All England Law Reports/1978/Volume 1 /Hesperides Hotels Ltd and another v Aegean Turkish Holidays Ltd and another - [1978] 1 All ER 277

Hesperides Hotels Ltd and another v Aegean Turkish Holidays Ltd and another

COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, ROSKILL AND SCARMAN LJJ

16, 17, 18, 19, 23 MAY 1977

Conflict of laws - Foreign government - Recognition - Law as declared by foreign government - Foreign government not recognised by United Kingdom government as de jure or de facto government - Administration controlling northern Cyprus - Occupation of plaintiffs' hotels lawful and not trespass according to laws made by administration - Plaintiffs bringing action in England for conspiracy in England to effect trespass to hotels and their contents - Whether claim justiciable in England when trespass not actionable in foreign territory.

Conflict of laws - Foreign land - Trespass to foreign land - Jurisdiction of English courts to entertain action for trespass to foreign land - Action framed as claim for conspiracy in England to effect trespass to foreign land - Whether jurisdiction to entertain action.

In 1960 the United Kingdom Parliament set up the Republic of Cyprus. The plaintiffs, two Greek Cypriot family companies, incorporated under the law of the republic, were the owners respectively of two hotels at Kyrenia in northern Cyprus. In July 1974 Turkey invaded and occupied northern Cyprus including Kyrenia. In consequence the plaintiffs fled to southern Cyprus and had been unable to return to Kyrenia. Northern Cyprus was controlled by a body called the Turkish Federated State of Cyprus. That body authorised occupation and use of the plaintiffs' hotels by Turkish Cypriots. In 1976 the Turkish Federated State of Cyprus issued in England, through a London travel agency, brochures which advertised the hotels to English holidaymakers from whom bookings for holidays at the hotels were accepted by the travel agency. On 16 February 1977 the plaintiffs issued a writ against the travel agency and against M, the London representative of the Turkish Federated State of Cyprus in which the plaintiffs asserted ownership of the hotels, admitted that they had been out of possession of them since 1974, and asserted that the defendants had conspired together to effect trespasses to the hotels by the unauthorised use of them. The writ claimed damages for conspiracy to effect the trespasses and an injunction restraining the defendants from conspiring to procure, encourage or facilitate a trespass to the hotels. The travel agency submitted to a perpetual injunction in the terms claimed. The plaintiffs applied to the judge in chambers for an interlocutory injunction, until trial of the action or further order, against M in the terms of the injunction claimed by the writ. M opposed the grant of the injunction and applied to the judge to have the writ set aside on the ground that the English courts had no jurisdiction to entertain an action for damages for a trespass to land situated abroad. At the judge's request the Foreign and Commonwealth Office issued a certificate which made it clear that the United Kingdom government did not recognise the administration established in northern Cyprus by the Turkish Federated State of Cyprus as either a de jure or de facto government and that the only lawful government recognised for any part of Cyprus was the Republic of Cyprus set up in 1960. The judge granted an interlocutory injunction against M and upheld the writ. M appealed. On the hearing of the appeal the plaintiffs amended the writ to claim as additional relief damages for conspiracy to effect trespass to the contents of the hotels. Furthermore, at the hearing the court admitted evidence on behalf of the second defendant, which the plaintiffs did not have the opportunity to answer, that according to the system of law in force in northern Cyprus, the plaintiffs had been lawfully deprived of possession of the hotels. The plaintiffs' right to

immediate possession of the hotels was therefore disputed by M, although their title to the hotels was not in dispute. The plaintiffs, whilst accepting that the English courts had no jurisdiction to entertain an action for damages for trespass to foreign land, submitted (i) that there was jurisdiction to entertain a claim for conspiracy to effect such a trespass where the plaintiff's title to the land was not in dispute, the alleged conspiracy and overt acts had occurred in England and the defendant was in England; (ii) that since damages would be an inadequate remedy an injunction was the appropriate relief; (iii) that the injunction would restrain the conspiracy in England and not the trespass to the land abroad and (iv) that in the circumstances the contemplated trespass to the foreign land, ie the hotels, was only incidental to the claim for conspiracy committed in England.

Held - The writ should be set aside and the injunction discharged, and the appeal would therefore be allowed, for the following reasons--

(i) (per Lord Denning MR) The English courts could recognise the laws or acts of a body which was in effective control of a territory even though that body had not been recognised by Her Majesty's Government de jure or de facto. On the evidence there was an effective administration in northern Cyprus which had made laws according to which the occupation of the plaintiff's hotels was lawful and not a trespass and therefore not actionable in northern Cyprus. As the trespasses to the hotels and to their contents were not actionable under the law in force in northern Cyprus, they were not actionable in England, and neither were the alleged conspiracies to effect the trespasses (see p 283 *e*, p 285 *h j* and p 286 *b e* and *h*, post); *Phillips v Eyre* (1870) LR 6 QB 1 applied.

(ii) (per Roskill and Scarman LJJ) Although the claim in the unamended writ was framed as one for conspiracy in England to effect a trespass to foreign land, ie the hotels, the claim fell within the rule of law that an English court had no jurisdiction to entertain an action for the determination of the right to possession of foreign land or for recovery of damages for trespass to foreign land for, in effect, the claim was one for trespass to foreign land and it had been so framed as a device to overcome the rule of law. Moreover the plaintiffs would have had to establish their disputed right to possession of the hotels to make good the claim for conspiracy to effect a trespass to them. But even if the English court had jurisdiction to entertain the claim in the unamended writ it would be a wrong exercise of the court's discretion to grant an injunction against M in the changing circumstances which existed in Cyprus. The amendment of the writ to claim conspiracy to effect a trespass to goods, ie to the contents of the hotels, disclosed no cause of action since the plaintiffs were not in possession of the contents at the date of the alleged conspiracy and the amendment did not, therefore, confer jurisdiction on the English court (see p 288 *f* and *j* to p 289 *d j*, p 290 *b d e*, p 291 *j* to p 292 *d* and p 293 *f* to p 294 *h*, post); *British South Africa Co v Companhia de Mocambique* [1891-4] All ER Rep 640, *Ward v Lewis* [1955] 1 All ER 55 and *Marrinan v Vibart* [1962] 1 All ER 869 applied.

Notes

For jurisdiction of English courts with respect to foreign land, see 8 *Halsbury's Laws* (4th Edn) paras 639, 640, and for cases on the subject, see 11 *Digest* (Reissue) 396-399, *367-393*.

Cases referred to in judgments

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396, [1975] 2 WLR 316, HL, *Digest* (Cont Vol D) 536, *152a*.

Arantzazu Mendi, The [1939] 1 All ER 719, [1939] AC 256, 160 LT 513, 19 Asp MLC 263, 63 Ll L Rep 89, HL, 1 *Digest* (Repl) 129, *155*.

