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Foreign parties and the tort jurisdiction gateway under the English CPR.

MANTE, J.

2023

Foreign parties and the tort jurisdiction gateway under the English CPR

Abstract

The Supreme Court of the United Kingdom took an expansive view of the word 'damage' under paragraph 3.1(9)(a) of the CPR Part 6, PD 6B on the tort jurisdictional gateway in the recent case of *FS Cairo (Nile Plaza) LLC v Lady Brownlie*. To the court, there was no good reason to limit the meaning of the word 'damage' to what was necessary to complete a cause of action in tort. It extended the meaning of the word to cover physical and financial damage caused by the wrongdoing and thereby allowed victims of torts committed outside the UK to maintain action for damages in an English court. The decision by the highest court in the UK raises the question whether the related paragraph 3.1(9)(b) of PD 6B of the CPR should also benefit from expansive interpretation. This piece critically examines the implications of a liberal interpretation of paragraph 3.1(9)(b) of PD 6B of the CPR for actions by foreign claimants in the English courts alleging duty of care by parent companies and their subsidiaries, especially those not domiciled in the UK. It explores the extent to which damage resulting from wrongful acts complained of – injuries to claimant's and damage to their properties occurring outside the UK – could be linked to the decisions or activities of parent companies made in the United Kingdom, and implications for the application of the tort gateway.

Key words: Foreign parties, English Civil Procedure Rule, Jurisdiction gateway, Tort

Foreign parties and the tort jurisdiction gateway under the English CPR

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Outline of presentation

- Context
- The Tort Gateway Rules
- Recent judicial Interpretations
- Implications for foreign parties

Context

- State of human interactions -more civil claims involving foreign parties.
- Service out of England and Wales - current rules :
 - CPR Part 6, Rules 6.36, 6.37 and Practice Direction (PD) 6B, para 3.1.
- Three conditions to be met:
 - Claim must fall under one of the Gateways under CPR PD 6B paragraph 3.1.
 - There must be a serious issue to be tried on the merits.
 - England must be the appropriate forum for trial (FS Cairo (Nile Plaza) LLC v, Lady Brownlie)



The Tort Gateway Rules

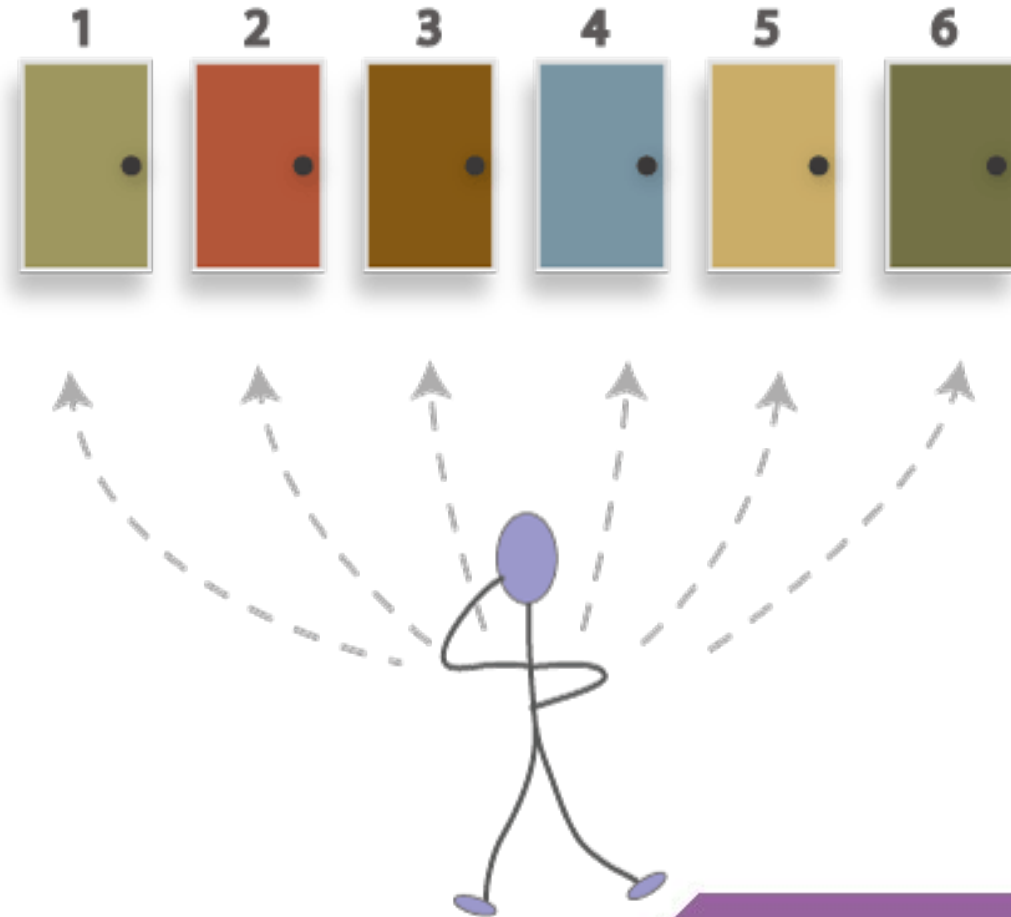
- CPR Part 6, PD 6B, Paragraph 3.1(9):

