A BRITISH JUDGEMENT UPHOLDING TURKISH CYPRIOTS RIGHTS

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"Hesperides Hotels Ltd and Another v. Aegean Turkish Holidays Ltd and Another

Before Lord Denning, Master of the Rolls, Lord Justice Roskill and Lord Justice Scarman

The English courts have no jurisdiction to entertain an action for the right to possession of land out of England or the recovery of damages for trespass to such land.

The Court of Appeal affirmed that long established principle in allowing an interlocutory appeal, in reserved judgements, by Mr. Omer Faik Muftizade, the London representative of a body called the Turkish Federated State of Cyprus, from Mr. Justice May in chambers on April 6, when on the application of Hesperides Hotels Ltd and Catsellis Hotels Ltd, companies incorporated according to the law of the Republic of Cyprus and presently situated in Limassol, he granted them an interlocutory injunction restraining Mr. Muftizade from conspiring or acting in any way whatever to procure, encourage or assist a trespass to two hotels owned by the companies in Kyrenia in the area now occupied by the Turkish regime.

The writ (which the judge refused to set aside) alleged that Mr. Muftizade has conspired with an English travel agent company, Aegean Turkish Holidays Ltd, to obtain advantage for themselves by the unauthorized use of the companies' hotels, the Hesperides (now known as Kyrenia Rocks), and the Dome, in Kyrenia.

Lord Denning, through concurring in the result, also considered the question whether, where her Majesty's Government had stated that it did not recognize the constituent parts of the community in Cyprus, the English courts might differ from the executive in relation to a particular regime in a particular territory at a particular time.

Mr. Patrick Neill, QC, and Mr. Gerald Davies for Mr. Muftizade; Mr. David Kemp, QC, Mr. George Newman and Mr. Kenneth Parker for the companies.

The MASTER OF THE ROLLS said that Kyrenia, in the north of Cyprus, attracted many visitors. Before 1974 the Hesperides and the Dome were owned by Greek Cypriots. The owner families ran them and lived there.

In July, 1974, the Turkish armed forces took possession of Kyrenia. The two hotel families fled to Limassol, where they still were. They could not return to the north, for it was cealed off by the Turkish forces.

In mid-1976 the families got to know that their hotels were occupied by Turkish Cypriots and were advertising in England for visitors. Brochures were issued by a body calling itself the "Turkish Federated State of Cyprus". In London a travel agency, Aegean Turkish Holidays Ltd, accepted bookings for the two hotels (among others). The families went to English solicitors, who found that the "Turkish Federated State of Cyprus" had a London representative, Mr. Omer Faik Muftizade, a man of distinction who held the Queen's Medal for Gallantry. The solicitors assumed that he had been a party to the issue of the brochures.

The solicitors decided to take action in England. They issued a writ against the travel agents and Mr. Muftizade, asserting that since August, 1974, the hotels had been illegally occupied by trespassers and that the defendants had conspired together to effect trespasses and to obtain advantage for themselves by the unauthorized use of the hotels. They applied to Mr. Justice May to ran injunction. The travel agents submitted to a perpetual injunction, but Mr. Muftizade applied to set aside the writ against him. The judge upheld the writ and granted an injunction against Mr. Muftizade. Mr. Muftizade appealed.

His Lordship would summarize the rival contentions. Mr. Kemp, for the companies, said that the only lawful constitution of Cyprus known to English law was that established in 1960; pursuant to the Cyprus Act, 1960; that the only lawful sovereign was the Republic of Cyprus established by that Act; that the companies were the legal owners of the two hotels and had the right to possession of them; and that having served Mr. Muftizade in England, they could sue him personally for the personal wrong done by him; that he was guilty of a personal wrong because he conspired with the travel agents and others to obtain bookings for the hotels and thus procured, encouraged and assisted trespasses to the hotels, such trespasses being unlawful by the laws of the Republic of Cyprus.