Askionairenoye Obschestvo A M Luther v James Sagor & Co [1921] 3 KB 532, [1921] All ER Rep 138, 90 LJKB 1202, 125 LT 705, CA; *rvsg* [1921] 1 KB 456, 11 *Digest* (Reissue) 344, *23.*

[1978] 1 All ER 277 at 279

Attorney General v Nissan [1969] 1 All ER 629, [1970] AC 179, [1969] 2 WLR 926, HL; *affg* [1967] 2 All ER 1238, [1968] 1 QB 286, [1967] 3 WLR 1044, CA, 11 *Digest* (Repl) 723, *446.*

Boys v Chaplin [1968] 1 All ER 283, [1968] 2 QB 1, [1968] 2 WLR 328, CA; *affd on other grounds* sub nom *Chaplin v Boys* [1969] 2 All ER 1085, [1971] AC 356, [1969] 3 WLR 322, [1969] 2 Lloyd's Rep 487, HL, *Digest* (Cont Vol C) 594, *709a.*

British South Africa Co v Companhia de Moçambique [1893] AC 602, [1891-4] All ER Rep 640, 63 LJQB 70, 69 LT 604, HL; *rvsg* sub nom *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358, 11 *Digest* (Reissue) 398, *388.*

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2) [1966] 2 All ER 536, [1967] 1 AC 853, [1966] 3 WLR 125, [1967] RPC 497, HL; *rvsg* [1965] 1 All ER 300, [1965] Ch 596, [1965] 2 WLR 277, 22 *Digest* (Reissue) 158, *1328.*

Gelston v Hoyt (1818) 3 Wheat 246.

James (an insolvent), Re (Attorney General intervening) [1977] 1 All ER 364, [1977] Ch 41, [1977] 2 WLR 1, CA.

Marrinan v Vibart [1962] 1 All ER 869, [1963] 1 QB 234, [1962] 2 WLR 1224; *affd* [1962] 3 All ER 380, [1963] 1 QB 528, [1962] 3 WLR 912, CA, 45 *Digest* (Repl) 300, *175.*

Mostyn v Fabrigas (1775) 1 Cowp 161, [1775-1802] All ER Rep 266, 20 State Tr 81, 98 ER 1021, 11 *Digest* (Reissue) 495, *944.*

Phillips v Eyre (1870) LR 6 QB 1, 10 B & S 1004, 40 LJQB 28, 22 LT 869, Ex Ch, 11 *Digest* (Reissue) 495, *946.*

Skinner v East India Co (1666) 6 State Tr 710, 11 *Digest* (Reissue) 396, *369.*

United Africa Co Ltd v Owners of MV Tolten, The Tolten [1946] 2 All ER 372, [1946] P 135, [1947] LJR 201, 175 LT 469, CA, 11 *Digest* (Reissue) 398, *387.*

Ward v Lewis [1955] 1 All ER 55, [1955] 1 WLR 9, CA, 50 *Digest* (Repl) 115, *962.*

Interlocutory appeal

By a writ issued on 16 February 1977 the plaintiffs, Hesperides Hotels Ltd and Castellis Hotels Ltd, companies incorporated according to the law of the Republic of Cyprus and respectively the owners and proprietors of the Hesperides Hotel and Dome Hotel ('the hotels') situated at Kyrenia, Cyprus, brought an action against the defendants, Aegean Turkish Holidays Ltd and Omer Faik Muftizade, claiming damages for conspiracy to effect trespasses to the hotels and an injunction restraining the defendants by their servants, agents or otherwise from conspiring or acting in any way whatsoever

to procure, encourage or facilitate a trespass to the hotels or to procure the unauthorised use of the hotels. By summons dated 4 March 1976 the plaintiffs applied to the judge in chambers for an interlocutory injunction, until after the trial of the action or further order, in the terms of the injunction claimed in the writ. The first defendant gave an undertaking in the terms of the injunction claimed by the writ. By an order dated 6 April 1977 May J, on the plaintiffs' giving a cross-undertaking as to damages, granted an injunction restraining the second defendant by himself, his agents or servants or howsoever otherwise from conspiring or acting in any way whatever to procure, encourage or assist a trespass to the plaintiffs' hotels until after the trial of the action or further order, and dismissed the second defendants' application for an order setting aside the writ as against him. The second defendant appealed, seeking an order that the injunction should be discharged and the writ set aside on the grounds (i) that the court had no jurisdiction to entertain the plaintiffs' action, (ii) that the statement of claim disclosed no reasonable cause of action and/or the action was an abuse of the process of the court, (iii) that there was no evidence that the second defendant had committed or threatened to commit any tort as against the plaintiffs and the judge had misdirected himself in finding to the contrary and (iv) that if, contrary to ground (i), jurisdiction existed, the court in the exercise of its discretion ought not to grant interlocutory relief in the special circumstances of the case and/or that the grant of relief by the judge had been wrong in principle.

By a respondent's notice the plaintiffs gave notice that at the hearing of the appeal

they would contend that the order dated 6 April 1977 should be affirmed on the grounds additional to those relied on by the judge, namely (i) that the court had jurisdiction to entertain the plaintiffs' claim against the second defendant because the ratio decidendi of *British South Africa Co v Companhia de Moçambique* ([1893] AC 602, [1891-4] All ER Rep 640) had no application in a suit where title to land situated abroad was not in dispute and the claim was for damages for trespass to the land and the defendant was within the jurisdiction, or where an investigation or issue as to title to land situated abroad arose incidentally or where the defendant had acted unconscionably, and (ii) that there was no other forum in which the plaintiffs' claim against the second defendant could have been brought. During the hearing of the appeal the plaintiffs exercised their right to amend the pleadings, by adding a claim for damages for conspiracy to effect a trespass to chattels, ie the contents of the hotels, and extending the claim for an injunction to the contents of the hotels. The facts are set out in the judgment of Lord Denning MR.

F P Neill QC and Gerald Davies for the second defendant.

David Kemp QC, George Newman and Kenneth Parker for the plaintiffs.

Cur adv vult

23 May 1977. The following judgments were delivered.

LORD DENNING MR.

Cyprus is an island torn with dissension. On the northern coast there is the town of Kyrenia which attracts many visitors. Two hotels there concern us today. One used to be called the Hesperides Hotel, but' now it is the Kyrenia Rocks Hotel. The other was called, and still is called, the Dome Hotel.

Before 1974 these two hotels were owned by Greek Cypriots. The Hesperides was owned by Hesperides Hotels Ltd, a Cyprus company, of which Mr and Mrs Kariolou were the sole directors and shareholders. They and their family lived there and ran the hotel. The Dome was owned by Catsellis Hotels Ltd, another Cyprus

company, of which Mr Catsellis was the sole director and shareholder. He and his family lived there and ran the hotel. In July 1974 the Turkish armed forces landed and took possession of Kyrenia. Many of the Greek Cypriot families fled. They went to the southern part of the island. The two families who owned these hotels went to Limassol where they still are. They were unable to return to the north. It was sealed off by the Turkish occupying forces.

In the middle of 1976 these families got to know that the hotels had been occupied by Turkish Cypriots. These hotels were advertising in England for visitors. Brochures were issued by a body calling itself the 'Turkish Federated State of Cyprus' with coloured photographs. The Kyrenia Rocks Hotel (formerly the Hesperides) was classified as three star. The description read 'This sea-front hotel in the centre of Kyrenia has a swimming pool, 46 rooms and 88 beds.' The Dome Hotel was classified as four star with 170 rooms and 305 beds. Those brochures were handled in London by a travel agency called Aegean Turkish Holidays Ltd in South Molton Street. They accepted bookings for these two hotels (amongst others) from holiday-makers in England.

