Neutral Citation Number: [2018] EWHC 19 (QB)

Case No: HQ15X01164

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2018

Before :

MR JUSTICE KERR

- -

Between :

ATHANASIOS SOPHOCLEOUS & OTHERS **Claimants**

- and –

(1) SECRETARY OF STATE FOR THE FOREIGN AND COMMONWEALTH OFFICE **Defendants**

(2) SECRETARY OF STATE FOR DEFENCE

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Mr Zachary Douglas QC & Mr Malcolm Birdling (instructed by **KJ Conroy & Co**) for the **Claimants**
Mr Martin Chamberlain QC & Mr James Purnell (instructed by **Government Legal Department**) for the **Defendants**

Hearing dates: 27th and 28th of November, 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE KERR

Mr Justice Kerr:

Introduction

1. In these claims, the 34 claimants complain of assaults, beatings, rape and other acts of violence allegedly inflicted from 1956 to 1958 in Cyprus during the "Cyprus Emergency" (the Emergency) by agents of the United Kingdom government and of the then Colonial Administration of Cyprus.

2. I am required to decide the following preliminary issue, which is the first of three preliminary issues ordered by Master Kay QC: "as a matter of private international law, which law (or laws) applies (or apply) for determining limitation?"

3. The claimants were all resident in Cyprus during the Emergency. All but five still are resident there. The defendants are the successors to the Secretaries of State for the Colonial Office and the War Office. They are sued as representing the Crown in right of the government of the United Kingdom.

4. The claimants contend that the defendants are (i) vicariously liable for the acts of violence alleged (ii) liable as joint tortfeasors with the Colonial Administration and (iii) liable for negligence, i.e. breach of a duty of care by allowing the acts of violence to take place or failing to prevent them.

5. The second and third preliminary issues are not before me. They are as follows. If Cyprus law applies, whether alone or in addition to English law, (2) what is the relevant limitation period in respect of each of the causes of action? (3) in the event that any of the claims have been brought outside the relevant limitation period under Cyprus law, should such limitation period be disapplied pursuant to section 2 of the Foreign Limitation Periods Act 1984 (the 1984 Act)?

6. A fourth preliminary issue for determination has also been formulated, as follows: are the facts as alleged by the claimants capable of constituting the fraudulent concealment of the civil wrong by the defendants within the meaning of article 68(d) of the Civil Wrongs Law of Cyprus? This issue too may need to be decided in due course.

7. It is agreed between the parties that the first preliminary issue, now before me, is to be treated as one of law to be determined on the basis of assumed facts, as alleged in the amended particulars of claim, at paragraphs 18 to 64. I will therefore proceed on the basis that those pleaded facts are true, although the defendants have not yet served their substantive defence.

8. The tortious acts allegedly committed in the 1950s fall outside the temporal scope of the Private International Law (Miscellaneous Provisions) Act 1995, whose material provisions do not apply to "acts or omissions giving rise to a claim which occur before the commencement of this Part" (section 14(1)). Nor do the material

provisions of EU Regulation 864/2007 (known as "Rome II") apply except to events occurring after its entry into force (article 31).

9. It is agreed that the issue of limitation is governed by the relevant provisions in the 1984 Act. Section 1 provides that where foreign law falls to be taken into account in English proceedings, that includes the foreign law of limitation, unless the law of England and Wales also falls to be taken into account, in which event both countries' limitation laws apply, the effective limitation period being the shorter of the two.

10. There is an exception enacted by section 2 of the 1984 Act: where the outcome under section 1 would conflict with public policy, section 1 is disapplied to the extent that its application would so conflict. By section 2(2) the application of section 1 conflicts with public policy "to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings … ."

11. It is agreed between the parties that in order to determine the first preliminary issue I am required to decide, first, where in substance the cause of action arose in the case of each of the three torts alleged; and secondly, if the answer is Cyprus, whether the court should instead apply English law, the *lex fori*, to the exclusion of Cypriot law, the *lex loci delicti*.

Assumed Facts: Overview

12. I am required to assume the following facts, to which the defendants have not yet pleaded. The acts of violence were committed from 1956 to 1958. The perpetrators were soldiers in the British Army, seconded British police officers and agents of the Colonial Administration, collectively referred to as "the Security Forces".

13. The British Army soldiers were deployed by the United Kingdom government from the United Kingdom. They answered to their military commander in the British Army, not to the Governor of Cyprus. The seconded British police officers were paid by the United Kingdom government and were nominated by the Colonial Secretary to carry out police duties in Cyprus under his control.

14. The British Army had the power to discipline and dismiss its soldiers through the court-martial system, as happened in one case where two British Army soldiers were convicted of assaulting the 11th claimant. The seconded British police officers could be discharged by the United Kingdom government.

15. The Governor of the Colonial Administration in Cyprus was appointed by the United Kingdom government, which also had the power to remove him and "to issue instructions to the Governor of the Colonial Administration on all aspects of the administration of Cyprus, including the conduct of security operations" (amended particulars, paragraph 54(c)).

16. There was constant dialogue between the Colonial Office, based in London, and the Colonial Administration, based in Cyprus, including on important matters of security policy, which required the consent of the United Kingdom government. The Treasury controlled the budget for counter-insurgency operations in Cyprus during the Emergency (paragraphs 54(c), (f) and (g)).

17. Security operations in Cyprus at the time were coordinated by local "District Security Committees", each comprising a senior British Army officer and a senior police officer, usually a seconded British police officer (paragraph 54(d)). British Army personnel participated directly in the acts of violence committed against 21 of the 34 claimants (paragraph 60(d)).

18. Some of those detained in Cyprus were removed to the United Kingdom under statutory authority (the Colonial Prisoners Removal Act 1884) (paragraph 59(e)). The Colonial Office co-ordinated deportations from Cyprus and detention of deportees in the Seychelles (paragraph 61(h)).

19. The United Kingdom government "knew, or ought to have known, that interrogation techniques amounting to assault, battery and torture were being used to obtain intelligence from detainees in Cyprus" (paragraph 59(d)). Further, the United Kingdom government and the Colonial Administration "carefully coordinated their responses to allegations of ill-treatment by the Security Forces in Cyprus" (paragraph 59(l)).

20. The assumed acts of violence mainly fall into the following categories, all occurring in at least one case and some in several or many: assaults, shooting in the ear, striking with rifles, tying the hands between the legs impairing breathing, wrapping a blanket round the head, whipping with an iron edged whip tearing the skin from the back, rubbing salt into wounds, punching and kicking, placing a tin bucket on the head and striking the bucket with a hammer, deprivation of water, forcing a person to swallow salt, shining bright light into the eyes, sleep deprivation, placing blocks of ice on the body, subjection to electric shocks, threats of death including placing one claimant in a coffin, simulated executions including simulation of hanging by putting the head through a noose, rape of one claimant, a young female student and a virgin at the time, tightening with screws an "iron wreath" placed around the head causing discharge of blood from the ears and eye sockets, simulation of drowning, a threat to cut off a person's penis and testicles, being left naked in a small dark space alone for days, stubbing out cigarettes on the exposed rectum, slamming the head into a wall and being made to stand for long periods in a stress position.

Reasoning and Conclusions

Where in substance did the causes of action arise?

21. It is agreed that the court must ask itself the question where in substance the causes of action arose; see *Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, per Slade LJ giving the judgment of the court, at 443F:

> "First, in deciding whether an alleged tort has been committed in this country or in some other country, our courts will look back over the series of events constituting it and ask themselves 'Where in substance did this cause of action arise?' Secondly, in answering this question, the courts will apply exclusively English law."

22. Those words draw on Lord Pearson's judgment of the Board of the Privy Council in *Distillers Co (Biochemicals) Ltd v. Thompson* [1971] AC 458, at 468:

> "The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?"

23. It is agreed that if the answer is that the cause of action arose in England, then the law of England and Wales applies and no other law. But if the answer is that the cause of action arose in Cyprus, then the "double actionability" rule applies, unless the court decides to apply a recognised exception to the application of that rule.

24. The double actionability rule provides that where a tort is committed outside England it is only actionable in England if, first, the wrong would be actionable if committed in England and, second, it is also actionable in the place where it was committed: *Phillips v. Eyre* (1870) LR 6 QB 1, per Willes J giving the judgment of the Court of Exchequer Chamber, at 28-29. Part of the rationale is that "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law" (*ibid.*, at 28).

25. The rule is, however, now subject to an exception in cases where it is considered just to apply it. This is often known as the "flexible exception". It is not to be lightly applied: there remains, as Lord Wilberforce said in *Boys v. Chaplin* [1971] AC 356, at 391D-E:

> "great virtue in a general well-understood rule covering the majority of cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present."

26. Lord Wilberforce restated the rule "as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done" (*ibid.* at 389F-G). The rule should be applied "unless clear and satisfying grounds are shown why it should be departed from ...." (*ibid.* at 391H).

