that a party has acted reprehensibly. While a court will be guided by those precedents, inevitably future judges are going to be forced to reach a moral or value judgement of their own on the issue of whether the conduct in pre-contractual negotiations is reprehensible. Lord Burrows was therefore right to say (at [133]) that, far from adding certainty, Lord Hodge's purportedly narrower approach would "create considerable uncertainty in the realm of commercial contracts". If English law is, alas, to be stuck with a lawful act duress doctrine, the approach of Lord Burrows is undoubtedly more certain and so to be preferred.

There is one final point to note. Although the multi-factorial approach in *DSND* has now been conclusively rejected, it is not clear what replaces it in the context of a claim for economic duress based on a threatened breach of contract. The Supreme Court said nothing about this. However, in the Court of Appeal, David Richards L.J. had noted ([2020] Ch. 98 at [51]) that a court might make a value judgement about whether a particular breach of contract is sufficiently illegitimate to count. Given that the only reported decision in which a threatened breach of contract was in fact held to be legitimate is *DSND* itself, this will need to be revisited. One option would be to extend the majority test of reprehensible conduct to this form of unlawful act duress; the alternative would be to hold that any threat to break a contractual promise should be sufficient for the purposes of a duress claim. It is suggested that the latter approach is preferable. Unlawful acts or threats—even if "only" a breach of contract—should always be treated as being illegitimate. That does not mean that a claim for duress will always succeed once a breach of contract is identified. In the context of contractual renegotiations, a party may be explaining that they simply will not be able meet their promises, unless the terms of the contract are varied, without that necessarily amounting to a threat. Further, as Lord Burrows noted ([2021] 3 W.L.R. 727 at [78]–[79]), the test for causation in cases of economic duress is much more searching in any event. ☙

William Day
Downing College, University of Cambridge

CASE COMMENT: SERVICE OUT IN THE SUPREME COURT (AGAIN)

Nearly a decade after proceedings in England were first issued, and following a second appeal to the UK's highest court on the same issue, the Supreme Court has definitively held that a wide interpretation is to be adopted to the tort gateway that applies when a claimant seeks the English court's permission to serve a tortious claim on a foreign defendant overseas on the basis that damage has been suffered here: *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45; [2021] 3 W.L.R. 1011 (*Brownlie II*). The Supreme Court accordingly allowed Lady Brownlie's claim from a tragic accident abroad to proceed in England.

Brownlie II is the leading authority on the "damage" aspect of the tort gateway in para.3.1(9)(a) of CPR PD 6B (Service out of the Jurisdiction) (PD 6B), which

☙ Commercial contracts; Duress; Rescission; Travel agents; Unconscionability

applies where "damage was sustained … within the jurisdiction". By contrast, it does not deal with the other aspect of the tort gateway at para.3.1(9)(b) of PD 6B (which is targeted at acts committed within the jurisdiction and which is not considered further in this note).

The meaning of "damage" for service out purposes has long divided judges and academic commentators. By a 4-1 majority, the Supreme Court in *Brownlie II* upheld the conclusion, obiter, and by a bare majority of 3-2, of a differently constituted panel of the Supreme Court at an earlier stage of the same case: *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80; [2018] 1 W.L.R. 192 (*Brownlie I*, noted at (2018) 134 L.Q.R. 344). In so finding, the Supreme Court in *Brownlie II* dismissed an appeal against the Court of Appeal's decision, which had followed (also by a majority) the approach in *Brownlie I*: [2020] EWCA Civ 996; [2021] 2 All E.R. 605.

The consequence is that in many, if not all, cases where an English-based claimant suffers substantial injuries abroad owing to a foreign defendant's negligence, the gateway will be satisfied such that (if the two other core requirements identified below are also met) the English court will have jurisdiction. The Supreme Court's conclusion moreover has particular resonance post-Brexit, given the UK's departure from the European jurisdictional regime in the Brussels Regulation and the corresponding increased importance of the gateways in a much wider range of cases where a claimant needs to serve out of the jurisdiction.