The two Greek Cypriot families went to English solicitors who made enquiries and found that the body calling itself the 'Turkish Federated State of Cyprus' had a London representative, Mr Muftizade, a man of distinction who holds the Queen's Medal for Gallantry. The solicitors assumed that he had been a party to the issue of the brochures seeing that they were issued by the Turkish Federated State of Cyprus.

The Greek Cypriot companies then decided to take action in England. On 16 February 1977 they issued a writ against the travel agents and Mr Muftizade asserting that since August 1974 the hotels had been illegally occupied by trespassers and that

the defendants had conspired together to effect trespasses and to obtain advantage for themselves by the unauthorised use of the hotels. They applied to the judge in chambers for an injunction. The travel agents submitted to a perpetual injunction. But Mr Muftizade opposed it and applied to set aside the writ against him. On 6 April 1977 May J upheld the writ and granted an injunction against Mr Muftizade 'restraining him from conspiring or acting in any way whatever to procure encourage or assist a trespass to the Plaintiffs' hotels'. Mr Muftizade now appeals to this court and we have expedited it especially because of the holiday season now beginning.

The case involves some important points on the conflict of laws. These best appear if I summarise the rival contentions put before us.

Counsel for the plaintiffs said that the only constitution of Cyprus known to English law is the constitution established on 16 August 1960 pursuant to s 1 of the Cyprus Act 1960, and that the only lawful government is the Republic of Cyprus established by the 1960 Act. He said that the plaintiffs are the legal owners of these two hotels and have the right to possession of them and that these legal owners (having found the defendant Mr Muftizade in England and having served him here) can sue him personally for any personal wrong done by him, and that he is guilty of a personal wrong because he conspired with the travel agents and others to obtain bookings for these hotels and thus procured, encouraged and assisted trespasses to these hotels, such trespasses being unlawful by the laws of the Republic of Cyprus.

Counsel for Mr Muftizade put before us a great deal of material which was not before the judge. He suggested that the original constitution of Cyprus had been supplanted in fact by two autonomous administrations. One was a Turkish Cypriot administration in the northern part of the island, the other a Greek Cypriot administration in the southern part of the island. He said that these administrations had each requisitioned properties of individuals. The Turkish Cypriot administration had requisitioned property in the north which formerly belonged to Greek Cypriots there, and the Greek Cypriot administration had requisitioned property in the south which had formerly belonged to the Turkish Cypriots there. He said that it was open to argument,

at least, that these requisitions were lawful; and that the courts of England could not, and should not, pronounce them unlawful: or issue any injunction on that footing.

The Foreign Office certificate

The Republic of Cyprus was set up by an Act of our Parliament in 1960, the Cyprus Act 1960. It established an 'independent sovereign Republic of Cyprus' with its own constitution. That is the only government which has been recognised by Her Majesty's Government as the de jure government of any part of Cyprus. So far as any subsequent administrations are concerned, they have never been recognised de jure or de facto as sovereign states. This is made clear by this certificate of 6 April 1977 issued by the Foreign and Commonwealth Office in response to a request by May J:

> '... Her Majesty's Government in the United Kingdom do not recognise the administration established under the name of the "Turkish Federated State of Cyprus" ... Her Majesty's Government do not recognise such administration as being the government of an independent de facto sovereign state ... Her Majesty's Government do not recognise or accord Mr Omer Faik Muftizade, the "London representative of the Turkish Federated State of Cyprus", any privilege or immunity under the [Diplomatic Privileges Act 1964].'

The effect in law of the certificate

Counsel for the plaintiffs submitted that, seeing that the 'Turkish Federated State of Cyprus' was not recognised de jure or de facto by Her Majesty's Government, it followed that the courts of this country could not recognise or give effect to any of the acts or laws of this so-called state. They are all nullities in the eyes of English law, he said, and should be treated as such by the English courts. These courts could

[1978] 1 All ER 277 at 282

not, he said, even receive evidence of the acts and laws made by this so-called state.

Those in favour

Counsel for the plaintiffs supported his submission by reference to many authorities of which I will select a few. In *Askionairenoye Obschestvo A M Luther v James Sagor & Co* ([1921] 1 KB 456 at 476) Roche J accepted the law as stated by the Supreme Court of the United States in 1818[a]:

[a] *Gelston v Hoyt* (1818) 3 Wheat 246 at 324

> 'No doctrine is better established, than that it belongs exclusively to Governments to recognise new States in the revolutions which may occur in the world; and until such recognition, either by our own Government, or the Government to which the new State belonged, Courts of Justice are bound to consider the ancient state of things as remaining unaltered.'

In *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* ([1965] 1 All ER 300 at 318, [1965] Ch 596 at 656) Diplock LJ said:

> 'The lex loci actus, to the consequences of which English courts will give effect, is thus limited to laws made by or under the authority of those persons who are recognised by the government of the United Kingdom as being the sovereign government of the place where the thing happened, and will not treat the happening as having in England any legal consequences which are claimed to result from a law made by persons who are not recognised as being the sovereign government of that place or persons authorised by that sovereign government to make laws for that place.'

To those judicial statements, counsel for the plaintiffs added most persuasively the book by the late Sir Hersch Lauterpacht on recognition of governments[b] where he said:

[b] Recognition in International Law (1947), pp 145, 147

'... no judicial existence can be attributed to an unrecognised government and ... no legal consequences of its purported factual existence can be admitted ... The correct and reasonable rule is that both the unrecognised government and its acts are a nullity.'

Those against

That doctrine is said to be based on the need for the executive and the courts to speak with one voice. If the executive do not recognise the usurping government, nor should the courts: see *The Arantzazu Mendi* ([1939] 1 All ER 719 at 722, [1939] AC 256 at 264) by Lord Atkin. But there are those who do not subscribe to that view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it in its impact on individuals as justice and common sense require, provided always that there are no considerations of public policy against it. The most authoritive statement is that of Lord Wilberforce in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* ([1966] 2 All ER 536 at 577, [1967] 1 AC 853 at 954):

'... where private rights, or acts of every-day occurrence, of perfunctory acts of administration are concerned ... the courts may, in the interest of justice and commonsense, where no consideration of public policy to the contrary has

to prevail, give recognition to the actual facts or realities found to exist in the territory in question.'

That view is supported by an article by Professor Lipstein in the Transactions of the Grotius Society[c] which he concludes by saying:

[c] (1950) 35 Transactions of the Grotius Society 157 at 188

'The regulations of foreign authorities which have not been recognised may be applied as the law of the foreign country if they are in fact enforced in that country, notwithstanding that the authorities have not been recognised by Great Britain.'

In the recent case[d] about the illegal regime in Rhodesia I was myself ready to apply the principles stated by Lord Wilberforce. I said:

[d] *Re James (an insolvent) (Attorney General intervening)* [1977] 1 All ER 364 at 370, [1977] 2 WLR 1 at 11

> 'When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory; and, as he can no longer do it himself, he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy.'

And Scarman LJ said that he agreed with much of this, adding ([1977] 1 All ER 364 at 377, [1977] 2 WLR 1 at 18):

> 'I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government.'

The choice

If it were necessary to make a choice between these conflicting doctrines, I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government de jure or de facto, at any rate in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth; and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.

