# CONFLICTS IN CAIRO: TORT GATEWAY RECONSIDERED

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## I. INTRODUCTION

IN ***FOUR SEASONS HOLDINGS INCORPORATED V BROWNLIE*** (hereinafter, "*Four Seasons*"),[1] the Supreme Court had the opportunity to consider the requirements for serving a claim out of jurisdiction where the defendant is not domiciled within the EU. But the extraordinary feature is that the ratio of the case does not even turn on the proper interpretation of those requirements, which is perhaps testament to Lord Neuberger's word of caution in *VTB Capital Plc v Nutritek International Corp*—"[i]t is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost."[2]

## II. THE BROWNLIE TRAGEDY

In January 2010, the claimant Lady Brownlie and her husband, the distinguished international lawyer Sir Ian Brownlie, were on holiday in Egypt, staying at the Four Seasons Hotel Cairo (hereinafter, "the hotel") at Nile Plaza. Before leaving England, Lady Brownlie booked with the concierge an excursion to Fayoum in a hired chauffeur-driven car (hereinafter, "the contract"), having read about safari tours advertised in a leaflet published by the hotel. The excursion took

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[1] *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192.

[2] *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 [82].

place on 3 January and ended in tragedy—Sir Ian and his daughter Rebecca were killed, while Lady Brownlie and Rebecca's two children were seriously injured.

Lady Brownlie subsequently brought contractual and tortious claims for damages for personal injury (i) in her own right, (ii) in her capacity as Sir Ian's executrix, and (iii) for bereavement and loss of dependency under the Fatal Accidents Act 1976 in her capacity as her late husband's widow. Because the defendant, Four Seasons Holdings (hereinafter, "Four Seasons"), is incorporated in British Columbia, the claimant had to apply for permission to serve the proceedings outside the jurisdiction. Before permission can be given by an English court for service of a claim form outside the jurisdiction, three requirements must be met: (a) the case must fall within at least one of the jurisdictional gateways in paragraph 3.1 of Practice Direction 6B (6BPD) to the Civil Procedure Rules (CPR); (b) the claimant has a reasonable prospect of success; and (c) England and Wales is the proper place in which to bring the claim, *i.e.* the *forum conveniens*.

Lady Brownlie's contractual claim relies on a contention that "the contract… was made within the jurisdiction" under paragraph 3.1(6)(a) of 6BPD (hereinafter, "the contractual gateway"), whereas her tortious claims rely on a contention that "damage was sustained within the jurisdiction" under paragraph 3.1(9)(a) (hereinafter, "the tortious gateway").

## III. THE JUDGMENT

Having been ruled against in the lower courts and the Court of Appeal, Four Seasons appealed to set aside the claim form and service thereof out of the jurisdiction. The Supreme Court unanimously allowed the appeal on the basis that the hotel had in fact been owned and operated by Four Seasons' Egyptian subsidiary at all material times. In other words, Four Seasons was *not* a party to the contract, nor could it be held vicariously liable for the driver's negligence. There is therefore no reasonable prospect of success in respect of either claim.[3] The rest was *obiter* but is no less important for that reason as the respective opinions of Lord Sumption and Lady Hale have shed light on two important issues.[4]

[3] *Four Seasons* (n 1) [15] (Lord Sumption).
[4] ibid [17] (Lord Sumption), [33] (Lady Hale).

## A. GOOD ARGUABLE CASE

The first concerns the evidential standard of the first requirement. The established position is that the claimant must satisfy the court that there is a *good arguable case*, which falls short of the usual civil standard of proof (*i.e.* on a balance of probabilities). This prevents the test from effectively amounting to a trial of the action or a premature expression of opinion on its merits, whilst ensuring that it depends on the legal adequacy of the factual case advanced by the claimant.[5]

But what does 'a good arguable case' actually mean? In essence, the claimant must show a much better argument on the material than the defendant.[6] Lord Sumption regards this as a "serviceable test" and goes on to explain that it means the court must be satisfied that the claimant has, at the very least, a plausible evidential basis for the application of a relevant jurisdictional gateway.[7] However, he is keen to dispense with the gloss "much", noting that he does not believe "that anything is gained by the word… which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."[8] Lady Hale expressed similar sentiments that glosses should be avoided and that Lord Sumption's explication does not in fact amount to a gloss.[9] Both observations should be welcomed—having regard to the preliminary nature of interlocutory proceedings and the associated risk of prejudicing a subsequent finding at trial on that very question, the gloss only adds uncertainty to an otherwise well-known and oft-applied standard of proof.