27. There is no mechanical rule determining when to apply the exception. It was applied in *Chaplin v. Boys* itself, by segregating the issue of recovery of damages for pain and suffering, which Maltese law denied, in a road traffic suit between two British military personnel temporarily stationed in Malta, where the accident occurred. English law was applied to that issue.

28. Although the other Law Lords gave varying speeches in *Boys v. Chaplin*, Lord Wilberforce's restatement of the rule and his formulation of the exception to it, are recognised as authoritative; see e.g. *Armagas Ltd v. Mundogas SA* [1986] 2 WLR 1063, per Robert Goff LJ at 740: "the applicable principle in respect of foreign torts is as stated by Lord Wilberforce in his speech in *Boys v. Chaplin*".

29. Lord Rodger gave the following explanation of the exception in *Harding v. Wealands* [2007] 2 AC 1, at paragraph 56:

> "When this House restored the double actionability rule to its full rigour in *Boys v Chaplin*, there was a somewhat increased risk that the test would exclude certain claims which it would actually be just to admit. Recognising this, the House held that, in appropriate cases, a claim or head of claim could proceed even though it was not actionable under the *lex loci delicti*. The flexible test for recognising these situations which Lord Wilberforce formulated came to win acceptance. In *Red Sea Insurance Co*

> *Ltd v Bouygues SA* [1995] 1 AC 190, the Privy Council held, conversely, that, where justice required in particular circumstances, an action could proceed in the courts of the forum on the basis of the *lex loci delicti*, even though the damage or head of damage would not be actionable under the *lex fori*."

30. The exception was formulated thus in the 12th (1993) edition of Dicey & Morris, *The Conflict of Laws*, in rule 203(2) (pages 1487-8) as follows, after stating the rule as 203(1):

> "But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."

31. The current, 15th edition of Dicey, Morris & Collins states the exception in materially the same terms, in what is now rule 256(4), applicable only to defamation and other torts to which the Rome II Regulation does not apply. Neither party suggested that the formulation of the exception in rule 203(2) of the 12th edition is inapt to describe its scope or inconsistent with the formulation of Lord Wilberforce in *Boys v. Chaplin*, from which it is derived.

32. The rationale for the double actionability rule and the exception to it was considered in *Metall und Rohstoff AG* (cited above). The court held that the rule does not apply to cases where the cause of action arises in England, i.e. where the tort is in substance committed in England, even though some of the relevant events have occurred outside England, in what Slade LJ called "double locality" cases.

33. Slade LJ accepted (at 445-6) a submission that two reasons lie behind the double actionability rule. The first is that a person should not ordinarily be liable for doing what is lawful (or retrospectively made lawful) in the place where it was done. A person should normally be able to regulate his or her conduct by the law of the place where they are, without having to "look over his shoulder" to see whether he is exposed to tort liability under English law.

34. The second reason is (445H-446A) that:

> "the principle of comity of nations will ordinarily require that a person who is given protection by the laws of one country in respect of acts done in that country shall be protected against legal proceedings in other countries in respect of those acts, at least if they cause damage solely in that country".

35. Slade LJ pointed out (at 445B) that *Phillips v. Eyre* and *Chaplin v. Boys* were not double locality cases. He discussed six such cases, at pages 441-3: *George Munro Ltd v. American Cyanamid and Chemical Corporation* [1944] KB 432 (CA); *Cordova Land Co Ltd v. Victor Brothers Inc* 1966] 1 WLR 793 (Winn J); the *Distillers* case; *Diamond v. Bank of London and Montreal Ltd* [1979] QB 333 (CA); *Castree v. E. R. Squibb & Sons Ltd* [1980] 1 WLR 1248 (CA); and *Cordoba Shipping Co Ltd. v. National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyds Rep 91 (CA).

36. The conclusion on the facts in *Metall und Rohstoff*, so far as material here, was (see 484F-G) that Gatehouse J had rightly decided that the tort of inducing breach of contract was committed in London, applying the "substance" test articulated by Winn J in *Cordova Land Co Ltd* and later by Lord Pearson in the *Distillers* case. The court

recognised that the question where a tort is in substance committed is one of fact in each case, as Lord Denning MR had observed in *Diamond*'s case (at 346).

37. For the claimants, Mr Douglas QC submitted that England was the country with which the torts had the closest connection and where, in substance, each of them was committed on the assumed facts. For the defendants Mr Chamberlain QC submitted, to the contrary, that the country with which the torts were most closely connected and, in substance, committed was in each case Cyprus.

38. I was referred to several more recent cases. Mr Douglas relied, by analogy, on two conspiracy to defraud cases: *Kuwait Oil Tanker Co SAK v. Al Bader*, (transcript, 17.12.98) (Moore-Bick J) and *Grupo Torras SA v. Sheikh Fahad Mohammed Al-Sabah* (transcript, 24.6.99) (Mance LJ); and one negligent misstatement case (*Base Metal Trading Ltd v. Shamurin* [2004] 1 All ER (Comm) 159 (Tomlinson J) and [2005] 1 WLR 1157 (CA). Mr Chamberlain submitted that those cases did not assist in the present different context.

39. He relied on two cases, which Mr Douglas did not accept as helpful, of negligence causing injury where the "toxic event" occurred outside England though the employing company or its parent was in England: *Durham v. T & N plc* (transcript, 1.5.96) (CA), where the plaintiff had inhaled asbestos dust in Quebec and later died in England; and *Connelly v. RTZ Corporation plc* [1999] CLC 533 (Wright J), where the plaintiff inhaled uranium ore dust in Namibia, causing cancer which was treated in Scotland where he lived.

40. In *Durham*, Sir Thomas Bingham MR applied the "substance" test as stated by Lord Pearson in *Distillers*, considered *Metall und Rohstoff AG* and some of the cases mentioned by Slade LJ in that case and concluded that in substance the cause of action arose in Quebec where "the lack of appropriate precautions in that factory … was the immediate cause of his death" (page 6).

41. Wright J took a similar approach in *Connelly*, reasoning that inhalation of toxic dust in Namibia occurred "under Namibian climatic and environmental conditions"; the allegedly negligent decisions taken in London "require to be considered in the light of conditions in Namibia", where alone they "produced any concrete results" (transcript, page 12).

42. In *Kuwait Oil Tanker*, Moore-Bick J was considering an elaborate international fraud. At the risk of over-simplifying the complex facts, it involved "back to back" charters of ships using a Liberian company as an intermediary; the defendants in effect pocketed the difference between the daily hire rate payable under one charter from that payable under the other, entered into "back to back" with the first, causing losses to the claimant.

43. On the facts, Moore-Bick J decided that the substance of the tort of conspiracy was committed in Kuwait, not England. He noted that applying the test may be complicated by developments over time in the objects and methods of the conspirators. He observed that in the tort of conspiracy, damage is as much the gist of the cause of action as in negligence. At page 67, he said that:

> "[w]hen seeking to decide where in substance the tort was committed it is necessary to have regard both to the nature of the particular tort and to the manner in which it was committed".

44. *Grupo Torras SA* was also a complex international fraud case. Again at the risk of over-simplifying the facts, a Kuwaiti fund based in London whose leading officers were the principal defendants, acquired a Spanish company, the plaintiff. A United Kingdom subsidiary of the plaintiff then loaned about £55 million to a Jersey company controlled by the defendants, who then caused the claimant to write off the loan after its proceeds had reached Swiss bank accounts controlled by the defendants.

45. Mance LJ (as he had become when he gave judgment) considered the "substance" test in relation to various transactions at pages 167-170 of the transcript. He found on the facts, balancing the various factors, that in the case of two of the transactions, the torts were committed in Spain, while in the case of a third, with some hesitation he decided that the torts were committed in England "where they were controlled and conceived" (page 170).

46. He observed that the substance test, while simple to state, is "difficult to apply in the case of conspiracies as complex and international and with as many different stages as the present" (page 167). He outlined factors to be considered as including:

> "the identity, importance and location of the conspirators, the place(s) of any agreement or combination, the nature and place(s) of the concerted action, the nature and place(s) of any unlawful act or means, the plaintiff's location and the place(s) where he or it suffered loss. It is possible to cite passages from authorities underline the importance of one factor or another. It would be wrong to attempt any general rule regarding their comparative importance, which must be considered from case to case ..."

47. In *Base Metal Trading Ltd*, a Guernsey company beneficially owned by Russians, whose business was conducted almost entirely from Russia, sued its Russian director and employee, whom it employed under a contract which, Tomlinson J held, was in substance a quasi-partnership and was governed (applying the Rome Convention provisions replicated in English domestic law) by Russian law.

48. He also had to decide where to locate the claimed tort, not actionable in Russia, of breach of the common law duty to use reasonable skill and care in in conducting transactions on behalf of the claimant on the London Metals Exchange. Applying the substance test, he decided (at paragraph 36) that the cause of action arose in Russia, not England:

> "... it is sensible to apply the gravamen of the case, when viewed as a whole. ... The gravamen of the case is that Mr Shamurin made an impermissible decision to speculate, or that he pursued a policy of speculation. That was a decision made or a policy pursued ... in Moscow from where he conducted this as all other aspects of BMTL's business."