The factual position in Cyprus

I turn therefore to look at the factual position as it has developed during the last three years.

(i) Generally

In 1960 there were Greek and Turkish Cypriots living in all parts of the island, but with more Turkish Cypriots in the north than in the south and vice versa. The 1960 constitution provided for a central government with a legislature, judiciary and public service, in all of which both communities were represented.

In 1960 too, there was a treaty of guarantee whereby Greece, Turkey and the United Kingdom guaranteed the independence, territorial integrity and security of the Republic of Cyprus and also the state of affairs established by the basic articles of the constitution. In the event of a breach, each of these guaranteeing powers reserved the right to take action with the sole aim of re-establishing the state of affairs enacted by the treaty.

In 1963 there were serious disturbances between the two communities followed by the stationing of a United Nations peacekeeping force in Cyprus. The story is told in *Attorney General v Nissan.* The two communities no longer participated jointly

[1978] 1 All ER 277 at 284

in the government of the country. The executive and House of Representatives were composed of Greek Cypriots alone and not Turkish. An account is given in the reports of the Secretary-General of the United Nations of 10 September 1964 and 29 July 1965. In December 1967 the Turkish Cypriot community formed its own administration. It set up its own legislature, executive council and judiciary.

In July 1974 there was an emergency which led Turkey to land armed forces on the island. She sought to justify her conduct by the treaty of guarantee. The Security Council met and expressed its grave concern about the situation and its equal concern 'about the necessity to restore the constitutional structure of the Republic of Cyprus'.

On 30 July 1974 the foreign ministers of Greece, Turkey and the United Kingdom met at Geneva and made a declaration calling for a cease-fire and agreed that negotiations should be carried on without delay. The declaration contained this significant statement: 'The Ministers noted the existence in practice in the Republic of Cyprus of the autonomous administrations, that of the Greek Cypriot community and that of the Turkish Cypriot community.'

Later, on 1 November 1974, the General Assembly of the United Nations commenced the negotiations between the representatives of the two communities and called for them to find a 'mutually acceptable political settlement'.

Ever since 1974 there have been two separate autonomous administrations. There has been a vast movement of population with the result that the northern part is inhabited by Turkish Cypriots and the southern part by Greek Cypriots, with little or no communication between the two.

On 13 February 1975 the Turkish Federated State of Cyprus enacted a constitution on the pattern of an independent state with legislature, executive and judiciary. Thereafter its Constituent Assembly passed laws relating to the property of foreign nationals, giving power to requisition such property and so forth.

Negotiations have been proceeding under the auspices of the United Nations. Talks have been going on in Vienna. The latest guidelines set down in April 1977 are to aim at 'an independent, non-aligned, bi-communal Federal Republic'. If these negotiations succeed, each of the two parts will be a separate state with a federation. Provision would be made, I should think, to validate much that has been done by the two administrations in the past to provide for compensation to be made to those whose property has been taken or requisitioned, and so forth.

(ii) Specifically

In April 1975, under legislative authority, the Cyprus Turkish Tourism Enterprise Co let the Hesperides Hotel with its contents to a lessee, Mr Izzet Mustafa, for seven years from 15 April 1975 to 15 April 1982 at a progressive rent. The lessee agreed to occupy and run the hotel for tourist purposes as approved by the company, and to do repairs and so forth. The lease contained an express provision that 'the Company is entitled to require the lessee at any time to give up possession ... in order to enable the Turkish Federated State of Cyprus to meet any claim made in accordance with international agreement ... '

On 11 September 1975 under the legislation authorising requisition of property, it would appear that the Dome Hotel was requisitioned, but we have no details of this.

(iii) Summary

The evidence points clearly to there being two autonomous administrations in Cyprus. Many of the Greek Cypriots in the north have fled to the south, abandoning their properties which have been taken over by the new Turkish Cypriot administration. Vice versa the Turkish Cypriots in the south have fled to the north abandoning their properties which have been taken over by the autonomous administration of the south. Negotiations are in progress for a bi-communal federal state. If these succeed, provision will no doubt be made for

the properties to be restored to their former owners or compensation paid. Meanwhile, however, under the laws purported

to be made by the respective administrations the properties have been let and occupied by persons authorised by the relevant administrations but not with the authority of the former owners.

A hypothetical state of affairs

As counsel for the plaintiffs' argument proceeded, it became plain that he would have us regard this case as if there had been no political disturbances in Cyprus in recent years. That is, as if it had continued as a stable country under a single administration. He invited us to consider several hypothetical cases to test the position. I will elaborate on them just to see what the position is. Imagine that a gang of thieves had broken into the Hesperides Hotel, hand-cuffed the proprietors, and occupied it for a while, stolen the money and jewellery from the safe, smashed up the place, escaped to England, spent some of the money on extravagent living, and lodged the rest of it and the jewellery in a bank in London. If the true owners had followed the thieves to England and had sued them here for damages, seeking also to recover the money and jewellery from the bank, would the English courts have entertained the action? I would say, certainly they would. The English courts would have awarded damages at any rate for all the injuries to person and damage to chattels and conversion of them. So much is clear from the opinion of the judges in the year 1666 in *Skinner v East India Co* and the decision of Lord Mansfield 100 years later in 1775 in the great case of *Mostyn v Fabrigas*. But what about the damage done to the hotel itself, smashed up as it was? I see no reason at all why the English courts should not have jurisdiction to award damages for trespass to land also against the wrongdoers. Some people seem to think the contrary, basing themselves on what was said in the House of Lords in *British South Africa Co v Companhia de Moçambique*. But in that case there was a disputed claim of title to foreign land. And it is at least arguable that the decision in the *Moçambique* case should be confined to cases where there is genuine issue as to title: see *The Tolten* ([1946] 2 All ER 372 at 374, 375, [1946] P 135 at 141, 142) by Scott LJ. It should not be extended to cases where no issue as to title is raised or can genuinely be raised.

Now to carry my hypothetical case one stage further. Suppose some of the gang go into hiding in Cyprus and the others escape to England; and then they plot together to carry out another raid in Cyprus; and those in England arrange to despatch money or means to their confederates in Cyprus to help in the scheme; and have actually loaded some of it on a van ready for Heathrow Airport; and then the plot is discovered. I should think it plain that the English courts would have jurisdiction to grant an injunction against those who can be served in England, basing it on a conspiracy in England to do an unlawful act abroad.

That is, of course, an extreme hypothesis. But it illustrates the very principle which counsel for the plaintiffs seeks to invoke here. He says that the defendant is here and is taking part in a conspiracy to commit trespasses in Cyprus.

The real state of affairs

The real state of affairs is, however, very different. There is an effective administration in northern Cyprus which has made laws governing the day to day lives of the people. According to these laws, the people who have occupied these hotels in Kyrenia are not trespassers. They are not occupying them unlawfully. They are occupying them by a virtue of a lease granted to them under the laws or by virtue of requisitions made by the existing administration. If an action were brought in the courts of this northern part, alleging a trespass to land or to goods, it would be bound to fail. It follows inexorably that their conduct cannot be made the subject of a suit in England. Even if any of the present occupiers himself came to England and was sued

here, the court would be bound to reject the claim. The case would fail because, in order to be actionable in England, it would have to satisfy the second of the conditions as laid down in *Phillips v Eyre* ((1870) LR 6 QB 1 at 29): 'The act must not have been justifiable by the law of the place where it was done.' Nor would it satisfy the condition in Dicey and Morris's Conflict of Laws[e], that it must be 'actionable according to the law of the foreign country where it was done'. Nor would it satisfy Lord Wilberforce's test in *Boys v Chaplin* ([1969] 2 All ER 1085 at 1102, [1971] AC 356 at 389). He said that an action would not lie in England if 'civil liability does not exist, or is excluded, under the law of the place where the wrong was committed'.

