

unjust factor, with the potential to be applied as an alternative to duress or undue influence in cases of illegitimate pressure (an approach perhaps deriving implicit support from the structure of the plurality judgment) or should it be categorised as an equitable wrong, albeit a wrong that usually gives rise to restitution rather than compensation for a breach of duty? The textbooks give different answers to this question, and in Australia the analysis is complicated by the ubiquity of statutory unconscionability provisions which are both compensatory and restitutionary in purpose and effect.

Perhaps the most remarkable feature of the judgments in *Thorne v Kennedy* is the almost complete absence of discussion of the impact of independent legal advice on undue influence and unconscionability claims. The law reports are replete with decisions in which a plaintiff within a relationship of undue influence received legal advice vitiated by a conflict of interest (*Lancashire Loans Ltd v Black* [1934] 1 K.B. 380) or which failed to address the merits of the transaction into which the influenced party intended to enter (*Bester v Perpetual Trustee Co Ltd* [1970] 3 N.S.W.R. 30). The contrast between these cases and *Thorne v Kennedy* could not have been more striking. The plaintiff had signed the pre-nuptial agreement in spite of having received correct advice from an experienced family law practitioner that the provision made for her was entirely inadequate. Only Gordon J. ((2017) 350 A.L.R. 1 at [123]) explained, in discussing the unconscionability claim, why the receipt of independent legal advice was not a bar to relief:

“The fact that Ms Thorne was willing to sign both agreements *despite* being advised that they were ‘terrible’ serves to underscore the extent of the special disadvantage under which Ms Thorne laboured, and to reinforce the conclusion that in these circumstances, which Mr Kennedy had substantially created, it was unconscientious for Mr Kennedy to procure or accept her assent”.

Paradoxically, it was the plaintiff’s perversity in ignoring good advice that contributed to the finding that, for bargaining purposes, she was specially disadvantaged. What a court must therefore consider is not only the quality of advice but also the circumstances in which it was given. Legal advice is not necessarily emancipatory. *Thorne v Kennedy* demonstrates that the provision of legal advice, however sound, will not inevitably cure a contracting party’s inability to exercise independent judgment, nor prevent a contract from being found to be exploitative.¹⁵

Michael Bryan
University of Melbourne Law School

CASE COMMENT: SERVICE OUT IN THE SUPREME COURT

In an unusual obiter decision by a bare majority, the Supreme Court in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 W.L.R. 192 was divided on a number of issues concerning the rules for service out of the jurisdiction contained within the CPR. Where a claimant requires the court’s permission to

¹⁵ Australia; Duress; Enforcement; Legal advice; Pre-nuptial agreements; Unconscionability; Unconscionable bargains; Undue influence; Void contracts

serve out, he or she is required to show: (a) a reasonable prospect of success/a “serious issue to be tried” on the merits; (b) a “good arguable case” that each pleaded claim falls within (at least) one of the “gateways” in Practice Direction 6B (PD 6B) at para.3.1; and (c) that England is the proper place in which to bring the claim: see e.g., *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804 at [71]; rr.6.36 and 6.37.

Four main issues were considered by the Supreme Court: (i) the so-called “*Canada Trust* gloss”; (ii) the scope of the “contract gateway” for contracts concluded within the jurisdiction; (iii) whether consequential loss suffered by a claimant in England satisfies the “tort gateway”; and (iv) the effect of Lord Sumption’s earlier dictum in *Abela v Baadarani* [2013] UKSC 44; [2013] 1 W.L.R. 2043 at [53]. These will be addressed in turn.

The claimant, Lady Brownlie, was the wife of the late Sir Ian Brownlie, Chichele Professor of Public International Law at the University of Oxford. She and her family went on holiday to Egypt, where they stayed at the Four Seasons Hotel Cairo at Nile Plaza. Before the family left England, the claimant telephoned the hotel to book a tourist excursion. Tragically, during that excursion there was a serious road traffic accident. Sir Ian Brownlie and his daughter were killed and Lady Brownlie was among those seriously injured. The claimant sought to serve the defendant Canadian corporation (Holdings) out of the jurisdiction on the basis that it was the owner/operator of the Four Seasons chain of hotels, including the Nile Plaza Cairo. The claimant relied on the contract and tort gateways: PD 6B para.3.1(6)(a) and 3.1(9)(a).