Mr. Neill suggested that the original constitution of Cyprus had been supplanted in fact by two autonomous administrations, one a Turkish Cypriot administration in the north, the other a Greek Cypriot administration in the south. He said that the Turkish Cypriot administration had requisitioned properties in the north which formerly belonged to Greek Cypriots there; that the Greek Cypriot Administration had requisitioned property in the south formerly belonging to Turkish Cypriots there; that it was open to argument at least that those requisitioned were lawful; and that the courts of England could not and should not pronounce them unlawful or issue any injunction on that footing.

The Foregin Office had issued a certificate that her Majesty's Government did not recognize the administration—the "Turkish Federated State of Cyprus"—as being the government of an independent de facto sovereign state; nor did the Government "recognize or accord to Mr. Muftizade... any privilege and/or immunity under the Diplomatic Immunities Act, 1964".

Mr. Kemp submitted that the effect in law of the certificate was that the English courts could not recognize or give effect to any of the acts or laws of the so-called state. They were all nullities, and our courts could not even receive evidence of such acts and laws.

Mr. Kemp supported his submission by reference to authorities, including Luther v Sagor ([1921] 1 KB 456), where Mr. Justice Roche accepted the law as stated by the United States Supreme Court in 1818: "No doctrine is better established than that it belongs exclu-

sively to governments to recognize new states in the revolutions which may occur in the world: and until such recognition, either by our own g o v e r n m e n t or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered:" and other judicial statements by Lord Justice Diplock.

Mr. Kemp added most persuasively citations from the late Sir Hersch Lauterpacht's Recognition of Government, when he said that the correct rule was that both an unrecognized government and its act were a nullity. The doctrine there stated was said to be based on the need for the executive and the courts to speak with one voice. If the executive did not recognize the usurping government, courts should not. But others said that there was no need for the executive and the judiciary to speak in unison. The executive were concerned with the external consequences of recognition vis-a-vis other states; the courts were concerned with the internal consequences vis-a-vis private individuals.

The courts had repeatedly received evidence of the status of various administrations in a country, the most authoritative statement being that of Lord Wilberforce in the House of Lords in Carl Zeiss ([1967] 1 AC 853, 954): "Where private rights, or acts of everyday occurence or perfunctory acts of administration are concerned... the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question."

His Lordship had been ready to apply the principle in In re James (An insolvent) (Attorney General intervening) (The Times, October 23, 1976; [1977] 2 WLR 1, 11) about Rhodesia. If it were necessary to make a choice between the conflicting doctrines, his Lordship would unhesitatingly hope that our courts recognize the laws or acts of a body in effective control of a territory, even though it had not been recognized de jure or de facto by our Government; at any rate in regard to the laws which regulated the day-to-day affairs of the people, such as their leases, their occupations and so forth; and furthermore that the courts could receive

evindenceof their state of affairs so as to see whetner or not the body was in effect in control.

His Lordship reviewed the history of Cyprus since 1960. Since 1974 the evidence pointed clearly to there being two autonomous administrations in Cyprus. Negotiations were in process for a bi-communal federal state. If they succeeded provision would no doubt be made for the properties to be restored to their former owners or compensation paid. Meanwhile, however, under laws purported to be made by the respective administrations, the properties had been let or occupied by persons authorized by the relevant administration.

There was now an effective administration in north Cyprus which had made laws governing the day-to-day lives of the people. According to those laws the people who had occupied the hotels in Kyrenia were not trespassers. They were not asserting their ownership. They were occupying them by virtue of a lease granted to them under the existing laws or of requisitions made by the existing administration. If an action were brought in the courts of northern Cyprus alleging trespass to land or to goods it would be bound to fail.

It followed inexorably that their conduct could not be made the subject of a suit in England. Even if one of the present occupiers himself came to England and was sued here, the courts would be bound to reject the claim. In order to be actionable in England it would have to satisfy the second condition in Philips v Eyre (1870) LR 1 29): "The act must have been justiciable by the law of the place where it was done."