[e] 9th Edn (1973), p 938, r 178(1)(*b*)

Nor is the case made any better by being framed in conspiracy. If the acts in Kyrenia are not actionable here, nor is an agreement beforehand: see *Marrinan v Vibart*. As I said in *Ward v Lewis* ([1955] 1 All ER 55 at 56, [1955] 1 WLR 9 at 11) it is often sought to get an added advantage by suing in conspiracy so as to overcome substantive rules of law. That is not permitted. The substantive law says that no action lies here for the trespass to the hotels or their contents in Kyrenia. The plaintiffs cannot overcome this rule of the substantive law by dressing it up as a conspiracy here to commit trespass there.

The amendment

During the argument counsel for the plaintiffs realised that the decision of the House of Lords in *British South Africa Co v Companhia de Moçambique* was against him. It appeared to be a conclusive authority that an action could not be brought in England for trespass to foreign land. So he sought to amend so as to allege a trespass to goods, that is, to the contents of the hotels, which would not be defeated by the *Moçambique* case. So framed, he suggested that the action could not be struck out.

To my mind, however, even if this amendment were allowed counsel for the plaintiffs does not overcome the difficulty presented to him by *Phillips v Eyre* (LR 6 QB 1). The trespasses to these hotels, both to the land and the contents, were not actionable according to the law then in force at that place. So they are not actionable in England. Nor is the alleged conspiracy actionable, because, if the alleged trespass is not actionable, a conspiracy also is not actionable.

Conclusion

Although this case has involved much discussion on many points, I think it could be disposed of on a broad ground of public policy. Underlying this case is a divergence of view between two autonomous administrations in Cyprus. The northern administration sets itself up as an administration entitled to pass laws requisitioning this property. The southern administration denies the claim and says that the requisitioning was unlawful. It is not the province of these courts to resolve such a dispute. It is a dispute which should be settled by negotiation between the two administrations aided, we hope, by intermediaries of good will. It is indeed, we hope, being settled at this very moment by negotiations in Vienna. If a settlement is reached it should deal with all questions relating to the taking of property, compensation and so forth. But, whether it is settled or not, it is not for these courts to decide between these conflicting views. The dispute, in my view, is not justiciable here. The action should be struck out as not sustainable. I would allow the appeal accordingly.

ROSKILL LJ.

The plaintiffs seek and have obtained from May J an interlocutory injunction against the second defendant restraining him from 'conspiring or acting in any way whatever to procure encourage or assist a trespass' to two hotels respectively

[1978] 1 All ER 277 at 287

owned by the plaintiffs in Kyrenia in northern Cyprus in the area presently occupied by the Turkish regime. The learned judge not only granted the plaintiffs that injunction but dismissed an application by the second defendant to set aside the plaintiffs' writ for want of jurisdiction. The learned judge's order does not, as I venture to think it should, specify the person or persons from conspiring with whom the second defendant is thus enjoined. But when one looks at the statement of claim in its unamended form it is clear that the principal allegation was that he had conspired and would unless restrained conspire with the first defendant, an English limited company carrying on business in London as travel agents. There was also an allegation of conspiracy between the second defendant and persons unknown. The first defendants have submitted to an injunction and have consented to payment of a small sum of damages to each of the plaintiffs. That followed from a consent order made by Peter Pain J on 13 May 1977. It is not necessary in this judgment to consider whether there was jurisdiction to grant that injunction, even by consent, though counsel for the second defendant submitted there was not. That consent order, whether rightly or wrongly made, cannot affect the position of the second defendant. He is the London representative of a body styled the Turkish Federated State of Cyprus. Since no recognition is accorded to that body by Her Majesty as the de jure government of any part of Cyprus or as the government of an independent de facto sovereign state (see the Secretary of State's letter of 6 April 1977) it follows that the second defendant is sued as a private individual and indeed cannot be sued otherwise or in any relevant representative capacity. He does not possess and in this court does not claim to possess any diplomatic privilege or immunity. Nor indeed has he any official status accorded to him, though it should be said in fairness to the plaintiffs' advisers and to the learned judge that the affidavit sworn by the second defendant on 25 March 1977 comes near to claiming some degree of official recognition for himself. If therefore the plaintiffs are to succeed in their claim against the second defendant they must prove that claim just as any claim for damages for conspiracy to trespass must be proved by any plaintiff against any other defendant, and if that claim falls within a class which the courts of this country have no jurisdiction to entertain, not only ought the interlocutory injunction sought and granted to be discharged but the writ should itself be set aside.

The second defendant seeks to have the writ set aside on the ground that the English courts have no jurisdiction to entertain this claim on the ground that however the claim may be dressed up in the unamended statement of claim it offends against the principle of English law summarised in r 79 of Dicey and Morris's Conflict of Laws[f]. Rule 79 is stated thus:

[f] 9th Edn (1973), p 516

> 'Subject to the Exceptions hereinafter mentioned, the court has no jurisdiction to entertain an action for (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land); or (2) the recovery of damages for trespass to such immovable.'

That rule, as appears from the relevant footnote, is founded on the decision of the House of Lords in *British South Africa Co v Companhia de Moçambique*. If this submission be right, it must follow that both the writ should be set aside and the interlocutory injunction in question ought not to have been granted. The learned judge did not have before him the evidence from the second defendant and others in part III of the record, for the adducing of which we gave leave. Had he done so he would not, I think, have felt able to hold as unhesitatingly as the revised note of his most careful judgment shows him to have done, that the evidence showed

an unlawful conspiracy between the first defendant and the second defendant to procure a trespass to the plaintiffs' property in Cyprus. For my part, now that all the evidence is available, I

[1978] 1 All ER 277 at 288

think it right to say that I can see very little evidence of the conspiracy alleged against the second defendant personally and insofar as such conspiracy is alleged to be by persons for whom he is vicariously responsible, I can see no evidence of any tortious act by anyone for whom he can reasonably be said to be vicariously responsible. To suggest, as did counsel for the plaintiffs at one point in his argument, that the second defendant is 'one member of a vast conspiracy' is to my mind quite unwarranted and the language of exaggeration.

In truth, as the plaintiffs' junior counsel, in an argument for which I would express my gratitude and which loses none of its merit by its lack of success, said, the case for the second defendant in this court bears little if any resemblance to the submissions advanced on his behalf before May J.