The judge (Tugendhat J.) concluded that Holdings’ evidence on the ownership of the Nile Plaza hotel was unsatisfactory and that there was a strongly arguable case that Holdings was the relevant contractual counterparty for the excursion. This aspect of Tugendhat J.’s reasoning was upheld by the Court of Appeal but doubted by the Supreme Court, which took the exceptional step of inviting Holdings to file further evidence on the division of corporate responsibility within the Four Seasons group. This showed that Holdings was a non-trading holding company, which could not have been the contractual counterparty, nor could Holdings be vicariously liable in negligence in relation to the excursion. It followed that the claimant could not show a serious issue to be tried or a good arguable case in relation to the gateways (i.e. requirements (a) and (b) above). Accordingly, the Supreme Court unanimously allowed the appeal on the facts and declared that it had no jurisdiction to try the claimant’s claims. The court was at pains to emphasise that its general observations on jurisdiction were obiter dicta (at [17], [33] and [57]). Those observations are addressed in the remainder of this note.

First, the Supreme Court did not speak with an entirely consistent voice on the *Canada Trust* gloss: the proposition that in order to establish a good arguable case that a claim falls within one of the “gateways” in PD 6B, a claimant has to show that he or she has a “much better argument”, on the material available, that the gateway is satisfied: *Canada Trust v Stolzenberg (No.2)* [1998] 1 W.L.R. 547 at 555F; [1998] 1 All E.R. 318 at 324–325 CA.

Despite the recent affirmation of the *Canada Trust* gloss by Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 W.L.R. 1804 at [71], Lady Hale

(for the majority) (at [33]) stated that the correct test was whether a party could show a “good arguable case” and warned that “glosses should be avoided”.

Although Lady Hale (at [33]) said that she agreed with Lord Sumption on this point, Lord Sumption (with whom Lord Hughes agreed) appeared more receptive to the *Canada Trust* gloss. His Lordship stated (at [7]) that it remained a “serviceable test”, provided that it was correctly understood. Specifically, nothing was to be gained by use of the word “much”, which “suggest[ed] a superior standard of conviction … both uncertain and unwarranted in this context” (also at [7]).

Lord Sumption also gave a further exposition of the gloss, namely that: (i) the claimant is required to supply a plausible evidential basis for the application of a gateway; (ii) if an issue of fact or some other reason for doubt arises, the court must take a view on the material available if it can reliably do so; but (iii) if the court cannot do so, the “good arguable case” requirement will be satisfied by a plausible (albeit contested) evidential basis for satisfying the gateway (at [7]). Lady Hale emphasised (at [33]), however, that she did not consider this to amount to a further gloss in its own right.

The Supreme Court therefore unanimously disapproved of the application of any test which requires a claimant to show that he or she has a “much” better argument than the defendant. This is to be welcomed, since it was always unclear precisely what standard was imported by the word “much”.

Secondly, the court unanimously invited the Rules Committee to reconsider the scope of the “contract gateway” in PD 6B para.3.1(6)(a), which applies where “[a] claim is made in respect of a contract where the contract … was made within the jurisdiction”.

The court accepted, without much enthusiasm, that the domestic rules on instantaneous contract formation set out in *Entores v Miles Far East Corp* [1955] 2 Q.B. 327; [1955] 2 All E.R. 493 applied to determine where the contract was made for the purposes of the contract gateway (at [16] and [34]). This means that where a contract is made by telephone, it will be made in England only if the acceptance is received by the caller within the jurisdiction. Lord Sumption (at [16]) stated that the application of these rules in the jurisdiction context depended on “arbitrary” assumptions and gave rise to “serious practical difficulties”, which merited re-examination by the Rules Committee. Lady Hale expressed similar sentiments on reform (at [34]). It is submitted that there is much force in these criticisms, since the place where the acceptance is received may be a matter of happenstance and there is a particular risk in relation to this gateway that it has little connection with the subject matter of the dispute or the parties. It is also difficult for the court to determine the precise communication which constituted the acceptance at the preliminary jurisdiction stage, when the evidence is necessarily limited.

Thirdly, the Supreme Court split by a majority of 3:2 on the important issue of whether consequential loss satisfies the tort gateway in PD 6B para.3.1(9)(a), which requires that “damage was sustained… within the jurisdiction”. This is an issue of great significance for English individuals who suffer personal injuries abroad, but it is also important for commercial entities seeking to establish English jurisdiction in respect of financial losses (which may by virtue of the international nature of their operations be suffered in a number of jurisdictions).