His Lordship thought that the case should be disposed of on broad grounds of public policy. There was a divergence of view between two autonomous administrations in Cyprus. It was not the province of the English courts to resolve such a dispute. It was a dispute which should be settled by negotiations between the two administrations, aided one hoped. It was, indeed, his Lordship hoped, being settled at this very moment by negotiations in Vienna. If a settlement was reached it should deal with all questions relating to the taking of properties, compensation and so forth.

The dispute was not justiciable. The action should be struck out as unsustainable and the appeal allowed.

LORD JUSTICE ROSKILL said that Mr. Justice May had not only granted the injuction against Mr. Muftizade but also dismissed his application to set aside the plaintiff's writ for want of jurisdiction. Since no recognition was accorded to the Turkish Federated State of Cyprus as the de jure government of any part of Cyprus or as the government of an independent de facto sovereign state, it followed that Mr. Muftizade was sued as a private individual; indeed he could not be sued otherwise or in any relevant representative capacity. He did not possess, and before their Lordships did not claim to possess, any diplomatic privilege or immunity. Nor had he any official status. Accordingly of the plaintiff companies were to succeed in their claim against him they must prove that claim just as any claim for damages for conspiracy to trespass must be proved by any plaintiff against any other defendant, and if that claim fell within a class which the courts of this country had no jurisdiction to entertain not only ought the interlocutory injunction to be discharged, but the writ should itself be set aside.

Mr. Muftizade said that however the claim might be dressed up it offended against the principle of English law summarized in rule 79 of Dicey's Conflict of Laws: "Subject to the exceptions there inafter mentioned, the court has no jurisdiction to entertain an action for (1) the determination of the title to, or the right to possession of, any immovable situtated out of England (foreign land), or (2) the recovery of damages for trespass to such immovable."

That rule was founded on the House of Lords decision in British South Africa Co v Companhia de Mocambique ([1893)] AC 602). If the submission were right both the writ should be set aside and the injunction ought not to have been granted. Had the judge had before him the evidence from Mr. Muftizade adduced before their Lordships we would not, his Lordship thought, have held as unhesitatingly as he did that the evidence showed an unlawful conspiracy between the travel agency and Mr. Muftizade to procure a trespass to the plaintiff's property. There was little evidence of the conspiracy alleged either against Mr. Muftizade personally and or of any tortious act by anyone for whom he could reasonably be said to be vicariously responsible.

But Mr. Neill was concerned to succeed on principle, submitting that however the claim might be disguised as one for damages for

conspiracy to trespass, it offended against the Mocambique principle. The judge appeared to have thought that the principle, which was correctly stated in Dicey's rule 79, was limited to cases where title to land was in dispute and should not be applied where the title was not in dispute and the cause of action was "in truth the recovery of damages for trespass."

But while the plaintiff's title to their hotels was not in dispute, their right to immediate possession was strongly disputed by Mr. Muftizade. and as a matter of English law, it must be an essential prerequisite of their right to recover damages for the alleged conspiracy to trespass that they showed that the acts relied on as constituting the alleged conspiracy and as causing the alleged damage were actionable.

Mr. Kemp's main submission was that that was not a matter which the court could investigate because the only ground on which the claim to immediate possession could be defeated depended on alleged laws and actions of the so-called Turkish Federated State of Cyprus, and that since no recognition had been accorded by her Majesty to that body, those laws and actions were nullities to which no effect must be given in our courts.

Mr. Kemp appeared to accept that if the plaintiffs' action was limited to damages for trespass to their properties in Cyprus the court could not entertain that claim; but he contended that because the action was founded in conspiracy to trespass the position was different, at least where the overacts of the conspiracy took place in this country, even though the alleged damage might have been suffered abroad.

