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IN *Fong v Ascentic Ltd.* [2022] HKCFA 12, Lord Collins of Mapesbury summoned the neglected spirit of the rules governing service out of the jurisdiction. If his influential lead in the Hong Kong Court of Final Appeal is followed by English judges, there may be an appreciable, and important, shift in the way that the courts approach questions of jurisdiction over foreign defendants. Although the formulation of the corresponding English rules of court and the Supreme Court's decision and reasoning in *FS Cairo L.L.C. v Brownlie* [2021] UKSC 45, [2022] A.C. 995 ("*Brownlie II*", noted Day [2022] C.L.J. 24) might be thought to stand in the way of this development, these impediments are not insuperable.

Mr. Fong, a resident of Hong Kong, entered into a contract of employment with Ascentic Ltd. ("Ascentic"), incorporated in Hong Kong, and Brentwood Industries Inc. ("Brentwood"), incorporated in Pennsylvania. He was assigned to work at a sewage treatment factory at Ningbo City in the People's Republic of China. In October 2014, he fell into the trench of a sedimentation tank and suffered serious personal injuries. He returned to Hong Kong shortly after the accident and received medical treatment there before issuing legal proceedings against Ascentic and Brentwood. His claim against Ascentic was settled, and he obtained a default judgment against Brentwood. The Employees Compensation Assistance Fund Board intervened and sought, unsuccessfully at every instance, to the challenge the court's jurisdiction.

The Hong Kong Court of Final Appeal held unanimously that the Board did not have standing to intervene (see Ribeiro P.J., [2022] HKFCA 12, at [57]–[59]). In a separate judgment, supported by the other Justices (at [6], [60], [61]), Lord Collins addressed the question whether the court had jurisdiction to adjudicate upon the claim against Brentwood. Order 11, rule 1(1) of the Hong Kong Rules of the High Court (RHC) provides that "service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ – … (f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction". This element of the rule is in materially the same terms as the former Order 11, rule 1(1)(f) of the Rules of the Supreme Court 1965 (RSC).

The applicability of Gateway (f) turned on the phrase "the damage was sustained … within the jurisdiction" (at [101]). In argument, the parties' submissions substantially replayed those that had been addressed to the

UK Supreme Court in *Brownlie II*. The Board submitted (at [71]) that only directly sustained damage should suffice to activate the Gateway. The claimant, supporting the conclusion of the Court of Appeal, submitted (at [72]) that the concept could not be so limited and extended to "all of the heads of damage which might be suffered as a result of tortious conduct, including all the detriment, physical, financial, and social which the plaintiff suffered as a result" (at [69]).

The broader meaning contended for by the claimant had been adopted by the Hong Kong Court of Appeal in *Dynasty Line Ltd. v Sukamto Sia* [2009] HKCA 197, [2009] 4 HKLRD 454. It was also favoured by the majority of the UK Supreme Court (Lords Lloyd-Jones, Reed, Briggs and Burrows) in *Brownlie II* (see *Fong*, at [86], [90]–[95], with reference also to the *obiter* reasoning of members of the differently constituted Supreme Court in the first *Brownlie* appeal – *Brownlie v Four Seasons Inc.* [2017] UKSC 80, [2018] 1 W.L.R. 192 ("*Brownlie I*")). The Board's narrower interpretation was supported, on the other hand, by the reasoning of Lord Sumption (*obiter*) in *Brownlie I* and that of Lord Leggatt (dissenting on this point) in *Brownlie II*.

Lord Collins concluded that the courts below had been correct to apply Gateway (f) in Mr. Fong's case (*Fong*, at [100]). His first step (at [102]) was to hold that the reference in the Gateway to "the damage" did not require that all the damage suffered by Mr. Fong should have been sustained within the jurisdiction. That proposition is supported by the English Court of Appeal's reasoning in *Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, 437 that "[i]t is enough if some significant damage has been sustained in England", followed by the Hong Kong Court of Appeal in *Dynasty Line*, above, at [33] (see *Fong*, at [86], using "occurred" instead of "been sustained"). Unfortunately, the formulation adopted by Lord Collins at this point in his judgment (at [102]; also at [80]: "that it was not necessary that all the damage should have been sustained within the jurisdiction, provided that damage has resulted from substantial and efficacious acts committed within the jurisdiction") elides the two alternative connecting factors used in the Gateway. This cannot have been His Lordship's intention, for all the relevant causal acts in Mr. Fong's case had occurred in China (see [2020] HKCFI 679, at [148]). It suffices that some significant damage has been sustained within the jurisdiction, regardless of where the causative acts have been committed.

Next, Lord Collins expressed his own opinion that the word "damage" should be understood in accordance with its "natural and ordinary meaning", which "does not distinguish between the damage which completes a cause of action and that which does not, nor does it distinguish between direct or indirect damage, or between physical or

financial damage" (at [107]). In his view, this interpretation accords with the legislative purpose of the gateways, which (at [105]) "is to set out a list of the situations in which the legislator considers that *there may be a sufficient link* with Hong Kong to justify a defendant in another country or law district being sued in Hong Kong" (emphasis added). In view of the discretionary nature of RHC Order 11, rule 1(1), it is not necessary to construe every gateway to demand a real connection to the forum (at [106], [109]).