In order to obtain permission to serve out, a claimant must show: (a) a good arguable case that the claims fall within one of the gateways in PD 6B para.3.1; (b) a serious issue to be tried on the merits; and (c) that England is the appropriate forum and that the court should exercise its discretion to permit service out of the jurisdiction (see *Brownlie II* [2021] 3 W.L.R. 1011 at [25]).

So far as *Brownlie II* is concerned, there were two principal issues before the Supreme Court. The first was whether requirement (a) was satisfied as a matter of law for personal injury claims arising following a foreign accident. The Supreme Court found (Lord Lloyd-Jones giving the leading judgment for the majority, Lord Leggatt dissenting) that "damage" for the purposes of the gateway refers to actionable harm, direct or indirect, caused by the tortious act (including all the bodily and consequential financial effects which the claimant suffers) and was *not* confined to direct damage. Damage had therefore been suffered in England notwithstanding that the accident had occurred abroad. The second issue was whether requirement (b) was satisfied for certain of Lady Brownlie's claims in circumstances where it was common ground that foreign (Egyptian) law governed them but no particulars of foreign law had been pleaded at the service-out stage. This note principally focuses on the first issue, but the second is briefly addressed at the end of this note.

Lady Brownlie and her husband, the late Sir Ian Brownlie, former Chichele Professor of Public International Law at the University of Oxford, and their family went on holiday to Egypt and stayed at the Four Seasons Hotel Cairo at Nile Plaza. Prior to leaving the UK, Lady Brownlie booked an excursion through the hotel's concierge. Tragically, a serious road traffic accident occurred on the excursion. Lady Brownlie was seriously injured, and Sir Ian Brownlie and their daughter were killed. She sought redress in the English courts, bringing claims in contract

and in tort, and suing in her own right for her personal injuries, as executrix and on behalf of Sir Ian's estate and a dependency claim for wrongful death.

Proceedings were first issued in 2012. The core defendant was named as Four Seasons' Canadian parent company (Holdings) after limited information on the corporate structure had been supplied at the pre-action stage to the claimant's solicitors. Permission to serve out was granted ex parte in the usual way and Holdings then applied to set aside the order. A series of interlocutory hearings ensued, culminating in the matter coming before the Supreme Court in *Brownlie I*. The Supreme Court took the exceptional course of inviting Holdings to file further evidence on the precise division of corporate responsibility for the operation of the Cairo hotel. This showed that Holdings was a non-trading company which neither owned nor operated the Cairo hotel. The Supreme Court therefore unanimously allowed the appeal on the basis that requirement (b) could not be satisfied because the wrong defendant had been sued. It nonetheless divided obiter and by a 3-2 majority on the correct interpretation of the tort gateway, with Lady Hale, Lord Wilson and Lord Clarke in the majority favouring a broad interpretation, and Lord Sumption and Lord Hughes in the minority favouring a narrow interpretation (see further (2018) 134 L.Q.R. 344 at 347).

Following the decision in *Brownlie I*, a successful application was made to substitute the relevant defendant who operated the hotel, FS Cairo (Nile Plaza) LLC ("Nile Plaza") in place of Holdings. Nile Plaza in due course challenged jurisdiction in respect of the reconstituted proceedings, inter alia on the basis that no damage had been suffered in England, such that the tort gateway was not engaged. The lower courts (Nicol J. and the Court of Appeal by a 2-1 majority, Arnold L.J. dissenting) followed the majority's obiter views in *Brownlie I*, with the matter coming back before the Supreme Court for definitive resolution in *Brownlie II*.

It is convenient first to address three core areas of agreement amongst the Supreme Court panel, before turning to examine the areas of disagreement.