But counsel for the second defendant was reluctant that the appeal should succeed on this ground alone, very understandably as I think, lest fresh proceedings should be started against some other alleged tortfeasor against whom perhaps some evidence could be found at least sufficient to obtain an interlocutory injunction if jurisdiction existed in the English courts to grant such an injunction. I will therefore assume, though I certainly do not accept, that there is for the plaintiffs' present purposes sufficient evidence against the second defendant of conspiracy in this country to trespass against the plaintiffs' hotels in northern Cyprus. Counsel for the second defendant was concerned to succeed on principle, the main submission being that, however the claim might be dressed up as one for damages for conspiracy to trespass, the pleaded claim when analysed offended against what for the sake of brevity and with sufficient accuracy I will call the *Moçambique* principle. That this principle, at any rate in its widest form, has been criticised by writers of distinction is undoubted. But that it is correctly stated in r 79 of Dicey and Morris[g] seems to me to be equally undoubted. That the rule is subject to certain exceptions is clear. But that does not mean that the rule has, as counsel for the plaintiffs submitted, been so far eroded as to cease to be a rule. The learned judge appears to have thought that the rule was in effect limited to cases where the title to land was not in dispute and the cause of action was 'in truth the recovery of damages for trespass'. With respect, whilst it is the fact that the plaintiffs' title to their hotels is not in dispute, their right to immediate possession of the hotels is strongly disputed by the second defendant and it must, as a matter of English law, be an essential prerequisite of their right to recover damages for the alleged conspiracy to trespass that they show that the acts relied on as constituting the alleged conspiracy and as causing the alleged damage are actionable. Counsel for the plaintiffs put in the forefront of his submissions that this was not a matter which this court could investigate because the only ground on which the plaintiffs' claim to immediate possession could be defeated depended on alleged laws and actions of the so-called Turkish Federated State of Cyprus and that since no recognition had been accorded by Her Majesty to that body, those so-called laws and actions were nullities to which no effect must be given in our courts: at one point he even objected to our looking at the evidence of these laws and actions as being inadmissible.

[g] Conflict of Laws (9th Edn, 1973), p 516

I will consider hereafter the submission that our courts cannot pay any regard to or give any effect to these so-called laws and actions as being in the absence of recognition nullities. But even if this were so, it cannot effect the character of the claim for damages which the plaintiffs have advanced against the second defendant. If the claim for damages be one which this court has in principle no jurisdiction to entertain, then this

court cannot acquire jurisdiction to entertain it merely because if jurisdiction did exist there would be no defence to the claim.

I understood leading counsel for the plaintiffs to accept that he could not maintain that if the plaintiffs' action had been limited to one for damages for trespass to their properties in Cyprus this court could entertain that claim. But he contended that because

[1978] 1 All ER 277 at 289

the action was founded in conspiracy to trespass the position was different, at least where the overt acts of the conspiracy took place in this country, even though the damage alleged might be suffered abroad. Junior counsel for the plaintiffs additionally contended that there was sufficient evidence of damage to the plaintiffs here by the mere making of a booking at these hotels which the plaintiffs had not authorised. Both counsel for the plaintiffs argued that since there was, as I am assuming to be the case for this purpose, sufficient evidence of the relevant tortious acts by the second defendant within the jurisdiction and since he was present within the jurisdiction there was no reason in principle why the English courts should not exercise jurisdiction in personam against him and thus prevent the continuance of the alleged conspiracy to trespass against their property. It was said that nothing in the *Moçambique* principle prevented this court so acting. It was said that the policy underlying that decision was simply that the English courts would not make orders which they could not enforce, the brutum fulmen principle. Here it was said that the relevant order could be enforced against the second defendant personally because he was within the jurisdiction and there was no reason why therefore it should not be made and, if necessary, enforced against him.

With respect, this seems to me to be the very argument which failed in the House of Lords in the *Moçambique* case, though it was favoured by two members of this court whose judgments were reversed by the House of Lords. If one looks at the argument of Sir Henry James QC ([1893] AC 602 at 611, 612) it reads thus:

> 'There is no want of jurisdiction, and the difficulty of procedure is removed where there is a defendant domiciled in this country against whom judgment can be enforced. The mere circumstance that the subject-matter of the action is abroad does not take away the jurisdiction ... '

This was the very argument which the House rejected. Lord Herschell LC said ([1893] AC 602 at 624, 625, [1891-4] All ER Rep 640 at 648):

> 'It was admitted in the present case ... that the Court could not make a declaration of title, or grant an injunction to restrain trespasses, the respondents having in relation to these matters abandoned their appeal in the Court below. But it is said that the Court may enquire into the title, and, if the plaintiffs and not the defendants are found to have the better title, may award damages for the trespass committed. My Lords, I find it difficult to see why this distinction should be drawn. It is said, because the Courts have no power to enforce their judgment by any dealing with the land itself, where it is outside their territorial jurisdiction. But if they can determine the title to it and compel the payment of damages founded upon such determination, why should not they equally proceed in personam against a person who, in spite of that determination, insists on disturbing one who has been found by the Court to be the owner of the property? ... But there appear to me, I confess, to be solid reasons why the Courts of this country should, in common with those of most other nations, have refused to adjudicate upon claims of title to foreign land in proceedings founded on alleged invasion of proprietary rights attached to it, and to award damages founded on that adjudication.'

It is true that, so far as appears from the report, there was no allegation in that case against the appellants of conspiracy. But in principle I find it impossible to see how, if, as seems clearly to be the position, our courts have no jurisdiction to entertain an action in respect of a trespass committed against land abroad, jurisdiction is suddenly acquired by dressing the claim up as an alleged unlawful agreement between two or more people in this country to commit that trespass abroad. Further, so far as more

[1978] 1 All ER 277 at 290

recent authority is concerned, the submission that the difficulty can be overcome by framing the claim as one for conspiracy to trespass seems contrary to the view of this court in *Ward v Lewis* and of Salmon J and of this court in *Marrinan v Vibart*. In my view so easy an escape route from the bonds of the *Moçambique* principle is not available to the plaintiffs in this case.

It follows that in my judgment the *Moçambique* principle presents a complete bar to the plaintiffs' claim as framed in the unamended writ and that their claim for damages for conspiracy to trespass cannot be entertained in our courts. I would allow this appeal on that ground alone, discharge the injunction and set aside the writ. But I would venture to add this. Counsel for the second defendant read to us from the evidence one version of the recent events in Cyprus. The plaintiffs have not had the opportunity of answering that evidence and no doubt had they had that opportunity, much could and would have been said on the other side. History, especially recent controversial political history, is not one-sided. All I would say about the evidence so far as it goes is that it shows the profound wisdom of the *Moçambique* principle. The position in Cyprus, both on the Greek and on the Turkish side, is at the present juncture evolutionary and continues to evolve and develop. Delicate international negotiations have taken place and are about to continue. In those circumstances for an English court to arrogate to itself the right at this juncture to determine questions of the right to possession of land in Cyprus by entertaining an action for conspiracy to trespass is something which in my view it ought not to do. Even if I am wrong in the view that the *Moçambique* principle applies, and even if I thought that our courts had jurisdiction and therefore a discretion whether or not to grant the injunction sought, in accordance with the principles recently laid down by the House of Lords in *American Cyanamid Co v Ethicon Ltd*, I would not hesitate in the existing circumstances to exercise my discretion against granting the injunction sought.

