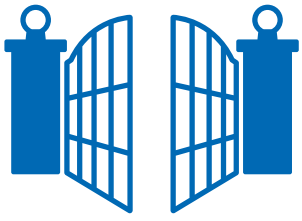
FONG CHAK KWAN V ASCENTIC LTD

HONG KONG COURT OF FINAL APPEAL ENDORSES WIDE MEANING OF "DAMAGE" IN TORT GATEWAY FOR SERVICE OUT OF THE JURISDICTION

Authored by: Wilson Leung (Barrister) - Serle Court

This article analyses the Hong Kong Court of Final Appeal's judgment in Fong Chak Kwan v Ascentic Ltd (2022) 25 HKCFAR 135, where Lord Collins of Mapesbury considered the meaning of "damage" in the tort gateway for service out of the jurisdiction. Lord Collins adopted a wide meaning of "damage" which includes all direct, indirect, and consequential damage flowing from the tort, and rejected a narrow interpretation that limits it to damage which completes the cause of action. In doing so, Lord Collins endorsed the majority judgments in the UK Supreme Court cases of Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 and Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45. Importantly, Lord Collins gave additional reasons for favouring the wide interpretation of the tort gateway, which are likely to have significant implications for the courts' future interpretations of the other gateways.



"Damage" and the tort gateway: the Brownlie decisions

The meaning of "damage" in the tort gateway for service out of the jurisdiction has attracted substantial debate. In the current English rules, the tort gateway appears in paragraph 3.1(9) of Practice Direction 6B. This includes the following limb, allowing the court to grant permission to serve out in circumstances where:

> "(9) A claim is made in tort where–
>
> (a) damage is sustained, or will be sustained, within the jurisdiction".

Does "damage" within this limb mean all damage that flows from the tort, including both physical harm and consequential financial loss? Or does it refer only to that damage which is necessary to complete the cause of action?

In two judgments arising out of the death of Sir Ian Brownlie QC (who was killed in a motor accident in Egypt), the UK Supreme Court decided in favour of the first, wider interpretation. In Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 ("Brownlie 1"), a majority held, obiter, that the word "damage" should be given its natural and ordinary meaning, which referred to any significant physical and financial detriment that the claimant has suffered as a result of the defendant's tortious

conduct.[1] In Brownlie v FS Cairo (Nile Plaza) LLC [2021] UKSC 45 ("Brownlie 2"), a differently constituted court came to the same conclusion, with the majority deciding that "damage" is not limited to the damage which completes the cause of action, but extends to any significant physical and financial damage caused by the wrongdoing.[2] The court accepted, however, that in relation to pure economic loss, the nature of such loss creates a need for constraints on the legal consequences of remote effects, which could give rise to "complex and difficult issues" as to where the damage was suffered.[3]

The upshot of Brownlie is that the tort gateway is capable of being satisfied where the claimant suffers any significant physical or consequential financial damage in England, even if all elements necessary to complete the cause of action (e.g. the accident and initial injury) had occurred abroad. Once the test for the gateway is satisfied, the court would go on to apply the discretionary test (discussed below) in deciding whether to permit service out.

The Fong Chak Kwan case

In Fong Chak Kwan v Ascentic Ltd (2022) 25 HKCFAR 135, the Hong Kong Court of Final Appeal ("HKCFA") joined the fray by analysing the equivalent Hong Kong rule[4] and agreeing with the majority decisions in Brownlie. The judgment on this issue was given by Lord Collins NPJ, whose views are notable as a former justice of the UK Supreme Court and also the longtime editor of Dicey, Morris & Collins on the Conflict of Laws.

The plaintiff was a Hong Kong resident who was employed by a US company to work in Mainland China ("PRC"), where he was injured in a factory accident. He returned to Hong Kong and received medical treatment. Based on the tort gateway, he obtained leave from the Hong Kong court to serve a writ of summons on the US company in Pennsylvania. The plaintiff conceded that he had suffered immediate bodily injuries in the PRC (and hence the cause of action in negligence was completed there), but argued that the indirect damage which he suffered in Hong Kong (including pain, loss of amenity, and medical expenses) was sufficient to bring his claim within the tort gateway.

The plaintiff obtained default judgment against the US company. However, the Employees Compensation Assistance Fund (a statutory fund providing relief payments to certain injured employees) ("the Fund") intervened and applied to set aside the order for service out.

The Fund's challenge was rejected by the HKCFA on two grounds. The first ground was that the Fund had no standing to intervene because (on a correct interpretation of its statute) it had no possible liability to the plaintiff. The second ground (which is relevant here) concerned the tort gateway. The Fund, relying on the minority view in Brownlie, contended that the word "damage" was limited to damage directly caused by the tortious act, and therefore the gateway was not satisfied because all such damage had occurred in the PRC.