First, Lord Lloyd-Jones for the majority, and Lord Leggatt in his dissenting judgment ([2021] 3 W.L.R. 1011 at [46] and [182], respectively) each reject any analogy between what constitutes "damage" for the purposes of the tort gateway and "damage" for choice of law purposes under the Rome II Regulation (Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40). Rome II draws a distinction between direct damage (which is the lodestar for the general rule on choice of law in art.4(1) Rome II) and the "indirect consequences [of the event giving rise to the damage]", such as consequential losses, which are irrelevant to the general rule in art.4(1). As Lord Leggatt succinctly put it at [182] (it is respectfully submitted, rightly), the legal context for jurisdiction and choice of law is different and:

> "[t]here is no necessary relationship between the law applicable to a claim and the question whether the courts of a country have jurisdiction over that claim."

The Supreme Court in this respect is *ad idem* with the unanimous conclusion reached previously in *Brownlie I*, disapproving the earlier judgment of the Court of Appeal in *Brownlie I* which held otherwise (noted at (2016) 132 L.Q.R. 42).

Secondly, the Supreme Court unanimously rejected an argument that, given the legislative history of the tort gateway, it should be interpreted to be no wider than the analogous European rule *on jurisdiction* (now in art.7(2) of the Brussels Regulation, Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1). Article 7(2) is engaged in respect of the courts of the place where the harmful event occurred. It has generally been interpreted restrictively as a derogation from the general rule of domicile-based jurisdiction under the Regulation and (so far has damage is concerned) has been limited to *direct* damage only. These authorities are also "likely to assist" when considering what constitutes direct damage for the purposes of art.4(1) of Rome II: see e.g., Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (2019), at para.35-024, approved in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [485].

Lord Lloyd-Jones held (it is respectfully submitted rightly) that given the fundamental differences between the European and common law jurisdiction regimes, assimilation between art.7(2) and the tort gateway would be "totally inappropriate" and the scope of the exceptional special jurisdiction for Brussels I purposes cannot be the defining consideration for the scope of the tort gateway (see [2021] 3 W.L.R. 1011 at [55]). Lord Leggatt agreed that the two rules did not have exactly the same scope, observing (at [180]) that the Brussels regime operates in a different way from the common law rules, given the greater flexibility associated with the latter.

Thirdly, a core aspect of the minority's narrow interpretation of the tort gateway in *Brownlie I* was based on a distinction between the damage done to an interest which the law protects (i.e. bodily integrity in the case at hand) and subsequent loss which merely goes to quantification. Lord Sumption had held that there was a clear relationship between the concept of "damage" for tort gateway purposes and damage which "serves to complete a cause of action in tort", even if the two concepts are not coterminous (*Brownlie I* [2018] 1 W.L.R. 192 at [23]). The Supreme Court in *Brownlie II* unanimously disapproved any approach which accords special significance to where the cause of action was completed, with Lord Lloyd-Jones observing that this was "unduly restrictive" (see [2021] 3 W.L.R. 1011 at [49]–[51] and [181]).

Turning to the areas of disagreement, shorn to its essentials, these concerned the proper ambit of the gateway and the interrelationship with the other requirements for service out. Specifically, there was disagreement as to whether (as the majority held) a wide approach was justified, with forum conveniens (i.e. requirement (c) above) having a greater role as a "safety valve", or (as Lord Leggatt held) a narrower approach was to be preferred, with the gateway itself acting as a more substantive filter. Underhill L.J. pithily summarised the territory of the debate in the Court of Appeal in *Brownlie II*, observing that there are powerful points to be made on both sides, "the language of the Practice Direction is capable of both a wide and a narrow interpretation" and "the choice between the two interpretations depends on general considerations of legal principle and policy": see [2021] 2 All E.R. 605 at [159]. (For academic commentary following *Brownlie I* advocating different approaches to the tort gateway, see e.g., Merrett, "Forum Conveniens" in Day and Worthington (eds), *Challenging Private Law: Lord Sumption on the*

Supreme Court (2020); Briggs [2018] L.M.C.L.Q. 196; and Dickinson [2018] L.M.C.L.Q. 189, who acknowledges that there is no self-evidently correct answer.)