In these circumstances it becomes unnecessary to deal with the other main branch of counsel for the second defendant's argument. Out of deference to that argument I would, however, make a few comments on it. The argument was this. Looking at the evidence, it was contended that it was on any view impossible for the plaintiffs to make good their cause of action because in order to do so they had to show not merely that the acts complained of were actionable in this country, but also that they were actionable in Cyprus: see *Phillips v Eyre*. This, it was said, they could not do in accordance with the relevant law of Cyprus because that relevant law was that now prevailing in that part of Cyprus presently under Turkish control. Counsel for the second defendant claimed in the light of the evidence that by the law now prevailing there the loss of possession of which the plaintiffs complained in this action was lawful. Therefore, he argued, their claim must fail since the acts complained of could not be shown to be unlawful both by the law of this country and by the relevant law prevailing in Cyprus. He further argued that our courts would not refuse to recognise or give effect to those laws simply because, as I have already pointed out, recognition has not been accorded by Her Majesty to the Turkish regime in northern Cyprus. Counsel for the second defendant referred to r 87 in Dicey and Morris's Conflict of Laws and in particular to the commentary on that rule[h]. The most relevant sentence in the commentary is[i]:

[h] 9th Edn (1973), pp 559, 560

[i] 9th Edn (1973), p 560

'However, there is high authority for regarding as open the question whether

the courts can recognise the law or acts of a body which although it does not satisfy either of the foregoing tests [those tests being concerned with recognition] is nonetheless in effective control of the place in question.'

Reliance is placed for that last sentence which I have quoted on the decision of the House of Lords in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2)* as well as on an article by Professor Lipstein[j] in 1950 to which we were referred. Counsel for the plaintiffs, on the other hand, roundly condemned that sentence as 'grossly misleading', claiming support for his submission in the decision of this court in *Askionairenoye Obschestvo A M Luther v James Sagor & Co*, as well as in certain academic writings and in the judgment of Diplock LJ in the *Carl-Zeiss* case ([1965] 1 All ER 300 at 318, [1965] Ch 596 at 656), by which he claimed that this court was bound notwithstanding that its decision was reversed by the House of Lords. Having regard to the fact that this is an interlocutory appeal, I think it both unnecessary and undesirable to make any observations on this difficult question of private international law which, in my view, does not arise for decision. I would only say this. First, with all respect to counsel for the plaintiffs' argument, I do not think that the submission that we are bound by that judgment of Diplock LJ ([1965] 1 All ER 300 at 318, [1965] Ch 596 at 656) is tenable. Secondly, as counsel for the second defendant pointed out in reply, whether the view of Diplock LJ be right or be wrong, he was extremely careful expressly to except from his observations what he described as the anomalous rule as to the legal consequences in England of torts committed abroad ([1965] 1 All ER 300 at 318, [1965] Ch 596 at 656). Thirdly, having regard to the observations of their Lordships in the House of Lords in the *Carl-Zeiss* case, and in particular to those of Lord Reid and Lord Wilberforce, it is clear that at some future date difficult questions may well arise as to the extent to which, notwithstanding the absence of recognition, the English courts will or may recognise and give effect to the laws or acts of a body which is in effective control of a particular area or place. I have already said that even if I were wrong in my view that the *Moçambique* principle operates to bar this claim I would not exercise my discretion in favour of granting an injunction. The fact that the argument just mentioned is also available to the second defendant is a further reason for declining the interim grant of the interlocutory relief sought.

[j] (1950) 35 Transactions of the Grotius Society 157 at 188

There is only one further matter with which it is necessary to deal. Somewhat belatedly, and claiming to be entitled so to do without leave, counsel for the plaintiffs amended the writ and statement of claim. The purpose of the amendment was to claim damages for conspiracy to trespass not only against the hotels to which I have referred but also their contents. It is important to observe that the amendment does not aver conversion or conspiracy to convert those contents, but simply damages for conspiracy to trespass against them. It is clear that the purpose of this amendment was if possible to save the writ from being wholly set aside if the plaintiffs' other arguments failed because this court felt obliged to apply the *Moçambique* principle and thus to hold that there was no jurisdiction to entertain the claim for conspiracy to trespass to land as originally advanced. No doubt the somewhat belated amendment was inspired by the fact that in the *Moçambique* case the action was allowed to continue insofar as it related to chattels and property other than land. There would be a certain logic in holding that if the present action could not be maintained in relation to damages for conspiracy to trespass in respect of the hotels themselves it ought not to be entertained in relation to the contents of those hotels. Nonetheless in my view the decision in the *Moçambique* case puts difficulties in the way of our accepting that view in this court. But as counsel for the second defendant was quick to point out in reply, trespass to goods is an interference with possession of goods,

and therefore if the plaintiffs were not in possession of the goods at the date of the alleged trespass or conspiracy to trespass, an action for trespass and therefore for conspiracy to trespass to goods will not lie. As already pointed out, there has been no amendment to aver conversion or conspiracy to convert. In my view, this point of counsel for the second defendant, though technical, is unanswerable. Faced with this, counsel for the plaintiffs belatedly sought leave further to amend to allege conversion and conspiracy to convert. For my part, I see no reason why this further indulgence should be granted at this late stage.

In the result, therefore, for the reasons I have given, in my view, with great respect to the learned judge, he was wrong in refusing to set aside the writ and also wrong in granting the injunction. In fairness to him, however, it must be said, as I have already pointed out, that this case has assumed a very different pattern in this court from that which it assumed before him and if he had had the advantage of the same arguments and the same evidence as we have had, it may very well be that he would have taken a different view from that which he did. I would add that since preparing this judgment I have had the advantage of discussing with Scarman LJ the judgment which he is about to deliver, and I agree with that judgment.

SCARMAN LJ.

I have had the advantage of reading the judgment of Roskill LJ, with which I agree. It is, therefore, unnecessary for me to add to the length of this interlocutory appeal. Nevertheless, as we are differing from the very careful judgment of the judge in chambers, I would wish to give shortly my reasons for doing so.

Counsel for the second defendant in the action came to the Court of Appeal to deal with a claim based on an alleged conspiracy to effect a trespass to land situated abroad. The argument had not proceeded far before counsel for the plaintiffs exercised his right to amend without leave (the pleadings not being closed) by adding a claim based on conspiracy to effect a trespass to chattels, ie the contents of the two hotels. He hoped to achieve by amendment what he might fail to obtain by argument. It is convenient, therefore, first to consider the claim as it was when the judge granted the plaintiffs their interlocutory injunction, and thereafter to consider the amended writ.

The unamended writ

Stripped down to its essentials, the claim originally endorsed on the writ is for damages for conspiracy to effect a trespass to land situate abroad, and for an injunction restraining the second defendant 'from conspiring or acting in any way whatever to encourage or assist a trespass' to the plaintiffs' two hotels in Kyrenia, Cyprus. Kyrenia is effectively controlled by a body known as the Turkish Federated State of Cyprus. This body is not recognised by the United Kingdom as an independent sovereign state, but its control of northern Cyprus, supported by the armed forces of the Republic of Turkey, has effectively excluded the two plaintiff companies, their servants or agents, from the possession of the two hotels, the Hesperides owned by the first plaintiff and the Dome owned by the second. The conspiracy alleged is that the second defendant, who claims to be the agent in London of the Turkish Federated State of Cyprus, has agreed with others to promote and encourage the booking of tourists to the hotels.