The Court of Appeal in *Brownlie* [2015] EWCA Civ 665; [2016] 1 W.L.R. 1814 had held that consequential loss did *not* satisfy the gateway, overruling a series of first instance decisions that had adopted a wider construction (see [2016] 132 L.Q.R. 42). That court had interpreted the tort gateway consistently with European instruments *on choice of law* (specifically, Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40). The Supreme Court unanimously disapproved of this reliance on Rome II (see [2018] 1 W.L.R. 192 at [22], [49] and [58]), holding that applicable law and jurisdiction are different matters. It is submitted that this conclusion is correct: there is no reason why the jurisdictional gateways in the CPR should be affected by a European instrument on applicable law.

Nonetheless, the Supreme Court was divided on whether the lower court's ultimate conclusion on consequential loss was correct. The view of the majority (Lady Hale, Lord Wilson and Lord Clarke) rejected that court's approach, and held that consequential loss *did* satisfy the gateway. This was because: (i) no analogy could be drawn between the European rules of jurisdiction and the CPR rules where permission is required: the European decisions were of "no help" because the language used in the rules was "quite different" to the language used in the Brussels Convention or Regulation (at [50] and [61]); (ii) the two schemes of jurisdiction are different, because of the discretion enjoyed by the English court to decline to hear cases which satisfy the gateway (at [51] and addressed below); (iii) it was likely that the framers of the CPR had used the term "damage" in the "ordinary and natural meaning of the word" (at [52]); and (iv) the absence of the definite article in PD 6B para.3.1(9)(a) suggested a wider construction of the term (at [40]–[41], [64]–[65] and [68]).

By contrast, Lord Sumption and Lord Hughes in the minority (at [23]–[25]) favoured a much narrower approach, which was based on a distinction between the damage done to an interest which the law protects (i.e. bodily integrity in a case such as *Brownlie*) and subsequent loss which merely goes to quantification of the damage. "Damage" for the purposes of the tort gateway did not extend to the latter, and so did not extend to consequential loss. This conclusion was supported by the need to ensure there was a substantial (and not merely adventitious) link between the tort and England, as well as the legislative history of the tort gateway (at [28]–[29]).

It is submitted that at least in the context of personal injury cases, the majority's decision is preferable in policy terms. The minority's inflexible approach would leave the court with no jurisdiction in cases where there are strong arguments in favour of a claim being heard in a place other than that in which the accident occurred. By way of an extreme example, the minority's construction of the tort gateway would leave a seriously injured claimant without substantial justice where the jurisdiction in which the victim is on holiday happens to suffer from inordinate delay, or other systemic problems: see *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB) (discussed by the majority at [47] and [65]). Even where substantial justice is available, there are powerful arguments in favour of a fact-sensitive assessment through the forum conveniens discretion (which are discussed below) rather than a universal rule which requires a holidaymaker injured while temporarily abroad to litigate in the foreign forum.

It might be questioned whether the majority view is limited to personal injury cases such as *Brownlie*. The majority's reasoning was not confined to this context and PD 6B does not make any distinction between personal injury and other torts (referring only to "[a] claim ... made in tort"). Moreover, although Lady Hale did not expressly deal with this issue, her Ladyship did state that she had rejected a "middle way" of holding that the bodily effects of an injury would satisfy the tort gateway partly on the basis that "in some torts the damage is wholly financial, so that separating out the direct and the consequential would be even more difficult" (at [55]). *Brownlie* therefore casts doubt on previous authority to the contrary dealing with financial loss: e.g. *Bastone & Firminger v Nasima Enterprises* [1996] C.L.C. 1902.

In any case, given that the disagreement on the tort gateway was obiter, it remains to be seen whether the majority view will be the final word on the subject. In particular, although Lord Wilson joined with the majority, his Lordship suggested that it "may ... be appropriate" for the majority's views on the tort gateway to form no part of the Supreme Court's decision given the "far-reaching" consequences and the less full argument on the law given the debate before the Supreme Court on the facts (at [57]). In recent times, a number of important legal developments have occurred obiter on the facts before the Supreme Court, for example *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467 (illegality) and *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67; [2017] 3 W.L.R. 1212 (criminal dishonesty). This can give rise to difficult questions as to how far the Supreme Court's decision recasts the previous law: see, in the context of illegality, *Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB); [2017] 1 W.L.R. 2673 at [90]–[93]. In this case, the majority decision can be expected to be persuasive in the lower courts, and is likely to be followed in practice, not least because the majority endorsed a series of first instance decisions (discussed below) whilst overruling the Court of Appeal case which had disapproved of those decisions.