The majority in *Brownlie II* followed a line of first instance personal injury cases which Lord Lloyd-Jones held strongly supported the conclusion that damage had been suffered in England, interpreting the concept as extending to any damage flowing from the tort (see [2021] 3 W.L.R. 1011 at [57]–[68]). They also specifically approved the Court of Appeal's important earlier decision in the economic loss case of *Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc* [1990] 1 Q.B. 391; [1989] 3 All E.R. 14, which held that it was enough if some significant damage is sustained in England and which acknowledges that damage for tort gateway purposes can occur in more than one place: [2021] 3 W.L.R. 1011 at [34]–[36], [51] and [81]. By contrast, Lord Leggatt's dissent endorsed Lord Sumption's reasoning in *Brownlie I* that the purpose of the gateways was to identify some *substantial* link to England (at [191]–[194]), and the claimant's interpretation amounted in substance not to a gateway but "an open territory with no fence" (at [171]). He favoured a narrower interpretation, which drew on the European jurisprudence (and a line of domestic cases following the ECJ authorities in an economic loss context, addressed below) which distinguish between direct and indirect damage: see at [178], [183] and [208]–[209].

In policy terms, it is submitted that there is much to be said for the majority's more flexible approach. In particular, the conclusion that a distinction between direct and indirect damage is not necessary or appropriate under the tort gateway is to be welcomed given the different ways the domestic and European rules operate. As noted above, Lord Leggatt's dissent accepted that the tort gateway and art.7(2) of the Brussels Regulation need not have the same ambit, but his Lordship appeared in substance to interpret them as covering the same or similar ground, in the interests of ensuring the gateway constituted a meaningful (or "real and substantial") threshold requirement: see at [189], [202] and [209]. It is respectfully submitted that if one accepts that the touchstone for the purpose of the gateway is "damage … sustained … within the jurisdiction" (and *not* the damage, direct damage or all damage), the majority's conclusion that damage had been suffered "in a very real sense" in the jurisdiction—viz from the pain, suffering and loss of amenity consequent upon the accident and the related financial consequences—is to be preferred: see at [76] and [83]; cf. at [176].

An important unresolved question arising following judgment in *Brownlie II* concerns the application of the Supreme Court's decision to pure economic loss cases. In *Brownlie I*, Lady Hale had praised the possibility of distinguishing between continuing physical or psychological effects of the wrongful act on the one hand (where the tort gateway would be engaged) and consequential financial losses on the other (where it would not). She observed however that it is "difficult to find a warrant for that in the language used" and therefore proposed to "adopt the ordinary and natural meaning of the language used in the Rules" ([2018] 1 W.L.R. 192 at [55]). In *Brownlie II*, Lord Lloyd-Jones held that it was necessary to approach the line of economic loss cases relied upon by Nile Plaza in support of its narrower interpretation of the tort gateway with a "degree of caution", given that the tort gateway and art.7(2) of the Brussels Regulation are not coterminous. He recognised however that pure economic loss cases could give rise to "complex and difficult

issues as to where the damage was suffered" which may require "careful analysis" and accepted the proposition that:

> "the mere fact of any economic loss, however remote, felt by a claimant where he or she lives or, if a corporation, where it has its business seat would be an unsatisfactory basis for the exercise of jurisdiction" (see [2021] 3 W.L.R. 1011 at [74]–[76], and cf. Lord Leggatt at [190] and [208]).

The precise contours of the tort gateway in economic loss cases will therefore need to be developed in the subsequent authorities.