## B. THE TORTIOUS GATEWAY

The second concerns the ambit of the tortious gateway in paragraph 3.1(9)(a). The question is whether, when a tortious act results in personal injury or death, "damage" is limited to the direct damage—that is, the physical injury or death—or whether it extends to the indirect damage, that is, the pecuniary expenditure or loss resulting from the personal injury or death.[10] Whilst stressing the correct interpretation of this gateway and indeed, of the contractual gateway, does not arise[11]

[5] *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, 879 (Lord Simons); *Four Seasons* (n 1) [5] (Lord Sumption).
[6] *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555 (Waller LJ).
[7] *Four Seasons* (n 1) [7] (Lord Sumption).
[8] ibid.
[9] ibid [33] (Lady Hale).
[10] ibid [20] (Lord Sumption).
[11] ibid [17] (Lord Sumption).

and that the Rome II Regulations has no bearing on its interpretation,[12] Lord Sumption held that damage is limited to *direct* damage. He gives two reasons for this restrictive interpretation.

### *(i) Damage under the Common Law*

His first reason is that there is apparently a "fundamental difference" between the damage done to an interest which the law protects (in this case, bodily integrity) and subsequent expenditure which is merely evidence of the financial value of that damage. Where these interests are deliberately or negligently injured, the tort is complete at the time of the injury, notwithstanding that damage is an essential element of it, since pecuniary interests are not generally protected as such under the law of tort.[13] As far as the wording of the 6BPD is concerned, Lord Sumption found nothing in the language to suggest "damage" should extend to the financial or physical consequences of the damage,[14] though it is not entirely clear how the latter is different from direct damage. But as Lady Hale recognises, "damage" is not an essential part of every cause of action in tort and indeed there are many torts which are actionable *per se*, without proof of damage (for example, trespass to persons and goods). As a matter of construction, there is no particular reason to think that completion of the cause of action is what the drafters of the CPR had in mind when they used the word "damage". It is more likely that they were simply contemplating the ordinary and natural meaning of the word—the actionable harm caused by the wrongful act alleged.[15]

This of course does not mean that any harm that is remotely linked to the tortious act is actionable. One of Lord Sumption's concerns is that if "damage" is extended to indirect damage, that would in effect amount to conferring jurisdiction by virtue of the claimant's place of residence since any pecuniary consequences of the accident or any continuing pain, suffering or loss amenity are more likely to be felt when the claimant has returned to his or her place of residence.[16] But the principles of causation, for one, should be sufficient to remedy the perceived shortcomings of a wider interpretation of damage. And indeed, Lord Wilson refers to the long-standing jurisdiction of the courts of Ontario and New South Wales to entertain tortious claims based only on secondary damage sustained, that is, any loss flowing from the initial injury, which should allay fears that a broader interpretation of the tort gateway would encourage abuse.[17]

[12] ibid [22] (Lord Sumption).
[13] ibid [23] (Lord Sumption).
[14] ibid [27] (Lord Sumption).
[15] ibid [52] (Lady Hale), [69] (Lord Clarke).
[16] ibid [28] (Lord Sumption).
[17] ibid [67] (Lord Wilson).