49. His conclusion was not altered by the fact that master agreements were entered into with London brokers and that instructions were telephoned to them in London; nor by the point that margin calls were paid from the claimant's London bank account. That was to concentrate on "the machinery of payment" rather than "the reality of where the loss was felt", which was in Russia because the margin calls caused a lack of

liquidity in Moscow which made the claimant unable to commit to further business transactions.

50. In the same paragraph, he noted that in the double locality cases examined in *Metall und Rohstoff AG*, one can detect "some notion of looking to see whether conduct abroad is directed against persons in the forum jurisdiction and likely to cause damage there to those who in consequence place reliance on it". Those cases, he said at paragraph 37, were different:

> "[i]t would ... be a triumph of form over substance to conclude that Mr Shamurin's supposed tort was in substance committed in England. .... [I]t was in substance committed in Russia where both Mr Shamurin and BMTL's place of business were located, the former studying his Reuters' screen and forming his own evaluation of likely market movements."

51. On appeal, Tomlinson J's decision on this aspect of the case was upheld unanimously. At paragraph 46, Tuckey LJ commented that "[r]eliance by the brokers on the instructions which they received is not comparable to reliance by the injured claimants in the cases referred to". Those cases included *Diamond*, *Cordoba Shipping* and *Metall und Rohstoff AG*.

52. Those are the cases supporting the proposition that the torts of negligent or fraudulent misrepresentation, and of inducing breach of contract, are likely to be committed, in substance, where the representation or the inducement is acted upon, not the country from which the communication containing the representation or inducement is sent.

53. Tuckey LJ noted that the wrongful acts had all taken place in Russia; "[t]he place where the loss occurs is not determinative", he said, since the substance test requires the court to look back over the sequence of events constituting the tort and not just the last event in the sequence, the suffering of loss. The judge had been entitled to reach the conclusion that the substance of the tort was committed in Russia.

Vicarious liability for the assaults

54. With that introduction, I turn to consider the questions I have to decide. The first question I propose to consider is where in substance the cause of action arose in so far as the right of action is founded on vicarious liability of the defendants. That vicarious liability is for the assaults assumed to have been committed by the perpetrators, the primary tortfeasors, in Cyprus.

55. The basis on which vicarious liability is asserted by the claimants in the amended particulars of claim is that the United Kingdom government exercised *de iure* and/or *de facto* control over the Security Forces operating in Cyprus, i.e. members of the British Army, seconded British police officers and the Colonial Administration, together with its servants and agents.

56. It is also said (amended particulars, paragraph 52) that those Security Forces were "integrated into the United Kingdom Government's command structure over security policy in Cyprus"; were "central to [its] aims and objectives in Cyprus"; and that "the approach and activities of the United Kingdom Government in and/or in relation to Cyprus created, or significantly increased, the risk that assaults would be carried out against individuals in Cyprus".

57. Detailed particulars are then given of the means by which the United Kingdom government exerted control over and directed policy and operations in Cyprus: by recruitment, training and deployment of soldiers and police officers, directing the activities of the Governor and the Colonial Administration, formulating and enacting legislative measures where necessary and controlling and allocating, through HM Treasury, the budget for operations in Cyprus.

58. The defendants submitted that vicarious liability is not a tort at all; it is the fixing of a person with liability for someone else's tort. Mr Chamberlain pointed out that the primary tortfeasors, for whose tortious acts the defendants are said to be vicariously liable, were located in Cyprus and their tortious acts were unquestionably committed in Cyprus. It could not be right, therefore, that the cause of action founded on vicarious liability arose in England.

59. Mr Chamberlain also submitted that the acts of the United Kingdom government on which the assertion of vicarious liability is founded – recruitment, training, deployment, directing and co-ordinating operations, and so forth – all either occurred in Cyprus or refer to matters arising in or substantially connected to Cyprus.

60. For the claimants, Mr Douglas submitted that the ordinary tests establishing vicarious liability are satisfied, in that the nature of the relationship between the primary tortfeasor and the defendants was sufficiently close and the connection between that relationship and the acts of the primary tortfeasors also sufficiently close, such that vicarious liability arises.

61. Mr Douglas sought to locate the vicarious liability of the defendants in England and not Cyprus by arguing that the exercise of control over the personnel, events and operations in Cyprus formed the setting of the tortious acts of the primary tortfeasors; and that the defendants' policy objectives and decisions to ensure Cyprus remained under British control were made in London.

62. Mr Douglas further submitted that it would not be possible to apply Cyprus law to the issue of vicarious liability; it could only be considered by applying the English law concept of vicarious liability. He further argued that it would be perverse to apply the law of the subordinate colony to determine the liability of the parent state to whose powers the subordinate colony was subject.

63. In support of the latter point, Mr Douglas observed that the constitution of Cyprus had been promulgated by an Order in Council made in London; and that when Cyprus eventually gained independence in August 1960, that was achieved by another Order in Council made under statutory authority in London.

64. I come to my reasoning and conclusions on this issue. The defendants have not conceded, but did not positively argue against, the proposition that on ordinary English law vicariously liability principles the defendants would be liable for the torts of the primary tortfeasors. I therefore do not find it necessary to examine those principles or their application to the assumed facts. They can be found in such cases as *Cox v. Ministry of Justice* [2016] AC 660 (SC) and *Mohamud v. Wm Morrison Supermarkets plc* [2016] AC 677 (SC).

65. The difficulty with the claimants' submissions is that they proceed from the accepted premise that the primary torts, in respect of which the defendants are to be held vicariously liable, occurred in Cyprus. It is, indeed, undeniable that the torts of assault committed by individual perpetrators, were committed in Cyprus. No one could suggest otherwise.

66. I accept Mr Chamberlain's submission that vicarious liability is not, conceptually, a tort. It is the description of a legal rule which imposes liability for someone else's tort. I therefore do not see how the party vicariously liable, wherever located in the world, can be taken to have incurred vicarious liability other than in the place where the primary tort is committed.

67. Since in this case that place is unquestionably Cyprus, I do not see how the cause of action asserting the vicarious liability of the defendants can be said to arise in England. On the claimants' own case, the foundation of the vicarious liability is that torts were committed by individuals in Cyprus.

68. It seems to me that, at least in this case and probably in every case, a cause of action founded on vicarious liability must share the same location as that of the primary tort. In relation to vicarious liability, the analogy is strong between the present case and accidental injury cases such as *Durham* and *Connelly*, involving alleged negligent exposure of a claimant to a toxic event outside England.

Joint liability for the assaults

69. In the amended particulars of claim, the claimants plead that the government of the United Kingdom, represented by the then War Office and Colonial Office, and by the British Army, is jointly liable for the pleaded assaults carried out by the Colonial Administration acting through its servants and agents.

70. The pleaded case is (paragraph 57) that the United Kingdom and the Colonial Administration "acted with a common design to (i) restore law and order in Cyprus; and/or (ii) obtain the intelligence necessary to restore law and order in Cyprus, using torture if necessary"; and that the War Office, British Army and Colonial Office provided the Colonial Administration with "assistance, encouragement and advice in furtherance of the common design".

71. Particulars to support that case are then set out, to the following effect. In order to retain British sovereignty in Cyprus, it was necessary to counter the activities of the Ethniki Organosis Kyprion Agoniston (National Organisation of Cypriot Fighters) (EOKA), a nationalist guerrilla organisation fighting to end British rule in Cyprus and to achieve self-determination and eventual union with Greece. Some of the claimants were members of EOKA.

72. Intelligence gathered during interrogation of detainees was an important means of seeking to achieve this goal. The United Kingdom government "knew, or ought to have known that interrogation techniques amounting to assault, battery and torture were being used to obtain intelligence from detainees in Cyprus" (paragraph 59(d)).

73. I interject that to allege that the United Kingdom government "ought to have known" the nature of the interrogation techniques in use, appears to me to fall short of what

would be required to make good the common design for which the claimants contend. But since the pleading also includes the allegation that the government actually did know their nature, I move on from this point.

74. The facts relied upon to identify the common design are these. The particulars state that the United Kingdom government co-operated with the Colonial Administration in many ways: by removing detainees to this country; by agreeing to limit the right of individuals to bring private prosecutions against members of the Security Forces; by providing military intelligence liaison officers; by helping to construct an interrogation centre; by bringing in a man who had presided over systemic torture in Kenya; by co-ordinating responses to allegations of ill treatment; by blocking an independent inquiry into such allegations; by approving refusals to allow independent observers access to interrogation centres; by increasing the number of British troops in Cyprus from 6,000 to 31,000 between March 1955 and December 1956; by the direct participation of British soldiers in the arrest, transfer and interrogation of detainees, sometimes in military facilities controlled by the British Army; and by the direct participation of British soldiers in the assaults on 21 of the 34 claimants.