Putting the debate on the tort gateway aside and turning to the second issue identified at the outset of this note, Lord Leggatt gave the sole judgment on behalf of a unanimous Supreme Court on this point. The judgment looks set to become an important decision on proof of foreign law in the English courts. The question was whether, owing to gaps or shortcomings in the Egyptian law evidence which had been filed for the purposes of obtaining permission to serve out, each of the foreign law governed claims had a real prospect of success (and thus whether requirement (b), set out above was satisfied), and how far it was open to the claimant to rely on English law principles in this context. Lord Leggatt drew a distinction between two different rules which he held are conceptually distinct: the "default rule" that the English courts apply English law unless either party pleads foreign law applies to their dispute on the one hand and the "presumption of similarity" which is a rule of evidence concerning the content of foreign law itself on the other (see at [112]). The default rule could not apply on the facts of *Brownlie II*, because the only claims advanced in the statements of case were pursuant to Egyptian law (see at [118]). While emphasising that the application of the "presumption of similarity" is necessarily fact sensitive, Lord Leggatt provided (at [143]–[149]) some general observations as to the contexts in which it may or may not be appropriate for it to operate. He held that the procedural context matters and there may be more scope for relying on the presumption at an early stage of proceedings when seeking to surmount the merits threshold for service out purposes. Critically for the purposes of the case at hand, the Supreme Court upheld the judge's conclusion that relying on the presumption of similarity with English law was sufficient to show that the pleaded claims have a real prospect of success and that was not changed by the foreign law expert evidence that had been adduced (see at [157] and [160]).

Finally, before leaving *Brownlie II*, the possibility that the second appeal to the Supreme Court was academic should be acknowledged. In an unfortunate twist, the Supreme Court suggested obiter that the claimant may have been able to rely against Nile Plaza on a different gateway entirely: see at [22], [85]–[87], [210] and [214]–[216]. In particular, a "connected claims" gateway was introduced into PD 6B at para.3.1(4A) in October 2015 (for commentary on this development following *Brownlie I*, see (2016) 132 L.Q.R. 42 at 46). The connected claims gateway was highlighted by Lord Burrows in the course of the hearing. It was available because Nicol J. had allowed the reconstituted contractual claim against Nile Plaza to proceed and permission to appeal against that conclusion had been refused.

Even if the appeal could have been avoided had a different procedural course been taken, the Supreme Court's definitive clarification of the scope of the tort gateway in the personal injury context and the endorsement of the majority's approach in *Brownlie I* is to be welcomed. That is so even if the decision may not be the last word on the application of the tort gateway to economic losses. ↺

Ian Bergson
Barrister, *London*

MASS COMPENSATION CLAIMS FOR ILLEGAL ONLINE TRACKING

Lloyd v Google is one of the most important data privacy and collective redress disputes to date. The claim was based on breach of the Data Protection Act 1998 (DPA 1998). Google illegally tracked the web browsing activity of millions of individuals and used the collected data for targeted advertising. Given how widespread such online tracking practices are these days, the Supreme Court's unanimous judgment ([2021] UKSC 50; [2021] 3 W.L.R. 1268) provides a much-needed clarification of the law.

Mr Lloyd, backed by a commercial litigation funder, applied to serve English proceedings against Google outside the jurisdiction. Mr Lloyd pursued his claim as a representative action (CPR r.19.6) on behalf of himself and some 4.4 million of Apple iPhone users. The sole remedy sought was "compensation" pursuant to s.13(1) of the DPA 1998, namely compensation for "loss of control" over personal data of the represented individuals. No material damage or distress was alleged.

According to CPR r 19.6, "[w]here more than one person has the same interest in a claim" the court may direct that a person may represent those other persons who have that interest. According to s.13(1) of the DPA 1998, any individual:

> "who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the controller for that damage".

On the claimant's case—rejected by the High Court ([2018] EWHC 2599 (QB); [2019] 1 W.L.R. 1265) but unanimously accepted by the Court of Appeal ([2019] EWCA Civ 1599; [2020] Q.B. 747 at [153] and [110]):

> "an individual is entitled to … compensation … whenever a data controller fails to comply with any of the requirements of the [DPA 1998] in relation to any personal data of which that individual is the subject, provided that the contravention [and resulting 'damage'] is not trivial".

No wonder data controllers nervously scratched their heads prior to the UKSC judgment. There was a worry that data subjects would be able successfully to demand compensation for any non-trivial contravention of data protection laws in respect of their personal data without proof of actual harm. According to the Court

↺ Allocation of jurisdiction; Economic loss; Foreign law; Personal injury claims; Presumptions; Service out of jurisdiction; Similarity; Torts