### *(ii) Evolution of the Tortious Gateway*

Lord Sumption's second reason is that the tortious gateway was deliberately drafted so as to assimilate the tests for asserting jurisdiction over persons domiciled in an EU Member State, which provides that a person domiciled in a Member State could be sued in tort "in the courts for the place where the harmful event occurred",[18] and persons domiciled elsewhere.[19] Having surveyed the history of the tortious gateway and its relationship with the approach under the Brussels Convention[20], Brussels I Regulations (BIR),[21] and the recast Brussels I Regulations,[22] Lord Sumption identified three important turning points in its wording:

1. Prior to 1987, service out of the jurisdiction was permitted by Rules of Supreme Court Order 11, rule 1(1)(h), where the action was "founded on a tort committed within the jurisdiction". The focus was on where the wrongful act was done, not the location of damage.
2. On 1 January 1987, however, the Supreme Court Rules (SI 1983/1181) came into effect, which was materially identical to the tortious gateway under the CPR, save that it provides for "the damage… sustained".
3. When the gateways were eventually transferred to a Practice Direction in 2000, the definite article "the" was omitted. The omission thus excludes the suggestion that all of the damage had to be sustained within the jurisdiction.

Recognising that the tortious gateway has generally been construed in the light of the case law of the Court of Justice, Lord Sumption regarded it strange if the effect of expanding the gateway to match the wider special jurisdiction authorised in the BIR cases had been to make it very much wider than even the Convention authorised.[23]

[18] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (adopted 12 December 2012, entered into force 09 January 2013) OJ L 351 (20.12.2012) art 7(2).
[19] *Four Seasons* (n 1) [30] (Lord Sumption).
[20] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels) (adopted 27 September 1968, entered into force 01 February 1973) 1262 UNTS 15, 8 ILM 229 (1969). The Brussels Convention was replaced by Council Regulation (EC) No 44/2001 (n 21).
[21] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) (entered into force 01 March 2002) OJ L 12 (16.1.2001). The BIR was then subsequently replaced in 2012 by the Regulation (EU) No 1215/2012 of the European Parliament (n 18).
[22] Regulation (EU) No 1215/2012 of the European Parliament (n 18).
[23] *Four Seasons* (n 1) [30] (Lord Sumption).

But construing the gateways in the light of the European case law does not necessarily mean they should be construed in the same manner. As Lord Wilson points out, it does not follow that the CPR jurisdictional gateways, in a claim unconstrained by EU law, as is the present case, should be narrowed to the size of the gateway set by EU law.[24] There has in fact been a consistent line of first instance decisions holding that, in a case which is not governed by the European jurisdictional rules, a claim in tort may be brought in England if damage is suffered here as a result of personal injuries inflicted abroad.[25] This is only achieved if the word "damage" is given its ordinary and natural meaning, namely, *any* harm sustained by the claimant, whether physical or economic. Indeed, Professor Briggs makes the point bluntly—it makes no sense to interpret a common law rule of jurisdiction, overlaid with a question about *forum conveniens*, in light of a European jurisdictional rule which operates in an entirely different manner.[26]

### *(iii) The Role of Forum Conveniens*

Under the CPR and its predecessors, the court has always retained a "valuable safety-valve" of discretion to refuse permission to serve proceedings outside the jurisdiction—this is the concept of *forum conveniens*.[27] The adjudicatory discretion of English courts is a feature of the common law which arguably stands out the most in comparison with the approach under the BIR, which deliberately eschews any discretion in favour of certainty and clarity in the attribution of jurisdiction.[28] Contrast this with the approach taken by the Court of Justice under the Brussels Convention and the BIR—it draws a stark distinction between direct and indirect damage on the basis of the objectives of the BIR and the need to avoid a multiplicity of courts with jurisdiction, which heightens the risk of irreconcilable decisions.[29]

Lord Sumption argues in response that the jurisdictional gateways and the discretion as to *forum conveniens* serve completely different purposes. The gateways define the maximum extent of the jurisdiction which the English court is permitted to exercise. The discretion then operates to limit the exercise of the court's jurisdiction depending on the practicalities of the case.[30] The