75. The particulars go on to state details of the "assistance, encouragement and advice" provided by the Colonial Office "in furtherance of the common design" (paragraph 61). These consisted of regular correspondence between the Colonial Office and the Governor of Cyprus, including on security and intelligence policy; giving consent to the Governor on matters of security policy; arranging the secondment of over 850 British police officers to Cyprus during the Emergency; allocating funds (with the Treasury) to security operations in Cyprus; vetting requests by international observers to go to Cyprus; co-ordinating public responses to "rebut or downplay the extent of abuses by the Security Forces"; helping the Colonial Administration with the deportation of Cypriot opponents of British rule and their detention in the Seychelles; and, in one claimant's case, authorising the Colonial Administration to deny her permission to bring a private prosecution against her assailant and encouraging the Colonial Administration to delay informing her of its decision until he had left Cyprus, to prevent her from bringing a civil claim against him.

76. It is common ground that the most authoritative recent statement of English law on joint liability in tort is to be found in the judgments of the Justices in *Fish & Fish Ltd v. Sea Shepherd UK* [2015] AC 1229 (SC). There was a disagreement on the facts, but none on the law, which is most conveniently to be taken from the judgments of Lord Toulson and Lord Sumption JJSC.

77. The former dealt with the relevant principles at paragraphs 19-25. He noted that joint liability may arise in a number of ways, such as joint signing of a defamatory statement or procuring commission of a tort by inducement, incitement or persuasion, typically in intellectual property cases. The case before the court was one of alleged assistance to the primary tortfeasor.

78. To establish "accessory liability in tort", Lord Toulson held, "it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort" (paragraph 21). Joint liability requires proof of two elements:

> "D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort."

79. At paragraph 22, he cited with apparent approval a passage from the 7th (1921) edition of *Clerk & Lindsell on Torts*, p.59, stating:

> "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design… ."

80. He said (paragraph 25) that there is "no formula" for determining the question whether the defendants had "combined to secure the doing of acts which proved (if they should prove) to be tortious" and agreed with Bankes LJ in *The Koursk* [1924] P 140, 151, that it would be "unwise to attempt to define the necessary amount of connection. Each case must depend on its own circumstances".

81. Lord Sumption JSC also referred to *The Koursk* and to the judgment of Mustill LJ (as he then still was) in *Unilever v. Gillette (UK) Ltd* [1989] RPC 583. He said the effect of these statements is that:

> "… the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious."

82. Lord Sumption (paragraph 38) went on to observe that "the accessory's liability is not for the assistance. He is liable for the tortious act of the primary actor, because by reason of the assistance the law treats him as a party to it". He then quoted from the judgment of Lord Neuberger PSC in *Vestergaard Frandsen A/S v. Bestnet Europe Ltd* [2013] 1 WLR 1556, at paragraph 34:

> "[*As Lord Sumption JSC pointed out in argument,*] in order for a defendant to be party to a common design, she must share with the other party, or parties, to the design, each of the features of the design which make it wrongful. If, and only if, all those features are shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some other relevant acts, will not stop them all from being jointly liable."

83. Lord Sumption went on to give examples of some joint liability cases as illustrations of (see paragraph 39) the concern of the law to:

> "recognise a liability for assisting the commission by the primary actor of a tort, while ensuring that the mere facilitation of the tort will not give rise to such a liability, even when combined with knowledge of the primary actor's intention".

84. Mr Chamberlain submitted that the allegations of common design and acts of assistance by the United Kingdom government to the Colonial Administration do not show that the substance of the torts was committed in England, since each of the allegations is, as put in the skeleton argument, "tied to Cyprus and the Colonial Administration".

85. In so far as part of the common design stems from decisions made by members of the United Kingdom government, he argued, the other party to the design and all the primary tortfeasors were in Cyprus; a point with still greater force, he said, in the case

of the alleged acts of assistance, encouragement and advice. Those acts, to the extent that they occurred in England, related to acts taking place in Cyprus.

86. In oral argument, he contended that joint liability is not a tort any more than is vicarious liability. As in the case of vicarious liability, he submitted, the damage is inflicted on the victim by the primary tortfeasor. Here, that damage was, as in the case of vicarious liability, inflicted in Cyprus not England.

87. Furthermore, he submitted that for the purposes of locating these torts geographically, the most potent factor here is that the infliction of violence was intentional rather than merely negligent as in the personal injury cases such as *Durham* and *Connelly*. The relevant intention was that of the primary tortfeasor, i.e. the individual perpetrator on the ground, in Cyprus.

88. Acknowledging a lively academic debate about whether joint liability is properly described as accessory or primary liability, Mr Chamberlain pointed out that whatever the merits of that debate, the Supreme Court had come down on the side of characterising the liability as accessory or secondary to that of the primary tortfeasors who struck the blows. It made no sense to say that the accessory's tort was committed in England if the blows were struck in Cyprus.

89. For the claimants, Mr Douglas submitted (in the words of his skeleton argument) that "the gravamen of the claim is the common design, taken together with the combination to secure the doing of the acts which constituted the tort"; and that the "indispensable acts" in respect of both the common design and the combination occurred in London.

90. He went on to submit that it is possible for different laws to govern primary and accessory liability. For the latter proposition, he relied on *Fiona Trust & Holding Corporation v. Privalov* [2010] EWHC 3199 (Comm) at paragraph 153 of the judgment of Andrew Smith J. In the context of alleged equitable wrongs and breach of fiduciary duty, the judge, citing Tuckey LJ's judgment in the *Base Metal Trading Ltd* case, said that:

> "... different laws might govern different claims arising from the same facts .... and specifically the law governing the liability of the secondary party to breach of fiduciary duty (whether the claim is for dishonest assistance or knowing receipt) is not necessarily that which governs the relationship between the fiduciary and his principal."

91. I come to my reasoning and conclusions on the geographical location of the assumed joint liability of the defendants. First, I do not agree that joint liability is to be equated with vicarious liability and that it is not to be regarded as a tort. In an accessory liability case such as *Fish & Fish*, the accessory and the principal are joint tortfeasors and no less so than in a case of direct joint participation in the tort.

92. That is because, as Lord Sumption explained, the law treats the accessory as a party to the primary tortfeasor's act. The accessory is liable not for the assistance given but as a party to the primary tortious act. That is as much the case in an accessory liability case such as the present case, or on the facts of *Fish & Fish*, as where an assault is committed by two persons each wielding a hammer and attacking the victim together.

93. To describe the liability of the accessory as secondary does not make that person's liability comparable to vicarious liability. In the case of vicarious liability, the vicariously liable party is not personally a wrongdoer. In the case of joint liability, he is.

94. Applying that reasoning to the assumed facts, the common design tort is qualitatively different from the defendants' vicarious liability. The joint liability arises from a common design between the United Kingdom government and the Colonial Administration. No common design is alleged directly between the United Kingdom government and the individual assailants; whereas in the case of vicarious liability the nexus is between the United Kingdom government and the individual perpetrators.

95. In this case, in a real sense it could be said that the common design was carried out and implemented in both countries. Obviously, one party to it is located in England, the other in Cyprus. Communications between the two in furtherance of the common design plainly passed between the two countries. The eventual damage to the claimants then occurred in Cyprus.

96. This is therefore a double locality case, but one like no other in the lexicon of reported cases. I do not get much help from classic double actionability cases such as *Phillips v. Eyre* and *Boys v. Chaplin*. Although the former was, like this case, one involving the intentional infliction of physical injury, there was no allegation that the Crown was complicit in the alleged tort of the Governor of Jamaica. And neither case was, as Slade LJ noted, one of double locality.

97. The cases involving negligently caused personal injury abroad, *Durham* and *Connelly*, are not much help either. The injury was physical in those cases but there was no allegation of any common design producing joint liability; still less of a common design that included the deliberate, rather than merely negligent, infliction of injury. Nor do they include the political element in the present case, namely the deliberate use of force as an instrument of government policy in the exercise of state power.

98. The claimants rely on the cases involving conspiracy and inducing breach of contract in a commercial, not political or military, context: *Kuwait Oil Tanker*, *Grupo Torras* and *Base Metal Trading Ltd.* In those cases, the element of combination is present, albeit not in the form of a common design; but the loss is economic, not physical and again, there is no element of state power being exercised.

99. In those cases, the court took account of where the operation was run from, as well as where the damage was suffered. But in earlier economic loss cases such as *Diamond* and *Cordoba Shipping Co. Ltd.*, and in *Metall und Rohstoff*, the tort was found to have been committed where the key communications were received and acted upon, not in the place from which they were sent.

100. A closer non-political analogy with the present case might be one where gangsters in one country combine with gangsters in another country to arrange assaults on rival gangsters in the second country. If one adds a political context and the exercise of state power, one could consider a factual scenario such as that of the assassination of Trotsky, planned and directed from Moscow but implemented by an agent of the USSR in Mexico.

