CASE NOTE: FONG CHAK KWAN V ASCENTIC LIMITED & ORS [2022] HKCFA 12

Rede Chambers
29.06.2022

The meaning of the word "damage" is notoriously nebulous. So much so that the debate in the last two decades over what it means in the English tort jurisdictional gateway for service-out has resulted in two split decisions of the United Kingdom Supreme Court in Brownlie v Four Seasons Holdings Inc ("Brownlie I") and Brownlie v FS Cairo (Nile Plaza) LLC ("Brownlie II"). By its recent judgment in Fong Chak Kwan v Ascentic Limited & Ors [2022] HKCFA 12, the Hong Kong Court of Final Appeal ("CFA") finally had the opportunity to weigh in on this controversial issue in the context of Order 11, rule 1(1)(f) ("Gateway F") of the Rules of the High Court, Cap. 4A ("RHC") applicable in this jurisdiction.

In Fong Chak Kwan, the respondent plaintiff is a Hong Kong permanent resident employed by, inter alios, the 2nd Defendant, a United States company ("D2"), to work predominantly in the Mainland. He suffered serious injuries whilst working there, but returned to Hong Kong to receive medical treatment. He obtained leave to serve a writ on D2 in the United States, relying on, inter alia, Gateway F, and interlocutory default judgment was later entered against D2. The Employees Compensation Assistance Fund Board then intervened and applied to set aside the order granting leave to serve D2 as well as the interlocutory judgment.

At first instance, Marlene Ng J held that "the damage… sustained" under Gateway F includes indirect or consequential damage ("wide interpretation"), such as the medical expenditure and the pain, suffering and loss of amenities suffered by the Respondent in Hong Kong. In so doing, the judge preferred the majority view in Brownlie I over the minority view, which is that the phrase is limited to direct damage only ("narrow interpretation"). The Court of Appeal (Cheung and Yuen JJA) upheld the judge's decision on this issue.

The CFA granted leave to appeal to the board on, inter alia, the Gateway F Issue. As Lord Collins NPJ, writing for the unanimous court, observed, the determination of the "important issue raised in this part of the appeal" "to a large extent hinge[s] on the applicability of… the two decisions of the UK Supreme Court in the Brownlie litigation".

In dismissing the board's appeal, Lord Collins endorsed the wide interpretation of the majority in both Brownlie I and Brownlie II. Drawing support from overseas and local authorities, the wide interpretation is founded on the 'natural and ordinary' meaning of the word "damage" in the context of the tort gateway as viewed against its purpose, namely "the actionable harm caused by the tortious act, including all the bodily and consequential financial effects which the claimant suffers". To the extent that such interpretation might encourage forum-shopping or permit claims founded on only a tenuous amount of damage sustained in the jurisdiction, those concerns were met by the "robust enough" or "sufficiently muscular" forum conveniens discretion.

On the other hand, Lord Collins rejected the narrow interpretation which was advanced by the minority in Brownlie I and Brownlie II and adopted by the board in this appeal. His Lordship further held, in reference to the reasoning of Lord Leggatt for the minority in Brownlie II, that there are "three flaws" in the reasoning: First, Order 11, rule 1(1) of the RHC is intended to set out a list of situations in which the legislature considers that there may exist a sufficient, but not necessarily a real (and in some cases even tenuous), link with Hong Kong to justify the courts' assertion of long-arm jurisdiction. Further, the gateways alone do not confer long-arm jurisdiction, but form only one element of the jurisdictional test for service-out. Thus, before the court will give permission to serve proceedings out of the jurisdiction, not only must a claim pass through one of the gateways, but it must also be shown that Hong Kong is the forum conveniens (which often requires a homeward trend). Finally, it is "well established" that a claim must fall within both the letter and spirit of the rule by virtue of Order 11, rule 4(2) of the RHC (which provides that no leave to serve-out shall be granted " unless it shall be made sufficiently to appear to the Court that the case is a proper one for service-out") before the court would exercise its discretion to grant leave to serve out of the jurisdiction. This provides the answer to the counter-argument that the wide interpretation might enable a claimant to create a link with the jurisdiction after the event giving rise to the damage had occurred.

Notably, none of the justices in either of the Brownlie decisions had placed any reliance on this "spirit of the rule" principle. This was, in Lord Collins' view, explicable, as it might have been assumed in the United Kingdom that the line of authorities in support of such principle were inapplicable or obsolete following the replacement of Order 11, rule 4 of the Rules of Supreme Court (in substantially the same terms as Order 11, rule 4 of the RHC) by the requirement in rule 6.37(3) of the Civil Procedure Rules that the court "will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim", with the result that the court's discretion in permitting service-out was thought to be concerned only (or mainly) with forum conveniens. However, Lord Collins himself preferred "the contrary view" that the replacement should be interpreted simply as part of the

exercise in the Civil Procedure Rules to use less technical language than the old Rules of Supreme Court, and that it applies equally to the question whether a claim is within the spirit of the relevant head of jurisdiction, irrespective of forum conveniens factors.

There are at least three implications flowing from Lord Collins' judgment on service-out of cases concerning Gateway F and beyond. First, generally, no distinction between direct and indirect damage needs to be drawn when considering whether Gateway F has been satisfied. Hence, where the plaintiff is able to show a good arguable case that some significant "actionable harm caused by the tortious act" had been sustained by him in the jurisdiction (such as the incurrence of substantial medical expenditure consequent on personal injuries suffered abroad), he would be able to show that "the damage" had been sustained within the jurisdiction.

Secondly, the discretionary forum conveniens factors continue to play an important role in mitigating any excesses that may result from the wide interpretation of Gateway F as part of the court's overall exercise of discretion in permitting service-out. Such factors may include practical issues relating to trial, as well as the particular gateway(s) invoked.

Thirdly, Lord Collins' novel contributions lie in his views that the purpose of the jurisdictional gateways is to set out the situations in which there may be a sufficient (but not necessarily a real) link with the jurisdiction to justify the assertion of long-arm jurisdiction, which buttresses the mitigating principle (other than forum conveniens) that a claim must fall within "the spirit" of the gateways invoked before service-out ought to be permitted.

Yet, there remain fogs at the gateways. Lord Collins' view on the purpose of the jurisdictional gateways, coupled with the reminder that the gateways are but one element of the jurisdictional test for service-out, may have profound implications over not just Gateway F cases, but all cases invoking the courts' long-arm jurisdiction. The precise nature and extent of such implications, however, can only be clarified in the future.

As for the "spirit of the rule" principle, whilst the clear imperative to prevent abuse of the courts' long-arm jurisdiction is to be commended, the deployment of the principle as a guard-dog against excesses of the wide interpretation may potentially raise more questions than it answers in practice. For instance, what exactly is the "spirit" of Gateway F? And how does that operate to filter out cases in which there is "only a tenuous amount of damage" sustained in Hong Kong? It also remains for the courts to navigate these uncertainties.

In any event, Lord Collins' judgment represents a significant development in the way in which we understand and apply the jurisdictional test for service-out (not only in Gateway F cases, as the "spirit of the rule" principle could equally apply to other gateways), moving Hong Kong's jurisprudence in a similar but arguably narrower direction compared with that of the United Kingdom after Brownlie II.

Horace Wong SC, Clark Wang and Adrian TY Wong acted for the board in this landmark appeal. The CFA's judgement can be accessed here.