In preferring the reasoning and conclusion of the majority in *Brownlie II* on this point, Lord Collins identified what he saw as three flawed assumptions in Lord Leggatt's dissent. First (*Fong*, at [110]), the assumption (*Brownlie II*, above, at [191]–[195]) that the gateways serve to guarantee a sufficient connection to the forum and should be construed to achieve that purpose. As Lord Collins noted (*Fong*, at [105]), the RHC gateways (like their Civil Procedure Rules (CPR) equivalents) deploy a variety of connecting factors, which in some cases demand a real connection to the forum and in others do not; indeed, in some cases, "the link may be tenuous". Second (*Fong*, at [111]), the assumption (*Brownlie II*, above, at [195]–[201]) that the question of discretion is entirely separate from that of jurisdiction and, third (*Fong*, at [111]), the related assumption that the exercise of discretion is exclusively or mainly related to *forum conveniens* considerations. Lord Collins agreed (at [112]) with Lord Lloyd-Jones's view in *Brownlie II*, above, at [77], that the jurisdictional gateways act in tandem with the court's discretion to refuse permission to serve out, a discretion that (as Lord Collins highlighted) must be exercised "with discrimination and scrupulous fairness to the defendant" (*Ocean Steamship Co. Ltd. v Queensland State Wheat Board* [1941] 1 K.B. 402, 417 (Du Parcq L.J.)). Lord Collins emphasised that RHC Order 11, rule 4(2), providing that leave to serve out should not be granted "unless … the case is a proper one for service out of the jurisdiction", does not confine the court's role to consideration of the appropriate forum for the trial of the action, but instead requires (at [117]) that it "must consider the substance of the matter and not merely whether the case technically falls within the letter of the head of jurisdiction in question: the case must be clearly within both the letter and the spirit of the head".

In His Lordship's view (*Fong*, at [118]), this distinct principle countered the argument of Lord Leggatt (*Brownlie II*, at [194]) that an expansive interpretation of the damage limb of the tort gateway might enable a claimant to manufacture a relevant connection to England. It could also address concerns that a trivial or fortuitous connection could open a gateway (*Fong*, at [117]).

The assumption, criticised by Lord Collins, that the *forum conveniens* enquiry provides the sole or predominant means of ensuring that the forum has a sufficient connection to the parties or the subject matter of the claim to justify an assertion of jurisdiction is present also in the reasoning of the majority in *Brownlie II*, at [77]–[79]. As Lord Collins notes (*Fong*, at [119]), the former RSC Order 11, rule 4(2) (in the same terms as its Hong Kong counterpart) was not carried forward into the CPR when they were amended in 2000 to make fresh provision for service out of the jurisdiction (SI 2000/221, rule 4 and Schedule 1). Instead, after a brief intermission, a new provision (rule 6.21(2A), now rule 6.37(3)) was inserted to the effect that "[t]he court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim" (SI 2000/940, rule 5). Recently, English judges have tended to assume that "proper place" is a synonym for *forum conveniens* or appropriate forum (*Lungowe v Vedanta Resources plc* [2019] UKSC 20, [2020] A.C. 1045, at [38], [66] (Lord Briggs); *Brownlie II*, above, at [28], [55], [76], [78]–[79], [82], [198]; *Fong*, at [119]).

Disagreeing with these *dicta*, Lord Collins suggested (at [119]) that "proper place" is simply a less technical way of expressing the former Order 11, rule 4(2) requirement ("proper one for service") and that rule 6.37(3) is more than capable of encompassing the question whether a claim is within the spirit, as well as the letter, of a particular gateway. This line of reasoning, if followed in England, would offer a *media sententia* between the majority and minority views in *Brownlie II*.

It must in any event be recalled that neither rule 6.36 nor rule 6.37(3) requires that the court *must* give permission if the claim falls within the letter of one or more of the gateways, the claim has a reasonable prospect of success and England is clearly the appropriate forum for the trial of the action. Instead, these two provisions give the court the power (but not the duty) to authorise the claimant to serve its claim form on a defendant outside England and Wales, bringing the defendant within the court's adjudicatory jurisdiction. If that is a correct characterisation of the legal basis on which the court acts, then it should then follow from CPR, rule 1.2 that the court, when it interprets the rules *and* when it exercises that power, must seek to give effect to the overriding objective. In *Brownlie II*, Lord Leggatt drew attention, at [202], to the potential significance of the overriding objective in interpreting the rules, but it is no less significant when it comes to their application in particular cases. If Lord Collins is right that we must invoke the "spirit of the rule", as well as its letter, then the formulation of the overriding objective in rule 1.1 seems as good a place to start as any,

broadening the range of factors that fall to be taken into account in deciding whether to authorise service out.

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