[24] ibid [61] (Lord Wilson).
[25] See, eg, *Booth v Phillips* [2004] EWCA 1437 (Comm); *Cooley v Ramsay* [2008] EWHC 129; *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB).
[26] Adrian Briggs, 'The hidden depths of the law of jurisdiction' [2016] LMCLQ 236, 246.
[27] *Four Seasons* (n 1) [51] (Lady Hale).
[28] ibid.
[29] See Case C-364/93 *Marinari v Lloyds Bank Plc* [1996] QB 217; Case C-220/88 *Dumez France SA v Hessische Landesbank* [1990] ECR I-49.
[30] *Four Seasons* (n 1) [31] (Lord Sumption).

existence of this "safety-valve" discretion therefore should not be relevant to determining the proper ambit of any jurisdictional gateway. But while the respective individual purposes of the gateways and the discretion may be different, it is important to consider the service out requirements as a whole.

The CPR does not require that permission be given to serve out of the jurisdiction whenever the relevant gateway applied. There was always a discretion not to do so,[31] exercised in accordance with the principles laid down in *Spiliada Maritime Corpn v Cansulex Ltd*.[32] Among those principles, the most fundamental one is to identify the forum in which the case might most suitably be tried in the interests of all the parties and of the ends of justice.[33]

By recognising the three requirements of service out as forming one continuous process of judicial enquiry, it follows that the existence of the *forum conveniens* discretion must be relevant to the construction of the gateways. If the gateways were to be arbitrarily restricted, the practical effect is that the court would be barred from exercising its adjudicatory discretion in the interests of justice, thus emptying this discretion of its function. Lord Sumption's opined that the discretion is to limit the exercise of the court's jurisdiction, not to displace the criteria in the gateways.[34]

With respect, this view is based partly on a misunderstanding of *forum conveniens* as a *residual* discretion. The better view is that the discretion is *overriding* and constitutes a fundamental tenet of the common law regime of jurisdiction. It goes *beyond* the practicalities of litigation and mere convenience.[35] Even if one were to accept Lord Sumption's opinion, its converse must be equally valid—the criteria in the gateways exist to define the extent of the court's jurisdiction, not to displace the discretion. A broad interpretation of the tortious gateway is therefore justified in order to avoid the risk of the gateway being under-inclusive, thus shutting out meritorious claims even when the English courts are the most appropriate forum for the dispute to be heard.[36]

Lord Wilson referred to *Pike v The Indian Hotels Co*[37] as an example that would illumine the injustice to which any narrow interpretation of the word "damage" can give rise.[38] The claimant sustained serious injuries rendering him paraplegic during the Mumbai terrorist attacks in 2008 and

[31] ibid [40] (Lady Hale).
[32] *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, [1986] 3 WLR 972.
[33] ibid 480 (Lord Goff).
[34] *Four Seasons* (n 1) [31] (Lord Sumption).
[35] ibid [66] (Lord Wilson).
[36] Bergson, 'Consequential Damage and the Tort Gateway' (2016) 132 LQR 42.
[37] *Pike v The Indian Hotels Co Ltd* [2013] EWHC 4096 (QB).
[38] *Four Seasons* (n 1) [65] (Lord Wilson).

sought to sue the operator of the hotel in England. Despite significant factors connecting the claim to India, Stewart J held that it would be a denial of justice to prevent him from suing the operator in England, since were Mr Pike to sue the operator in the courts of India, the case would not be concluded for another 15 to 20 years, resulting in substantial delay.[39]

Given that CPR rule 6.21(2A) has effectively enshrined the *forum conveniens* principle by providing that "[t]he court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim", adopting a broader interpretation of the gateways seems more consistent with the structure and policy of the CPR. The tortious gateway should therefore be given a wide interpretation, encompassing both direct and indirect damage, as the majority (consisting of Lady Hale, Lord Wilson and Lord Clarke) has advocated. But alas, owing to the *obiter* nature of all this, English courts must await further definitive guidance on the matter.

[39] *Pike* (n 37) [58], [71] (Stewart J).