Finally on the tort gateway, it is submitted (with respect) that some aspects of Lord Wilson's reasoning are open to question. His Lordship held that: (i) the Brussels Recast Regulation (Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1) applied only where the defendant is domiciled in the EU (citing art.4, at [59]); and (ii) that it was "necessary" for the CPR to be at least as wide as the European Regulations (at [60]). The former is an over-simplification because some articles of the Brussels Recast apply to non-EU-domiciled defendants (for example arts 18(1), 21(2) and 25). The latter overlooks the free-standing regime in the CPR for service out in Brussels Regulation cases, in relation to which the gateways are irrelevant: CPR rr.6.33(2) and 6.34.

Fourthly, the Supreme Court considered the effect of Lord Sumption's earlier dictum in *Abela v Baadarani* ([2013] UKSC 44; [2013] 1 W.L.R. 2043 at [53]) that:

"It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum".

Lord Sumption's comments were made in an alternative service case, but have subsequently been applied as a matter of ratio in the service out context: e.g. *Fujifilm v AbbVie* [2016] EWHC 2204 (Pat); [2017] Bus. L.R. 333 at [83].

Professor Briggs has argued that Lord Sumption's obiter comments in *Abela* supported the "downgrading" of the need to satisfy a relevant jurisdictional gateway, which he suggested might ultimately lead to their "oblivion": Briggs [2013] L.M.C.L.Q. 415 at 418; see also Briggs, *Civil Jurisdiction and Judgments*, 6th edn (2015), at para.4.61. For contrary views on *Abela*, see Andrew Dickinson (2014) 130 L.Q.R. 197 and Lord Collins (2014) 130 L.Q.R. 555.

In *Brownlie*, Lord Sumption noted and rejected Professor Briggs' argument, stating that it would be "contrary to principle, and [was] not warranted by anything that was said in *Abela v Baadarani*" (at [31]). Lord Sumption went further, however, and stated that although in *Abela* he had "protested against the importation of an artificial presumption against service out as being inherently 'exorbitant'", his Lordship had:

"not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion".

His Lordship held that the correct approach to the gateways ought to be "a neutral question of construction or discretion" (all at [31]).

The argument that a broad interpretation of the gateways could be justified by placing greater weight on the "control valve" of the forum conveniens analysis had also been advocated by Briggs in *Civil Jurisdiction and Judgments*, 6th edn (2015), at para.4.73. A similar "control valve" argument had also been used to distinguish case law on the Brussels Convention or Regulation in a number of first instance decisions dealing with consequential loss and the tort gateway, for example, *Cooley v Ramsey* [2008] EWHC 129 (QB); [2008] I.L.Pr. 27 at [34] and [43]; *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB) at [41].

Whilst Lady Hale, Lord Wilson and Lord Clarke did not deal expressly with Lord Sumption's obiter comments in *Abela*, the approach of the majority accords in substance with the view that a broader construction of the gateways is justified by the discretion left to the court by the forum conveniens requirement. This is consistent with the majority's endorsement of *Cooley* and *Wink* (at [48] and [69]) and their reliance on the forum conveniens discretion when reaching their conclusions (at [51], [54] and [58]). For example, Lady Hale responded to the argument that a broad interpretation of the tort gateway could result in the claimant choosing where to bring their claim by saying that that could be prevented by a "robust" application of the forum conveniens requirement (at [54]).

The majority's approach is significant because other historic limitations on the ability of a claimant to serve out appear to have arisen from the traditionally narrow approach to the gateways, for example that a claim had to fall within the "spirit" as well as the letter of the gateways: *Johnson v Taylor* [1920] A.C. 144 at 154; doubted in *Sharab v Al-Saud* [2009] EWCA Civ 353; [2009] 2 Lloyd's Rep. 160

at [35]. It may therefore be that the last has not yet been heard of Lord Sumption's dictum in *Abela*.⁶⁵

Ian Bergson
Barrister, London

Joshua Folkard
Barrister, London

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⁶⁵ Consequential loss; Obiter dicta; Personal injury claims; Service out of jurisdiction; Tortious liability