Mr. Newman, in addition, contended that there was sufficient evidence of damage suffered in this country by the plaintiffs by the mere making of a booking at the hotels which they had not authorized. Both counsel for the plaintiffs had argued that, assuming sufficient evidence of the relevant tortious acts by Mr. Muftizade within the jurisdiction, there was no reason in principle why English courts should not exercise jurisdiction against him in personal and thus prevent the continuance of the alleged conspiracy to trespass against their property. It was said that nothing in the Mocambique principle prevented the court from so acting and that the policy un-

derlying the decision was simply that the English court would not make orders which they could not enforce—the brutum fulmen principle; here it was said that the relevant order could be enforced against Mr. Muftizade.

In his Lordship's view that was the very argument which had failed in the House of Lords in Mocambique: see Lord Chancellor Herschell at pp 624/625, His Lordship found it impossible to see how, if our courts had no jurisdiction to entertain an action in respect of a trespass committed against land abroad, jurisdiction was suddenly acquired by dressing the claim up as an agreement between two or more people in this country to commit that trespass abroad.

It followed that the Mocambique principle presented a complete bar to the plaintiffs' claim and that their claim for damages for conspiracy to trespass could not be entertained in our courts. His Lordship would allow the appeal on that ground alone, discharge the injunction, and set aside the writ.

His Lordship would add that Mr. Neill had read to the court evidence giving one version of events in Cyprus. The plaintiffs had not had an opportunity to answer, and if they had had, no doubt much could have been said on the other side. History, especially recent controversial political history, was not one-sided. So far as the new evidence went it showed the profound wisdom of the Mocambique principle. The position in Cyprus, both on the Greek and on the Turkish side, was at present evolutionary and continued to evolve and develop. Delicate international negotiations had taken place and were about to continue. In those circumstances for an English court to arrogate to itself the right at the present juncture to determine questions of the right to possession of land in Cyprus by entertaining an action for conspiracy to trespass was something which the court ought not to do.

His Lordship considered that in light of observations in the Carl Zeiss case in the House of Lords, in particular Lord Reid and Lord Wilberforce, it was clear that at some future date difficult questions might well arise as to the extent to which, notwithstanding the absence of recognition, the English courts would or might recognize and give effect to the laws or acts of a body which was in effective

control of a particular area or place; but they did not arise for decision in the present case.

LORD JUSTICE SCARMAN, agreeing with the judgement of Lord Justice Roskill, said that any interlocutory injunction granted in the circumstances of the present case could well do more harm than good. An English court might sometimes have to make an order which to some would appear to be an unwarrantable intrusion by a municipal court into the world of international relations between sovereign states; but if it were asked to intrude its order into that world it should be very slow to grant interlocutory relief by way of injunction, bearing in mind the limitations of evidence and argument necessarily imposed by law on interlocutory proceedings.

Leave to appeal was refused.

Solicitors: Theodore Goddard & Co; Lovell, White & King."

In this judgment many principles of private international law also, several principles of public international law are reaffirmed.

The first principle of English private international law reaffirmed by the court is that "The English courts have no jurisdiction to entertain an action for the right to possession of land out of England or the recovery of damages for trepass to such land."

The principle is well established in English law that a court in one country will not exercise jurisdiction in any action involving an adjudication upon the title to land situated in another country, obviously, if a court gives a judgment in defiance of this principle the judgment is not entitled to recognition in the country of the situs. The English courts have, however, sometimes exercised jurisdiction to make an order *in personam* against a defendant who is within the jurisdiction, on the ground of a breach of contract, a breach of trust or fraud on his part, nowstanding that the controversy relates to land situated in another court.

Mr. Justice May in chambers adopted this view and granted Hesperides Hotels Ltd. and Catsellis Hotels Ltd. an interlocutory injunction restraining Mr. Müftüzade, the London representative of the Turkish Federated State of Cyprus from "conspiring or acting in any way whatever to procure, encourage or assist a trepass to two hotels owned by the companies in Kyrenia.