101. In oral argument, Mr Chamberlain said that on those facts, the tort against Trotsky in 1940 was (as a matter of English law) committed in Mexico. Mr Douglas said it was committed in the USSR. I am more comfortable with the latter proposition. But the analogy is very imprecise; the balance may tilt strongly in the direction of Mexico if one supposes that Stalin's agents there constituted an organised machine and not just an individual assassin.

102. In the present case, the complicity alleged against the United Kingdom government is more indirect; it is not suggested that it ordered assaults and torture. Rather, it is alleged that the United Kingdom government used its sovereign state power to establish and help to operate systems, in a common design with the Colonial Administration, which included tortious acts of violence as an instrument of policy.

103. I accept Mr Douglas' point that, in the different context of equitable wrongs, different wrongs forming part of the same overall factual matrix can be committed in different countries and may be governed by different laws, as Andrew Smith J noted in the *Fiona Trust* case. But I do not think that is likely or even possible where the allegation is one of joint liability for the same tort.

104. As already noted, in joint liability the essence of the tort is the common design or combination, such that the law makes the accessory a party to the primary tortious act. That does not mean the formation of the common design and acts done in furtherance of it cannot occur in more than one country. But I think it probably does mean that the substance of the joint tort must be committed in one country, not two or more. That follows, in my judgment, from the nature of joint liability as explained in the cases culminating in *Fish & Fish*.

105. The tort to which the accessory is treated as a party can only be committed, in substance, in one country, not in two or more. Similarly, in the conspiracy cases, the judges searched for only one geographical location for each tort committed. There was no question of conspirators in different countries, undoubtedly joint tortfeasors, committing the tort of conspiracy together but in more than one country, so that one conspirator might incur liability in Kuwait and another, in the same conspiracy, in England.

106. I therefore reject the idea that the United Kingdom could be jointly liable, in England, for torts committed, as respects the joint liability of the Colonial Administration, in Cyprus. That view is fortified by the point that in the case of the joint liability torts, there are in my judgment three tortfeasors not two. They are the United Kingdom government, the Colonial Administration and the individual assailants. Each individual perpetrator of an assault is a tortfeasor, albeit not in a common design between himself and the United Kingdom government.

107. I conclude that the stark choice here is between England and Cyprus. It must be one or the other. I accept that the elements of combination, of deliberately inflicted injury and of exertion of state power over a colony, point in the direction of England. The assumed *mens rea* of the United Kingdom in the common design was surely entertained principally in London, the *situs* of the senior partner in the common design, rather than the junior partner, the Colonial Administration.

108. For that reason, in a vivid and real sense, it can be said that the "engine" of the wrong was in England; that the formation of the common design proceeded from there; and that these factors should overbear the weight to be given to the suffering of the damage in Cyprus. As Tuckey LJ observed in *Base Metal Trading Ltd*, the place where the loss occurred is not determinative. Looking back at the sequence of events constituting the tort, the principal place of the wrongful act has considerable potency.

109. But in the end I have reached the conclusion that the location of the common design liability should be the same as the location of the ultimate individual perpetrator's liability, which is also that of the other partner in the common design. I think it is artificial to treat the common design liability of the defendants, jointly with the then Colonial Administration, as located in a different country from that in which the ultimate perpetrators of the assaults, who executed the design, are located.

110. Two of the three links in the chain (the Colonial Administration and the individual perpetrators) are based in Cyprus. The third, and highest, is in England but that does not in my judgment outweigh the presence of the second and third in Cyprus. Accordingly, although the nature of joint liability is different from that of vicarious liability, the answer turns out to be the same; the joint liability was incurred in Cyprus.

The cause of action in negligence

111. I will address next the question where in substance the cause of action in negligence arose. The pleaded case is as follows. The War Office, the British Army and the Colonial Office owed a duty to take reasonable and necessary steps to prevent use of excessive force, including torture, by the Security Forces during the course of security operations in Cyprus (amended particulars, paragraph 62).

112. The claimants were a limited class to whom the duty was owed. They were British subjects resident in a colony created by the Crown, which was responsible in international law for the affairs of the colony. The United Kingdom was then (as now) a signatory to the European Convention on Human Rights (ECHR), which included the prohibition in article 3 against torture or inhuman and degrading treatment or punishment. Derogation from article 3 was not permitted under the ECHR.

113. It is also pleaded (paragraph 63) that that defendants assumed a responsibility towards the claimants by virtue of their responsibilities in international law, their actual or constructive knowledge that unlawful violence was being used to restore law and order in Cyprus, and their power to prevent such abuses. Particulars of knowledge are then set out. These consist mainly of historical sources in the press, in Parliament and from lawyers and others in Cyprus, drawing the abuses to the attention of the United Kingdom government.

114. The particulars of negligence (paragraph 64) allege that the defendants caused or permitted the injuries sustained by the claimants, by failing to take the necessary steps to act upon reports of torture, disregarding international obligations under the Geneva Convention and the ECHR, failing to rein in and properly train the Security Forces so that they would exercise the necessary restraint and, instead, encouraging them by giving them legislative protection against private prosecutions.

115. For the defendants, Mr Chamberlain submitted that the substance of the cause of action is the allegation of unlawful acts of violence in Cyprus. That means the centre of gravity of the tort was Cyprus even if, which is far from clear, many of the acts and omissions alleged, occurred in London. He also argued that most of the necessary steps to perform the duty of care, by restraining the use of unlawful violence, would have had to have been done in Cyprus.

116. Mr Chamberlain contended that the best analogy in the case law is found in the personal injury cases, *Durham* and *Connelly*, where the gist of the cause of action is very similar: the sustaining of physical injury abroad which the English based defendant is accused of failing to prevent. The less closely analogous conspiracy cases, he argued, allege a qualitatively different wrong but still include a focus on where the damage was sustained.

117. Mr Douglas, for the claimants, focussed on the acts and omissions that occurred in London. Again, he located the tort where the wrongful acts of the tortfeasor were done or mainly done, not where their results were felt by the victims. He emphasised the obligation of the Governor of Cyprus to do London's bidding and his lack of authority over the British Army, which answered not to him but to its Commander in Chief.

118. He criticised the reasoning of Wright J in the *Connelly* case and submitted that, in any case, *Connelly* and *Durham* were completely different because there was no equivalent to the allegations here, to the effect that the defendants had deliberately filled Cyprus with ill trained, over-zealous and brutal soldiers and police officers, whose presence there was integral to the operations in which unlawful violence was used.

119. In my judgment, the submissions of Mr Chamberlain are to be preferred. Where the cause of action is negligence, the analogy with the two personal injury cases on which he relies, is stronger than in the case of the common design joint liability tort, considered above. There, what is alleged against the defendants is a tort involving a conscious decision to cause and permit violence, not merely a negligent failure to prevent it.

120. It is true that the toxic agents causing injury abroad are, in this case, human rather than chemical, as in the two personal injury cases. It is also true that the English based defendants in those two cases did not exercise state power or owe relevant duties in international law. But I do not find those factors decisive. Where negligence is alleged, any considerations that are particular to states or state bodies are more attenuated than where a tort of deliberate intent, such as assault, is alleged against a state or state body. I hold that the cause of action for negligence also arose in Cyprus.

Can the claimants rely on the "flexible exception" to the double actionability rule?

121. It is not disputed by the claimants that the double actionability rule should be applied "unless clear and satisfying grounds are shown why it should be departed from ...." (per Lord Wilberforce in *Boys v. Chaplin* at 391H). There is no mechanical rule determining when to apply the exception, but it cannot be applied merely by appealing to some generalised conception of justice.

122. As Lord Hope said in *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 (paragraph 164):

> "[u]nless a rigorous approach to this question is adopted, the application of the exception is at risk of giving rise to much uncertainty and to the criticism alluded to in the Australian cases that it has become instinctive and arbitrary".

123. If, but only if, "clear and satisfying grounds" are found for determining that the exception should be applied to a particular issue, then the court may apply the law of the country "which, with respect to that issue, has the most significant relationship with the occurrence and the parties", in the words of *Dicey & Morris*, *op. cit.*, rule 203(1) in the 12th (1993) edition.

124. That law is likely in most cases to be the *lex fori*, in place of the *lex loci delicti*, but the position can be the other way round: see *Red Sea Insurance Co SA v. Bouygues* [1995] 1 AC 190, which also demonstrates that the exception may be applied to the whole of a claim or cause of action and need not be applied only to a particular segregated issue in the case (see also *Pearce v. Ove Arup Partnership Ltd* [2000] Ch 403 (CA), explained in the 15th edition (2012) of *Dicey, Morris & Collins* at 35-011).

125. Equally uncontroversial must be the proposition that, since the two reasons identified by Slade LJ in *Metall und Rohstoff* underlie the double actionability rule – first, that one should ordinarily not be liable for doing what is lawful where it is done and, second, that the comity of nations normally accords precedence to local law at least where the damage is local – it is likely to be in cases where those reasons do not apply that the exception may be pressed into service.