A claim is made in tort where –

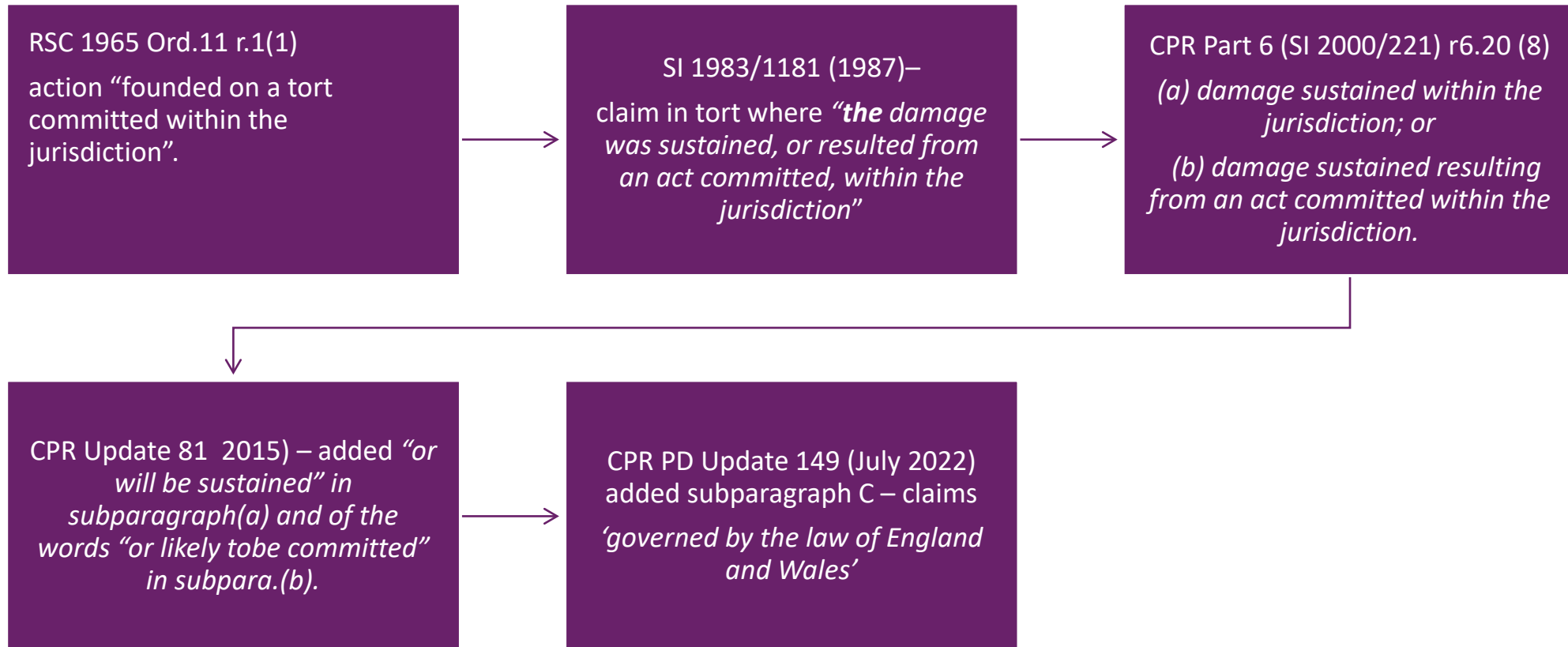
(a) damage was sustained, or will be sustained, within the jurisdiction;

(b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction; or

(c) the claim is governed by the law of England and Wales.