Mr. Müftüzade's application to set aside the plaintiff's writ for want of jurisdiction was also dismissed by Mr. Justice May. The writ alleged that Mr. Müftüzade has conspired with an English travel agent company, Aegean Turkish Holidays Ltd. to obtain advantage for themselves by the unauthorized use of the companies' hotels the Hesperides (now known as Kyrenia Rocks and the Dome in Kyrenia.)

According to Lord Justices the so called unauthorized use of the hotels did not constitute a ground to bring an action. The second condition in Phillips v. Eyre (1870) LR I 29) was clear: "The Act" here the unauthorized use of the hotels" must have been justiciable by the law of the place where it was done". This act was not actionable in England as it did not satisfy the above mentioned condition. Because the Act was not justiciable in north Cyprus where "an effective administration" according to Lord Justices, exists, this administration called Turkish Federated State of Cyprus had made laws governing the day to day lives of the people. According to those laws the people who had occupied the hotels in Kyrenia were not trespassers. They were not asserting their ownership. They were occupying them by virtue of a lease granted to them under the existing laws or of requisitions made by the existing administration. If an action were brought in the courts of northern Cyprus alleging trespass to land or to goods it would be bound to fail.

Lord Denning arrived to this conclusion after reviewing the history of Cyprus since 1960. He said that since 1974 evidence pointed clearly to there being two autonomous administrations in Cyprus. He indicated that negotiations were in process for a bi-communal federal state, if they succeeded provision would no doubt be made for the properties to be restored to their former owners or compensation paid. Meanwhile, however, under laws purported to be made by the respective administrations, the properties had been let or occupied by persons authorized by the relevant administration.

Lord Dennig recognized as valid and the law of the place, the laws passed by Turkish Cypriot Administration and he judged that the Act so called illegal occupation of the hotels by trespassers was not justiciable.

Lord Denning thought that the case should be disposed of on broad grounds of public policy. There was a divergence of view bet-

ween two autonomous administrations in Cyprus, English Courts had to stay outside of this dispute. If the parties to dispute were reaching a settlement it should deal with all questions relating to taking of properties, compensation etc.

The dispute was non justiciable. The action should be struck out as unsustainable.

The principle of public international law discussed was the effect of non recognition of a de facto governmement by the government upon the courts.

The Solicitor for the plaintiff Mr. Kemp showed to the court a certificate of the Foreign Office stating that her Majesty's Government did not recognize the Turkish Federated State of Cyprus as being the government of an independent de facto sovereign state. Mr. Kemp claimed that the effect in law of the Certificate was that the English Courts could not recognize or give effect to any of the acts or laws of the Turkish Federated State of Cyprus. Mr. Kemp claimed that all acts and laws of this entity were all nullities and the British Courts could not even receive evidence of such acts and laws. In support of his claim Mr. Kemp mentioned Sir Hersch Lauterpacht's Recognition of Government. Sir Lauterpacht stated the doctrine that the executive and the courts had to speak with one voice, so the corrcet rule was that both an unrecognized government and its act were a nullity. Mr. Kemp also referred to Luther V. Sagor (1921) 1 KB 456) were Mr. Justice Roche accepted the law as stated by the United States Supreme Court in 1818 "No doctrine is better established that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world and until such recognition either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

The Justice against the claim of Mr. Kemp said that others said that there was no need for the executive and the judiciary to speak in unison. The executive were concerned with the external consequences of recognition vis-a-vis other states; the courts were concerned with the internal consequences vis-a-vis private individuals.

The courts in spite of non recognition of de facto government by the executive had repeatedly received evidence of the status of

various administrations in a country, the most authoritative statement being that of Lord Wilberforce in the House of Lords in Carl Zeiss (1967) 1 AC 853, 954): "Where private rights, or acts of every day occurence or perfunctory acts of administration are concerned... the courts may, in the interests of justice and common sense, where no consideration of public to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question."

So the British Justices upheld the rihts of Turkish Cypriots as actual facts and realities.