126. Thus, for example, in *Boys v. Chaplin* itself, Lord Wilberforce identified (at 392E-F), as a reason for applying the exception, the absence of any interest on the part of the Maltese state in the method for determining recovery of damages in a suit between two foreign nationals only temporarily resident in Malta. I was also referred to two other cases in which the exception was discussed.

127. In the first, *Church of Scientology of California v. Commissioner of Metropolitan Police* (1976) 120 Sol J 690 (and the more useful transcript of 13.7.76), Bridge LJ (as he then was) considered that the exception might at trial be applied to allow English law, rather than West German law, to determine an issue of vicarious liability for publication (in West Germany) of a defamatory statement about the plaintiff by an officer of the defendant even if, applying West German law, there would be no vicarious liability and therefore no right of action. Bridge LJ attached significance, again, to the point that both parties were resident in England: see p.18D-F in the transcript.

128. The second case was a personal injury action tried in Manchester by Mr J. Kay QC, sitting as a deputy judge of the High Court: *Johnson v. Coventry Churchill International Ltd* [1992] 3 All ER 14. The English plaintiff was sent to work in Stuttgart by the defendant recruitment agency which employed him to work at the premises of the defendant's West German client, where he sustained injury when a rotten plank gave way under him.

129. West German law gave him no remedy unless he could establish what the judge (at page 23f) called "wilful breach of duty", a higher hurdle, insurmountable on the facts, than negligence in English law. The rationale for the West German rule was that compensation for accidents at work was regulated by a state insurance system funded by employer contributions.

130. The judge observed at page 24j that there was "nothing in the policy underlying the foreign rule that was ever intended to have any application to the case of an English citizen working for an English employer", who could not benefit from the West German social security legislation and, like his employer, did not pay contributions to the West German scheme.

131. Such is the body of law to which I was referred on this issue. At the hearing, I asked for clarification of some further points which seemed to me of potential relevance to whether the exception should be applied in the present case. The clarification was helpfully provided in the form of four propositions of law supplied by the defendants, of which all except the first were agreed by the claimants to be correct.

132. The first proposition of law was that tort claims for assault could have been brought against individual perpetrators in the civil courts of the colony of Cyprus up to independence in 1960, subject to any limitation defence available under the law of the colony of Cyprus. Mr Chamberlain confirmed that, not surprisingly, assault and battery was unlawful under the then law of the colony; actions against individuals would therefore, in principle, succeed if well founded on the facts and subject to any limitation defence.

133. The claimants, understandably, do not accept this concession. Indeed, they have pleaded that active legislative and other steps were taken to prevent at least one claimant from obtaining redress in Cyprus, whatever the theoretical content of Cypriot substantive tort law. Mr Douglas said he thought there may also have been a doctrine of immunity available at the time to agents of the Crown or of the Colonial Administration acting in the course of their duties.

134. The second proposition is that claims alleging vicarious or joint liability for assaults, or negligence in failing to prevent them, could have been brought against the Crown in right of the government of the United Kingdom in the courts of England and Wales at any time after the coming into force of the Crown Proceedings Act 1947, subject to any available limitation defence. Such claims are justiciable in the English court which, had any been brought, could have applied the then (pre-independence) law of the colony of Cyprus.

135. The authority for that second proposition is *Alvarado v. Secretary of State for Defence* (2013) 15 BHRC 428, a modern decision of the Court of Appeal of Gibraltar. The proposition is accepted by the claimants as representing the law of England. In *Alvarado*, a personal injury claim was brought in Gibraltar against the Secretary of State for Defence, alleging that the defendant's negligence had caused the claimant to suffer personal injury at premises operated in Gibraltar by the Ministry of Defence. The proper defendant was, therefore, the Crown in right of the government of the United Kingdom, not the Crown in right of the government of Gibraltar.

136. The defendant appealed against a decision refusing to strike out the claim on the ground of Crown immunity. The defendant argued in the appeal that the claimant could not sue the Crown in right of the government of the United Kingdom in the Gibraltar court. This was because there was no right of action against the Crown at common law; the right had to be created by the Crown Proceedings Act 1947 (the 1947 Act), which by section 52 only applied to claims brought in the courts of England and Scotland.

137. The argument was accepted by the Court of Appeal of Gibraltar. At page 7 of the transcript (of 15.11.13), Sir Paul Kennedy, presiding, said:

> "There is nothing in Gibraltar law to suggest that CUK [*the Crown in right of the United Kingdom*] cannot be sued in England and Wales, where it has been rendered capable of being sued by statute. And there is nothing in the 1947 Act to suggest that under that Act CUK cannot be rendered liable for torts committed abroad.... ."

138. The third proposition of law, again accepted by the claimants, is that by reason of section 52 of the 1947 Act and according to the reasoning in *Alvarado*, no tort claims could have been brought against the Crown in right of the government of the United Kingdom in the courts of the colony of Cyprus prior to independence. There was no statutory provision allowing such a claim to be brought, and no right to sue the Crown at common law.

139. The fourth proposition is also common ground: a tort claim could have been brought against the Crown in right of the government of the United Kingdom in the civil courts of Cyprus after independence in 1960, but such a claim would not succeed because the defendant could defeat it by pleading sovereign immunity.

The defendants' submissions on the flexible exception

140. Mr Chamberlain emphasised that application of the exception should be rare, as Lord Wilberforce had stated, and had to be justified on rigorous reasoning, in light of the purpose of the exception, namely (as Sir Thomas Bingham MR had stated in the *Durham* case) "to give effect to what amounts to the proper law of the tort or the law with which the tort has the closest connection".

141. He submitted that in the cases where the exception has been applied (*Boys v. Chaplin*, *Johnson v. Coventry Churchill International Ltd* and *Red Sea Insurance Co v. Bouygues*), the connection between the issue to which it was applied, and the country whose law was applied to that issue, was very close indeed. The same was not true of the present case, he argued.

142. He submitted that the claimants had failed to point to any feature of Cypriot law that was repugnant or contrary to public policy and, even if they had done so, it would suffice to apply English law in place of any offending provision of Cyprus law only and not to disapply Cyprus law in respect of all issues relevant to the causes of action.

143. Mr Chamberlain argued that the claimants' citizenship of the United Kingdom and colonies, owing allegiance to the Crown, was no more a reason for applying English law to these causes of action than it had been in the case of *Phillips v. Eyre* where the plaintiff was a British subject but held not entitled to bring an action founded on English law if Jamaican law, the law of the colony, barred his right of action. It is

well recognised, he contended, that citizenship of a colony of the United Kingdom does not entitle the citizen to invoke the law of the United Kingdom instead of the law of the colony.

144. He emphasised that the court should ignore the content of, respectively, the Cypriot law of limitation and the English law of limitation, when considering whether to apply the exception. The question of limitation was subsequent to the question which law governs the causes of action, and should be considered at the stage of the third preliminary issue, by reference to the 1984 Act.

145. Mr Chamberlain's argument, at its simplest, is that Cyprus law is fit for purpose in respect of these claims and there is no good reason to disapply it if Cyprus is (as I have now indeed decided) the *lex loci delicti*. He also relied on the Law Commission Report (No. 193 of 1990), *Private International Law: Choice of Law in Tort and Delict*. At paragraph 2.7, the report's authors stated:

> "We think that it is correct in principle that the introduction of a foreign element may make it just to apply a foreign law to determine a dispute, even though the substantive provisions of that foreign law might be different from our own. There is no reason why this general principle of the conflicts of laws should not apply in cases involving torts and delicts. Apart from matters of procedure, and subject to overriding public policy considerations, there is no reason why the *lex fori* should be applied in all cases involving a tort or delict regardless of the foreign complexion of the factual situation."

146. Finally, Mr Chamberlain submitted that if the claims fell to be considered against the provisions of the Private International Law (Miscellaneous Provisions) Act 1995, or the Rome II Regulation, the applicable law in personal injury cases under both is normally that of the country where the individual sustained injury (section 11(2) of the 1995 Act and article 4(2) of Rome II); albeit not invariably so (see the exceptions in section 12 of the 1995 Act and article 4(3) of Rome II).

The claimants' submissions on the flexible exception

147. Mr Douglas' primary submission was that if (as I have now decided) the *lex loci delicti* is Cyprus, the law of England should nevertheless be applied to the whole of the claims, applying the exception. Alternatively, he submitted that the English law of limitation should be applied to the claims, even if the substantive law governing the torts is that of Cyprus.

148. Mr Douglas' main argument was expressed thus in his skeleton argument:

> "... if the British Government does something in London which is directed against British Subjects in Cyprus, '*whether as a matter of justice, comity or public policy*' there can be no reason to allow the British Government to claim exemption from liability in tort under English law by reference to the law of Cyprus."

His italicised words are taken from Slade LJ's judgment in *Metall und Rohstoff*, at 446G.

149. He submitted that not only is England the only available forum for the claims, because of the availability of sovereign immunity if a claim were brought now in the independent state of Cyprus; the United Kingdom is the country with which the torts

have the closest connection, since the gravamen of the wrongdoing alleged against the defendants is the decisions made, instructions given and the other pleaded acts and omissions which, overwhelmingly, occurred in London.