The Tort Gateway Rules -History



Judicial Interpretation—CPR Pt6,PD6B,Para 3.1(9)(a)

- Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc (1989) AC –
 - Where the claim was founded on a tort and either the damage was sustained within the jurisdiction, or the damage resulted from an act committed within the jurisdiction.
 - Where damage had occurred in more than one jurisdiction -significant damage in England is required to ground jurisdiction.
 - Where the tort consisted of acts done in more than one jurisdiction, and substantial acts had been committed within the court's jurisdiction

Judicial Interpretation—CPR Pt6,PD6B,Para 3.1(9)(a)

- Meaning of ‘Damage’
- Two important decisions from the Supreme Court:

**Four Seasons Holdings Inc v
Brownlie (2017)**

**FS Cairo (Nile Plaza) LLC v Lady
Brownlie (2021)**



Judicial Interpretation—CPR Pt6,PD6B,Para 3.1(9)(a) Meaning of ‘Damage’

- Majority:
 - ‘Damage’ must be given its literal meaning
 - The word "damage" in para.3.1(9)(a) simply referred to actionable harm, direct or indirect, flowing from the alleged wrongful act.
 - Interpretation based on the EU system (interpretation of Article 7(2) of the Brussels I Recast) not applicable.
 - Damage could be sustained in more than one place - see *Metall und Rohstoff* (CA decision)
 - This definition has the support of a string of first instance decisions and decisions from Canada and Australia – see e.g., *Wink v Croatia Osiguranje DD* (2013), *Qatar Airways Group Q.C.S.C. v Middle East News FZ LLC* (2020) etc.



Judicial Interpretation—CPR Pt6,PD6B,Para 3.1(9)(a) Meaning of ‘Damage’

- Minority :
 - ‘Damage’ if interpreted in context and with the purpose of the gateways in mind, should have a narrow meaning.
 - The word "damage" in para.3.1(9)(a) should refer to direct damage, the harm which constitutes the basis of the tort (which completes the cause of action) not ‘facts which are merely evidence of the financial value of that damage’.
 - Dissenting voices!



Illustration: Stylianou v Toyoshima [2013]

- Accident occurred in Australia
- Injuries were sustained in Australia
- Applicable law - Western Australian
- Active proceedings in Australia – 2+ years
- Considerations of the judge:-
 - Only issue in dispute was quantum of the claim
 - Claimant was English, lived in England and could not travel to Australia
 - Injuries will make it hard for her to give instructions during the hearing
 - Large number of expert witnesses would have to travel to Australia
- The fact that the defendant had no connection with England
- **Only connection: - he was involved in a collision with a British holidaymaker in Australia**

Implications of the majority view

- It confers on the English courts what amounts to a universal jurisdiction to entertain claims by English residents for more serious personal injuries suffered anywhere in the world.
- The ‘forum non conveniens’ guardrail has not achieved much so far – see FC Cairo – dissenting decision of Leggatt JSC at para 203
- Current approach does not sufficiently take account of foreign parties’ connection with England and Wales - Stylianou v Toyoshima; economic and other implications
- Lloyd LJ in *Golden Ocean Assurance Ltd v Martin (The Goldean Mariner)*... It must never become the practice to bring foreign defendants here as a matter of course...

CPR Part 6 – Practice Direction 6B

Para 3.1(9)(b)

Judicial Interpretation–

- *A claim is made in tort where –*
 - (b) *damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction*
- *Literal Interpretation of rule*
- *Expansive approach adopted in Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc (1989) AC –*
‘what if damage has resulted from acts committed partly within and partly without the jurisdiction?’ –p437

Judicial Interpretation—CPR Pt6,PD6B,Para 3.1(9)(b)

- *Metall und Rohstoff AG Approach:*

ask whether 'damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere): if the answer is yes, leave may...be given...'

- *Other cases : -*
 - *Newsat Holdings Ltd v Zani - negligent misstatement – where statement was made not where it was received*
 - *Manek v IIFL Wealth (UK) Ltd - Negligent misrepresentation - decisions taken at various meetings in London*

Implications of expansive interpretation of Para 3.1(9)

- When decisions made in England and implemented out of the jurisdiction results in or contributes to injury to foreign claimants or damage to their properties?
 - Parent company deemed to be managing/joint managing a subsidiary which commit tort outside England?
 - Parent company providing defective advice in England?
 - Parent company promulgates defective group-wide safety/environmental policies, which are then implemented by the subsidiary?
 - Parent company holds itself out as exercising a particular degree of supervision and control over the subsidiary in England?
- Should '*an act committed*' in paragraph 3.1.(9)(b) also be given an expansive interpretation to include 'direct and indirect acts'?

Conclusions

- Extra-territorial nature of service out of the jurisdiction – possible international repercussions
- Rules meant to ensure:
 - that there is real and substantial connection with England
 - that there is a ‘stable and legitimate basis for assumption of jurisdiction over a foreign defendant’.
- Changes to rules on tort gateway since mid-60 have progressively broaden scope of gateway...
- Current interpretation of paragraph 3.1.(9a) - English courts assuming universal jurisdiction over English residence in serious physical injury cases
- Further expansion of paragraph 3.1.(9b) possible/likely?
- Implications for foreign parties – mixed but overall negative...