To meet this case, counsel for the second defendant submits: (1) that the court has no jurisdiction to entertain the action: he relies on *British South Africa Co v Companhia de Moçambique*; (2) that if the case falls outside the *Moçambique* rule (as the judge held) it discloses no cause of action because it is plain on the evidence available to the court that the use or possession of the hotels by others authorised by the de facto administration of the Turkish Federated State of Cyprus but unauthorised by the owners, ie the plaintiffs, is not actionable in northern Cyprus; indeed, it is, he submits, a governmental act valid and effective by the law of the country where the hotels

are situate; (3) that in any event, and in the light of all the evidence, it was a wrong exercise of the judicial discretion to grant the interlocutory injunction. Accordingly, he says that the injunction should be discharged and the writ set aside.

The second of the submissions raises questions of great difficulty and, in my judgment, can only be tested after much fuller argument and evidence than can be, or ought to be, considered at an interlocutory stage of

an action. I would not set aside the writ, therefore, on the basis of that submission, though on such evidence as we have seen (admittedly one-sided, as the plaintiffs have had no sufficient opportunity to answer the massive evidence introduced, with our leave, by the second defendant during the hearing of the appeal) I think it may well prove to be well-founded. The fact, however, that this submission is open to the second defendant and its character are matters relevant to be considered in the context of the court's discretion to grant interlocutory relief by way of injunction. They are strong factors militating against the exercise of the discretion to grant such relief.

Counsel for the plaintiffs recognised that the English courts have no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad. Subject to amendment of his statement of claim, which I shall consider later, that must be the end of his case unless he can show that a conspiracy to effect such a trespass is outside the rule. He seeks to do so by making the following points: (1) that the plaintiffs' title to the land is not in dispute; (2) that the conspiracy and overt acts alleged occurred in England; (3) that the second defendant is in England and was served here; (4) that since damages would not be an adequate remedy, an injunction is appropriate; (5) that the injunction restrains not the trespass to the foreign land but the conspiracy in England; (6) that in all the circumstances the trespass to foreign land contemplated by the conspirators is only incidental to the English tort, so that this case should as a matter of principle be treated, if need be, as an exception to the *Moçambique* rule.

Junior counsel for the plaintiffs, in a forceful address following his leader, summarised the argument in these emphatic words: 'Our cause of action is the commercial exploitation in England by the defendants and others of our property situate abroad without our consent.'

The first four of leading counsel for the plaintiffs' points are, in my judgment, overborne by the *Moçambique* rule. The plaintiffs are out of possession and must, therefore, establish their right to possession if they are to be in a position to complain of trespass. Inevitably this means that the plaintiffs have to show a better title to possession than that of those presently in possession. And this they cannot do without requiring the court to enquire into the title or right to possession of the foreign lands. The House of Lords refused to embark on such an enquiry in the *Moçambique* case ([1893] AC 602 at 624, 625, [1891-4] All ER Rep 640 at 648): see the passages quoted by Roskill LJ from the speech of Lord Herschell LC. Further, the fourth point cannot arise if the court has no jurisdiction to grant damages for the trespass.

The fifth and sixth points are, in my judgment, the high-water mark of the plaintiffs' case. They constitute in essence the reasons why the judge granted the plaintiffs their interlocutory injunction. It is said that the trespass to foreign land is only incidental, that the cause of action is damage sustained in England by a conspiracy taking place in England (as well as elsewhere), and that the case falls outside or is an exception to the *Moçambique* rule. I reject this argument. First, authority is against the device of overcoming substantial difficulties of law by dressing up a case as conspiracy: see *Ward v Lewis, Marrinan v Vibart*. But, more significant, the reliance

on the alleged conspiracy as distinct from the alleged trespass which it is intended to effect is wrong in principle. The combination or agreement which is said to constitute (with overt acts and ensuing damage) the tort of conspiracy is unlawful only if there be the intention to effect a trespass on foreign land. Unless that be shown there is nothing unlawful. And that can be established only if the court is prepared to adjudicate on the right to possession of the foreign land, which is exactly what the House of Lords said the English courts may not do: see Lord Herschell LC[k] in the passage already cited.

[k] *British South Africa Co v Companhia de Moçambique* [1893] AC 602 at 624, 625, [1891-4] All ER Rep 640 at 648

As Roskill LJ said in the course of his judgment, it matters not for the purpose of jurisdiction whether the plaintiffs appear likely to be able to establish their foreign right or not. If it be in issue, as it plainly is in the present case, the English court must refuse to adjudicate on it. I would therefore allow the appeal and set aside the writ on the ground of lack of jurisdiction unless the amendment made in the course of the hearing of the appeal has added a claim which the English court does have jurisdiction to entertain.

I turn therefore to consider the amended writ. The key amendment, made during the hearing of the appeal and without leave, is that which has added a claim in respect of chattels, namely the contents of the two hotels. The *Moçambique* rule applies only to land. The courts have jurisdiction to entertain a claim to damages for trespass to movable property situate abroad, provided always the acts are actionable in the country where committed. The plaintiffs, therefore, submit that, insofar as it relates to chattels, the writ cannot be set aside for want of jurisdiction. There is, I think, force in this contention. But, as amended, the writ discloses no cause of action in trespass in that the claim is put on ownership, not possession. Indeed the writ itself admits that the plaintiffs are, and had been for two years prior to the alleged conspiracy, out of possession. Trespass is of course a wrong not to ownership, but to possession. Faced by the amendment counsel for the second defendant, therefore, submitted that it disclosed no reasonable cause of action and should not, therefore, be allowed to save the writ from being set aside or struck out. To counter this argument, an attempt at a very late stage was made to re-amend the writ by raising a claim in conversion. I would not be disposed to give leave for such an amendment.

Although I recognise that it is open to the plaintiffs to issue another writ, if so advised, I think it right to set aside, or strike out, this one. No claim which the court can entertain is to be found correctly pleaded in it. The original claim lacks jurisdiction: and the added claim lacks a pleaded basis necessary to create a cause of action. If the plaintiffs have an arguable case on the amended writ, as to which I say nothing, they had better start again with their tackle in order. The rescue operation by amendment, in my judgment, fails.

Finally even if, contrary to my view, the writ discloses a claim which the English court can and ought to entertain, it was, in my judgment, a wrong exercise of discretion to grant the interlocutory injunction. The cause of action, for the reasons which Roskill LJ has developed, is very doubtful, and if a wrong has been done or is threatened by the second defendant against the plaintiffs' property (as to which I entertain grave doubts) damages would appear to me to be the appropriate remedy. Indeed, an interlocutory injunction granted in the circumstances of this case could well, as Lord Denning MR has shown in the course of his judgment, do more harm than good. An English court may sometimes have to make an order which to some would appear an unwarrantable intrusion by a municipal court into the world of international relations between sovereign states, but if an English court is asked to intrude its order into this world, it should be very slow in such a case to grant interlocutory

relief by way of injunction, bearing in mind the limitations of evidence and argument necessarily imposed by law on interlocutory proceedings.

I would therefore allow the appeal.

Appeal allowed; injunction discharged. Leave to appeal to the House of Lords refused.

Solicitors: Theodore Goddard & Co (for the second defendant); Lovell, White & King (for the plaintiffs).

Gavin Gore-Andrews Esq Barrister.