150. Indeed Cyprus, at the time of the alleged torts, did not exist as a state at all, he reminded me. The counter-insurgency efforts of the United Kingdom during Emergency were directed from London. Cypriot law is "wholly extraneous", he said, to issues relating to the United Kingdom government's responsibility, which arises on the basis of "acts or omissions through the exercise of executive power in London".

151. He added in oral argument that the pre-independence colony of Cyprus could have no interest in its law being applied to the dispute; it had no statehood which could found considerations of comity of the type alluded to in *Boys v. Chaplin*, *Metall und Rohstoff* and *Johnson v. Coventry Churchill International Ltd.* It would be as artificial to apply Cypriot law to these torts as it would be to apply the West German law of vicarious liability to the publication of the defamatory statements in the *Church of Scientology* case.

152. In oral submissions, Mr Douglas added that even if Cypriot law is the substantive law governing the torts, the Cypriot law of limitation should be disapplied at this stage, and not left to be determined as a question arising later by reference to sections 1 and 2 of the 1984 Act.

153. He pointed to the practical impossibility of Cypriot claimants issuing claims in this country before expiry of the normal two year Cypriot limitation period, which occurred at the latest in 1960. If they had somehow managed to do so, they would have been subject to the English law of limitation, which at the time was classified as a matter of procedure and therefore subject to the *lex fori*.

The flexible exception; reasoning and conclusions

154. Mr Chamberlain correctly pointed out that there is no overriding "interests of justice" ground on which to apply the exception, without proper analysis. The only basis for applying it is by the rigorous process of reasoning of which Lord Wilberforce spoke in *Boys v. Chaplin*, echoed subsequently by Lord Hope in the *Kuwait Airways Corporation* case. While justice may demand that the exception be applied, that conclusion may not be reached on a basis that is merely intuitive, instinctive or arbitrary.

155. I also agree with Mr Chamberlain's submission that the issue of limitation is subordinate and secondary to the prior question of which country's substantive law governs the torts alleged. The tail of limitation should not wag the dog of the proper law of the torts. I therefore put to one side the issue of limitation when considering whether the exception should be applied in this case.

156. I agree with Mr Douglas that there is no question of forum shopping in this case. There is no question of the claims being heard in Cyprus; as it is an independent state, the defendants could plead sovereign immunity which would bar the claims. There is no indication that the defendants would not do so and it is overwhelmingly likely that they would. I therefore put to one side any issue of forum shopping.

157. It is common ground, on the authority of *Alvarado*, that the claims are justiciable in this country, whether English or Cypriot law is applied as the law governing the torts. There would be no particular difficulty if the English court were to apply Cypriot law. English courts frequently apply foreign laws to causes of action brought before them. The foreign law, if not agreed, is proved by expert evidence and determined by the court.

158. Next, I proceed on the basis that the English High Court, if it were applying Cyprus law, would hold that what the individual assailants did, if proved, was unlawful and tortious under the law of the colony of Cyprus at the time the acts were committed. Although Mr Douglas expressed concern about invocation of a possible immunity for the assailants, Mr Chamberlain disavowed any reliance on such an immunity.

159. I think the possibility of immunity for the individuals can probably be discounted, even if the defendants' instructions to their lawyers were to change. The counter-insurgency operations conducted in Cyprus during the Emergency were not acts committed in the course of waging war against a foreign state. There would be no immunity based on Crown act of state. The individual assailants' acts would be treated as actionable under the law, whether the law is that of England or Cyprus.

160. It does not follow, however, that if the claims are factually well founded as against individual assailants (who are not sued), and not barred by limitation, they would necessarily succeed as against the defendants, if the law applied is that of Cyprus at the time and not that of England. Mr Chamberlain has not conceded that, if the claims are factually well founded and Cypriot law is applied, the defendants' only potential defence is that of limitation.

161. The concession of the defendants that the claims are justiciable in England, applying the substantive law of Cyprus, says nothing about the content of the relevant Cypriot substantive law. Assuming, as I do, that the pleaded facts are true, the English court would have to decide whether the content of Cypriot law at the time leads to the conclusion that the defendants are vicariously liable for the torts, jointly liable in tort by a common design with the Colonial Administration and liable in negligence for failing to prevent the assaults.

162. The next point is this. Mr Chamberlain is right that there is no plea from the claimants that any particular part of Cyprus law is repugnant or contrary to public policy. As the pleadings currently stand, there is nothing comparable to the legal resolution considered repugnant and objectionable in the *Kuwait Airways Corporation* case.

163. There, the Iraqi regime which had invaded Kuwait, had purported to pass a legally effective resolution transferring to itself the ownership of aircraft owned by the claimant. The English court was unsurprisingly not willing to give effect to it. There is no equivalent provision of Cyprus law to which the claimants can point and assert that it is abhorrent to public policy.

164. The defendants are therefore able to say, and do say, that if Cyprus law affords the claimants no right of action, that is a satisfactory state of affairs not productive of any injustice. They say this is an ordinary case of a person – as it happens, in this case the

Crown in right of the government of the United Kingdom - being entitled to behave on foreign soil in a manner that would be unlawful here but is not unlawful there.

165. At this stage of the analysis, the force of the defendants' arguments starts to diminish. This is not an ordinary case; the defendants are not private persons or entities; they represent the government of the United Kingdom, which is said to be responsible for and indeed complicit in, as well as responsible for failing to prevent, unlawful acts of violence committed against citizens of one of its colonies, in that colony.

166. The defendants say they are entitled to escape liability in tort if the local law so provides, even though the Crown created the colony of Cyprus and enacted the law which may absolve it from legal liability. Mr Douglas said it would be wrong to allow that. Mr Chamberlain answered that citizenship of a United Kingdom colony entails the protection of the law of the colony but not that of the parent state; and that in *Phillips v. Eyre* the British plaintiff suing in England also had to bow to the local law.

167. Those points, in my judgment, are not a complete answer for two reasons. First, when *Phillips v. Eyre* was decided, the flexible exception to the double actionability rule had not yet been carved out from the rule itself, established in that case. Secondly, in *Phillips* the defendant was not the parent state but the Governor of the colony, Jamaica, subordinate to the parent state. There was no suggestion that the Crown in right of the United Kingdom was legally liable for the tortious acts of the Governor by vicarious or joint liability.

168. In the present case, my knowledge of substantive Cypriot tort law at the relevant time is incomplete. The most that can safely be assumed, as I have said, is that the acts of the individual assailants were tortious. Beyond that, I have the benefit of some pleaded Cypriot law but its content is not agreed and I have not heard expert evidence.

169. The parties have agreed to the first preliminary issue being determined on assumed facts, but I do not understand the assumed facts to extend to the content of relevant Cypriot substantive law. Neither party invited me to assume that the claims are (subject to limitation) actionable under the then law of Cyprus. I am therefore asked to decide whether to apply the exception without knowing whether they are or not.

170. This contrasts with the position in many of the cases cited to me. For example, in *Base Metal Trading Ltd*, it was common ground that the defendant's acts were not actionable in Russian law. In *Kuwait Aircraft Corporation*, the court was confident that the relevant Iraqi law of conversion was the same as that of England. In *Phillips v. Eyre*, the court determined (adversely to the plaintiff) what the law of Jamaica was.

171. And in the two modern cases where the exception was applied (*Chaplin v. Boys* and *Johnson v. Coventry Churchill International Ltd.*), the very reason for applying the exception was to enable a plaintiff to enjoy an English law benefit not available under local law. No one was in any doubt about the content of the *lex loci delicti*.

172. I do not think I can be expected to determine the content of substantive Cyprus tort law. I am not in a position to do so. Mr Chamberlain's submission that the claimants have not shown that any provision of Cyprus law is repugnant, must be viewed in that light. It seems to me that I must consider the issue I have to decide on the basis of the

best information I have about what Cyprus law is. This is to be found in the parties' respective pleadings, extending into the second preliminary issue.

173. The claimants started the claims by pleading their causes of action by reference to English law. The defendants, in their Preliminary Issues Defence, responded that the double actionability rule applies and that the claimants' pleading was therefore "deficient in that they fail to particularise whether and, if so, how the claim would be actionable under Cypriot law". The defendants therefore "require[d] the Claimants to plead which provisions of Cyprus law they rely upon as providing causes of action for the matters alleged" (paragraph 10).

174. In response, the claimants pleaded that the double actionability rule does not apply and denied that the pleading was deficient but, without prejudice to that denial, they went on to plead their position under Cyprus law, saying that it would be a matter for expert evidence in due course. The pleas were as follows in their Preliminary Issues Statement of Case, paragraph 9.

175. First, they pleaded that damages for trespass to the person is actionable: Civil Wrongs Law (Cap 148) (hereafter, the CWL) section 26, which was then set out and provided a serviceable definition of assault. There is no difficulty with this aspect of Cypriot law, as I have said.

