because (as noted by Lord Leggatt, dissenting: at [189]) those decisions had relied upon an “inference” that PD 6B, para. 3.1(9)(a) should be interpreted consistently with the Brussels Convention/Regulation. That approach was, however, rejected by both the majority and minority of the Supreme Court: at [74] & [189]. It therefore appears likely that the application of *Brownlie II* to economic torts will be the subject of significant future litigation.