HKCFA's analysis of Brownlie

The Fund's argument on the second issue was rejected by the HKCFA.

Lord Collins accepted the majority's reasoning in Brownlie based on the natural and ordinary meaning of the word "damage"[5]. However, he also articulated additional grounds for favouring it over the minority view. In particular, he pinpointed three flaws in the minority judgments of Lord Sumption in Brownlie 1 and Lord Leggatt in Brownlie 2.

The first flaw was the minority's assumption that the legislative purpose of the gateways was to identify a real connection between the cause of action and the domestic forum (e.g. Hong Kong or England).[6] Lord Collins opined[7] that this was not the correct lens with which to interpret the gateways. This was demonstrated by the fact that some of the gateways do not require any real connection between the claim and the domestic forum (e.g. the "necessary or proper party"[8] gateway).

The second flaw was the minority's assumption that the question of discretion is entirely separate from that of jurisdiction.[9] The third (and related) flaw was the assumption that the exercise of discretion is exclusively or mainly related to 'forum conveniens'.[10]

Lord Collins held that that was an erroneous characterisation of the court's discretion in a service out application. He pointed out[11] (echoing

1 The lead judgment was given by Baroness Hale PSC ([41], [52]-[55]), with the concurrence of Lord Wilson JSC ([64]-[67]) and Lord Clarke JSC ([68]-[69]). See the dissent of Lord Sumption JSC at [23]-[28], [31] (with which Lord Hughes JSC agreed).

2 Lord Lloyd-Jones JSC at [49]-[51], [64]-[68], [76] (with whom Lord Reed PSC, Lord Briggs JSC, and Lord Burrows JSC agreed). Lord Leggatt JSC dissented on this issue ([177], [192]-[194], [197]-[199], [208]-[209]).

3 [75]-[76] per Lord Lloyd-Jones.

4 Rules of the High Court, Order 11, rule 1(1)(f), : "the claim is founded on a tort and the damage was sustained…within the jurisdiction." This is identical to the pre-CPR rule in England (RSC Order 11, rule 1(1)(f)).

5 [92], [107]

6 Brownlie 1 at [28]; Brownlie 2 at [192]-[194].

7 [105], [109]-[110]

8 RHC O.11 r.1(1)(c) (Hong Kong); para 3.1(4) of PD 6B (England).

9 Brownlie 1 at [31]; Brownlie 2 at [196]-[197].

10 Brownlie 1 at [31]; Brownlie 2 at [198], [202].

11 [111]-[112]

the majority's view in Brownlie 2[12]) that the gateways alone do not confer jurisdiction; jurisdiction is only conferred if, in addition to satisfying one of the gateways, it is also shown that the domestic forum is the proper place to bring the claim. Lord Collins also explained[13] that the discretionary stage is not limited to mere considerations of forum conveniens (e.g. the location of witnesses). Instead, the court is entitled to consider other discretionary factors – including whether the case falls within both the "spirit" and "letter" of the gateway. Where the plaintiff has no real connection with the domestic forum, the court may refuse permission on the ground that the claim is not within the "spirit" of the gateway (irrespective of whether the forum conveniens factors are satisfied).

Thus, Lord Collins' view[14] (which expanded on the majority's analysis in Brownlie 1[15] and Brownlie 2[16]) was that the wide interpretation of "damage" would not lead to an unacceptable enlargement of the domestic courts' jurisdiction over tort claims (contra the fears of Lords Sumption and Leggatt[17]), because the courts would carefully exercise their discretion, which was "sufficiently muscular" to prevent any inappropriate assumption of jurisdiction.

Conclusion

The meaning of "damage" in the tort gateway appears to be authoritatively settled by the UK Supreme Court's judgments in Brownlie and now the HKCFA's decision in Fong Chak Kwan.

More generally, the reasoning in these judgments is likely to have significant implications for the courts' interpretation of the other gateways in future cases.

The emphasis on the role of the discretionary test – which was expressed forcefully in Fong Chak Kwan – may encourage the courts to favour a wide construction of the other gateways, on the premise that the discretionary stage would be robust enough to mitigate the potential excesses which might otherwise result from a broad interpretation.

It remains to be seen whether this trend is a positive one – giving the courts greater flexibility in dealing with service out applications, and claimants more options as to forum – or one which simply leads (in the words of Lord Leggatt) to more "unpredictability, inefficiency…and inconsistency."[18]

12 Brownlie 2 at [77]
13 [114]-[120]
14 [95], [118]-[120]
15 Brownlie 1 at [54], [66]-[67]
16 Brownlie 2 at [77]-[79]
17 Brownlie 1 at [28], [31]; Brownlie 2 at [193]-[194]
18 Brownlie 2 at [199]-[200]