176. Next, they pleaded that negligence is actionable and cited section 51 of the CWL. This provided a definition of negligence causing damage; but the pleading does not include (though it refers to) section 51(2) of the CWL, setting out the circumstances in which a person owed a duty "not to be negligent". Unless the duty is owed, negligence is not actionable.

177. Next, the claimants pleaded that the CWL provides for vicarious liability, in section 12, if a person "shall join or aid in, authorise, counsel, command, procure or ratify any act done or to be done by any other person". There is a provision for vicarious liability for the acts of an agent, but not for a non-agent contractor unless there was negligence in selecting the contractor. There is also, in section 13, a 20th century style provision for "master and servant" vicarious liability for acts done in the course of duties but not outside the course of duties.

178. As for joint liability in tort, the claimants rely on section 11 of the CWL, quoted in full in the pleading, but not replicated here. The main provision is that where two or more persons are respectively liable for a tort, they are liable as "joint civil wrong doers" and "may be sued therefor either jointly or severally". Finally, the claimants plead without particulars, that "[t]he concept of common design is provided for in the common law of Cyprus".

179. The defendants then pleaded a Reply making no express response to paragraph 9 of the claimants' Preliminary Issues Statement of Case dealing with the content of Cyprus tort law. The response to that paragraph is therefore found in paragraph 1 of the Reply: save as otherwise pleaded "the Defendants join issue with the Claimants on their Statement of Case and require the Claimants to prove all facts and matters contained therein".

180. The defendants have yet to show their hand in relation to Cyprus law. It seems clear that they do not positively dispute the existence and applicability at the time of the provisions of the CWL relied on by the claimants. But they have not responded to the more important question whether the effect of those very general provisions of Cyprus tort law is to fix the defendants (as distinct from the individual perpetrators) with liability on the assumed facts.

181. In that rather unusual procedural position, I have reminded myself of the discussion in Chapter 9 (and rule 25) of the current 15th edition of Dicey, Morris & Collins. Under the sub-heading "[b]urden of proof" paragraph 9-025 intriguingly states (omitting the footnotes):

> "The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the court applies English law."

182. However, in the footnotes and the ensuing paragraphs 9-027 to 9-029 further qualifications and exceptions are introduced. The discussion at paragraph 35-121 to 35-124 (and in the 4th Supplement at paragraph 35-122), under the sub-heading "[a]llegation and proof of the lex loci delicti", cites further recent case law, which is equally inconclusive for present purposes.

183. Having considered the parties' respective positions and submissions, the state of the pleadings, the terms of the preliminary issue I am asked to decide and the basis upon which I am asked to decide it, I find no simple answer to the question which party should bear responsibility for demonstrating the adequacy or, as the case may be, inadequacy of Cypriot law for determining liability for the pleaded torts.

184. On the one hand, there are clearly applicable statutory provisions of British origin and informed by our common law, whose content is not obviously defective or lacking in clarity. They may now appear passé in their tone and content, but that may well be because the conduct alleged took place so long ago. If these were standard personal injury claims alleging negligence, I would be inclined to view Cypriot law as adequate and appropriate to deal with them.

185. On the other hand, there are cogent reasons for treating the present claims as different in kind from ordinary claims for personal injury sustained abroad. In the end, I have reached the conclusion that those reasons outweigh the proposition that Cypriot law is appropriate for these claims, and I have concluded that the exception should be applied so that English law governs the claims instead. My reasons for reaching that conclusion are as follows.

186. The first reason is that the defendants do not concede that the claims are actionable against them under Cyprus law. That is only the starting point, but it is relevant because if the defendants had made that concession, the choice of substantive law

would not make any practical difference except to the issue of limitation which, as Mr Chamberlain correctly submitted, is a subsequent issue to that of choice of substantive law.

187. The second reason is that the defendants represent the state which made the very law which may absolve it from liability, if it were the case that the claims are not actionable under Cypriot law. The law of the colony of Cyprus before independence was made by the United Kingdom, which the defendants represent. It seems fair to judge the party responsible for making the law in Cyprus by reference to the superior law of the United Kingdom, pursuant to which it made Cyprus law, than by reference to the inferior local law, made by one of the parties to the dispute, about events in the locality.

188. Thus, to judge the United Kingdom government according to the colonial law of pre-independence Cyprus is to judge it by a law it has itself made and under which it may have immunised or protected itself against suit. The United Kingdom appointed the Governor, could remove him and make, and unmake, Cyprus law. It seems to me just to hold the United Kingdom to account in its own courts by applying its own law, to the exclusion of the colonial law.

189. The third and related reason is that although I have narrowly decided that the three torts were, on the assumed facts, all committed in Cyprus, the connection with London is very close; while the actual assailants were in Cyprus and the assaults occurred there, and while the assailants no doubt in many cases acted on behalf of the Colonial Administration rather than directly on behalf of the Crown, it was the latter which bore responsibility for justice in Cyprus; and many of the key decisions and instructions emanated from London.

190. The fourth reason for my conclusion is that all three pleaded torts engage the special responsibility of the state where violence is deliberately inflicted on its citizens. In the case of two of the three torts, namely the vicarious liability and joint liability claims, the claimants seek to hold the defendants directly responsible for the injuries.

191. In the case of the common design joint liability claims, where the defendants are accused of complicity in the assaults, the allegations are at their most serious; the responsibility of the state is engaged to the highest degree possible, short of an allegation (which is not made) that it actually ordered the violent assaults to be committed.

192. In the negligence claims, the claimants seek to hold the defendants indirectly responsible for the injuries by failing to prevent them, but the injuries were nevertheless inflicted by persons who in a broad sense could be described as agents of the state. The level of state responsibility engaged in the negligence claim brought in *Alvarado* was much lower, because there the injury was not deliberately inflicted.

193. The fifth reason for my conclusion is that the current independent state of Cyprus has no interest in the application of its law to the issues in this litigation, any more than did Malta in *Boys v. Chaplin* or West Germany in *Johnson v. Churchill Coventry International Ltd.* Any post-independence modern developments in Cyprus tort law (about which I am not informed) would have no intrinsic relevance to the rights and wrongs of this litigation.

194. No question therefore arises as to respect for the comity of nations, if that question is considered from the perspective of the modern independent state of Cyprus. If the question is considered from the perspective of the pre-independence colony of Cyprus, no question of comity arises either: the colony and the parent state, represented by the defendants, were ultimately ruled by the same sovereign power.

195. The sixth and final, linked reason is that modern and familiar English tort law is well equipped to address the difficult issues that arise in determining these claims. The English law of tort includes the use of refined and sophisticated reasoning techniques that are well suited to deal with the liability issues in the case, even though the events under consideration occurred more than 60 years ago.

196. For those reasons I find this case like no other cited to me and I accept Mr Douglas' submission that in this case, if the British government "does something in London which is directed against British subjects in Cyprus", the court should not, whether as a matter of justice, comity or public policy, allow the British government to claim exemption from liability in tort under English law by reference to the law of Cyprus.

197. To put the point in a slightly different way, it seems to me that, in this case at any rate, where a state stands to be held to account for acts of violence against its citizens, it should be held to account, in its own courts, by its own law and should not escape liability by reference to a colonial law it has itself made.

198. If that is wrong, I would not hold that the limitation laws of Cyprus should be disapplied. I did not hear detailed argument on a comparison between those rules and English law limitation rules at the time, although reference is made in the pleadings to Cyprus rules of limitation then in force. The normal period of limitation is two years from the date of the injury sustained.

199. In my judgment, if I am wrong in my decision that the flexible exception should be applied in this case and that the substantive law of the colony of Cyprus should be applied to determine these torts, the issue of limitation should also be that of the colony of Cyprus. I see no reason why any question of disapplying Cypriot limitation law should not be decided by applying the bespoke statutory provisions in the 1984 Act.

200. In particular, the "undue hardship" test in section 2 of that Act is a form of protection for the claimants forming part of English law. If, as the claimants are likely to contend, they would have faced insuperable practical difficulties in issuing proceedings in London before expiry of the two year limitation period, that is argument which could, in the third preliminary issue, stand them in good stead in arguing the "undue hardship" point.

Conclusion

201. All three of the torts alleged by the claimants were, on the assumed facts, committed in Cyprus. However, applying the exception found in Lord Wilberforce's speech in *Boys v. Chaplin*, the law of England and not Cyprus should be applied for the purpose of determining whether they were committed. The law of limitation governing those alleged torts is therefore also English law. Section 1(1) of the 1984 Act does not apply to the case.

202. If I were wrong about applying the exception, the law of Cyprus would apply for determining whether the torts were committed. In that event, the limitation law of both England and Cyprus would apply, pursuant to section 1(1)(a) and 1(2) of the 1984 Act. The question whether the limitation law of Cyprus should be disapplied pursuant to section 2(2) on the ground of "undue hardship" would then have to be determined at a future hearing of the third preliminary issue.